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Marina Lao

Prof. of Law, Seton Hal University School of Law

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Law School Accreditation: The Applicability of State Action and *Noerr* Exemptions, and First Amendment Principles

Marina Lao*

I. Introduction

In legal education, the American Bar Association (“ABA”) has been the standard-setter for almost a century, granting accreditation to those law schools that complied with its minimum educational standards and denying it to those that did not.¹ While it is sometimes said that accreditation is nothing more than an expression of an accrediting body’s considered professional opinion on what it deems to be acceptable standards in an educational institution, ABA accreditation actually holds much more significance than that. It is true that, in theory, law schools are not compelled to seek ABA accreditation. Nor are they forced to comply with its standards, should they be indifferent to accreditation. In reality, however,

* Professor of Law, Seton Hall University School of Law (email: Laomarin@shu.edu). I would like to thank Ed Hartnett, Michael Risinger, Charles Sullivan and Spencer Weber Waller for their insightful comments on an earlier draft of this paper. I am also grateful for the suggestions made by participants at the 2002 AALS Section on Antitrust and Economic Regulation annual meeting where this paper was presented, particularly Peter Carstensen. Portions of this paper are based, in part, on an earlier article that I have written: *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L.Q 1035 (2001).

¹ For a discussion of the history of American legal education, including the genesis of ABA control over accreditation, see RICHARD L. ABEL, *AMERICAN LAWYERS* 40-73 (1991); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983); Harry First, *Competition in the Legal Education Industry (I)*, 53 NYU L. REV. 311, 333-400 (1978) [hereinafter *Competition I*]; Harry First, *Competition in the Legal Education Industry (II): An Antitrust Analysis*, 54 NYU L. REV. 1049, 1050-65 (1979) [hereinafter *Competition II*].

foregoing ABA approval is not a true option since securing such approval is critical for the success, and perhaps the very existence, of most law schools. That is because only graduates of ABA-approved schools are eligible to sit for the bar examination in forty-two states.² Schools whose graduates are excluded from the bar examination, and hence have no chance whatsoever of being admitted to the bar, would naturally have a difficult time attracting enough students to be financially viable.³ The system, in effect, imposes a barrier to entry in legal education.⁴

Despite this fact, few would contend that accreditation is inherently anticompetitive. It is generally acknowledged that the system performs a procompetitive function, by providing complex professional service markets with valuable information consumers need for informed decisionmaking.⁵ At the same time, because most

² See SECTION OF LEGAL EDUC. AND ADMISSIONS TO THE BAR, AM. BAR ASS'N & NAT'L CONFERENCE OF BAR EXAMINERS, COMPREHENSIVE GUIDE TO BAR ADMISSION REQUIREMENTS 2000 10-11 (2000) [hereinafter BAR ADMISSION REQUIREMENTS]. Additionally, the ABA is recognized by the United States Department of Education as the sole accrediting body for law schools, which enables students at the accredited schools to obtain federal financial assistance for their education. See Complaint at 3, United States v. Am. Bar Ass'n, No. 95-1211 (CR) (D.D.C. filed June 27, 1995), available at <http://www.usdoj.gov/atr/cases/f0200/0254.htm> (last visited Mar. 18, 2002) [hereinafter Complaint].

³ There are presently 21 non-ABA-approved (and 183 ABA-accredited) law schools in the United States, of which 19 are located in states that do not require graduation from an ABA-accredited law school as a condition for sitting for the bar examination (16 in California, 2 in Massachusetts, 1 in Alabama). Only two are located in states that do have such requirement (1 in Kansas and Florida). From this data, it is clear that non ABA-approved law schools have difficulty surviving in states that limit the bar examination to those with J.D. degrees from ABA-approved schools. See BARRON'S GUIDE TO LAW SCHOOLS 557-63 (14th ed. 2000) (listing non ABA-accredited law schools); BAR ADMISSION REQUIREMENTS, *supra* note 2, at 10-11 (listing states in which graduates of non ABA-approved schools are eligible to sit for the bar examination); AM. BAR ASS'N & LAW SCH. ADMISSION COUNCIL, OFFICIAL GUIDE TO ABA-APPROVED LAW SCHOOLS (2000) (listing all 183 ABA-accredited law schools).

⁴ See generally *Competition I*, *supra* note 1, at 314-22; *Competition II*, *supra* note 1, at 1099-1101; Marina Lao, *Discrediting Accreditation: Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035 (2001); George B. Shepherd & William G. Shepherd, *Scholarly Restraints? ABA Accreditation and Legal Education*, 19 CARDOZO L. REV. 2091, 2219-29 (1998). But see Clark C. Havighurst & Peter M. Brody, *Accrediting and the Sherman Act*, 14-AUT LAW & CONTEMP. PROBS., 199, 199 (1994) (arguing that accreditation, standing alone, is not a restraint but merely an expression of opinion on quality by the accrediting body).

⁵ See Lao, *supra* note 4, at 1079-82, 1079-80 n.260-63 (discussing the value of

standard-setting and certification processes (including the ABA accreditation program) are administered by professionals in the field, the power to exclude is effectively wielded by self-interested market participants. When that happens, there is an inherent conflict of interest and a potential for abuse of the process for anticompetitive purposes; even the most selfless and well-intentioned decisionmakers cannot be expected to consistently make neutral decisions or assessments on issues directly implicating their own status, self-identity, and well-being.⁶ Accreditation or certification activities, therefore, have obvious antitrust implications.

Given the significant impact that ABA accreditation has on legal education and the profession, one might have expected numerous antitrust challenges to the process, instead of the mere handful that have actually been brought.⁷ Indeed, in an analogous context involving the medical profession, physicians denied hospital staff privileges, or otherwise excluded from competition by negative peer review action, have brought countless antitrust cases against the certification or other decisionmaking body, usually composed of other professionals in the field, alleging an illegal boycott in violation of section 1 of the Sherman Act.⁸ The boycott theory applicable in these medical staff privileges, peer review, and certification-related cases is, of course, just as applicable in the legal education accreditation context. This then raises the question as to how the ABA has managed to insulate its accreditation activities from much

accreditation in providing information to consumers and citing scholarship on the subject).

⁶ See *id.* at 1090 (suggesting that lawyers' desire to uphold an exclusively elite-model legal education might be partially influenced by concerns relating to professional status, income, and other matters unrelated to public interest).

⁷ See *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026, 1034-38 (3d Cir. 1997) (dismissing unaccredited law school's antitrust action against the ABA on state action and petitioning immunity grounds); *Feldman v. Gardner*, 661 F.2d 1295, 1304-08 (D.C. Cir. 1981) (holding that D.C. Court of Appeals is entitled to state action immunity for limiting admission to the bar to graduates of ABA-approved schools); *Zavaletta v. Am. Bar Ass'n*, 721 F. Supp. 96, 98 (E.D. Va. 1989) (dismissing an antitrust suit brought by students at unaccredited law school against the ABA on First Amendment grounds); *Brandt v. Am. Bar Ass'n*, No. CIV. A 3:96-cv-2606D, 1997 WL 279762 (N.D. Tex. May 15, 1997) (dismissing an antitrust suit, on petitioning immunity grounds, brought against the ABA over its failure to grant accreditation to a law school).

⁸ See BARRY R. FURROW ET AL., *HEALTH LAW* § 10-22 at 419-24 (1995) (discussing such cases); Peter J. Hammer & William M. Sage, *Antitrust, Health Care Quality, and the Courts*, 102 COLUM. L. REV. (forthcoming 2002) (presenting a study showing the types of medical antitrust cases that are most often brought).

antitrust scrutiny.

One possible reason for the ABA's success in this regard is the widely held assumption that ABA accreditation is immune from the antitrust laws under one or both of two doctrines: state action; and petitioning immunity (often referred to as the *Noerr* or *Noerr-Pennington*⁹ doctrine). Stated briefly, the state action doctrine creates an antitrust exemption for state regulation, assuming that certain conditions are satisfied, regardless of the anticompetitiveness of that regulation. The *Noerr* doctrine provides a corollary exemption from the antitrust laws for private efforts to influence government action, no matter how anticompetitive the intent of those private efforts. Since the rules for bar admission, including the critical one limiting access to the bar examination, are promulgated by the states' highest courts in the vast majority of states,¹⁰ and a state's highest court acting in its legislative capacity is sovereign, it has generally been assumed that any competitive harm resulting from ABA accreditation is immune from antitrust review.

These two immunity doctrines have, thus far, successfully shielded the ABA accreditation system from serious substantive antitrust inquiry in every single private suit that has been brought against the organization.¹¹ However, the last such case, *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*,¹² precipitated a related Department of Justice antitrust action against the ABA,¹³ which was eventually settled in a consent decree wherein the ABA agreed to discontinue certain accreditation practices.¹⁴ While a consent decree has no precedential force, the ABA's decision to settle the case without first insisting on summary disposition based on these two doctrines may well increase its vulnerability and inspire more sustained accreditation-related

⁹ The term "*Noerr-Pennington*" doctrine is derived from the two cases that first articulated the principles of the petitioning immunity doctrine: *E. R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

¹⁰ See BAR ADMISSION REQUIREMENTS, *supra* note 2, at 3.

¹¹ See cases cited *supra* note 7.

¹² 107 F.3d 1026 (3d Cir. 1997).

¹³ The Department of Justice initiated an investigation into the ABA accreditation process, and subsequently filed suit against the ABA, after receiving complaints from MSL. See John Yemma, *Law School Loses Fight with Bar Association*, BOSTON GLOBE, Oct. 7, 1997, at B4.

¹⁴ *United States v. Am. Bar Ass'n*, 934 F. Supp. 435, 436 (D.D.C. 1996).

challenges in the future. It is, therefore, perhaps an appropriate time to re-think the assumptions generally made about the applicability of either or both immunity doctrines to ABA accreditation.

This paper addresses the reach of both immunity doctrines, and of the First Amendment, in the law school accreditation context. My analysis draws a distinction between restraints on competition flowing from the ABA *decisions* to grant or deny accreditation and their associated use by the states on the one hand, and restraints on competition emanating from the accreditation *standards* themselves on the other. I conclude that, although the effect of the use of the ABA's accreditation decisions may be immunized, neither doctrine exempts restraints resulting from the standards themselves. In other words, while the ABA may be immune from antitrust review for any exclusionary effect flowing from state-imposed rules requiring a J.D. degree from an ABA-approved school as a condition for taking the bar examination, the state action doctrine does *not* provide immunity to the standards that the ABA established and applied in reaching those accreditation decisions. That is because the states do not specifically adopt the standards themselves. Nor does the ABA seek to influence the states to do so. With respect to the First Amendment defense, I take issue both with the characterization of accreditation as mere speech, and with the view that a restraint on competition effectuated by pure speech is absolutely protected by the First Amendment. Of course, even if the accreditation process is not immune from antitrust scrutiny, whether it is *unlawful* under the antitrust laws poses an entirely separate and complex issue which this paper will not address.¹⁵

II. Background

The ABA began its accreditation function in 1921 through its Section of Legal Education and Admissions to the Bar ("Section of Legal Education"), which was created in 1893.¹⁶ Central to any accreditation program are standards setting minimum requirements that must be satisfied for approval to be granted. The ABA's standards cover many aspects of the operation of a law school, such as its curriculum, faculty, administration, admissions, library

¹⁵ For a discussion of this issue, see generally *Competition II*, *supra* note 1; Lao, *supra* note 4; Shepherd & Shepherd, *supra* note 4.

¹⁶ See ABEL, *supra* note 1, at 46; STEVENS, *supra* note 1, at 95; OFFICE OF THE CONSULTANT ON LEGAL EDUCATION TO THE AM. BAR ASS'N, THE ABA'S ROLE IN THE LAW SCHOOL ACCREDITATION PROCESS I (1997).

resources, and physical facilities.¹⁷ Included among them are rules requiring a three-year full time program for a J.D. degree,¹⁸ limiting the student-faculty ratio,¹⁹ prohibiting academic credit for bar review courses,²⁰ prohibiting correspondence schools,²¹ and imposing certain requirements on library resources²² and on law school physical facilities.²³ The ABA makes its approval or denial decisions based on an application of these standards, and it sends to the states annually a list of all accredited schools, along with the *Review of Legal Education in the United States*, the current ABA accreditation standards, and any proposed revisions.²⁴

The ABA's accreditation decisions initially had little competitive impact because no state before 1927 required graduation from any law school, let alone an ABA-accredited one, as a condition for admission to the bar.²⁵ Anyone could become a licensed attorney through apprenticeship and passing the bar examination, which was then typically easy.²⁶ By 1958, however, the ABA, in conjunction

¹⁷ See OFFICE OF THE CONSULTANT ON LEGAL EDUCATION TO THE AM. BAR ASS'N, ABA STANDARDS FOR APPROVAL OF LAW SCHOOLS (1999) [hereinafter ABA STANDARDS]. The core of the standards was adopted in 1973 and periodically amended since then. The most significant changes came about as a result of a consent decree that the ABA signed in 1995 to settle a civil antitrust suit brought by the Department of Justice. Under the terms of the consent decree, the ABA can no longer collect faculty salary data or consider faculty compensation in accreditation; or bar accreditation of for-profit schools; or prohibit acceptance of transfer credits from unaccredited schools. *Am. Bar Ass'n*, 934 F. Supp. at 436. The ABA also made other changes in 1996, including eliminating a teaching load limit and the requirement of periodic sabbaticals; allowing some counting of adjuncts in the calculation of student-faculty ratios; and making minor changes in the language of a few other standards.

¹⁸ ABA STANDARDS, *supra* note 17, at std. 304(b).

¹⁹ *Id.* at std. 402, interps. 402-1, -2.

²⁰ *Id.* at std. 302(f).

²¹ *Id.* at stds. 304(b), (g).

²² *Id.* at std. 606.

²³ *Id.* at stds. 701-703. For a more extensive discussion of some of these accreditation standards, see Lao, *supra* note 4, at 1087-88.

²⁴ See *Mass. Sch. of Law*, 107 F.3d at 1030.

²⁵ See STEVENS, *supra* note 1, at 174; see also *Competition I*, *supra* note 1, at 333-34 (describing vast differences among law schools in the post-Civil War period and noting that they were not the only path to the bar).

²⁶ See STEVENS, *supra* note 1, at 174.

with the Association of American Law Schools (“AALS”),²⁷ had prevailed upon all but fourteen jurisdictions to require candidates for the bar examination to be graduates of ABA-approved schools.²⁸ Today, graduation from an ABA-approved school is a condition for taking the bar in forty-three jurisdictions.²⁹ This rule, included as part of the bar admission eligibility rules, is usually promulgated by the states’ highest courts.³⁰

With any meaningful accreditation system, it is expected that some seeking approval will fail to satisfy the standards set and will be denied approval. When the individuals setting and applying the standards are, in a sense, competitors of those unsuccessfully seeking accreditation, there is potentially a concerted refusal to deal or group boycott claim,³¹ thus implicating the antitrust laws, unless some

²⁷ The AALS is an association of American law schools formed as an entity separate from the ABA in 1900. *See* ABEL, *supra* note 1, at 46. Its current members are all ABA-accredited schools. The AALS “accredits” law schools only in the sense that it evaluates them for membership in the association, but its decisions, unlike those of the ABA, have no impact on bar admission rules. *See Mass. Sch. of Law*, 107 F.3d at 1030. *See generally* ASS’N OF AM. LAW SCHS., 2000 HANDBOOK art. 6 (2000); *Competition II*, *supra* note 1, at 1078-80 (describing the close relationship between the ABA and AALS).

²⁸ STEVENS, *supra* note 1, at 207-08.

²⁹ *See* BAR ADMISSION REQUIREMENTS, *supra* note 2, at 10-11. The only states that permit graduates of non-ABA approved schools to take the bar examination are Alabama, California, Connecticut, Massachusetts, Michigan, Nevada, Tennessee, and Virginia. *Id.* In addition to a degree from an ABA-accredited law school, admission to the bar in most states typically requires a college degree or three years of college study; passing of the state bar examination; and approval of character and fitness by the committee governing bar admissions. *Id.* (fully listing bar admission requirements for each state).

³⁰ *See id.* at 3. In forty two states and the District of Columbia, the states’ highest courts, with assistance from court appointed boards or committees, alone control admission to the bar (which includes promulgating eligibility rules for bar admission). In the eight remaining states, this authority is held jointly by the legislature and the state supreme courts. *Id.*

³¹ The term “group boycott,” also referred to as concerted refusals to deal, covers a wide variety of conduct, including an association’s exclusion (or limitation of access) of others from their association or joint venture. *See, e.g.,* Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 293-94 (1985); *Associated Press v. United States*, 326 U.S. 1, 21-22 (1945). Trade or professional associations are treated as combinations of their members so that the activities of such associations are considered the collective conduct of their members, thus satisfying the “agreement” or “combination” requirement of Section 1 of the Sherman Act. *See* VII PHILLIP E. AREEDA, ANTITRUST LAW ¶ 1477 at 343 (1986).

exemption exists. Although it was once believed that the antitrust laws had no application to the “learned professions,” such as law and medicine, on the theory that the professions do not engage in “trade or commerce” within the meaning of the Sherman Act,³² that belief was laid squarely to rest in *Goldfarb v. Virginia State Bar*.³³ Noting that “the exchange of . . . a service for money is ‘commerce,’”³⁴ the Supreme Court, in 1975, refused to find the “learned professions” immune from the antitrust laws. Subsequent Supreme Court cases have consistently followed *Goldfarb* in applying the Sherman Act to professional activities, thus making clear that these activities are considered business-related and subject to antitrust review.³⁵

In the accreditation context, an earlier court of appeals decision, *Marjorie Webster Junior College, Inc. v. Middle States Ass’n of Colleges & Secondary Schools*,³⁶ held that accreditation activities conducted with a noncommercial purpose were beyond the

³² See *FTC v. Radam Co.*, 283 U.S. 643, 653 (1931) (observing, in a case testing the FTC’s jurisdiction under section 5 of the FTC Act, that “medical practitioners. . . follow a profession and not a trade.”).

³³ 421 U.S. 773 (1975). Foreshadowing *Goldfarb* was *American Medical Ass’n v. United States*, 317 U.S. 519 (1943), a case brought by the Antitrust Division of the Justice Department challenging the AMA’s efforts to thwart competition from a precursor to today’s HMOs through an ethical rule that prohibited its members from affiliating with those who practice medicine in that form. While the Supreme Court avoided explicitly declaring that medicine was a “trade,” it found the physicians liable for an antitrust violation, noting that “the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was . . . obstruction and restraint of the business of Group Health” (an HMO-like group practice). *Id.* at 528.

³⁴ *Goldfarb*, 421 U.S. at 786-88.

³⁵ See, e.g., *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 759 (1999) (requiring a rule of reason analysis, not the “quick look,” to determine the legality of a professional rule banning a broad range of advertising); *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 432 (1990) (holding that the collective refusal by a group of criminal defense lawyers to represent indigent criminal defendants unless the government raised their compensation rates was per se illegal); *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 466 (1986) (finding dentists’ collective refusal to submit x-rays to patients’ insurers to be an illegal antitrust restraint); *Ariz. v. Maricopa County Med. Soc’y*, 457 U.S. 332, 357 (1982) (holding that doctors’ setting of maximum fees for specific medical procedures constituted price fixing and was per se illegal); *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 697 (1978) (finding professional rule prohibiting competitive bidding among engineers to be an antitrust violation).

³⁶ 432 F.2d 650, 655 (D.C. Cir. 1969), *cert. denied*, 400 U.S. 965 (1970).

scope of the Sherman Act.³⁷ In light of *Goldfarb*, however, the continued validity of this case and its rationale is highly questionable. Furthermore, in *United States v. Brown University*,³⁸ a more recent case involving an alleged agreement among Ivy League schools fixing the level of financial assistance offered to commonly-admitted students, the Third Circuit quickly dismissed the schools' claim that their non-profit educational status provided an exemption from the Sherman Act, holding that the payment of money for an education is commerce.³⁹

Because there is no blanket professional, non-profit, or educational exemption from the antitrust laws today, it is unsurprising that the ABA has faced some antitrust challenges to its accreditation practices. Two of the more serious ones, a private suit and a Department of Justice civil action, were brought in the mid-1990s.⁴⁰ After being denied ABA approval, the Massachusetts School of Law at Andover ("MSL"), a school operating on a low budget and in conscious defiance of many ABA rules, sued the ABA alleging that its enforcement of the standards to deny accreditation to MSL amounted to a group boycott against the school and an agreement to fix prices, in violation of the Sherman Act.⁴¹ The case was dismissed, on a summary judgment motion, on antitrust state action and *Noerr* petitioning immunity grounds,⁴² but not before it had precipitated a

³⁷ *Id.*

³⁸ 5 F.3d 658 (3d Cir. 1993).

³⁹ *Id.* at 666.

⁴⁰ In addition to these two cases and the cases cited in *supra* note 7, the ABA also faced a challenge from Western State University College of Law ("WSU") in the mid-1970's, although no suit was filed. WSU, a for-profit law school in California, was ineligible for ABA approval because of the non-profit standard in existence at that time. Denied ABA approval, WSU applied for accreditation from a recognized regional accrediting agency in order to allow its students to participate in federal financial aid programs. When the ABA attempted to interfere with WSU's efforts, WSU filed a complaint against the ABA with the Department of Education. This prompted a Department of Education investigation and a Department threat to remove the ABA's accrediting status. The ABA eventually decided to delete the standard prohibiting proprietary schools but did not accredit WSU, presumably because of other deficiencies. See *Competition II*, *supra* note 1, at 1082-86; STEVENS, *supra* note 1, at 244-45.

⁴¹ *Mass. Sch. of Law*, 107 F.3d at 1031-32.

⁴² *Id.* at 1034-38 (holding that MSL's injuries stemmed, not from the ABA's actions, but from the states' exclusion of graduates of non-ABA approved schools from the bar examination, and that state action and *Noerr* provided antitrust

related Department of Justice civil antitrust action against the ABA.⁴³

The government's case alleged that the law school accreditation process had been captured by legal educators⁴⁴ and that the ABA, under these educators' influence, formulated and enforced anticompetitive standards and engaged in a group boycott of schools failing to achieve those standards.⁴⁵ The case was eventually terminated with a consent decree in which the ABA agreed to discontinue a few of the challenged practices,⁴⁶ and to alter the composition of the committees and organizations that control the accreditation process so as to reduce the role of legal educators in the process.⁴⁷ Despite the fact that it had always prevailed in such suits in

immunity for these injuries).

⁴³ Complaint, *supra* note 2.

⁴⁴ At that time, 90% of the members of the Section of Legal Education, all members of the Standards Review Committee, and a majority of the members of the Accreditation Committee were legal educators. Furthermore, site inspection teams that performed on-site evaluations of law schools for accreditation purposes were typically all made up of legal educators. See Competitive Impact Statement at 4-5, *United States v. Am. Bar Ass'n*, No. 95-1211 (CR) (D.D.C. filed June 27, 1995), available at <http://www.usdoj.gov/atr/cases/f1000/1034.htm> [hereinafter Competitive Impact Statement] (last visited Mar. 18, 2002).

⁴⁵ Among the standards and practices alleged to be anticompetitive were: the requirement that faculty compensation be comparable to that of similarly situated ABA-approved schools; the prohibition against granting transfer students credit for courses completed at unaccredited law schools; the requirement that schools be non-proprietary; interpretations of the student-faculty ratio standard to exclude adjunct faculty in the calculation of that ratio; limitations on faculty teaching loads; the requirement that faculty be granted periodic sabbaticals; the banning of bar review courses from the law school curriculum; and a few interpretations of standards relating to facilities and resources. See *id.* at 5-9.

⁴⁶ See *Am. Bar Ass'n*, 934 F. Supp. at 436. Under the consent decree, the ABA is enjoined from adopting or enforcing any standard that 1) effectively imposes compensation requirements for legal educators as a condition for accreditation (including the collection of salary data and using that data in connection with accreditation review); 2) prohibits member schools from enrolling graduates of unaccredited law schools in a post-J.D. program or from granting transfer students credit for courses completed at an unaccredited law school (except that transfer credits can be limited to no more than one-third of the total credits required for graduation); or denies accreditation on the basis that the school is proprietary. *Id.*

⁴⁷ Structural changes mandated by the consent decree include the following: 1) law school deans or faculty will make up no more than 50% of the members of the Council to the Section of Legal Education, the Accreditation Committee, and the Standards Review Committee; and no more than 40% of the nominating committee for the officers of the Section of Legal Education; 2) each site inspection team will, to the extent possible, consist of at least two members who are not legal

the past, based on state action and *Noerr*, the ABA settled the case without first insisting on summary disposition based on these two threshold issues, and it remains to be seen whether the ABA's earlier invincibility on these issues will be eroded as a result. The following section reexamines the common assumption made about ABA accreditation: that it is insulated from substantive antitrust review under the immunity doctrines of state action and *Noerr*.

III. Antitrust Immunity: "State Action" and *Noerr*

The antitrust immunity doctrines of state action and *Noerr* are often said to express "the principle that the antitrust laws regulate business, not politics":⁴⁸ state action "protects the States' acts of governing and *Noerr* the citizens' participation in government."⁴⁹ Other than this truism, not much else is settled about the two doctrines. They have, however, been applied to shield the legal profession from antitrust scrutiny in accreditation and a wide range of other self-regulatory activities. Lawyers, unlike physicians and other professionals, have the luxury of coordinating their collective action under the auspices of rules adopted by the states' highest courts, which is then often afforded antitrust immunity as state action or as legitimate petitioning of the state.⁵⁰ For that reason, although *Goldfarb* was a case involving the legal profession, the brunt of the decision, ironically, has been borne principally by other

educators; and an independent consultant, who is not a legal educator, will be hired to assist in validating all standards and interpretations. *Id.* at 437.

⁴⁸ *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 383 (1991).

⁴⁹ *Id.*

⁵⁰ *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977) (holding that a lawyer advertising ban was unconstitutional based on the First Amendment, but finding that the bar association was immune from antitrust liability based on state action); *Hoover v. Ronwin*, 466 U.S. 558 (1984) (dismissing, on state action immunity grounds, an antitrust suit brought against a court-appointed committee responsible for administering the state bar examination and admissions over its grading system); *Va. State Bar v. Surety Title Ins. Agency, Inc.*, 571 F.2d 205 (4th Cir. 1978); *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992) (dismissing, based on state action, an antitrust suit brought against the ABA and others over rules relating to the unauthorized practice of law); *Green v. State Bar*, 27 F.3d 1083 (5th Cir. 1994); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997); *Lender's Serv., Inc. v. Dayton Bar Ass'n*, 758 F. Supp. 429 (S.D. Ohio 1991); *Guralnick v. Supreme Court of N.J.*, 747 F. Supp. 1109 (D.N.J. 1990).

professionals, not lawyers.⁵¹ The following discussion seeks to make sense of these two ambiguous immunity doctrines in the law school accreditation context, and to see if their protection should, indeed, extend to ABA accreditation. It will also examine an additional contention that accreditation is pure speech protected under the First Amendment, independent of the *Noerr* doctrine.

A. The Antitrust State Action Doctrine⁵²

Grounded in federalism and state sovereignty, state action immunity is intended to shield acts of the states from the federal antitrust laws, even if those acts may be anticompetitive and unwise.⁵³ The doctrine began with the seminal case of *Parker v. Brown*.⁵⁴ *Parker* involved a California statute that established a program fixing prices and controlling output among raisin growers, and added the state's enforcement authority behind it.⁵⁵ The Supreme

⁵¹ See, e.g., Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679 (1977) (applying Sherman Act to a society of engineers); *Ariz. v. Maricopa County Med. Soc'y*, 457 U.S. 332 (1982) (finding a society of physicians liable for price-fixing); *FTC v. Ind. Fed'n. of Dentists*, 476 U.S. 447 (1986) (applying group boycott laws to a federation of dentists); *Patrick v. Burget*, 486 U.S. 94 (1988) (subjecting medical peer review committee decisions to federal antitrust laws). Physicians and other professionals have no channel equivalent to the state supreme court within which to conduct their self-regulatory activities. Thus, except in situations where the state legislature steps in and enacts legislation giving effect to their regulation, the (non-lawyer) professionals' activities would not fall within the scope of these two exemptions.

⁵² The term "state action" as used in antitrust law is different from the concept of state action used in civil rights cases under the Fourteenth Amendment. The definition of state action is relatively narrow in antitrust law, as will be discussed later, but is much broader under a Fourteenth Amendment analysis, where it has been held to extend even to certain private actions with a "quasi-public" character. See generally LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW 1688-1720* (2d ed. 1988). Consequently, conclusions as to what constitutes state action under constitutional law have no application to the question whether state action is implicated under antitrust law.

⁵³ See *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("There is no suggestion of a purpose to restrain state action in the Act's legislative history."); *Omní Outdoor Adver.*, 499 U.S. at 374 (stating that Congress did not intend to override state interests when it passed the Sherman Act).

⁵⁴ 317 U.S. 341 (1943).

⁵⁵ *Id.* at 346. The Act was passed during the Depression in the 1930's when, according to the preamble to the Act, an overproduction of raisins resulted in "the unreasonable waste of [the state's] agricultural wealth." 1933 Cal. Stat. 1969, § 1.

Court held that state officials enforcing the raisin program were immune from antitrust liability because the Sherman Act was not intended to restrain “state action.”⁵⁶ Because only state administrators of the program, not the private growers who either orchestrated or complied with the program, were named as defendants in *Parker*, the Court did not address whether and under what circumstances private parties acting under warrant of state law would also be exempt.

The resolution of that issue was left to a series of subsequent cases, which extended the antitrust immunity accorded state officials in *Parker* to private parties whose anticompetitive acts are the product of state action.⁵⁷ Three formal rules eventually emerged from these cases. If the anticompetitive restraint in question is considered a direct act of the State as sovereign, it enjoys absolute immunity from antitrust review;⁵⁸ a direct act of “the state as sovereign” generally refers to acts of the state legislature, the highest state court acting in its legislative capacity, and possibly the governor.⁵⁹ However, if the actor is “private,” then, under a test articulated in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*,⁶⁰ there is immunity only if the challenged restraint is taken pursuant to a “clearly articulated and affirmatively expressed. . .state policy,”⁶¹ and the conduct is subject to active state supervision.⁶² A third intermediate

⁵⁶ *Parker*, 317 U.S. at 351.

⁵⁷ See *infra* notes 58-65.

⁵⁸ See, e.g., *S. Motor Carriers, Inc. v. United States*, 471 U.S. 48, 64 (1985); *Cnty. Communications Co. v. City of Boulder*, 455 U.S. 40, 50-54 (1982); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 790-91 (1975).

⁵⁹ See *Hoover v. Ronwin*, 466 U.S. 558, 567-69 (1984); *Parker*, 317 U.S. at 350-51; *Bates*, 433 U.S. at 359-60.

⁶⁰ 445 U.S. 97 (1980).

⁶¹ *Id.* at 105-06 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)); *Patrick*, 486 U.S. at 100. To satisfy this “clear authorization” requirement, it is unnecessary to show that the challenged actions were compelled by state law. See *S. Motor Carriers*, 471 U.S. at 60-61; *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 42 (1985). All that must be shown is that the legislature or state supreme court contemplated the kind of activity that is being challenged. *Town of Hallie*, 471 U.S. at 42. However, it should be noted that “mere neutrality respecting the. . .actions challenged as anticompetitive” on the part of the state will not satisfy this first requirement. *Cnty. Communications Co.*, 455 U.S. at 55.

⁶² *Midcal*, 445 U.S. at 105-06. See also *S. Motor Carriers*, 471 U.S. at 58-59; *Patrick*, 486 U.S. at 100; *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). Active state supervision is not met when the state “simply authorizes price setting and enforces the prices established by private parties” because such authorization

rule governs acts of municipalities, state agencies, and other subordinate state entities. Not deemed “the state” for purposes of the state action doctrine,⁶³ these lower level state entities must show state authorization for their regulation to enjoy state action immunity.⁶⁴ However, unlike private actors, they are not required to show active state supervision of their actions.⁶⁵

MidCal seems to be based on the belief that federal antitrust laws should give way to state regulatory decisions only if the state has a concrete regulatory scheme that it believes would better serve the state’s interests than free competition.⁶⁶ But if the state’s regulatory intentions are unclear or if the state does not appear to be taking its own policy seriously (by actively monitoring it), then the

merely “cast[s] . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.” 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344-45 (1987) (quoting *Midcal*, 445 U.S. at 105).

⁶³ See *City of Lafayette v. La. Power & Light Co*, 435 U.S. 389, 408-17 (1978); *Town of Hallie*, 471 U.S. at 38-40; *Hoover*, 466 U.S. at 568-69; *Cnty. Communications Co.*, 455 U.S. at 50-54.

⁶⁴ See *S. Motor Carriers*, 471 U.S. at 60-61, 62-63; *Town of Hallie*, 471 U.S. at 38-40; *Cnty. Communications Co.*, 455 U.S. at 51-52. It should be noted, however, that it does not take much for municipalities to meet this clear authorization requirement. It is sufficient to simply demonstrate that the state as sovereign intended “to displace competition in a particular field with a regulatory structure.” *S. Motor Carriers*, 471 U.S. at 64. Clear state authorization for agency action has been found in federal antitrust cases even when the state supreme court had earlier found that the action was unauthorized, and even when evidence showed that state officials abused their authority. See *Lease Lights, Inc. v. Pub. Serv. Co.*, 849 F.2d 1330, 1333-35 (10th Cir. 1988), *cert. denied*, 488 U.S. 1019 (1989); *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985).

⁶⁵ See *Town of Hallie*, 471 U.S. at 46-47, 46 n.10 (concluding that active state supervision is not required where the actor is a municipality, and suggesting – though not deciding – that it is probably also not required where the actor is a state agency); *Hass v. Or. State Bar*, 883 F.2d 1453, 1457-63 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) (viewing state bar association as a state agency requiring clear state authorization but not active state supervision). Active state supervision is not required for municipalities (and probably state agencies) because they are considered less likely than private actors to pursue private interests, as opposed to state interests, in imposing regulation. *Hass*, 883 F.2d at 1459.

⁶⁶ See *Parker*, 317 U.S. at 351 (pointing out that state action doctrine does not permit the state to “give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful”); *Cnty. Communications Co*, 455 U.S. at 55 (holding that there must be a clearly articulated and affirmatively expressed state policy of replacing competition with regulation in the industry and that municipalities are not simply free “to do as they please”).

rationale for immunity disappears.⁶⁷ Where the sovereign state itself is the actor, the state's policy is presumably crystal clear; moreover, there is no state entity superior to the state sovereign that could conceivably supervise the action. Hence, the two prong-test of *MidCal* would be superfluous. However, if the state chooses to delegate its regulatory authority to subordinate state agencies or private parties, it is presumably prudent to require some demonstration of state authorization for the restraint and, in the case of private actors, also active state supervision before antitrust immunity is deemed warranted.

One of the vexing problems with the state action doctrine is that no solid theoretical principles seem to guide the determination of which actor is deemed responsible for the restraint,⁶⁸ when a restraint is considered an "act of the State as sovereign,"⁶⁹ how much supervision suffices for the active state supervision requirement, who needs supervision, who can supervise on behalf of the state, and so forth.⁷⁰ Critics contend that the doctrine lacks coherence,⁷¹ and "spawn[s] more confusion and litigation than certainty."⁷² Some also assert that there is often no doctrinal explanation for the courts' decisions as to whether state or private action is implicated in a

⁶⁷ See *Ticor Title Ins. Co.*, 504 U.S. at 636 ("[S]tates must accept political responsibility for the actions they intend to undertake.").

⁶⁸ See I PHILLIP AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 212.6 at 159-60 (Supp. 1989) (commenting on the "pervasive vexatiousness" of the problem).

⁶⁹ See *id.* ¶ 212.2 at 127-31, ¶ 212.9f at 184-87.

⁷⁰ See *id.* ¶ 212.7 at 164-67.

⁷¹ See, e.g., Eisner Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 668 (1991); Daniel J. Gifford, *Federalism, Efficiency, and the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1229 n.5 (1995) (noting that "case law exhibits a remarkable lack of coherence"); David McGowen & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL'Y 293, 298-301 (1994) (remarking on the "confused state of the cases" and the "doctrinal confusion" caused by the Court's interpretation of the state action doctrine); William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B.U. L. REV. 1099, 1109 (1981) (describing the current doctrine as "internally inconsistent"); John Shephard Wiley, Jr., *Revision and Apology in Antitrust Federalism*, 96 YALE L.J. 1277, 1280 (1987) (criticizing the state action doctrine as "irrational antitrust policy").

⁷² Elhauge *supra* note 71, at 674.

particular case.⁷³

In the context of competitive restraints involving lawyers, for example, the Supreme Court construed the acts of a state bar association as private in one case.⁷⁴ In *Goldfarb v. Virginia State Bar*,⁷⁵ the earliest Supreme Court case involving state action in connection with the legal profession, the Court declined to find state action immunity for the Virginia State Bar's issuance of an ethical opinion requiring its members to adhere to a minimum fee schedule.⁷⁶ Although the Court acknowledged that the Virginia State Bar was "a state agency for some limited purposes," it treated the state bar as a private actor⁷⁷ apparently because the Virginia Supreme Court, which regulates the practice of law through the state bar association, had not compelled the adoption of fee schedules.⁷⁸

However, in other cases, the Court attributed various state bar or bar committee actions to the state's highest court.⁷⁹ In *Bates v. State Bar of Arizona*,⁸⁰ for example, the true actor was held to be the

⁷³ See, e.g., *id.* at 685 (observing that the Court simply "ignored the clear state action . . . and made the conclusory assertions that these restraints were 'private' . . . and thus not immune without active state supervision.").

⁷⁴ See *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975). See also *Lender's Serv., Inc. v. Dayton Bar Ass'n*, 758 F. Supp. 429 (S.D. Ohio 1991) (concluding that state bar's prosecution of alleged violation of Ohio Supreme Court rule banning the unauthorized practice of law cannot be considered an act of the Ohio Supreme Court but ultimately finding immunity on grounds that there was both clear authorization for, and active supervision of, the restraint by the state).

⁷⁵ 421 U.S. 773 (1975).

⁷⁶ Although the minimum fee schedules were supposedly merely "advisory," the state bar's ethical opinion provided that its "consistent and intentional violation . . . for the purpose of increasing business can . . . constitute solicitation," which is a violation of the Virginia bar disciplinary rules. *Goldfarb v. Va. State Bar*, 497 F.2d 1, 4 (4th Cir. 1974), *rev'd*, 421 U.S. 773 (1975).

⁷⁷ See *Goldfarb*, 421 U.S. at 791-72 ("The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act."); see also *Lender's Serv.*, 758 F. Supp. at 437.

⁷⁸ *Goldfarb*, 421 U.S. at 790-91.

⁷⁹ See, e.g., *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Hoover v. Ronwin*, 466 U.S. 558 (1984). See also *Lawline v. Am. Bar Ass'n*, 956 F.2d 1378 (7th Cir. 1992) (holding bar associations immune from antitrust liability where their proposed disciplinary rule was adopted by the state supreme court).

⁸⁰ 433 U.S. 350 (1977).

Arizona Supreme Court, and the action was therefore immunized by state action. *Bates* involved an antitrust challenge to a state bar association's enforcement of a disciplinary rule banning lawyer advertising.⁸¹ Even though the disciplinary rule at issue was part of the Code of Professional Responsibility proposed by the ABA, and its interpretation and enforcement was undertaken by a state bar committee, the Court held that the real actor was the Arizona Supreme Court, because it had adopted the rule and was "the ultimate body wielding the State's power over the practice of law."⁸²

In another antitrust case where a state supreme court's involvement seemed even less direct, *Hoover v. Ronwin*,⁸³ the Supreme Court likewise held that the challenged conduct "was in reality that of the Arizona Supreme Court" and, as such, per se immune.⁸⁴ The plaintiff in *Hoover*, a candidate who had failed a state bar examination, alleged that the Committee on Examination and Admissions violated the Sherman Act in its administration of the state bar examination. His theory was that the committee, composed of lawyers, had graded on a curve formulated to limit the number of passing examinations and, hence, the number of potential competitors.⁸⁵ In affirming the lower court's dismissal of the complaint, the Court held that the real actor was the state supreme court, which had appointed the committee and formally made all bar admission decisions.⁸⁶ While it was true that final decisions on all bar applications technically rested with the Arizona Supreme Court, that court left real control of the examination and bar admissions process to the Committee and rarely exercised its formal powers, as the dissent pointed out.⁸⁷ Given this reality, the Court's holding that the

⁸¹ *Bates* is mostly remembered for holding that bans on lawyer advertising violated the First Amendment right to free speech. However, the case is also significant for its rejection of the plaintiff's antitrust claim on state action grounds. *Id.* at 359-62.

⁸² *Id.* at 360.

⁸³ 466 U.S. 558 (1984).

⁸⁴ *Id.* at 573.

⁸⁵ *See id.* at 564-65, 569-70, 570 n.19.

⁸⁶ *Id.* at 573. The Court gave three reasons for its conclusion that the state was the real actor: the committee filed its grading formula with the state supreme court prior to the examination; the state supreme court had considered and rejected the plaintiff's challenge to the grading formula; and the state supreme court made the final decisions on bar applications. *Id.* at 572-73, 576-78.

⁸⁷ *Id.* at 588-89, 589 n.12, 592 n.16 (Stevens, J., dissenting).

committee acted as "the state," and not merely as a subordinate state agency, is somewhat puzzling.

Lower court treatment of this issue does not provide any clearer guidelines. In *Lawline v. American Bar Ass'n*,⁸⁸ for example, the Seventh Circuit dismissed an antitrust complaint brought against the ABA, state and local bar associations, the Attorney Registration and Disciplinary Commission ("ARDC"), and others in connection with two ethical rules that had been proposed by the ABA, adopted verbatim by the Illinois Supreme Court (upon the recommendation of its Committee on Professional Responsibility), and enforced by the ARDC.⁸⁹ The court held that, in enforcing the rules, the ARDC acted as an agent of the Illinois Supreme Court and, therefore, was immune under the state action doctrine. The various bar associations were held to have immunity as well, under *Noerr*. As to interpretative opinions issued by the Illinois State Bar Association, the court further held that they had no force except to the extent that the Illinois Supreme Court agreed with them and, thus, it was the state supreme court's actions (not the private parties') that had anticompetitive effect. Other lower courts have tended to treat acts of state bar associations, committees, boards and other state court appointed entities as those of subordinate state agencies,⁹⁰ or as completely

⁸⁸ 956 F.2d 1378 (7th Cir. 1992).

⁸⁹ The two relevant provisions of the ABA Model Rules of Professional Responsibility prohibited lawyer association with non-lawyers (where any of the association's activities involve the practice of law) and lawyers assisting non-lawyers in the unauthorized practice of law. The plaintiff, Lawline, was an association of lawyers and paralegals who provided free legal advice to members of the public over the telephone and also referred appropriate cases to outside lawyers, who paid referral fees to Lawline. The Illinois Supreme Court's Attorney Registration and Disciplinary Commission sought to enjoin Lawline based on the two ethical rules regarding the unauthorized practice of law. *Id.* at 1381.

⁹⁰ See, e.g., *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990) (concluding that the state bar acted as a state agency in requiring all state attorneys to purchase malpractice insurance through the state bar, and was therefore required to show clear state authorization but not active state supervision); *Benton v. La. Pub. Facilities Auth.*, 897 F.2d 198, 203-04 (5th Cir. 1990) (holding that a public corporation of the state authorized to issue bonds operated as a state agency in its selection of bond counsel and, therefore, active state supervision of its activities was unnecessary for state action immunity); *Guralnick v. Supreme Court of N.J.*, 747 F. Supp. 1109, 1117-18 (D.N.J. 1990) (holding that the Fee Arbitration Committee appointed by the New Jersey Supreme Court acted as a state agency which probably did not need to show active supervision by the state), *aff'g* 961 F.2d 209 (3d Cir. 1992).

private acts,⁹¹ and not as acts of the state as sovereign.

In an effort to harmonize the seemingly ad hoc judicial decisions on state action, Professor Einer Elhauge has quite persuasively argued that the dispositive issue in each case, and the normative approach to the doctrine, is whether “the person controlling the terms of the restraint”⁹² is financially interested.⁹³ Accordingly, courts apply state action immunity only when financially disinterested officials control the terms of the restraint in question.⁹⁴ When the state delegates its decisionmaking function to private parties, the persons controlling the terms of the restraint are financially interested and, therefore, courts are unwilling to grant state action immunity unless it is clear that the state both authorized and actively supervised the private conduct, i.e., unless a financially disinterested party was ultimately in charge of the decisionmaking process.⁹⁵

Even this paradigm, however, is not always helpful. To the extent that state supreme courts usually act with assistance from court appointed committees, boards, or state bar associations – composed primarily of lawyers – it is often unclear *who* is controlling the terms of the restraint: the supreme court itself (financially disinterested), or members of the its appointed committee (financially interested). In *Hoover*, for example, one could say that the Arizona Supreme Court “controlled the terms of the restraint” since it had formal powers over the entire bar admissions process. Under this construction, immunizing the committee’s grading activities as acts of the state as sovereign would be justified. But it is at least as likely that the real persons in control were members of the committee, since it is hard to imagine the Arizona Supreme Court actually involving itself with the formulation of the challenged grading formula or other details of the bar examination process. Thus, determining whether the real actor responsible for a particular restraint is the state, or a private party, or something in between is seldom easy.

⁹¹ See *Lender’s Serv.*, 758 F. Supp. at 437.

⁹² Elhauge, *supra* note 71, at 685.

⁹³ *Id.* at 683-96.

⁹⁴ *Id.*

⁹⁵ *Id.*

B. *Noerr* (or Petitioning Immunity)

In *Parker*, the case from which the state action doctrine was derived, the Court implied that if state action is immune from antitrust liability, regardless of its anticompetitive impact, petitioning the state for that restraint cannot be punished.⁹⁶ This implication was made explicit in *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.*,⁹⁷ a case involving a publicity campaign conducted by a group of railroads against truckers. The campaign, which included fraudulent and disparaging statements about truckers, produced two anticompetitive effects: it persuaded the state to pass legislation impeding truckers' ability to compete with the railroads,⁹⁸ and it also directly impaired truckers' good will with their customers – an effect separate from the harm caused by the anticompetitive legislation.⁹⁹ In other words, the second anticompetitive effect flowing from the railroad companies' actions was independent of the state action.

With respect to the first effect, the Supreme Court had little trouble finding antitrust immunity for the railroads, simply stating that “[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition.”¹⁰⁰ Petitioning immunity would seem to be a corollary of state action, given the value of the right to petition in a democracy.¹⁰¹ Whether the second effect should enjoy similar antitrust immunity is a more difficult issue. On this question, the Court concluded that the second effect should also be immunized because it was “incidental” to legitimate attempts to influence government action.¹⁰² The Court did not, however, address what effects would be deemed “incidental” and, thus, entitled to petitioning immunity. For example, is an effect

⁹⁶ *Parker*, 317 U.S. at 351-52.

⁹⁷ 365 U.S. 127 (1961).

⁹⁸ *Id.* at 129-30.

⁹⁹ *Id.* at 129, 133, 142.

¹⁰⁰ *Pennington*, 381 U.S. at 670; *see also Noerr*, 365 U.S. at 136-38; *Cal. Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11 (1971).

¹⁰¹ *See Noerr*, 365 U.S. at 137 (noting that “the whole concept of representation depends on the ability of the people to make their wishes known to their representatives,” and that the Court cannot penalize citizens for making demands of the government when the government is expected to be responsive to their needs).

¹⁰² *Id.* at 142-44.

considered incidental if it is small relative to the political effect? Or is the effect incidental whenever it is related to the petitioning activities? Or is it incidental only if it is necessary for petitioning?

As with state action, commentators have generally noted the lack of doctrinal coherence of the *Noerr* doctrine,¹⁰³ its lack of “clear moorings,”¹⁰⁴ its inconsistency,¹⁰⁵ and the uncertainty as to whether it is based on statutory interpretation or on the First Amendment right to petition.¹⁰⁶ Although some of the doctrinal muddle in the earlier

¹⁰³ The sweeping principle articulated in *Noerr* – that joint efforts to influence the government do not violate the antitrust laws, even though intended to eliminate competition – has been marked with conflicting and confusing exceptions, especially in the early years. For example, there is the “sham” exception, which was stretched to cover petitioning activities that were deemed improper, even if they were intended to and did influence government action. A “commercial” exception to the doctrine was also unclear and poorly defined, as was the “conspiracy” exception. See generally Stephen Calkins, *Development in Antitrust and the First Amendment: The Disaggregation of Noerr*, 57 ANTITRUST L.J. 327 (1988) (discussing these exceptions and other ambiguities); Gary Minda, *Interest Groups, Political Freedoms, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 HASTINGS L.J. 905 (1990) (critiquing the incoherence of the *Noerr* doctrine). The sham exception has since been narrowed so that only activities not genuinely intended to gain government action would be considered sham. See *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 502-03 (1988). For further discussion of *Allied Tube*, see *infra* notes 108-22 and accompanying text.

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

¹⁰⁵ See Calkins, *supra* note 103, at 338-39; McGowan & Lemley, *supra* note 71, at 363-64.

¹⁰⁶ The cases seem to say that the interpretation of the doctrine is statutory, but with an appreciation of the First Amendment right to petition. See, e.g., *Noerr*, 365 U.S. at 138 (casting its decision on statutory interpretation, but noting that ruling otherwise “would raise important constitutional questions.”); *Pennington*, 381 U.S. at 669 (taking a similar approach in stating “[t]he Sherman Act. . . was not intended to bar concerted action of this kind. . . .”); *Cal. Motor Transp.*, 404 U.S. at 510-11 (employing a more constitutional analysis); *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411, 424 (1989) (seeing the doctrine as “[i]nterpreting the Sherman Act in light of the First Amendment’s Petition Clause. . . .”). For arguments supporting a statutory interpretation approach, see Milton Handler & Richard A. De Sevo, *The Noerr Doctrine and Its Sham Exception*, 6 CARDOZO L. REV. 1, 4-5 (1984). For arguments supporting a First Amendment analysis, see Daniel Fischel, *Antitrust Liability for Attempts to Influence Government Action: The Basis and Limits of the Noerr-Pennington Doctrine*, 45 U. CHI. L. REV. 80, 80-84, 94-96 (1977); McGowan & Lemley, *supra* note 71, at 361-70; James D. Hurwitz, *Abuse of Governmental Processes, the First Amendment, and the Boundaries of Noerr*, 74 GEO. L.J. 65, 66 (1985).

petitioning immunity cases has been cleared in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*¹⁰⁷ (and a few other recent cases),¹⁰⁸ that case has created new sources of confusion and its implications on standard-setting and accreditation are particularly unclear.

Allied Tube involved the practice, widespread among trade association members, of promulgating standards that are later adopted by state and municipal governments. The plaintiff alleged that Allied Tube, a steel conduit maker, stacked a meeting of a much respected private standard setting association, of which it was a member, with its own agents to defeat the approval of a competitor's plastic conduit for inclusion in the association's electrical standards, or code.¹⁰⁹ The defendant's activities allegedly had two effects. First, numerous state and local governments adopted the code that Allied Tube caused the association to pass, which resulted in the ban of plastic conduit in those areas.¹¹⁰ Second, even in the limited areas where the code was not incorporated into law, the exclusion of plastic conduit from the code stigmatized the product.¹¹¹ For instance, many insurance underwriters refused to insure buildings not built in conformity to the code, and many building contractors would not use unapproved products, irrespective of whether the relevant state and local governments had adopted the code.¹¹² This second set of harms

¹⁰⁷ 486 U.S. 492 (1988). This case sharply restricted the "sham" exception to petitioning immunity so that it now applies only to activities not genuinely intended to influence government action; real efforts to petition the government, no matter how improper and abusive, are no longer considered "sham." *Id.* at 502-03, 507 n.10.

¹⁰⁸ *See, e.g., Omni Outdoor Adver.*, 499 U.S. at 374-84 (overturning a jury verdict, which found a conspiracy between a private competitor and municipal officials to enact an ordinance harmful to another competitor, on the ground that there is no conspiracy exception to either state action or *Noerr* immunity, except possibly when the government acts as a market participant).

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

¹¹⁰ *Id.* at 495.

¹¹¹ *Id.* at 496.

¹¹² *Id.*

– flowing from the stigma caused by the standard-setting organization’s nonapproval – was separate from the effect of state adoption of the code.

In an antitrust action brought by the plastic conduit maker seeking damages for the second effect,¹¹³ Allied Tube asserted *Noerr* immunity as a defense.¹¹⁴ At issue was whether Allied Tube’s efforts to influence the standard setting organization (to ensure that its competitor’s new product would not be approved) should be immunized from antitrust liability with respect to the stigma effect.

The Court’s decision was complex. It first reaffirmed and elaborated on the difference, drawn in *Noerr*, between harm caused by the requested state action and harm resulting from “private action.” The Court held that where the anticompetitive effect or restraint in question is a result of state action, those urging the action are absolutely immune.¹¹⁵ But where the effect or restraint results from “private action,” immunity exists only if the restraint is “incidental” to valid efforts to influence the government, with “validity” depending on the “context and nature” of the activities.¹¹⁶ The Court further held that a petition to a *private* organization might still enjoy petitioning immunity, if it was “incidental to a valid effort to influence government action,”¹¹⁷ again with validity varying with “the context and nature” of the activity in which it had engaged.¹¹⁸

Applying this standard, the Court said the private standard setting association was not a “quasi-legislative” body simply because the states routinely adopted its work product.¹¹⁹ Therefore, to enjoy petitioning immunity, the defendant’s efforts to affect the association vote must be “incidental” to “valid” attempts to influence government action. While the Court conceded that the defendant’s activities were incidental to genuine efforts to indirectly influence state and local governments,¹²⁰ it said that the efforts were not

¹¹³ The issue of damages for direct harm caused by state enactment of the code was not before the Court. However, the Court implied that such damages would not be recoverable because of state action immunity. *Id.* at 500.

¹¹⁴ *Id.* at 495.

¹¹⁵ *Id.* at 499.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 502.

¹¹⁸ *Id.* at 504.

¹¹⁹ *Id.* at 501.

¹²⁰ The Court rejected earlier interpretations of the “sham” exception that

“valid.”¹²¹ Thus, harm flowing from the defendant’s efforts to influence the private association (thereby indirectly influencing government action) did not enjoy immunity.¹²² Although it is not entirely clear from the decision, the “context and nature” that made defendant’s petitioning efforts invalid seemed to have been the defendant’s subversion of the standard-setting process.¹²³ The Court also ended with a broad holding that “where, as here, an economically interested party exercises decision-making authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effect the standard has of its own force in the marketplace.”¹²⁴

Given the vagueness of the decision, the implications of *Allied Tube* for standard-setting and accreditation, which is essentially standard-setting, are uncertain.¹²⁵ If the expansive holding applies, then few members of a standard setting body would ever have immunity for the marketplace effects of those standards (i.e., effects other than those flowing from their adoption into law), because most standard-setting bodies are composed of interested

covered any form of improper petitioning, and specifically said that the defendant’s activities were not a “sham” since they were obviously aimed at influencing government action. *Allied Tube*, 486 U.S. at 502-03. The Court also rejected the argument that petitioning immunity can apply only to direct petitioning of government officials, noting that petitioning a private standard setting organization may sometimes be the only effective way to influence government action. *Id.*

¹²¹ *Id.* at 503-04.

¹²² *Id.* at 509-10.

¹²³ *Id.* at 504 (noting the defendant’s “rounding up economically interested persons to set private standards” need not be protected).

¹²⁴ *Id.* at 509-10.

¹²⁵ In dissent, Justice White, joined by Justice O’Connor, stated that:

Conduct otherwise punishable under the antitrust laws either becomes immune from the operation of those laws when it is part of a larger design to influence the passage and enforcement of laws, or it does not. No workable boundaries to the *Noerr* doctrine are established by declaring, and then repeating at every turn, that everything depends on ‘the context and nature of’ the activity. . .if we are unable to offer any further guidance about what this vague reference is supposed to mean, especially when the result here is so clearly wrong as long as *Noerr* itself is reputed to remain good law. . . [Lower courts] will be obliged to puzzle over claims raised under the doctrine without any intelligible guidance about when and why to apply it.

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

market participants. If, however, *Allied Tube's* narrower holding applies, then the determinative factor would be the tactics that are used, and an interested participant who has not engaged in improper methods of persuasion might still enjoy immunity.

C. Application of State Action and *Noerr* to Law School Accreditation¹²⁶

Because of the ambiguity of the state action and *Noerr* doctrines, determining their applicability in any ordinary situation is enough of a challenge. Applying them to ABA accreditation is further complicated by several factors peculiar to standard-setting and accreditation. First, in accreditation, unlike most state action and petitioning immunity situations, there is a restraint that precedes, and is separable, from state action and petitioning:¹²⁷ an accrediting body must set standards and apply those standards in making its decisions. Even if state action fails or does not follow, the accreditation standards continue to apply to the accreditation process. Second, state action is usually limited to the official adoption of the accreditation results. Rarely, if ever, is there state endorsement of the criteria used in reaching those results. This factor raises the question of whether state action immunity extends to ABA accreditation standards even if it applies to the use of accreditation decisions in bar admissions. Third, there is typically no current petitioning of the state: the successful petitioning usually long precedes the particular

¹²⁶ Because the United States Department of Education recognizes the ABA as the sole accrediting body for American law schools, entitling students of the approved schools to receive federal financial assistance, some might argue that the ABA enjoys federal antitrust immunity. This argument should not succeed because there is no explicit immunity granted under the congressional act authorizing the Department of Education to designate accrediting agencies. *See* 20 U.S.C. § 1099b (2002). And, the Supreme Court has long disfavored implicit exemptions from the Sherman Act, noting that “[i]mplied antitrust immunity. . . can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.” *Nat’l Gerimedical Hosp. v. Blue Cross*, 452 U.S. 378, 388 (1981) (quoting *United States v. Nat’l Ass’n of Securities Dealers*, 422 U.S. 694, 714-20 (1975)). There is no clear repugnancy between the Department of Education’s regulation of the ABA accreditation system and the antitrust laws. The Department’s regulations primarily require that accrediting agencies have voluntary memberships, focus on their accrediting activities, and make certain disclosures to students. *See* 34 C.F.R. §§ 602.14-.26 (2000). The regulations certainly do not compel or even facilitate violation of the antitrust laws.

¹²⁷ A preexisting restraint, independent of state action, is also present when trade associations set standards that are later adopted by the state, as in *Allied Tube*.

accreditation decisions.¹²⁸ Thus, it is questionable whether *Noerr* immunity has any application today, long after the successful petitioning. Of the handful of cases dealing with antitrust claims in the accreditation context,¹²⁹ only *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*¹³⁰ has even briefly mentioned these complicating factors.¹³¹

Furthermore, even assuming that there is current petitioning of the state, those efforts are usually limited to persuading appropriate government authorities to adopt and give effect to the accreditation results. There is usually no attempt by the accrediting body to persuade the state to adopt the underlying accreditation standards themselves. Therefore, it is also questionable whether *Noerr* immunity ever attaches to the standards, even if it can be found for the accreditation decisions.

¹²⁸ For example, the ABA petitioned the states many decades ago to allow only graduates from its approved schools to take the bar examination, and largely succeeded in its campaign by 1958. STEVENS, *supra* note 1, at 207-08. Since then, the ABA merely sends its list of accredited law schools to the states annually, along with a copy of its accreditation standards. *See supra* note 24 and accompanying text. The current ABA conduct – the mere communication of its accreditation results to the states – may not qualify as petitioning. Thus, the real petitioning associated with ABA accreditation took place *prior* to the accreditation decisions.

¹²⁹ *See* Mass. School of Law at Andover, Inc. v. Am. Bar Ass'n, 107 F.3d 1026 (3d Cir. 1997); Sherman Coll. of Straight Chiropractic v. Am. Chiropractic Ass'n, 654 F. Supp. 716 (N.D. Ga. 1986), *aff'd*, 813 F.2d 349 (11th Cir. 1987) (holding that chiropractic board of examiners enjoyed petitioning immunity for lobbying state licensing boards); Zavaletta v. Am. Bar Ass'n, 721 F. Supp. 96, 98 (E.D. Va. 1989) (finding that the ABA's denial of accreditation was merely an expression of its opinion that is protected by the First Amendment, and is not a restraint at all); Feldman v. Gardner, 661 F.2d 1295, 1307-08 (D.C. Cir. 1981) (holding that the D.C. Court of Appeals was entitled to state action immunity for requiring graduation from an ABA accredited school as a condition for bar admission); Brandt v. Am. Bar Ass'n, No. Civ. A 3:96-CV-2606D, 1997 WL 279762 (N.D. Tex. May 15, 1997) (dismissing an accreditation-related suit against the ABA on petitioning immunity grounds).

¹³⁰ 107 F.3d 1026 (3d Cir. 1997).

¹³¹ *See id.* at 1037-38 (noting that although the ABA's petitioning activities occurred before the 1970s, its current conduct in communicating its accreditation decisions to the states was also petitioning); *Id.* at 1038-39 (concluding that unaccredited school showed no antitrust injury, but noting that "the ABA is not immune in the enforcement of its standards" because "the state action relates to the use of the results of the accreditation process, not the process itself.")

1. Exclusionary Effect of States' Use of Accreditation Decisions

The primary anticompetitive effect of ABA accreditation comes from the states' effective adoption of the results of that process – through the state's promulgation of bar eligibility rules that allow only graduates of ABA-approved schools to sit for the bar examination. This exclusionary effect would be ipso facto immune from antitrust review if the bar eligibility rules were considered an act of the state, a conclusion that *Hoover v. Ronwin*¹³² seems to compel. As previously discussed, the plaintiff in *Hoover*, who attributed his failure of the Arizona bar examination to the use of a grading formula that allegedly limited the number of passing applicants, sued the Committee on Examinations and Admissions that had set the "curve" and graded the examinations.¹³³ While the Committee administered all aspects of the bar examination and admissions process, the Arizona Supreme Court retained final authority to grant or deny bar admission applications and had also appointed the Committee.¹³⁴ In affirming dismissal of the plaintiff's claim, the United States Supreme Court held that the real actor in *Hoover* was Arizona's highest court¹³⁵ and the challenged activities of the Committee were, therefore, per se immune.¹³⁶

In the most recent private antitrust case involving ABA accreditation, *Massachusetts School of Law*, the Third Circuit likewise found that the states acted as sovereign when they promulgated bar eligibility rules.¹³⁷ Noting that every state regulates admission to the practice of law in its own state,¹³⁸ the Third Circuit held that the unaccredited law school's injuries were the effects of state action because they stemmed from its students' inability to sit for the bar examination in most states. Thus, the ABA enjoyed state action immunity without the need for any further showing of clear state authorization or active state supervision.¹³⁹

¹³² 466 U.S. 558 (1984).

¹³³ *Id.*

¹³⁴ *Id.* at 561-64.

¹³⁵ *Id.* at 573.

¹³⁶ *Id.*

¹³⁷ 107 F.3d at 1036.

¹³⁸ *See id.* at 1035.

¹³⁹ *Id.* at 1036.

This conclusion seems consistent with *Bates* and *Hoover*. While there is some functional delegation of authority to the ABA in that the accreditation decisions (which effectively control *who* will be affected by the exclusionary bar rule) are left to the ABA, the states remain the ultimate decisionmakers. They are free to abandon their reliance on the ABA process at any time, by revising or eliminating the bar eligibility rule at issue. If, as in *Bates*, a state bar association's interpretation and enforcement of a disciplinary rule is considered an act of the state because the rule, though proposed by the private bar, was promulgated by the state supreme court, then surely the states' bar eligibility rules should be considered no less an act of the state. Similarly, if, as in *Hoover*, the grading methods of a court-appointed committee of lawyers can be attributed to the state supreme court itself (which retained formal powers over the process), despite the fact that the state supreme court obviously had little to do with the derivation of the challenged grading formula, then it seems appropriate to treat the bar eligibility rule excluding graduates of non-ABA approved schools as a state act.

2. Stigma Effect of Accreditation Independent of State Action

In addition to the primary exclusionary effect caused by state adoption of the ABA accreditation decisions, the ABA's accreditation activities have another potential anticompetitive effect – the stigma that attaches to unaccredited law schools as a result of their unapproved status, which hinders their ability to compete on the merits. This second effect does not implicate the state action doctrine because it is independent of the anticompetitive effect of the bar eligibility rule. However, under *Noerr*,¹⁴⁰ this stigma effect would still enjoy petitioning immunity so long as it is “incidental” to legitimate petitioning activities.¹⁴¹ In other words, as long as there is valid petitioning of the state, *Noerr* immunity will extend, not only to the anticompetitive effects of the state action that may result from the petitioning, but also to the independent effects on the marketplace that are incidental to the petitioning.

In the context of ABA accreditation, this means that if the ABA has validly sought state adoption of the restrictive bar examination rules, any stigma (i.e., non state-action) injury to

¹⁴⁰ E. R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961).

¹⁴¹ *Id.* at 142-44.

competition will likely be considered “incidental” to those lobbying efforts and will be immunized as well. Given that most states require graduation from an ABA-accredited law school as a condition for taking the bar, the exclusionary effect of the states’ rules (i.e., state action) would obviously be significantly greater than any stigma injury that might be inflicted on the unaccredited schools. Moreover, discussing why it believes its seal of approval to be the only reliable signal of quality in a law school would logically be an integral part of any case that the ABA might make to the states urging acceptance of its accreditation decisions. There is also nothing in the “context and nature” of the petitioning that might be construed as invalid, as in *Allied Tube*.¹⁴² Accordingly, the stigma effect would most likely qualify as “incidental” to the petitioning activity.

However, if the ABA has *not* engaged in any petitioning activities, there is obviously no valid petitioning to which the stigma effect can be incidental, and thus no possible *Noerr* immunity for that stigma effect. In the early to mid-1900s, when the ABA waged its state-by-state campaign to secure the restrictive bar eligibility rules that currently exist in most states, it was unquestionably engaged in valid petitioning. Under *Noerr*, as well as under state action, the anticompetitive effect of the state bar admission rules passed as a result of that successful campaign, is immunized. Furthermore, under *Noerr*, if the petitioning also resulted in incidental stigma injury to the unaccredited law schools at that time, that stigma effect would probably also be exempt from antitrust scrutiny as an “incidental” effect of valid petitioning.

It is an open question, however, whether resting on one’s laurels and relying on *prior* successful petitioning can be considered *current* petitioning so as to immunize stigma injury today. In other words, to the extent that the ABA’s current petitioning consists of merely sending to the states on an annual basis its list of accredited schools, along with a copy of its accreditation standards, does that suffice as a “petition” to invoke *Noerr* immunity for any incidental stigma injury that might flow from the denial of accreditation? I argue that it does not. If there is no petitioning to which the stigma can be incidental, then, of course, no petitioning immunity for the stigma effect is possible.

¹⁴² See *Allied Tube*, 486 U.S. at 499-500.

3. Restraint of the Underlying ABA Accreditation Standards

As previously mentioned, other factors in the accreditation context further complicate the already difficult application of state action and *Noerr* immunity doctrines in typical cases. Accreditation and standard-setting inevitably include standards that preexist state action, and continue to exist whether or not state action follows. Even when states adopt the accreditation decisions, they typically do not specifically adopt the underlying standards that were applied in reaching those decisions.¹⁴³ There is also usually little, if any, attempt to influence the states regarding the standards themselves, even assuming that there is current petitioning of the states to give effect to the accreditation decisions.¹⁴⁴

In non-accreditation cases, this overlay of standards, independent of the ensuing state action and petitioning, is absent. For example, if a group of raisin producers petitions the state to set minimum raisin prices and the legislature obliges by passing a statute so fixing the prices, there is clearly only one restraint – the price fixing. This price fixing is protected as state action and raisin growers enjoy state action immunity for “compliance” with the set prices. The growers’ earlier discussions among themselves on the price levels to seek from the government and their efforts to win favorable legislative action will also be protected under *Noerr*. If the attempt to obtain government action *fails*, then the situation returns to the way it was before the campaign (i.e., no fixed prices), but the growers’ prior agreement on what to ask of the government and their efforts to pass

¹⁴³ In standard-setting cases not involving accreditation, such as *Allied Tube*, the standards are typically embodied in the “codes” submitted to the states for enactment into law. To the extent that the standards are enumerated in a state-adopted code, the state has technically adopted each standard therein. As a practical matter, however, it is unrealistic to think that, in enacting a code consisting of numerous (and usually highly technical) standards relating to a specific industry, states actually consider the substantive merits of each standard and decide to adopt each into law. Therefore, there is no substantive difference between accreditation and other standard-setting programs in this respect.

¹⁴⁴ Similarly, in presenting a code of standards to the states for adoption, a private standard setting organization has technically petitioned the state with respect to all of the standards. But, in truth, a private setting organization, much like an accrediting body, does not generally spend time persuading the state on each standard that is incorporated in the code but, instead, urges state adoption of the code in its entirety. Thus, there is little real difference between accreditation and non-accreditation standard-setting in this respect.

the desired regulation will still receive *Noerr* immunity.¹⁴⁵ Any explicit or implicit agreement, however, among the growers to maintain the prices and other restraints that they had hoped the government would impose, even absent government action, would *not* be protected petitioning activity but would simply be an illegal price-fixing agreement. While the right to petition encompasses the right to agree on what to jointly ask of the government, it does *not* extend to agreements to adhere to the restraints even if the petitioning fails.

In accreditation, the restraint that is requested of the government is the exclusion (or disadvantaging) of institutions that are unaccredited: the ABA asks that the states limit access to the bar examination to graduates of its approved schools. The relevant state action is the restrictive bar examination rule that states promulgate as a result, which essentially effectuates the ABA's accreditation decisions. The states, however, do not actually incorporate the standards used by the ABA in reaching its accreditation decisions. Nor is it likely that the ABA spends time discussing with the states the merits of those substantive standards, even assuming that there is current petitioning of the states to adopt the accreditation decisions. Furthermore, even if some states choose not to give effect to the ABA accreditation results, the underlying standards remain. Given this reality, assuming that state action and *Noerr* protect the restraint relating to the accreditation decisions, do these doctrines also extend to shield the anticompetitive harm flowing from the restraint of the standards? In other words, can the ABA be sued on the theory that one or more of its accreditation standards are anticompetitive, if it is found to enjoy state action and/or *Noerr* immunity for the use of its accreditation decisions to exclude those who do not meet the ABA's standards? I argue that it can.

In the only case that has even mentioned this issue, *Massachusetts School of Law*, the Third Circuit said that “[a]lthough

¹⁴⁵ The existence of petitioning immunity is generally not dependent on the presence of state action immunity. In other words, even if no state action follows (because the state is unpersuaded by the petitioning) or state action fails (perhaps because the “state” response is not deemed an act of the state as sovereign and is otherwise insufficiently authorized or supervised to qualify for state action), the defendant's right to petition the government is still protected and the defendant enjoys petitioning immunity. See *Video Int'l. Prod. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075, 1082-83 (5th Cir. 1988), *cert. denied*, 490 U.S. 1047 (1989) (describing the purpose of *Noerr* as protecting the private party making the petition, and it does not matter whether the government agency acted appropriately in passing the legislation).

the ABA is immune from liability attributable to the state action in requiring applicants for the bar examination to have graduated from an ABA-accredited law school. . . under the Noerr petitioning doctrine, the ABA is not immune in the actual enforcement of its standards."¹⁴⁶ Although the Third Circuit's analysis on this issue was rather limited, as it found no antitrust injury to the plaintiff, the opinion noted that to rule otherwise "would run counter to *Allied Tube*."¹⁴⁷

Although I agree with the conclusion that neither immunity doctrine should extend to the anticompetitive effects resulting from the ABA's promulgation and enforcement of its accreditation standards, the Third Circuit's reliance on *Allied Tube* is questionable. *Allied Tube* is not really analogous to the ABA accreditation scenario because the question in *Allied Tube* was whether and under what circumstances the *participants* in a private standard setting process should enjoy *Noerr* immunity for the anticompetitive market effects of a standard that they had caused the private organization to adopt, not whether the private standard setting organization itself was entitled to immunity for those effects.¹⁴⁸ Had *Allied Tube* involved the trade association deciding, in the normal course of its standard-setting activities, to exclude plastic conduit from its code and to prevail upon the states to adopt the code, and the issue was whether the association enjoyed petitioning immunity for the effects of the no-plastic standard, then the analogy would be more fitting. Stated differently, *Allied Tube* would be more applicable in a hypothetical case against a few accredited law schools for urging the ABA to promulgate, interpret, or enforce accreditation standards in such a way as to deny accreditation to another law school (rather than in a case against the ABA alleging that its formulation and application of accreditation standards constituted a Sherman Act violation).

Apart from this issue, the implications of *Allied Tube* are ambiguous in other respects as well. The Court in *Allied Tube* denied the defendant *Noerr* immunity for the plaintiff's stigma injury, holding that an attempt to influence a private organization is immunized only if its anticompetitive effect is incidental to "valid" petitioning, and that the "context and nature" of the activities in the case (i.e., defendant's subversion of the standard-setting process)

¹⁴⁶ 107 F.3d at 1038-39.

¹⁴⁷ *Id.* at 1039.

¹⁴⁸ *Allied Tube* did not address the issue of state action immunity.

made the petitioning “invalid.”¹⁴⁹ This finding suggests that so long as inoffensive or less offensive tactics are used, participants in a private organization’s standard setting process would still enjoy *Noerr* immunity.

But the opinion also included a broad holding “that at least where. . .an economically interested party exercises decisionmaking authority in formulating a product standard for a private association that comprises market participants, that party enjoys no *Noerr* immunity from any antitrust liability flowing from the effects the standard has of its own force in the marketplace.”¹⁵⁰ Under a reasonable reading of this broader holding, it would seem that if the ABA accrediting body can be construed as comprising market participants, then *no* one who plays a role in setting the accreditation standards and is considered an “economically interested party” would have *Noerr* immunity for the anticompetitive marketplace effects of the standards (i.e., effects other than those resulting from state action), even if no improper tactics are used.¹⁵¹

Before the Department of Justice consent decree was entered in 1995, the ABA Section of Legal Education (and its committees), which administered the accreditation process, was made up predominantly of legal educators¹⁵² and can be fairly construed as a private association comprising “market participants.”¹⁵³ Although the consent decree has significantly lessened the influence of legal educators in the process, it is still almost exclusively controlled by lawyers.¹⁵⁴ While lawyers uninvolved in legal education are not literally “competitors” of law schools seeking accreditation, they are still interested participants in the process because accreditation implicates the status, income, and general well-being of the profession as a whole. Hence, all lawyers may have a collective self-interest in using accreditation to control entry into the profession.¹⁵⁵

¹⁴⁹ *Allied Tube*, 486 U.S. at 502-07.

¹⁵⁰ *Id.* at 509-10.

¹⁵¹ *See id.* at 515 (White, J., dissenting) (criticizing the majority on this point).

¹⁵² *See supra* note 44.

¹⁵³ While individual legal educators are not literally “market participants” in that they do not personally compete for students, they have a substantial personal stake in preserving the status of accredited law schools and, in that sense, could be viewed as interested participants.

¹⁵⁴ *See supra* note 47.

¹⁵⁵ It is well documented that the legal profession, in the early days of ABA

A broad reading of *Allied Tube* would mean that no *Noerr* immunity would be available to the ABA for the market effects of those standards, irrespective of the methods used.

While the implications of *Allied Tube* are far from clear, it is safe to say that neither a broad nor a narrow reading of the case requires extending state action (which was not discussed) or *Noerr* immunity to the ABA's formulation and application of the accreditation standards. To the extent that both doctrines are based on statutory interpretation, then, as antitrust tradition demands for all exemptions, they should be construed narrowly.¹⁵⁶ Furthermore, public policy would seem to favor denying immunity for the standards themselves in these kinds of situations.

Where states adopt private standard-setting rules (including accreditation decisions), their attention to the underlying criteria used in formulating those rules is usually infeasible because accrediting and other rule-making generally involve specialized fields requiring expertise. Although state officials may have some experience in the field, they typically do not have the resources or specific knowledge to make substantive inquiries into the merits of the group's recommendations, much less the reasonableness of the standards on which the recommendations were based. When state officials adopt a private group's recommendations, it is generally because the group (perhaps by its reputation) has convinced them of the recommended action's general desirability; the state officials merely place their trust in the rule-making group with respect to the integrity of the underlying standards. While the political right to petition is important and may justify a group's efforts to persuade the state to adopt its decisions, this right should not be broadly construed to shield the standards on which the decisions were based, when the state was

accreditation, wanted to use the accreditation process to control, not so much the number of future lawyers, but rather the social and ethnic composition of the profession. See STEVENS, *supra* note 1, at 100-01, 126 n.18, 180 n.3, 184 n.41; JEROLD AUERBACH, *UNEQUAL JUSTICE* 74-124 (1976); *Competition I*, *supra* note 1, at 358 & nn. 273-74.

¹⁵⁶ See, e.g., *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 127 (1982); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975) (stating that "there is a heavy presumption against implicit exemptions," even in areas where Congress has enacted a special regulatory scheme). Even if the petitioning immunity doctrine is based on First Amendment principles and not on statutory interpretation of the antitrust laws, it should still be given a limited interpretation, since the First Amendment protection for content-neutral regulations tends to be limited, unless the regulations unduly burden speech and there is no alternative avenue of expression. See LAWRENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 12-2 at 789-94 (2d ed. 1988).

never “persuaded” on the standards but simply had to take on faith their reasonableness because of practical considerations.

With respect to state action immunity, to the extent that the states do not specifically approve (or even review) the underlying accreditation standards, but merely give effect to the accreditation decisions, the *standards* should not be construed as the act of the state as sovereign.¹⁵⁷ If the standards are not acts of the state as sovereign, they must be clearly authorized and actively supervised by the state to be entitled to state action immunity, which they are clearly not in the case of ABA accreditation.

In fact, there is some question as to whether the various states may regulate the uniform standards used by a national accrediting body (such as the ABA) at all, even if they were so inclined, without violating the Commerce Clause of the Constitution. In *National Collegiate Athletic Ass’n v. Miller*,¹⁵⁸ the Ninth Circuit Court of Appeals struck down a Nevada law intended to regulate the NCAA’s procedural rules governing the enforcement of its standards in the state of Nevada, on the ground that it violated the commerce clause. The Ninth Circuit reasoned that since the NCAA has member institutions in over forty states and must enforce its rules uniformly throughout the country, the Nevada law effectively forces the NCAA to adopt Nevada’s rules in all other states, which constitutes a violation of the Commerce Clause.¹⁵⁹

By analogy, it could be argued that if a state sought to tell the ABA what accreditation standards it should apply towards law schools located within that state, the same Commerce Clause objection found in *Miller* would apply. The ABA serves as a national accrediting body for American law schools and, as such, must have uniform accreditation standards. If different states seek to regulate the ABA’s accreditation of law schools within their own borders (other than simply choose to give or not give effect to its accreditation decisions), it would interfere with interstate commerce in the same manner that the Ninth Circuit found unconstitutional in *Miller*. If state regulation of the ABA’s accreditation standards is deemed a violation of the Commerce Clause, then the state action doctrine

¹⁵⁷ *Hoover* is distinguishable in that the Committee on Examination and Admissions was required to file its grading formula with the Arizona Supreme Court before the bar examination was administered. Thus, the Arizona Supreme Court presumably had at least the opportunity to review the challenged grading method. See *Hoover v. Ronwin*, 466 U.S. 558, 576 n.28 (1984).

¹⁵⁸ 10 F.3d 633 (9th Cir. 1993).

¹⁵⁹ *Id.* at 638-39.

would obviously have no application.

IV. First Amendment Free Speech Protection

Courts have traditionally based the *Noerr* doctrine on a statutory interpretation of the antitrust laws, construed in light of constitutional principles, rather than on the First Amendment right to petition itself.¹⁶⁰ It has recently been suggested that accreditation should also enjoy free speech protection under the First Amendment,¹⁶¹ apart from any state action and *Noerr* immunity that might be applicable. The gist of this argument is that accreditation, standing alone, carries no coercive sanctions (the denial or withdrawal of accreditation not being considered a sanction) and, therefore, is no more than a professional group's expression of its private opinion concerning quality.¹⁶²

Advocates of this approach draw a distinction between collaboration for the purposes of standard setting and evaluating whether particular institutions meet those established standards on the one hand, and an explicit agreement to abide by the set standards and sanction non-compliance on the other.¹⁶³ Under this view, an accrediting program is said to fall within the first category of activities and is not considered a restraint because it involves only speech, which is protected under the First Amendment. If this position is valid, then the ABA accreditation program would be constitutionally protected as free speech, independent of any immunity that state action and *Noerr* might afford.

At least one district court has apparently taken this approach.

¹⁶⁰ See, e.g., *Noerr*, 365 U.S. at 137-38 (stating that the Sherman Act is intended to regulate business, not political, activity, but also noting that a different construction of the Act would raise First Amendment problems); see also *supra* note 102 and accompanying text.

¹⁶¹ See generally *Havighurst & Brody*, *supra* note 4, at 220.

¹⁶² See *id.* at 218-19.

¹⁶³ See *Schachar v. Am. Acad. of Ophthalmology, Inc.*, 879 F.2d 397, 399 (7th Cir. 1989) ("There can be no restraint of trade without a restraint. . . [W]hen a trade association provides information. . .but does not constrain others to follow its recommendations, it does not violate the antitrust laws.") (citation omitted); *Havighurst & Brody*, *supra* note 4, at 213-16 (viewing accreditation as distinct from self regulation, on the theory that accreditation does not include any explicit agreement to comply with the standards set or any sanction for non-compliance, other than non-approval).

In *Zavaletta v. American Bar Ass'n*,¹⁶⁴ a trial court dismissed an antitrust accreditation case against the ABA, holding that the ABA's accreditation activities "imposed no restraint on trade, unreasonable or otherwise."¹⁶⁵ Noting that the ABA never limited its members' freedom to hire graduates of unaccredited law schools or to teach at those schools, or restricted the unaccredited schools' access to prospective students, the district court concluded that the ABA was merely expressing "its educated opinion" in denying accreditation.¹⁶⁶ Additionally, it found the ABA's communication of its accreditation decisions to the states to be protected by the First Amendment.¹⁶⁷

The argument that accreditation is mere speech, and not a restraint, unless there is explicit coercion or agreement to adhere to the standards, is somewhat unreal. Had there been any coercion or even a simple agreement on the part of the participants to comply with the set standards, a restraint subject to antitrust review would clearly exist.¹⁶⁸ While there is a conceptual difference between the collective setting of standards and an actual agreement to abide by the agreed-upon standards, the distinction is more theoretical than real. In any standard-setting by a group of interested participants, there is at least an implicit expectation or understanding that the participants will follow the standards set, or the standard-setting process would be meaningless.¹⁶⁹ Given that case, it is unduly

¹⁶⁴ 721 F. Supp. 96 (E.D. Va. 1989).

¹⁶⁵ *Id.* at 98.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* In an alternative holding in *Massachusetts School of Law*, the trial court also held that the ABA, in denying accreditation to the plaintiff law school, was merely expressing a professional opinion that is protected by the First Amendment. *Mass. Sch. of Law*, 937 F. Supp. at 444-45. In affirming the trial court's grant of summary judgment to the ABA, the Third Circuit did so only on state action and *Noerr* grounds, and did not expressly rule on the lower court's First Amendment holding.

¹⁶⁸ See Havighurst & Brody, *supra* note 4, at 212-13 (agreeing that "a collective agreement to boycott anyone who did not follow its standards voluntarily" or "naked agreements among competitors to sell only products meeting agreed-upon standards" would violate antitrust laws).

¹⁶⁹ See *Allied Tube*, 486 U.S. at 500 (observing that an "agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products"). As previously noted, the accreditation activities of the ABA Section of Legal Education and its committees can be construed as standard setting by interested participants both before and after the 1995 consent decree. See *supra* notes 156-159 and accompanying text.

formalistic to argue that such standard setting is merely an exercise of free speech, when it is acknowledged that an explicit agreement by the participants to conform to (or enforce) the standards would be actionable.

The further contention that accreditation is merely speech, not conduct, because it carries no coercive force on its own¹⁷⁰ seems equally illusory in a situation where the state gives effect to the accreditation results. In a technical sense, compliance with accreditation standards is voluntary. No law school is compelled to conform to the ABA standards and no penalty is meted out to those that choose not to comply, except to the extent that accreditation is denied or withdrawn. Thus, law schools that are indifferent to accreditation are perfectly free *not* to heed the ABA's standards. Given the practical reality that ABA approval is essential for the survival of most law schools,¹⁷¹ however, it is disingenuous to say that the denial or withdrawal of accreditation for noncompliance with the standards is *not* a form of sanction.

In one antitrust case unrelated to accreditation, the Seventh Circuit did say that speech unaccompanied by coercion or sanction cannot be considered a restraint.¹⁷² But the speech in that case was classic speech and is very different from the so-called "speech" in standard-setting situations.¹⁷³ *Schacher* involved a press release issued by the American Academy of Ophthalmology that described a new surgical ophthalmology procedure as "experimental," called for more research, and urged caution on the part of patients, doctors and hospitals alike. Several ophthalmologists sued the Academy alleging that the press release was a restraint of trade in violation of the Sherman Act. Finding for the defendant, the Seventh Circuit said that simply stating an opinion without constraining others to follow it is not a restraint,¹⁷⁴ and that "[a]n organization's towering reputation does not reduce its freedom to speak out."¹⁷⁵

The court stressed that the Academy did nothing other than

¹⁷⁰ See Havighurst & Brody, *supra* note 4, at 212-16 (arguing that collective accreditation, standing alone, sanctions no one and should be considered mere speech, not a restraint).

¹⁷¹ See *supra* note 3 and accompanying text.

¹⁷² *Schacher v. Am. Acad. of Ophthalmology*, 870 F.2d 397 (7th Cir. 1989).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 399.

¹⁷⁵ *Id.*

issue its press release. It did not require members to cease performing the procedure, or discipline or expel anyone for disregarding its warning. Nor did it induce hospitals to restrict those surgeries or urge insurers to withhold payment for them. In other words, it was pure speech, with no implicit agreements, and no coercion or sanction in any form for dissidents. In contrast, in accreditation, there is usually an implicit agreement of compliance with the standards among schools participating in the process. There is also coercion and sanction in the sense that non-compliance means a loss of accreditation status or a failure to obtain such status, which portends the failure of the law school.

In any event, even assuming that accreditation does constitute mere speech, immunity from the antitrust laws does not necessarily follow. That the First Amendment does not provide blanket protection for commercial speech, i.e., speech related to the “economic interests of the speaker and its audience,”¹⁷⁶ is beyond debate.¹⁷⁷ In an analysis articulated in *Central Hudson Gas v. Public Service Commission*,¹⁷⁸ the Supreme Court said that for commercial speech to come within the First Amendment clause, it must “concern lawful activity and not be misleading.”¹⁷⁹ In other words, untruthful, misleading, or deceptive statements do not enjoy constitutional protection.¹⁸⁰ In a case involving a false pre-announcement of a new product, for example, the Seventh Circuit held that a “knowingly false statement designed to deceive buyers” could constitute an exclusionary practice violative of the Sherman Act.¹⁸¹ Even speech that is normally labeled “opinion” is not automatically entitled to absolute First Amendment protection,¹⁸² because it is understood that

¹⁷⁶ *Cent. Hudson Gas v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980).

¹⁷⁷ *See id.*; *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 455-57 (1978) (recognizing the distinction between commercial speech, which is traditionally subject to government regulation, and other varieties of speech); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748, 771-72 (1976) (stating that, especially in the area of commercial speech, the government may restrict speech that is not demonstrably false, but merely deceptive or misleading).

¹⁷⁸ 447 U.S. 557 (1980).

¹⁷⁹ *Id.* at 566.

¹⁸⁰ *See, e.g.*, *Va. State Bd. of Pharmacy*, 425 U.S. at 771-72; *MCI Communications v. Am. Tel. & Tel. Co.*, 708 F.2d 1081, 1129 (7th Cir.), *modified* by 1983-2 Trade Cas. (CCH) 65,520 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

¹⁸¹ *See MCI Communications*, 708 F.2d at 1128-29.

¹⁸² *See, e.g.*, *Washington v. Smith*, 80 F.3d 555, 556 (D.C. Cir. 1996) (“There

expressions of opinion “often imply an assertion of objective fact”¹⁸³ that can be as deceptive or misleading as statements of fact.¹⁸⁴ It would be hard, of course, to characterize the normative judgment of an accreditation standard as a lie, or as deceptive.¹⁸⁵

However, even for speech that concerns lawful activity and is not misleading, government regulation would still be permissible under *Central Hudson*, if the government interest in the regulation is substantial, if the regulation directly advances the government interest, and if the regulation of the speech in question is narrowly tailored to serve that interest.¹⁸⁶ Preventing anticompetitive conduct, which application of the antitrust laws is intended to do, is obviously a substantial government interest; applying the antitrust laws to alleged restraints of trade that are effectuated by speech, not overt acts, directly advances that government interest. To afford blanket First Amendment protection to seals of approval, standard-setting, and accreditation on the ground that mere speech is involved would be to ignore market realities. Restraints of trade can be effectuated by speech, as well as by overt acts, and they can be just as harmful to competition. For example, if a group of competitors creates a seal of approval based on rather subjective factors and denies approval to pesky competitors for the primary purpose of excluding or disadvantaging them (due to the unwillingness of suppliers and customers to deal with those without the seal of approval), the effects of this “speech” may be as anticompetitive as if the parties had engaged in a boycott through traditional “conduct” activities. In that event, the government’s interest in preventing these anticompetitive effects is substantial and the use of the antitrust laws to circumscribe the “speech” directly serves this government interest. Thus, under *Hudson*, the application of the antitrust laws to such commercial speech is entirely appropriate assuming that its use is no broader than necessary.

Similarly, if it is alleged, in a law school accreditation case,

is no categorical First Amendment immunity against defamation suits for statements of opinion.”); *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18-19 (1990) (statements couched as opinion but implying a false assertion of fact may be actionable libel).

¹⁸³ *Milkovich*, 497 U.S. at 18.

¹⁸⁴ *Id.* at 19.

¹⁸⁵ On the other hand, an inaccurate finding of non-compliance with the standards, rather than the judgment guiding the formulation of the standards, can be more easily attacked as untruthful or deceptive.

¹⁸⁶ *Cent. Hudson*, 447 U.S. at 566.

that any of the ABA accreditation standards (“speech”) were promulgated to lessen competition, it would seem that subjecting the “speech” to antitrust review would advance a substantial government interest. To the extent that a rule of reason analysis is applied to determine antitrust liability, the regulation is “not more extensive than is necessary”¹⁸⁷ to serve the government interest in protecting competition, and should be permissible under the First Amendment.

V. What Lies Ahead

As a historical matter, ABA accreditation had little market impact until the organization succeeded in securing the backing of most states, in the form of state-promulgated bar eligibility rules that catapulted ABA approval from being a desirable status symbol for law schools to being a formidable barrier to entry. It is the states’ action in giving effect to the ABA’s accreditation decisions that has legally protected the organization, under state action and *Noerr*, from all previous private antitrust challenges to its accreditation activities. Recently, however, the ABA chose not to aggressively assert these threshold immunity doctrines by agreeing to a settlement in the accreditation suit brought against it by the Justice Department without first insisting on summary disposition based on these two doctrines. Although a consent decree obviously has no precedential impact, the ABA’s concession may nonetheless leave it more vulnerable on the immunity issue. At the very least, it is likely to encourage more accreditation-related suits and perhaps more resolute arguments from future plaintiffs for limiting the scope of these immunity doctrines.

I argue in this paper that the case for extending state action and *Noerr* immunity to all ABA accreditation related activities is not very strong, despite common assumptions to the contrary. While the anticompetitive effect that flows from state bar rules limiting bar admission to graduates of ABA-accredited schools may well constitute state action, it is questionable whether any stigma effect caused by ABA accreditation is protected by *Noerr*. Furthermore, it is doubtful that either state action or *Noerr* insulates the underlying accreditation standards from antitrust review because there is usually neither state action nor ABA petitioning involving the standards themselves. The day may come soon when the ABA accreditation system must stand or fall on the merits.

¹⁸⁷ *Id.*
