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ABA ACCREDITATION OF LAW SCHOOLS: AN ANTITRUST ANALYSIS

Andy Portinga*

The accreditation activities of the American Bar Association are under attack. From within legal academia, professors and deans complain that the ABA accreditation process is overly formalistic and intrusive. In addition, the Massachusetts School of Law has sued the ABA, alleging that the ABA's accreditation standards violate the Sherman Act. From outside legal academia, the Department of Justice has investigated the ABA's accreditation activities and initiated an antitrust suit against the ABA. The Department of Justice and the ABA immediately settled this suit, and, as a result of this settlement, the ABA has agreed not to enforce certain standards and to review other standards. In this Note, the author analyzes the applicability of the Sherman Act to the accreditation of law schools and concludes that law school accreditation is within the scope of the Act. The author further reviews the antitrust implications of the individual accreditation standards and suggests changes to questionable standards. The author argues that the ABA should establish a strong link between each standard and a legitimate educational goal in order to avoid any antitrust problems.

INTRODUCTION

The history of the legal profession is to a great extent, and despite noisy and incessant protestation and apologetics, the history of efforts by all branches of the profession, including the professoriat and the judiciary, to secure a lustrous place in the financial and social-status sun.1

When the American Bar Association (ABA) denied accreditation to the Massachusetts School of Law at Andover (MSL),2


many members of the legal community predicted that the young school would not survive.\textsuperscript{3} Without ABA accreditation, MSL graduates are extremely limited in career opportunities. Forty-five states require that an applicant to the bar be a graduate of an ABA-accredited law school.\textsuperscript{4} In addition, under current ABA standards, students at unaccredited law schools may not transfer academic credits to accredited law schools.\textsuperscript{5} MSL graduates, in effect, are limited to taking the Massachusetts bar examination.\textsuperscript{6}

MSL, however, has not passively accepted its rebuff. The school filed an antitrust claim against the ABA,\textsuperscript{7} charging that the ABA's accreditation standards and procedures constitute an unreasonable restraint of trade in violation of section 1 of the Sherman Act.\textsuperscript{8} Specifically, MSL alleged that the ABA inflated faculty salaries, reduced teaching loads, increased the cost of legal education, and prevented disadvantaged persons from obtaining a legal education.\textsuperscript{9} MSL charged the ABA with operating like a typical cartel, increasing price and reducing output.\textsuperscript{10}

\textsuperscript{3} Law schools that are denied ABA accreditation typically fail. See, e.g., Annand Ageshwa, \textit{Accreditation: To Have... and Have Not}, NAT'L L.J., Oct. 8, 1990, at 14 (discussing the closing of the 100-year-old Atlanta Law School after the Georgia Supreme Court issued a rule that, beginning in 1998, only graduates of ABA-approved schools can sit for the state bar exam).

\textsuperscript{4} \textit{Comprehensive Guide to Bar Admission Requirements}, 1993–1994 A.B.A. Sec. Legal Educ. & Admissions to Bar 10–12. Beginning in 1998, Georgia will require that a bar applicant be either a graduate of or a third-year student at an ABA-approved school. Id. at 11. Of the remaining four states, Connecticut requires either a J.D. or an LL.M from an ABA-accredited school and Maine requires that a bar applicant have completed at least two-thirds of her law school coursework at an ABA-accredited school. Id.

\textsuperscript{5} \textit{American Bar Ass'n, Standards for Approval of Law Schools and Interpretations}, Interpretation 3 of Standard 305 (1993) [hereinafter ABA Standards]. This standard, however, is being revised. See infra notes 20–21 and accompanying text.

\textsuperscript{6} Ken Myers, \textit{Law Schools: Bar Eligibility}, NAT'L L.J., June 11, 1990, at A4 (explaining that Massachusetts allows graduates of unaccredited in-state law schools to sit for the bar if the state has approved the school).


\textsuperscript{9} Complaint, supra note 7, at 15, reprinted in MSL L. Rev. at 11.

\textsuperscript{10} \textit{Paul A. Samuelson, Economics} 107, 484 (11th ed. 1980).
Although one may be tempted to dismiss the MSL complaint as "sour grapes," MSL is not alone in criticizing the accreditation process. Shortly after MSL started its litigation, the deans of fourteen law schools, including the University of Chicago, Stanford, and Harvard, sent a letter to the deans of all ABA-accredited law schools, calling for a reformation of the accreditation process. The deans complained:

We find the current process overly intrusive, inflexible, concerned with details not relevant to school quality (perhaps even at odds with maintaining quality), and terribly costly in administrative time as well as actual dollar costs to schools.

... 

It is this sense of responsibility that gives rise to our concern that the accreditation process for law schools is heading in the wrong direction. Our varied visions of legal education focus on the results of the educational process, on the outputs of legal education—about the sort of graduates we produce, about the sort of lives they will lead, about the consequences of our writing and teaching. In contrast, the ABA's accreditation process increasingly concentrates on inputs—how many seats are there in the library, for example.

Within the law school community, several academics have noted that the ABA historically has attempted to restrict entry into the legal profession. Although the ABA's attempts have resulted in the imposition of minimum standards of quality ostensibly designed to protect the public, the restrictions have often been self-serving. Professor Harry First of New York University Law School has argued that when the ABA gained control over legal education, "elite" law schools were able to eliminate competition from low-cost competitors such as "sour grapes," MSL is not alone in criticizing the accreditation process. Shortly after MSL started its litigation, the deans of fourteen law schools, including the University of Chicago, Stanford, and Harvard, sent a letter to the deans of all ABA-accredited law schools, calling for a reformation of the accreditation process. The deans complained:

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as night schools and proprietary schools. In addition, Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit has argued that entry barriers to legal academia have, in part, caused low-quality legal academic writing. Posner has posited that law schools are "awash in tuition income" and thus able to support numerous law journals.

Complaints about school accreditation also have drawn the attention of federal antitrust enforcement agencies. After a year-long investigation, the Department of Justice (DOJ) filed suit against the ABA, alleging that the ABA's accreditation activities violated the antitrust laws. That same day, the ABA and the DOJ entered into a consent decree, effectively ending the suit. The decree prohibits the ABA from fixing faculty salaries, from refusing to accredit for-profit law schools, and from completely preventing member schools from accepting course credits earned at non-ABA-accredited law schools. The consent decree also requires the ABA to establish a committee to review accreditation standards in six other areas: student/faculty ratios, teaching loads, leaves of absence, bar preparation classes, physical plant requirements, and allocation of resources by the law school or its parent university. Finally, the ABA must change the composition of its accreditation inspection teams. The teams previously consisted primarily of law professors, but under the consent decree law school deans or faculty may not comprise more than fifty percent of a team's personnel.

15. First, supra note 13, at 347-51. The motive behind restricting entry into the legal profession apparently was both economic and xenophobic. One prominent ABA member noted the need to prevent "Russian Jew Boys" from entering the profession. MSL v. ABA, Plaintiffs' Report to the Court on the Initial Phase of the Conspiracy, MSL L. Rev., Fall 1994, at 111, 112; see also STEVENS, supra note 13, at 93-103 (discussing attempts by Yale Law School to restrict admission of Jews and foreigners).

16. POSNER, supra note 1, at 100-01.

17. Id. "Law professors can find publication outlets for their scholarship too easily . . . ." Id. at 101.


19. Id.; see also ABA Resolves Division's Charges of Fixing Salaries of Law Faculty, 68 Antitrust & Trade Reg. Rep. (BNA) No. 1719, at 877 (June 29, 1995); Justice Department and American Bar Association Resolve Charges that the ABA's Process for Accrediting Law Schools was Misused, Department of Justice News Release No. 95-363 (June 27, 1995).


21. Id. at 39,423.

22. Id. at 39,422.
Although the parties entered into the consent decree the same day the suit was filed, the decree did not become final automatically. As required by the Antitrust Procedures and Penalties Act, the DOJ submitted the consent decree for a sixty-day comment period and awaited approval. The consent decree, however, proved controversial. During the comment period, which ran from August 3, 1995, to October 2, 1995, numerous law professors, law schools, and private accrediting agencies submitted comments, most opposing the decree. After the ABA agreed to the settlement, Joseph W. Bellacosa, a judge on the New York Court of Appeals and then Chair of the ABA’s Council of the Section on Legal Education and Admission to the Bar, resigned from his chairmanship in protest.

Many of the comments to the consent decree argued that antitrust laws do not apply to accreditation of educational institutions in the same way that such laws apply to for-profit businesses. Indeed, the question of whether educational institutions are exempt from the antitrust laws has persisted for decades. By entering into the consent decree, the ABA and the DOJ have left the question unanswered.

This Note argues that the ABA’s accreditation activities are subject to the antitrust laws and that the ABA’s past accreditation activities violated these laws. This Note makes recommendations on how specific accreditation standards should be modified in order to promote educational quality without violating the antitrust laws. Part I provides a brief overview of the Sherman Act. Part II critiques the applicability of antitrust laws to the accreditation of law schools. Part III looks at certain past practices of the ABA that may have violated section 1 of the Sherman Act and recommends changes in specific accreditation standards.

27. See infra Part II.
I. THE SHERMAN ACT—A BRIEF OVERVIEW

The Sherman Act\textsuperscript{28} is the backbone of American antitrust law.\textsuperscript{29} The basic policy behind the Sherman Act is the preservation of competition in trade and commerce, and conversely, the prevention of cartels and monopolies.\textsuperscript{30} Section 1, which prohibits contracts that unreasonably restrain trade, states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."\textsuperscript{31}

To establish a violation of section 1, a plaintiff must show that (1) an agreement existed and (2) the agreement unreasonably restrained trade.\textsuperscript{32} Even though the agreement requirement presupposes the existence of at least two parties, the Supreme Court has had little difficulty holding that a professional or trade organization may be liable under section 1.\textsuperscript{33} The Supreme Court has ruled that a professional organization is a continuing conspiracy among its members.\textsuperscript{34}

Although section 1 is written in absolute terms, the Supreme Court very early held that section 1 does not condemn all agreements that restrain trade, but only those agreements that "unreasonably" restrain trade.\textsuperscript{35} The reasonableness of a restraint traditionally has rested on whether the restraint promotes or inhibits competition.\textsuperscript{36} Even with the reasonableness caveat read into section 1, the Supreme Court has held that certain types of activities are so plainly anticompetitive

\textsuperscript{30} Id.
\textsuperscript{31} Id. § 1.
\textsuperscript{32} Standard Oil Co. v. United States, 221 U.S. 1, 63–64 (1911).
\textsuperscript{34} See Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
\textsuperscript{35} Standard Oil, 221 U.S. at 60, 64–65. The Court recognized that the Sherman Act could not be read literally, since all contracts restrain trade to some extent. Id. at 59–60; see also Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 ("Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.").
\textsuperscript{36} United States v. Trenton Potteries Co., 273 U.S. 392, 397 (1927).
that they can be deemed per se illegal.\textsuperscript{37} Such activities include price fixing,\textsuperscript{38} horizontal market allocation,\textsuperscript{39} and boycotts targeting a competitor.\textsuperscript{40} Analysis under section 1, therefore, has two levels: those restraints that are per se illegal and those that are illegal under the rule of reason.\textsuperscript{41}

II. DOES THE SHERMAN ACT APPLY TO ABA ACCREDITATION ACTIVITIES?

A. Accreditation as Trade or Commerce

Because section 1 of the Sherman Act applies only to trade or commerce,\textsuperscript{42} any inquiry into whether the ABA’s accreditation practices violate the Sherman Act must begin with an examination of whether the ABA’s accreditation activities constitute “trade or commerce.”

The starting point for this analysis is \textit{Marjorie Webster Junior College v. Middle States Ass’n of Colleges & Secondary Schools}.\textsuperscript{43} In \textit{Marjorie Webster}, the United States Court of Appeals for the District of Columbia Circuit held that accreditation of junior colleges was not trade or commerce for purposes of the Sherman Act.\textsuperscript{44} In this case, Middle States, pursuant to a long-standing policy of limiting accreditation to nonprofit schools, denied accreditation to Marjorie Webster, a proprietary institution.\textsuperscript{45} The court of appeals held that Congress did not intend the Sherman Act to apply to education, stating:

\begin{itemize}
\item \textsuperscript{37} \textit{Engineers}, 435 U.S. at 692.
\item \textsuperscript{38} \textit{See Trenton Potteries}, 273 U.S. at 398.
\item \textsuperscript{39} \textit{See United States v. Topco Assocs.}, 405 U.S. 596, 608 (1972) ("One of the classic examples of a \textit{per se} violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.").
\item \textsuperscript{40} Fashion Originators’ Guild of Am. v. Federal Trade Comm’n, 312 U.S. 457 (1941).
\item \textsuperscript{41} \textit{Engineers}, 435 U.S. at 692. The “rule of reason” has become a term of art in antitrust law, focusing not on the reasonableness of the challenged restraint but rather on the restraint’s competitive effects. \textit{Id.} at 688.
\item \textsuperscript{42} \textit{See 15 U.S.C. § 1} (1994).
\item \textsuperscript{43} 432 F.2d 650 (D.C. Cir.), \textit{cert. denied}, 400 U.S. 965 (1970).
\item \textsuperscript{44} \textit{Id.} at 654–55.
\item \textsuperscript{45} \textit{Id.} at 652–53.
\end{itemize}
The proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions. . . .

. . . [T]he process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself.46

In support of this conclusion, the court noted that Congress has been silent on the question of whether the Sherman Act applies to education.47 The court did provide a caveat, however, stating that the antitrust laws would conceivably apply to an accreditation standard that had "little other than a commercial motive."48

Although Marjorie Webster seems to protect the ABA from challenges to its accreditation activities,49 the validity of Marjorie Webster appears doubtful. Almost from the moment the court released the opinion, Marjorie Webster generated academic criticism.50 Despite the Court of Appeals' opinion, the legislative history of the Sherman Act shows that Congress intentionally used broad language and intended the Act to have a wide application. The Supreme Court, in reviewing the language and history of the Sherman Act, stated that "[l]anguage more comprehensive is difficult to conceive."51 The Court also

47. Id.
48. Id.
49. In Donnelly v. Boston College, 558 F.2d 634 (1st Cir. 1977), the United States Court of Appeals for the First Circuit stated, in dicta, that law school activities do not have a commercial motive, citing Marjorie Webster. 558 F.2d at 635. The principle of Marjorie Webster never has been directly applied to law schools. In Zavaletta v. American Bar Association, 721 F. Supp. 96 (E.D. Va. 1989), a district court granted summary judgment to the ABA in an antitrust suit brought by the CBN University School of Law. The court did not mention Marjorie Webster but instead held that the accreditation standards did not constitute a restraint of trade because the law school voluntarily submitted to the accreditation process. Id. Because virtually every state requires bar applicants to be graduates of ABA-approved schools, the "voluntariness" of the accreditation process seems suspect. See supra note 4 and accompanying text.
50. See, e.g., Comment, 44 N.Y.U. L. Rev. 1014 (1969) (supporting the rationale of the district court opinion, which held that accreditation was commerce); Recent Cases, 84 HARV. L. REV. 1912, 1920 (1971) (arguing that applying the Sherman Act to accrediting bodies would not inhibit the pursuit of legitimate educational goals); Recent Decisions, 56 VA. L. REV. 1492, 1499 (1970) ("The problem with the opinion is that its departure from making an explicit reasonableness inquiry may act as a shield for accrediting associations and other concerted educational activities that would be struck down under a reasonableness examination.").
stated that the legislative history "shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states."52 Furthermore, the Supreme Court repeatedly has held that it will not require application of the Sherman Act be rejustified every time it encounters a new occupation or business.53

The court of appeals' weakest argument appears in its assertion that the "historical reluctance of Congress to exercise control in educational matters,"54 implies that Congress did not intend the Sherman Act to apply to educational institutions. Certainly, congressional silence cannot be interpreted as creating an implicit exemption to the antitrust laws, especially when one considers the laissez-faire economic atmosphere at the time the Sherman Act was enacted.55 If, in fact, the Sherman Act only applied to markets over which Congress has historically exercised control, the scope of the Sherman Act would be very narrow. In addition, Supreme Court case law prior to Marjorie Webster established a heavy presumption against implicit exemptions to the Sherman Act.56 Congress can, and has, created express exemptions to the Sherman Act.57 Therefore, if Congress had actually intended educational institutions to be exempt, it presumably would have created an express exemption.

In addition to the questionable reasoning of the court of appeals, subsequent decisions have further weakened Marjorie Webster. In Goldfarb v. Virginia State Bar,58 the Supreme Court severely limited, and perhaps eliminated, the "learned profession" exemption on which the court of appeals relied in Marjorie Webster. In this case, the Court held that a minimum

52. Id.
53. See Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 351 (1982) ("[T]he argument that the per se rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for per se rules . . . .").
55. See SAMUELSON, supra note 10, at 141-42.
57. See, e.g., 15 U.S.C. § 17 (1994) (exempting labor unions and agricultural cooperatives from Sherman Act liability); id. §§ 1011-1012 (exempting insurance where the industry is already subject to state regulation); id. § 2158 (exempting certain activities which further national defense objectives).
fees schedule promulgated by the Virginia Bar Association violated section 1 of the Sherman Act.\textsuperscript{59} In holding that the legal profession is not exempt from the Sherman Act, the Court undermined the rationale behind the opinion in \textit{Marjorie Webster}. The Court stated:

The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions. Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose.

The language of § 1 of the Sherman Act, of course, contains no exception. . . . And our cases have repeatedly established that there is a heavy presumption against implicit exemptions.\textsuperscript{60}

The Supreme Court declined to hold that learned professions should be treated like any other businesses, however, and placed a caveat on the application of the Sherman Act to professions that have a public service aspect. In footnote 17 of the opinion, often quoted by members of learned professions, the Court stated:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.\textsuperscript{61}

Although the caveat in \textit{Goldfarb} may seem to provide a glimmer of life in the learned profession exception, the

\textsuperscript{59} \textit{Id.}
\textsuperscript{60} \textit{Id.} at 787 (citations omitted).
\textsuperscript{61} \textit{Id.} at 788 n.17.
Supreme Court has consistently applied the Sherman Act to both learned professions and professional organizations post-Goldfarb. In National Society of Professional Engineers v. United States, the Court applied the Sherman Act to an engineers' organization that prohibited its members from bargaining with a customer over price until the customer selected a specific engineer for the job. The Society relied heavily on footnote 17 of Goldfarb and argued that unfettered competition among engineers would lead to poor quality work and public safety hazards. The Court, however, refused to exempt the engineers based on a public safety concern, calling such justification "a frontal assault on the basic policy of the Sherman Act." The Court explained that the Sherman Act "reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."

A few years later, the Supreme Court went even further than Goldfarb or Engineers by applying the per se rule to a professional organization of doctors. In Arizona v. Maricopa County Medical Society, the Maricopa County Medical Society established a schedule of maximum fees that would be charged to policyholders of certain insurance plans. The Court held that the fee schedule constituted price fixing and was per se illegal. Although the Court had stated in Goldfarb and Engineers that the existence of a public service aspect of a learned profession justified the use of a rule of reason analysis, the Court noted in Maricopa that no possible public service justification existed for price fixing. The Court held that the mere fact that the price fixing was among members of a profession would not prevent application of the per se rule. Maricopa, therefore, strongly suggests that a profession

63. Id. at 682-83.
64. Id. at 687.
65. Goldfarb, 421 U.S. at 778 n.17.
66. Engineers, 435 U.S. at 693.
67. Id. at 695.
68. Id.
70. Id. at 337.
71. Id. at 348.
72. Id. at 348-49.
73. Id. at 348.
needs to show a link between a public service goal and the challenged restraint in order to change the application of the Sherman Act.

The Supreme Court continued this approach in *Federal Trade Commission v. Indiana Federation of Dentists.* In *Dentists*, the Court applied a "quick look" or "truncated" rule of reason analysis to an organization of dentists that refused to submit x-rays to claims examiners. Because of the dentists' professional status, the Court declined to apply the per se ban on boycotts. Nevertheless, the Court held that finding a violation under the rule of reason was "not a matter of any great difficulty" because the boycott was plainly anticompetitive. Absent a showing of procompetitive effects by the professional organization, a "naked" restraint, such as a boycott, would constitute a section 1 violation under a rule of reason analysis.

For the purposes of the ABA's accreditation activities, however, perhaps the most relevant precedent comes from *United States v. Brown University.* In this case, the DOJ challenged the financial aid practices of the Massachusetts Institute of Technology (MIT) and eight Ivy League colleges. Specifically, the DOJ claimed that the schools' practice of jointly determining the amount of financial aid awarded to each student constituted price fixing.

75. See id. at 455.
76. Id. at 458–59.
77. Id. at 459.
78. Id.
79. Id. at 460. The Supreme Court most recently applied the Sherman Act to a professional organization in *Federal Trade Commission v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990). In this case, the Court held that a strike by trial lawyers aimed at raising the fees paid to court-appointed attorneys was a per se violation. Id. at 436. The Court quickly dismissed the respondents' public service argument—that the "boycott was adequately justified by the public interest in obtaining better legal representation for indigent defendants"—stating simply that the lawyers' proffered social justifications did not make the restraint any less unlawful. Id. at 419, 424.
81. Id. at 289.
MIT, the only school that did not enter into a consent decree with the DOJ, claimed that it was not engaged in "trade or commerce" within the meaning of the Sherman Act because it was an educational institution. MIT relied heavily on Marjorie Webster. The district court, however, had little trouble dismissing this argument, noting that Goldfarb and its progeny seriously questioned the validity of Marjorie Webster. The district court stated:

Since Goldfarb, the Supreme Court has continually brought within the purview of the Sherman Act restraints involving traditionally "nonbusiness" areas . . . . The court fails to see why the rationale of Goldfarb and its progeny with respect to learned professions should not apply with equal force to the field of education . . . . [T]he court cannot ignore Goldfarb's admonition that profession-wide exemptions should be granted warily.

Once the court successfully sidestepped Marjorie Webster, it easily found that MIT was engaged in commerce. The court noted that MIT had a billion dollar budget, with annual revenues from tuition, room, and board of approximately $200 million. The court concluded, "MIT provides educational services to its students, for which they pay significant sums of money. The exchange of money for services is "commerce" in the most common usage of that word."

The United States Court of Appeals for the Third Circuit reversed the district court's decision. The court's reversal, however, was not based on a belief that education falls outside the bounds of commerce. Rather, the court of appeals reversed because it determined that the district court incorrectly applied the "quick look" or "truncated" rule of reason analysis. The court of appeals ordered the district court on remand to undertake a full rule of reason analysis and to consider the social welfare aspects of the universities' "need-blind admissions" policies.

84. Id. at 296. Specifically, MIT argued that the institutions' financial aid scheme "solely implicated non-commercial aspects of higher education." Id.
85. Id. at 297.
86. Id. at 298.
87. Id.
88. Id. (quoting Goldfarb, 421 U.S. at 787-88).
90. Id. at 678.
91. Id. at 678-79.
Most importantly, the court of appeals expressly held that the Sherman Act does apply to education. The court stated that "[t]he exchange of money for services, even by a nonprof-
it organization, is a quintessential commercial transaction. Therefore, the payment of tuition in return for educational services constitutes commerce."^{92}

Notably, the court of appeals did not adopt the district court's argument that Goldfarb and its progeny eclipsed Marjorie Webster. To the contrary, the court of appeals attempted to reconcile its opinion with Marjorie Webster. The court stated that Marjorie Webster had held correctly that the Sherman Act does not apply to the "noncommercial aspects of the liberal arts."^{93} The court then distinguished the situation in Brown University, determining that the challenged practice—the setting of tuition—clearly was commercial.^{94}

Unfortunately, by attempting to reconcile its opinion with Marjorie Webster, the court of appeals created the potential for confusion. The assertion that the Sherman Act does not apply to "noncommercial aspects" of education provides no guidance for determining which activities of an educational institution are commercial and which are noncommercial. By resuscitating Marjorie Webster, the court of appeals has allowed a shadow of doubt to remain on the applicability of the Sherman Act to education.

Finally, any qualms that the Brown University court or the Marjorie Webster court had in applying the Sherman Act to liberal arts education should not discourage a court from applying the Sherman Act to legal education. Legal education is much more like a traditional economic good than is a typical liberal arts education. That is, legal education is an investment in human capital through which the purchaser forgoes present income in hopes of increased future earnings.^{95} Although one may pursue a liberal arts education for noneconomic reasons, few students enter law school on an esoteric quest for knowledge. Rather, for most students law school is a necessary step to entering the legal profession.\(^{96}\)

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^{92.} Id. at 666 (citation omitted).
^{93.} Id. at 667.
^{94.} Id. at 667–68.
^{96.} Several studies have shown a very strong correlation between law school applications and perceived earnings of lawyers. Richard B. Freeman, Legal
B. Implicit Immunity

Despite Goldfarb's admonition against implicit exemptions from the Sherman Act,\textsuperscript{97} some commentators have argued that the Higher Education Act of 1963\textsuperscript{98} (HEA) implicitly exempts accreditation activities which the Department of Education approves.\textsuperscript{99} Under the HEA, the Department of Education requires that educational institutions be approved by an established accrediting agency in order to be eligible for federal programs.\textsuperscript{100} Because the Department of Education promulgates standards for the approval of accrediting agencies\textsuperscript{101} and because the ABA has been approved as an accrediting agency under these regulations, some commentators argue that activities that are approved by one branch of the government should not be prosecuted by another.\textsuperscript{102} Thus, to avoid such inconsistency, Congress must have repealed implicitly the antitrust laws for accrediting institutions, such as the ABA,\textsuperscript{103} which have been approved by the Department of Education.

This argument, however, overstates the potential conflict between approval by the Department of Education and illegality under the Sherman Act. The Supreme Court has held that regulation of an industry by an arm of the Executive Branch will not implicitly immunize the industry from antitrust liability unless the immunization is "necessary to make the [conflicting regulation] work, and even then only to the minimum extent necessary."\textsuperscript{104}

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\textsuperscript{100} See 20 U.S.C. § 1088(a)–(b) (1994).
\textsuperscript{101} See id. § 1099b.
\textsuperscript{102} See supra note 99.
\textsuperscript{103} See MSL's Reply Regarding Termination of the ABA's Accreditation Status 1 [hereinafter MSL's Reply] (seeking to terminate the ABA's status as an approved accrediting agency).
For example, in *National Gerimedical Hospital v. Blue Cross*, a hospital sued Blue Cross under the Sherman Act after Blue Cross refused to accept the hospital as a participating member. Blue Cross claimed that it based its refusal on the recommendation of a private, nonprofit corporation funded by the National Health Planning and Resource Development Act of 1974 (NHPRDA). The organization had found that a surplus of beds existed in the nearby area and had recommended against building new hospitals. Blue Cross argued that because its action aided in implementing the recommendations of a congressionally created agency, its actions were immune from antitrust scrutiny.

The Court, however, held that the NHPRDA did not implicitly repeal the antitrust laws. The Court wrote:

"Implied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." ...

... Even when an industry is regulated substantially, this does not necessarily evidence an intent to repeal the antitrust laws with respect to every action taken within the industry. Intent to repeal the antitrust laws is much clearer when a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge.

Because Blue Cross was not required to shun National Gerimedical Hospital under the NHPRDA, but rather undertook its action voluntarily in response to an advisory opinion, the Court held that Blue Cross' activities were not exempt from the Sherman Act.

108. *Id.*
109. *Id.* at 388.
110. *Id.* at 388–89 (emphasis added) (citations omitted) (quoting United States v. National Ass'n of Sec. Dealers, 422 U.S. 694, 719–20 (1975)).
111. *Id.* at 389–90. Indeed, the Supreme Court has held that regulatory oversight has implicitly repealed the Sherman Act in only a few cases. Such cases involved situations in which an agency directly sanctioned a restraint on trade. See, e.g., United States v. National Ass'n of Sec. Dealers, Inc., 422 U.S. 694, 730–35 (1974) (holding that certain restrictions on the sale of mutual funds were implicitly immunized from antitrust immunity by the Maloney and Investment Company
The provisions of the HEA that allow the Secretary of Education to approve certain accrediting institutions do not meet the "clear repugnancy" test of *Gerimedical*. The HEA merely requires that accrediting agencies have voluntary memberships and have the principal purpose of accrediting institutions of higher education. \(^{112}\) Neither requirement directly conflicts with the Sherman Act. Rather, certain provisions within the HEA show that Congress probably did not want the HEA to repeal implicitly the antitrust laws. The HEA requires that accrediting institutions be financially and administratively "separate and independent" from any affiliated trade association. \(^{113}\) This requirement indicates that Congress apparently recognized the possibility that an industry could use accreditation for anticompetitive purposes. This apparent concern, along with the lack of any direct conflict between the HEA and the Sherman Act, negates any argument that approval by the Department of Education immunizes the ABA from antitrust liability.

**C. The State Action Doctrine**

In defending future accreditation standards, the ABA may claim that it is immune from antitrust liability under the "state action" doctrine. The state action doctrine stems from the Supreme Court's decision in *Parker v. Brown*, \(^ {114}\) which held that anticompetitive conduct undertaken pursuant to a mandate from state law is immune from federal antitrust liability. In *Parker*, a raisin producer sought to enjoin enforcement of California's Agricultural Prorate Act. \(^ {115}\) The California Act was intended to "conserve the agricultural

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\(^{113}\) Id. § 1099b(a)–(b).

\(^{114}\) 317 U.S. 341 (1943).

\(^{115}\) Id. at 344.
wealth of the state" by stabilizing the price of raisins and restricting output. Although the Court assumed that such a restraint on trade would violate the Sherman Act if undertaken by private actors, the Court, relying on the principles of federalism, held that Congress did not intend the Sherman Act to apply to state actors.

The ABA could argue that any restraints on trade which the accreditation standards impose result from state action, because forty-five states require that an applicant to the bar be a graduate of an ABA-accredited law school. The ABA, therefore, may argue that the accreditation standards stem from a state mandate.

Such an argument should fail. The Supreme Court dealt with a very similar argument in Goldfarb v. Virginia State Bar. The lawyers in Goldfarb argued that because the Supreme Court of Virginia authorized county bar associations to establish ethical codes, the establishment of a minimum fee schedule constituted state action. The Supreme Court, however, found that the minimum fee schedule was essentially private anticompetitive activity masquerading as state action. The Court stated:

[I]t cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. . . . [A]lthough the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them . . . . It is not enough that, as the County Bar puts it, anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

116. Id. at 346 (quoting the California Agricultural Prorate Act, 1933 Cal. Stat. 754).
117. Id. at 348.
118. Id. at 350–51.
119. See supra note 4 and accompanying text.
120. At least one law school dean has advanced this argument. See Ken Myers, Dean Comes Out Swinging and Defends Accreditation ABA-Style, NAT'L L.J., Jan. 22, 1996, at A15.
122. Id. at 790–91.
123. Id.
The reasoning in *Goldfarb* is directly applicable to the ABA accreditation and antitrust issue. Although states have authorized the ABA to accredit law schools, the ABA cannot argue that the states have authorized it to issue specific accreditation standards that restrain trade.

The Supreme Court has further limited the state action doctrine since *Parker*. In *California Retail Liquor Dealers Ass'n v. Midcal*, the Court held that no state action immunity could exist without both adequate supervision by the state and a clear mandate from the state to displace competition. The ABA accreditation process would fail on both counts. Although most states rely on ABA accreditation decisions, no state actively supervises the adoption of ABA accreditation standards or the accreditation process. In fact, state legislatures have no input on accreditation standards; the ABA House of Delegates alone approves the standards. Further, no state has articulated a clear mandate to displace competition by requiring bar applicants to be graduates of ABA-approved schools.

In sum, *Goldfarb* and its progeny show that the ABA is not exempt from the Sherman Act by virtue of its status as a nonprofit organization of professionals. Furthermore, *Goldfarb*, juxtaposed with *United States v. Brown University*, show that no blanket exemption exists for legal education. Rather, the market for legal education is a type of market that the Sherman Act is intended to govern. Also, regulation by the Department of Education does not implicitly immunize the ABA's accreditation activities, nor does the state action doctrine protect the ABA.

### III. APPLICATION OF SECTION 1 OF THE SHERMAN ACT TO LAW SCHOOL ACCREDITATION

#### A. "Per Se" Versus "Rule of Reason" Analysis

If the accreditation activities of the ABA are subject to the Sherman Act, one may wonder if it is possible to have any

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125. *Id.* at 102–06.
126. ABA STANDARDS, *supra* note 5, at i.
127. 5 F.3d 658 (3d Cir. 1993).
accreditation standards for law schools. After all, accreditation is a barrier to entry—a means of preventing some parties from competing in the market for legal education. Early in the history of the Sherman Act, however, the Supreme Court held that the Sherman Act does not prohibit all restraints on trade. Because all contracts restrain trade to some extent, the Court held that the Sherman Act focused only on "unreasonable" restraints on trade. The Supreme Court has further held that some restraints on trade are so patently harmful to competition that they are per se illegal. Yet, the Court has been hesitant to extend application of the per se rule. Generally, the rule only applies in cases of price fixing, output restrictions, horizontal market allocation, and boycotts aimed at a competitor.

Although ABA accreditation affects the price of legal education, restricts output, and could be characterized as a boycott of non-ABA-accredited schools, the per se rule should not apply to a review of accreditation standards for two reasons.

First, the ABA accreditation committee is essentially a joint venture among members of the ABA. That is, the members of the ABA joined together to create a new product: the ABA "seal of approval." ABA accreditation signals to potential consumers that a law school and its graduates have met ABA standards. By placing its seal of approval on a law school, the ABA essentially warrants the quality of a school, much like Good Housekeeping or the Underwriters Laboratory signal quality by placing their seals of approval on certain products.

128. Standard Oil Co. v. United States, 221 U.S. 1, 60, 64–65 (1911).
129. Id.
130. Id.
131. See supra Part I.
132. See Open Letter to Deans, supra note 11, at 49 (complaining that accreditation compliance is "terribly costly").
133. The difficulty of meeting accreditation standards has discouraged the creation of many law schools. See Harry First, Competition in the Legal Education Industry (II): An Antitrust Analysis, 54 N.Y.U. L. Rev. 1049, 1074 (1979) (discussing eight universities which studied the feasibility of opening law schools and were deterred).
134. The accreditation system could be characterized as a boycott of unaccredited schools. Id. at 1099–101; Antitrust Opinion Letter Issued by Weil, Gotshal & Manges, MSL L. Rev., Winter 1994, at 26, 44–45. Cf. Associated Press v. United States, 326 U.S. 1 (1945) (holding that the Associated Press—a collection of independent newspapers which agreed to share news stories—was an illegal boycott since it refused to deal with newspapers which were not part of the cooperative).
In recent years, the Supreme Court has consistently held that the rule of reason, rather than the per se rule, applies to judgments regarding joint ventures. In *Broadcast Music, Inc. v. Columbia Broadcasting System*, the Supreme Court held that courts should not apply the per se rule to restrictions that are necessary to create a product. Broadcast Music, Inc. (BMI) was a nonprofit corporation which was affiliated with or represented nearly 20,000 composers and authors for the purpose of selling and policing the copyrights of artistic works. BMI sold blanket licenses to television and radio stations, and under these licenses the broadcaster had rights to unlimited use of works covered by the license. Although the blanket license was the result of a horizontal agreement between competitors who fixed a price, the Court noted that the blanket license had redeeming procompetitive qualities. The blanket license reduced the transaction costs between artist and broadcaster and also reduced the cost of policing the use of the copyright. Without some horizontal restriction, the Court noted, the blanket license product would not exist.

Similarly, in *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court noted that restraints necessary to create a product were not unreasonable per se and, therefore, should be evaluated under the rule of reason. In *NCAA*, the University of Oklahoma and the University of Georgia challenged an NCAA rule that limited the number of times a university's football team could appear on television in a season. The Court noted that "what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all." Without an agreement on the basic rules, the product of college athletics could not exist.

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136. Id. at 16–24.
137. Id. at 5.
138. Id.
139. Id. at 20–21.
140. Id. at 21.
142. Id. at 100–04.
143. Id. at 88.
144. Id. at 101.
145. Applying the rule of reason, the Court held that the NCAA's restrictions on televising games violated the Sherman Act. Id. at 120.
Second, the ABA's accreditation activities should be judged under the rule of reason because of the public service aspect of law school accreditation. Footnote 17 of Goldfarb v. Virginia State Bar suggests that although a learned profession is not exempt from antitrust scrutiny, the presence of a public service component in a given profession may soften a court's approach. After Goldfarb, the Supreme Court has usually applied the rule of reason, not the per se rule, to professional organizations.

In the case of accreditation, the ABA potentially serves the public interest by protecting primary consumers from informational asymmetries. The market for legal services is one in which the general public is ill-equipped to make judgments about quality. The average person would have to incur a large opportunity cost in order to educate herself so that she adequately could judge the quality of legal services.

Enforcing minimum quality standards through accreditation, however, eliminates some of the information asymmetry. A consumer who chooses legal services from a graduate of an accredited law school ostensibly guarantees himself a certain level of competence, thereby eliminating some of the costs of searching for quality legal services. The elimination of possible information asymmetries, if found to exist, would be an important procompetitive factor in a rule of reason analysis.

B. The Enjoined Standards

Even taking into account the informational asymmetries of the legal market in a rule of reason analysis, several of the ABA's accreditation standards most likely would not survive

147. See supra notes 74-90 and accompanying text.
150. See id.
151. See id.
antitrust scrutiny. Many of the standards seem to have no other purpose than to benefit the faculties of law schools or the law schools themselves, and cannot fairly be characterized as minimum quality standards. Rather, the standards increase the price of legal education, restrict output, and potentially enforce monopolies in other markets. The consent decree enjoins the enforcement of standards governing faculty salaries, the transfer of credits from unaccredited schools, and the prohibition against proprietary law schools. This section reviews the enjoined standards and analyzes the antitrust liability of each standard.

1. Standard 405: Faculty Salaries—ABA Accreditation

Standard 405 requires, in part:

The law school shall establish and maintain conditions adequate to attract and retain a competent faculty.

(a) The compensation paid faculty members should be sufficient to attract and retain persons of high ability and should be reasonably related to the prevailing compensation of comparably qualified private practitioners and government attorneys and of the judiciary. The compensation paid faculty members at a school seeking approval should be comparable with that paid faculty members at similar approved law schools in the same general geographical area.

This standard comes perilously close to price fixing. The standard could ostensibly prevent a school from attempting to undercut a competitor's price by paying lower faculty salaries. The ABA's interpretations of the standard support this price-fixing characterization. Interpretation 1 of Standard 405(a) states:

A law school's faculty salaries, especially of full and associate professors, which remain unfavorable in comparison with the national median and with faculty salaries at approved law schools in the same geographical area may not be sufficient to attract and maintain a competent faculty.

153. ABA STANDARDS, supra note 5, Standard 405 (emphasis added).
154. Id. Interpretation 1 of Standard 405(a).
Thus, the interpretation suggests that any school that tries to undercut the market for law faculty by paying less than the national or geographic means runs the risk of the ABA finding its faculty incompetent and therefore in noncompliance with the standard.

Further, Interpretation 2 of Standard 405(a) states that "[a] faculty salary structure which ranks at the very bottom of salaries at ABA-approved law schools is . . . presumptively in noncompliance with the Standards."\textsuperscript{155} Interpretation 2 can easily be seen as a means of putting upward pressure on faculty salaries. Under this interpretation, no school can afford to remain continually at the low end of faculty salaries. Although the range in faculty salaries among law schools is substantial,\textsuperscript{156} anecdotal evidence shows that the ABA vigorously reviews faculty salaries during accreditation inspections.\textsuperscript{157}

Although the ABA states that Standard 405 is necessary to "establish and maintain conditions adequate to attract and retain a competent faculty,"\textsuperscript{158} this justification would not save the standard under a rule of reason analysis. Such a rationale is very similar to that which the Supreme Court rejected in \textit{National Society of Professional Engineers v. United States}.\textsuperscript{159} In \textit{Engineers}, the Society argued that supra-competitive pricing for engineering services was necessary to protect the public from low-quality work.\textsuperscript{160} The Court rejected the argument that high price was tied to high quality,

\textsuperscript{155} Id. Interpretation 2 of Standard 405(a).
\textsuperscript{156} A 1994 survey of 176 law schools shows a median salary of $61,792 for an assistant professor, with the range extending from $46,350 (University of Akron) to $79,200 (Brooklyn Law School). \textit{What Lawyers Earn: Professors and Deans}, NAT'L L.J., Aug. 1994, at 30 (Career Issue). For full professors, the median was $102,986 with a range from $65,935 (University of Akron) to $127,500 (University of Michigan). \textit{Id.} For deans, the median was $135,925 with a range of $118,000 (Humphreys School of Law) to $184,680 (University of Texas). \textit{Id.}
\textsuperscript{157} MSL's \textsc{Reply}, supra note 103, at 22 (citing a complaint by the ABA to the dean of Cooley Law School that a salary of $100,000 was too low for twelve months of work). Salaries at some schools have risen dramatically in recent years. \textit{See} Ken Myers, \textit{Law Profs: Poor No More, Pay Is Up—Some Academic Salaries Have Increased 50 Percent. Is It Too Much?}, NAT'L L.J., Oct. 18, 1993, at A1, A50; \textit{see also} Steven R. Smith, \textit{Accreditation Revisited: A Reexamination of ABA Approved Law Schools}, 27 WAYNE L. REV. 95, 105 (1980) (stating that the author, an accreditation official, believes that accreditation is used to further faculty interests including the promotion of reasonable compensation).
\textsuperscript{158} ABA \textsc{Standards}, supra note 5, Standard 405.
\textsuperscript{159} 435 U.S. 679 (1978).
\textsuperscript{160} \textit{Id.} at 684–85.
stating that such an argument was "nothing less than a frontal assault on the basic policy of the Sherman Act." The same rationale that was applied to Engineers also should apply to legal educators.

Although a school could request a variance from Standard 405 and potentially rebut a presumption of noncompliance, the possibility of a variance most likely would not save this Standard under a rule of reason analysis. In fact, Interpretation 2 of Standard 405(a), which states that very low faculty salaries are presumptively in noncompliance, is very similar to the minimum fee schedule challenged in Goldfarb v. Virginia State Bar. In Goldfarb, the Virginia State Bar did not require adherence to the minimum fee schedule, but stated that "evidence that an attorney habitually charges less than the suggested minimum fee schedule ... raises a presumption that such lawyer is guilty of misconduct." As with Goldfarb, the possibility of a variance from this price control would not ameliorate the antitrust violation.

2. Standard 305: Transfers from Unaccredited Law Schools—Interpretation 3 of Standard 305 states, "Transfer credit may be granted only for work taken at another ABA approved law school. Transfer credit may not be given for work taken at a school before it receives ABA approval." This Standard may constitute an illegal boycott of unaccredited law schools. That is, because accredited schools cannot accept transfer credits from unaccredited schools, and because graduates of unaccredited schools are not allowed to sit for the bar in most states, unaccredited schools are essentially forced out of the market.

The Supreme Court has held that horizontal boycotts—boycotts in which a group of actors coerce a third party not to deal with a competitor—are per se illegal. In the case of ABA accreditation, accredited schools, acting through the ABA, could be characterized as prohibiting member schools from dealing with nonmember schools.

161. Id. at 695.
162. ABA STANDARDS, supra note 5, Interpretation 2 of Standard 405(a).
164. Id. at 777–78 (quoting Virginia State Bar Comm. on Legal Ethics, Opinion No. 98 (June 1, 1960) and No. 170 (May 28, 1971)).
165. ABA STANDARDS, supra note 5, Interpretation 3 of Standard 305.
In the case of accreditation, of course, some exclusion is necessary in order for accreditation to serve its purpose. If all schools received accreditation as a matter of right, accreditation would lose its value as a signal for quality. Also, if no restrictions were placed on transfers from unaccredited schools, accreditation would lose much of its value, because a student potentially would be able to graduate from an accredited school after receiving most of his education at an unaccredited school. For this reason, the consent decree only requires the ABA to allow member schools to accept credits from schools approved by their states and permits the ABA to require that two-thirds of all credits come from an ABA-accredited school. Therefore, the decree balances the anticompetitive effects of the restriction against the procompetitive effects of accreditation as a signal for quality.

3. Prohibition on Proprietary Law Schools—Standard 202 requires that law schools be nonprofit institutions. In 1977, however, the ABA announced that it would consider applications for accreditation from proprietary schools that otherwise meet the ABA Standards. Despite this change in policy, the ABA has been reluctant to accredit a proprietary law school.

Like the restriction on accepting credits from unaccredited schools, Standard 202 may be an illegal boycott. In this case, however, the argument that the ABA needs to exclude inferior schools is undermined by the ABA's own finding that proprietary schools are not necessarily inferior to nonprofit schools. Including proprietary schools, therefore, will not necessarily decrease the value of accreditation as a signal for quality.

168. ABA STANDARDS, supra note 5, Standard 202.
169. Id. Interpretation of Standard 202.
170. For example, Western State University College of Law, a large proprietary school in California, has been seeking accreditation for two decades. Compare First, supra note 133, at 1082–86 (detailing Western's accreditation efforts during the late 1970s) with Ken Myers, Calif. School Says New ABA Plan Gives Accredit Where It Is Due, NAT'L L.J., Aug. 14, 1995, at A15 (discussing Western's current optimism with respect to gaining ABA accreditation under the new consent decree).
C. Standards Under Review

In addition to enjoining the enforcement of the standards on faculty compensation, transfer credits, and proprietary law schools, the consent decree requires the ABA to review standards in six other areas: limits on teaching hours, student/faculty ratios, bar review courses, physical facilities, sabbaticals, and resource allocation. This section analyzes the antitrust implications for each of the standards and proposes changes to questionable standards.

1. Standard 404: Limits on Teaching Hours—Standard 404 mandates that a faculty member shall not be required to teach more than

(i) an average of eight scheduled class hours per week, counting repetitions during the same academic period as one-half for this purpose, or
(ii) an average of ten scheduled class hours per week, counting repetitions during the same academic period at full value.

Restricting teaching hours effectively restricts output. Courts generally deem restrictions on output per se illegal. Because agreements to restrict output are essentially the same as agreements to raise prices, the impact of Standard 404 is very similar to that of Standard 405. Both standards raise the effective hourly wage of faculty members.

The ABA could argue that the restriction on the number of teaching hours ensures that faculty members have adequate time to prepare for class. This argument, however, is essentially the same as the argument for fixing salaries at a high rate. The restriction on hours taught can serve only to elevate a professor's hourly wage above the market rate. Any quality justification for holding down output should therefore

173. ABA STANDARDS, supra note 5, Standard 404.
175. Cf. SAMUELSON, supra note 10, at 52–58 (discussing the inverse relationship between output and price).
be treated the same as a quality justification for holding up price. Such a justification should be rejected under Engineers.¹⁷⁶

Because the restriction in hours elevates a professor's hourly wage above the market rate, the ABA should eliminate Standard 404 and allow the market to determine the number of teaching hours. If the ABA wishes to ensure that professors are adequately prepared for class, it should modify Standard 404 to require that professors spend at least one hour preparing for each hour taught. Such a standard would do more to ensure the quality of instruction than a standard that merely limits the number of hours taught. After all, the current version of Standard 404 does not require professors to spend any of their excess time preparing for class.¹⁷⁷

2. Standards 201 and 401–405: Student/Faculty Ratios—The Interpretation of Standards 201 and 401–405 states that a law school that has a student/faculty ratio of greater than 30:1 is presumptively in noncompliance with the standards, while a school that has a student/faculty ratio of less than 20:1 is presumptively in compliance.¹⁷⁸ In computing the faculty component of the student/faculty ratio, the ABA includes only full-time tenure track teachers who do not have administrative duties.¹⁷⁹ Thus, the ABA does not count adjuncts, professors emeriti, or administrators who also teach.

The consent decree does not require the ABA to review its student/faculty ratio; rather, it only requires the ABA to review its calculation of the faculty component of the ratio. By excluding adjuncts, professors emeriti, and administrators, the ABA increases a school's student/faculty ratio. Thus, in order to remain in compliance with the standards, a law school must hire more faculty. There are two problems with this requirement.

First, although the ABA states that the purpose of the student/faculty ratio is to reduce class size and increase student

¹⁷⁶. See supra notes 62–68 and accompanying text.
¹⁷⁷. Although a standard which requires professors to spend an hour preparing for each hour taught would almost certainly reduce the amount of time available for research, this should be of no concern to the ABA. The point of ABA accreditation should be to ensure that law schools are producing competent lawyers, not volumes of scholarship.
¹⁷⁸. ABA STANDARDS, supra note 5, Interpretation of Standards 201, 401–405.
¹⁷⁹. Id.
contact with faculty, neither the means of calculating the ratio nor the ratios themselves further this goal. If the purpose of the standards is to promote small classes, the ABA should not exclude adjuncts, emeriti, and administrators from the calculation of the ratio. Presumably, the addition of a class taught by an adjunct would reduce average class size as much as the addition of a class taught by a tenure-track professor. Likewise, there is no reason to believe that a professor emeritus would be less receptive to student comments than a tenure-track professor.

Second, a student/faculty ratio by itself does nothing to reduce class size, because such a ratio does not require faculty to teach. Many schools boast a low student/faculty ratio, yet maintain a high average class size. The ABA states that classes of fewer than thirty students have “special value.” If the purpose of the standards is to promote such classes, the ABA should, at a minimum, interpret Standards 201 and 401–405 to require that the average class size be less than thirty. In addition, if the ABA wishes to increase student contact with faculty, the ABA should interpret Standards 201 and 401–405 as imposing a minimum on the number of hours that faculty are available. Such an interpretation would do more to increase faculty accessibility than would imposing a twenty-to-one student/faculty ratio.

3. Standards 301, 302, and 503: Bar Review Courses and the LSAT—Standards 301 and 302(b) prohibit a law school from offering credit for a bar review course. The ABA offers no justification for this requirement. Indeed, the ABA may have a conflict of interest because an owner of a major bar review course sits on the ABA accreditation committee.

180. Id. ("Legal educators have traditionally found special value in classes of fewer than 30 students each.").
181. The University of Michigan Law School, for example, has approximately 1060 students and 58 faculty members who are not adjuncts, emeriti, or administrators. Thus, the law school has a student/faculty ratio of approximately 18 to 1. Telephone Interview with Rayburn Howland, Assistant to the Dean of the University of Michigan Law School (Mar. 28, 1996) (based on data provided by the law school to the ABA for winter of 1996). Yet students spend most of their time in classes of more than eighty students. Telephone Interview with Trent Taylor, Student at the University of Michigan Law School (Apr. 4, 1996).
182. ABA STANDARDS, supra note 5, Interpretation of Standards 201, 401–405.
183. Id. Standard 302(b) and Interpretation of Standard 301.
184. Professor Frederick Hart of the University of New Mexico Law School is a member of the ABA accreditation committee. See infra note 186. Professor Hart is
This prohibition could easily qualify as an unreasonable restraint on trade. By preventing law schools from offering for-credit bar review courses, commercial bar reviews foreclose a major and natural source of competition.

Although not addressed in the consent decree, a similar conflict of interest exists between the ABA and the Law School Admissions Council (LSAC), which administers the Law School Admissions Test (LSAT). Standard 503 requires that law schools either use the LSAT or another "acceptable test" as part of their admissions criteria. To date, all accredited law schools use the LSAT.\(^1\)

Although use of a standardized admissions test, in and of itself, does not violate the Sherman Act, the placement of some directors of the LSAC on the ABA accreditation committee and site inspection teams\(^2\) may raise an antitrust problem. Given that the LSAC collects revenues of over forty million dollars from administering the LSAT\(^3\) and has posted profits as high as fourteen million dollars, the LSAC clearly has an interest in maintaining the LSAT monopoly and preventing an alternative test from being used.

Standard 503 could be characterized as an illegal tying contract under section 1 of the Sherman Act. A tying contract requires the buyer of one good to purchase another good that

\(^{185}\) See MSL's Reply, supra note 103, at 108.

\(^{186}\) Professor Hart is a long-time member of both the Board of Directors and the Board of Trustees of the Law School Admissions Council (LSAC). 1990–1991 LAW SCHOOL ADMISSIONS COUNCIL ANNUAL REPORT 35–36 [hereinafter LSAC ANNUAL REPORT]. He is also a member of the ABA's Accreditation Committee. 1990–1991 ANNUAL REPORT OF THE CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION 105 [hereinafter ABA ANNUAL REPORT]. Professor Claude R. Sowle has served as interim president of the LSAC, 1990–1991 LSAC ANNUAL REPORT, supra, at 35–36, and on the ABA's Accreditation Committee, 1991–1992 ABA ANNUAL REPORT, supra, at 100. They are the Hart and Sowle of the interlocking leadership. In addition, Peter A. Winograd, past president of the LSAC, 1988–1989 LSAC ANNUAL REPORT, supra, at 14, allegedly has served on an ABA site inspection team for at least one law school that does not use the Law School Admissions Test (LSAT). Complaint, supra note 7, at 7, reprinted in MSL L. REV., Winter 1994, at 6.


\(^{188}\) Id. The LSAC historically has been a profitable enterprise. Other than a $462,000 loss posted in 1983–1984, the LSAC has posted a profit every year since 1983. See 1983–1991 LSAC ANNUAL REPORTS, supra note 186.
is distinct from the primary good. A tying contract is illegal under section 1 if (1) a tie exists between two separate products; (2) a seller has market power in the market for the tying product; and (3) a substantial volume of commerce is affected in the market for the tied product. Under this rule, Standard 503 most likely is illegal. First, the buyer of a legal education also must purchase the LSAT. Second, because the ABA has a monopoly over legal education accreditation, the ABA definitely has market power in the tying market. Third, the LSAT involves a substantial volume of commerce in the market for law school admissions tests. The fact that the two goods stem from two nominally separate producers probably will not defeat a tying claim because some of the sellers of the tying product, ABA accreditation, have an economic interest in the tied product, the LSAT.

In order to prevent the misuse of ABA accreditation by commercial enterprises, the ABA should prohibit persons who have a substantial financial stake in either the LSAC or a commercial bar review course from participating in the creation or enforcement of accreditation standards. This prohibition would not only alleviate any antitrust concern, but would also circumvent the need for a debate on the educational merits of prohibiting for-credit bar review classes or of requiring the LSAT.

4. Standards 601–603 and 704: Library Requirements—The consent decree requires the ABA to review its standards on physical plant requirements. For many law schools, the most vexing and expensive of these requirements concern the size and maintenance of an adequate library, as required by

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191. See supra notes 187–88 and accompanying text.
192. Cf. Moore v. Jas. H. Matthews & Co., 550 F.2d 1207, 1216 (9th Cir. 1977) (holding that cemeteries that require customers to purchase tombstones through the cemetery have an economic interest in the tied product because they receive a commission on the sale). But see Boddicker v. Arizona State Dental Ass'n, 680 F.2d 66, 67 (9th Cir. 1980) (holding that a local dental association had no economic interest in its requirement that its members also belong to a national dental association).
Standards 601, 602, and 603. Every library must contain the materials on the ABA’s “Core Collection” list, and must provide access to other materials “reasonably necessary for the proper conduct of the school’s educational and research programs.” The ABA has stated that a lack of seating space or “low salary levels of current library staff” will violate these standards. In addition, Standard 704 requires that the library of a law school with a full-time program be able to seat at least fifty percent of the student body and that the library of a school with a part-time program be able to seat at least thirty-five percent of the student body. Anecdotal evidence indicates that in evaluating law libraries, the ABA focuses primarily on the size of a collection and not on the ease of access to materials.

Certainly, the adequacy of a law school’s library has a direct impact on the quality of the school’s education. The ABA, however, has been inflexible in applying this standard and has resisted schools’ attempts to adopt low-cost alternatives to expensive collections. For example, the ABA requires that schools have hard-bound copies of materials, even if the materials are rarely used and are available on-line. Such a requirement dramatically increases library costs. The ABA standards also have presented an obstacle to law schools that are located near one another and wish to consolidate collections. Such a rigid application of Standards 601, 602, and 603 suggests that the standards are aimed only nominally at the quality of education and instead are aimed at achieving uniformity regarding the cost of inputs of legal education. By achieving uniformity in the cost of inputs, the standards could be used to prevent price cutting by law schools.

195. ABA STANDARDS, supra note 5, Standards 601–603.
196. Id. Standard 602(a) and Annex II.
197. Id. Standard 602(b).
198. Id. Interpretation 3 of Standard 601.
199. Under the consent decree, the ABA is prohibited from enforcing any requirements on the salaries of librarians. 60 Fed. Reg. 39,421, 39,422 (1995).
200. ABA STANDARDS, supra note 5, Standard 704.
201. See Daly, supra note 194, at 69 (citing legal educators who accuse the ABA of “bean counting”).
203. Id.
204. See Daly, supra note 194, at 67 n.27 (citing a study that shows that the cost of a subscription to a periodical is 12 times more expensive than the cost of providing access by electronic means).
206. See SULLIVAN, supra note 190, at 275–77.
In order to alleviate these concerns, the ABA should revise Standards 601, 602, and 603 to focus on the ease of access to information, instead of the size of the collection. Although the ABA still should require that each law school possess a core collection of essential materials, it should also acknowledge that rarely used materials available on-line or through CD-ROM should be counted as part of a school’s collection. The ABA also should allow geographically close libraries to consolidate collections, provided that each law school has a set of core materials on-site. Such a requirement would allow students ready access to important materials, while allowing schools to decrease expenses by sharing the cost of providing rarely used materials.

5. Standard 405(b): Sabbaticals—Standard 405(b) requires that law schools provide faculty with “reasonable opportunities for leaves of absence and for scholarly research.” The DOJ alleged that this standard had been used to require paid sabbaticals, summer stipends, and other research compensation. Although paid sabbaticals are typical of institutions of higher education and may allow professors to develop new instructional materials, this standard could also be characterized as a means of salary augmentation. That is, by requiring paid leaves of absence, the ABA decreases the amount of time spent in class and increases the effective hourly wage of law faculty.

As with the limitations on the number of hours taught, strong arguments could be made that the sabbatical requirement increases the quality of teaching. The potential for abuse, however, still exists. In order to alleviate this concern, the ABA should continue to require that law schools provide leaves of absence but should not require paid sabbaticals. Rather, each institution should decide the issue of paid sabbaticals during negotiations with its faculty. Faculty at a given school, for instance, may be willing to trade paid sabbaticals for higher salaries in non-sabbatical years. In any event, by removing the issue of compensation from the sabbatical requirement, the ABA would allow faculty wages to be determined more by the market and less by accrediting authorities.

Although not addressed in the consent decree, other aspects of the standards can be characterized as attempts at salary

207. ABA STANDARDS, supra note 5, Standard 405(b).
augmentation. The standards mandate certain amenities for faculty, such as private offices for each faculty member\textsuperscript{209} and secretarial assistance.\textsuperscript{210} The ABA has interpreted these requirements to include access to on-line services.\textsuperscript{211} The ABA also has interpreted Standard 405 to require that faculty members be allowed to retain copyrights over scholarly work.\textsuperscript{212} The requirement that faculty be provided with private offices, secretarial assistance, and on-line resources seems almost trivial, because schools almost certainly would provide these services even if the ABA did not require them. The requirement that faculty retain their copyrights, however, may be of more concern. Copyrights for casebooks and treatises are potentially valuable, and faculty could use their copyrights to supplement income. By requiring that faculty retain their copyrights, the ABA may be using this standard to elevate faculty salaries above the market rate. Further, the retention of copyrights by faculty, although an incentive for high quality scholarly research, does nothing to ensure the quality of education at a law school. Therefore, the ABA should drop any requirement concerning copyrights and allow the issue to be determined by each institution.

\textbf{6. Standards 201, 209, and 210: Law School Resources—}\nStandard 201 requires that law schools have "resources necessary to provide a sound legal education."\textsuperscript{213} Likewise, Standard 209 requires that "[t]he present and anticipated financial resources of the law school shall be adequate to sustain a sound educational program,"\textsuperscript{214} and Standard 210 encourages law school affiliation with a university.\textsuperscript{215} Interpretations of these standards state that law schools cannot be overly dependent on tuition income,\textsuperscript{216} that a parent university cannot assess high overhead costs to a law school,\textsuperscript{217} and that a parent university cannot withhold "excessive portions of revenue which should be available to the school of law."\textsuperscript{218}

\begin{thebibliography}{9}
\item \textsuperscript{209} ABA STANDARDS, \textit{supra} note 5, Standard 703.
\item \textsuperscript{210} \textit{Id.} Standard 405(c).
\item \textsuperscript{211} \textit{Id.} Interpretation of Standard 405(b).
\item \textsuperscript{212} \textit{Id.} Interpretation 8 of Standard 405.
\item \textsuperscript{213} \textit{Id.} Standard 201(b).
\item \textsuperscript{214} \textit{Id.} Standard 209.
\item \textsuperscript{215} \textit{Id.} Standard 210.
\item \textsuperscript{216} \textit{Id.} Interpretation 2 of Standard 201; Interpretation 1 of Standards 201 and 209.
\item \textsuperscript{217} \textit{Id.} Interpretation 2 of Standards 201, 209, and 210.
\item \textsuperscript{218} \textit{Id.} Interpretation of Standard 210.
\end{thebibliography}
The requirement of "adequate" resources and the prohibition of dependence on tuition income could act as barriers to entry for new law schools and proprietary law schools. That is, a new law school or a proprietary law school is unlikely to have a substantial endowment and will necessarily be dependent on tuition income. For-profit schools, in particular, would be almost totally dependent on tuition income, because few individuals would likely donate money to a for-profit enterprise. Because the consent decree prohibits the ABA from refusing to accredit proprietary law schools, the ABA should not be allowed to accomplish the same result by requiring that schools be substantially independent of tuition income. Therefore, the ABA should drop any requirement that a law school have a substantial endowment or be free from dependence on tuition income.

Although the ABA does not state any reason for intervening in the relationship between a law school and its parent university, these interpretations may have been created to give law school faculty additional bargaining power in negotiations with the parent university. Law schools tend to be "cash cows," and the parent university often may attempt to extract revenue generated by the law school. The Interpretations of Standards 201, 209, and 210, however, provide leverage to a law school in countering such an extraction by asserting that it threatens the law school's accreditation. Although these Interpretations may give law faculty a stronger negotiating position, they do not present an antitrust problem. If anything, the prohibition on extractions reduces the cost of legal education by increasing the law school's assets.

**CONCLUSION**

Economists contend that any time an industry engages in self-regulation, the regulators eventually will act in the interests of the regulated instead of the public. The regulation of law schools by the ABA is no exception. One may argue

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that the public needs protection from incompetent lawyers and that accreditation is one means of promoting quality in the market for lawyers. However, the current accreditation standards have less to do with the quality of legal education than with the promotion of faculty goals.

Several of the accreditation requirements, such as those affecting faculty salaries and teaching hours, are the types of restrictions that the Supreme Court has deemed illegal in the past. First, these restrictions raise the price and reduce the output of a service. Under current precedent, a "quality" justification would not exonerate these standards. Second, other standards, such as the requirement of the use of the LSAT and the prohibition of for-credit bar review courses, potentially affect markets other than the market for legal education. Finally, some standards, such as the library requirements could be used to police the cartel and eliminate price cutters.

The ABA should modify its accreditation standards so that ABA accreditation ensures the quality of education that a law school provides for its students, not the quality of life it provides for its faculty. In modifying its standards, the ABA needs to establish a close link between each standard and a legitimate educational goal.

Most importantly, courts should hold that the antitrust laws apply to the ABA's accreditation activities. As the only accreditor of law schools, the ABA is the gatekeeper to the legal profession. Although this power may be used to prevent unqualified persons from practicing law, it also can be used to secure monopoly rents for those already in the profession. By subjecting ABA accreditation standards to rule of reason scrutiny, courts would force the ABA to prove that the standards serve the public good and not merely the good of legal academia.