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THE SHERMAN ACT AND
BAR ADMISSION RESIDENCE REQUIREMENTS

In recent months the legal profession has found itself the object of critical scrutiny by large and vocal segments of the American public. Evidence of political and professional wrongdoing on the part of persons trained in the law has incited a wave of disapproval of lawyers and the legal profession. While the subject of this article—the potential liability of the organized bar under the Sherman Act for restrictive residence requirements—is not calculated to engender the same degree of consternation on the part of the public, its ramifications are no less significant for the public and the profession. The absence of dramatic public impact hardly reflects the dimensions of the problem.

The similarity between professional admission requirements and the process of acceptance as a member of a medieval guild has been widely noted. The avowed purpose of such requirements is protection of the public from incompetence and wrongdoing. As in the medieval guilds, however, an implicit, and possibly compelling, motive for support of restrictive admission standards is the desire to exclude potential competitors as a means of ensuring the economic well-being of present attorneys.


2 It would be unfair to say that the profession is not sensitive to such criticism, though concrete proposals for corrective action are limited. See Meserve, Watergate: Lessons and Challenges for the Legal Profession, 59 A.B.A.J. 681 (1973).


4 The potential significance of an antitrust analysis of bar admission procedures was recognized by the majority in Goldfarb v. Virginia State Bar, 497 F.2d 1, (4th Cir. 1974), cert. granted, 95 S. Ct. 223 (1974), in dictum to which this article in part, owes its genesis:

To hold that the practice of law is subject to the Sherman Act would cast doubt upon the validity of bar admission standards, prohibitions upon advertising, and a multitude of other restrictions upon the practice of law.


6 M. FRIEDMAN, supra note 5, at 148; W. GELLHORN, supra note 5, at 109; Holen, Effects of Professional Licensing Arrangements on Interstate Labor Mobility and Resource Allocation, 73 J. POL. ECON. 492 (1965); Horack, "Trade Barriers" to Bar Admission, 28 J. AM. JUD. SOC'Y 102 (1944); Moore, The Purpose of Licensing, 4 J. LAW & ECON. 93, 95 (1961).
members of the occupational group. The consequent reduction of competition which results from erecting barriers to entry represents a matter of economic significance to society at large, since an undersupply of attorneys is likely to produce not only higher incomes for established practitioners but also increased costs for legal services in general.

The Sherman Act demonstrates the manner in which residence requirements restrain trade. Although residence requirements have been invalidated on constitutional grounds by some courts, employing an equal protection or right-to-travel rationale, the flexibility of an alternative statutory basis for invalidation might prove persuasive to a court hesitant to reach the constitutional issues involved. Furthermore, particular residence requirements which a court might not deem unconstitutional could still constitute Sherman Act violations.

But the arguably anticompetitive practices of the legal profession have been exempted from close judicial scrutiny under the "learned profession" exemption. Likewise, where these practices are associated with an asserted state policy limiting competition, the "state action" exemption to the antitrust laws, as enunciated in Parker v. Brown, has been invoked. Without minimizing the significance of these traditional obstacles to antitrust analysis, it will be argued that a judicial unwillingness to subject residence requirements to intensive antitrust examination is unsupported by logic or policy and works a disservice to attorneys and the general public.

This article will focus on the restrictive aspects of residence qualifications for admission to the state bar. Such restrictions are significant in three cases: initial admission to the bar, relocation by a foreign attorney, and multistate practice by an attorney admitted to the bar in another state. An attempt will be made to determine whether these

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7 M. Friedman, supra note 5, at 148; W. Gellhorn, supra note 5, at 109; Dalton & Williamson, State Barriers Against Migrant Lawyers, 25 U. Kansas City L. Rev. 144, 147-48 (1958); Holen, supra note 6, at 494; Horack, supra note 6, at 106; Moore, supra note 6, at 95.

8 See notes 168-71 and accompanying text infra. The problem would appear to be aggravated where minimum fee schedules are employed. See generally note 68 infra.


10 See note 30 and accompanying text infra.


13 See, e.g., Goldfarb v. Virginia State Bar, 497 F.2d 1, 4-12 (4th Cir. 1974), cert. granted, 95 S. Ct. 223 (1974).
requirements might be invalid under the Sherman Act and to analyze the case for their abolition. The commercial counterpart of professional entry restrictions has been termed "the very essence of monopoly," and on this basis it is submitted that further freedom from antitrust scrutiny is unjustifiable.

I. RESIDENCE REQUIREMENTS: RATIONALE AND EFFECT

Traditionally, bar admission requirements have been established by the states and justified by an acknowledged state interest in regulating the practice of law. In general, standards for admission are established and applied by the state supreme court, which in turn delegates administrative responsibility for examination of applicants to a committee of law or bar examiners. Some states which regulate the practice of law by means of an integrated state bar vest that body or its

14 Harris, Restrictive Practices in the Professions, 120 New L.J. 1048 (1970). In United States v. Griffith, 334 U.S. 100 (1948), Mr. Justice Douglas, for the court, addressed himself to the restraint brought about by exclusion from competition:

"Hence the existence of power "to exclude competition when it is desired to do so" is itself a violation of § 2 [of the Sherman Act] provided it is coupled with the purpose or intent to exercise that power. . . . It is indeed "unreasonable per se to foreclose competitors from any substantial market." . . . The antitrust laws are as much violated by the prevention of competition as by its destruction.

Id. at 107 (citations omitted).

15 See generally Sprecher, Admission to Practice Law, 40 State Gov't 21 (1967); cf. note 116 and accompanying text infra.

Reluctance of federal courts to interfere with state regulation of the practice of law was expressed in Brown v. Supreme Court of Virginia, 359 F. Supp. 549 (E.D. Va. 1973), aff'd sub nom., Titus v. Supreme Court of Virginia, 414 U.S. 1034 (1973). A Virginia Supreme Court rule, requiring reciprocally admitted attorneys to maintain Virginia residency and to practice full time in Virginia but not imposing the same restrictions on attorneys admitted by examination, was challenged on equal protection and right to travel grounds. The district court rejected the challenge and noted:

"These cases involve . . . the right of a state to establish and administer standards for admission to the bar—a field into which federal courts should be especially reluctant and slow to enter, but one in which there is a duty to investigate in appropriate cases.

359 F. Supp. at 551 (citations omitted).


17 Integration of the bar has been defined as:

"The act of organizing the bar of a state into an association, membership in which is condition precedent to the practice of law. Integration is accomplished by enactment of detailed statutes, by enactment of a short statute conferring authority upon the highest court of the state to integrate the bar, or by rule of court in the exercise of its inherent power.

representatives with responsibility for setting and administering admission requirements. Finally, admission requirements may be prescribed directly by statute, although the judicial branch may play an administrative role in these states as well.

Many authorities have singled out the suppression of competition as a commonplace, albeit unfortunate, by-product of the licensing process. More specifically, at least one study has noted a positive correlation between restrictive entry requirements and average attorneys' income within a given state. The anti-competitive motive of residence requirements would appear to be magnified in states where established practitioners participate in the formulation and administration of admission requirements. Legitimate criticism has been directed at the intimate involvement of members of the licensed profession in such activity. The exclusive presence of members of the profession on the licensing board, it must be conceded, is not unique to the legal profession. It has been estimated that 75 percent of the licensing bodies at work today exhibit this characteristic. The potential dangers inherent in self-regulation might be greatly reduced if judicial review were easily obtainable. However, active supervision of licensing boards in the legal profession by state courts has been seen by some as more myth than reality.

Having noted the economic motives which are inherent in licensing

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18 See D. MCKEAN, supra note 17, at 124. While the integrated bar has assumed an important role in attorney discipline, the level of its influence over the admission process, at least through formal channels, has been less pervasive. See V. COUNTRYMAN & T. FINMAN, THE LAWYER IN MODERN SOCIETY 352 (1966).

19 See generally Bard & Bamford, supra note 5, at 446-48.


One case, while declaring unconstitutional Mississippi's one-year residence requirement for admission to the bar, raised the issue of an economic motivation for entry restrictions but refused to speculate on any possible exclusionary motive on the part of the local bar. Lipman v. Van Zant, 329 F. Supp. 391, 401 (N.D. Miss. 1971).

21 Holen, supra note 6, at 494-95.

22 M. FRIEDMAN, supra note 5, at 140; W. GELLHORN, supra note 5, at 115; Moore, supra note 6, at 95, 99.

23 W. GELLHORN, supra note 5, at 140. The enormous pressure which organized private occupational groups are able to bring to bear on their brethren in such positions is noted in Barton, Business and Professional Licensing—California, a Representative Example, 18 STAN. L. REV. 640, 650 (1966).

24 See Comment, Controlling Lawyers by Bar Associations and Courts, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 301, 315 (1970). See also Annot., 39 A.L.R.3d 719, 721 (1971), which suggests the reluctance of the courts to actively supervise the functioning of bar examination boards, at least with respect to individual admission cases.
schemes and detract from impartiality, it is necessary to examine in more detail the effect which restrictive residence requirements have on the practice of law.\textsuperscript{25} Residence restrictions, with regard to both initial entry and interstate movement and practice of attorneys, are consistent with a rationale of protection of the economic interests of the local bar.

To both the novice attorney seeking admission to the bar and the experienced practitioner contemplating a permanent relocation or a substantial interstate practice, state residence requirements are a particularly onerous prerequisite to practice which may, in some cases, work a substantial economic hardship.\textsuperscript{26} At this writing twenty-five jurisdictions require some residence qualification for initial admission to the bar,\textsuperscript{27} while twenty-one states mandate residence

\textsuperscript{25} The remainder of this article will focus exclusively upon the restrictive character of residence requirements, leaving aside the other primary qualifications for membership in the bar—successful performance on a state bar examination and character and fitness requirements. While serious criticism has been directed at these qualifications, residence requirements appear to be most arbitrary in their restrictive effects. For a critical treatment of character and fitness requirements see generally Comment, \textit{Controlling Lawyers by Bar Associations and Courts}, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 301 (1970). See also Annot., 64 A.L.R.2d 301 (1959).

\textsuperscript{26} While the most restrictive residence requirements, ranging from six months to one year, have generally been abandoned, many of those still in effect require residence at the time of application for admission, which may predate examination by as much as one to three months. Admittedly, a pre-admission residence requirement standing alone would not constitute the same type of burden in light of the delay incident to bar examination scoring in most states. It has been pointed out, however, that economic considerations such as support of a family or repayment of accumulated educational debts may make it imperative that a recent graduate or lawyer be eligible to begin his practice as soon as possible.

Note, \textit{Residence Requirements for Initial Admission to the Bar: A Compromise Proposal for Change}, 56 CORNELL L. REV. 831, 841 (1971). For this and similar reasons, see W. GELLHORN, supra note 5, at 127 (terms such requirements "disqualifications" rather than "qualifications").

\textsuperscript{27} States which require a residence qualification other than residence at time of admission or intent to reside for initial admission to the bar are: Alaska (bona fide residence for thirty days prior to first day of examination with residence continuing through certification for admission); Colorado (bona fide residence, thirty days prior to examination, continuing through examination and admission); Delaware (actual residence at time of examination and six months' residence prior to admission); Georgia (twelve months' residence for graduates of non-ABA-accredited law schools; all others, residence at time of examination and intent to continue in residence for one year); Hawaii (actual and bona fide residence for three months prior to admission; physically present seventy five percent of time); Iowa (residence at time of application, which must be filed at least thirty days prior to examination); Kansas (residence at time of application, which must be filed at least ninety days prior to examination; Maryland (actual residence in order to petition for bar examination and for admission to bar); Mississippi (residence at time of application which must be filed three months prior to examination); Montana (six months' continuous actual and bona fide residence prior to application, which must be filed at least forty-five days prior to examination); Nebraska (bona fide residence at time of application, which must be filed at least one month prior to examination); Nevada ( bona fide residence prior to March 1 of year of examination and continued residence through examination, which is at end of July); New Mexico (bona fide residence and domicile in state ninety days prior to admission and physical presence for seventy-five days); North Carolina (bona fide citizenship and residence on and after June 15
requirements for attorneys who seek admission from another state.\textsuperscript{28}

The asserted justifications for residence requirements are numerous. Among the most common are assurance that the applicant possesses a sufficient knowledge of local government and legal custom, opportunity for local bar officials to observe the applicant's character and fitness to practice law, indication of a bona fide intent on the part of the applicant to continue a practice in the state, and protection of the public from unscrupulous practitioners with no local affiliations.\textsuperscript{29} In a series of recent cases, however, several courts have pierced these rationalizations and have invalidated residence requirements on constitutional grounds.\textsuperscript{30} In each case, the residence requirements were

\begin{itemize}
  \item of year in which applicant takes examination, which is at the end of July; Oklahoma (actual residence at time of examination, residence for at least 60 days prior to admission); Rhode Island (three months' residence prior to admission); South Carolina (actual residence for not less than three months prior to filing application for examination, which must be filed at least four months prior to examination); Tennessee (domicile and physical residence for two months before receiving license); Texas (residence for not less than three months prior to bar examination); Utah (residence for three months prior to date of taking bar examination); Vermont (establishment of physical residence in state six months prior to admission); Virginia (residence from December 15 prior to February examination and May 15 prior to July examination and must remain in residence to time of taking examination); West Virginia (residence at time of application, which must be filed at least sixty days prior to examination); Wyoming (bona fide residence at time of application, which must be at least thirty days prior to examination; bona fide, actual residence for six months prior to admission).
\end{itemize}

\textsuperscript{28} States imposing a residence requirement on foreign attorneys for admission with or without examination are: Alaska (same as initial admission); Connecticut (actual residence for six months prior to application and intent to conduct major part of practice in state); Delaware (bona fide residence and intent to maintain principal office in state); Hawaii (same as initial admission); Illinois (actual residence at time of application and intent to maintain office in state for continuous and active practice of law); Indiana (bona fide residence and intent to engage in practice; requirements may be waived if requirements of other jurisdiction are less severe); Kansas (same as initial admission); Maryland (domiciliary of state with intent to practice law and have office therein); Mississippi (residence for not less than six months immediately prior to admission); Montana (same as initial admission); Nebraska (same as initial admission); Nevada (same as initial admission); New Mexico (same as initial admission); North Carolina (bona fide residence for at least sixty days immediately preceding consideration of application); Oklahoma (depends upon rules in foreign jurisdiction from which attorney seeks admission); Rhode Island (same as for initial admission); South Carolina (same as for initial admission); Texas (same as for initial admission); Utah (actual, continuous, and bona fide residence for period of at least three months prior to date of filing application); Washington (residence 180 days prior to examination); West Virginia (thirty days' residence and intent to practice). 1975 \textit{BAR EXAM DIGEST} (Center for Creative Educational Services, Inc. 1975).


\textsuperscript{30} Lipman \textit{v.} Van Zant, 329 F. Supp. 391 (N.D. Miss. 1971) (declared Mississippi's one-year pre-application residence requirement unconstitutional as violation of equal protection); Potts \textit{v.} Honorable Justices of Supreme Court of Hawaii, 332 F. Supp. 1392 (D. Hawaii 1971) (declared Hawaii's requirement of six months' physical residence in state after age fifteen unconstitutional as violation of equal protection); Webster \textit{v.} Wofford, 321 F. Supp. 1259 (N.D. Ga. 1970) (declared Georgia's one-year pre-admission residence requirement unconstitutional as violation of equal protection); Keenan \textit{v.} Board of Law Examiners of
struck down because the avowed goals could be achieved by less restrictive methods and because little direct correlation was seen between the residence requirements and the functions they allegedly served.\textsuperscript{31}

A comparison between restrictive residence requirements and the relative ease with which attorneys may be admitted to practice \textit{pro hac vice} further undermines the alleged justifications for residence requirements. In many states the admission of a foreign attorney on a limited basis is often little more than a formality. At most, association with local counsel is required.\textsuperscript{32} If states truly are possessed of an overriding concern to protect their citizens from being victimized by unethical or incompetent attorneys, it is difficult to perceive how such an end is achieved by allowing foreign attorneys to practice in a state, even on a limited basis, without effective local control. Indeed, a more effective array of sanctions may exist for disciplining the attorney who has been admitted on a regular basis to the state bar than is the case with attorneys admitted \textit{pro hac vice}.\textsuperscript{33}

It has been suggested that residence requirements impose a burden on the interstate mobility of attorneys.\textsuperscript{34} At least one court has held that a one-year residence requirement represents an unconstitutional infringement of the right to travel.\textsuperscript{35} Misallocation of attorney resources among states has been viewed as a consequence of residence restrictions.\textsuperscript{36} At the same time, as business and commercial activities take on an increasingly national character, residence requirements which inhibit the attorney from engaging in multistate practice should be viewed more critically.\textsuperscript{37} It is not unreasonable for a client to expect

\textsuperscript{31} See note 30 supra.
\textsuperscript{32} Brakel, supra note 29, at 1084-86; Katz, \textit{Admission of Nonresident Attorneys Pro Hac Vice}, Research Contributions of the Am. B. Foundation (No. 5 1968), in A. CONARD, R. KNAUSS & S. SIEGEL, \text{ENTERPRISE ORGANIZATION: CASES, STATUTES & ANALYSIS} 30 (1972).
\textsuperscript{33} Cf. Marks & Cathcart, supra note 3 at 208-09. By implication, perhaps \textit{pro hac vice} requirements should be made more stringent, but this approach should yield the same undesirable consequences characteristic of residence qualifications for admission.
\textsuperscript{35} See note 34 supra.
his attorney to render comprehensive service, but residence qualifications which restrict practice in another state may undermine that assumption. Finally, the significant impact of restricting entry upon the cost and availability of legal services to the public should be emphasized.\textsuperscript{38}

In short, residence requirements for bar admission, rather than advancing legitimate state interests, have a number of deleterious effects: denial of admission to otherwise competent attorneys, protectionist effects with respect to members of the state bar, and restrictions on the ability of attorneys to engage in substantial interstate practice. The question, then, is whether the Sherman Antitrust Act is the appropriate mechanism for addressing the problem.

II. THE SHERMAN ACT AND THE PROFESSIONS

Current discussion in the field of antitrust law has taken a renewed interest in subjecting the practices of professional groups to examination under the Sherman Act.\textsuperscript{39} The Justice Department's successful attack on bar-sanctioned minimum fee schedules in \textit{United States v. Oregon State Bar}\textsuperscript{40} may signal the start of a concerted effort by the Antitrust Division to prosecute Sherman Act violations among the professions.\textsuperscript{41} The Antitrust Division may have become particularly sensitive to the antitrust implications of activities within the legal profession.\textsuperscript{42}

(1968). While it might be argued that interstate practice could be facilitated by more extensive use of the \textit{pro hac vice} device, that approach fails to address itself to the substantial ongoing needs that would be served by relatively simple procurement of multiple state bar membership.

\textsuperscript{38} See notes 168-171 and accompanying text infra.


\textsuperscript{40} The District Court denied the Oregon State Bar's motion for summary judgment on learned profession and state action defenses. 385 F. Supp. 507 (D. Ore. 1974).

\textsuperscript{41} The Supreme Court's grant of certiorari in Goldfarb v. Virginia State Bar, 95 S. Ct. 223 (1974), subjects the continued vitality of the \textit{Oregon State Bar} decision to some doubt. The Court has indicated that it will address itself directly to the validity of minimum fee schedules. \textit{See generally 5 Trade Reg. Rep.} ¶ 60,021, at 65,107 (Jan. 20, 1975).

\textsuperscript{42} See Address of Bruce Wilson, Deputy Assistant Attorney General, Department of Justice Antitrust Division, to Pennsylvania Bar Ass'n Conference of County Bar Officers, 5 \textit{Trade Reg. Rep.} ¶ 50,131, at 55,215 (1972). \textit{See also Donnem, supra note 20; Note, The Antitrust Division v. the Professions—'No Bidding' Clauses and Fee Schedules, 48 Notre Dame Law.} 966, 967 (1973).
A successful antitrust challenge to state residence requirements would face, at the outset, three judicially recognized barriers to the imposition of an antitrust sanction upon the profession: the issue of whether or not the practice of law constitutes "trade or commerce" within the meaning of the Sherman Antitrust Act, the "learned profession" exemption, and the "state action" exemption. Each of the possible restrictions will be analyzed in turn, but it must be remembered that the exemptions, which operate in derogation of the policies of the antitrust laws, should be strictly construed and applied only where the conditions for exemption are clearly satisfied.

III. BARRIERS TO APPLICATION OF THE SHERMAN ACT

A. Trade or Commerce Under the Sherman Act

Section 1 of the Sherman Antitrust Act declares illegal "every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . ." Section 2 of the Act renders unlawful the activity of every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . .

In order to subject any activity to the sanctions of the Sherman Act, therefore, it must be shown that "commerce among the several states" has been affected. In delineating the meaning of that phrase, the Supreme Court has interpreted the reach of the Sherman Act to be coextensive with the power of Congress under the commerce clause.

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44 See part III B infra.
45 The exemption was established in Parker v. Brown, 317 U.S. 341 (1943). See part III C infra.
46 Pogue, The Rationale of Exemptions From Antitrust, 19 PROCEEDINGS OF ABA SECTION OF ANTITRUST LAW 313, 327 (1961). In an exhaustive survey of antitrust exemptions Pogue points out that the learned profession and state action exemptions are judicial and not legislative creations, an observation which may lead one to inquire more closely into the question of whether they are in harmony with the legislative policy of the Sherman Act, at least insofar as the exemptions are not express products of legislative actions. See also Norman's on the Waterfront, Inc. v. Wheatley, 317 F. Supp. 247, 253 (D.V.I. 1970), aff'd, 444 F.2d 1011 (3d Cir. 1971).
Thus, the Act has been held to govern wholly intrastate activities having a substantial effect on interstate commerce, as well as those more traditionally thought to be "commerce among the several states." This judicial construction of congressional power under the commerce clause has resulted in significant expansion of that power.

The search must be for activities of the legal profession sufficiently connected with interstate commerce to satisfy the jurisdictional requirement. This nexus is not self-evident. Past challenges to allegedly restrictive practices within the medical profession indicate that certain activities will be held to be so inherently localized in effect that they are beyond the reach of the Sherman Act. Furthermore, a recent decision of the National Labor Relations Board based its denial of jurisdiction over the unionization activities of law firm employees partly on the allegedly insubstantial impact which the practice of law had on interstate commerce.

While the practice of law may be largely a "local" activity, several possible interstate impacts should be noted. First, the demand for goods and services moving in commerce is responsive in some degree to the number of persons engaged in the practice of law, to the extent that a smaller number of attorneys would diminish such demand. Such a rationale has been accepted as satisfying the commerce jurisdictional


52 See generally Searls, Trade or Commerce Among the Several States or With Foreign Nations, in AN ANTITRUST HANDBOOK 141 (ABA Antitrust Section 1958), for a survey of the types of activities which satisfy the Sherman Act's commerce requirement.

53 See Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1958); Spears Free Clinic & Hospital v. Cleere, 197 F.2d 125 (10th Cir. 1952). Riggall held that the complaint alleged no impact on interstate commerce sufficient to sustain jurisdiction under the Sherman Act as a result of defendant's refusal to admit plaintiff to membership in a county medical society, while Spears reached the same conclusion with respect to defendant's alleged restraint on the practice of chiropractic in Colorado.

Although it is tempting to apply this reasoning to the legal profession on the grounds that both law and medicine have traditionally been classified as "learned" professions, and both involve personal dealing between practitioner and client or patient, it could be argued that the practice of medicine tends to be more localized, while the legal profession has at least some supra-state aspect in the nature of practice in the federal district courts.

54 Bodle, Fogel, Julber, Reinhardt & Rothschild and Local 495, Int'l Bhd. of Teamsters, 206 N.L.R.B. No. 60, 84 L.R.R.M. 1321 (1973), 1973 CCH NLRB DEC. ¶ 25,863, at 33,339 (1973). The Board, noted that "the law firm does not itself engage in the production, distribution or sale of goods in commerce," as a basis for declining to assert jurisdiction, though the ruling may have hinged primarily upon interpretation of the National Labor Relations Act, 29 U.S.C. §§ 151, 164(c)(1) (1970). In contrast, a strong dissenting opinion stressed the effect of the legal profession on American business.
Bar Residence Requirements

requirement in both Sherman Act\(^\text{55}\) and non-Sherman Act\(^\text{56}\) cases. It has also been proposed that the use of the mails in "giving advice, billing clients, referring clients and subscribing to legal periodicals" represents an activity sufficiently in interstate commerce to bring the practice of law within the Sherman Act.\(^\text{57}\) In contrast, however, the plaintiffs in Goldfarb v. Virginia State Bar\(^\text{58}\) unsuccessfully urged that the requirement by out-of-state lenders that title to property be examined by a Virginia attorney as a pre-condition to issuance of a home loan mortgage brought the activities of the Virginia State Bar and the Fairfax County Bar Association under the interstate commerce ambit.

A second connection which could satisfy the interstate commerce requirement of the Sherman Act lies in the impact that the practice of law has upon activities which are themselves engaged in such commerce.\(^\text{59}\) It is apparent that the cost and availability of legal services, both of which are closely related to the supply of attorneys, have a direct influence upon the transaction of interstate business. The fact that residence requirements limit access to the profession and thereby tend to restrain competition shows that such requirements do affect the cost and availability of legal services. The practice of law, therefore, should not be viewed as an exclusively local activity.\(^\text{60}\)

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\(^{55}\) Doctors, Inc. v. Blue Cross of Greater Philadelphia, 490 F.2d 48 (3d Cir. 1973). But see Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), cert. denied, 355 U.S. 954 (1958); Spears Free Clinic & Hospital v. Cleere, 197 F.2d 125 (10th Cir. 1952).

\(^{56}\) Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942). In Katzenbach the Supreme Court upheld the constitutionality of the public accommodations provisions of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a et seq., as a valid exercise of congressional power under the commerce clause, citing the impact on the movement of goods in commerce which resulted from defendant's refusal to serve blacks. 379 U.S. at 299-301, 303-05. In Wickard the Court sustained regulation of wheat grown and consumed on a single farm under the Agricultural Adjustment Act of 1938, 7 U.S.C. § 1340, on the ground that such production and consumption affected the flow of wheat in interstate commerce. 317 U.S. at 127-29.


\(^{58}\) 497 F.2d 1, 15-19 (4th Cir. 1974), cert. granted, 95 S. Ct. 223 (1974). The court held that the impact on interstate commerce of such activity was merely "incidental." 497 F.2d at 18. The question, on certiorari to the Supreme Court in Goldfarb, has been posed as follows:

Does a restraint of trade by attorneys in the fixing of fees for title examinations in connection with obtaining mortgages on real estate in Northern Virginia, substantially restrain commerce among the several states, where the undisputed evidence shows that a substantial portion of these mortgages involve (a) loans made from persons outside of Virginia, and/or (b) guarantees by agencies of the Federal Government headquartered in Washington, D.C., and/or (c) the purchase of a home by a nonresident of Virginia?

\(^{59}\) See Brakel, supra note 29; Morris, supra note 37; Nahstoll, supra note 20. But see note 54 and accompanying text supra.

\(^{60}\) In United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), the Supreme Court ruled that interstate transactions in intangibles (specifically, insurance transactions) were subject to the Sherman Act. Concededly, the impact which legal practice has
A final source of Sherman Act jurisdiction over commerce rests upon the influence which residence requirements have on interstate mobility of attorneys and the consequent allocation of legal skills.61 While, in dictum, Mr. Justice Holmes, in *Federal Baseball Club v. National League of Professional Baseball Clubs*62 commented that "personal effort, not related to production, is not a subject of commerce,"63 subsequent cases have clearly concluded that personal services64 and service industries65 fall within the scope of the Sherman Act. But the issue is not simply the movement of attorneys across state lines; rather, it is the relationship of such movement to the efficient allocation of attorneys as well as the restraint which may be imposed upon interstate commercial transactions.66

Any of the three possible interstate impacts—the use of goods and services moving in interstate commerce by those engaged in the practice of law, the pervasive influence of legal practice on activities traditionally thought to be part of interstate commerce, and the effect of licensing restrictions on interstate mobility of attorneys—suggests sufficient nexus with interstate commerce to support application of the Sherman Act to bar admission requirements.

**B. The Learned Profession Exemption**

The issues of interstate commerce jurisdiction and a learned profession exemption from antitrust law to some degree rest upon a similar

61 See W. Gellhorn, supra note 5, at 202 n.59, citing NATIONAL MANPOWER COUNCIL, A POLICY FOR SKILLED MANPOWER (1959). Holen, supra note 6, at 498 concludes that empirical evidence is consistent with the hypothesis that professional licensing arrangements and practices in . . . law restrict interstate mobility among . . . lawyers and distort the allocation of professional personnel in [this] field.

62 259 U.S. 200 (1922).

63 259 U.S. at 209.

64 United States v. Nat'l Ass'n of Real Estate Boards, 339 U.S. 485 (1950). The Court held that adoption by an association of real estate brokers in Washington, D.C., of standard rates of commissions was a "restraint of trade" within the meaning of § 3 of the Sherman Act, 15 U.S.C. § 3 (1970). The Court took pains to note, however, that it did not "intimate an opinion on the correctness of the application of the term ["trade"] to the professions." Id. at 492.


66 The caveat is in order in light of another well-known Holmes dictum in *Federal Baseball* to the effect that "a firm of lawyers sending out a member to argue a case . . . does not engage in such commerce because the lawyer . . . goes to another state." 259 U.S. at 209.
foundation, insofar as they relate to the commerce aspect of the Sherman Act. The overlap, in theory, rests on the assertion that professional activities do not affect “trade or commerce” or, alternatively, are “traditionally noncommercial” in nature, and are therefore entitled to exemption.67 For analytical purposes, however, they will be treated as distinct issues under the Sherman Act.

The most recent significant affirmation of the learned profession exemption has come in the case of Goldfarb v. Virginia State Bar.68 The majority opinion in Goldfarb lent unqualified support to the exemption in holding that the Virginia State Bar and Fairfax County Bar Association, in adopting minimum fee schedules for services incident to a client's purchase of a home (chiefly title searches), were immune from Sherman Act liability on the ground that the Act does not reach the activities of learned professions.69 The court relied for support primarily on the two cases traditionally cited as the source of the exemption: Federal Baseball Club v. National League of Professional Baseball Clubs70 and FTC v. Raladam Co.71 Both cases, however, lend scant support to the idea of an unqualified exemption for professional activities.72

Federal Baseball held that the business of providing public professional baseball games for profit is not “commerce,” because it is strictly a local affair; as a result, no Sherman Act cause of action

69 497 F.2d at 13-15. The learned profession issue in Goldfarb has been framed for the Supreme Court in the following terms:

Are bar associations which promulgate a minimum fee schedule exempt from the price fixing prohibitions of the antitrust laws because the restraint on competition is among the members of a "learned profession"?

70 259 U.S. 200 (1922).
71 283 U.S. 643 (1931).
72 See United States v. Oregon State Bar, 385 F. Supp. 507 (D. Ore. 1974), where the court concluded, upon analysis of those decisions, that “[T]he ‘learned profession’ dicta in these two cases have no current vitality.” Id. at 515. But see Bank Bldg. & Equip. Corp. of America v. Council of Architectural Registration Bds. and W. Va. Bd. of Architects, 5 TRADE REG. REP. (1975 Trade Cas.) ¶ 60,108, at 65,229 (D.D.C. 1975), which held that the activities of a professional architectural association and state architectural board are not subject to the Sherman Act, on the grounds that "the profession of architecture is a 'learned profession'" and that the practice of a learned profession is not trade or commerce within the meaning of the Sherman Antitrust Act, § 1. Id. at 65,230: The court did not, however, indicate the basis for its determination that architecture constitutes a "learned profession."
would lie against one who interfered with that business.\textsuperscript{73} The court noted the noncommercial nature of "personal effort not related to production."\textsuperscript{74} However, serious questions have been raised about the continued validity of that assertion.\textsuperscript{75} Indeed, \textit{Federal Baseball} has been frequently criticized by the Supreme Court; the Court has steadfastly refused to expand baseball's antitrust exemption to other sports and has questioned the wisdom of continued recognition of the exemption in the case of baseball itself.\textsuperscript{76} Subsequent cases,\textsuperscript{77} in dictum, at least, have erected a sacrosanct boundary around the "learned professions,"\textsuperscript{78} based upon Holmes' statement with respect to personal services, on the theory that the professions are engaged in the rendering of services, not trade or the production of goods in commerce. Such a reading of \textit{Federal Baseball} has been criticized on the grounds that the case stands not for this principle, but only for the proposition that interstate travel incident to the rendition of purely local services is not sufficient to satisfy the interstate commerce jurisdictional requirement of the Sherman Act.\textsuperscript{79}

\textit{FTC v. Raladam Co.}\textsuperscript{80} is generally recognized as the other traditional foundation for the learned profession exemption. The case involved a complaint by the Federal Trade Commission against a vendor of patent medicines under section 5 of the Federal Trade Commission Act.\textsuperscript{81} The Court affirmed the court of appeals' reversal of the
Commission's cease-and-desist order, in analyzing whether respondent's activities tended to injure its competitors noted:

Of course, [the] medical practitioners . . . [who revealed] the danger of using the [patent-medicine] remedy without competent advice . . . are not in competition with respondent. They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them.82

The creation of a "learned profession" exemption in this dictum is wholly tangential to the Court's treatment of the issue in Raladam. Standing alone, the Court's statement can not support a broad professional exemption.

More recent statements of the doctrine, many of them extrapolated from the dicta in Federal Baseball and Raladam, assert that "non-commercial" aspects of the professions, at a minimum, are exempt from Sherman Act liability.83 Cases dealing with alleged Sherman Act violations in health-related professions raise questions about the existence of a professional exemption.84 At least to a limited extent, the courts appear willing to acknowledge tacitly a special status for

82 283 U.S. at 653 (emphasis added). The Court's observation arose in the context of its argument that respondent's patent medicine remedies would not serve to injure those allegedly in competition.

83 See, e.g., Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, 432 F.2d 650 (D.C. Cir. 1970), cert. denied, 400 U.S. 965 (1970). Marjorie Webster held that the defendant, a voluntary, non-profit educational corporation which denied accreditation to a proprietary junior college, could not be enjoined from denying such accreditation under the Sherman Act. The court commented that "the prescriptions of the Sherman Act were 'tailored . . . for the business world,' not for the non-commercial aspects of the liberal arts and the learned professions." 432 F.2d at 654. Stress might be placed on the term "non-commercial" in arguing that no blanket prohibition on professional liability is to be implied. See A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. 8-9 (2d ed. 1970), which suggests a distinction between "commercial" and "non-commercial" activities as a basis for a qualified exemption. While the distinction has some surface appeal, ready application of it may be more difficult. Clearly, minimum fee schedules, which constitute a form of price-fixing, are commercial in nature, but the line becomes less distinct when issues such as residence requirements, attorney discipline, and advertising restraints are considered.

84 In Am. Medical Ass'n v. United States, 317 U.S. 519, 528-29 (1943), the Supreme Court, while affirming a conspiracy conviction against the AMA under § 3 of the Sherman Act, scrupulously avoided the issue of whether the practice of medicine constitutes a "trade" under the Act. The Court did find that the Association's attempt to undermine the activities of a nonprofit group health cooperative was a "conspiracy in restraint of trade" consisting chiefly of coercive acts and threats against physicians associated with the group health plan. Later, in United States v. Oregon Medical Soc'y, 343 U.S. 326 (1952), the Court referred to ethical considerations in the direct relationship between physician and patient which are quite different from considerations prevailing in ordinary commercial matters. Id. at 336. The Court dismissed the complaint on the grounds of failure to adduce sufficient evidence of the defendant's concerted refusal to deal with private health associations engaged in the contract practice of medicine. The Court declined to consider whether proof of such a refusal to deal would constitute a violation of the antitrust laws, though Am. Medical Ass'n, supra, gives some indication that it would be.

Cf. Northern California Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir. 1962), cert. denied, 371 U.S. 862 (1962); United States v. Utah Pharmaceutical Ass'n, 201
professional groups that is justified by historical and ethical considerations. In some of the cases emphasizing an exemption, however, the issue arose only obliquely. Perhaps the more the activity resembles group exertion of market power, the less amenable the courts will be to conferring exempt status. The organized bar's promulgation and enforcement of restrictive residence requirements may constitute such an exertion. In contrast, *United States v. Oregon State Bar* involved a direct confrontation and rejection of the exemption. The Supreme Court's decision in *Goldfarb* could settle the exemption issue. But the Court has several alternative grounds on which to dispose of the case and may avoid ruling on whether a "learned profession" exemption exists. Therefore, the future status of the exemption can only be a matter for speculation.

Nevertheless, it should be clear that the authority of *Federal Baseball* and *Raladam* as the basis for the learned profession exemption is questionable at best. The comments of the Supreme Court which touch upon professional immunity in those cases are mere dicta, while the holding in *Federal Baseball* has been suspect for some time. Whether the Supreme Court will expressly reject an exemption for the practice of law is uncertain. As the cases indicate, any professional exemption is a qualified one at best; in any event it should not extend to residence requirements which lack valid justification and which produce adverse economic consequences.


On the whole, it would appear questionable for the bar to defend activities which would otherwise constitute violations of the Sherman Act on the existence of a "learned profession" exemption. The profession may have been forewarned in this regard. See Wilson Address, supra note 42, at 55,216.

See, e.g., *United States v. Oregon Medical Society*, 343 U.S. 326, 336 (1952). The courts might be reluctant to intervene directly into the attorney-client relationship on a similar rationale, for example, but exertion of group economic influence should not be placed on a similar footing, since traditional ethical justifications are not so strong where such power is exercised.

See, e.g., *Am. Medical Ass'n v. United States*, 317 U.S. 519 (1943). The Court noted that the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was to obstruct and restrain the business of Group Health.


See note 76 supra.

See text accompanying notes 84-88 supra.
C. The State Action Exemption

The state action exemption to the antitrust laws, founded primarily on the case of *Parker v. Brown*,92 represents the third and perhaps most fundamental, obstacle to application of the Sherman Act as a means of striking down bar residence requirements. In substance, *Parker* held that activity which would otherwise constitute a violation of the Sherman Act can be immune when undertaken at the express command of the state in pursuance of a recognized state policy to limit competition.93 The Court read the absence of any reference to state activity in the Sherman Act as indicating a congressional intent to exclude state action from the coverage of the Act.

*Parker* involved a challenge to the 1940 marketing program adopted pursuant to the California Agricultural Prorate Act.94 The act authorized the establishment by state officials of programs for the marketing of agricultural commodities produced in the state. The purpose of the programs was to restrict competition among growers and to maintain prices in the distribution of their commodities to packers. Appellee alleged in part that the marketing program's restrictions on competition in the raisin industry violated the Sherman Act.95

Controversy over the meaning of *Parker* continues to the present day.96 Since the decision was rendered, the courts have attempted to

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92 317 U.S. 341 (1943). See also Olsen v. Smith, 195 U.S. 332 (1904), where the Supreme Court exempted state pilotage licensing schemes from the application of the antitrust laws. For an argument approving Olsen as indicative of a proper interpretation of congressional intent not to supersede state regulatory activity in the field of occupational licensing see Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 7 (1972).

93 317 U.S. at 350-52. *Parker* involved a challenge to the 1940 marketing program adopted pursuant to the California Agricultural Prorate Act. The Act authorized the establishment by state officials, of programs for the marketing of agricultural commodities produced in the state.


95 317 U.S. at 346-47. The program was administered in a cooperative manner between private individuals and state officials, with substantial private input in the form of program committees, whose members were selected by the State Director of Agriculture from a list of nominees submitted by producers in a defined production zone. The committee's responsibility was to formulate a prorate marketing program for the commodity produced in the zone. Appellee, a producer and packer of raisins in California, sought an injunction against enforcement of the Act which would result in criminal proceedings against him and prevent him from marketing his 1940 crop, from fulfilling his sales contract, and from purchasing for sale and selling in interstate commerce raisins of that crop. *Id.* at 349. The District court in granting an injunction held that enforcement of the 1940 raisin marketing program was an illegal interference with and undue burden upon interstate commerce, though its opinion does not mention the Sherman Act. 39 F. Supp. 895, 901 (S.D. Cal. 1941).

apply the Supreme Court's reasoning to a wide variety of factual contexts. The inconsistency with which the exemption has been applied makes clear an obvious shortcoming of \textit{Parker}: the lack of a precise description of those elements which may suggest the propriety of conferring state action immunity in any given case.\textsuperscript{97}

In \textit{Goldfarb}, the Fourth Circuit Court of Appeals posited three factors, which it believed to be implicit in \textit{Parker}, as a basis on which to exempt the Virginia State Bar from Sherman Act liability for the promulgation of a minimum fee schedule: regulation for the benefit of the public, regulation actively and continuously supervised by the state, and regulation which receives its authority and efficacy from a legislative command.\textsuperscript{98} Over a vigorous dissent\textsuperscript{99} the court held that the minimum fee schedule promulgated by the Virginia State Bar satisfied these tests and was not subject to Sherman Act proscription.\textsuperscript{100} The issue of state action is another of the questions which the Supreme Court has been asked to consider in its review of \textit{Goldfarb}.\textsuperscript{101} Nevertheless, the possibility that the Court may not settle the issue makes it necessary to explore the \textit{Parker} theory more fully.

At the outset, it is unclear whether the test for state action under \textit{Parker} envisions the same inquiry as that involved in cases under the due process and equal protection clauses of the fourteenth amendment.\textsuperscript{102} One observer has suggested that the test for state action under the Sherman Act is much narrower than that applied to cases arising


\textsuperscript{97} See Note, 13 B.C. IND. & COM. L. REV. 393, 407 (1971).

\textsuperscript{98} 497 F.2d at 6.

\textsuperscript{99} The dissent took particular issue with the court's claim that supervision by the Virginia Supreme Court of the promulgation and implementation of fee schedules was in any sense "active," but it concluded that the State Bar should be exonerated from Sherman Act liability on the ground that its involvement with the fee schedules was "minor." 497 F.2d at 21 (dissenting opinion).

\textsuperscript{100} 497 F.2d at 12.

\textsuperscript{101} The petitioners in \textit{Goldfarb} have framed the state action issue in the following terms: "Is the Virginia State Bar exempt from the antitrust laws under the doctrine of \textit{Parker v. Brown} for its role in a price-fixing arrangement utilizing minimum fee schedules even though there is no statute authorizing the promulgation of such schedules, and where the only independent state agency involved, the Virginia Supreme Court, did not approve either the fee schedules themselves, the reports of the State Bar which led to their adoption, or the opinions of the State Bar which provided the enforcement mechanism for obtaining adherence to such schedules?"

\textit{TRADE REG. REP. ¶ 60,021, at 65,107 (Jan. 20, 1975).}

\textsuperscript{102} For a sampling of recent cases treating the state action issue in the context of the fourteenth amendment, see, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Reitman v. Mulkey, 387 U.S. 369 (1967).
under the fourteenth amendment. There appears to be support in the case law for this view. A plausible policy argument might be made for the distinction since a strict state action standard in the antitrust field and a more liberal test in the realm of equal protection and due process effectuate the respective remedial purposes of the Sherman Act and the fourteenth amendment. In interpreting the Sherman Act, the Supreme Court has emphasized the legislative policy favoring free and unfettered competition.

Clearly, the courts will not confer the Parker immunity on every activity which has the color of state involvement. In cases where state action defenses have been sustained, the courts have appeared to require more than an unsupervised delegation of state power to a group having the responsibility to carry out an anticompetitive plan of regulation. In Parker itself, the Court was quick to note by way of limitation that

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103 Comment, 5 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 301, 347 (1970). The Comment suggests that, to qualify for the state action exemption, the activity in question should provide a "politically responsible substitute for the market mechanism." Id.


Hecht involved a Sherman Act challenge, by individuals who sought to obtain a professional football franchise in Washington, D.C., to a restrictive covenant in a lease between the football team presently occupying Robert F. Kennedy Stadium in the District of Columbia and the District of Columbia Armory Board, which barred the use of the facility by another team for a period of thirty years. The Armory Board was authorized by statute to construct, maintain, and operate a stadium in which athletic events and other activities might be held. The court balanced the governmental interest involved in operation of the stadium by the Armory Board against the policy of the antitrust laws and determined that the latter outweighed the claim that the restrictive lease covenant constituted exempt government acts. 444 F.2d at 933, 946-47.

Wainwright involved an alleged price fixing conspiracy among milk producers in Georgia. The court held that the defendants could invoke the Georgia Milk Control Act as a defense to the Sherman Act action. The actions of the Georgia Milk Control Commission in implementing the act were deemed to be state action within the meaning of Parker. The court focused on the following facts in reaching its conclusion: the Commission functioned as a state agency within the Georgia Department of Agriculture; an elected state official, the Commissioner of Agriculture, appointed the Commission's Chairman, fixed his compensation, and had dismissal power over him; and the chairman's salary was paid out of the general treasury of the state. 304 F. Supp. at 574. Both Hecht and Wainwright suggest that substantial state involvement in the regulatory scheme is a prerequisite for state action status. Cf. Reitman v. Mulkey, 387 U.S. 369 (1967), where a state constitutional provision, on its face merely affirming the right of a person to sell, lease, or rent real property to whomever he chooses, was declared unconstitutional on the grounds that it implicated the state in active encouragement of discrimination.


a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful. . . .108

The most commonly advocated approach to reconciling the continued existence of anticompetitive state regulation with the federal antitrust laws has been the balancing test.109 Thus, Parker is construed to dictate that when state police power, exercised in the context of an actively state-supervised regulatory scheme which is sufficiently related to avowed state interests, comes into conflict with Sherman Act antitrust policy, the federal policy will yield.110 In analyzing the propriety of applying Parker to exempt bar residence requirements from the antitrust laws, therefore, a twofold test must be satisfied. First, a recognizable state intent to limit competition must be found. Second, there must be active state supervision implementing an anticompetitive state regulatory scheme.

It is not contended that states lack a legitimate interest in assuring that members of the bar meet minimum standards of competence as a prerequisite to the practice of law.111 Nevertheless, it is reasonable to balance the protection of that interest against countervailing policies such as individual freedom and the public need for an adequate supply of attorneys at reasonable cost. Restrictive practices which lack sufficient relationships to valid state interests and which are strongly biased in favor of entrenched occupational groups should not qualify for the state action exemption.112 The status of licensed occupations under present schemes has been likened to that of a private cartel, in classical economic terms.113 In light of this economic impact, a re-

108 317 U.S. at 351.
110 See George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), where this philosophy is stated as follows: Valid government action confers antitrust immunity only where government determines that competition is not the summun bonnum in a particular field and deliberately attempts to provide an alternate form of public regulation. Id. at 30.
111 Advocacy of such an approach would be untenable given the conceded state interest in the practice of law and the recognized state police power to regulate that practice. See note 15 and accompanying text supra.
112 Cf. notes 20-24 and accompanying text supra.
113 Barron, supra note 23, at 644, describes the operation of such a cartel: The purpose of a private cartel is to obtain and maintain monopolistic control of the supply of a product or service for the purposes of enhancing the returns to the members of the cartel and of protecting the members of the cartel from price competition that would reduce the return to a competitive level. In order to maintain its monopoly, the cartel must have the power . . . to control entry into the industry in order to prevent increased supply from reducing prices to the competitive level. . . .
examination of the rationale of *Parker* and supporting cases with specific reference to bar admission practices appears warranted.\(^{114}\)

A second major question under the *Parker* rationale is the degree of direct state supervision. Arguably, more direct state involvement in the form of statutory admissions requirements might circumvent the charge of insufficient state regulation.\(^{115}\) Such direct legislative action is comparatively rare; even statutory standards which lack a rational relationship to valid state interests are still subject to attack on constitutional grounds.\(^{116}\) In many states, however, the highest appellate court has the power to prescribe and administer rules for bar admission. Frequently, this power is exercised by quasi-official boards of law or bar examiners who obtain, for all practical purposes, effective control over the admission process.\(^{117}\) While a scheme involving a degree of delegation was upheld in *Parker*, the exclusionary economic aspect of residence requirements makes it crucial that courts closely examine the supervision system before granting an exemption for ostensible state action.\(^{118}\)

An example of the type of analysis which close scrutiny of state action can produce is found in *Asheville Tobacco Board of Trade v. FTC*.\(^{119}\) In interpreting section 5 of the Federal Trade Commission Act,\(^{120}\) the Fourth Circuit Court of Appeals held that activities of local tobacco boards of trade, which were comprised of tobacco warehouse-

\(^{114}\) Out of such an inquiry might emerge a clearer picture of the true interests—state or private—served by current residence requirements.

\(^{115}\) *Parker* confers immunity upon a program found to have "derived its authority and its efficacy from the legislative command of the state and . . . not intended to operate or become effective without that command." 317 U.S. at 350.


\(^{117}\) See note 16 and accompanying text supra.

\(^{118}\) In *Parker*, for example, the Director of Agriculture, a state official, was an ex-officio member of a nine-member Agricultural Prorate Advisory Commission. The other eight members were appointed by the Governor for four-year terms, subject to Senate confirmation, and were required to take an oath of office. The Director was also charged with the responsibility, subject to Commission approval, of selecting members of the local program committees. In turn, the prorate marketing program formulated by the committee was subject to Commission ratification, following a public hearing and a consent requirement by local producers. Finally, the Director was authorized to confer authority to administer the program on the local committees. 317 U.S. at 346-47. In order to confer the state action exemption on bar residence requirements, a comparable level of state involvement would be required.

\(^{119}\) 263 F.2d 502 (4th Cir. 1959).

men and purchasers and were authorized by state statute to adopt
reasonable rules and regulations for handling the sale of leaf tobacco,
were not immune by virtue of *Parker* from sanctions for unreasonable
restraints of trade.121 The court singled out as its reasons for denying
immunity the lack of active state supervision and the fact that the
regulations primarily benefited private parties.122

In *United States v. Oregon State Bar*123 the court also failed to find
active state involvement in the promulgation of minimum fee schedules,
though the Oregon State Bar was a public corporation and an instru-
mentality of that state's Judicial Department.124 The analysis in that
case seemed to turn on the lack of close state supervision.125

It is not feasible, therefore, to state useful general rules for the form
of state supervision which would be required to qualify the promulga-
tion of residence requirements for the state action exemption. The
requisite degree of active state supervision would depend on facts
unique to each state regulatory plan. Concededly, a rather forceful
argument might be mounted, in light of *Parker* and the tradition of
state involvement in the licensing process, that state action immunity
should remove restrictive elements in bar admission procedures from
antitrust sanctions.

On the other hand, to the extent that residence requirements are
restrictive, the circumstances may militate in the opposite direction.126
The exclusionary effect of residence requirements which protect a
privileged occupational group to the detriment to the public,127 to-
gether with the apparent reluctance of courts to give *Parker* broad
application,128 suggest that the exemption can be successfully chal-
lenged. If the barriers of jurisdiction and exemption can be overcome,

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121 263 F.2d at 508-10.
122 *Id.* at 509-10. *Asheville*, however, is distinguished on these points in *Goldfarb*, 497 F.2d
at 6-12, on the grounds that public and not private benefit is involved in the operation of the
Virginia State Bar, and that sufficiently active supervision is provided in the form of oversight
by the Virginia Supreme Court. Judge Craven dissented with respect to the degree of "active
supervision" in the case of minimum fee schedules. 497 F.2d at 20-21.
124 385 F. Supp. at 511.
125 *Id.*
126 Bard & Bamford, *supra* note 5, at 441, cogently identify the need for the legal profes-
sion to take the lead in an inquiry into the restrictive effect of residence requirements.
The initial burden must be on the lawyers themselves to institute action.
Who, but the law profession, is familiar with the antitrust laws? Who, but the
law profession, has been victimized by unfair and immobilizing bar admission
rules? And who, but the law profession, can meet the challenge of creating an
individual or class action suit which will pass muster in the very forum against
which it is directed?
127 *See* text accompanying notes 168-171 *infra*.
128 *See* note 106 *supra*. 
it is appropriate to explore the impact which the Sherman Act may have on restrictive bar admission requirements.

IV. ANTITRUST ANALYSIS OF RESIDENCE REQUIREMENTS

The requirement of establishing a "restraint of trade or commerce" under the Sherman Act as a prerequisite for violation of either section 1 or section 2 has been previously discussed at length. However, the fulfillment of this requirement alone will not suffice to sustain a Sherman Act action.

In addition to the finding of a restraint of trade, a section 1 violation consists of some "contract, combination, or conspiracy." In the case of trade associations, it has been suggested that this element is satisfied by the fact of joint membership by competitors in a collective organization. Combination among competitors in the legal profession is particularly strong in states which require membership in an integrated or unified bar as a prerequisite to the practice of law. Whether an individual attorney actively supports the policies behind restrictive residence requirements is of little consequence, assuming that a bar organization of which he is a member promotes such policies.

In contrast, section 2 of the Sherman Act reaches "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire to monopolize . . . ." "Monopoly power" has been defined, in part, as the "power to exclude competition." Subsequent analysis herein will draw primarily upon cases arising under section 1 of the

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131 See notes 47-60 and accompanying text supra.
134 At present, the following jurisdictions compel membership in such a body: Alabama, Alaska, Arizona, California, District of Columbia, Florida, Georgia, Idaho, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. J. PARNES, CITATIONS AND BIBLIOGRAPHY ON THE UNIFIED BAR IN THE UNITED STATES 3 (1973). The integrated bar movement has experienced steady growth in the last half century. See note 17 supra.
135 See note 18 supra.
Sherman Act. It will be demonstrated that a "bottleneck" analogy may be applied to residence requirements to establish a violation of section 1.

In analyzing the applicability of section 1 to bar admission requirements, the concept of a concerted refusal to deal, effected by means of a group boycott, should be considered. It is common to speak of such practices as falling within a category of per se illegality, but caution should be exercised in reaching the conclusion that proof of a concerted refusal on the part of the legal profession would be so viewed.

The concerted refusal to deal is manifested in the commercial context by an agreement or combination which bars dealings with or limits the extent to which parties to the agreement will deal with a competitor or potential competitor. Adherence to the combination is often enforced by a system of privately imposed sanctions against

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138 It has been suggested that the strictures against monopoly in § 2 of the Sherman Act are aimed primarily at the acquisition and retention of market power by a single firm which thereby becomes capable of producing the same economic effects as a combination. A. Neale, supra note 83, at 92. The atomized nature of legal practice and the legal profession would seem to elude this characterization. However, the support by members of the bar for the promulgation and enforcement of residence requirements and the role of some lawyers in the process suggests § 1 as a more persuasive line of analysis. See Klor's, Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959); Fashion Originators' Guild of American, Inc. v. Federal Trade Comm'n, 312 U.S. 457 (1941).

139 The "bottleneck" analysis is that of A. Neale, supra note 83, at 63, 66-69.

140 For more detailed discussion of concerted refusals to deal, see generally Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847 (1955); Bird, Sherman Act Limitations on Non-Commercial Concerted Refusals to Deal, 1970 Duke L.J. 247 (1970). Bird terms the concerted refusal to deal "nothing more than an agreement among a number of economic actors to sever or limit economic relations with another economic actor or actors." Id. at 248.

141 See, e.g., Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originizers' Guild of America, Inc. v. Federal Trade Comm'n, 312 U.S. 457 (1941); Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914). See generally Horsley, Per Se Illegality and Concerted Refusals to Deal, 13 B.C. Ind. & Com. L. Rev. 484 (1972). In general, the per se concept invalidates certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, divisions of markets, group boycotts, and tying arrangements.

142 See Bird, supra note 140; Columbia Note, supra note 133.

143 See, e.g., Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 209 (1959) (concerted refusal to deal in violation of § 1 in the form of a refusal by defendant manufacturers, distributors, and retailers to sell to plaintiff retailer or to sell to it only at discriminatory prices, in an attempt to drive plaintiff from competition); Fashion Originizers' Guild of America, Inc. v. Federal Trade Comm'n, 312 U.S. 457, 461 (1941) (boycott of retailers who sold garments copied by other manufacturers from designs produced by Guild members held to violate Sherman Act).
parties to the agreement. The effectiveness of such concerted refusals to deal in restraining competition is a primary reason for their treatment as per se violations of the Sherman Act.

The bottleneck analogy is helpful in analyzing the attributes of the concerted refusal to deal which may inhere in bar residence requirements. By analogy, imagine a group of competitors who exercise control over some essential commodity or facility in order to bar potential new competitors from entry into a particular market or activity, thereby reducing competitive pressures upon persons already in the group. The characterization is limited to situations where the essential facility can not practically be duplicated by those who wish to enter into competition. It may validly be argued that the "facility," in the bar admission setting, is the license which one must obtain in order to practice law, with a "bottleneck" imposed in the form of restrictive residence requirements.

The leading case in which a "bottleneck" theory was employed to establish a section 1 violation is Associated Press v. United States. Associated Press involved a complex system of bylaws formulated by the defendant, a news-gathering-and-dissemination agency, which, in substance, prohibited its members from selling news to nonmembers and which conferred substantial power upon members to block competition from nonmembers, since lack of access to Associated Press news rendered competition in the newspaper business extremely difficult. In upholding the district court injunction against continued enforcement of those bylaws restricting membership and forbidding provision of news by members to nonmembers, the Supreme Court noted:

Trade restraints of this character aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field of business and to frustrate the free enterprise system which it was the purpose of the Sherman Act to protect.


A. Neale, supra note 83, at 66.

Id. at 67; cf. Bird, supra note 140, at 272.

The practical unavailability of legal practice to one who is not licensed is manifest in the universal sanctions against the unauthorized practice of law. See generally Unauthorized Practice Handbook (J. Fischer & D. Lachmann ed. 1972).

326 U.S. 1 (1945).

326 U.S. at 4, 9, 13. The bylaws operated to deny access to AP news on the part of nonmembers while erecting substantial barriers to the acquisition of membership privileges by outsiders.

326 U.S. at 13.


326 U.S. 1, 13-14.
One possible interpretation of the rationale of *Associated Press* is that the Court will not permit private bodies to act in a judicial capacity. Other decisions have struck down private systems which created extensive regulation of an industry and imposed quasi-judicial sanctions on group members. However, the case can also be read to impose a duty to provide reasonable access to unique facilities necessary to effective competition, when those facilities are controlled so as to restrain trade. The latter proposition carries an implicit warning that residence restrictions on bar admission could be held to constitute such a denial of access to the practice of law and that they would be eliminated on that basis. The license to practice law is a condition precedent to entry into the field and is clearly a facility which can not be duplicated. On the rationale of *Associated Press*, therefore, unreasonable barriers to obtaining it could be invalid.

As a limitation on the bottleneck theory, however, courts have sustained "trade association" exclusionary practices which were found to be reasonably necessary for achieving proper objectives. In *Deesen v. Professional Golfers' Association of America* (PGA), a Sherman Act challenge was raised to the action of the PGA in terminating the plaintiff's status as an approved tournament player because of insufficient playing ability and failure to compete in the requisite number of tournaments. Rejecting the plaintiff's allegation that the PGA and its members combined and conspired to monopolize the business of professional golf, the court held that the restraints imposed by the PGA were reasonable in light of its intention to foster competition by keeping tournament size within manageable proportions. In response to a charge under section 2 of the Act, the court conceded the existence of monopoly power in the PGA over the business of professional golf but found no evidence that the organization intended to use that power to exclude golfers from its tournaments or to suppress competition.

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158 358 F.2d at 170. See also *Molinas v. Nat'l Basketball Ass'n*, 190 F. Supp. 241 (S.D.N.Y. 1961), upholding as nonviolative of the Sherman Act an indefinite suspension and refusal to reinstate in the case of a professional basketball player convicted of gambling violations. But see *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260 (N.D. Ga. 1973), which condemned as a "naked restraint of trade" the action of fellow professional golfers in suspending the plaintiff from competition for alleged rule infractions. In *Molinas*, the plaintiff was suspended in accordance with established league rule and standard contract clause dealing with gambling by players. 190 F. Supp. at 243-44. In *Blalock*, however, the court found that the decision to suspend the plaintiff was made in the exercise of the
Exclusionary effects of residence requirements in the legal profession might also be viewed in light of the Supreme Court's decision in *Silver v. New York Stock Exchange*. The Exchange was held liable, under section 1 of the Sherman Act, for withdrawing approval of private wire connections between securities firms in New York and the plaintiff's nonmember brokerage firm in Texas, without notice or opportunity for hearing. The connections were deemed vital to effective communication, and their severance was held to constitute a substantial injury to plaintiff's brokerage business. In finding a violation of the Act, the Court eschewed reliance upon a rule of per se illegality for an action which allegedly constituted a concerted refusal to deal and instead sought to balance the policies of self-regulation inherent in the Securities and Exchange Act of 1934 with the Sherman Act's emphasis upon free competition.

As previously indicated, the classic concerted refusal to deal has been held to constitute a per se violation of the antitrust laws. Cases like *Deesen* and *Silver*, however, indicate that the presence of countervailing policies may prompt a court to invoke a "rule of reason" approach to validate practices which would otherwise constitute violations of the Sherman Act. The "rule of reason" approach envisions consideration of a range of factors which may lead to a determination that the harm incident to a particular restraint does not warrant its invalidation under the Sherman Act. In the case of bar admission residence requirements, both the state interest in the practice of law and the asserted rationale of public protection would likely be

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159 See notes 140-42 and accompanying text supra.
160 See generally *Bird*, supra note 140; *Monroe*, supra note 133; *Columbia Note*, supra note 133.
161 See note 163 supra.
162 See text accompanying note 29 supra.
pressed as arguments for applying the rule of reason analysis in evaluating whether these restraints violate the Sherman Act.

In order to establish that residence requirements do represent an unreasonable restraint of trade, it is necessary to examine more closely the economic and social impact of these requirements.

The first major area of impact is the geographic distribution of attorneys and income levels. First, states whose residence requirements were among the most restrictive, and which were challenged on that basis in the early part of this decade, all had fewer lawyers per capita than the per capita figure for the nation as a whole. While other factors contribute to these ratios, such substantial deviations are at least partly related to residence requirements. In turn, a relative undersupply of attorneys in a given state is likely to influence the level of average attorney income. Artificially high income levels can be maintained only by the continuation of an enforced undersupply of attorneys. The public pays the costs of this system because of the restriction on price competition.

In light of rapidly expanding law school enrollments the problem of attorney undersupply may be reduced nationally. However, the problem of misallocation of attorneys will continue to place artificial restraints on the price-competition mechanism.

A second major impact of residence requirements is the restraint placed on attorney mobility. The Supreme Court, interpreting the constitutionality of congressional action under the commerce clause, has held that the interstate movement of persons for commercial or non-

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166 See note 30 supra.

167 AMERICAN BAR FOUNDATION, 1971 LAWYER STATISTICAL REPORT 6, 26 (1972). The figures, which represent number of state residents per lawyer (1970 data), are as follows:

<table>
<thead>
<tr>
<th>State</th>
<th>Residents per Lawyer</th>
</tr>
</thead>
<tbody>
<tr>
<td>National</td>
<td>572</td>
</tr>
<tr>
<td>North Carolina</td>
<td>1095</td>
</tr>
<tr>
<td>Hawaii</td>
<td>850</td>
</tr>
<tr>
<td>Mississippi</td>
<td>802</td>
</tr>
<tr>
<td>New Mexico</td>
<td>770</td>
</tr>
<tr>
<td>Georgia</td>
<td>748</td>
</tr>
</tbody>
</table>

168 For a discussion of the economic relationship between client demand and lawyer supply, see generally Katzman, There is a Shortage of Lawyers, 21 J. LEGAL ED. 169 (1968). See also Holen, supra note 6, at 494.

169 See note 168 supra. One byproduct of lawyer undersupply is increased use of persons not trained in the law to perform tasks traditionally done by attorneys. The public might be victimized as a result. Merson, Meeting Legal Needs: A New Malthusian Dilemma, 47 DENVER L.J. 54 (1970). For an illustration of similar phenomenon in the medical profession, see M. FRIEDMAN, supra note 5, at 155-56.

170 The American Bar Foundation indicated that the size of first-year law classes increased over 30 percent from 1966 to 1970. AMERICAN BAR FOUNDATION, 1971 LAWYER STATISTICAL REPORT 20 (1972) (Computation based on data reported therein).

171 Holen, supra note 6, at 496.
commercial purposes is embraced by the commerce power.\textsuperscript{172} If, as has been asserted, the power of Congress under the Sherman Act is co-extensive with its power under the commerce clause,\textsuperscript{173} then an impediment to the interstate movement of persons could be grounds for imposing Sherman Act liability.

The impact of residence requirements upon general commerce has been discussed herein.\textsuperscript{174} While no concrete data exist to delineate the degree to which residence requirements hinder attorneys in rendering legal services in interstate transactions, the potential for such interference clearly exists and has been identified by some observers.\textsuperscript{175} The influence which lawyers and law firms exercise in business affairs has been seen by some as a fact of modern economic life.\textsuperscript{176}

A future impact of residence requirements is likely to occur with the trend in the legal profession toward specialization. With the increasing complexity of legal and business problems, current movement within the profession toward specialization is likely to continue and expand.\textsuperscript{177} A likely result of such specialization will be the emergence of groups of highly trained attorneys in fields such as antitrust or patent law whose services will be demanded on a nationwide basis. Residence requirements may serve to check the growth of this phenomenon.\textsuperscript{178}

Violation of the Sherman Act is manifest in the case of residence requirements which lack a proper relation to valid state interests,

\textsuperscript{172} Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964).
\textsuperscript{173} See text accompanying note 49 \textit{supra}.
\textsuperscript{174} See notes 59-60 and accompanying text \textit{supra}.
\textsuperscript{175} See note 59 \textit{supra}.
\textsuperscript{176} Bodle, Fogel, Julber, Reinhardt & Rothschild and Teamsters Local 495, Int’l Bhd. of Teamsters, 206 N.L.R.B. No. 60, 84 L.R.R.M. 1321 (1973), 1973 CCH NLRB DEC. ¶ 25,863, at 33,339 (dissenting opinion). The dissent noted, Without the services of the legal profession, American business as we know it today could not function. The legal profession plays a vital role at all stages from the act of incorporation through the obtaining of licenses or certificates which might be needed, governmental approval of rates and/or routes, the issuance and sale of stocks and bonds, the negotiations and preparation of legal contracts necessary for the holding of property, and the purchase and sale of materials and products, to name but a few aspects, and all these have their impact on how, where, and when a business may operate. To brush all this aside with the observation that a law firm renders services related to law rather than commerce . . . is unrealistic, indeed. It is more realistic to say that without such services their clients would be unable to engage in such commerce and that there is a very direct and very immediate impact which must be recognized.
\textit{Id.} at 33,342.
\textsuperscript{178} See generally Mindes, \textit{supra} note 177, for an interesting discussion of problems of monopoly that might arise from lawyer specialist certification and regulation.
which unreasonably restrain commerce by restricting entry into the profession, which reduce mobility, and which hinder the growth of specialization. The fact that members of the bar derive economic benefit from the maintenance of these requirements further warrants careful scrutiny by the courts.

V. CONCLUSIONS

Close examination of the restrictive effect of bar admission residence requirements is clearly necessary. The requirement that an individual achieve residency status before being entitled to take the bar examination often serves motives no more substantial than the protection of the economic interests of the local bar. In light of this motive and the adverse impact of such requirements upon people who wish to enter the legal profession or to relocate their practice, Sherman Act claims against these restrictions should be recognized and upheld.

Significantly, the proposed Model Code of Rules for Admission to the Practice of Law of the National Conference of Bar Examiners eliminates any requirement of state residency as a prerequisite for admission by examination.\textsuperscript{179} The proposed Model Code, however, does maintain the requirement of bona fide residence as a prerequisite for admission as well as the requirement of intent to practice law on a continuing basis for foreign attorneys seeking admission.\textsuperscript{180} The former proposal would be a positive step in reducing the barriers to initial entry. The latter proposal is questionable in terms of Sherman Act analysis because of the greater significance of residence restrictions in the case of established practitioners who seek either permanent relocation or substantial interstate practice.

The organized bar appears to have a substantial interest in the perpetuation of a system which erects obstacles to entry into the profession. Many courts might be reluctant to examine afresh the special status of activities in the legal profession which operate in restraint of trade. In any event, as with the problem of minimum fee schedules, the mere suggestion that residence requirements may be subject to Sherman Act proscriptions could be sufficient to stimulate reform without the necessity of litigation.

The elimination of residence requirements and the substitution of a declaration of intent to conduct a substantial portion of one's practice

\textsuperscript{179} National Conference of Bar Examiners, Proposed Model Code of Rules for Admission to the Practice of Law, 40 BAR EXAMINER 129, 131 (1971).

\textsuperscript{180} Id. at 136.
within the state might be a proper compromise.¹⁸¹ This device would impose at least a moral obligation upon the attorney and would indicate some degree of desire to affiliate himself with the local bar. Obviously, an individual who had not yet practiced law would still be required to pass a bar examination in at least one state, but eligibility to take the examination would not be conditioned upon residency status. The foreign attorney seeking admission on motion would be required to file the same declaration of intent. Disciplinary problems could be handled by a system of reciprocity among the states, whereby complaints could be referred to the jurisdiction responsible for issuing the attorney's license to practice.

In many instances, an attorney's practice never takes him beyond the boundaries of a single jurisdiction. The elimination of residence requirements, however, facilitates movement in an age when that phenomenon has become commonplace. As society becomes increasingly mobile, there appears to be less justification for binding attorneys to practice in a single jurisdiction or for limiting their initial choice on the basis of a residence qualification. The legal profession should seek to raise the level of competence of its members, present and prospective, but not by maintaining artificial and arbitrary limits to the opportunities of otherwise qualified persons. The elimination of residence requirements on a Sherman Act rationale would help achieve this goal.

—Harvey Freedenberg