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Professional Activities and the Antitrust Laws

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PROFESSIONAL ACTIVITIES AND THE ANTITRUST LAWS

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I. Introduction

The applicability of the antitrust laws to the so-called "learned professions" has been discussed for over 50 years.[1] However, two recent events suggest that some of the questions which have arisen with respect to this asserted immunity—either partial or total—may soon be resolved.[2] During the same week last year, the Court of Appeals for the Fourth Circuit held in favor of the Virginia State Bar and a county Bar Association in an action in which they were alleged to have violated § 1 of the Sherman Act by implementing minimum fee schedules,[3] and the Justice Department brought an action against the Oregon State Bar, alleging similar violations.[4] Further clarification can be expected since the Supreme Court has granted plaintiff's petition for a writ of certiorari in the Virginia case.[5] This article will examine the scope and underlying theories of the alleged immunity of professionals from the antitrust laws and then will suggest a methodology by which the courts may decide these questions.[6]

The alleged immunity of professionals from the antitrust laws is predicated on at least three different theories: (1) Professional activities do not constitute "trade or commerce" within the meaning of the antitrust laws.[7] This historical doctrine is based on two other related rationales: (A) Professionals primarily pursue the well-being of their clients and the general public, and any restraints they engage in are not motivated by a desire to lessen competition, and (B) The ethical ideals

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1 See discussion of *Federal Baseball Club v. Nat'l League,* 259 U.S. 200, 209 (1922), at text accompanying notes 14-22 *infra.*

2 One of the reasons for the indecision as to the present state of the law is that several actions brought by the Justice Department against professional groups have been settled by consent decree, thereby avoiding an adjudication of the legality of the practice under attack. *See, e.g.,* United States v. Prince George's County Board of Realtors, 1971 TRADE CAS. ¶ 73,393 (D. Md. 1970); United States v. Am. Soc'y of Civil Engineers, 1972 TRADE CAS. ¶ 73,950 (S.D.N.Y. 1972); United States v. Am. Institute of Architects, 1972 TRADE CAS. ¶ 73,981 (D.D.C. 1972); United States v. Am. Institute of Certified Pub. Accountants, Inc., 1972 TRADE CAS. ¶ 74,007 (D.D.C. 1972); United States v. Real Estate Bd., Inc., 1974–2 TRADE CAS. ¶ 75,350 (S.D.N.Y. 1974); United States v. Real Estate Bd., Inc., 1974–2 TRADE CAS. ¶ 75,355 (W.D.N.Y. 1974).

3 Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974), *cert. granted,* 43 U.S.L.W. 3246 (Oct. 29, 1974).

4 United States v. Oregon State Bar, Civil No. 74-362 (D. Ore., filed May 9, 1974), *defendants' motion for summary judgment denied,* 1974-2 TRADE CAS. ¶ 75,400 (1974).

5 43 U.S.L.W. 3246 (Oct. 29, 1974).

6 Among the occupations which have been considered "professional" in certain contexts are doctors, lawyers, accountants, veterinarians, dentists, real estate brokers, clergymen and engineers. This article will not attempt to list those occupations which fall within the definition. Instead, as will be suggested, it is much more important to focus on the type of activity engaged in by the "professional," and the effect on competition of that activity.

7 This doctrine is sometimes referred to as the "learned professions exemption." However, the "trade or commerce" theory of exemption is somewhat narrower. As the discussion below will illustrate, while the original rationale for the exemption for professionals was indeed based on the "non-trade" character of their activities, the modern basis of the exemption focuses on the following two related rationales.

and values of the professions would not only be inconsistent with competition, but might be jeopardized by the very conduct the antitrust laws seek to promote in the business world. (2) The activities of professionals are local and thus do not satisfy the requirement of the antitrust laws that the restraint either be in or affect interstate commerce. (3) State agencies and officials actively supervise and regulate professional conduct, thereby displacing the federal antitrust laws.

A threshold argument can obviously be made that the activity is not one about which the antitrust laws are ever concerned regardless of the occupation of the person engaging in that conduct. For example, the defendants in the *Goldfarb* case argued that the promulgation of minimum fee schedules simply did not constitute "price fixing."[8] Similarly, a suit under the antitrust laws attacking the procedures followed by Bar Examiners in admitting a person to practice in that state under a group boycott or limitation of supply theory would no doubt face vigorous arguments based on the definition of the conduct.[9] I will avoid this definitional struggle and instead assume that the conduct under consideration is within the scope of the antitrust laws.

It should be noted, however, that the definitional debate is significant in another respect: Once defined under a particular rubric, certain conduct has been deemed illegal *per se* and a court will not consider evidence of the lack of any anticompetitive effect, or the presence of benefits to competition, from the conduct in question.[10] While it might be appropriate to characterize minimum fee schedules as price fixing, it does not necessarily follow that they should be proscribed in all instances.

II. Learned Professions Exemption

The primary theory for a professional exemption relies on a mixture of statutory interpretation and policy argument. The statutory basis is that the antitrust laws apply only if the conduct in question is "trade or commerce." Proponents of the exemption then maintain that professionals merely render services or personal efforts, rather than sell goods or conduct trade. The policy arguments

8 Brief for Appellant Fairfax Bar Association at 44-51, Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974). For an elaborate demonstration that minimum fee schedules are price-fixing, *see* Note, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption That Doesn't Exist*, 3 U.C.L.A.-ALASKA L. REV. 207, 220-22 (1974).

9 Examples of other kinds of activities by professionals which would arguably be shielded by a professional exemption are the proscription on advertising and soliciting by attorneys, *see* ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-3 and EC 2-9; or restrictions on admission to medical societies and limitations on the hospitals at which a physician may practice. Any listing of the conduct included in an exemption would not be exhaustive.

The primary focus of this paper on attorneys' minimum fee schedules is only because of the current interest in this area. Any discussion of the considerations that courts should apply in dealing with fee schedules is intended to apply to other professions and other types of conduct as well. In fact, one of my conclusions is that the various types of professional restraints should be dealt with on a case-by-case basis.

10 Price fixing has been *per se* illegal for almost half a century, United States v. Trenton Potteries Co., 273 U.S. 392 (1927). *See also*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (conspiracy to boycott); United States v. Topco Associates, Inc., 405 U.S. 596 (1972) (horizontal territorial and customer restraints); and Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958) (tying arrangements).

are variations on this theme.[11] Professionals argue that they are interested in the well-being of their clients, patients, or the general public; any restraints they impose are not motivated by a desire to lessen competition. They also urge that not only are these higher ethical ideals not inconsistent with competition, but that they might in fact be jeopardized by the conduct which the antitrust laws seek to promote in the business world.

A. *Judicial Precedents*

Although the Sherman Act does not explicitly limit its applicability to a person engaged in "trade or commerce," the conclusion that the antitrust laws do not apply to any conduct which is not "trade or commerce" seems a logical negative inference from the language of the statute.[12] The Supreme Court has, however, never explicitly held that the professions do not fall within this statutory language.[13] The following discussion will review the historic development of this exemption. Although both the cases and sound policy considerations support at least a partial exemption for the learned professions, the cases also suggest that it is unwise to predicate this exemption solely on an interpretation of the "trade or commerce" requirement.

1. Historical Development in the Federal Courts

The genesis of the suggestion that the antitrust laws do not apply to the professions—since they do not satisfy the "trade or commerce" requirement—may be found as dictum in Mr. Justice Holmes' opinion written over 50 years ago in *Federal Baseball Club v. National League*.[14] A baseball club that had joined with seven other clubs in a new league, in what proved to be an unsuccessful attempt to challenge the monopoly over professional major league baseball enjoyed by the two existing baseball leagues, sued for treble damages.[15] The Supreme Court did not reach the merits of the case, since it affirmed the Circuit Court's conclusion that the "defendants were not within [the coverage of] the Sherman Act."[16] Holmes stated that "the exhibition, although made for money

11 Of course, the policy arguments do use the statute as a starting point. The assertion is that the Sherman and Clayton Acts should be read so as not to include the activities of professionals, because of the following policy reasons.

12 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1970).

13 In fact, the Supreme Court has expressly declined to consider this question on at least one occasion.

> Much argument has been addressed to the question whether a physician's practice of his profession constitutes trade under § 3 of the Sherman Act. In the light of what we shall say with respect to the charge laid in the indictment, we need not consider or decide this question.

Am. Medical Ass'n v. United States, 317 U.S. 519, 528 (1943). However, some lower federal and state courts have so interpreted the Sherman Act. *See, e.g.*, Riggall v. Washington County Medical Soc'y, 249 F.2d 266, 268 (8th Cir. 1957).

14 259 U.S. 200 (1922).

15 The complaint alleged violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970). For additional details see the opinion of the Circuit Court of Appeals, 269 Fed. 681 (D.C. Cir. 1920).

16 259 U.S. at 208.

would not be called trade or commerce in the commonly accepted use of those words."[17] Then, in dictum specifically referring to the legal profession, he continued:

> That which in its consummation is not commerce does not become commerce among the States because the transportation that we have mentioned takes place. To repeat the illustrations given by the Court below, a firm of lawyers sending out a member to argue a case, or the Chautauqua lecture bureau sending out lecturers, does not engage in such commerce because the lawyer or lecturer goes to another State.[18]

This decision illustrates the two separate and distinct bases for the "trade or commerce" doctrine: the failure to satisfy the definitional requirements of "trade or commerce" and the failure to satisfy the interstate commerce requirement.[19] Although both theories are jurisdictional, the former focuses on the nature of the activity, while the latter focuses on its scope and effect. It was the failure to distinguish these two theories that led to much of the confusion in some later decisions dealing with the professional exemption.

The oft-quoted first sentence[20] might be cited for the proposition that operating an organization of major league baseball clubs (or, by analogy, operating a law firm or a State Bar Association) is not "trade or commerce," however that requirement is defined. However, the next two sentences suggest either that organized baseball simply was not in interstate commerce, regardless of whether characterized as "trade or commerce" or the mere rendition of personal effort,[21] or that, more likely, this particular conduct should be characterized as a service rather than a trade, precisely because defendants were not engaging in it among the States.[22]

The assertion that professional activities are not "trade or commerce"—quite apart from any interstate considerations—found its strongest support in the Supreme Court's opinion in *Federal Trade Commission v. Raladam Co.*,[23]

17 *Id.* at 209.

18 *Id.* An extensive discussion of the theories underlying the *Federal Baseball* decision may be found in Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities,* 82 YALE L.J. 313, 318-20 (1972). This case is described as "a throwback—what is perhaps the nadir of all antitrust decisions" in Kallis, *Local Conduct and the Sherman Act,* 1959 DUKE L.J. 236, 241.

For later cases dealing with the exemption for professional baseball, *see* Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953) and Flood v. Kuhn, 407 U.S. 258 (1972).

19 This latter basis for the exemption is the subject of Part III of this article.

20 *See* text accompanying note 17 *supra.*

21 A similar argument—that insurance companies were not engaged in interstate commerce because the insurance business was not "commerce"—was made and rejected in United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 537-38 (1944).

22 The distinction is significant, in view of the history of the theories underlying the "learned professions" exemption. An examination of more recent cases will show that originally the exemption was based on an assertion that professionals were not engaged in "trade or commerce." Although the Supreme Court explicitly avoided the "trade or commerce" issue in Am. Medical Ass'n v. United States, 317 U.S. 519 (1943), discussed *infra* in text accompanying notes 37-40, it is my belief that since that decision any exemption for professionals can be predicated only on the policy arguments which result from the different ethical and commercial standards under which professionals operate.

23 283 U.S. 643 (1931).

a decision which has since been widely criticized on other grounds.[24] Pursuant to § 5 of the Federal Trade Commission Act,[25] the Commission charged the manufacturer of an obesity cure with unfair methods of competition in that the medicine might be harmful if not taken under a doctor's supervision. Although the Court found that the Commission had sufficient evidence to conclude that these harmful effects might result, the question on appeal was whether the F.T.C. had jurisdiction to restrain the manufacture and sale of this product. The Court stated that an essential jurisdictional element was that there be injury to competition: "[T]he trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured."[26] The F.T.C. maintained that doctors might be adversely affected by the respondent's conduct. Dismissing this possibility, the Court said:

> Of course, medical practitioners, by some of whom the danger of using the remedy without competent advice was exposed, are not in competition with respondent. They follow a profession and not a trade, and are not engaged in the business of making or vending remedies but in prescribing them.[27]

This, then, is an explicit statement that doctors practice a profession rather than engage in trade. However, the context within which the statement was made dilutes its value. The Court was not concerned with whether physicians were engaged in conduct falling within the language of § 1 of the Sherman Act.[28] Instead, the Court's inquiry was merely whether the alleged injury suffered by doctors was sufficiently more specific than by the general public, to confer jurisdiction on the Commission under § 5 of the Act. The first sentence of the quoted statement disposes of this argument; the further characterization of the physicians' activities is only dictum and then not even directly in point.

The next Supreme Court decision to consider the meaning of "trade or commerce"—*Atlantic Cleaners & Dyers, Inc. v. United States*[29]—presented an opportunity for the Court to interpret this phrase without the limitations which the Commerce Clause might have imposed on an otherwise broader construction. The defendants, who were engaged in cleaning, dyeing, and renovating wearing apparel within the District of Columbia, were charged under § 3 of the Sherman Act[30] with fixing prices and dividing customers among competitors, practices which are today clearly *per se* violations of the Sherman Act.[31] Defendants argued

24 *See, e.g.*, FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 241-44 (1972); Holloway v. Bristol-Myers Corp., 485 F.2d 986, 992, 997 (D.C. Cir. 1973). *See also* FTC v. Brown Shoe Co., 384 U.S. 316, 320-21 (1966).

25 15 U.S.C. § 45 (1970).

26 283 U.S. at 649.

27 *Id.* at 653.

28 *See* note 12 *supra.*

29 286 U.S. 427 (1932).

30 15 U.S.C. § 3 (1970). Section 3 of the Sherman Act provides:

> Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is declared illegal.

31 United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Topco Associates, Inc., 405 U.S. 596 (1972).

that they were "engaged solely in the performance of labor and rendering service . . . , and that this did not constitute trade or commerce within the meaning of the Antitrust Act."[32] They further argued that the Sherman Act extended only to those forms of "trade" which were interstate commerce within the meaning of the Commerce Clause. The Court responded that since the action had been brought under § 3 of the Sherman Act—which governs restraints of trade in territories and in the District of Columbia—rather than under § 1, the breadth of the language "trade or commerce" was not governed by any Commerce Clause limitations.[33] Section 3 had been enacted under the power given by Art. 1, § 8, cl. 17 of the Constitution to legislate for the District of Columbia. Therefore, here the meaning of "trade or commerce" could be far broader than mere "interstate commerce," as that phrase was at the time more narrowly interpreted.[34]

In an effort to interpret the phrase "trade or commerce," the Court turned to an opinion written by Mr. Justice Story[35] in a libel action involving the forfeiture of a fishing vessel: "Wherever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the learned professions, it is constantly called a *trade*."[36] The Court then concluded that the defendants had restrained trade in violation of § 3 of the Sherman Act. Significantly, although once again the Supreme Court did not hold that the learned professions were not "trade or commerce," this is another statement to that effect.

The Court was squarely confronted with the question whether the professions were "trade or commerce" in *American Medical Association v. United States*.[37] The AMA and the Medical Society of the District of Columbia were indicted and convicted for conspiring to violate § 3 of the Sherman Act, by impeding a nonprofit organization of government employees which had set up a group health plan and employed its own physicians in an attempt to share the risk of medical expenses.[38] The defendants argued that the Sherman Act did not apply to them,

32 286 U.S. at 431.

33 Assuming, but not deciding, that if the acts here charged had involved interstate transactions appellants would not come within the provisions of § 1, because the scope of the words "trade or commerce" must there be limited by the constitutional power to regulate commerce, it does not follow that the same words contained in § 3 should be given a like limited construction.
286 U. S. at 433.

34 *See* text accompanying notes 146-50 *infra*.

35 The Schooner Nymph, 18 F. Cas. 506 (No. 10,388) (C.C.D. Me. 1834).

36 *Id.* at 507, *quoted* in Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436 (1932) (emphasis in original).

37 317 U.S. 519 (1943).

38 The opposition by some members of the medical profession to prepaid health insurance foreshadowed the present opposition by many lawyers to prepaid legal services. Organized opposition by lawyers to such plans may have many of the effects on competition which led the Court to condemn the defendants' activities in the *AMA* case.

A recent survey of 38 state bars showed that in two states, "their membership is significantly unreceptive to the whole idea of prepaid, and 11 specify that there is widespread antipathy toward closed panels," wherein the lawyer to which the client can turn is designated in advance by his insurance carrier or employer. AM. B. NEWS, Nov., 1974, at 5. Unless some type of exemption applies to the legal profession, such organized opposition to prepaid legal services would probably be dealt with under the Sherman Act § 1 prohibitions on concerted refusals to deal, see, *e.g.*, Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941).

For some views on the antitrust implications of the American Bar Association's positions on prepaid legal service plans, which were adopted by the ABA at the February, 1974,

since a physician's practice of his profession did not constitute "trade." The Court declined to rule on this argument,[39] saying that "the calling or occupation of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was such obstruction and restraint of the business of Group Health."[40]

This decision is significant for two reasons. First, it calls into question the dicta in prior cases that the professions were not "trade." But, far more significantly, it marks a shift in focus: The Court said the result should not depend on whether they were defined as tradesmen or professionals. Instead, the existence of any alleged exemption should depend on whether the *object* of the restraint is itself engaged in commerce. The case shifts the focus away from the persons engaging in the conduct, in favor of a focus on the effect of the restraint upon competition.

Seven years later, the Court was presented with another opportunity to pass upon the status of the professions under the antitrust laws;[41] once again it expressly declined to do so.[42] The National Association of Real Estate Boards, its local affiliate in the District of Columbia, and certain individual Realtors were accused in a civil proceeding[43] of having engaged in a price-fixing conspiracy in violation of § 3 of the Sherman Act by adopting and adhering to standard commission rates.[44] In reviewing the trial court's judgment for the defendants,[45] the Supreme Court was asked to consider the argument that the business of a real estate agent is not "trade" within the meaning of § 3. Instead, Mr. Justice Douglas' opinion never defined "tradesman." On several occasions, he stated that the word is used in a "broad sense" in the antitrust statutes, citing with approval

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meeting in Houston, Texas, as amendments to the Code of Professional Responsibility, see 60 A.B.A.J. 791-96 (1974) and 60 A.B.A.J. 1410-14 (1974).

39 *See* note 13 *supra.*

Apparently the District Court had concluded that the defendants were not engaged in "trade or commerce." 28 F. Supp. 752, 756 (D.D.C. 1939). In its opinion reversing the trial court, the Circuit Court observed: "The learned trial judge felt that [the citation by the Supreme Court in *Atlantic Cleaners* of *The Schooner Nymph* case] . . . should be regarded as an authoritative statement of the Supreme Court that the professions were not trades and therefore not within the intent of the Act. But we think this by no means follows." United States v. Am. Medical Ass'n, 110 F.2d 703, 709 (D.C. Cir. 1940).

40 317 U.S. at 528.

41 United States v. Nat'l Ass'n of Real Estate Bds., 339 U.S. 485, 491-92 (1950).

42 In the period between the *AMA* case and the *Real Estate Boards* case, in a dissenting opinion, Chief Justice Stone repeated the statement that the practice of law was not commerce. In United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944), he cited the *Federal Baseball* case for the proposition that

> [t]he practice of law is not commerce, nor, at least outside the District of Columbia, is it subject to the Sherman Act, and it does not become so because a law firm attracts clients from without the state or sends its members or juniors to other states to argue cases, or because its clients use the interstate mails to pay their fees.

Id. at 573. The majority did not respond to this assertion, probably because it was unnecessary to its decision involving the applicability of the antitrust laws to the insurance business.

43 The same conspiracy had first been the subject of criminal proceedings. At the close of the government's case, the District Court had granted the defendants' motion for a judgment of acquittal. United States v. Nat'l Ass'n of Real Estate Bds., 80 F. Supp. 350 (D.D.C. 1948).

44 The parallel between this practice and the setting of minimum fee schedules by attorneys does not need much emphasis.

45 The Supreme Court affirmed the District Court's judgment in favor of the National Association and one of the individual defendants. The judgment in favor of the other defendants was reversed.

Mr. Justice Story's opinion in *The Schooner Nymph.*[46] Then, he simply concluded that real estate brokers were in fact engaged in a "trade."[47]

The Court explicitly noted that it was not passing on the applicability of the antitrust laws to the professions.[48] The opinion does, however, provide some clues. Suggesting the continued vitality of the professional exemption is Douglas' quotation of the language in *The Schooner Nymph.* On the other hand, the opinion states that "[t]he fact that the business involves the sale of personal services rather than commodities does not take it out of the category of 'trade' within the meanin of § 3 of the Act."[49] Furthermore, Mr. Justice Jackson's dissent argued that real estate brokers are, from an antitrust viewpoint, indistinguishable from other professionals;[50] he seems to imply that this decision cripples the exemption for all professionals.

A careful reading of the opinion still leaves room for this exemption, although certainly not for an across-the-board application. Douglas points out that

> [n]o reason of policy has been advanced for reading § 3 of the Act less literally than its terms suggest. The competitive standards which the Act sought to preserve in the field of trade and commerce seem as relevant to the brokerage business as to other branches of commercial activity.[51]

To the extent that a restraint is primarily intended to increase the profits of the participants therein, there probably is no more reason to extend an exemption to a professional than to any businessman. However, if professionals can demonstrate the policy reasons to which Douglas alluded, the professional exemption should be recognized. Furthermore, to the extent that the tradesman/professional dichotomy is no longer predominant, it should not matter whether a professional is deemed to engage in "trade or commerce," so long as these policy reasons justify a different application of the antitrust laws.

The assertion that the professions were not "trade or commerce" within the meaning of the Sherman Act was made, and again not passed upon, in a decision[52] rendered two years after the *Real Estate Boards* case. The Oregon State Medical Society, eight county medical societies, and an affiliated corporation engaged in the sale of prepaid medical care[53] were charged with violating §§ 1 and 2 of the

46 18 F. Cas. 506, 507 (No. 10,388) (C.C.D. Me. 1834), *quoted* in 339 U.S. at 490-91. This case was also relied on in the *Atlantic Cleaners* case, and is discussed in text accompanying notes 35-36 *supra.*

47 We have said enough to indicate we would be contracting the scope of the concept of "trade," as used in the phrase "restraint of trade," in a precedent-breaking manner if we carved out an exemption for real estate brokers. Their activity is commercial and carried on for profit.
339 U.S. at 492.

48 "We do not intimate an opinion on the correctness of the application of the term ["trade"] to the professions." 339 U.S. at 491-92.

49 339 U.S. at 490.

50 "I am not persuaded that fixing uniform fees for the broker's labor is more offensive to the antitrust laws than fixing uniform fees for the labor of a lawyer, a doctor, a carpenter, or a plumber." 339 U.S. at 496.

51 339 U.S. at 492.

52 United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952).

53 These physician-sponsored plans were the forerunners of today's broad medical and hospitalization insurance plans, controlled largely by Blue Cross and Blue Shield. For a discussion of special antitrust problems relative to the medical profession, see Comment, *Private Physician Unions: Federal Antitrust and Labor Law Implications,* 20 U.C.L.A. L. Rev. 983 (1973).

Sherman Act by allegedly conspiring to monopolize the business of providing prepaid medical care and to restrain competition between various doctor-sponsored plans. The district court gave a judgment for the defendants, holding that supplying prepaid medical care did not constitute "trade or commerce" within the meaning of the Sherman Act[54] and also finding that there was no violation on the merits.

The Supreme Court affirmed the decision on the merits, agreeing with the district court that the defendants did not engage in an unlawful monopoly and that any restraint of trade actually engaged in was not unreasonable. The opinion noted the existence of the "trade or commerce" issue in two separate places,[55] but the Court again failed to express an opinion on this defense. However, Mr. Justice Jackson did make a statement lending at least limited support to the professional exemption, although not based on the "trade or commerce" theory employed in the pre-1940's cases:

> We might observe in passing, however, that there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters. This Court has recognized that forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.[56]

In the past twenty years, the Supreme Court has not decided a case raising the status of the professional exemption. However, lower courts—both state and federal—have recently passed on this question and the results, as might be expected, have been inconsistent.

One of the more significant decisions[57] involved the preparation and distribution of price schedules on prescription drugs by an association of registered pharmacists.[58] In response to charges of price fixing in violation of § 1 of the Sherman Act, the defendants argued *inter alia* that their conduct was sheltered because the learned professions were beyond the reach of the Sherman Act. The district court assumed that pharmacists, like doctors and lawyers, were engaged in a learned profession, but nonetheless held the particular conduct subject to the Sherman Act.

The district court did not inquire whether the conduct constituted "trade or commerce." It simply determined that the conduct was not related to the furnishing of a professional service and that, instead, the defendants used the price schedules primarily to secure greater profits for association members on the

54 United States v. Oregon State Medical Soc'y, 95 F. Supp. 103 (D. Ore. 1950). The defendants had also argued that their conduct was not "in interstate commerce." Although the District Court declined to rule on this subject on two separate occasions, *id.* at 105, 120, the District Court did rule in defendants' behalf on at least one other occasion. *Id.* at 118. The Supreme Court then upheld this finding. 343 U.S. at 338-39. For a discussion of this portion of the case, see text accompanying notes 162-64 *infra.*

55 343 U.S. at 331, 338.

56 343 U.S. at 336.

57 Perhaps it takes on some added significance because it was affirmed *per curiam* by the Supreme Court. Utah Pharmaceutical Ass'n v. United States, 371 U.S. 24 (1962).

58 United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D. Utah 1962).

sale of their goods.[59] Therefore, the court found no basis for arguing "that members of a learned profession were any more at liberty to restrain interstate trade in goods than any other class of persons."[60] The district court expressly reserved, as unnecessary to its decision, the question of fee schedules by doctors and lawyers with respect to professional services.[61] The court also made clear that the outcome might have differed if the object of the restraint and the intent of the defendants had been different.[62]

On the other hand, a recent Eighth Circuit opinion has directly held that the conduct of doctors is immune from the antitrust laws because as members of a profession they do not engage in "trade or commerce."[63] The case arose out of the allegedly wrongful exclusion of the plaintiff-physician by a county medical society, resulting in loss of earnings both by him personally and by the hospital of which he was part owner and director. As one basis for dismissing the plaintiff's complaint, the court said: "The practice of his profession . . . is neither trade nor commerce within Section 1 of the Sherman Anti-Trust Act . . . ."[64]

A detailed discussion of the status of the professional exemption is contained in the district court and circuit court opinions in *Goldfarb v. Virginia State Bar.*[65] In connection with the purchase of a home and a mortgage thereon, plaintiffs

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59 The District Court made a finding that the officers and directors of the Association had "the intent of establishing uniform prices for prescription drugs within the State of Utah to the extent of their ability . . . ." 201 F. Supp. at 34.

60 201 F. Supp. at 33.

61 What the result would be if a fee schedule of doctors or lawyers covered the sale of commodities as part and parcel of the medical or legal transaction for which the fee was fixed under the schedule is unnecessary to decide here. But it is clear that this would put a different complexion upon the related activities of an association in that connection.

201 F. Supp. at 34.

62 What would be the status of "professional service schedules" as distinguished from "drug pricing schedules" it is unnecessary to determine here. Fully recognizing the professional capacity and services of pharmacists, the conclusion seems inescapable that the schedules in question did not have as their sole or even primary purpose the regulation or stabilization of fees or compensation of members of a learned profession, and, if they did, the pricing of drugs as a commodity was so intermingled and confounded as to invalidate the whole.

201 F. Supp. at 36.

A similar issue was presented a decade later in Northern Cal. Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.), *cert. denied,* 371 U.S. 862 (1962), in which an association of pharmacists and the Chairman of its "Suggested Prescription Pricing Schedule Committee" were convicted of fixing prices in violation of Section 1 of the Sherman Act. In its discussion of the defendants' professional status as a possible defense under the Act, the Ninth Circuit said:

> In short, there is no defense to *price-fixing* on the ground that it is reasonable or that it is being done by professionals. Appellants' "professional" status *per se* will not protect them if the activity in which they are shown to have engaged is clearly proscribed by the statute.

306 F.2d at 385 (emphasis in original).

63 Riggall v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957), *cert. denied,* 355 U.S. 954 (1958).

64 249 F.2d at 268. In support of this conclusion, the court cited the opinion of the District Court in United States v. Oregon State Medical Soc'y, 95 F. Supp. 103 (D. Ore. 1950), discussed at note 54 *supra,* in which the Oregon District Court had also stated that the medical profession was not engaged in "trade or commerce." However, the Eighth Circuit's reliance on this decision is weakened by its implication, 249 F.2d at 269, that the Supreme Court's decision in *Oregon Medical Society* had affirmed with respect to this issue, when the Supreme Court in fact sidestepped this question. *See* text accompanying note 55 *supra.*

65 355 F. Supp. 491 (E.D. Va. 1973), *aff'd in part and rev'd in part,* 497 F.2d 1 (4th Cir. 1974), *cert. granted,* 43 U.S.L.W. 3246 (October 29, 1974).

were required to purchase title insurance; this necessitated employing a Virginia attorney to conduct a title examination of the real estate. Plaintiffs contacted numerous attorneys in an attempt to secure the necessary legal services at the lowest possible cost.[66] They found that none of the attorneys they contacted were willing to quote a fee less than that set forth in the minimum fee schedule prescribed by the county bar association and promulgated under the aegis of the State Bar. Plaintiffs then brought a class action, charging that setting and adhering to this minimum fee schedule constituted price fixing in violation of § 1 of the Sherman Act.

Although the district court recognized that the question was open, it refused to accept the argument that lawyers were exempt from the Sherman Act and held that setting fees was at best dubious professional activity: "Certainly fee setting is the least 'learned' part of the profession."[67] The court then evaluated the conduct under § 1 of the Sherman Act and held that although the activities of defendant State Bar were sheltered by the *Parker v. Brown*[68] doctrine, the county bar association had violated the antitrust laws.

Judge Boreman of the Fourth Circuit rejected this latter conclusion, stating that the activities of lawyers were *not* "trade or commerce."[69] Although the court noted that the Supreme Court had in recent cases refused to pass on the validity of the "learned profession" exemption, it held that the exemption should "continue to be applied in appropriate cases."[70] The inquiry to be made in determining whether the exemption should be accorded was whether the *object* of the restraint was engaged in commerce.[71] Judge Boreman found that the minimum fee schedules effected restraints only on other attorneys, rather than on the public at large. The court therefore reversed the judgment against the county bar association and affirmed the dismissal on behalf of the State Bar.[72]

66 497 F.2d at 4.

67 355 F. Supp. at 495.

68 317 U.S. 341 (1943). This doctrine is considered in detail in Part IV of this article. In brief, it provides that private action approved and supervised by state officials is not subject to the coverage of federal antitrust laws.

69 "Restraints upon the practice of law are not illegal *per se* because that which is restrained (*i.e.*, the practice of a 'learned profession') is neither trade nor commerce." 497 F.2d at 13.

70 497 F.2d at 14.

71 This test was first articulated in Am. Medical Ass'n v. United States, 317 U.S. 519, 528 (1943). *See* text accompanying note 40 *supra*.

72 Judge Boreman's decision is somewhat confusing. At one point in the opinion, he seems to say that *all* professional activities of lawyers are sheltered from Sherman Act coverage, until and unless Congress affirmatively decides otherwise:

> In effect, what the Goldfarbs urge upon us is judicial legislation. This is an area in which such legislation would be most inappropriate. To hold that the practice of law is subject to the Sherman Act would cast doubt upon the validity of bar admission standards, prohibitions upon advertising, and a multitude of other restrictions upon the practice of law. In our governmental system a legislative body is better equipped to accommodate these restrictions imposed upon the practice of a profession to the overall design and purpose of the antitrust laws.

497 F.2d at 19.

On the other hand, earlier in the opinion he seems to make the existence of an exemption turn upon the persons affected by the restraint in question:

> We do not intend to suggest that any learned profession is above the law. The "learned profession" exemption is a defense to a Sherman Act violation only where the restraint is upon the learned profession itself . . . . Thus, fee schedules are valid insofar as the effect is to restrain competition among attorneys.

Id. at 15. The court then suggested that if the restraint affected persons other than attor-

Another decision involving the "learned profession" exemption is *Alabama Optometric Association v. Alabama State Board of Health.*[73] Plaintiff-optometrists brought a class action charging that defendants[74] had violated § 1 of the Sherman Act by conspiring to exclude plaintiffs from providing eye care services in federal health care programs (Medicaid). Defendants moved to dismiss the complaint on the ground that it did not allege an interference with "trade or commerce" within the meaning of the Sherman Act. The court rejected this argument for two reasons: First, the medicare-medicaid program is national and, therefore, interstate in scope. Then, the court said that the optometrists were engaged in the sale and distribution of products—eye wear—and therefore were retailers within the meaning of the Sherman Act.

While the court's first rationale is contrary to Holmes' dictum in *Federal Baseball* with respect to baseball teams and lawyers,[75] it is certainly consistent with the Commerce Clause cases of the past forty years.[76] Furthermore, although the court does not so state, it accurately reflects the fact that the "trade or commerce" exception is based not on the geographical scope of the activity, but on the nature of the conduct and of the persons engaged therein.

The second reason, however, may prove more troubling.[77] All professionals deal in both goods and services. A physician does not sell penicillin when he gives an injection, nor does an attorney sell paper and ink when she prepares an appellate brief. Similarly, optometrists provide eyeglasses to their patients at the optometrists' cost from their optical house suppliers, making a profit from their professional services.[78] The logical extension of this reasoning would be the partial demise of the "trade or commerce" exemption for all professionals. That it need not be total is indicated by the stage at which this decision was rendered—a motion directed to the pleadings. It is certainly possible that after discovery or after trial the court could find that the *object* of the restraint is not within "trade or commerce,"[79] or that the restraint is reasonable in view of the needs and activities of professionals.[80]

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neys, it might be illegal: "Since that which is allegedly restrained is not a learned profession [but rather is the buyer of a home], the 'learned profession' exemption does not apply here." *Id.*

The dissenting judge apparently believed that the majority had determined that attorneys were always exempt from the antitrust laws: "Nor can I accede to the view that the legal profession is exempt from the Sherman Act." *Id.* at 23.

73 379 F. Supp. 1332 (M.D. Ala. 1974).

74 Defendants were a state organization, its Board of Censors and the individual state officials. Interestingly, the opinion reveals no claim that the activities of the defendants were sheltered under *Parker v. Brown,* which is discussed in Part IV of this article.

75 *See* text accompanying note 18 *supra.*

76 See the discussion of the interstate commerce component of the exemption in Part III of this article.

77 This conclusion is inconsistent with the *Raladam* case. *See* text accompanying note 27 *supra.*

78 For example, the Michigan Attorney General's Office has rendered an opinion that optometrists need not collect sales tax on *any* portion of their fees, even though Michigan does collect a sales tax on such essentials as food, clothing and pharmaceuticals. 1963-64 MICH. OP. ATT'Y GEN. 34 (1963). *See also* MICH. COMP. LAWS ANN. § 205.104 (Supp. 1974).

79 Compare the application of this theory in the *American Medical Association* case, note 40 *supra,* with the Circuit Court of Appeal's opinion in *Goldfarb,* notes 71-72 *supra.*

80 In fact, these issues will not be determined in this case, since the parties agreed to settle the action. Plaintiffs dropped their treble damage claims in return for defendants' agreements to cease certain restrictive practices. AM. OPTOMETRIC ASS'N NEWS, December 15, 1974.

The most recent discussion of the professional exemption arose in the Justice Department's challenge to the establishment and use of a minimum fee schedule by the Oregon State Bar.[81] In its decision denying the defendants' motion for summary judgment, the district court reviewed the history of the exemption and concluded that the question was open. Judge Sharp held that since exemptions to the antitrust laws should not be granted lightly and even then only by the Congress, it "is not for this court to create a new exemption to the Sherman Act for so-called 'learned professions.' . . . It is the conclusion of this Court that the fee schedule activities of the defendant, Oregon State Bar, are not immune to Sherman Act attack . . . by the 'learned profession' exemption."[82]

2. State Court Decisions

The liability of professionals for restraining trade has also been considered by a few state courts, construing their own statutes.[83] In the earliest such case, decided in Iowa in 1908,[84] 13 physicians who had agreed upon common fees for medical services were indicted under a statute making it unlawful to conspire to enter into an "agreement, contract, combination . . . to regulate or fix the price of any article of merchandise or commodity . . . ."[85] In affirming the trial court's grant of a writ of habeas corpus (which tested the sufficiency of the indictment), the Supreme Court of Iowa held the statute inapplicable since the activity was the furnishing of labor—the rendering of a service—rather than the sale of commodities. The court did not discuss the unique nature of professional services and explicitly distinguished the state statute from the Sherman Act.[86]

Two recent decisions came to the same conclusion. In a California case[87] under the Cartwright Act,[88] the plaintiff, an osteopathic physician, charged defendants with conspiring to expel him from the local professional association and thereby depriving him of his economic livelihood. The Cartwright Act proscribes "trusts"—combinations "to create or carry out restrictions in trade or commerce."[89] The court held that the defendants were not engaged in "trade or

81 United States v. Oregon State Bar, Civ. No. 74-362 (D. Ore., filed May 9, 1974).

82 *Id.*, 1974-2 TRADE CAS. ¶ 75,400, at 98,314 (D. Ore. 1974). [Since the preparation of this article, another decision has rejected the "learned professions" exemption. At issue in United States v. Nat'l Soc'y of Professional Engineers, 1974-2 TRADE CAS. ¶ 75,415 (D.D.C. 1974), was the legality under § 1 of the Sherman Act of noncompete and noncompetitive bidding clauses in the Code of Professional Ethics applicable to professional engineers. For a discussion of this question, see Note, *The Antitrust Division v. The Professions—"No Bidding" Clauses and Fee Schedules,* 48 NOTRE DAME LAWYER 966 (1973)].

83 The cases discussed below are intended to be a representative sample of state court decisions discussing the relationship of the activities of professionals to various state antimonopoly or restraint of trade statutes.

The author is presently a consultant in one such state litigation. The State of Michigan has sued a group of eye doctors, charging that their proposed group plan of not furnishing prescriptions for corrective eye wear to a patient unless the patient also obtains the eye glasses from that doctor would violate state antitrust statutes. Michigan v. Sisson, No. 74-16697CP (Ingham County Ct., filed June 28, 1974).

84 Rohlf v. Kasemeier, 140 Iowa 182, 118 N.W. 276 (1908).

85 *Id.* at 185, 118 N.W. at 277.

86 "The statute before us has nothing to do with commerce; nor does it have to do with restraint of trade or commerce as does the Sherman Act." *Id.* at 189-90, 118 N.W. at 279.

87 Willis v. Santa Ana Community Hosp. Ass'n, 58 Cal. 2d 806, 376 P.2d 568 (1962).

88 CAL. BUS. & PROF. CODE §§ 16700-16758 (West 1964).

89 CAL. BUS. & PROF. CODE § 16720(a) (West 1964).

commerce." However, the court then said that plaintiff did state a cause of action under a common law tort theory, rejecting the defendants' suggestion that professional groups had the unlimited discretion to exclude fellow doctors from membership in order to maintain professional standards.[90]

The question of whether professional conduct was "trade or commerce" also arose in a recent New York Court of Appeals decision.[91] At issue was whether the Surrogate Court's use of a county Bar Association suggested minimum fee schedule in setting attorneys' fees in connection with the probate and settlement of an estate violated New York's Donnelly Act.[92] The evidence was that the Surrogate used the fee schedule as a guide, that he did not consider himself bound by it,[93] that the fee schedule was merely a recommendation to the Bar, and that there were no sanctions for noncompliance. The Court of Appeals found that the use of these fee schedules was not price fixing. The court therefore "concluded that neither by virtue of the statutory language, the legislative history, nor intent of the Legislature does the Donnelly Act apply to the legal profession."[94]

At least one state court decision has held that certain professional activities violated the state's antimonopoly law. In *Group Health Cooperative v. King County Medical Society*,[95] the Washington Supreme Court considered a private suit alleging monopolization of contract medical and hospital services by defendant physicians, a hospital, and several medical organizations.[96] In holding that the defendants had violated the state constitution,[97] the court did not consider the "trade or commerce" issue since this phrase was not part of the constitutional language. However, the defendants did raise two other familiar defenses: Doctors do not furnish a product or commodity and the unique ethical requirements of professionals necessitate immunity. The court rejected the first proposition, asserting that the constitutional provision must be read broadly to afford maximum protection to the public.[98] The court rejected the ethical protection argument on the

90 For an example of a decision under a common law tort theory, see Falcone v. Middlesex County Medical Soc'y, 34 N.J. 582, 170 A.2d 791 (1961).

91 *In re* Estate of Freeman, 34 N.Y.2d 1, 311 N.E.2d 480 (1974).

92 This statute makes illegal "[e]very contract, agreement, arrangement, or combination whereby . . . [c]ompetition or the free exercise of any activity in the conduct of any business, *trade or commerce* or in the furnishing of any service in this state is or may be restrained . . . ." N.Y. GEN. BUS. LAW § 340 (McKinney 1968) (emphasis added).

93 However, the "fee allowed to the attorney . . . equalled almost precisely the amount that the then minimum fee schedule established by the Monroe County Bar Association would have required or 'suggested' in decedents' estates." 34 N.Y.2d at 6, 311 N.E.2d at 482.

94 *Id.* at 9, 311 N.E.2d at 484. The court took note of the recent decision in *Goldfarb*, but stated that that decision was inapposite in the construction of this state statute. *Id.* at 7, 311 N.E.2d at 483.

The use of state bar minimum fee schedules for the setting of attorney's fees has also been approved in a number of state court decisions in which antitrust questions were *not* at issue. *See, e.g.*, Junker v. Junker, 188 Neb. 555, 198 N.W.2d 189 (1972); Cox v. State Industrial Accident Comm'n, 168 Ore. 508, 522-24, 123 P.2d 800, 801-02 (1942); State *ex rel.* Baker v. County Court, 29 Wis. 2d 1, 138 N.W.2d 162 (1965).

95 39 Wash. 2d 586, 237 P.2d 737 (1951).

96 The underlying controversy in this case is similar to that which gave rise to Am. Medical Ass'n v. United States, 317 U.S. 519 (1943); *see* text accompanying notes 37-40 *supra*. The analogy between these two cases was noted by the Washington Supreme Court, 39 Wash. 2d at 651-54, 237 P.2d at 772-73.

For a brief discussion of the implications of the legal profession's opposition to prepaid legal services, see note 38 *supra*.

97 39 Wash. 2d at 635, 237 P.2d at 763.

98 Monopolies affecting price or production in essential service trades and professions can be as harmful to the public interest as monopolies in the sale or production of

facts, finding that the physicians sought not to protect the public from less-qualified physicians, but rather to increase their profits.[99] It is noteworthy that the Washington Supreme Court felt that the source of its Constitutional provision was the Sherman Act.[100]

B. *Implications for the Future*

One of the reasons for looking at past decisions is that stare decisis generally requires judicial adherence to a series of relevant precedents. The cases, however, illustrate that the interpretation of the professional exemption has been inconsistent and equivocal, giving the courts a freer hand in establishing a rule.

The examination of prior decisions should also force an examination of the underlying policy considerations applicable to the professional exemption. If the Sherman Act truly is of the constitutional breadth ascribed to it by Chief Justice Hughes in *Appalachian Coals,*[101] then it must be adaptable to the needs of the times. Admittedly, it would be improper to do violence to any clear intent of the Act's drafters and to its subsequent judicial interpretation. Since, however, the very existence, much less the scope, of the exemption is unsettled, a clear articulation of the bases and nature of this exemption is necessary.

The history compels several broad inquiries: What is the prognosis for the continued vitality of the exemption, if it exists at all? Are there valid policy reasons—intertwined with or even apart from the particular statutory language—to confer antitrust immunity on the professions? How can that immunity be justified today, in the face of an apparent though halting expansion in the scope of the antitrust laws? Most importantly, if immunity should exist, should it be unlimited or should it apply only in certain situations, and if so, which?

There are indeed valid reasons for immunizing certain kinds of professional conduct from the antitrust laws. However, a selective approach—a Rule of Reason rather than an all-or-nothing standard—should be used to determine whether particular professional activities should be exempt.

Judge Boreman's opinion for the Fourth Circuit in *Goldfarb*[102] seems only a beginning toward an effective resolution of these questions. It is certainly true that a merely mechanistic test—whether the activity of the professional is "trade or commerce"—would obfuscate these more important underlying inquiries. However, Judge Boreman's focus on the object of the restraint as the touchstone of legality is both too difficult a test and too narrow an inquiry.[103] Rather than have

tangible goods. The constitutional provision was designed to safeguard this public interest from whatever direction it may be assailed. The language used must therefore be liberally construed with that end in view.

39 Wash. 2d at 638, 237 P.2d at 765.

99 39 Wash. 2d at 644-45, 237 P.2d at 768.

100 39 Wash. 2d at 651, 237 P.2d at 771-72.

101 As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions which might either work injury to legitimate enterprise or through particularization defeat its purpose by providing loopholes for escape.

Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933).

102 *See* text accompanying notes 69-72 *supra.*

103 As suggested earlier, see note 72 *supra,* it is not even clear whether Judge Boreman feels this inquiry is appropriate in considering the coverage of attorneys under the antitrust laws, or whether he feels that the learned profession exemption totally forecloses this inquiry.

the exemption turn on either the definitional question of "trade or commerce" or on Judge Boreman's test of whether only other professionals are restrained, it seems more useful to ask four different questions: (1) What is the nature of the specific activity that the professionals are engaged in? (2) What are the motivations of the professionals in engaging in the restraints? (3) What is the effect of this conduct, both on other individuals and on the competitive struggle in general? (4) What societal objectives would be furthered, or impaired, by conferring the exemption in a particular situation?[104]

1. The Nature of the Professionals' Activities

Writing over fifty years ago, Mr. Justice Brandeis said:

> Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[105]

As suggested earlier, I believe it improper to claim a complete exemption for professionals based solely on the fact that they are engaging in certain aspects of their work. Judge Bryan, who wrote the district court opinion in *Goldfarb,* was certainly correct in noting that minimum price setting was "less professional" than other professional activities.[106] Under normally accepted definitions, such activity might well be characterized as price fixing.[107] An examination of the nature of the activity, and its common characteristics with price fixing, may then lead a court—as it did Judge Bryan—to look harshly at the activity. Admittedly, "pigeon holing" is useful, for it allows a court to draw upon familiar doctrines and rules.

However, such activity should not be summarily condemned pursuant to the *per se* rule applicable to price fixing.[108] This is not because professionals deserve

104 This seems the direction the district court in United States v. Utah Pharmaceutical Ass'n, 201 F. Supp. 29 (D. Utah), *aff'd per curiam,* 371 U.S. 24 (1962), was tending toward. *See* notes 61-62 *supra* and accompanying text.

105 Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

106 *See* note 67 *supra.*

107 Any combination which tampers with price structures is engaged in an unlawful activity . . . .
Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*
United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, 223 (1940).

108 United States v. Trenton Potteries Co., 273 U.S. 392 (1927); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

special treatment. Rather, it is because the rationale used to justify a *per se* rule —the conduct almost always has anticompetitive effects and does not merit the court's time to evaluate its full impact[109]—does not apply. Even price fixing in the context of minimum fee schedules may be justified because of its special setting.

Similarly, when other forms of restrictive activities by professionals are under scrutiny, a close examination of their nature is required, as suggested by Brandeis. While such an examination certainly would not preclude a finding of illegality, the analysis is essential. Only then can a court conclude that the purposes or goals of the defendant are so unworthy of protection, and the effect on competition is so serious, that condemnation under the Sherman Act is appropriate.

2. The Professionals' Motivations

In *Chicago Board of Trade,* Mr. Justice Brandeis suggested that a court should ascertain the purpose of the restraint to obtain some insight into its effect upon competition.[110] Such an inquiry is especially important in applying the antitrust laws to professionals.

One of the characteristics supposedly distinguishing professionals from tradesmen and merchants is their obligation to work for the public good as well as for their own private gain.[111] The fact that medicine and law are among the highest

109 [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). *See also* Elman, *"Petrified Opinions" and Competitive Realities,* 66 COLUM. L. REV. 625 (1966).

110 The Supreme Court has suggested that the absence of anticompetitive motives on the part of the defendant may save conduct which would otherwise be illegal *per se* under the Sherman Act. For example, in discussing concerted refusals to deal, the Court stated: "[T]he [Sherman] Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations, like labor unions, which normally have other objectives." Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 213 n.7 (1959).

The absence of a profit-making objective as a defense under the antitrust laws is often known as the "noncommercial purpose" doctrine. It finds its clearest articulation in Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges and Secondary Schools, Inc., 432 F.2d 650, 654 (D.C. Cir. 1969), *cert. denied,* 400 U.S. 965 (1971): [T]he proscriptions of the Sherman Act were "tailored . . . for the business world," not for the noncommercial aspects of the liberal arts and learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the professions, is not sufficient to warrant applications of the antitrust laws.

See also Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities,* 82 YALE L.J. 313 (1972). For an extensive discussion of the extent to which the defendant's motives may remove a horizontal group boycott from the scope of a *per se* violation of § 1 of the Sherman Act, see Horsley, *Per Se Illegality and Concerted Refusals to Deal,* 13 B.C. IND. & COM. L. REV. 484 (1972).

111 The Supreme Court has already recognized that professionals do operate under different competitive and ethical standards than do nonprofessionals. In Semler v. Oregon State Bd. of Dental Examiners, 294 U.S. 608 (1935), the plaintiff challenged state statutes prohibiting dentists from certain forms of advertising and soliciting; from offering certain free services; and from guaranteeing dental work. In upholding Oregon's right to enact such regulations, the Court said:

paid occupations often gives this claim a hollow ring. However, it is clear that professionals indeed do have the interests of their patients or clients in mind. Physicians must subscribe to the Hippocratic oath, which requires assistance to the sick regardless of financial ability.[112] The Code of Professional Responsibility imposes a similar requirement on attorneys[113] who, as "officers of the court," have obligations to the legal system and the public as well as to their clients.[114] In view of these societal obligations, Brandeis' admonition is apposite; knowledge of the professionals' purpose in employing a particular restraint—personal, societal or mixed—will tell much about the nature and the effect of the restriction.

The minimum fee schedule in *Goldfarb* exemplifies both the importance of scrutinizing the defendants' purpose and the difficult task such an evaluation poses. The organized bar has frequently and eloquently defended minimum fee schedules as necessary to protect the public.[115] It is argued that without such schedules competition as to the price of legal services would lead to inadequate or incomplete services, as less competent or less thorough attorneys compete to offer services to a public unable to distinguish between levels of quality. Minimum fee schedules assertedly also serve the informational function of advising a prospective client of a fair fee for particular legal services and of assisting an inexperienced attorney to set reasonable rates. It is even suggested that the obligation to provide free legal services to indigents may require support through guaranteed minimum

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> The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. What is generally called the "ethics" of the profession is but the consensus of expert opinion as to the necessity of such standards.

Id. at 612.

See United States v. Oregon State Medical Soc'y, 343 U.S. 326, 336 (1952).

Of course, these statements do not answer the question of whether professionals are therefore entitled to a total, or even partial, exemption under the antitrust laws. It does suggest that the answer cannot be found simply by analogizing the professionals' activities to those permitted, and proscribed, in the business world.

112 I will look upon him who shall have taught me this Art even as one of my parents. . . . I will regard his offspring even as my own brethren, and I will teach them this Art, if they would learn it, without fee or covenant . . . . The regimen I adopt shall be for the benefit of my patients according to my ability and judgment, and not for their hurt or for any wrong.

15 ENCYCLOPEDIA BRITANNICA 198 (1938 ed.).

113 The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional prominence or professional work load, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer . . . .

ABA CODE OF PROFESSIONAL RESPONSIBILITY EC 2-25 (1971).

114 Compare Canon 1: "A lawyer should assist in maintaining the integrity and competence of the legal profession" with Canon 7: "A lawyer should represent a client zealously within the bounds of the law." ABA CODE OF PROFESSIONAL RESPONSIBILITY (1971).

115 *See, e.g.*, Miller & Weil, *Let's Improve, Not Kill, Fee Schedules*, 58 A.B.A.J. 31 (1972) and Armstrong, *American Bar Association and Justice Department Explain Positions on Minimum Fee Schedules to Senate Subcommittee*, 59 A.B.A.J. 1296 (1973).

fees from paying clients. On the other hand, opponents of the professional exemption consider fee schedules nothing more than an attempt by the legal profession to maximize profits and eliminate competition.[116] Empirical evidence exists that by setting a floor under the fees they charge, attorneys receive an overall increase in income.[117]

Similarly conflicting goals characterize other professional conduct.[118] The licensing prerequisite to entry into the legal profession—bar examinations and compliance with ethical standards—may be characterized both as methods of protecting the public from incompetent and unethical attorneys and as means of limiting the number of competitors.[119]

An examination of the motivation and purpose, however, is neither impossible nor unavailing. Once it is agreed that a *per se* rule is inappropriate, the trial court would have to consider a number of factors, such as the history of the restraint and the evils the defendants perceived as justifications therefor. The trier of fact will then determine whether these evils in fact motivated the restraint and whether they continue to exist, or whether other less noble purposes spurred the defendants' conduct. The goal is to determine the "objective" intent of the defendants rather than merely the worthy purposes the defendants attribute to their actions.

Consideration should also be given to the existence of less restrictive alternatives to the conduct in question. If similar ends could have been achieved by less anti-competitive means, there should be a strong presumption that the questioned conduct was chosen or is being continued for anti-competitive reasons. Even if the less restrictive alternatives might not have achieved all of the defendants' purposes, the trier of fact should still weigh the cost of achieving those results against the deleterious effect on competition. The fact finder should also determine the defendant's purpose either in failing to consider or in rejecting less restrictive alternatives.

Under this methodology, inconsistent conclusions may result from the decisions of different courts and different juries. But, this has always been a consequence of Rule of Reason analysis, found tolerable because of the benefits such an approach yields. There seems no compelling reason for being especially troubled by inconsistent results when dealing with professional activities.

3. The Effect of the Restraint upon Competition

In the *American Medical Association* case,[120] the Supreme Court suggested

116 *See, e.g.*, Arnould & Corley, *Fee Schedules Should Be Abolished*, 57 A.B.A.J. 655 (1971); Ferren & Snyder, *Antitrust and Ethical Aspects of Lawyers' Minimum Fee Schedules*, 7 REAL PROP., PROB. & TRUST J. 726 (1972) and Note, *A Critical Analysis of Bar Association Minimum Fee Schedules*, 85 HARV. L. REV. 971 (1972).

117 *See* Comment, *Bar Association Fee Schedules and Suggested Alternatives: Reflections on a Sherman Exemption That Doesn't Exist*, 3 U.C.L.A.-ALASKA L. REV. 207, 238 (1974). This article contains extensive citations to other legal literature in this area.

118 For example, in United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952), the Court observed that the "[o]bjections of the organized medical profession to contract practice are both monetary and ethical." *Id.* at 328.

119 Similar arguments could also be directed at accreditation of law schools and medical schools, and making attendance thereat a prerequisite to admission to the practice of law or medicine.

120 317 U.S. 519 (1943). See text accompanying notes 37-40 *supra.*

that the primary inquiry in determining the existence and scope of the professional exemption should be the effect of the restraint upon competition. In his *Goldfarb* opinion, Judge Boreman narrowed this test considerably, stating that the determining factor was whether the restraint affected only other professionals or whether it affected the general public as well. However, Judge Boreman's test is neither useful nor sufficiently broad. Since an antitrust violation is in effect a business tort, it should not be surprising that this test—who is affected and how direct is the injury—is common to many areas of tort law.[121] But, just as the test is difficult to apply in cases of assault or negligence, so also is it less than helpful in determining the existence of an antitrust violation.

A plaintiff's standing to sue for treble damages under § 4 of the Clayton Act[122] turns in part on whether the defendant's acts were the proximate cause of the injury—whether plaintiff was within the "target area" of the defendant's acts.[123] The decisions under this standard, however, are in terrible confusion.[124] The Supreme Court should not adopt such an indefinite standard to test the applicability of a professional exemption, especially since it has continually refused to pass upon the inconsistent decisions of the lower federal courts.[125]

Instead, the Court should consider the full implications and effects of the defendant's conduct. As Judge Boreman suggested, one element would be the effect on other professionals. However, a court must also determine whether the conduct affects competition among nonprofessionals as well. Are the defendants attempting either to limit the amount of competition among nonprofessionals or to limit their ability to compete with the defendants? What are the effects on the general public using the defendants' services? Do they have to pay higher prices? Do they face restricted access to the amount or quality of services? Has the geographic distribution of the services been artificially altered?

Both opponents and proponents of a professional exemption will argue against such an effect-oriented approach. Opponents of the exemption urge a *per se* prohibition on at least certain restraints of trade, contending that horizontal agreements among professionals should fare no better than agreements among other competitors. On the other hand, defenders of a professional exemption argue that scrutiny of such arrangements as minimum fee schedules will lead to similar analyses of other, routinely accepted restraints of trade.

However, there is nothing frightening or even novel about such an approach. Several sections of the Clayton Act contain "effect provisos," conditioning il-

121 *See generally* W. PROSSER, TORTS §§ 41-42 (4th ed. 1971).

122 15 U.S.C. § 15 (1970).

123 The inquiry is whether the plaintiff was within the target area or whether plaintiff's injury was merely incidental to an act aimed at someone else. *See, e.g.*, Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971) and Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

124 *See* Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits —The Twenty-Third Annual Antitrust Review*, 71 COL. L. REV. 1, 24-31 (1971).

125 The most recent examples of the refusal of the Supreme Court to decide this issue are Nassau County Ass'n of Insurance Agents, Inc. v. Aetna Life & Cas. Co., 497 F.2d 1151 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3256 (Oct. 29, 1974); Contreras v. Grower-Shipper Vegetable Ass'n, 484 F.2d 1346 (9th Cir. 1973), *cert. denied*, 415 U.S. 932 (1974); and Morgan v. Auto Mfrs. Ass'n, 481 F.2d 122 (9th Cir. 1973), *cert. denied*, 414 U.S. 1045 (1973).

legality on a finding of the requisite effect on competition.[126] The floodgate argument of proponents of a professional exemption is that invalidating minimum price schedules might lead, for example, to condemning even the formation of a law partnership by the only two practitioners in a small town.[127] However, that "merger" should be analyzed in the same manner as other Clayton Act § 7 cases. For example, a court would determine whether the small town is a relevant geographic market[128] or whether other lawyers in adjoining towns provide significant competition; whether there are significant barriers to entry; perhaps even whether the amount of legal business in the town makes one lawyer a "failing enterprise."[129] If the analysis then showed that the § 7 standards were fully satisfied, the residents of this small town should receive the same protection[130] they would deserve with respect to a merger of the only two grocery stores in that town.[131]

In summary, the anticompetitive effect of the professional conduct may be so serious that the practice should be forbidden regardless of the defendants' purposes or the availability of a less restrictive alternative. On the other hand, the practice may so minimally affect competition[132] that it should escape censure even though the defendants' allegedly laudable purposes are an ineffective mask for an equally ineffective restraint on competition. Where any particular activity will fall on this spectrum cannot be known until and unless the trier of fact has evidence of its effect on competition before it. That evidence will be available if and only if a *per se* rule—either of legality or illegality—is rejected.

4. Consideration of Societal Objectives

One approach to determining legality is to measure the conduct in question against the goals the antitrust laws should promote: (1) maximization of competi-

126 For example, § 7 of the Clayton Act, 15 U.S.C. § 18 (1970), makes unlawful an acquisition where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." Similar "effect provisos" may be found in § 3 of the Clayton Act, 15 U.S.C. § 14 (1970), which proscribes tying arrangements and exclusive dealing arrangements; and in § 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970).

Most actions against professionals have been brought under the Sherman Act or a state equivalent thereof. However, nothing would preclude an action under the Clayton Act; in that case, an examination of the effect upon competition would be mandated.

127 Brief for Appellant Fairfax County Bar Association at 42, Goldfarb v. Virginia State Bar, 497 F.2d 1 (4th Cir. 1974), *cert. granted*, 43 U.S.L.W. 3246 (Oct. 29, 1974).

128 *See*, for example, United States v. Marine Bancorporation, Inc., 418 U.S. 602 (1974) and United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

129 *See* United States v. Greater Buffalo Press, Inc., 402 U.S. 549 (1971); Citizen Publishing Co. v. United States, 394 U.S. 131 (1969); and Int'l Shoe Co. v. FTC, 280 U.S. 291 (1930).

130 Certainly United States v. Phillipsburg Nat'l Bank & Trust Co., 399 U.S. 350, 358, 361-62 (1970) indicates that residents of small cities are as much entitled to the protection of § 7 of the Clayton Act with respect to mergers having effects solely within that small geographical area as are residents of a large metropolitan area or an entire region of the country.

131 Perhaps an answer might be that the merger of the only two small grocery stores in town would not present any Clayton Act problems. For a humorous but cynical contrary view, see United States v. Joe's Delicatessen, Inc. in Handler, *Recent Antitrust Developments—1964*, 63 MICH. L. REV. 59, 70-78 (1964).

132 For example, one response to a complaint that lawyers artificially restrict the number of new lawyers by the use of bar examinations and accreditation of law schools would be that the numbers of law graduates, of persons admitted to the bar, and of newly approved law schools, has increased dramatically in the past few years. See table in Ruud, *That Burgeoning Law School Enrollment Is Portia*, 60 A.B.A.J. 182, 183 (1974). This evidence would go far towards showing only a minimal, if any, effect on competition from these alleged restraints.

tion to achieve lower prices, greater efficiency and increase in the production and distribution of goods and services, (2) protection of competitors, particularly small businessmen, (3) and maintenance of opportunities for entrepreneurs to enter and leave the market.[133] Unfortunately, there are several problems with this methodology.

First, it may often be difficult to determine in advance what the effect of certain conduct will be with respect to these goals. Second, even if the effect can be determined, the results may be inconsistent. The conduct may advance some of the goals while impairing others. Finally, it may be necessary to consider other goals such as freedom from government regulation, the right of privacy, and freedom of speech, assembly, and association, all of which may be irreconcilable with antitrust goals.

It almost seems implicit that restraints engaged in by professionals would, standing alone, be inconsistent with these antitrust objectives.[134] Only the nature of the people engaging in the conduct, their motives, and the societal benefits flowing from the restraints would justify their being treated differently than tradesmen or merchants.

In one sense, this analysis is similar to the suggested approach for gauging the effect of the conduct: anticompetitive effects are counterbalanced by benefits from the conduct. The prior inquiry, however, focuses primarily on the effect in the marketplace. Here the inquiry weighs antitrust goals against other societal objectives—political and social as well as economic.

In analyzing mergers, the Supreme Court has proscribed balancing anticompetitive effects against other economic or social benefits[135] since such a reckoning not only is beyond judicial competence, but also is precluded by the language of the Clayton Act. However, there is no similar statutory bar under the Sherman Act. The question then becomes whether the courts can make such an inquiry and, if so, what the results would be.[136]

As recognized by the Court, this analysis is quite difficult. The right to

133 The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.

United States v. Topco Associates, Inc., 405 U.S. 596, 610 (1972).

See also United States v. Aluminum Co. of America, 148 F.2d 416, 428-29 (2d Cir. 1945).

134 Presumably, to the extent that the activities are consistent with these antitrust goals, they would be held lawful regardless of the parties engaging therein.

135 We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7.

United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 371 (1963). *See also* Ford Motor Co. v. United States, 405 U.S. 562, 569-70 (1972).

136 Another frequent generalization is that "implied repeals" of the antitrust laws are

counsel of indigent criminal defendants is now recognized as being constitutionally mandated.[137] If the burden of fulfilling this social and political objective falls upon the legal profession,[138] could it not then claim exemption from some of the norms imposed by the competitive system?

Although this argument sounds appealing, its application is extremely difficult. Courts have far less experience in weighing these varying policy considerations (more commonly thought to be the province of the legislative and executive branches) than they have in weighing narrower antitrust objectives. Nonetheless, difficulty in applying a standard does not justify abandoning it; were it otherwise the Rule of Reason would always yield to a *per se* rule.

The Court should not foreclose the possibility of lower courts weighing these broader societal objectives. Rather than either clothing professionals with total antitrust immunity or equating professional activities with commercial enterprises, the Supreme Court should allow the lower courts to weigh the questioned professional activities against the standards suggested in this article. Each activity should receive individual consideration. A finding that the *per se* rule against price fixing applies to minimum fee schedules ought not preclude a Rule of Reason approach for other forms of professional conduct.[139]

Of course, any court engaging in such a balancing test must do so warily. Nothing would more disturb the layman and more damage the authority of the courts than to have professional exemptions sustained on the basis of vague and poorly articulated social or political grounds. However, with the addition of lower court decisions developing this weighing process, the Supreme Court can eventually reassess the balancing test in the light of experience.[140]

III. The Interstate Commerce Requirement[141]

Although this article initially focused on the exemption of professionals' activities based on the "learned professions" doctrine, any discussion of the

looked upon with disfavor. *See, e.g.,* Otter Tail Power Co. v. United States, 410 U.S. 366, 372 (1973); Carnation Co. v. Pac. Westbound Conference, 383 U.S. 213, 217-18 (1966); United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 350-51 (1963); Silver v. New York Stock Exchange, 373 U.S. 341, 357 (1963). Although such statements create a presumption against an exemption for the activities of professionals, they are hardly dispositive, and an examination of the underlying policies in favor of such an exemption should not thereby be foreclosed.

137 Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972).

138 See note 113 *supra.*

139 In the *Oregon Bar* case, Judge Sharp recognized this as a possibility: "Even should fee schedules be invalidated under the Sherman Act, ethical considerations could still be sufficient to sustain prohibitions on solicitation and advertising." United States v. Oregon State Bar, 1974–2 TRADE CAS. ¶ 75,400 at 98,313 (D. Ore. 1974).

140 There is precedent for such an approach. In White Motor Co. v. United States, 372 U.S. 253 (1963), the Court held it inappropriate to decide the legality of vertical territorial restraints imposed by a manufacturer upon its distributors under an argued-for *per se* rule. The Court instead remanded the case to the district court for further factual inquiry.

> We do not know enough of the economic and business stuff out of which these arrangements emerge to be certain. They may be too dangerous to sanction or they may be allowable protections against aggressive competitors . . . and within the "rule of reason." We need to know more than we do about the actual impact of these arrangements on competition to decide whether they . . . should be classified as *per se* violations of the Sherman Act.

Id. at 263.

141 The discussion in the next two parts of this article is not meant to be a comprehensive

professional exemption involves a threshold jurisdictional[142] question: Does the conduct have a sufficient relationship with interstate commerce?

The jurisdictional limitation on the antitrust laws has two sources—the Commerce Clause of the Constitution[143] and the statutes themselves.[144] However, since the Supreme Court has stated that the antitrust laws reach as far as the Constitution itself,[145] only antitrust cases construing the interstate commerce limitation will be considered.

At first the Supreme Court gave the Sherman Act a rather limited reach. In *United States v. E. C. Knight Co.*,[146] the defendant had acquired the stock of four other sugar refiners and thus obtained control of more than 90 percent of all sugar refined in the United States. The Supreme Court never reached the legality of the merger under the Sherman Act, holding that the manufacture of a product was not part of interstate commerce, even if the product would eventually be transported to and sold in other states.[147]

By the turn of the century, the Court already began moving away from this

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treatment of the problems of interstate commerce and the antitrust laws, or of the *Parker v. Brown* doctrine, respectively. Such an analysis has been done in detail by papers dealing specifically with those areas. Therefore, the next two parts are intended only to suggest the basic contours of these problems, some of the tests or standards the courts have applied, and some of the particular considerations applicable in the area of professional exemptions. The applicability of these two areas to the question of professional exemptions is of course complicated by the variety of professional conduct which might be involved.

For more detailed discussions of the interstate commerce requirement for the application of the antitrust laws, see, for example, Kallis, *Local Conduct and the Sherman Act*, 1959 DUKE L.J. 236 (1959) [hereinafter cited as Kallis]; Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961); Krotinger, *The "Essentially Local" Doctrine and Section 1 of the Sherman Act*, 15 W. RES. L. REV. 66 (1963); and Eiger, *The Commerce Element in Federal Antitrust Litigation*, 25 FED. B.J. 282 (1965).

For an analysis of the earlier reach of the antitrust laws, *see, e.g.*, Note, *The Concept of Interstate Commerce as Defined by the Antitrust Cases*, 35 COLUM. L. REV. 1072 (1935).

142 The requirement that the conduct in question be "trade or commerce" is also jurisdictional in the sense that failure to fall within the definition presumably will preclude the application of the antitrust laws. This was the rationale for earlier cases suggesting that professionals might not be subject to the antitrust laws. However, while such an exemption applies to various *types* of conduct or actors, the interstate commerce requirement is jurisdictional in the sense that it limits the breadth of coverage by looking to the *geographical* impact of the conduct in question, regardless of its nature.

143 "The Congress shall have power . . . to regulate commerce with foreign nations, and among the several States, and with the Indian tribes." U.S. CONST. art. I, § 8.

144 Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or *commerce among the several States, or with foreign nations*, is declared to be illegal . . . ." 15 U.S.C. § 1 (1970). (Emphasis added.) The Clayton Act also refers to restraints "in commerce." For example, § 3 provides "[t]hat it shall be unlawful for a person engaged in commerce, in the course of such commerce . . . ." 15 U.S.C. § 14 (1970). "Commerce" is defined in § 1 of the Clayton Act as "trade or commerce among the several states and with foreign nations, or between the District of Columbia or any Territory of the United States and any state . . . ." 15 U.S.C. § 12 (1970).

145 "That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements . . . admits of little, if any, doubt." United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 558 (1944).

146 156 U.S. 1 (1895).

147 Two other early cases which construed the Sherman Act's commerce requirement in a similarly narrow fashion were Hopkins v. United States, 171 U.S. 578 (1898) and Anderson v. United States, 171 U.S. 604 (1898). In *Hopkins*, the defendants were members of the Kansas City Live Stock Exchange (which had some stock yards in Kansas and some in Missouri), who bought livestock as commission merchants from farmers in several states. This livestock was then shipped in interstate commerce to Kansas City. The Court nonetheless held that the business or occupation of the members of the Exchange was *not* interstate commerce. The *Anderson* case involved similar facts, but the *Anderson* defendants were purchasers of cattle for their own account. The interstate commerce question was resolved similarly in both cases.

very limited construction of the Sherman Act.[148] However, as is true with the Commerce Clause cases, the major shifting point came with the New Deal and post-New Deal Court.[149] Since the 1940's, the Court has greatly broadened the interstate commerce reach of the antitrust laws.[150]

The leading case on the interrelationship of the Commerce Clause and the antitrust laws is *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*[151] The defendants were the only three sugar refiners in Northern California; the plaintiff sugar beet growers alleged that the defendants had agreed upon a common formula for the price at which they would buy beets. In response to a treble damage complaint asserting a conspiracy to "monopolize and restrain trade and commerce among the several states and to unlawfully fix prices,"[152] defendants argued that their acts concerned solely the intrastate purchase of sugar beets. Rejecting this argument, the Supreme Court enunciated the following test for determining whether challenged conduct was "in interstate commerce":

> [T]he inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented. For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to the Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. . . .
>
> . . .
>
> [T]he vital thing is the effect on commerce, not the precise point at which the restraint occurs or begins to take effect in a scheme as closely knit as this in all phases of the industry.[153]

Unfortunately, this test proved vague and indefinite. In a later attempt to supply guidance,[154] the Court delineated two alternative methods of satisfying the inter-

148 *See, e.g.*, Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); Montague & Co. v. Lowry, 193 U.S. 38 (1904); Northern Sec. Co. v. United States, 193 U.S. 197 (1904); and Swift & Co. v. United States, 196 U.S. 375 (1905).

149 A commonly cited example of the modern expanse of the Commerce Clause is Wickard v. Filburn, 317 U.S. 111 (1942), where the Court held that a farmer growing wheat solely for his own, on-farm consumption affected the total national supply and sale of wheat. Therefore, subjecting his production to a quota, as permitted by the Agricultural Adjustment Act of 1938, was held to be within the constitutional power of the Congress to regulate interstate commerce. *Wickard* contains an extensive discussion of the evolution of the Commerce Clause. *Id.* at 118-29. See also Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 257 (1964) and Katzenbach v. McClung, 379 U.S. 294 (1964).

150 Cases decided under the antitrust laws during this period dealing with the interstate commerce element of the Sherman Act include Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533 (1944); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945); and United States v. Yellow Cab Co., 332 U.S. 218 (1947) (here, the Supreme Court held that certain of the defendants, who operated taxicabs in Chicago which went *inter alia* between private homes or businesses and interstate railroad terminals did not satisfy the Sherman Act's interstate commerce requirement).

151 334 U.S. 219 (1948).

152 334 U.S. at 225.

153 334 U.S. at 234, 238.

154 Some of the Supreme Court decisions since the *Mandeville Islands* case which have dealt with the interstate commerce element of the antitrust statutes are United States v. Women's Sportswear Mfrs. Ass'n, 336 U.S. 460 (1949); United States v. Employing Plasterers Ass'n, 347 U.S. 186 (1954); United States v. Shubert, 348 U.S. 222 (1955); United States v. Int'l Boxing Club, Inc., 348 U.S. 236 (1955); and Burke v. Ford, 389 U.S. 320 (1967).

state commerce requirement: whether the activity is "in interstate commerce," or whether it "substantially affects interstate commerce."[155] The inadequacy of this formula is illustrated by the fact that the Supreme Court was presented with a case which again raised this issue only a few months ago.[156]

There, the plaintiffs, manufacturers and sellers of asphaltic concrete used to build and repair interstate highways solely in California, asserted that the defendant petroleum companies had violated the Sherman Act, §§ 3 and 7 of the Clayton Act, and the Robinson-Patman Act. The Ninth Circuit had held that the product in question was "in interstate commerce" since used in interstate highways, and therefore held that federal jurisdiction existed.[157] On appeal, the Supreme Court's review was expressly limited to the reach of the Clayton and Robinson-Patman Acts.[158] The Court concluded that plaintiffs' complaint was defective under both alternative methods. The Court held that the "in commerce" requirement of the Clayton and Robinson-Patman Acts was more exacting than that of the Sherman Act.[159] The Court never reached the plaintiffs' second argument that the scope of the Sherman and Clayton Acts should be coextensive under the affectation doctrine since it found the plaintiffs' offer of proof insufficient.[160]

The Supreme Court has not squarely decided the narrower issue of whether furnishing professional services amounts to interstate commerce within the mean-

155 Burke v. Ford, 389 U.S. 320, 321 (1967). Apparently the first direct exposition of these two theories was in Las Vegas Merchant Plumbers Ass'n v. United States, 210 F.2d 732, 739 (9th Cir.), *cert. denied,* 348 U.S. 817 (1954). This second theory is sometimes referred to as the "affectation doctrine."

156 Gulf Oil Corp. v. Copp Paving Co., 43 U.S. L.W. 4059 (U.S. Dec. 17, 1974), *reversing* 487 F.2d 202 (9th Cir. 1973).

157 487 F.2d 202, 204-06.

158 415 U.S. 988 (1974).

159 This "in commerce" language differs distinctly from that of § 1 of the Sherman Act . . . .

In contrast to § 1, the distinct "in commerce" language of the Clayton and Robinson-Patman Acts provisions with which we are concerned here appears to denote only persons or activities within the flow of interstate commerce . . . .

43 U.S.L.W. at 4062.

The Court's disdain for plaintiff's theory is evident:

The chain of connection has no logical endpoint. The universe of arguably included activities would be broad and its limits nebulous in the extreme [citation omitted]. More importantly, to the extent that those limits could be defined at all, the definition would in no way be anchored in the economic realities of interstate markets, the intensely practical concerns that underlie the purposes of the antitrust laws.

Id. at 4063.

160 Even if the Clayton Act were held to extend to acquisitions and sales having substantial effects on commerce, a court cannot presume that such effects exist. The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to involve federal antitrust prohibitions . . . .

. . .

This being so, the "effects on commerce" theory, even if legally correct, must fail for want of proof.

Id. at 4064. For other discussions of the reach of the Robinson-Patman Act, *see, e.g.,* Kintner & Mayne, Interstate Commerce Requirement of the Robinson-Patman Price Discrimination Act, 58 GEO. L.J. 1117 (1970); Note, 27 VAND. L. REV. 539 (1974).

ing of the antitrust laws.[161] In the *Oregon Medical Society* case,[162] the trial court found that the

> sale of medical services, by Doctor Sponsored Organizations, as conducted within the State of Oregon, is not trade or commerce within the meaning of Section 1 of the Sherman Anti-Trust Law, nor is it commerce within the meaning of the constitutional grant of power to Congress "To regulate Commerce . . . among the several States."[163]

Although the Supreme Court upheld the district court's conclusions, it affirmed under the "clearly erroneous" rule.[164] However, a number of other lower federal courts have upheld restraints on furnishing medical services because the conduct in question was neither "in interstate commerce" nor did it affect interstate commerce.[165]

It has been contended that the test is intended to be flexible rather than mechanical.[166] But, this also suggests that reasonable men may differ not only on the Constitutional applicability of the antitrust laws in a particular area, but also over whether as a policy matter they should apply. The *Goldfarb* case[167] illustrates both the different conclusions that can be drawn from the same facts and the potential benefits of a different approach than the *Mandeville Farms* test.[168]

In *Goldfarb,* the plaintiffs did not contend that setting and adhering to a minimum fee schedule by attorneys was "in interstate commerce." However, the Goldfarbs did attempt to show that such a schedule "affected" interstate commerce. Plaintiffs introduced and the district court accepted evidence that: (1) "[A] significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia"; (2) "a large percentage of persons who live in Fairfax County work outside of Virginia"; and (3) "significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development, both headquartered in the District of Columbia."[169] Therefore, the district court concluded that the "commerce among the several states" requirement of §

161 However, Mr. Justice Holmes' statement in *Federal Baseball* is dictum to the effect that a lawyer is not engaged in interstate commerce even when he travels on business from one state to another. *See* text accompanying note 18 *supra.* The Court expressly avoided this question in two other professional activity cases—American Medical Ass'n v. United States, 317 U.S. 519 (1943) and United States v. Nat'l Ass'n of Real Estate Bds., 339 U.S. 485 (1950)—since they were decided under § 3 of the Sherman Act, which applies to restraints of trade in the District of Columbia.

162 United States v. Oregon State Medical Soc'y, 343 U.S. 326 (1952). See text accompanying notes 52-56 *supra.*

163 *Id.* at 338, *citing* 95 F. Supp. at 118.

164 343 U.S. at 339. This is the standard set forth in FED. R. CIV. P. 52(a).

165 *See,* for example, Hosp. Building Co. v. Trustees of Rex Hospital, 1973-1 TRADE CAS. ¶ 74,428 (E.D.N.C. 1973); Elizabeth Hosp., Inc. v. Richardson, 269 F.2d 167 (8th Cir. 1959); Riggall v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957); Robinson v. Lull, 145 F. Supp. 134 (N.D. Ill. 1956); Spears Free Clinic & Hosp. v. Cleere, 197 F.2d 125 (10th Cir. 1952); and Polhemus v. Am. Medical Ass'n, 145 F.2d 357 (10th Cir. 1944).

166 Kallis, *supra* note 141, at 247, and cases cited therein.

167 Goldfarb v. Virginia State Bar, 355 F. Supp. 491 (E.D.Va. 1973), *affirmed in part and rev'd in part,* 497 F.2d 1 (4th Cir. 1974), *cert. granted,* 43 U.S.L.W. 3246 (Oct. 29, 1974). See text accompanying notes 65-72 *supra.*

168 *See* text accompanying note 153 *supra.*

169 355 F. Supp. at 494.

1 of the Sherman Act was satisfied. On appeal, the Fourth Circuit examined each of these factors and reversed, stating that "we are left with the firm conviction that the activities of the [Fairfax County Bar] Association did not have a direct and substantial effect upon *interstate* commerce and that jurisdictional requirements are not met."[170]

Given the expansive interpretation of the Commerce Clause and of the commerce limitation on the antitrust laws over the past 35 years,[171] it appears that the Fourth Circuit has erred in its conclusion. If a minimum fee schedule inflates the cost of buying or selling a home, it makes the purchase of a home in Fairfax County, Virginia relatively less desirable than homes in adjacent states and counties. As a result, some persons might buy a house in Maryland or in the District of Columbia instead of in Fairfax County. This would certainly have some effect on home sales, building starts, traffic patterns, local investment decisions, and a myriad of other factors bearing on interstate commerce. Therefore, it would certainly not be inconsistent with its past decisions for the Supreme Court to hold that these fee schedules fall within the "affectation doctrine" and therefore satisfy the interstate commerce requirement.[172]

However, some of the other implications of this test suggest that the Court might appropriately reevaluate the standards used to determine if the antitrust laws should apply. Beyond probing the parameters of the Commerce Clause, the Supreme Court should also determine the appropriate reach of these laws in a federal setting in which other types of regulation might be more appropriate.

In addition to regulating attorneys' fees for title searches, the fee schedule in *Goldfarb* also included suggested rates for divorce and automobile personal injury work.[173] Since divorce actions are almost by definition local— the marriage is a *res* which travels with the marriage partners[174]—fees for divorce actions would never "affect" interstate commerce. The propriety of a suggested fee for representing an automobile accident victim might turn on whether the injury took place on a dirt road or an interstate highway. Such relatively inconsequential factors should not determine the applicability of the antitrust laws. Instead, the Court should also consider a major historical reason for the Commerce Clause: the desire to limit the federal government's power with respect to matters more properly the concern of state and local governments.[175] Thus, it might be appropriate to inquire

170 497 F.2d at 16 (emphasis in original).

171 It is probably premature to tell whether the recent decision in Gulf Oil Corp. v. Copp Paving Co., 43 U.S.L.W. 4059 (U.S. Dec. 17, 1974), *supra* notes 156-60, signals a reversal in this trend, whether it merely is a call for a halt in this expansion, or whether it should be limited to its distinction between the Sherman Act and the Clayton and Robinson-Patman Acts. Further clarification should be provided by United States v. Am. Bldg. Maintenance Ind., *cert. granted,* 43 U.S.L.W. 3383 (Jan. 13, 1975).

172 It is a thesis of this article that each type of professional restraint should be dealt with individually. Therefore, the condemnation of minimum fee schedules does not mean that other forms of restraint should also be swept under the same rule. For example, it would be more difficult to show that a concerted agreement by physicians not to let another physician practice at a particular hospital without meeting certain criteria actually had a "substantial effect on interstate commerce."

173 497 F.2d at 17 n.52.

174 *See, e.g.,* Pennoyer v. Neff, 95 U.S. 714, 735 (1877).

175 *See generally* Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment,* 25 MINN. L. REV. 432 (1941). This is not to suggest that some of the Founding Fathers might not have had additional, or perhaps quite different, reasons for desiring the Commerce Clause in the language adopted.

whether the antitrust laws ought to regulate these forms of professional conduct and whether the individual states are not better able and do not have a more compelling interest in regulating such conduct.

As noted earlier, each type of professional conduct should receive individual treatment. The Court may find that minimum fee schedules so substantially affect interstate commerce as to warrant application of the federal antitrust laws. However, other forms of conduct, while satisfying the constitutional minima, may be so substantially local that the courts would abstain from applying the antitrust laws. In these areas, federal courts would defer to state, local, or even internal professional, regulation.[176] The Supreme Court has already recognized that different ethical standards and commercial considerations distinguish the conduct of professionals from that of businessmen.[177] This adds support to a restrictive application of federal power.[178]

IV. The *Parker v. Brown* Doctrine[179]

Another theory advanced in favor of the professional exemption is that extensive state supervision and regulation make the conduct that of the state itself, thereby displacing federal law. Any examination of this theory must start with the decision in which it was first clearly articulated—*Parker v. Brown*.[180]

Parker involved a suit by a California raisin grower seeking to enjoin a state program setting quotas on the volume of raisins which could be grown in various areas of the state. Pursuant to a state statute,[181] an Agricultural Prorate Advisory Commission[182] determined the tonnage of raisins each farmer could grow and regulated the channels through which he could market them; violations of the proration program carried both civil and criminal penalties. The plaintiff alleged that this program violated the Sherman Act. The Supreme Court assumed that

176 This suggested abstention from the exercise of federal power is to be distinguished from the displacement of the federal antitrust laws under the *Parker v. Brown* doctrine, discussed in Part IV of this article. I would suggest that the federal courts might forego exercising their power in these borderline cases even if the requirements of *Parker v. Brown* have not been met.

177 See notes 56 and 111 *supra*.

178 The outcome might even differ from state to state, depending on whether the state has its own "little Sherman Act." *See, e.g.*, New York State's Donnelly Act, N.Y. GEN. BUS. LAW § 340 *et seq.* (McKinney 1968).

179 A number of recent articles deal with this topic. *See, e.g.*, Slater, *Antitrust and Government Action: A Formula for Narrowing* Parker v. Brown, 69 NW. U. L. REV. 71 (1974) [hereinafter cited as Slater]; Simmons & Fornaciari, *State Regulation as an Antitrust Defense: An Analysis of the* Parker v. Brown *Doctrine*, 43 U. CINN. L. REV. 61 (1974); Comment, *Antitrust Immunity—Reevaluation & Synthesis of* Parker v. Brown*—Intent, State Action, Causation*, 19 WAYNE L. REV. 1245 (1973); Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 4 (1972) [hereinafter cited as Handler]; and Comment, *Government Action and Antitrust Immunity*, 119 U. PA. L. REV. 521 (1971).

The caveat with respect to the limited scope of this and the previous part of this article, stated at note 141, is repeated here.

180 317 U.S. 341 (1943). The Court cited one nineteenth century lower federal court decision and one early twentieth century Supreme Court decision as antecedents of this doctrine, Lowenstein v. Evans, 69 Fed. 908 (D.S.C. 1895) and Olsen v. Smith, 195 U.S. 332 (1904). 317 U.S. at 352.

181 California Agricultural Prorate Act. Act of June 5, 1933, ch. 754, Statutes of California of 1933, *as amended by* chs. 471 and 743, Statutes of 1935; ch. 6, Extra Session, 1938; chs. 363, 548 and 894, Statutes of 1939; and chs. 603, 1150 and 1186, Statutes of 1941.

182 The Commission was made up of nine members, one of whom was the State Director of Agriculture. The other eight members were appointed by the Governor, confirmed by the State Senate, and were required to take an oath of office. 317 U.S. at 346.

"the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate."[183] However, the Court stated that the Sherman Act did not apply to the actions of a state or of state officials.[184] Since California had adopted the Agricultural Prorate Program in the execution of its governmental policy and enforced it through criminal sanctions, the Court held that the Sherman Act was simply not applicable to these alleged restraints of trade.

However, subsequent application of the *Parker v. Brown* doctrine has been inconsistent. Some of this confusion is attributable to a limiting statement in the decision itself that a state cannot immunize[185] the acts of private individuals which would otherwise violate the antitrust laws,[186] as well as the Court's failure to deal with this doctrine in the 32 years since its first articulation.[187]

Courts have adopted and commentators have suggested a number of different limitations on the doctrine.[188] There is, however, general agreement on at least some principles. The Court's statement that a state cannot immunize the anticompetitive conduct of private individuals suggests that it must in some undefined fashion purport to act for the public good of its citizens. Furthermore, the state must act in its governmental or regulatory as opposed to a private or proprietary capacity.[189]

There are several other criteria that the state's regulation might have to satisfy before the action would be exempted under *Parker v. Brown*. The Fourth Circuit suggested in *Goldfarb* that the state action would have to pass three tests: (1) The regulation must be for the benefit of the public; (2) it must be actively supervised by some state official or agency; and (3) the state must have created the program, rather than merely have given after-the-fact approval to essentially

183 317 U.S. at 350.

184 The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . . .

. . .

That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history . . . .

. . .

[I]t must be taken to be a prohibition of individual and not state action.

317 U.S. at 351-52.

185 Professor Slater argues that properly speaking the doctrine is one of the nonapplicability of the antitrust laws rather than of exemption from them. However, the latter usage is by far the more common. See Slater, *supra* note 179, at 71 n.4.

186 "A state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." 317 U.S. at 351.

187 The Supreme Court has denied petitions for writs of certiorari in a number of cases in which the *Parker v. Brown* doctrine was raised. *See, e.g.*, Hecht v. Pro-Football, Inc., 444 F.2d 931 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971), *cert. denied*, 404 U.S. 1062, *reh. denied*, 405 U.S. 969 (1972); Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir.), *cert. denied*, 400 U.S. 850 (1970); Allstate Ins. Co. v. Lanier, 361 F.2d 870 (4th Cir.), *cert. denied*, 385 U.S. 930 (1966).

Of course, one of the issues presented by the *Goldfarb* case is the application of the *Parker v. Brown* doctrine. See also Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 135-36 (1961), which deals with the related question of the immunity (under the First Amendment) of private concerted action to influence state decisions.

188 See note 179 *supra* and cases discussed in articles cited therein.

189 This limitation is suggested by the Court's statement that "we have no question [here] of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade . . . ." 317 U.S. at 351-52.

private conduct.[190] Professor Handler would resort to a different and more general standard: Whether the state's regulatory process provides an acceptable alternative to competition.[191] Professor Slater notes three broad categories which courts have used to test the sufficiency of state regulation[192] but then opts for a balancing test to determine if *Parker v. Brown* should apply: Whether the conduct produces a greater advancement of public goals than it does injury to competition.

Additional problems inhere in applying *Parker v. Brown* to the activities of professionals. One of these is the variety both in the kinds of professional activity and the forms of state regulation. Certain state regulations, such as minimum suggested prices or minimum fee schedules, almost completely eliminate some forms of competition.[193] Other kinds of state action may only limit competition. These include statutes or regulations governing entry into a profession, barring an attorney or physician from soliciting clients or from advertising rates, or specifying how and where products may be sold.[194]

Another variation which may affect the court's willingness to apply the *Parker v. Brown* doctrine is the degree of state involvement in the regulation. The area of attorneys' minimum fee schedules provides a graphic illustration of this problem. State bar associations fall into two broad categories: integrated, in which every attorney admitted to practice in that state must become a member of the bar association and the association is an arm of the highest court of the state,[195] and nonintegrated. Furthermore, in some states certain regulatory functions are delegated to county or municipal bar associations. One criterion used to determine the applicability of *Parker v. Brown* is the extent of state supervision

190 497 F.2d at 6.

191 "The crucial question in each case, then, is whether the pertinent state statute purports to authorize uncontrolled anticompetitive behavior or whether it provides a scheme of state regulation to take the place of enforced competition." Handler, *supra* note 179, at 9.

192 His three categories are (1) What were the true interests of the state officials who implemented the decision? (2) Did the state legislature intend anticompetitive means to be used in fulfilling the purposes of the statutory scheme? (3) Was the state action so ill-advised that it really serves no state purpose? Slater, *supra* note 179, at 91-101.

193 If all pharmacists were to adhere to the suggested minimum price, and if the minimum also becomes (as often happens) the maximum, competition with respect to price would be eliminated. N. Cal. Pharmaceutical Ass'n v. United States, 306 F.2d 379 (9th Cir.), *cert. denied,* 371 U.S. 862 (1962). On the other hand, it is likely that even with a suggested minimum fee schedule, some legal fees in any given geographical area will exceed the suggested minima. Those attorneys charging the higher fees would attract business because of the superiority of their legal services, which quality obviously is one form that competition can take.

194 Although it did not raise the *Parker v. Brown* issue, a recent Supreme Court decision —Gibson v. Berryhill, 411 U.S. 564 (1973)—illustrates the extent to which purported regulation of professional conduct can be used to limit competition. The State of Alabama had given the State Board of Optometry the power to suspend or revoke an optometrist's license for "unprofessional conduct." Membership on the State Board was limited to "independent" practitioners, *i.e.,* those not employed by others. The Board sought to revoke the licenses of certain optometrists who were salaried employees of an optical company for engaging in unprofessional conduct by advertising and splitting fees with their corporate employer. These optometrists brought an action under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970), for an injunction against further proceedings by the State Board. The Supreme Court affirmed the lower court's grant of the injunction, noting that the members of the Board were improperly biased towards acting in their own pecuniary interest rather than in behalf of the general public in Alabama; it was clear, the Court said, that the exclusion of plaintiffs from practice in the state would redound to the benefit of the independent optometrists.

195 In Lathrop v. Donohue, 367 U.S. 820 (1961), the Supreme Court upheld a Wisconsin statute creating an integrated bar; plaintiff had argued that the requirement that he join the State Bar and pay annual dues was inconsistent with the Fourteenth Amendment. This case contains an extensive discussion of the operation of an integrated bar. *See also* Note, *The Wisconsin Minimum Fee Schedule: A Problem of Antitrust,* 1968 WIS. L. REV. 1237.

of the professionals' activities.[196] Applying this standard, both the district court and the Fourth Circuit in *Goldfarb* agreed that while the Virginia State Bar[197] was sufficiently involved in the promulgation and use of the minimum fee schedule to be shielded by *Parker v. Brown,* the doctrine did not protect the Fairfax County Bar Association.[198]

The question of which test or combination of tests a court should use in applying *Parker v. Brown* to professional activities thus remains unclear. The *Goldfarb* court's mechanical test[199] might be somewhat easier to apply. However, the uncertain nature and effect of professional activities make a more flexible test preferable. In determining the propriety of professional exemptions, one inquiry is whether there are certain values—protection of the public and maintenance of ethical standards—which are antithetical to but more important than an increase in competition. In such an uncertain area, *Parker v. Brown* stands for the proposition that a state's institution and use of regulatory mechanisms to protect these values may displace federal antitrust regulation.

The notion that regulation may be a better means of preserving certain values than unbridled competition is hardly unique to professional activities. The essential justification for both state and federal regulation of banks, transportation, communication and utilities, is that competition is not the best form of providing the public with those values—the fullest distribution of goods and services at the lowest possible price—which the antitrust laws seek to promote through competition.[200]

In determining whether state regulation of professional conduct should displace the federal antitrust laws, a court should ask the following questions: (1) How strong is the state's interest in regulating the activity?[201] (2) How strong is the interest of the federal antitrust laws in promoting competition in the area? (3) What goals or values is the state seeking to promote? (4) What injury will the public suffer because of the loss of competition? (5) Were there reasonable alternatives to the state action chosen, and did the state weigh and then reasonably dismiss those alternatives?[202]

V. Conclusion

The professional exemption had its origin in an era when commerce was far more limited and the interpretation of the Commerce Clause was far more restrictive than they are today. Therefore, exemptions grounded primarily on these historical justifications probably have little hope for survival.

196 *See* text accompanying note 190 *supra.*
197 The Virginia State Bar was an integrated bar. 497 F.2d at 9 n.25.
198 355 F. Supp. at 495-96; 497 F.2d at 4-13.
199 *See* text accompanying note 190 *supra.*
200 The values which the antitrust laws seek to promote are described more fully in note 133 *supra.*
201 Once again, I would urge here too that each form of conduct be evaluated individually.
202 Professor Handler rejects the propriety of such an inquiry, saying that its net effect would be "to take review of state administrative determinations out of the hands of the state judiciary, where it properly belongs, and to invite collateral antitrust attack as the accepted means for assessing the propriety of state administrative decisions." Handler, *supra* note 179, at 13.

Nonetheless, a professional exemption can also be justified because of the unique nature of the conduct in question. The legality of this conduct should not be decided solely by analogy to the business world. Professionals operate under different ethical and business standards. It may ultimately be determined that certain professional restraints are so anticompetitive as to be illegal. However, each activity should be analyzed under a Rule of Reason, examining its nature, its alleged benefits, and its effects on competition, in the larger context of antitrust goals and values.