

NOTES

ANTITRUST LAW AND NONPROFIT ORGANIZATIONS: THE LAW SCHOOL ACCREDITATION CASE

PETER JAMES KOLOVOS

INTRODUCTION

The Massachusetts School of Law at Andover (MSL), a nonprofit corporation that commenced operations in 1988, presents what many would view as a positive development in legal education.¹ The law school's mission is to provide its students with more practical skills and knowledge than the traditional legal education currently does.² To this end, the school emphasizes the practical and business aspects of a legal practice: legal writing, negotiating, drafting documents, and trying cases.³ Adding to this practical perspective, MSL makes extensive use of practicing lawyers as adjunct professors and encourages students to participate in actual cases taken on by their professors.⁴

The extensive use of practitioners as adjunct professors has the added benefit of allowing MSL to keep faculty salaries at a low level.⁵ Through this and other cost-cutting measures,⁶ MSL was able to main-

¹ See, e.g., Harry T. Edwards, *The Role of Legal Education in Shaping the Profession*, 38 *J. Legal Educ.* 285, 290-93 (1988) (recognizing need for law schools to better integrate legal practice and legal education); John C. Weistart, *The Law School Curriculum: The Process of Reform*, 1987 *Duke L.J.* 317, 324-40 (discussing various proposals for legal curricular reform, including some to increase clinical training).

² See Plaintiff's Complaint ¶ 12, *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 846 F. Supp. 374 (E.D. Pa. 1994) (No. 93-6206) [hereinafter *MSL Complaint*], reprinted in *MSL L. Rev.*, Winter 1994, at 4, 8.

³ See *id.* ¶ 12.

⁴ See *id.*

⁵ While no specific salary data has been released, it is evident from the arguments in the case that the salaries offered by MSL are on average well below the salaries offered to full-time professors by other law schools in the region. See *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 857 F. Supp. 455, 457-59 (E.D. Pa. 1994) (discussing whether one of reasons ABA did not accredit MSL was noncompliance with ABA salary guidelines).

⁶ MSL's reliance on adjunct professors allows MSL to attract professors at lower salaries since the adjuncts can maintain their law practices while they teach. See *id.* at 457.

The school saves additional costs by relying on an electronic law library (i.e., LEXIS and Westlaw) instead of investing in an extensive collection of hardbound legal volumes. See *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 846 F. Supp. 374, 376 (E.D. Pa. 1994).

tain its tuition at approximately \$9000 for the 1993-1994 academic year.⁷ As this figure is only sixty percent of the median tuition at private law schools in New England, MSL thus makes legal education available for people who arguably could not afford to attend a "traditional" law school.⁸

MSL sought accreditation from the American Bar Association (ABA) in 1992.⁹ However, a number of MSL's educational practices conflict with the criteria that the ABA has adopted to guide its accreditation decisions.¹⁰ For example, MSL's heavy use of adjunct faculty leads to a student-faculty ratio of 60:1, well above the 30:1 maximum ratio permitted under the ABA Standards.¹¹ In all, MSL's program was found deficient in eleven respects, encompassing factors related to faculty benefits, student affairs, admissions, academic requirements, and physical plant.¹² Due to MSL's numerous violations of the accreditation standards, the ABA's Section on Legal Education rejected the school's application for accreditation in 1993.¹³

⁷ See *Massachusetts Sch. of Law*, 846 F. Supp. at 376.

⁸ See MSL Complaint, *supra* note 2, ¶ 14; see also *Massachusetts Sch. of Law*, 846 F. Supp. at 376 (noting that MSL "endeavors to provide high-quality, low-cost legal education to people who might otherwise be shut out of more traditional law schools").

⁹ The ABA, a nonprofit corporation, operates as a trade association for attorneys throughout the United States. See MSL Complaint, *supra* note 2, ¶ 5. Because 41 of the 50 states (plus the District of Columbia) require graduation from an ABA-accredited law school before seating an applicant for the state bar examination, ABA accreditation is considered a key component to the success of a law school. See *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 853 F. Supp. 837, 838-39 (E.D. Pa. 1994). While Massachusetts is one of the few jurisdictions that does not require bar applicants to have attended law school, potential MSL students from neighboring states—including New Jersey and New Hampshire—are subject to such a requirement. See MSL Complaint, *supra* note 2, ¶¶ 19-20; *Massachusetts Sch. of Law*, 846 F. Supp. at 376 (noting that ABA denial of accreditation has made it difficult for MSL to compete for students).

¹⁰ The guidelines used by the ABA in making an accreditation decision are set forth in *American Bar Ass'n, Standards for Approval of Law Schools and Interpretations* (Oct. 1993) [hereinafter ABA Standards].

¹¹ See *id.*, Standard 201. Under Standard 402, the ABA counts only full-time faculty in its calculation of the student-faculty ratio. See *id.*, Standard 402.

¹² The reasons cited by the ABA in refusing to accredit MSL include: (1) high student-faculty ratio (Standards 201, 401-405); (2) substantial reliance on part-time faculty (Standard 403(a)); (3) heavy faculty teaching loads (Standard 404(a)); (4) failure to accord faculty members reasonable opportunities for leaves of absence (Standard 405(b)); (5) inclusion of for-credit bar review course in curriculum (Standards 301, 302(b)); (6) inadequate field-placement programs (Standard 306); (7) insufficient number of days in academic year (Standard 305(b)); (8) inadequate safeguards limiting student employment (Standard 305(c)); (9) failure to use LSAT or similar admissions test (Standard 503); (10) failure to adopt a plan to comply with Standard 212; and (11) inadequate physical plant (Standards 701-703). See *Massachusetts Sch. of Law*, 857 F. Supp. at 457. All references above to ABA accreditation requirements are found in ABA Standards, *supra* note 10.

¹³ See *Massachusetts Sch. of Law*, 846 F. Supp. at 376.

MSL's response to the denial of accreditation was to file an anti-trust challenge to the ABA's accreditation power.¹⁴ In the suit, the school asserts that certain accreditation criteria used by the ABA have anticompetitive effects that restrain trade in violation of section 1 of the Sherman Act.¹⁵ Specifically, MSL asserts that the ABA has used its accreditation power to: (1) fix the salaries of law school deans, professors, and librarians; (2) limit the services that can be provided by faculty members; (3) raise tuition levels; and (4) restrict access to law schools for both people from lower socioeconomic classes and people in mid-life.¹⁶ In addition, MSL claims that the ABA has conspired to monopolize the provision of legal education, the accreditation of law schools, and the licensing of lawyers in the United States in violation of section 2 of the Sherman Act.¹⁷

¹⁴ See John H. Kennedy, *Law School Sues ABA Over Denial of Accreditation*, Boston Globe, Nov. 24, 1993, at 65 (reporting MSL suit); Margot Slade, *A Little Law School Does Battle with the ABA*, N.Y. Times, Feb. 4, 1994, at A19 (same).

For a detailed summary of the facts of the case and MSL's allegations, see *Massachusetts Sch. of Law*, 846 F. Supp. at 376.

MSL's original complaint names the ABA, the American Association of Law Schools (AALS), the Law School Admission Council, the Law School Admission Services, and 21 individuals as defendants. See MSL Complaint, *supra* note 2, ¶¶ 5-9. While each of the four organizations remains as a defendant, the district court has dismissed the claims against the individual defendants for lack of personal jurisdiction. *Massachusetts Sch. of Law*, 846 F. Supp. at 377. For the sake of convenience, references to "the ABA accreditation processes" in this Note are intended to encompass the activities of all four organizational defendants.

¹⁵ 15 U.S.C. § 1 (1994).

MSL challenges ABA accreditation requirements relevant to six categories of law school operations: (1) suggested faculty-salary levels (Standard 405); (2) student-faculty ratio, limits on course loads, and the sabbatical requirement (Standards 201, 401-05); (3) use of the Law School Admissions Test (Standard 503); (4) law libraries guidelines (Standards 602-03, 704); (5) prohibition on for-credit bar review courses (Standard 302(b)); and (6) limits on student-employment hours (Standard 305). See *Massachusetts Sch. of Law*, 857 F. Supp. at 456. Note that the Standards challenged by MSL are not necessarily the same as those on which the ABA grounded its rejection of MSL's application for accreditation. See *supra* note 12. All references above to ABA accreditation requirements are taken from ABA Standards, *supra* note 10.

¹⁶ See MSL Complaint, *supra* note 2, ¶¶ 1, 24-26.

MSL's allegations echo arguments presented in an article by Professor First discussing competition in legal education and the law school accreditation process. Harry First, *Competition in the Legal Education Industry (II): An Antitrust Analysis*, 54 N.Y.U. L. Rev. 1049 (1979). Finding that the accreditation process discouraged law school entry and innovation, restricted educational output, and standardized the product offered by law schools, Professor First maintained that the ABA-AALS activity unreasonably restrained competition in the market for legal education. See *id.* at 1050-78. Professor First concluded that this anticompetitive accreditation process was ripe to be challenged and remedied under the Sherman Act. See *id.* at 1089-1101. It is surprising that it took fourteen years for a law school to adopt Professor First's suggestions and challenge the accreditation power of the ABA.

¹⁷ MSL Complaint, *supra* note 2, ¶¶ 1, 19-23, 39-40, 46.

Soon after MSL filed its lawsuit against the ABA, the Antitrust Division of the Justice Department commenced its own investigation of the ABA's accreditation procedures.¹⁸ After a year of investigation, the Justice Department filed a civil antitrust action against the ABA in a federal district court for the District of Columbia, alleging that the ABA had used the accreditation process to fix the salaries of professors and other employees at member law schools in violation of the Sherman Act.¹⁹ Simultaneous to the filing of the suit, the parties settled the case through a consent decree.²⁰ Without admitting any wrongdoing, the ABA has agreed through the settlement to make the following changes in its accreditation process: (1) remove consideration of faculty-salary levels from the accreditation decision; (2) discontinue the practice of gathering salary data from and disseminating salary data to ABA member schools; (3) remove any nonprofit requirements from its accreditation criteria; and (4) change the composition of the accreditation committee so that no more than half of its members are law school deans or faculty members.²¹

In addition, under the consent decree the ABA has agreed to establish a special committee to review the usefulness of a number of the other standards challenged in the MSL lawsuit. The specific requirements under review include those concerning student-faculty ratios, maximum teaching loads for professors, mandatory faculty sabbaticals, for-credit bar review courses, library resources, and other facilities.²² According to Anne Bingaman, Assistant Attorney General in charge of the Antitrust Division, the consent decree is intended

¹⁸ The Justice Department's investigation of the ABA's accreditation practices commenced after MSL brought the matter to the attention of the Antitrust Division in November of 1993. See John H. Kennedy, *ABA Faces Federal Inquiry*, *Boston Globe*, Mar. 25, 1994, at 67.

¹⁹ See *United States v. American Bar Ass'n*, No. 95-1211 (D.D.C. filed June 27, 1995); see also Department of Justice, Notices, 60 Fed. Reg. 63,766 (1995) [hereinafter *Justice Department Notice*] (discussing claims against ABA, setting out details of proposed consent decree between ABA and government and providing summary of public comments regarding settlement).

²⁰ See *Justice Department Notice*, supra note 19, at 63,766; see also Steven A. Holmes, *Justice Dept. Forces Changes in Law School Accreditation*, *N.Y. Times*, June 28, 1995, at A1, A17; Henry J. Reske, *ABA Settles Antitrust Suit on Accreditation*, *A.B.A. J.*, Aug. 1995, at 24. The complaint and the proposed consent decree are published in 60 Fed. Reg. 39,421 (1995).

²¹ See Department of Justice, Antitrust Division, News Release: *Justice Department and American Bar Association Resolve Charges that the ABA's Process for Accrediting Law Schools Was Misused*, DOJ 95-363 (1995) [hereinafter *Justice Department Release*], available in Westlaw, 1995 WL 380923 (D.O.J.) (discussing content of consent decree).

²² See *id.* at 95-363; see also Viveca Novak, *ABA Settles Charges a Panel Fixes Law-School Salaries*, *Wall St. J.*, June 28, 1995, at B6 (discussing ABA requirements regarding student-faculty ratio, teaching hours, student employment, and law libraries).

to eliminate any accreditation requirements that are unrelated to the quality of legal education provided.²³

While the claims in the Justice Department investigation and the MSL case are similar, the Justice Department and the district court hearing the MSL case have taken markedly different approaches in applying the antitrust laws to the ABA. While both the Justice Department and the MSL court noted the ABA's status as a nonprofit organization in discussing the allegations, the Justice Department found that the nonprofit status of the defendant would not alter its analysis of the claims against the ABA in any way.²⁴ Taking the alternative view, however, the court hearing the MSL case noted that the ABA's status as a nonprofit trade association will indeed influence the analysis of MSL's antitrust claims against the ABA.²⁵

The different approaches adopted by the Justice Department and the MSL court raise a significant question for antitrust analysis—whether the ABA's status as a nonprofit professional association should play a role in the outcome of the antitrust challenges to its accreditation process. More generally, should nonprofit organizations receive some degree of special treatment under the antitrust laws, or should these organizations be subject to the same rules as profit-seeking defendants? Using the case of ABA accreditation as an illustration, this Note suggests an analytical framework for the application of the antitrust laws to the activities of nonprofit organizations.

Part I examines the interplay between the objectives of the Sherman Act and the policies pursued by nonprofit organizations. The analysis begins by considering the goals that Congress intended the Sherman Act to serve and recognizing that competitive markets are the means that best serve those goals. This Part then suggests that the

²³ See Justice Department Release, *supra* note 21.

It seems that this flurry of challenges to ABA accreditation procedures has stirred the ABA to commence an independent review of the process. In August 1995, an ABA commission reviewing the accreditation process filed a preliminary report recommending certain changes in the accreditation process. The changes include: counting adjunct professors in the calculation of student-faculty ratios, modifying standards governing physical-plant resources, and removing all references to faculty salaries from the decision process. See Judith W. Wegner, *Two Steps Forward, One Step Back: Reflections on the Accreditation Debate*, 45 *J. Legal Educ.* 441, 444 (1995) (discussing proposed changes).

²⁴ See Justice Department Notice, *supra* note 19, at 63,770.

²⁵ See *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 853 F. Supp. 837, 839-40 (E.D. Pa. 1994) (finding that rules of professional associations are subject to rule of reason analysis rather than *per se* standard). The MSL case, currently in the discovery stages, has not been affected by the Justice Department's suit against the ABA. While most of the ABA's accreditation standards challenged by MSL either have been eliminated or put under review by the consent decree, see *supra* notes 20-23 and accompanying text, MSL can claim an antitrust injury—that allegedly anticompetitive standards were in place at the time the ABA denied MSL's application for accreditation.

activities of nonprofit organizations often correct market failures, thus ensuring the proper functioning of the markets in which they operate. Part I then argues that through these market corrections, nonprofits often play a significant role in achieving the objectives of the Sherman Act—a role that courts should not overlook in the enforcement of the antitrust laws.

Part II then considers whether the courts have properly recognized this market-correcting role in applying the Sherman Act to the activities of nonprofit organizations. Specifically, this Part argues that neither of the approaches developed by the courts sufficiently accounts for the potential market-correcting nature of nonprofit activity. The first approach, which applies the rule of reason to the challenged practices, fails to recognize the procompetitive virtues that arise from the correction of market failure. On the other hand, the second approach, which exempts the “noncommercial” activities of nonprofit organizations from antitrust regulation, fails to provide a sufficient antitrust check to potentially anticompetitive practices. This Part illustrates the under- and overprotective nature of these rules by applying the two modes of analysis to MSL’s case against the ABA.

Recognizing that neither of the approaches developed by the courts provides a sufficient framework for analyzing the practices of nonprofit organizations, Part III suggests the proper framework for applying the antitrust laws to the activities of nonprofit organizations—the “flexible rule of reason.” This Part argues that courts must recognize the procompetitive nature of activities that correct market failures, even if those activities at first glance appear to restrict competition in the affected market. At the same time, courts must be aware of the potential for abuse that exists in nonprofit activity, especially when the activity takes the form of self-regulation by professionals. This Part demonstrates how a flexible rule of reason can be used to determine whether a challenged nonprofit activity should be rejected as overbroad and self-serving or upheld as necessary to achieve the goals of competition through market correction.

I

THE OBJECTIVES OF THE SHERMAN ACT AND A ROLE FOR NONPROFIT ORGANIZATIONS

The sweeping language of the Sherman Act suggests that its prohibitions apply with equal force to both commercial enterprises and nonprofit organizations. Section 1 of the Sherman Act literally prohibits “[e]very contract, combination . . . or conspiracy, in restraint

of trade or commerce,"²⁶ while the prohibition of section 2 reaches to every person who might engage in monopolistic conduct.²⁷ As the Supreme Court has recognized, "[l]anguage more comprehensive is difficult to conceive."²⁸

The statutory language notwithstanding, there is legislative history that arguably limits the Sherman Act's reach with respect to nonprofit organizations. During the debates on the Senate floor, Senator Sherman himself addressed the applicability of the legislation to the activities of professional associations and other nonprofit organizations:

The bill as reported contains three or four simple proscriptions which relate only to contracts, combinations, [and] agreements made with a view and designed to carry out a certain purpose *It does not interfere in the slightest degree with voluntary associations . . . to advance the interests of a particular trade or occupation. . . .* They are not business combinations. They do not deal in contracts, agreements, etc. They have no connection with them.²⁹

Obviously, Senator Sherman's view of the nature of nonprofit organizations is outdated: The modern nonprofit organization does in fact "deal in contracts, agreements," and other businesslike activities.³⁰ Nonetheless, the fact that Senator Sherman singled out nonprofit organizations for special treatment during the legislative debates suggests that it may be proper to differentiate between commercial enterprises and nonprofit organizations in modern antitrust analysis.

This Part explores the question of why it might be desirable to grant nonprofit organizations some measure of special treatment under the antitrust laws. The analysis begins by recognizing that antitrust scholars generally agree that perfect competition and the proper functioning of competitive markets are essential to the realization of the various economic and social-welfare policies implemented by the Sherman Act. This Part then considers how certain activities by non-

²⁶ 15 U.S.C. § 1 (1994) ("Every 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.").

²⁷ 15 U.S.C. § 2 (1994) ("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, or with foreign nations, shall be deemed guilty of a felony").

²⁸ *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, 553 (1944).

²⁹ 21 Cong. Rec. 2562 (1890) [hereinafter Testimony of Senator Sherman] (emphasis added), quoted in *American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 585 (1982) (Powell, J., dissenting).

³⁰ See Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 232.2, at 287 (Supp. 1992) (discussing nature of modern nonprofit institutions).

profits, while anticompetitive on their face, can play a significant role in the proper functioning of competitive markets—a role that must be recognized to ensure the proper application of the Sherman Act to nonprofit organizations.

A. *The Policies Implemented by the Sherman Act*

There is no consensus position regarding what policy, or combination of policies, Congress intended the Sherman Act to implement. The legislative history of the Sherman Act suggests that Congress had a number of goals in mind when adopting the Act; this legislative history, however, fails to provide any guidance regarding which of the policies should prevail when competing goals come into conflict.³¹

The antitrust scholarship is similarly divided. Judge Bork argues that the maximization of consumer welfare should be the sole concern of antitrust³² and that the enforcement of the antitrust laws should place a premium on efficiency in order to maximize consumer welfare.³³ On the other hand, Professors Fox and Elzinga argue that the adoption of the Sherman Act embodies a broader range of goals, including the dispersion of economic power and a desire to promote the liberty of entrepreneurs and small business enterprises—at times even at the expense of efficiency and consumer welfare.³⁴

³¹ In looking to the legislative history, one discerns repeated concern for the welfare of consumers and also for the welfare of small businesses and for various other values—a potpourri of other values. . . . Congress . . . never faced the problem of what to do when values come into conflict in specific cases. Legislators appear to have assumed . . . that all good things are always compatible.

Robert H. Bork, *The Role of the Courts in Applying Economics*, 54 *Antitrust L.J.* 21, 24 (1985); see also Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *Cornell L. Rev.* 1140, 1146 (1981) (noting “multivalued” nature of legislative history of Sherman Act).

³² See Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 51, 81-89 (1978) (concluding that “the case is overwhelming for judicial adherence to the single goal of consumer welfare in the interpretation of the antitrust laws”).

³³ See *id.* at 91-106 (asserting that “[t]he whole task of antitrust can be summed up as the effort to improve [efficiency]” to optimize consumer welfare). A number of prominent scholars also agree with Judge Bork’s conclusion that consumer welfare and efficiency should be the touchstone of antitrust analysis. See 1 Philip Areeda & Donald F. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶¶ 103-12, at 7-31 (1978) (acknowledging that while antitrust laws may embody some “populist” non-efficiency concerns, efficiency should be dominant goal); Richard A. Posner, *Antitrust Law: An Economic Perspective* 23 (1976) (concluding that framers of Sherman Act were concerned mainly with price and output effects of monopolies and cartels).

³⁴ See Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 *U. Pa. L. Rev.* 1191, 1194-1203 (1977); Fox, *supra* note 31, at 1146-55; see also Hans B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* 226 (1955) (stating that Congress believed “occupations were to be kept open to all who wished to try their luck”).

While academics have not been able to agree on a single policy objective that underlies the Sherman Act, there is agreement regarding the means that best achieves each of the competing objectives: the competitive-market process. In Judge Bork's view, competition is desirable when it leads to "such things as low prices, innovation, choice among different products—all things we think of as being good for consumers."³⁵ Likewise, Professor Fox offers a similar view on the utility of using the competitive process to achieve what she sees as the multiple objectives of the antitrust laws: "The competition process is the preferred governor of markets. If the impersonal forces of competition . . . determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair."³⁶

Yet both of these models' reliance on competition to fulfill the Sherman Act's objectives rests on a critical assumption: that markets are functioning properly. Where informational problems or externalities—the classical paradigms of market failure³⁷—are present, such imperfections distort the proper allocation of resources, economic power, and business opportunities, leading in turn to reductions in efficiency and consumer welfare.³⁸

The correction of market failure in order to restore the optimal competitive balance is a standard justification for the regulation of certain industries.³⁹ While the government serves this regulatory role for a number of industries,⁴⁰ the activities of nonprofit organizations can often serve this market-correcting role as well. The following section examines how the activities of nonprofits correct market failures—a role that must be recognized in the application of the antitrust laws.

³⁵ Bork, *supra* note 32, at 61.

³⁶ Fox, *supra* note 31, at 1154.

³⁷ For a general discussion of market failures caused by externalities and informational problems, see Walter Nicholson, *Microeconomic Theory* 537-53, 748-66 (5th ed. 1992).

³⁸ See Fox, *supra* note 31, at 1154 (discussing how process of competition creates "by-products" of efficiency and consumer welfare).

³⁹ See, e.g., Ira Horowitz, *The Economic Foundations of Self-Regulation in the Professions*, in *Regulating the Professions: A Public Policy Symposium* 1, 6-7 (Roger D. Blair & Stephen Rubin eds., 1980) (describing market imperfections as one principal factor in providing impetus for governmental regulation).

⁴⁰ See Louis B. Schwartz et al., *Free Enterprise and Economic Organization: Government Regulation* 26-37 (6th ed. 1985) (surveying various industries subject to government regulation).

B. *A Role for Nonprofit Organizations*

Professor Hansmann argues that nonprofit organizations most often operate in those industries whose markets fail to police producers by ordinary contractual devices.⁴¹ In his view, nonprofit organizations correct the market failures that would otherwise tend to lead to resource misallocations.⁴² This section suggests that through supplying information and correcting externalities, facially anticompetitive practices by nonprofit organizations play a role in the proper functioning of markets that antitrust analysis should not overlook.⁴³

1. *Informational Problems*

Nonprofit organizations are frequently called upon to supply information about product quality.⁴⁴ Simply stated, certain markets operating alone often cannot provide consumers with the information that is required to make an informed purchasing decision. For example, in the markets for legal and medical services, the complexity of the services provided does not allow consumers to adequately assess the value of the services received.⁴⁵ Without the proper amount of information, a suboptimal level of the service may be purchased, and efficiency might be sacrificed.⁴⁶

Nonprofit organizations cure these informational defects through a number of activities. First, nonprofits that supply products or services directly to the marketplace have no motive to "cut corners" in the production process since the organization would not be allowed to retain or distribute the profits that would have been achieved by these savings.⁴⁷ Direct supply by nonprofits thus provides consumers with a

⁴¹ Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 *Yale L.J.* 835, 843-45 (1980).

⁴² See *id.* at 898 (concluding that "we should view the nonprofit organization as a reasonable response to a relatively well-defined set of social needs that can be described in economic terms").

⁴³ Of course, nonprofit organizations are often founded to serve social or political goals that have little to do with the correction of market failures. See *id.* at 892-94 (citing social clubs as example of nonprofit organization founded for noneconomic social goal—desire for exclusivity). While recognizing that nonefficiency goals are important, the question of how these additional objectives might factor into antitrust analysis is beyond the scope of this Note.

⁴⁴ See *id.* at 846-48, 862-63.

⁴⁵ See Horowitz, *supra* note 39, at 7-8 ("Imperfect information is inherent in professional services which, by nature of being highly specialized and requiring considerable training, cannot be appropriately evaluated by most purchasers.").

⁴⁶ Indeed, in the market for professional services, the informational defect is the prevailing justification on which regulation is grounded. See Alan D. Wolfson et al., *Regulating the Professions: A Theoretical Framework*, in *Occupational Licensure and Regulation* 180, 190-93 (Simon Rottenberg ed., 1980).

⁴⁷ See Hansmann, *supra* note 41, at 847, 862-63.

“signal” that quality has not been compromised for a profit-maximization motivation. The provision of health care, charity, and higher education by nonprofit entities may be seen as examples of such quality “signaling” by nonprofit organizations.⁴⁸

Second, self-regulatory activities by nonprofit organizations, most frequently by trade associations, also convey important information about the quality of the service provided.⁴⁹ Entry requirements based on educational standards or other measures of ability clearly restrict entry and competition in the markets in which these requirements operate.⁵⁰ Such standards, however, correct the informational uncertainties consumers face regarding the quality of the service that is being purchased; at the very least, consumers can be assured that their dollar has purchased some minimum level of quality or competence⁵¹—a level that could not be assured in the absence of some form of restriction.⁵²

Law school accreditation by the ABA can be thought of as curing this sort of informational defect in the markets for legal services and education. Graduation from an accredited institution assures potential consumers that at least a certain minimum level of competence can be expected from the lawyer. States, in addition, can use the curricular mix signaled by accreditation as an initial screen to determine which candidates are eligible to sit for state bar examinations.⁵³ Moreover, potential law school applicants might see ABA accreditation as a signal that at least a certain minimum quality of education will be offered by a school, thereby sparing each applicant the cost of searching for this information on a school-by-school basis.

In addition, due to the market failures that can plague the professions, professional organizations arguably deserve special consideration in antitrust analysis. As one commentator has noted, “[t]he economic analysis of the professions is the study of market failure.”⁵⁴ While the markets for professional services suffer from the aforemen-

⁴⁸ See *id.*

⁴⁹ See Wolfson, *supra* note 46, at 211-12 (noting that high cost of information argues for self-regulation since professionals may most competently assure quality).

⁵⁰ See Horowitz, *supra* note 39, at 14-15 (describing how professional standards act as barrier to entry to low-priced sellers).

⁵¹ *Id.* at 15-16 (“Society permits these self-serving practices to persist, in exchange for a guarantee of a certain minimum level of competence on the part of the professionals that serve it.”).

⁵² See *id.* at 7-8 (arguing that, absent entry restrictions, some professional-service markets would generally attract least qualified entrants).

⁵³ See *id.* at 15-16 (discussing minimum quality assurances provided by self-regulation).

⁵⁴ Robert G. Evans, *Professionals and the Production Function: Can Competition Policy Improve Efficiency in the Licensed Professions?*, in *Occupational Licensure and Regulation*, *supra* note 46, at 225, 225.

tioned informational problems concerning the *quality* of service provided, these markets also suffer from a second level of informational defects: consumers generally are unable to assess the optimal *quantity* of the services they require in a given instance. To resolve this problem, the client relies on a professional to act as the client's agent in making decisions regarding the purchase of services.⁵⁵

A potential conflict of interest clouds this professional agency relationship, however, because the consumer's agent is generally the supplier of the service as well.⁵⁶ The opportunity for abuse is obvious, as the agent may "overservice" the client to achieve personal benefit. Due to this potential conflict of interest, the professional-client relationship, and thereby the markets for professional services themselves, cannot function unless there is trust between the consumer and the agent.⁵⁷

Professional organizations can instill this trust in consumers through a number of activities. First, the adoption and enforcement of ethical codes can play a role in assuring consumers that they will not be exploited by their agents.⁵⁸ Moreover, by prohibiting conduct thought to be "unprofessional," ethical codes can maintain the integrity and character of the profession on which consumers can base their trust of the agent. For example, concerns for integrity are commonly cited to justify prohibitions on advertising with respect to price.⁵⁹ Finally, the fact that the professions regulate themselves can signal the government's trust of the profession as a whole, "and thereby reinforce [] individual trust relationships."⁶⁰

ABA accreditation likely serves the role of furthering the trust and integrity needed within the attorney-client relationship. If nothing else, the "stamp" of accreditation itself can foster a certain level of trust between the client and the lawyer. Moreover, the integrity of the profession is further protected by requiring the curriculum to include courses in legal ethics or professional responsibility.⁶¹

⁵⁵ See Wolfson, *supra* note 46, at 190 (discussing informational problems faced by consumers and role of professionals in alleviating these concerns).

⁵⁶ *Id.* at 190-91 (noting dual roles of agent and supplier played by professionals).

⁵⁷ See *id.* at 191 (citing trust as necessary element in professional-client relationship).

⁵⁸ See *id.* at 192 (noting that ethical codes and disciplinary systems can influence how consumer views principal-agent relationship).

⁵⁹ See Horowitz, *supra* note 39, at 8-9 (examining integrity justifications for bans on price-specific advertising).

⁶⁰ Wolfson, *supra* note 46, at 212.

⁶¹ See ABA Standards, *supra* note 10, Standard 302 (requiring all institutions to include course in professional ethics among their graduation requirements).

2. Externalities

The problem of externalities is a second market failure that non-profit organizations typically correct. To simplify the issue somewhat, externalities arise when the costs of providing a product are not fully realized by the producer or when the benefits inherent to the product do not fully accrue to the purchaser.⁶² Since a portion of the cost or benefit is realized by actors other than the parties to the transaction, the unrestrained market will over- or undersupply the optimal output level.⁶³

Examples of externalities abound in markets where nonprofit organizations operate. Consider the engineering profession: a proper accounting of the safety of a proposed design should consider not only the benefits that accrue to the engineer's client, but also those that accrue to the general public from the safety of the design.⁶⁴ In an unregulated market, however, the parties to the transaction (the engineer and the client) would not account for the added benefits that would accrue to the public; thus, safety would be undervalued and provided at suboptimal levels.⁶⁵ A similar process is at work in the market for higher education: the welfare of society itself increases when the populace is educated; yet this benefit is not directly accounted for in the transaction between the school and the student.⁶⁶

Professions often use self-regulation to correct market imperfections caused by externalities. An engineering association, for example, can prescribe standards for design safety in order to achieve levels of safety that competitive markets would be unable to produce.⁶⁷ Likewise, a professional code of ethics can ensure that practitioners do not engage in certain activities whose effect would be detrimental to society (or the profession) as a whole even though the activity would benefit the immediate client.⁶⁸

The ABA accreditation standards may similarly correct externalities. Consider as an example the ABA rule governing student-faculty

⁶² See Wolfson, *supra* note 46, at 193 (discussing problems of externalities).

⁶³ The classic example of an externality is pollution. If the producer is forced to "internalize" into the production function the societal costs of cleaning up pollution, a lower level of output, and thus decreased pollution, would result. However, as long as the producer does not have to pay for the cleanup, industrial output will remain above the optimal level. See Nicholson, *supra* note 37, at 745-53.

⁶⁴ See Wolfson, *supra* note 46, at 193 (providing examples of externalities in engineering industry).

⁶⁵ *Id.*

⁶⁶ See Hansmann, *supra* note 41, at 848-54 (examining failed contractual relationships in provision of public goods).

⁶⁷ See Wolfson, *supra* note 46, at 193-94 (arguing that externalities provide justification for self-regulation).

⁶⁸ See *id.*

ratios.⁶⁹ A low student-faculty ratio produces a better-trained lawyer, and the benefits accrue to both the student personally and to society in general. The individual transaction between student and school only takes into account the benefits to the student, and thus this bargain would generate a suboptimal student-faculty ratio as far as society is concerned. The ABA's required ratio thus can ensure that the societal benefits are internalized in each individual transaction. The societal benefits accruing from a better-trained lawyer might also justify the ABA's requirements concerning both limits on student-employment hours⁷⁰ and the law-library resource guidelines.⁷¹

In the self-regulatory context, however, any special treatment accorded to nonprofits must be tempered with a degree of caution. A degree of self-interest is inherent in self-regulatory bodies, and this might lead an organization to "overcorrect" for market failures to the benefit of the organization's members.⁷² The potential for abuse is obvious: While entry restrictions might correct externalities, they just as easily can insulate the current members from socially beneficial competition. Therefore, when inquiring whether a challenged practice corrects a market failure, courts also must ask whether the correction goes further than necessary to restore competitive conditions.

In light of the preceding discussion, the lessons for antitrust analysis are evident. When faced with an antitrust challenge to the activities of a nonprofit organization, courts must be ready to question whether the challenged practices correct some element of market failure. At the same time, courts must recognize the potential for "overcorrection" to the advantage of the self-regulatory organization's membership. Part II of this Note asks whether the current antitrust jurisprudence provides the flexibility required to undertake such an analysis.

⁶⁹ A student-faculty ratio of 20:1 or below will satisfy the ABA's accreditation requirements, while any ratio above 30:1 is presumptively impermissible. A ratio between these two figures requires a case-by-case evaluation. See ABA Standards, *supra* note 10, Standards 201, 402.

⁷⁰ See *id.*, Standard 305 (precluding students from employment of more than 20 hours per week).

⁷¹ See *id.*, Standards 603-04, 704 (requiring certain hard-copy volumes in law library's collection).

⁷² See Horowitz, *supra* note 39, at 8-9 (discussing potential for abuse inherent in self-regulation); Wolfson, *supra* note 46, at 210-12 (same).

II

JUDICIAL APPLICATION OF THE SHERMAN ACT TO THE ACTIVITIES OF NONPROFIT ORGANIZATIONS

As Part I illustrated, the role nonprofit organizations can play in the correction of market failures is a factor that should be recognized in the application of the antitrust laws. Examination of the relevant case law, however, suggests that the courts have failed to take the market-correcting potential of nonprofit actors into account when applying the Sherman Act to these organizations. Courts have used two modes of antitrust analysis in the nonprofit context: one subjecting the challenged practices of nonprofits to rule of reason scrutiny and the other crafting a judicial exemption from the antitrust laws for the "noncommercial" activities of nonprofits. As this Part will demonstrate, neither approach is satisfactory. The rule of reason, in its current state, fails to offer nonprofits adequate protection from antitrust scrutiny and thus only reinforces market imperfections. On the other hand, the noncommercial exemption overprotects nonprofit organizations by failing to bring potentially anticompetitive conduct by nonprofits within the scope of the antitrust laws.

A. The Rule of Reason and Nonprofit Organizations

The rule of reason is the mode of antitrust analysis most preferable to the examination of "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed."⁷³ From this characterization, it appears that the rule of reason would allow courts to recognize the special nature of nonprofit activities. Since the rule would allow courts to take into account the history and justifications of nonprofit action—the correction of market failures—it would appear that the rule of reason offers an adequate methodology for examining how challenged activities affect competitive conditions.

The goal of the rule of reason analysis is to determine whether the total effect of a challenged practice on competition is positive or negative.⁷⁴ The analysis usually proceeds in three steps: first, the plaintiff shows the anticompetitive effects of the challenged practice; second, the defendant offers procompetitive aspects of the practice that justify these negative effects; and third, the plaintiff attempts to rebut these procompetitive justifications by showing that the practice

⁷³ National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

⁷⁴ See *id.* at 691-92 (discussing objectives and framework of rule of reason analysis).

is unnecessary to achieve the stated objective.⁷⁵ Under such a framework, it would appear that procompetitive market-correcting activities by nonprofits would enter into the second stage of the analysis while any "overreaching" could be corrected by the third step of the process.

The promise of the rule of reason, however, has not been realized. As the cases discussed in this Part illustrate, the Supreme Court has failed to recognize the market-correcting virtues of nonprofit activities. The application of the rule of reason thus has created a system of antitrust overenforcement with respect to nonprofit organizations, which serves only to preserve the market failures that nonprofit activity might cure.

1. *Early Flexibility Under the Rule of Reason*

*Goldfarb v. Virginia State Bar*⁷⁶ marked one of the Court's first opportunities to apply the antitrust laws to the actions of a nonprofit professional organization. In *Goldfarb*, a county bar association had published a minimum-fee schedule to be followed by the members of that association.⁷⁷ A client who was unable to find an attorney willing to charge a below-schedule fee for a land-title examination challenged this practice as price-fixing.⁷⁸ Among other defenses,⁷⁹ the bar association sought immunity from the Sherman Act, arguing that the activities of professions should not be considered "trade or commerce" within the scope of the statute.⁸⁰

Chief Justice Burger was unwilling to grant such a broad notion of antitrust immunity for the professions, as "[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of a professional practice controlling in determining whether [the Sherman Act] includes professions."⁸¹ To bring the association within the scope of the Sherman Act, it was enough for the Court to find that "the activities of lawyers

⁷⁵ See, e.g., *United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993) (applying three-part rule of reason analysis).

⁷⁶ 421 U.S. 773 (1975).

⁷⁷ *Id.* at 776.

⁷⁸ *Id.* at 778.

⁷⁹ The bar association argued that its activities were local in nature and thus only had a remote and incidental effect on interstate commerce, a contention that was rejected by the Court. *Id.* at 783-86. The Court also rejected the claim that the "state-action" doctrine, which exempts from the Sherman Act activities required by states, shielded the association's activities. *Id.* at 788-92.

⁸⁰ *Id.* at 786-87.

⁸¹ *Id.* at 787 (citation omitted).

play an important part in commercial intercourse, and that anticompetitive activities by lawyers may exert a restraint on commerce.”⁸²

The reasoning of *Goldfarb*, however, did leave open the possibility that the professions might deserve special treatment under the antitrust laws. Note that the nature of the occupation, “standing alone,” was not enough to justify Sherman Act immunity. This phrase could be read to imply that some other factor, coupled with the nature of the occupation, could earn a nonprofit organization a relaxed degree of antitrust scrutiny. One of the Court’s footnotes explicitly recognized that the “public service aspect” of a defendant should be taken into account in the antitrust analysis:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether a 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.*⁸³

In the years after *Goldfarb*, lower courts attempted to read some flexibility into the rule of reason for the professions. In *Boddicker v. Arizona State Dental Association*,⁸⁴ for example, the United States Court of Appeals for the Ninth Circuit interpreted *Goldfarb* to allow a self-regulatory rule to survive antitrust challenge as long as the regulation contributed to increasing the quality of the service to the public; regulations “which only suppress competition between practitioners will fail to survive the challenge.”⁸⁵ Under that reading of *Goldfarb*, as long as a regulation is related in some way to increased quality and public service, the antitrust challenge would fail.

Goldfarb thus held out the promise that the rule of reason would be flexibly applied to the activities of nonprofits. The flexible rule of reason envisioned by *Goldfarb* would allow courts to take the special nature of nonprofits into account when evaluating the propriety of a particular restraint of trade, thereby allowing courts to shelter these

⁸² Id. at 788.

⁸³ Id. at 788 n.17 (emphasis added).

⁸⁴ 549 F.2d 626 (9th Cir.), cert. denied, 434 U.S. 825 (1977).

⁸⁵ Id. at 632. For additional cases recognizing the flexibility promised by *Goldfarb*, see *Hennessey v. National Collegiate Athletic Ass’n*, 564 F.2d 1136, 1148-54 (5th Cir. 1977) (denying antitrust challenge to Association’s limits on number of coaches employable by university in light of NCAA’s history and motives); *Paralegal Inst. v. American Bar Ass’n*, 475 F. Supp. 1123, 1129-31 (E.D.N.Y. 1979), aff’d, 622 F.2d 575 (2d Cir. 1980) (recognizing special treatment of professions afforded by *Goldfarb*).

actors from the antitrust laws when the actors behaved in a manner that was beneficial to the markets in which they operated.

2. *Judicial Tightening of the Rule of Reason*

While *Goldfarb* promised a flexible application of the rule of reason for nonprofit organizations, Supreme Court decisions since *Goldfarb* have steadily removed any flexibility from the analysis, ultimately subjecting nonprofit actors to the same rule of reason test that is applicable to profit-seeking defendants. This subsection suggests that the legacy of the Court's post-*Goldfarb* cases is a rule of reason that denies nonprofits the ability to correct market failures through their actions. In so doing, the Court has effectively protected the market imperfections that the challenged nonprofit activity has the potential to correct.

The steady march away from flexibility began with *National Society of Professional Engineers v. United States*.⁸⁶ The case presented a challenge to an engineering association's canon of ethics that prohibited a member from negotiating or discussing fees with a particular client until after the client had selected an engineer.⁸⁷ The association attempted to justify its restraint on two grounds. First, the ban on competitive bidding preserved the profession's "traditional" method of assigning projects, wherein the customer would choose an engineer "on the basis of background and reputation, not price."⁸⁸ Second, the engineers maintained that bidding would inevitably lead to underbidding since the costs of providing engineering services were inherently difficult to predict. If these mistakenly low bids were allowed, the association argued, engineers would be tempted to cut corners and perform inferior work to make up their costs, and in so doing would endanger the public safety and health.⁸⁹

After recognizing that *Goldfarb* called for a flexible rule of reason when the activities of the professions were at issue, Justice Stevens traced the historical development of the rule of reason to determine whether the association's defenses should be recognized. Drawing from some of the earliest cases brought under the Sherman Act,⁹⁰ the

⁸⁶ 435 U.S. 679 (1978).

⁸⁷ *Id.* at 682-83.

⁸⁸ *Id.* at 684. The association's ethical rules did not foreclose price negotiations after a client initially selected an engineer. If at that time the engineer was unable to negotiate a satisfactory fee arrangement with the client, the client could withdraw her selection and approach a new engineer. See *id.* at 684 n.6, 693 n.19.

⁸⁹ *Id.* at 684-85, 685 n.7.

⁹⁰ See *id.* at 689-92. The Court relied upon *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) (applying common law rule of reason to interpretation of Sherman Act), *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897) (rejecting argument that

Court concluded that “the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.”⁹¹

Finding that the association’s ban on competitive bidding suppressed competition on its face,⁹² the Court, relying on this statement of the law, refused to entertain any justifications because of “the potential threat that competition poses to the public safety and the ethics of its profession.”⁹³ The engineers had maintained that in a free market, the lack of precise information would lead consumers to make the wrong choices.⁹⁴ Such an argument, according to the Court, launched “a frontal assault on the basic policy of the Sherman Act,” a legislative belief that “all elements of a bargain—quality, service, safety, and durability . . . are favorably affected by the free opportunity to select among alternative offers.”⁹⁵

Having reached this conclusion, the Court once again returned to the professional nature of the defendants, effectively gutting the promise of a flexible rule of reason by stating that the only professional norms that may survive an antitrust challenge under the rule of reason are those that regulate and promote competition.⁹⁶ With one swift motion, Justice Stevens eliminated the flexibility promised by *Goldfarb*. While in *Goldfarb* Chief Justice Burger advised that both the public-service aspect and special features of a profession could be factored into the rule of reason analysis, *Professional Engineers* refused to consider the two justifications that addressed those issues specifically: a concern for the public welfare and a desire to maintain the integrity of one of the professions.⁹⁷

railroads, because of their public-service nature, should be exempt from antitrust enforcement), and *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898) (rejecting argument that reasonableness of price excuses agreement among competitors), *aff’d*, 175 U.S. 211 (1899).

⁹¹ *Professional Eng’rs*, 435 U.S. at 691.

⁹² *Id.* at 692-93.

⁹³ *Id.* at 695.

⁹⁴ See *id.* at 694-95 (explaining argument that competitive bidding may lead to inferior products).

⁹⁵ *Id.*

⁹⁶ See *id.* at 696.

⁹⁷ Justice Blackmun’s concurrence in *Professional Engineers* recognized that the majority’s approach defeated the spirit of *Goldfarb*. See *id.* at 699-701 (Blackmun, J., concurring). Justice Blackmun cautioned that by “holding that ethical norms can pass muster under the Rule of Reason only if they promote competition, I am not at all certain that the Court leaves enough elbowroom for realistic application of the Sherman Act to professional services.” See *id.* at 701.

However, Justice Blackmun agreed with the outcome of the case, concluding that the engineering association’s rule was overbroad even under a flexible rule of reason. See *id.* at 700.

Cases following *Professional Engineers* have shown that courts have lost the flexibility needed to apply the Sherman Act to the professions. In *Arizona v. Maricopa County Medical Society*,⁹⁸ the Court further unravelled the protections promised by *Goldfarb*. *Maricopa County* presented a challenge to the setting of maximum fees for services performed under certain health-insurance plans.⁹⁹ Like the agreement in *Professional Engineers*, the agreement among the doctors in *Maricopa County* clearly restrained competition on its face; in this case, however, it placed a ceiling on the prices that a doctor could charge.

Although the rule of reason analysis of *Goldfarb* and *Professional Engineers* would have provided some limited protection for the respondents, the Court in *Maricopa County* chose not to apply it. It instead chose to invalidate the agreement under a per se rule. The Court justified its break with the prior mode of analysis by arguing that “[t]he price-fixing agreements in this case . . . are not premised on public service or ethical norms.”¹⁰⁰ Thus, while *Professional Engineers* at least afforded the minimal protection of the rule of reason, this final safeguard was swept away by the *Maricopa County* Court’s adoption of the per se standard.

While the Court has apparently stepped away from the per se rule of *Maricopa County*,¹⁰¹ it may have gone even further in *Federal Trade Commission v. Superior Court Trial Lawyers Association*.¹⁰² In that case, the lawyers had agreed not to represent indigent criminal defendants until the District of Columbia government increased their compensation. The Court deemed this agreement a “constriction of supply” that was essentially price-fixing and “unquestionably a ‘naked restraint’ on price and output.”¹⁰³ The Court found this “naked restraint” per se illegal, even though the lawyers attempted to justify the restraint as necessary to increase the quality of legal representation of

⁹⁸ 457 U.S. 332 (1982).

⁹⁹ *Id.* at 339.

¹⁰⁰ *Id.* at 349 (The respondents did “not argue, as did the defendants in *Goldfarb* and *Professional Engineers*, that the quality of the professional service that their members provide is enhanced by the price restraint.”).

¹⁰¹ See *Federal Trade Comm’n v. Indiana Fed’n of Dentists*, 476 U.S. 447, 458-59 (1986) (noting Court’s reluctance to apply per se standard to rules adopted by professions); *National Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85, 100-02 (1984) (invalidating price and output limitations on college football television broadcasts under rule of reason rather than per se rule).

¹⁰² 493 U.S. 411 (1990).

¹⁰³ *Id.* at 423 (citing *National Collegiate Athletic Ass’n*, 468 U.S. at 110).

indigent defendants.¹⁰⁴ Thus, while *Maricopa County* can be read to imply that a quality or other social-welfare justification is enough to guarantee a rule of reason analysis for professional defendants,¹⁰⁵ *Superior Court Trial Lawyers* sheds some doubt on the continued validity of this distinction.

Even if professional associations are given the opportunity to have their standards judged under the rule of reason,¹⁰⁶ the cases since *Professional Engineers* have made it increasingly clear that the justifications available to them will be of a very narrow scope. The Court recently stated, for example, that under the rule of reason "the essential inquiry remains the same—whether or not the challenged restraint enhances competition."¹⁰⁷ Such a rule, the Court reasoned, affirmed the Sherman Act's premise that quality is best achieved by the free operation of the market, not self-regulation.¹⁰⁸ Additionally, the Court has rejected further appeals to "quality of care" justifications in the rule of reason analysis, relying on *Professional Engineers* to hold that social-welfare arguments could not justify anticompetitive conduct.¹⁰⁹

3. Underprotection of the ABA Under the Current Rule of Reason

The district court hearing the MSL case has already determined that it will apply a rule of reason analysis to the claims against the ABA.¹¹⁰ In so doing, the court explicitly rejected the per se stance of *Maricopa County* in favor of the more lenient approach advanced in *Professional Engineers*.¹¹¹ As this subsection will show, however, proper application of the inflexible rule of reason as developed by

¹⁰⁴ Id. at 423-24 ("It is . . . true that the quality of representation may improve when rates are increased. Yet [this potential improvement] is [not] an acceptable justification for an otherwise unlawful restraint of trade.")

¹⁰⁵ See supra text accompanying note 100.

¹⁰⁶ See supra note 101 and accompanying text.

¹⁰⁷ *National Collegiate Athletic Ass'n*, 468 U.S. at 104 (citation omitted).

¹⁰⁸ See id. at 104 n.27 ("The Sherman Act . . . rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress." (quoting *Northern Pac. R.R. Co. v. United States*, 356 U.S. 1, 4-5 (1958))).

¹⁰⁹ See *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447, 462-63 (1986) (noting that *Professional Engineers* rejected argument that "an unrestrained market in which consumers are given access to the information they believe to be relevant to their choices will lead them to make unwise and even dangerous choices" as illegitimate).

¹¹⁰ See *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 853 F. Supp. 837, 839-40 (E.D. Pa. 1994) ("The accreditation criteria in question are simply not . . . unlawful. . . . I find that the rule of reason applies to the alleged restraints in this case.")

¹¹¹ See id. at 840 (finding that challenged accreditation standards "are educational standards adopted by the ABA, a professional association" and "[t]herefore . . . [they] should not be condemned out of hand").

Professional Engineers and subsequent cases will almost certainly lead the court to conclude that the accreditation activities of the ABA violate the Sherman Act.¹¹²

The accreditation requirements used by the ABA undoubtedly reduce competition in the legal education market to some degree, as the standards create artificial barriers to entry that certain schools (like MSL) are unable to overcome. Therefore, MSL's burden in the first phase of the rule of reason analysis—to show that the challenged conduct produces anticompetitive effects—will be satisfied.

In the second step of the analysis, the burden shifts to the ABA to offer justifications for its conduct. It is here that the *Professional Engineers* rule comes into play. The strongest justifications for the challenged activity are the educational and professional ones: due to the standards, the quality of education is better, and attorneys are able to serve the public more effectively. These are the types of justifications, however, that *Professional Engineers* has exorcised from the analysis—as only procompetitive objectives can justify the challenged conduct.¹¹³

If we accept the premise that activities by nonprofit actors correct market failures,¹¹⁴ it is evident that the all-or-nothing, inflexible rule of reason hurts the operation of the Sherman Act. By providing information to consumers and adjusting for externalities, the ABA can play a useful role in maintaining the quality of legal education.¹¹⁵ The *Professional Engineers* approach, however, takes this self-regulatory authority away from the ABA—unless the accreditation process somehow promotes or increases competition in the legal education industry. We are therefore faced with a paradox: While we want the ABA to play an active role in enhancing the quality of the legal profession, the application of the antitrust laws takes away the power to achieve these public-service objectives.

¹¹² The rule of reason analysis generally proceeds in three steps: (1) the plaintiff shows the anticompetitive aspects of the challenged practice; (2) the defendant offers procompetitive justifications for the practice; (3) the plaintiff rebuts by showing that the practice is unnecessary to achieve the stated justification. See *United States v. Brown Univ.*, 5 F.3d 658, 668-69 (3d Cir. 1993) (summarizing steps used in rule of reason analysis). The district court hearing the MSL case has also adopted this three-step approach to frame issues for discovery in the case. See *Massachusetts Sch. of Law*, 853 F. Supp. at 840-43.

¹¹³ See *Brown Univ.*, 5 F.3d at 669 (“A restraint on competition cannot be justified solely on the basis of social welfare concerns.”).

¹¹⁴ See *supra* text accompanying notes 44-71 (noting “trade or commerce” issue as first step of antitrust analysis).

¹¹⁵ For instance, recall that schools produce better-trained lawyers where externalities are corrected to properly value all potential benefits of the education. See *supra* text accompanying notes 62-71.

Fundamentally, the weakness of the *Professional Engineers* analysis is that the Court failed to recognize a competitive virtue when it saw one. Blinded by the facially anticompetitive nature of the restraints at issue, the Court did not understand that these restraints can help to perfect the competitive process in the markets in which they operate by correcting market failures. The Court placed an unwavering reliance on the proposition that the free market would provide quality, safety, and service in the optimal quantities¹¹⁶ but failed to recognize that market failures could distort this process. Had the Court understood the potential of nonprofits to correct market failures, the outcomes of these cases might have been different.

Due to the inflexible nature of the Supreme Court's antitrust analysis under the rule of reason, it is not surprising to find that lower courts have attempted to craft a competing paradigm in order to better accommodate nonprofit organizations under the Sherman Act. As the next section demonstrates, however, this alternative paradigm is not without fault itself, as it has proven to be unduly deferential to nonprofit actors.

B. *The Noncommercial-Conduct Exemption*

A threshold question in any antitrust case is whether the challenged activity amounts to "trade or commerce" and thus falls within the jurisdictional reach of the Sherman Act.¹¹⁷ After *Goldfarb v. Virginia State Bar*,¹¹⁸ it is clear that there is no "class exemption" to the antitrust laws based on an organization's nonprofit status.¹¹⁹ As this section demonstrates, however, courts have determined that in some circumstances the nonprofit status of a defendant will factor into the determination of whether a challenged activity is a proper subject for antitrust regulation.

I. *The Marjorie Webster Rule*

*Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*¹²⁰ is the case most closely analogous to the MSL lawsuit against the ABA. The Middle States Association (Middle States), a nonprofit educational corporation,

¹¹⁶ See supra text accompanying notes 90-97.

¹¹⁷ See, e.g., *Brown Univ.*, 5 F.3d at 665.

¹¹⁸ 421 U.S. 773 (1975).

¹¹⁹ See *id.* at 787 (rejecting argument that learned professions are exempt from Sherman Act); see also *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85, 100 n.22 (1984) ("There is no doubt that the sweeping language of [the Sherman Act] applies to non-profit entities . . .").

¹²⁰ 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970).

functioned as an accrediting agency for secondary schools and institutions of higher education within a certain geographical region.¹²¹ As a prerequisite to such accreditation, Middle States required its members to be nonprofit institutions.¹²² Middle States denied Marjorie Webster Junior College's application for accreditation due to the school's for-profit status.¹²³ Alleging that the nonprofit accreditation criterion had anticompetitive effects, the school brought an antitrust claim against Middle States under section 1 of the Sherman Act.¹²⁴

Drawing on early Supreme Court pronouncements regarding the intended scope of the Sherman Act,¹²⁵ Chief Judge Bazelon of the D.C. Circuit established a two-part test to determine when the provisions of the Sherman Act could be applied to the activities of nonprofit institutions.¹²⁶ First, the court must determine whether the challenged activity is best characterized as commercial or noncommercial in nature. If the court finds that the conduct is commercial, the Sherman Act can be applied to the activity. Alternatively, if the court deems the conduct noncommercial, the analysis moves to the second stage, where the court must focus on the nonprofit's intent in undertaking the challenged conduct. If the court finds a commercial intent, the conduct is within the reach of the Sherman Act. Otherwise, the noncommercial conduct is immune from antitrust regulation.¹²⁷

Applying this test to the facts of the case, Judge Bazelon held that the conduct was immune from antitrust regulation. The court found

¹²¹ Middle States's coverage included schools in New York, New Jersey, Pennsylvania, Delaware, Maryland, the District of Columbia, and schools outside the continental United States. See *id.* at 652.

¹²² See *id.* at 652-53, 653 n.3 ("Middle States has never accredited or evaluated a proprietary institution of higher education.").

¹²³ See *id.* at 652-53 ("Middle States refused to consider Marjorie Webster for accreditation because the latter was not 'a nonprofit organization with a governing board representing the public interest.'").

¹²⁴ See *id.* at 653.

¹²⁵ See *id.* at 653-54. Judge Bazelon relied most heavily on *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-93 (1940), and *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 (1959), for the broad proposition that the Sherman Act was aimed primarily at those organizations that were commercially motivated. See *Marjorie Webster*, 432 F.2d at 654.

¹²⁶ Judge Bazelon addressed the issue of the Sherman Act's jurisdictional reach as follows:

[T]he proscriptions of the Sherman Act were "tailored . . . for the business world," not for the noncommercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.

Marjorie Webster, 432 F.2d at 654 (quoting *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 141 (1961) (footnotes omitted)).

¹²⁷ See *id.* at 654-55.

that "the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself."¹²⁸ Acknowledging Middle States's noncommercial intent in adopting the nonprofit requirement,¹²⁹ the court found the second prong of the test satisfied as well. The court therefore held that the accreditation activity was outside the reach of the Sherman Act.

It is important to recognize that *Marjorie Webster* did not attempt to create a class exemption from the antitrust laws for nonprofit organizations.¹³⁰ In fact, Judge Bazelon cautioned that his reasoning was not intended to "immunize any conceivable activity of [nonprofit actors] from regulation under the antitrust laws."¹³¹ The correct reading of the case reveals that the immunity provided to nonprofit organizations is of very limited application, exempting only those noncommercial activities that are motivated by something other than commercial objectives.¹³²

2. Criticisms of the Noncommercial-Conduct Exemption

The exemption for noncommercial conduct granted by the D.C. Circuit in *Marjorie Webster* has been and continues to be a target for criticism in academic circles.¹³³ The criticisms of the decision can be

¹²⁸ *Id.* at 655.

¹²⁹ *Id.* at 654. It was not disputed that Middle States's adoption and implementation of the nonprofit accreditation requirement was not commercially motivated. *Id.*

¹³⁰ Indeed, such a misreading of the holding of *Marjorie Webster* is the foundation for much of the criticism of the D.C. Circuit's opinion. See, e.g., Donald R. Carlson & George B. Shepherd, *Cartel on Campus: The Economics and Law of Academic Institutions' Financial Aid Price-Fixing*, 71 *Or. L. Rev.* 563, 609 (1992) (asserting that *Marjorie Webster* "is not good law").

The Supreme Court's decision in *Goldfarb* did not implicitly overrule *Marjorie Webster*, as the outcomes in the cases are consistent. First, the Court found that the fee-control activities at issue in *Goldfarb* implicated commerce: "[T]he exchange of [legal services] for money is 'commerce' in the most common usage of that word." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975). The Court apparently had reservations about the bar association's motives as well, finding that "[t]he reason for adopting the fee schedule does not appear to have been wholly altruistic." *Id.* at 786 n.16. Thus, either prong of Judge Bazelon's test would have recommended that the Sherman Act could reach the challenged activities.

¹³¹ *Marjorie Webster*, 432 F.2d at 654. Note that Judge Bazelon was careful to ground the immunity not on the nonprofit status of the defendant organization but on the nature of the challenged activity itself. See *id.* (noting that prohibitions of Sherman Act were not meant to apply to noncommercial aspects of liberal arts and learned professions but rather to business world).

¹³² The difficulty of assessing when an activity is "commercial" or "noncommercial" in nature or when a nonprofit's objectives cross into the "commercial" domain is addressed *infra* text accompanying notes 144-51.

¹³³ See, e.g., Carlson & Shepherd, *supra* note 130, at 609 (stating that *Marjorie Webster* is not good law); First, *supra* note 16, at 1091-98 (arguing that *Marjorie Webster* was

grouped into two categories: (1) that the exemption for noncommercial activities defeats the legislative intent and the policies underlying the Sherman Act, and (2) that the test established by *Marjorie Webster* presents a judicially unmanageable standard.

Policy-oriented criticisms of *Marjorie Webster* focus on the apparent frustration of Congress's intent to sweep as broad a spectrum of conduct as possible within the reach of the Sherman Act. In this vein, Professor First has argued:

The proper approach is to directly address the question whether the defendant's acts have an adverse impact on competition. There is no reason to avoid this inquiry and grant a flat exemption for accreditation activity. . . .

. . . .

[*Goldfarb*] demonstrates that the Court will apply the Sherman Act whenever concerted conduct restrains trade, regardless of the identity of the defendant or the benevolent purposes asserted.¹³⁴

These critics conclude that "Congress intended the Act to reach anticompetitive behavior no matter where it arises"¹³⁵ with no attention given to the nature of the challenged conduct or the motivations for undertaking the conduct.

Recall, however, Senator Sherman's statement that the Sherman Act would not "interfere in the slightest degree with voluntary associations . . . to advance the interests of a particular trade or occupation."¹³⁶ This statement, and the Senator's reasons for exempting these organizations,¹³⁷ offer some support for Judge Bazelon's decision. Where nonprofit organizations act in a noncommercial manner—the role that Sherman envisioned for these associations—they should be exempt from the antitrust laws. On the other hand, where nonprofits deal in contracts—and Senator Sherman's view of nonprof-

wrongly decided and that Sherman Act should have been given broader coverage by D.C. Circuit); Mark D. Selwyn, *Higher Education Under Fire: The New Target of Antitrust*, 26 Colum. J.L. & Soc. Probs. 117, 139-40 (1992) (noting that *Marjorie Webster* may have fallen into disfavor over time); Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities*, 82 Yale L.J. 313, 325-30 (1972) (criticizing *Marjorie Webster* decision).

¹³⁴ First, *supra* note 16, at 1094-95.

¹³⁵ See Note, *supra* note 133, at 327.

¹³⁶ Testimony of Senator Sherman, *supra* note 29; see also *supra* text accompanying note 29.

¹³⁷ Senator Sherman concluded that nonprofits were not "business combinations" that dealt in "contracts" or "agreements." Testimony of Senator Sherman, *supra* note 29; see also *supra* text accompanying note 29.

its therefore no longer applies—such commercial activity should be regulated by the Act.¹³⁸

Criticism of *Marjorie Webster* also has centered on the creation of a judicial exemption to the Sherman Act where Congress has chosen to remain silent.¹³⁹ The Supreme Court has articulated that the history of the statute's application "establishe[s] that there is a heavy presumption against implicit exemptions" in the construction of the Sherman Act.¹⁴⁰ The legislative history reveals, however, that Congress did consider granting an explicit exemption for nonprofit actors.¹⁴¹ While Congress chose not to include such an exemption in the text of the legislation, this omission was not necessarily caused by a desire to expose nonprofit actors to Sherman Act regulation:

I do not see any reason for putting in [exemptions for] temperance societies any more than [for] churches or school-houses or any other kind of moral or educational associations that may be organized. Such an association is not in any sense a combination or arrangement made to interfere with interstate commerce. . . . You may as well include churches and Sunday Schools.¹⁴²

Thus, while the lack of an explicit legislative exemption might be seen as a reason for criticizing *Marjorie Webster*, the answer is not so clear.

Although the legislative history of the Sherman Act does not provide the definitive answer on the wisdom of the noncommercial-conduct exemption,¹⁴³ practical problems weigh against the utility of Judge Bazelon's formulation. Both parts of the *Marjorie Webster* test present judicially unmanageable standards, and the *Marjorie Webster* court did little to provide any guidance about how these standards should be interpreted.

Marjorie Webster drew a crucial distinction between commercial and noncommercial conduct; the opinion itself, however, sheds little light on what factors determine whether a certain activity should be classified as noncommercial. The D.C. Circuit argued that Congress

¹³⁸ Had the D.C. Circuit articulated its argument in this manner in *Marjorie Webster*, it is possible that the distinction may have been taken more seriously in the literature. Instead, Judge Bazelon simply cited the prior cases and jumped to his distinction without outlining the link between the two. See *Marjorie Webster*, 432 F.2d at 653-55.

¹³⁹ See, e.g., First, *supra* note 16, at 1095 (noting that Court has been hesitant to read exemptions into language of Sherman Act); Note, *supra* note 133, at 331-32 (critical of judicially crafted exemption on policy grounds).

¹⁴⁰ *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975) (citing *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963); *California v. Federal Power Comm'n*, 369 U.S. 482, 485 (1962)).

¹⁴¹ 21 Cong. Rec. 2658-59 (1890).

¹⁴² *Id.* (statement of Sen. Sherman).

¹⁴³ See *supra* note 31 (discussing multivalued nature of congressional intent in adopting Sherman Act).

did not intend the antitrust laws to reach "the noncommercial aspects of the liberal arts and the learned professions."¹⁴⁴ Instead of explaining what it was that made accreditation one of these noncommercial aspects, the court offered only the conclusory statement that "the process of accreditation is an activity distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself."¹⁴⁵ The court offered no further examples of what other activities might fall into the "noncommercial" category, nor did it provide any definition for the phrase "trade or commerce" that might have aided in future analyses of this type.¹⁴⁶

Moreover, the opinion from the D.C. Circuit did not provide any guidance regarding the intent prong of the test because it failed to define what "commercial intent" means. In the *Marjorie Webster* case itself, the school had conceded that Middle States's objectives in the development and application of the accreditation standards were not commercial, and thus an in-depth analysis of the question of intent was unnecessary.¹⁴⁷ While the D.C. Circuit did allow that some standards of accreditation "could have little other than a commercial motive,"¹⁴⁸ on this issue the court provided little in the way of further guidance for lower courts.¹⁴⁹

In addition, even if a court knew what sort of intent it was looking for, it is unlikely that the true intent of the association would become readily apparent. First, there is an obvious proof problem, as it is unlikely that a defendant will admit to a commercial purpose.¹⁵⁰ Second, in light of the numerous decisionmakers generally necessary to the functioning of such organizations, in many cases it may not be possible to conclude that a single purpose motivated a nonprofit's actions.¹⁵¹

¹⁴⁴ *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Sch., Inc.*, 432 F.2d 650 (D.C. Cir.), cert. denied, 400 U.S. 965 (1970).

¹⁴⁵ *Id.* at 655.

¹⁴⁶ See *First*, supra note 16, at 1091-92 (noting lack of guidance provided by D.C. Circuit).

¹⁴⁷ *Marjorie Webster*, 432 F.2d at 654; see also *First*, supra note 16, at 1094 n.281 (recognizing that D.C. Circuit did not need to address question of intent).

¹⁴⁸ *Marjorie Webster*, 432 F.2d at 654.

¹⁴⁹ The court's only guidance on the issue of commercial intent was to hypothesize a "commercially motivated" accreditation standard. See *id.* at 654-55, 655 n.21. However, the standard hypothesized by the court—that member institutions could not purchase textbooks from any supplier who does not provide special discounts for all association members—is so clearly commercially motivated that it fails to provide any real guidance for lower courts in close cases.

¹⁵⁰ See *First*, supra note 16, at 1098 ("[I]t may be difficult to 'unmask the groups' real purpose;" bad purposes can too easily masquerade as good") (footnotes omitted).

¹⁵¹ See *id.* (noting that "a group is not likely to have a unitary purpose").

Therefore, *Marjorie Webster* not only provided lower courts with a standard that was difficult to implement, but it also failed to offer any guidance that could alleviate these difficulties. The court neither articulated a manageable distinction between commercial and non-commercial conduct nor did it define the degree of intent necessary to satisfy the second prong of the test. Perhaps such shortcomings in the opinion, as well as the court's failure to illustrate how its decision could be supported by some legislative history,¹⁵² explain why other circuits have treaded cautiously in adopting the standard established by *Marjorie Webster*.¹⁵³

3. United States v. Brown University

These problems notwithstanding, the Third Circuit yyyrecently resurrected the rationale of *Marjorie Webster*. In *United States v. Brown University*,¹⁵⁴ a civil antitrust claim against the Massachusetts Institute of Technology (MIT) and the eight Ivy League colleges,¹⁵⁵ the Third Circuit agreed, in dicta, that certain activities conducted by nonprofit institutions are indeed exempt from antitrust scrutiny. The nine institutions had agreed that any commonly admitted student would be offered a comparable financial-aid package from each school.¹⁵⁶ To implement this agreement, the schools adopted a uniform financial-aid-setting methodology, shared financial information about admitted students, and held an annual meeting to eliminate discrepancies in the aid packages that each school was prepared to offer to a particular student (the Overlap arrangement).¹⁵⁷ The Justice Department alleged that this arrangement restrained trade in violation of section 1 of the Sherman Act.¹⁵⁸

Turning first to the question of whether the Sherman Act could reach the challenged conduct, the Third Circuit quickly dismissed the

¹⁵² See supra notes 134-43 and accompanying text.

¹⁵³ Only three other circuits have followed—explicitly or implicitly—the noncommercial-conduct rule established by the D.C. Circuit in *Marjorie Webster*. See *United States v. Brown Univ.*, 5 F.3d 658, 667-68 (3d Cir. 1993) (adopting D.C. Circuit approach, as discussed infra at Part II.B.3); *Donnelly v. Boston College*, 558 F.2d 634, 635 (1st Cir. 1977) (holding that law school admission criteria are noncommercial in nature); *Selman v. Harvard Medical Sch.*, 494 F. Supp. 603, 621 (S.D.N.Y.) (holding that admissions criteria that have incidental effects on commercial aspects of medical profession are non-commercial in nature), aff'd, 636 F.2d 1204 (2d Cir. 1980).

¹⁵⁴ 5 F.3d 658 (3d Cir. 1993).

¹⁵⁵ Immediately after the complaint was filed, the Ivy League schools signed a consent decree with the United States. Therefore, only MIT remained as a defendant in the case. *Id.* at 664.

¹⁵⁶ *Id.* at 662 & n.2.

¹⁵⁷ *Id.* at 662-63.

¹⁵⁸ *Id.* at 663-64.

schools' argument that they were entitled to a class exemption based on their nonprofit status.¹⁵⁹ The court did recognize, however, that not all of the activities conducted by a nonprofit institution fall within the Sherman Act's jurisdiction, reasoning that "when [nonprofit organizations] perform acts that are the antithesis of commercial activity, they are immune from antitrust regulation."¹⁶⁰

The key issue, therefore, became defining what sorts of conduct should be characterized as the "antithesis of commercial activity." As the court recognized, this issue fell within the first prong of the *Marjorie Webster* test: whether the challenged conduct is commercial or noncommercial in nature.¹⁶¹ In addressing this question, the Third Circuit failed to provide a bright-line standard distinguishing commercial from noncommercial conduct, stating only that such a classification is "based on the nature of the conduct in light of the totality of surrounding circumstances."¹⁶² Nonetheless, one may gain insight into the Third Circuit's definition of a commercial transaction by focusing on how it reached the conclusion that the Overlap arrangement constituted commerce.

The Third Circuit developed what amounts to a "process-based" definition for when a given transaction is commercial. The court's reasoning sprung from the uncontroversial principle that the payment of money in exchange for educational services is commerce; the tuition-setting decision, an integral part of this exchange, is obviously commercial as well.¹⁶³ In finding that the amount of financial aid given to a student is a component of a process that sets the price for the exchange, the court held that the aid-setting Overlap arrangement was "trade or commerce" within the meaning of the Sherman Act.¹⁶⁴ Therefore, to restate the Third Circuit's rule, if a challenged activity can be characterized as a component of a larger commercial process, that activity will be deemed commercial as well.

As with the *Marjorie Webster* rule, once the Third Circuit classified the conduct as commercial, an altruistic motivation could not exempt the conduct from antitrust regulation. In *Brown University*, for example, MIT attempted to justify the arrangement with an altruistic

¹⁵⁹ *Id.* at 665.

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 666.

¹⁶² *Id.*

¹⁶³ See *id.* ("[T]he payment of tuition in return for educational service constitutes commerce. MIT concedes . . . that its determination of the full tuition amount is a commercial decision.").

¹⁶⁴ *Id.* at 667.

motivation: a desire to make a top-flight education available to needy students.¹⁶⁵ Citing to *Marjorie Webster*, the court reasoned as follows:

[T]o determine whether trade or commerce is implicated, motive plays a much less important role when the nature of the activity, as here, is plainly commercial. An anticompetitive motive may trigger antitrust scrutiny of otherwise noncommercial conduct. The opposite, however, is not also true. A beneficent objective does not excuse commercial activities from compliance with the Sherman Act. . . . [M]otive arguments lose force when used to justify an obviously commercial endeavor.¹⁶⁶

After concluding that the Overlap arrangement implicated trade or commerce, the Third Circuit explained that its decision was consistent with the rule announced in *Marjorie Webster*. Agreeing that the nature of the conduct involved in *Marjorie Webster* was “distinctly noncommercial,” the court stated that the Overlap arrangement presented “the opposite side of the coin—the commercial aspects of the liberal arts.”¹⁶⁷ Unlike MIT, Middle States neither had “received . . . payment or other benefit for evaluating institutions and deciding whether to accredit them” nor an “exchange of money for services or the setting of a price.”¹⁶⁸ Thus, the two decisions were harmonized: the financial-aid-setting conduct in *Brown University* was commercial while the accreditation activity challenged in *Marjorie Webster* was not.

4. Overprotection of the ABA Under the Exemption Approach

Since MSL brought its case against the ABA in a district court in Pennsylvania, the Third Circuit’s decision in *Brown University* will be the governing precedent. Thus, the district court hearing the case is bound to ask the threshold question of whether the accreditation activity is immune from the Sherman Act. As this section illustrates, *Brown University* provides sufficient precedent on which the court could find that the ABA’s accreditation activities are indeed noncommercial in nature and therefore beyond the scope of the Sherman Act. However, such a conclusion would fail to take the special nature of

¹⁶⁵ Id. at 666-67.

¹⁶⁶ Id. at 666 n.7 (citations omitted).

The court nevertheless proceeded to question the true altruism of MIT’s motives, arguing that the arrangement allowed MIT to derive benefits through the increased prestige of attracting the “cream of the crop.” Id. at 666-67. It appears that the Third Circuit would find that the Overlap arrangement failed both parts of the *Marjorie Webster* test: the challenged conduct was both commercial in nature and commercially motivated.

¹⁶⁷ Id. at 667.

¹⁶⁸ Id.

the ABA's activities—and the dangers of self-regulatory abuses—into account.¹⁶⁹

As a first step, the ABA's accreditation activity would be deemed "noncommercial" under the process-based rule articulated by the Third Circuit in *Brown University*. The Third Circuit stated outright its conclusion that the accreditation activity at issue in *Marjorie Webster* was "distinctly noncommercial"¹⁷⁰—a statement the court could not have made had it believed that accreditation was a component of a larger commercial process. In order to maintain the internal logic of the decision, *Brown University* necessarily implies that the act of accreditation is not a component of a commercial process and is thus noncommercial.

The characteristics used by the Third Circuit to distinguish *Marjorie Webster* from the Overlap arrangement also distinguish the ABA's accreditation activity. In contrast to *Brown University*, there is "no exchange of money for services or the setting of a price,"¹⁷¹ as the ABA receives no payment for the "service" of considering an applicant for accreditation.¹⁷² Consistent with the Third Circuit's treatment of *Marjorie Webster*, the conduct will be deemed noncommercial because the ABA "receive[s] no payment or other benefit for evaluating institutions and deciding whether to accredit them."¹⁷³

¹⁶⁹ It should be noted that the district court hearing the MSL case has already decided that the rule of reason analysis drawn from *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), will be applied to the challenged ABA criteria. See *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 853 F. Supp. 837, 839-40 (E.D. Pa. 1994) ("The Supreme Court has been hesitant to denounce as unreasonable per se the rules adopted by professional associations."). The district court reached this conclusion without once mentioning the Third Circuit's decision in *Brown University*.

It is possible that the MSL court has implicitly chosen to limit *Brown University* to its facts, distinguishing between the educational defendants in *Brown University* and the ABA, a professional association. See *id.* (stressing ABA's status as professional association). However, while both cases did deal with educational institutions, neither *Brown University* nor *Marjorie Webster* drew a distinction between education and the professions. See *Brown Univ.*, 5 F.3d at 665 ("[The Sherman Act's] scope reaches the activities of non-profit organizations, including institutions of higher learning."); *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Sch., Inc.*, 432 F.2d 650, 654 (D.C. Cir.) (noting that "historical reluctance of Congress" to regulate educational matters does not immunize "any conceivable activity" of educational institutions), cert. denied, 400 U.S. 965 (1970). Thus, those cases provide sufficient precedent for applying Judge Bazelon's two-part test to ABA accreditation.

¹⁷⁰ *Brown Univ.*, 5 F.3d at 667.

¹⁷¹ *Id.*

¹⁷² There are no allegations in the MSL complaint that the ABA receives a fee in exchange for considering an application for accreditation. See MSL Complaint, *supra* note 2. A review of the ABA's accreditation materials similarly reveals that the ABA is not paid by the applicant institution for this service. See ABA Standards, *supra* note 10.

¹⁷³ *Brown Univ.*, 5 F.3d at 667 (discussing accreditation activities of Middle States Association). MSL might argue that the persons conducting the accreditation review are indeed

Since the accreditation conduct is noncommercial, the court's focus would then shift to determining whether the ABA's motive in undertaking the challenged conduct was commercial.¹⁷⁴ The ABA should have little difficulty arguing that it adopted each of the challenged criteria with the noncommercial intent of enhancing the quality of legal education offered by accredited schools. For example, low student-faculty ratios¹⁷⁵ promote student-faculty interactions while limits on teaching hours¹⁷⁶ provide more time for such interactions. The ABA's salary-level guideline¹⁷⁷ and sabbatical requirement¹⁷⁸ help to attract high-quality faculty members into academia and away from the private sector. Moreover, the LSAT requirement,¹⁷⁹ the for-credit bar review limitation,¹⁸⁰ and the limits on student-employment hours¹⁸¹ arguably help to insure a student body that is both high quality and focused. Finally, law-library requirements¹⁸² insure that institutions have provided their students with the resources necessary to maximize the value of their education.

It is true that some of these requirements affect commercial aspects of both education and the legal profession: For example, law school libraries must purchase certain volumes, and faculty salaries must be held at competitive levels. The *Marjorie Webster* court, how-

receiving payment for their services. This is not, however, the type of commercial transaction that the circuit court was concerned with: the relevant exchange is between the ABA and the applicant school, not the ABA and its employees. Middle States likely paid its employees to conduct accreditation reviews; this exchange, however, did not trigger antitrust scrutiny in the eyes of the Third Circuit.

¹⁷⁴ See *Brown Univ.*, 5 F.3d at 667-68 (noting that *Marjorie Webster* court focused on intent prong of test since conduct at issue was noncommercial); *Marjorie Webster*, 432 F.2d at 654 (finding that "absent an intent or purpose to affect the commercial aspects of the profession," incidental, noncommercial restraints of trade do not warrant application of antitrust laws).

¹⁷⁵ See ABA Standards, *supra* note 10, Standard 201 interpretations at 7-8 (requiring student-faculty ratio below 30:1).

¹⁷⁶ See *id.*, Standard 404 (limiting teaching loads for full-time faculty).

¹⁷⁷ The ABA does not set a specific floor or ceiling for faculty salaries. Instead, schools are required to offer salaries that are "reasonably related to the prevailing compensation of comparably qualified private practitioners and government attorneys and of the judiciary [and] comparable with that paid [law school] faculty members . . . in the same general geographical area." *Id.*, Standard 405(a).

¹⁷⁸ See *id.*, Standard 405(b) (requiring schools to provide full-time faculty with opportunities for leaves of absence).

¹⁷⁹ See *id.*, Standard 503 (requiring that schools use LSAT or similar test in admissions process).

¹⁸⁰ See *id.*, Standard 302(b) (prohibiting schools from granting students academic credit for completion of bar exam preparatory courses).

¹⁸¹ See *id.*, Standard 305(c) (limiting full-time student employment to 20 hours per week).

¹⁸² See *id.*, Standard 602(a) (requiring law school libraries to maintain "Core Collection Library Schedule" of specific hard-copy volumes, as listed at Annex II of the Standards).

ever, was not troubled by such "incidental" effects as long as the criteria were not adopted with the purpose of achieving those results.¹⁸³ Therefore, unless the ABA's intent or purpose in adopting the regulations is shown to be the inflation of faculty salaries, the conduct will be immune from antitrust regulation.¹⁸⁴

Thus, the *Marjorie Webster* rule leads to the conclusion that the ABA's accreditation activities are exempt from antitrust scrutiny. Such a result is not without its merits, as the accreditation standards set by the ABA clearly increase the quality of the resources—professors, materials, and fellow students—available to law students. Such quality assurances might indeed serve the market-correcting purposes recognized in Part I,¹⁸⁵ even though the *Marjorie Webster* and *Brown University* courts never used such language in their decisions.

The problem with the all-or-nothing exemption approach, however, is that the court is not allowed to examine whether the ABA has gone too far in trying to reach its educational goals. As Part I recognized, professional self-regulatory systems are always subject to abuse.¹⁸⁶ Since some degree of competition is being sacrificed for educational quality, the currently accredited schools benefit from the reduction of competition. Perhaps some of the ABA's quality-oriented goals could have been reached with less stringent accreditation requirements. It is also possible that the ABA has "overcorrected" the market to the benefit of its members. Under the exemption approach, however, a court is not given the flexibility to undertake this type of balancing analysis. For this reason, as Part III demonstrates, courts would be well advised to adopt a more flexible approach to the antitrust laws that could properly apply the Sherman Act to the ABA's activities.

III

THE FLEXIBLE RULE OF REASON AS APPLIED TO THE CASE AGAINST THE ABA

As the analysis of Part II indicated, the two lines of analysis that courts have developed in applying the Sherman Act to the activities of nonprofit organizations have failed to provide the degree of flexibility

¹⁸³ See *Marjorie Webster*, 432 F.2d at 654 ("[A]n incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws." (footnote omitted)).

¹⁸⁴ One would think that such an all-or-nothing intent argument would be difficult for MSL to prove unless some "smoking gun" memo reveals the ABA's motivations. See First, *supra* note 16, at 1098 (noting difficulty of proving intent).

¹⁸⁵ See *supra* text accompanying notes 44-71.

¹⁸⁶ See *supra* text accompanying note 72.

necessary for the proper application of the antitrust laws. This Part suggests that the approach to the rule of reason suggested in *Goldfarb v. Virginia State Bar*,¹⁸⁷ which would recognize that nonprofit organizations can play an important role in correcting market failures,¹⁸⁸ is the proper method of applying the Sherman Act to the activities of nonprofit organizations. After setting out the manner in which the flexible rule of reason should operate, this Part suggests how a court might apply this mode of analysis to the case against the ABA.

A. *The Operation of the Flexible Rule of Reason*

Recalling the arguments of Part I, the application of the flexible rule of reason should be based on a simple premise: The activities of nonprofit organizations can often correct market failures.¹⁸⁹ When these market failures are removed, markets function properly and achieve optimal output, and thus the process of competition secures the objectives of the Sherman Act.¹⁹⁰ The flexible rule of reason, therefore, must be structured in a manner that allows courts to recognize the potential market-correcting function of nonprofit activity.

In considering antitrust challenges to the activities of a nonprofit organization, the analysis necessarily must be framed by an understanding of the market in which the nonprofit defendant operates. The task is to isolate any market imperfections that might exist in the absence of nonprofit activity. In other words, the court should consider how the market might function without the intervention of the nonprofit actor. In so doing, the court would simply consider some of the questions addressed in Part I: Are informational problems or externalities distorting the competitive process?¹⁹¹ Does the proper functioning of the market require some degree of trust between the consumer and the provider?¹⁹² If a court reasons that none of these market defects would be present, the conclusion to be reached is obvious: The market-correction rationale cannot justify the nonprofit

¹⁸⁷ 421 U.S. 773 (1975).

¹⁸⁸ Note that the "public service aspect" discussed in *Goldfarb* failed to draw a connection between the ability of nonprofit actors to correct market failures and the procompetitive virtues of such action. See *id.* at 788 n.17. Had the Court recognized this market-correcting role at that juncture, it is possible that the line of cases following *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), see *supra* notes 86-109 and accompanying text, might have taken the flexible approach that this Part recommends.

¹⁸⁹ See *supra* text accompanying notes 44-71.

¹⁹⁰ See *supra* Part I.A.

¹⁹¹ See *supra* text accompanying notes 44-71.

¹⁹² See *supra* text accompanying notes 54-61.

activity since the market functions optimally without any intervention.¹⁹³

If the court concludes that the market in question is one that would be subject to market imperfections, then flexibility would be required. Instead of invalidating a practice under the *National Society of Professional Engineers v. United States*¹⁹⁴ approach as “facially anticompetitive,” the nonprofit actor should be allowed to present the social-welfare justifications that have recently fallen into disfavor with the Court.¹⁹⁵ But rather than simply asserting these justifications, the nonprofit must demonstrate how the challenged practice corrects a distortion or imperfection in the market and thus promotes the proper functioning of the market.

While granting nonprofits the leeway to present these market-correcting justifications, the analysis also must demonstrate an awareness of the self-interest that might be implicated in the nonprofit activity.¹⁹⁶ Even where the market suffers from proven imperfections that need correction, a nonprofit actor should not be given free reign. Instead, a court conducting a flexible rule of reason analysis should be prepared to consider the potential for “overreaching” that could plague self-regulation.

Understood in this light, the flexible rule of reason would do exactly what the Court in *Professional Engineers* advised that the rule of reason should do: inquire “whether the challenged agreement is one that promotes competition or one that suppresses competition.”¹⁹⁷ The only difference between the flexible rule of reason approach and the *Professional Engineers* approach is the recognition of the manner in which competition can be promoted. The flexible rule recognizes that nonprofit organizations can often correct market failures—and thus promote competition—through activities that are anticompetitive on their face; the analysis of the *Professional Engineers* approach stops at a more facial level.

In essence, all that is meant by “flexibility” is the freedom to look beyond facial characterizations of a challenged practice in order to recognize the market-correcting role that nonprofit organizations can

¹⁹³ This is not to say that there is no other justification for the challenged nonprofit activity. Nonprofit organizations are often founded on a commitment to social and political goals that have little or nothing to do with the proper functioning of markets. See supra note 43. As the Sherman Act does not operate in a vacuum, it would be naive to assume that concerns for efficiency trump every other societal goal in every case. Such nonefficiency justifications, however, are beyond the scope of the analysis in this Note.

¹⁹⁴ 435 U.S. 679 (1978).

¹⁹⁵ See supra Part II.A.2.

¹⁹⁶ See supra text accompanying note 72.

¹⁹⁷ *Professional Engineers*, 435 U.S. at 691.

serve. A flexible rule of reason would not ask courts to apply a more lenient antitrust standard for nonprofit defendants, nor would it require courts to give some nonprofit defendants a greater scope of immunity than others based on a noncommercial intent or purpose. The rule simply suggests that courts abandon the cursory and superficial approach of *Professional Engineers* in favor of one that allows courts to recognize the procompetitive impact that can result from nonprofit activity.

There is no question that the flexible rule of reason requires courts to achieve a delicate balance. If the antitrust laws are applied too strictly, the market-correcting benefits of nonprofit activity are lost. Alternatively, overly deferential application of the antitrust laws might allow a self-regulating organization to unfairly advantage its members through "overreaching." Although the calculus is complex, there is no reason to believe that courts would not be institutionally competent to handle this task. The rule of reason advocated by *Professional Engineers* already requires courts to assess how a challenged restraint affects the competitive process and to consider how the market would operate without the restraint or under an alternative restraint. No further sophistication would be required under the flexible rule of reason outlined in this Note.

More generally, the suggested analysis would not be the first instance in which courts would undertake a complex balancing task. In numerous other contexts our society has chosen to entrust the judiciary with critical decisions that involve weighing extremely sensitive interests: for example, decisions regarding the right to privacy and free speech often implicate delicate judicial balancing.¹⁹⁸ The same courts that are competent to balance those sensitive issues are equally competent to untangle the complex antitrust issues posed by the flexible rule of reason.

B. The Flexible Rule of Reason in Practice: The ABA Case

The ultimate goal in a flexible rule of reason case is no different than the objective of the "everyday" antitrust case—the promotion of competition. Therefore, as a practical matter, the structure of the "standard" rule of reason inquiry could be adopted for this flexible

¹⁹⁸ See, e.g., *United States v. Leon*, 468 U.S. 897, 922-25 (1984) (after balancing competing interests, recognizing "good faith" exception to Fourth Amendment exclusionary rule for officials acting in reasonable reliance on search warrants); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298-99 (1984) (finding that time, place, and manner restriction on free speech was reasonable in light of legitimate government interest).

inquiry as well.¹⁹⁹ Thus, the analysis would proceed in three stages: (1) MSL would show that the challenged accreditation standards produce anticompetitive effects; (2) the ABA would offer procompetitive justifications for the challenged practices, including any arguments that the standards serve to correct market imperfection; (3) MSL could rebut by showing that the practice goes beyond what is necessary to achieve market correction.²⁰⁰ The application of this three-step process to the ABA case illustrates how the flexible rule protects those practices that correct market failures and filters out those that do nothing to ensure the optimal functioning of the market for legal education.

1. *The Existence of Anticompetitive Effects*

The first stage of the inquiry requires little attention for these purposes, as it poses no analytical difficulties. MSL can easily overcome its initial burden of showing that the challenged ABA accreditation criteria result in anticompetitive effects. For example, MSL could assert that an anticompetitive effect stemmed from the very denial of accreditation and placed it at a competitive disadvantage vis-a-vis ABA-accredited law schools. MSL can also show the manner in which each of the challenged criteria raises the costs of providing legal education and thus poses a facially anticompetitive barrier to entry in the legal education market.²⁰¹ Therefore, the outcome of the ABA case under the flexible rule of reason would turn on the second and third stages of the inquiry.

2. *Assessing Procompetitive Justifications*

It is at this second stage of the rule of reason analysis that the market-correcting role of the ABA must be taken into account. Once MSL demonstrates that a particular accreditation standard yields anticompetitive effects, the ABA must be given the opportunity to explain how each of the standards helps to correct imperfections in the markets for legal education or legal services.

As the analysis in Part I suggests, there are a number of ways in which the ABA's self-regulatory activities might correct market failures.²⁰² First, the ABA's accreditation standards might "signal" con-

¹⁹⁹ For a summary of the mechanics of the traditional rule of reason analysis, see *United States v. Brown University*, 5 F.3d 658, 668-69 (3d Cir. 1993).

²⁰⁰ See *id.*

²⁰¹ For a listing of the standards that MSL has challenged as anticompetitive, see *supra* note 15.

²⁰² For the purposes of this discussion, this Note assumes that the ABA will be able to show the existence of some imperfections in the market. Of course, a showing of market

sumers about the quality of the legal services or education they are about to purchase. Accreditation might thus mitigate consumer uncertainties by providing information that would not be available in the purely competitive market.²⁰³ It could be argued that the entire process of accreditation is founded on such a “signaling” premise: ABA approval informs the consumer that, at a minimum, the education that she purchases will consist of the components embodied in the standards (e.g., high-quality faculty, extensive research materials, etc.), or that an attorney trained at an ABA-accredited law school has a certain level of training.

Second, the prescription of educational standards can ensure a quality of legal education that conforms with the socially optimal level—a level that might not be reached in the bargain between student and school because some of the benefits are external to the parties.²⁰⁴ For example, without the standards, the educationally and socially beneficial effects of limiting teaching hours²⁰⁵ and student employment²⁰⁶ would be lost because they are undervalued in the individual transactions between students and the school.

Finally, accreditation standards can maintain the integrity and respect of the profession—a factor that is necessary for the proper functioning of the agency relationship that characterizes the legal profession.²⁰⁷ Arguably, the prohibition on for-credit bar review courses serves this purpose²⁰⁸ by assuring consumers that a legal education provides a measure of knowledge and ability greater than a series of test-preparatory courses. Moreover, the “stamp” of accreditation itself might help to foster the degree of trust between the client and the attorney that is required for the proper functioning of the agency relationship.

The crucial distinction between the flexible rule of reason and the *Professional Engineers* approach is a proper understanding of what the concept of “procompetitive” entails. The view of the *Professional Engineers* approach is short-sighted in failing to recognize that the

failure is necessarily the first component of the defendant's burden at this stage of the analysis. See *supra* text accompanying notes 189-93.

²⁰³ See *supra* text accompanying notes 44-61 (discussing nonprofit role in correcting informational problems).

²⁰⁴ See *supra* text accompanying notes 62-71 (discussing nonprofit role in correcting externalities).

²⁰⁵ See ABA Standards, *supra* note 10, Standard 404 (limiting full-time faculty teaching loads).

²⁰⁶ See *id.*, Standard 305 (limiting student employment to 20 hours per week).

²⁰⁷ See *supra* text accompanying notes 54-61 (discussing nonprofit role in maintaining integrity and respect of profession).

²⁰⁸ See ABA Standards, *supra* note 10, Standard 302(b) (prohibiting law schools from offering for-credit bar examination review courses).

correction of market failure is indeed a procompetitive virtue. Under the flexible rule of reason, the demonstration that a facially anticompetitive standard corrects a market failure is sufficient to carry the case into the third stage of the analysis.

3. *The Necessity of the Challenged Standards*

This final inquiry recognizes the potential for abuse that is inherent in the ABA's system of self-regulation.²⁰⁹ Courts must be given the flexibility to consider whether the accreditation standards are broader than necessary to achieve the objectives of market correction. If a particular standard goes too far, and thus serves to benefit ABA members and not to correct the market, the court should strike it down. Through this analysis, the court is given the ability to parse out the standards one by one, accepting those that are needed to correct market failures while rejecting the ones that do not serve their purported goal.

As both MSL and the Justice Department noted in their allegations,²¹⁰ the accreditation standard relating to faculty salaries²¹¹ is a potential candidate for self-regulatory abuse. The potential for abuse arises because approximately ninety percent of the members of the ABA Section of Legal Education, which oversees the accreditation process, are law faculty.²¹² The potential conflict of interest is evident: while higher faculty salaries arguably would attract the best professors to academia and thus increase the quality of education, those adopting the standard maintaining these salary levels also stand to benefit from this decision.

In light of this potential for abuse, a court must consider whether the salary standard is broader than necessary to achieve market correction.²¹³ For instance, the cumulative effect of other accreditation requirements could send a sufficiently strong "signal" to consumers regarding the quality of education and thereby render the faculty-salary guideline superfluous.²¹⁴ On the other hand, this standard may

²⁰⁹ See *supra* text accompanying note 72.

²¹⁰ See MSL Complaint, *supra* note 2, ¶ 25(a) (claiming ABA used accreditation to fix salaries); Justice Department Release, *supra* note 21 (alleging ABA used its accreditation power to "raise salaries to artificially-inflated levels").

²¹¹ See ABA Standards, *supra* note 10, Standard 405(a) (mandating faculty pay to be comparable to that of private practitioners, judges, and faculty at other law schools in area).

²¹² See Justice Department Release, *supra* note 21 (noting lack of sufficient oversight of accreditation program).

²¹³ Recall that by this stage of the analysis, the ABA will have already shown (at step two) that the faculty-salary guideline helps to correct an imperfection in the market. See *supra* Part III.B.2.

²¹⁴ See *supra* text accompanying notes 44-61 (discussing signalling function).

indeed be necessary to internalize the benefits of increased educational quality that would not be accounted for during salary negotiations between the school and potential professors.²¹⁵ After considering all of the relevant evidence,²¹⁶ the court would reach an ultimate determination of whether the challenged standard was necessary to achieve the market correction.

Therefore, for each of the standards that survives the second stage of the flexible rule of reason analysis, the court must consider whether the ABA has overcorrected for the asserted market failure. As the discussion of the faculty-salary guideline indicates, this final stage of the test becomes most crucial where a conflict of interest or other potential for abuse is evident.²¹⁷ Through this filter of flexible review, courts can allow ABA accreditation to restore the market to its competitive level—even though on its face accreditation might appear to erect a barrier to entry in the legal education market—while ensuring that this power of self-regulation is not abused.

CONCLUSION

This Note has argued that a proper understanding of the market-correcting nature of nonprofit activity is necessary to the enforcement of the antitrust laws. As long as the competition-enhancing virtues of nonprofit activity are recognized, the flexible rule of reason can be used to implement the objectives of the Sherman Act by insuring the proper functioning of our markets. However, an antitrust jurisprudence that is blind to the imperfect nature of the markets in which nonprofit organizations operate and chooses instead to rely on an unyielding faith that “all elements of a bargain . . . are favorably affected by the free opportunity to select among alternative offers”²¹⁸ can only reinforce market failures and thus frustrate the various policy objectives of the Sherman Act.

In MSL's case against the ABA, Judge Ditter already has framed discovery in a manner that facilitates the required flexible rule of reason analysis.²¹⁹ For each of the challenged standards, the court has

²¹⁵ See *supra* text accompanying notes 62-71 (discussing correction of externalities).

²¹⁶ One would imagine that the testimony of economists as to failures in the affected markets (education and legal services) would be relevant, as would testimony of experts about what would be required to correct these failures.

²¹⁷ Note that such a potential for abuse is evident for any other accreditation standard that arguably improves the position of law faculty. See, e.g., ABA Standards, *supra* note 10, Standard 404 (maximum teaching loads); *id.*, Standard 405(b) (sabbaticals).

²¹⁸ *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

²¹⁹ See *Massachusetts Sch. of Law at Andover, Inc. v. American Bar Ass'n*, 853 F. Supp. 837, 839-43 (E.D. Pa. 1994) (discussing reasons for adopting rule of reason and setting guidelines for discovery in MSL case).

focused the attention of the parties on the proper issues: (1) the anticompetitive effect of the standard; (2) the redeeming virtues claimed for the standard; and (3) the alternative means of reaching the same virtues.²²⁰ Where the approach in the ABA case must differ from the approach suggested in *Professional Engineers* is in recognizing that the correction of market failures is indeed a redeeming virtue that can be used to justify standards that restrict entry into the market.

There is language in Judge Ditter's opinion that raises a hope that he will use something akin to a flexible rule of reason in the MSL case. Discovery for the second part of the rule of reason analysis is addressed to the "redeeming virtues" claimed for each challenged accreditation standard.²²¹ While the inflexible rule of reason of *Professional Engineers* might have placed some limitations on the permitted scope of the "redeeming virtues" the ABA could assert—permitting only procompetitive virtues—Judge Ditter instead left the issue open to the entire range of justifications for the ABA's conduct.²²² Therefore, it is possible that at this second stage the judge will allow the ABA to assert "redeeming virtues" related to market correction: For instance, the ABA could argue that a given standard provides a signal to consumers or attains a level of educational quality that, due to its imperfections, the market otherwise would not have provided. If this is the case, the court can then properly consider whether the accreditation activities of the ABA violate the Sherman Act.²²³

The Justice Department's comments regarding its settlement with the ABA suggest that the government was also willing to take a more flexible approach than is suggested by *Professional Engineers*. The Justice Department noted that where the ABA uses its accreditation power to maintain the quality of legal education or to provide information to consumers, no antitrust challenge would follow.²²⁴ The implication is that the Justice Department would entertain quality-control and informational justifications in the second stage of a rule of reason analysis. While these arguments would clearly fall outside the

²²⁰ *Id.* at 840-43.

²²¹ See *id.* at 842 (listing focus questions for each part of analysis).

²²² See *id.* (framing questions in terms of who benefits from and what evil is corrected by challenged standard).

²²³ As of the time of this writing, the MSL case is still in the discovery stages with no further opinions issued on matters relevant to the analysis in this Note.

²²⁴ See Justice Department Notice, *supra* note 19, at 63,766 ("[R]ather than setting minimum standards for law school quality and providing valuable information to consumers, the legitimate purposes of accreditation, the ABA acted as a guild that protected the interests of professional law school personnel.").

scope of the justifications allowed under *Professional Engineers*,²²⁵ each fits squarely within the market-correcting rationale of the flexible rule of reason.

This last point highlights the fundamental problem with the inflexible rule established by *Professional Engineers*. Trade associations, by virtue of their specialized knowledge and skills, are best qualified to ensure that members of a profession possess the skills required to serve the public in a competent manner. The inherent inconsistency of the rule in *Professional Engineers* is that it would deny the ABA the use of this purpose—the maintenance of quality in the legal profession—as a defense to an antitrust challenge.²²⁶ A flexible rule of reason analysis that could take all the relevant factors into account—including the nature of markets, the optimal quality of services, the integrity of the professions, and the public interest—offers a better approach. Faithful to the promise of *Goldfarb v. Virginia State Bar*,²²⁷ this rule would allow courts to better recognize how the activities of nonprofit organizations can help to achieve the objectives of the Sherman Act.

²²⁵ See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (holding that defendants could not rely on social-welfare concerns related to quality, safety, and ethics to justify facially anticompetitive restraints).

²²⁶ See *id.*

²²⁷ 421 U.S. 773 (1975).