

# UNREASONABLE RESTRAINTS: ANTITRUST LAW AND THE NATIONAL RESIDENCY MATCHING PROGRAM

## I. INTRODUCTION

The road to becoming a medical doctor (“MD”) in the United States is long and arduous.<sup>1</sup> After four years of medical school, every new MD must spend between two and nine years training under the instruction of experienced physicians.<sup>2</sup> These training programs, called “residencies,”<sup>3</sup> are distributed among graduating medical students through a program known as the National Residency Matching Program (“NRMP”).<sup>4</sup>

Affectionately called “the match” by individuals involved in the program, the NRMP is a private, nonprofit corporation designed to provide “an impartial venue for matching applicants’ and programs’ preferences for each other consistently.”<sup>5</sup> The NRMP attempts to facilitate the process through which medical students choose their residency programs by using preference sheets called “Rank Order Lists.”<sup>6</sup> Each potential resident ranks the residency programs in which he or she desires to participate.<sup>7</sup> Every hospital department administering a residency program does the same.<sup>8</sup> The hospital departments and students turn in their lists, and a computer performing a mathematical algorithm “matches” potential residents to programs.<sup>9</sup> Every year, the NRMP receives over 30,000 student applications for approximately 23,000 available residency positions.<sup>10</sup>

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1. To become a physician, students must complete four years of training at an accredited medical school, as well as two to nine years of graduate medical training in the form of residencies and fellowships. See National Board of Medical Examiners, USMLE, at <http://www.nbme.org/programs/usmle.asp>.

2. For data on the lengths of different residency programs, see *infra* notes 37–39 and accompanying text.

3. See *infra* notes 19–21 and accompanying text.

4. National Resident Matching Program Medical School User Guide, available at [http://www.nrmp.org/res\\_match/tables/med\\_schl\\_off\\_2000.pdf](http://www.nrmp.org/res_match/tables/med_schl_off_2000.pdf) (January 2004) [hereinafter User Guide], at 2.

5. *Id.* at 3.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 2.

A major goal of the NRMP is elimination of confusion that could arise during the matching process if each residency program utilized its own procedure and timeline when filling resident positions.<sup>11</sup> However, the match creates different problems. Every student who participates in NRMP agrees to “honor the match” and accept a residency at any program selected by the computer.<sup>12</sup> This requirement results in new residents having virtually no power to bargain with their future employers over working hours or compensation.<sup>13</sup>

Critics have long argued that the NRMP process is extremely difficult for young doctors, and that the long hours and little pay residents receive for their efforts borders on abuse.<sup>14</sup> However, a group of residents has recently gone further, alleging that the NRMP matching program violates § 1 of the Sherman Antitrust Act.<sup>15</sup> The Complaint, filed in the District Court for the District of Columbia on May 5, 2002, against major medical associations such as the AAMC, NRMP, and AMA, as well as prominent educational hospitals, alleges that the actions by the defendants in the “hiring, employment and compensation of resident physicians,” through the NRMP matching program, have the purpose and effect of depressing and stabilizing compensation and other terms of residents’ employment.<sup>16</sup>

In a purely commercial setting, the NRMP’s policies would likely be condemned by a court using the relatively quick and very final per se rule, which traditionally held invalid any horizontal agreements among

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11. See *infra* notes 22–26 and accompanying text.

12. NRMP: Residency Match, Match Participation Agreement for Applicants and Programs § 5.1, available at [http://www.nrmp.org/res\\_match/policies/map\\_main.html](http://www.nrmp.org/res_match/policies/map_main.html) [hereinafter NRMP: Residency Match].

13. See *infra* notes 180–87 and accompanying text.

14. See, e.g., Michael Romano, *Preserving Quality of Education: Accreditation Council Limits Residents’ Work Week*, MODERN HEALTHCARE, June 17, 2002, at 17 (stating that residents often work 100 hours per week for an average of \$36,000 per year, or less than \$10 per hour, “less than the pay for many hospital maintenance workers”). In response to these criticisms there has been some attempt at internal reform. The Accreditation Council for Graduate Medical Education (“ACGME”) approved a policy in June 2000 limiting residents’ hours to eighty per week, averaged over one month. *Id.* However, the policy allows for extensions. *Id.* The only state to regulate residents’ work hours is New York, which has limited residents to eighty hours per week since 1989. *Id.* In November 2001, a similar bill was introduced into the United States Congress. *Id.* However, it faces serious opposition from hospital groups who are “eager to try to forestall attempts by Congress to pass broad legislation mandating a limit on resident work hours.” *Id.*

15. Complaint, *Jung v. Ass’n of Am. Med. Coll.* (D.C. D.C. 2002) (No. 1-02-00873) [hereinafter Complaint]. The Complaint also alleges that the numerous defendants have violated antitrust laws through acts of information exchange and the maintenance of anticompetitive accreditation standards. Complaint at 6. This Note addresses the legality of the NRMP matching program. Consideration of the other antitrust allegations is beyond the scope of this Note.

16. *Id.* at 5–6.

competitors to fix prices.<sup>17</sup> However, due to the function of nonprofit and professional organizations in the marketplace, courts have been less certain of the breadth of analysis needed to invalidate restraints by these types of organizations.<sup>18</sup> Using the NRMP program as an example, this Note examines the application of antitrust principles to the actions of nonprofit and professional organizations and concludes that courts should apply traditional antitrust analysis except in very limited circumstances. Part II will describe the NRMP program. Part III will discuss the goals of the Sherman Act. Part IV will outline the special role nonprofit organizations can play in the market. Part V will trace the course of Sherman Act jurisprudence with respect to nonprofit and professional organizations. Finally, Parts VI and VII will apply the case law to the NRMP and conclude that under traditional antitrust analysis, the NRMP program should be invalidated and replaced by a system of minimal regulation that promotes competition.

## II. THE NRMP PROCESS

### A. *History of the Match*

The concept of the in-house “rounding-out,” or residency, for medical school graduates did not originate until World War I.<sup>19</sup> Once the programs began, early residents actually lived at their respective hospitals while tending to patients and observing the techniques and practices of more respected physicians.<sup>20</sup> By 1940, fourteen medical specialties<sup>21</sup> offered board certification, meaning specialized residency programs existed in those areas.<sup>22</sup> As the number of certified specialties continued to grow, so

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17. See *infra* notes 86–89 and accompanying text.

18. See *infra* notes 104–62 and accompanying text.

19. KENNETH M. LUDMERER, *TIME TO HEAL: AMERICAN MEDICAL EDUCATION FROM THE TURN OF THE CENTURY TO THE ERA OF MANAGED CARE* 80 (1999). Before World War I, residency training programs did not exist. *Id.* at 79. Most educators believed four years of medical school provided sufficient training for the general practice of medicine. *Id.* However, in the 1920’s, the growing body of medical knowledge combined with rapid changes in technique became too much information to be learned in just four years. *Id.* at 80.

20. *Id.* Because they actually lived in the hospitals, early residents were known as “resident physicians” or “house staff,” from which the modern term “resident” arose. *Id.* at 80.

21. The fourteen subspecialties offering board certification in 1940 were ophthalmology, otolaryngology, obstetrics and gynecology, dermatology, pediatrics, orthopedic surgery, psychiatry and neurology, radiology, urology, internal medicine, pathology, anesthesiology, plastic surgery, and surgery. *Id.* at 88.

22. *Id.* For a general history of the rise of specialization in medicine, see U.S. Department of Health and Human Services, Health Resources and Services Administration, *Graduate Medical Education and Public Policy: A Primer 2* (December 2000) [hereinafter GME Primer].

did the demand for residency training.<sup>23</sup> Although enough resident positions existed to meet the demand, medical students competed fiercely for placement in the more prestigious programs.<sup>24</sup> Different hospitals appointed residents on different dates and often pressured students to enter into binding contracts before competing institutions released their appointments.<sup>25</sup> To solve this problem, the Association of American Medical Colleges (the “AAMC”), the American Medical Association (“AMA”), and several hospitals instituted the National Intern Matching Plan in 1951-52.<sup>26</sup> This system formed the basic rubric on which the current matching program has been built.<sup>27</sup>

After the match was adopted, teaching hospitals began using salary increases to lure the best residents away from competing programs.<sup>28</sup> Price competition was especially fierce among schools in the same geographic area.<sup>29</sup> Medical students and residents “reveled” in the competition.<sup>30</sup> However, many hospitals expressed a “gnawing fear” that resident salaries would continue to increase and never stop as long as the market was competitive.<sup>31</sup>

### *B. Scope of the Modern Matching Program*

The modern matching program, the NRMP, is larger, more complex, and more widespread than the original program.<sup>32</sup> In 2000, over eighty percent of the available first-year residency positions in the United States

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23. LUDMERER, *supra* note 19, at 88–90.

24. *Id.* at 93.

25. *Id.* This situation led to medical students being left with an unenviable choice: “to accept a position at a less desirable hospital, or to wait to hear from a more desirable hospital, risking the chance of ending up with no appointment at all.” *Id.*

26. *Id.* at 206. At first, the matching program was only used to match students with one year intern programs following medical school. As longer residencies became the norm, the match expanded to control those as well. *Id.* The early match worked in the same manner as the current program: both students and hospitals ranked their choices for programs and students, respectively. *Id.* On a certain date, the two lists were matched and the resulting appointments became binding on both parties. *Id.*

27. *See supra* notes 5–10 and accompanying text.

28. LUDMERER, *supra* note 19, at 192–93. By raising resident salaries, hospitals were essentially lowering the costs of an education for their students. *Id.* The fact that salaries continued to rise indicated the existence of a competitive market. *Id.*

29. LUDMERER, *supra* note 19, at 192–93.

30. *Id.*

31. *Id.* at 192.

32. The NRMP is now sponsored and run by five organizations: The American Board of Medical Specialties (“ABMS”), the American Medical Association (“AMA”), the Association of American Medical Colleges (“AAMC”), the American Hospital Association (“AHA”) and the Council of Medical Specialty Societies (“CMSS”). User Guide, *supra* note 4, at 2.

were offered exclusively through the NRMP.<sup>33</sup> Hospitals whose programs participate in the NRMP must agree not to select residents in any other way.<sup>34</sup> This situation has the effect of substantially limiting the residency programs available to students who choose to pursue graduate medical training outside of the match. Furthermore, students who choose to participate in the NRMP must accept a position where they are matched.<sup>35</sup>

In addition to the large percentage of residency positions controlled exclusively by the NRMP, residents are left virtually optionless when deciding between programs administered through the match.<sup>36</sup> Past average starting resident salaries for NRMP residencies varied as little as \$1,000 between diverse specialties such as neurosurgery and internal medicine.<sup>37</sup> Within specialty programs in the same geographic region, salaries were all within \$4,000.<sup>38</sup> Figures for other variables, such as average work hours and time on-call, were also very similar within specialties.<sup>39</sup>

Although the NRMP was initially founded to control confusion in matching residents and programs, critics of the match have alleged that it is the cause of residents' heavy workload and low pay and should be invalidated.<sup>40</sup> The rest of this Note examines antitrust principles and applies them to the NRMP.

### III. PURPOSES OF THE SHERMAN ACT

Courts and commentators generally agree that in passing the Sherman Antitrust Act,<sup>41</sup> Congress sought to protect and promote competition in the marketplace.<sup>42</sup> However, neither the Act's plain language nor its

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33. Complaint, *supra* note 15, at 23. The 2000 match placed approximately 20,000 applicants for residencies into 3,700 programs at 701 different hospitals. GME Primer, *supra* note 22, at 3. In 2003, 31,004 applicants participated in the match, competing for 23,365 positions in 3,719 different programs. User Guide, *supra* note 4, at 2.

34. NRMP: Residency Match, *supra* note 12, § 1.0 ("Teaching hospitals that register any programs in the Matching Program agree to select senior students of U.S. allopathic medical schools for all of their programs only through the Matching Program.

35. *Id.* at § 5.1

36. *See, e.g.*, AAMC, FREIDA Online Specialty Training Search, at <http://www.ama-assn.org/vapp/freida/spcindx/0,2654,TR,00.html>.

37. *See id.*

38. *Id.*

39. *See id.* The average first-year resident in an internal medicine program makes \$38,172.00 per year, and works on average 64.3 hours per week.

40. FREIDA Online Specialty Statistics Information, at <http://www.ama-assn.org/vapp/freida/spcstsc/0,1238,140,00.html>.

41. 15 U.S.C. §§ 1-7 (1998).

42. *See* HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 1 (1985)

legislative history provides much guidance concerning the specific goals Congress wanted to address.<sup>43</sup> Because of this, substantial disagreement exists as to exactly why competition should be protected.<sup>44</sup>

One influential view<sup>45</sup> is that antitrust laws exist to enhance consumer welfare through the efficient allocation of resources.<sup>46</sup> Judge Bork, the leading scholar supporting this school of thought, argues that “[t]he only legitimate goal of American antitrust law is the maximization of consumer welfare” through economic efficiency.<sup>47</sup> Judge Bork asserts that the legislative history of the Sherman Act “displays the clear and exclusive policy intention of promoting consumer welfare.”<sup>48</sup> Many economists and legal scholars share Judge Bork’s views as to the fundamental purpose of antitrust law.<sup>49</sup>

Other scholars argue that efficiency is not the only thing that “counts” when applying antitrust principles.<sup>50</sup> These individuals believe that

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[hereinafter HOVENKAMP, ECONOMICS] (stating that “[a]n important goal—and perhaps the only goal—of antitrust law is to ensure that markets are competitive.”).

43. ROGER D. BLAIR & DAVID L. KASSERMAN, ANTITRUST ECONOMICS 53 (1985) (“The vague and general prohibition of trade restraints . . . in Sections 1 and 2 of the Sherman Act has caused much mischief. Due to the lack of specificity, the Sherman Act was little more than a legislative command that the judiciary develop the law of antitrust.”). See also Terry Calvani, *What is the Objective of Antitrust?*, in ECONOMIC ANALYSIS AND ANTITRUST LAW 7 (Terry Calvani & John Siegfried eds., 2d ed. 1988) (“[I]t is fair to say that the historical examination of the Sherman Act does not conclusively establish that Congress had a consistent particularized goal in mind when it enacted the legislation.”).

44. See Calvani, *supra* note 43, at 8 (“[A] veritable menu of possibilities” have been suggested as to the underlying rationale for federal antitrust laws).

45. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 51 (1978).

46. *Id.* at 12. Properly functioning competitive markets are the most efficient because they maintain what is called marginal cost pricing. *Id.* Marginal cost is the cost increase resulting from producing one more unit of a product. *Id.* In a competitive market where no one firm (or combination of firms) is large enough to affect prices, each producer of goods is forced to sell at marginal cost. *Id.* If a given producer in a competitive market were to raise its price above marginal cost, it would face losing business to competitors who could undercut its price. *Id.* Pricing at marginal cost ensures that consumers pay no more for a product than it is actually worth to them and to society. BLAIR & KASSERMAN, *supra* note 43, at 21. If producers price goods above marginal costs—as often happens in the absence of competition—consumers pay more for goods than they are actually worth. *Id.* Some argue that this view is the most influential explanation of antitrust principles. See, e.g., Shrikanth Srinivasan, Note, *College Financial Aid and Antitrust: Applying the Sherman Act to Collaborative Nonprofit Activity*, 46 STAN. L. REV. 919, 926 (1994) (arguing that although the consumer welfare explanation of antitrust is not “universally accepted,” it is the “dominant” view). See also Calvani, *supra* note 43, at 12 (“Perhaps the most frequently cited antitrust objective is to achieve allocative or economic efficiency by preserving competition in the marketplace.”).

47. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 51 (1978).

48. *Id.* at 61. Judge Bork cites to comments made by Senator Sherman during Senate arguments in which he expressed both concern for consumer welfare and an understanding of what effects higher prices could have on output and productivity. *Id.* at 62.

49. See Calvani, *supra* note 43, at 8 (arguing that “consumer welfare is the most appropriate frame of reference” in which to apply antitrust laws). See also (put some other things here later.)

50. See HOVENKAMP, ECONOMICS, *supra* note 42, at 41.

efficiency must sometimes be sacrificed to protect alternative values.<sup>51</sup> Professor Fox contends, for example, that antitrust law should protect a variety of interests, such as wealth transfer, entrepreneurial opportunity, and preventing the spread of big business,<sup>52</sup> sometimes at the expense of economic efficiency.<sup>53</sup>

The vague language of the Sherman Act and its scant legislative history, combined with competing views over the underlying objectives of antitrust laws, puts courts in a difficult position. Courts must balance competing policy goals and understand the often complicated economic consequences of their possible actions.<sup>54</sup> Decisions regarding activities of the nonprofit sector have been particularly inconsistent as courts struggle with the role nonprofit firms play in markets.<sup>55</sup>

#### IV. ROLE OF NONPROFIT ORGANIZATIONS IN THE MARKET

Although the underlying premise of antitrust law is debatable, behind every theory is a shared belief that competition in a properly functioning market is the most effective means by which to achieve the desired policy objective.<sup>56</sup> When achieved, a functioning, competitive market involves

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51. *Id.* at 41–42. Professor Eleanor Fox, for example, argues that “neither Congress nor the Supreme Court envisioned sacrificing any one goal of antitrust for fuller realization of any other.” Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1142 (1981). Unlike Judge Bork, Professor Fox sees the legislative history of the Sherman Act as indicative of the diverse conditions and concerns that prompted passage of the statute. *Id.* at 1147–48.

52. *Id.* at 1153–54. See also HOVENKAMP, *ECONOMICS*, *supra* note 42, at 41–42 (stating that the “competing values” at play in antitrust law include protection of small business, protection of ease of entry into business (or “entrepreneurship”), concern about the power of large companies, and encouragement of moral business practices); BLAIR & KASSERMAN, *supra* note 43, at 55 (explaining the view that multiple goals, such as prevention of wealth transfers and limiting the social and political power of large firms, should be seen as the goals of antitrust).

53. Fox, *supra* note 51, at 1142. Promoting alternative goals of antitrust can be harmful to efficiency when, for example, a large firm is broken up into several smaller ones. Sometimes, a large, integrated firm can more efficiently produce and deliver products to the market, thereby effectively lowering prices for consumers. Allowing the large firm to do business unimpeded would therefore promote consumer welfare through allocative efficiency. However, courts have found even these “good monopolies” violative of the Sherman Act based on the view that antitrust laws should protect small business and encourage entrepreneurship. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 428–29 (2d Cir. 1945) (finding a Sherman Act violation by a monopolist in large part because “great industrial consolidations are inherently undesirable, regardless of their economic results. . . . [I]t has been constantly assumed that one of [the antitrust statutes’] purposes was to perpetuate and preserve, for its own sake, and in spite of possible cost, an organization of small industry units . . .”) (internal citations omitted).

54. See HOVENKAMP, *ECONOMICS*, *supra* note 42, at 42 (arguing that policymakers “must have a fairly good idea of what is being thrown into the scales” before attempting to balance competing policies regarding antitrust enforcement).

55. See *infra* Part IV.

56. See BORK, *supra* note 47, at 98 (stating that the “forces of competition in open markets”

multiple firms, allows for the entry of new businesses, and puts constant downward pressure on the price of goods.<sup>57</sup> However, unregulated markets sometimes fail to function as they should due to situations that disrupt the competitive balance.<sup>58</sup> These “market failures” cause inefficient allocation of resources and economic power and can reduce both business opportunities and consumer welfare.<sup>59</sup>

Market failures are often corrected by governmental regulation.<sup>60</sup> However, the existence and activities of nonprofit organizations may also act to correct two of the most common reasons for market failure: informational asymmetries and externalities.<sup>61</sup> Because of their role in correcting market failure, the seemingly anticompetitive practices of nonprofit corporations arguably promote competition.<sup>62</sup>

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bring firms closer to the point of maximum efficiency and thus maximum social welfare); Fox, *supra* note 51, at 1154 (stating that “[t]he competition process is the preferred governor of markets. If the impersonal forces of competition . . . determine market behavior and outcomes, power is by definition dispersed, opportunities and incentives for firms without market power are increased, and the results are acceptable and fair.”). Courts have also endorsed the view that competition will most successfully achieve the many possible purposes of antitrust law. In *Northern Pacific Railway Co. v. United States*, the Court stated:

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. But even were that premise open to question, the policy unequivocally laid down by the Act is competition.

356 U.S. 1, 4 (1958). See also *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) (holding that “whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that the public interest is best protected from the evils of monopoly and price control by the maintenance of competition.”).

57. See BLAIR & KASSERMAN, *supra* note 43, at 22 (discussing how competitive markets are generally seen as those with a large number of small firms).

58. A “market failure” occurs when the pricing system in a given market fails to produce the quantity of the good that is most efficient for society. ROY J. RUFFIN & PAUL R. GREGORY, *PRINCIPLES OF ECONOMICS* 706 (1983).

59. See, e.g., Peter James Kolovos, Note, *Antitrust Law and Nonprofit Organizations: The Law School Accreditation Case*, 71 N.Y.U. L. REV. 689, 697 (1996).

60. *Id.* Some examples of regulated industries are those for professional services such as law, medicine, dentistry, engineering, or aviation. *Id.*

61. See Marina Lao, *Discrediting Accreditation?: Antitrust and Legal Education*, 79 WASH. U. L.Q. 1035, 1083 (2001) (finding that accreditation of professional education could be seen as procompetitive because it closes the information deficit and corrects market imperfections); Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 847–50 (1980) (suggesting that nonprofit organizations exist to correct the particular type of market failure that occurs when there is no way for consumers to be sure they are getting the quality of service they paid for).

62. See Kolovos, *supra* note 59, at 698, (arguing that facially anticompetitive practices by nonprofit companies are often actually procompetitive means of correcting information deficits and externalities, and that a special antitrust analysis should be used when evaluating the effects of

Informational asymmetries arise when consumers of goods do not possess adequate knowledge with which to evaluate the quality of those goods.<sup>63</sup> This asymmetry is often seen in markets for professional services such as medicine, law, or education, where the nature of the service provided is too complex for the ordinary consumer to adequately determine the actual value of what he or she purchases.<sup>64</sup> Because the consumer lacks the necessary information concerning quality, he or she may settle for a service of suboptimal value, which is inefficient and thus harms consumer welfare.<sup>65</sup>

Nonprofit organizations can correct market failure due to information asymmetries in two ways. First, because a nonprofit firm, by definition, cannot distribute net earnings to its members,<sup>66</sup> the organization will have less of an incentive to deceive consumers by cutting corners and delivering poor quality goods.<sup>67</sup> Second, many nonprofit organizations exist for the sole purpose of providing information to consumers concerning goods or services<sup>68</sup> or setting quality standards by which every member of a

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restraints in nonprofit markets); Srinivasan, *supra* note 45, at 947–49 (proposing a new standard of antitrust analysis, the “market failure rule,” for use when analyzing the activities of nonprofit organizations).

63. See Hansmann, *supra* note 61, at 843–44, 862–63 (noting that in certain markets, “consumers may be incapable of accurately evaluating the goods promised or delivered,” resulting in situations where “the consumer entrust[s] to the producer a great deal of discretion that the consumer is in a poor position to police”).

64. See *id.* at 866 (finding that education is a “complex and subtle service” about which potential students or their parents may not feel confident making qualitative judgments); see also Lao, *supra* note 61, at 1081 (finding that there is an “information gap” between producers and consumers in the market for legal services, although it is not as large as the gap in technical fields such as medicine). For example, even a well-educated consumer would find it difficult to compare the quality of service provided by different surgeons, or to evaluate a surgeon’s performance after a procedure to make sure that he or she received optimal value. See generally *id.*

65. See *id.* at 1084. The theory is that if consumers are unable to ascertain the quality of a service, they will be unwilling to pay a higher price for high quality service because they cannot tell the difference anyway. *Id.* If consumers will not pay a higher price for quality, the producers will have no incentive to produce high quality services, resulting in a downward spiral of price and quality that ultimately harms consumers. *Id.*

66. See, e.g., Hansmann, *supra* note 61, at 538. By definition, all nonprofit organizations must be barred from distributing their net profits to individuals who exercise control over them. *Id.* That does not mean that a nonprofit corporation cannot earn a profit, only that it must devote those earnings entirely to the furtherance of the purpose of the organization. *Id.* Hansmann refers to this lack of membership profits as the “nondistribution constraint.” *Id.*

67. See *id.* at 847–48 (finding that a consumer who purchases goods or services in a market where he must rely on the producer for quality assurance can “trust” a nonprofit organization, because the nondistribution constraint removes incentives to cut corners).

68. Such as Consumers Union.

profession or industry must abide.<sup>69</sup> These actions narrow the distance between the knowledge of the producer and that of the consumer,<sup>70</sup> thereby instilling consumer confidence in the market and allowing consumers to pay for quality.<sup>71</sup>

Nonprofit organizations can also correct market failures caused by externalities. An externality occurs when the purchaser of a product or service does not receive the product's full value.<sup>72</sup> Nonprofit organizations correct externalities through regulation.<sup>73</sup> For example, in the case of medical education, the accreditation committee, the American Council on Graduate Medical Education ("ACGME"), sets the number of years required to acquire certification in any given medical field.<sup>74</sup> The lengths of residency programs are therefore fixed, regardless of whether the student, as a consumer of education, would rather purchase a shorter program.<sup>75</sup> This fixed length ensures that future physicians choose a socially optimal level of education.<sup>76</sup>

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69. The most frequently cited example of this type of nonprofit is an accreditation or policing organization for a profession, such as the American Bar Association or the American College of Obstetricians and Gynecologist.

70. Nonprofit groups that set professional standards lower informational asymmetries by providing consumers with a base level of quality assurance. *See* Lao, *supra* note 61, at 1079–82; *see also* Hansmann, *supra* note 61, at 862–63 (arguing that the nondistribution constraint places restrictions on the producer's conduct "beyond those that [the consumer] is able to impose," thus providing the consumer with additional protection).

71. *See id.*; *see also* Kolovos, *supra* note 59, at 699.

72. *See, e.g.*, WALTER NICHOLSON, MICROECONOMIC THEORY 568 (2d ed. 1978). In economic terms, an externality is defined as a situation in which "interactions among firms and individuals . . . are not adequately reflected in market prices." *Id.* Externalities can occur when the benefits of an interaction are externalized. *Id.* For example, in the market for graduate medical education, it could be argued that a medical student who "purchases" a residency program does not receive the total value of the education. Some of the value passes to other consumers who benefit from competent, well-trained physicians. Because the student does not receive the total value of her education, she will be unwilling to pay more for it than the portion of the value she receives, thus undervaluing educational quality. In the end, this results in fewer well trained doctors than is socially optimal.

Externalities also occur when some of the costs of a transaction are not internalized. Nicholson, *supra* note 72, at 568. The classic example of a cost not being internalized is pollution. NICHOLSON, *supra*, at 568. Part of the cost of producing utilities is pollution. *Id.* at 569. However, the costs of pollution are imposed, at least in part, on the public. *Id.* at 569.

For other examples of market failure due to externalities see Lao, *supra* note 61, at 1085–86 (explaining externalities in terms of law school education), and Kolovos, *supra* note 59, at 701 (explaining externalities in the field of engineering).

73. *See generally* NICHOLSON, *supra* note 72, at 651. Externalities can also be corrected through government regulation, such as in the environmental context, or through private bargaining by the affected parties. *Id.* at 644–51.

74. *See* National Board of Medical Examiners, *supra* note 1.

75. *Id.*

76. *Id.*

The roles played by nonprofit and professional organizations in the market affect the way courts apply antitrust laws to trade restraints practiced by these types of groups.<sup>77</sup> The next section will explore antitrust jurisprudence with respect to nonprofit and professional organizations.

## V. APPLICATION OF THE SHERMAN ACT TO NONPROFIT AND PROFESSIONAL ORGANIZATIONS

### A. Structure of Sherman Act Analysis

Section 1 of the Sherman Act<sup>78</sup> prohibits “[e]very contract, combination . . . or conspiracy, in restraint of trade.”<sup>79</sup> If taken literally, this broad language would prohibit almost every contract.<sup>80</sup> Since the passage of the statute, courts have had to develop a framework for analyzing exactly which contracts and conspiracies should be declared illegal as anticompetitive.<sup>81</sup> At all times, they have attempted to balance the goals of antitrust regulation.<sup>82</sup> The Supreme Court held early on that for a contract or conspiracy to violate § 1 of the Sherman Act, it had to *unreasonably* restrain trade.<sup>83</sup>

Modern courts analyze every antitrust case under one of three frameworks: the per se rule, the rule of reason, or the modified rule of reason, or “quick look.”<sup>84</sup> Under each, the basic inquiry is whether the

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77. See *infra* notes 104–63 and accompanying text.

78. 15 U.S.C. § 1 (1998).

79. *Id.*

80. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 687–88 (1978) (“[R]estraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law.”); *United States v. Topco Assocs, Inc.*, 405 U.S. 596, 606 (1972) (“Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it.”); see also *Bd. of Trade of City of Chicago v. United States*, 246 U.S. 231, 238 (1918) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”); see generally *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898).

81. See *supra* notes 41–55 and accompanying text.

82. See *supra* notes 41–55 and accompanying text.

83. In *Standard Oil*, Chief Justice White, after analyzing § 1 of the Sherman Act, stated:

The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combinations or otherwise, which did not *unduly restrain* interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an *undue restraint*.

221 U.S. at 60 (emphasis added).

84. See *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (finding three “general standards” for analyzing whether a proposed restraint is unreasonable under the Sherman Act). Although endorsing the three categories of antitrust analysis, the Supreme Court has stated that antitrust analysis should be “less fixed” than the categories would have it appear, and that the three

proposed restraint is unreasonable and therefore unlawful.<sup>85</sup> This section will explain each of these frameworks and explore how they have been applied by courts to the activities of nonprofit organizations.

The per se rule holds any practice that has been found to be plainly anticompetitive, with no procompetitive effects, presumptively unreasonable and invalid without an inquiry into the particular circumstances surrounding the restraint.<sup>86</sup> Horizontal restraints<sup>87</sup> such as price-fixing, territorial allocation, and to some extent, information exchange, all fall into this category.<sup>88</sup> Due to their “pernicious effect on competition and lack of any redeeming virtue,” these types of restraints are categorically condemned—no market analysis is needed.<sup>89</sup>

In the majority of cases in which the alleged restraint is not so manifestly anticompetitive that it can be quickly condemned per se, courts

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tests should be seen as a continuum on which individual restraints are placed and analyzed. *See* Cal. Dental Ass'n v. FTC, 526 U.S. 756, 779 (1999); *see, e.g.*, Julie L. Seitz, Note, *Consideration of Noneconomic Procompetitive Justifications in the MIT Antitrust Case*, 44 EMORY L.J. 395, 408 (1995); Theodore J. Stachtiaris, *Antitrust in Need: Undergraduate Financial Aid and United States v. Brown University*, 62 FORDHAM L. REV. 1745, 1750 (1994). While realizing that bright lines do not separate the three categories of analysis, this Note will analyze the challenged activity of the NRMP each one of the three categories, as this is the type of analysis a district court hearing the case will likely undertake.

85. *See infra* notes 86–103 and accompanying text.

86. *See Prof'l Eng'rs*, 435 U.S. at 692 (stating that there “are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are ‘illegal per se.’”); *Topco Assocs., Inc.*, 405 U.S. at 607 (“[C]ertain business relationships are per se violations of the Act without regard to a consideration of their reasonableness.”).

87. A horizontal restraint is one made through an agreement between competitors at the same level of the market, such as an agreement among manufacturers. *See generally* Nicholsan, *supra* note 72. In comparison, vertical restraints are those made pursuant to an agreement between businesses at different levels, such as a manufacturer and a retailer. *See* HOVENKAMP, *ECONOMICS*, *supra* note 42, at 8.

88. *See Topco Assocs.*, 405 U.S. at 608 (territorial restraints are per se violations of Sherman Act); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 468 (1941) (group boycotts are a per se violation); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940) (finding horizontal price-fixing per se illegal).

89. *N. Pac. Ry. Co.*, 356 U.S. at 5. Justice Black justified the stark results of the per se rule by stating:

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.

*Id.*

use the rule of reason.<sup>90</sup> First announced in *Chicago Board of Trade v. United States*,<sup>91</sup> the rule of reason looks at “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.”<sup>92</sup>

In order to determine the legality of a restraint on trade under the rule of reason, courts first require a plaintiff to prove that the activity in question restrains trade or has anticompetitive effects.<sup>93</sup> If the plaintiff meets that burden, courts undertake a complicated analysis of the relevant market in order to assess the restraint in terms of its possible procompetitive effects.<sup>94</sup> If the court finds that the restraint has a net procompetitive effect, it will survive antitrust scrutiny.<sup>95</sup> However, if the anticompetitive effects outweigh any proffered procompetitive justifications, or if the justifications can be achieved through measures which do not stifle competition, the activity will be in violation of the Sherman Act.<sup>96</sup>

In between the per se rule and the rule of reason is a hybrid analysis often called the “quick look” or truncated rule of reason.<sup>97</sup> A relatively recent development,<sup>98</sup> the quick look test is applied when the restraint

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90. See *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) (“Since the early years of this century a judicial gloss on this statutory language has established the ‘rule of reason’ as the prevailing standard of analysis.”).

91. 246 U.S. 231 (1918).

92. *Id.* at 238.

93. See *id.*; see also *Brown University*, 5 F.3d at 668 (“The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anti-competitive effects within the relevant product and geographic markets.”).

94. A classic statement of the relevant factors examined when looking at the procompetitive effects of a restraint under the rule of reason, often included in jury instructions, was given in *Chicago Board of Trade* by Justice Brandeis:

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.

246 U.S. at 238.

95. See *Brown University*, 5 F.3d at 669 (“If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective.”).

96. *Id.*

97. See *California Dental*, 526 U.S. at 770.

98. The Supreme Court is said to have created the “quick look” in *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109–10 & n.39 (1984), when the court quoted leading antitrust scholar Phillip Areeda, who stated that “[t]he essential point is that the rule of reason can sometimes be applied in the twinkling of an eye.” *Id.* The court went on to state that the faster analysis allows the

being scrutinized does not necessarily fall into a per se category, but has plain and obvious anticompetitive effects.<sup>99</sup> First, the activity is presumed unreasonable. This differs from the rule of reason in that under that test the plaintiff has the burden of proving anticompetitive effects; they are not presumed. The defendant has the opportunity to rebut the presumption of unreasonableness by presenting evidence of legitimate justifications or procompetitive effects.<sup>100</sup> If the court finds the alleged justifications inadequate, or if it finds that the justifications can be served through less restrictive means, it will condemn the practice.<sup>101</sup> However, if the justifications are plausible and questions remain, the court will undertake a full rule of reason analysis.<sup>102</sup> Nonprofit and professional organizations have been analyzed under each type of antitrust analysis.<sup>103</sup>

### B. Early Cases

Early case law suggested that the activities of nonprofit organizations might be immune from antitrust scrutiny.<sup>104</sup> However, in the 1975 decision *Goldfarb v. Virginia State Bar*,<sup>105</sup> the Supreme Court put that idea to rest by holding a county bar association that fixed minimum prices for legal services subject to § 1 of the Sherman Act.<sup>106</sup> The Supreme Court found

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condemnation of a “naked restraint” on price or output without an “elaborate industry analysis.” *Id.* at 110. However, the Supreme Court did not officially recognize the term “quick look” until its decision in *California Dental*, where it recognized and approved of lower courts’ use of the analysis generally, but rejected it in the particular case. See *infra* notes 152–60 and accompanying text for a discussion of the *California Dental* decision.

99. See *California Dental*, 526 U.S. at 770 (explaining that the quick look is applied when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.”); *NCAA*, 468 U.S. at 106.

100. See *California Dental*, 526 U.S. at 771.

101. See *Chicago Prof’l Sports Ltd. P’ship v. NBA*, 961 F.2d 667, 674–76 (7th Cir. 1992) (finding the quick look analysis adequate after assessing and rejecting proffered procompetitive justifications).

102. See, e.g., *California Dental*, 526 U.S. 756; *Brown University*, 5 F.3d at 677–78 (requiring full rule-of-reason analysis where universities colluded to provide financial aid to needy students).

103. See *supra* notes 104–62 and accompanying text.

104. In *Marjorie Webster Jr. Coll., Inc. v. Middle States Ass’n of Colls. & Secondary Sch., Inc.*, 432 F.2d 650 (D.C. Cir. 1970), the court found:

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

*Id.* at 654 (quoting *F. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961)). The court concluded that the defendant’s accreditation scheme was not intended to affect commerce, and thus the Sherman Act did not apply. *Id.* at 654–55.

105. 421 U.S. 773 (1975).

106. *Id.* at 787–88. In *Goldfarb*, the defendant state bar association argued that its “minimum fee schedule” could not be invalidated under antitrust law because “Congress never intended to include the

that “[t]he nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act.”<sup>107</sup> The Court did acknowledge, in a footnote, that antitrust analysis of the activities of a nonprofit organization might take the nature of the organization into account.<sup>108</sup> However, the Court held that the county bar’s activities in this instance constituted “price-fixing,” and were per se unreasonable, even though the minimum fee schedule was merely advisory.<sup>109</sup>

Following *Goldfarb*, the Court was not shy in its application of § 1 of the Sherman Act to the activities of professional or nonprofit associations.<sup>110</sup> However, it seemed reluctant to condemn the practices of nonprofit organizations using the per se rule.<sup>111</sup>

In *National Society of Professional Engineers v. United States*,<sup>112</sup> the Court employed a “quick look” analysis in holding that a professional engineering society’s prohibition on competitive bidding by its members was a violation of the Sherman Act.<sup>113</sup>

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learned professions within the terms ‘trade or commerce’ in § 1 of the Sherman Act.” *Id.* at 786.

107. *Id.* at 787 (citing *Assoc. Press v. United States*, 326 U.S. 1, 7 (1945)). The Court reasoned that the Sherman Act contained no express exemption for nonprofit organizations, and that because “Congress intended to strike as broadly as it could” in section 1, to read in an exemption would not be consistent with the purposes of the Act. *Id.*

108. *Id.* at 788–89 n.17. The Court stated:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

*Id.*

109. *Id.* at 783 (“On this record respondents’ activities constitute a classic illustration of price fixing.”).

110. *See supra* notes 112–63 and accompanying text.

111. *See* *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 458 (1986) (“[W]e have been slow to condemn rules adopted by professional organizations as unreasonable *per se* . . .”). However, the Court has, on occasion, found agreements between nonprofit organizations to be *per se* violations of the Sherman Act. CITE These cases most often involve a naked agreement between members of nonprofit or professional organizations to fix prices. *See, e.g.,* *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1989) (finding a per se violation when a group of trial lawyers boycotted their public practices to obtain higher salaries’); *see also* *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332, 345–46 (1982) (holding that an agreement among doctors in a medical association to fix the maximum fees to be charged for service is a per se violation of the Sherman Act).

112. 435 U.S. 679 (1978).

113. *Id.* at 696–97. The engineering society attempted to justify the ban on price bidding as a necessary check on price fluctuations that could lead to public safety hazards. *Id.* at 693. The Society argued that the restraint was justified “because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health.” *Id.*

Because the restraint was not plainly price-fixing, the Court refused to apply the per se rule.<sup>114</sup> Nonetheless, the Court found that “no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.”<sup>115</sup> The Court then refused to accept as justifications any of the public health and safety concerns the engineering society offered.<sup>116</sup> Rejecting the argument that competition in an industry could actually make things worse as “nothing less than a frontal assault on the basic policy of the Sherman Act,” the Court made a broad statement that the rule of reason does not entertain social welfare justifications for a restraint,<sup>117</sup> even in the case of nonprofit organizations.<sup>118</sup>

In *Professional Engineers*, the Court acknowledged its language in *Goldfarb* concerning the nature of antitrust scrutiny of nonprofit associations, but downplayed its significance.<sup>119</sup> In *NCAA v. Board of*

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114. *Id.* at 692.

115. *Id.*

116. *Id.* at 694. The court stated that while the society’s concern for public safety “might be reasonable . . . these are not reasons that satisfy the Rule.” *Id.*

117. *Id.* at 695.

Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.

*Id.* at 595–96.

118. *See id.* at 695. The Court made clear that under the rule of reason, only a restraint that may promote competition is justified; those that promote welfare at the expense of competition are not. *See id.* at 695.

The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

*Id.* at 695.

119. *See id.* at 696.

[T]he cautionary footnote in *Goldfarb* cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions. We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason. But the Society’s argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem of professional deception is a proper subject of an ethical canon. But, once again, the equation of competition with deception, like the similar equation with safety hazards, is simply too broad; we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.

*Regents of the University of Oklahoma*,<sup>120</sup> the Court again invalidated the practice of a nonprofit organization using a “quick look” analysis.<sup>121</sup> Reiterating its finding in *Professional Engineers* that “as a matter of law, the absence of proof of market power does not justify a naked restraint on price or output,” the Court turned directly to the television plan’s possible procompetitive effects<sup>122</sup> without first finding that the defendant possessed market power in the relevant market.<sup>123</sup>

The Court first found that the NCAA’s principal justification for the restraint—protecting live attendance at football games—was “a justification that is inconsistent with the basic policy of the Sherman Act,” since it attempted to insulate live football from the effects of competition.<sup>124</sup> It then dismissed the NCAA’s claim that the television

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*Id.* (citations omitted).

120. 468 U.S. 85 (1984).

121. *Id.* The defendants in *NCAA* maintained a “plan” for televising all NCAA college football games that “limit[ed] the total amount of televised intercollegiate football and the number of games that any one [football] team [could] televise.” *Id.* at 94. The Court recognized that such a restriction of output could be invalidated using the *per se* rule. *Id.* at 100 (“Horizontal . . . output limitation [is] ordinarily condemned as a matter of law under an ‘illegal *per se*’ approach”). However, it declined to do so because the industry was one in which “horizontal restraints . . . are essential if the product is to be available at all.” *Id.* at 101. The Court explained that the NCAA performed a necessary function by promulgating rules and marketing college football, without which no league sport could operate. *Id.* at 101–02. However, the Court expressly denied treating the NCAA’s activities differently due to its status as a nonprofit association. *Id.* at 100.

122. *Id.* at 116–20. The NCAA contended that its television plan protected live attendance at football games by limiting the number of televised games, and helped to maintain a competitive balance among college athletic teams by ensuring that any one team did not receive a disproportionate share of revenue from television. *Id.* It also asserted that its television plan constituted a “cooperative joint venture,” by allowing the sale of many television rights at fixed prices to television networks, thereby cutting down on transaction costs. *Id.* at 113. For this argument the NCAA relied on the Court’s decision in *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979), which held that BMI’s fixed-price blanket licenses of its members’ music were, in essence, new products that allowed buyers of music to eliminate the costs associated with contracting individually with every artist, and thus had a net procompetitive effect under the rule of reason. *Id.* at 19–25. The *NCAA* Court distinguished *BMI*, finding that the NCAA’s television plan did not enhance efficiency because it did not end the practice of individual schools contracting with networks, and because the “package” product did not increase the total number of televised games. *NCAA*, 468 U.S. at 113–14.

123. *NCAA*, 468 U.S. at 109. Under the rule of reason, a plaintiff must first prove that a defendant’s alleged restraint of trade has anticompetitive effects. See *supra* notes 98–101 and accompanying text. Because anticompetitive effects in a particular industry can be difficult to assess, courts typically allow a showing of market power as a “surrogate” for showing anticompetitive effects.” HOVENKAMP, *ECONOMICS*, *supra* note 42, at 56–58. Market power is typically defined as the ability to raise or control prices in the relevant market. *Id.*

The Court’s finding of anticompetitive effects without a showing of market power in this case is generally seen by scholars as the first true application of the “quick look” analysis, although the court did not explicitly state that it used a truncated analysis in this case until its decision in *California Dental*. See *infra* notes 152–60 and accompanying text.

124. *NCAA*, 468 U.S. at 117. The Court reiterated its finding in *Professional Engineers* that “the Rule of Reason does not support a defense based on the assumption that competition itself is

plan actually helped maintain college football's competitive balance.<sup>125</sup> Seeing no legitimate justifications for the NCAA's actions, the Supreme Court affirmed the lower court's judgments condemning the practice.<sup>126</sup>

In a final early case, *FTC v. Indiana Federation of Dentists*,<sup>127</sup> the Court used the "quick look" to determine that a dental association's refusal to submit x-rays to dental insurers<sup>128</sup> for use in determining coverage constituted a violation of the Sherman Act.<sup>129</sup> The Federation asserted, inter alia, that their "concerted refusal to deal" was lawful because the Federal Trade Commission had not offered empirical evidence that the boycott raised the prices of dental care<sup>130</sup> and the submission of x-rays alone to dental insurers could lead to a drop in the quality of dental care for consumers.<sup>131</sup>

The Court applied the rule of reason to the Federation's behavior, but again did not conduct a market analysis.<sup>132</sup> Stating that "application of the Rule of Reason to these facts is not a matter of any great difficulty,"<sup>133</sup> the Court characterized the dentists' behavior as plainly anticompetitive and went straight to the proffered justifications.<sup>134</sup> The Court found, as it did in *Professional Engineers*, that noncompetitive "quality of care" justifications do not belong in antitrust analysis, as they essentially assert

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unreasonable." *Id.*

125. *Id.* at 119–20. The Court accepted NCAA's contention that maintaining the competitive balance in intercollegiate football, "a revered tradition of amateurism," is a legitimate procompetitive interest. *Id.* at 120. However, the Court found that limiting the amount of revenue teams receive from televised football games "is not even arguably tailored to serve such an interest." *Id.* at 119.

126. *Id.* at 120.

127. 476 U.S. 447 (1986).

128. *Id.* at 449–50. The dentists in *Indiana Federation* collectively refused to send patient x-rays to insurers, dental consultants would give recommendations concerning whether a claim for payment should be accepted. *Id.*

129. *Id.* at 465–66. The defendants' conduct was found to violate section 5 of the FTC Act, which, in the antitrust context, is governed by the substantive law of section 1 of the Sherman Act. *Id.* at 454–55.

130. *Id.* at 461 ("[T]he Federation . . . argues that a [finding of] unreasonable restraint of trade is precluded by the Commission's failure to make any finding that the policy resulted in the provision of dental services that were more costly . . .").

131. *Id.* at 462–63. The Federation argued that claim assessors looking at x-rays in a vacuum would make inadequate judgments about appropriate treatment. *Id.* These judgments could lead to erroneous claim denial and degradation in the quality of care consumers received from their dentists. *Id.*

132. *Id.* at 461.

133. *Id.* at 459.

134. *Id.* at 461. It found that empirical proof of higher prices "is not an essential step in establishing that the dentists' [behavior] was an unreasonable restraint of trade." *Id.* This finding allowed the FTC to infer anticompetitive effects from the nature of the dentists' concerted refusal to deal. *Id.* at 463–64.

that an unrestrained market will lead consumers to dangerous choices.<sup>135</sup> Finding no valid procompetitive justifications for the dentists' refusal to deal with insurers, the Court held the Federation in violation of the Sherman Act.<sup>136</sup>

### C. Recent Doctrinal Shifts

Decisions in cases such as *Professional Engineers, NCA*, and *Indiana Federation* seemed to indicate that non economic factors could never justify agreements to fix price or reduce output.<sup>137</sup> However, in two recent cases, *United States v. Brown University*<sup>138</sup> and *California Federation of Dentists v. FTC*,<sup>139</sup> the Third Circuit and then the Supreme Court, respectively, signaled a willingness to broaden the category of acceptable justifications for horizontal restraints when nonprofit organizations are involved, at least in certain circumstances.<sup>140</sup>

In *Brown University*, the Court of Appeals for the Third Circuit held that an agreement among nine universities, the "Ivy Overlap Group," to fix financial aid awards<sup>141</sup> could not be invalidated using the per se rule or the "quick look" even though horizontal price fixing was involved.<sup>142</sup> After finding that the "Overlap Agreement" was plainly anticompetitive,<sup>143</sup> the district court, relying on Supreme Court decisions such as *Professional*

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135. *Id.* at 463.

136. *Id.* at 466.

137. *See supra* notes 120–36 and accompanying text. *See also* Frances H. Miller & Thomas L. Greaney, *The National Resident Matching Program and Antitrust Law*, 289 JAMA 913, 915 (2003) (stating that the "core principle" arising out of cases such as *Professional Engineers* "is that under the rule of reason, only improvements in competitive conditions will count on the defendants' side of the ledger.").

138. 5 F.3d 658 (3d Cir. 1993).

139. 526 U.S. 756 (1999).

140. *See supra* notes 138–39 and accompanying text. Neither court explicitly sanctioned trade-restraining activities by nonprofit organizations, but the cases were remanded for full rule of reason analysis and consideration of noneconomic procompetitive justifications. *Id.*

141. *Brown University*, 5 F.3d at 662–63. The agreement in question, called the "Overlap Agreement," had been investigated by the Department of Justice after several newspaper articles suggested that prestigious schools conspired when dispensing awards. *See, e.g.*, Gary Putka, *Do Colleges Collude on Financial Aid?*, WALL ST. J., May 2, 1989, at B1. The investigation eventually implicated fifty-five different schools and spawned the *Brown University* lawsuit as well as several private actions. *See, e.g.*, Kingsepp v. Wesleyan Univ., 763 F. Supp. 22 (S.D.N.Y. 1991).

142. *Brown University*, 5 F.3d at 672.

143. *Id.* at 664. The schools in the Ivy Overlap Group expressly agreed to award commonly admitted students the same amount of need-based financial aid (no other type of aid was permitted). *Id.* To facilitate the agreement, the schools shared financial information about candidates and developed a joint system for computing financial aid awards. *Id.* at 663. Any failure to follow the award system or attempt to cheat by awarding money to students in alternative forms, such as research grants, "would result in retaliatory sanctions." *Id.*

*Engineers*, dismissed the defendants' proffered justifications as "social welfare concerns" and thus invalidated the Group's conduct under the "quick look."<sup>144</sup>

The Third Circuit reversed and remanded, holding that Massachusetts Institute of Technology ("MIT") had offered sufficient "procompetitive and noneconomic"<sup>145</sup> justifications for the restraint to look past the "quick look" to a full rule of reason analysis.<sup>146</sup> First, it explained that MIT's assertions that the Overlap program promoted economic diversity at elite institutions and expanded access to the college market for needy students could be seen as procompetitive justifications because they enhanced consumer choice.<sup>147</sup> Then, the court found that MIT's social welfare justification for the Overlap Group—that the Group's policies allowed the member schools to commit to need-blind admissions, thus promoting "the social ideal of equality of educational access and opportunity"<sup>148</sup>—should also be fully considered under the rule of reason.<sup>149</sup>

Because the parties in *Brown University* settled without appeal to the Supreme Court,<sup>150</sup> many considered the legitimacy of noneconomic justifications for price restraints by nonprofits an area ripe for Court

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144. *Id.* at 664. MIT argued that the actions of the Overlap Group

... widened the pool of applicants to Overlap institutions by providing needy students with the ability to enroll if accepted. This, MIT asserted, increased consumer choice and enhanced the quality of the education provided to all students by opening the doors of the most elite colleges in the nation to diversely gifted students of varied socio-economic backgrounds.

*Id.*

145. *Id.* at 678 (emphasis added); *see id.*

146. *Id.* at 678. The Third Circuit agreed with the district court that because the Overlap Agreement was "a price fixing mechanism impeding the ordinary functioning of the free market, MIT [was] obliged to provide justification for the arrangement." *Id.* at 674. However, the Third Circuit found MIT had provided such justification. *Id.* at 678.

147. *Id.* at 675.

148. *Id.*

149. *Id.* at 677. In holding that MIT's social welfare consideration should be analyzed under the rule of reason, the Third Circuit distinguished *Professional Engineers* and *Indiana Federation* in two ways. *Id.* at 677–78. It reasoned that while the restraints in both prior decisions were enacted to deny consumers a choice, the free market would even out the anticompetitive effects. The Overlap Group's restraint on financial aid competition could actually increase consumer choice by enabling more consumers (students) to afford tuition at elite institutions. *Id.* at 677. Finally, it found that the restraints imposed by the nonprofit organizations in both *Professional Engineers* and *Indiana Federation* were based on "economic self-interest." *Id.* at 677–78. In contrast, MIT asserted that the Overlap was created for the benefit of "needy prospective students who otherwise could not attend the school of their choice." *Id.* at 678. The court felt that these differences warranted giving MIT a chance to legitimize the Overlap Group through a full rule of reason analysis. *Id.*

150. *See, e.g.,* Julie L. Seitz, *Consideration of Noneconomic Procompetitive Justifications in the MIT Antitrust Case*, 44 EMORY L. J. 395, 431 (1995).

interpretation.<sup>151</sup> However, the Supreme Court's 1999 decision in *California Dental* shed little light on the confusing state of the law.

Like the Third Circuit in *Brown University*, the Court in *California Dental* found that regulations promulgated by a professional association ("the CDA") could not be invalidated using a "quick look" analysis.<sup>152</sup> The Court first acknowledged that it had created the "quick look," or truncated rule of reason, through its previous decisions.<sup>153</sup> It then explained that although the truncated rule of reason was a valid mode of analysis,<sup>154</sup> the case before it failed to "present a situation in which the likelihood of anticompetitive effects is comparably obvious," and thus could not be dealt with using the "quick look."<sup>155</sup>

The Court's reluctance to condemn the CDA restrictions without more analysis rested in large part on its perception of market failures in the area of professional advertising, particularly informational asymmetries.<sup>156</sup> The Court characterized the market for dental advertising as one containing "striking disparities between the information available to the professional and the patient."<sup>157</sup> It then reasoned that restrictions on deceptive advertising might actually increase competition, because consumers would be better informed by the resulting truthful advertising.<sup>158</sup>

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151. *See id.* (arguing that after *Brown University*, the debate over noneconomic justification was not settled, and remained open for other circuits interpretations); Srikanth Srinivasen, 46 *Stan. L. Rev.* 919, 940 (stating that during the *Brown University* litigation and after, courts struggled with the issue of noneconomic justifications due to "conflicting signals sent by the Supreme Court.").

152. 526 U.S. at 771–73. The California Dental Association regulations prohibited "false or misleading" advertising, and required members to make substantial price disclosures in advertisements. *Id.* at 760–61. The regulations effectively banned advertising as to the quality of dental services as claims "not susceptible to measurement" and "likely to be false." *Id.* at n.1. The FTC felt that the regulations restricted truthful advertising, thereby restraining competition in the market for dental services. *Id.* at 762.

153. *Id.* at 770 (characterizing the analysis as one used when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."). The Court cited its decisions in *NCAA*, *Professional Engineers*, and *Indiana Federation*. *Id.* Before *California Dental*, the Court had not officially endorsed what lower courts had been calling the "quick look" approach. *See supra* note 98 and accompanying text.

154. *Id.* at 770 ("[Q]uick-look analysis carries the day when the great likelihood of anticompetitive effects can be easily ascertained.").

155. *Id.* at 771.

156. *Id.*

157. *Id.*

158. *Id.* at 773 ("The existence of such significant challenges to informed decisionmaking by the customer for professional services immediately suggests that advertising restrictions arguably protecting patients from misleading or irrelevant advertising call for more than cursory treatment . . ."). For an argument that the Court erred in finding that professional advertising has an anticompetitive effect, see David Balto, *Some Observations on California Dental Association v. FTC*, 14 *ANTITRUST* 64, 65 (Fall 1999) (arguing that economic evidence suggests that professional

Finally, in remanding the case for further consideration, the Court did not direct the lower court to undertake a full rule of reason analysis with a detailed market inquiry.<sup>159</sup> Thus, the Court remanded for a “fuller” look, not necessarily a full one.<sup>160</sup>

*California Dental* has generated an enormous body of commentary.<sup>161</sup> The full effect of the decision on antitrust jurisprudence remains to be seen. Part VI will argue that *California Dental* and *Brown University* did not open the door for consideration of non economic justifications in every rule of reason case involving professionals.<sup>162</sup> Despite both decisions, a less than full rule of reason analysis should suffice to show the anticompetitive nature of the NRMP.

## VI. ANALYSIS

### A. A “Quick Look” Analysis Should be Used to Evaluate the Conduct of the NRMP

*Brown University* and *California Dental* certainly add difficulty to a court’s determination of the type and breadth of evidence to consider in

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advertising of both price and quality tends to decrease the price of services more than in areas where such advertising is restricted).

159. *California Dental*, 526 U.S. at 781. Instead, it emphasized that “there is generally no categorical line between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.” *Id.* at 780–81.

160. *Id.* at 781. The court went on to explain that “[t]he object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.” *Id.* For commentary praising a more fluid, sliding-scale antitrust analysis, see Thomas A. Piraino, Jr., *Making Sense of the Rule of Reason: A New Standard for Section 1 of the Sherman Act*, 47 VAND. L. REV. 1753, 1771 (1994) (“[C]ourts will have to undertake varying degrees of inquiry depending upon the type of restraint at issue.”).

161. See William J. Kolasky, *California Dental Association v. FTC: The New Antitrust Empiricism*, 14 ANTITRUST 68, 68 (Fall 1999) (praising the Court’s decision as “rejecting overly simplistic formulations” and “show[ing] a greater emphasis by the Court on reaching the right result . . .”). Cf. Herbert Hovenkamp, *Competitor Collaboration After California Dental Association*, 2000 U. CHI. LEGAL F. 149, 151 (2000) (criticizing *California Dental* for giving antitrust jurisprudence “a juxtaposition of concerns” where the Court “seems excessively sanguine about the threats posed by collusive conduct . . .”); Balto, *supra* note 158, at 64 (“[T]he suggestion that something like a new form of analysis might be presented or articulated [by the Court’s decision] is unconvincing. Rather than crafting a template for future rule of reason analysis generally . . . the decision is limited to the specific context of self-regulation of advertising by an association of professionals.”); Marina Lao, *Comment: The Rule of Reason and Horizontal Restraints Involving Professionals*, 68 ANTITRUST L. J. 499, 499–500 (2000) [hereinafter Lao, *The Rule of Reason*] (viewing the decision as limited, but as possibly setting the stage for lower courts to expand the scope of the decision to all restraint cases involving professionals).

162. See *infra* notes 163–203 and accompanying text.

antitrust cases involving horizontal restraints among professional or nonprofit organizations.<sup>163</sup> Nevertheless, it is clear that even after these decisions, restraints involving professional or nonprofit markets—including the restraints of the NRMP—should not generally be barred from consideration under the “quick look.”<sup>164</sup> Both the Third Circuit and the Supreme Court expressly acknowledged that the truncated rule of reason is appropriate in cases where a plaintiff can show obvious evidence of the likelihood of anticompetitive effects of a restraint.<sup>165</sup>

Much has been said of the Supreme Court’s requirement in *California Dental* that a plaintiff show “empirical evidence” of anticompetitive effects before the “quick look” can be applied in cases involving the professions.<sup>166</sup> Because such evidence is often impossible to produce, such a requirement might prove fatal to plaintiffs in these cases.<sup>167</sup> However, the Supreme Court’s holding should not be applied so broadly. The Court emphasized that greater evidence of anticompetitive effects is needed in professional markets characterized by large informational asymmetries.<sup>168</sup> For example, consumers of dental services find it difficult to discern whether claims made in professional advertisements are truthful or deceptive.<sup>169</sup> It recognized that in those situations, regulation by

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163. See Lao, *The Rule of Reason*, *supra* note 161, at 526 (arguing that the *California Dental* “sliding scale” approach to the rule of reason may prove “unworkable in practice . . . since there are no rules for determining where a particular restraint should fall on the continuum . . .”).

164. See Hovenkamp, *supra* note 161, at 176 (stating that the Court in *California Dental* was not intending to create a blanket deference for the learned professions); Balto, *supra* note 158, at 66 (arguing that the Court’s decision in *California Dental* is limited to the context of advertising by professionals, and does not extend to other kinds of horizontal restraints).

165. See *Brown University*, 5 F.3d at 678. The *Brown University* court reversed the district court decision because MIT succeeded in overcoming its burden of showing procompetitive effects, not because the “quick look” framework was incorrect at the outset. *Id.* See also *California Dental*, 526 U.S. at 769–71.

166. *California Dental*, 526 U.S. at 773–76 (discussing the court of appeals’ failure to require “empirical evidence” of anticompetitive effects before shifting the burden of proof to the defendants).

167. See Lao, *The Rule of Reason*, *supra* note 161, at 511 (stating that requiring empirical evidence of anticompetitive effects “could mean that truly anticompetitive acts may escape condemnation because the kinds of data demanded by the Court are often difficult to produce.”). Such data, which often come in the form of expert economic testimony and market analysis, are also very expensive for plaintiffs to produce. *Id.*

168. *California Dental*, 526 U.S. at 772.

169. *Id.* (“[I]n a market for complex professional services, ‘inherent asymmetry of knowledge about the product’ arises because ‘professionals supplying the good are knowledgeable [whereas] consumers demanding the good are uninformed.’”) (quoting Carr & Matthewson, *The Economics of Law Firms: A Study in the Legal Organization of the Firm*, 33 J. Law & Econ. 307, 309 (1990)). See also Hovenkamp, *supra* note 161, at 176 (“[T]he Supreme Court was not intending to defer to the learned professions as such, but rather to distinguish a class of differentiated markets having unusually high information costs. . .”).

professional and nonprofit bodies can “have a net procompetitive effect.”<sup>170</sup>

This requirement should not be extended to include professional markets not burdened by such market failure. Doing so would offer too great a protection to nonprofit and professional organizations whose regulations do not correct market failure, but burden consumers with higher prices and fewer choices.<sup>171</sup> By citing with approval to previous cases where evidence of anticompetitive effects was inferred from the nature of the agreement at hand,<sup>172</sup> the Court limited its *California Dental* holding.<sup>173</sup>

The market for graduate medical education is not characterized by informational asymmetries.<sup>174</sup> Medical students in the market for residency programs—unlike consumers viewing dental advertising—are well equipped to evaluate the quality of the education they are buying and to make educated cost/quality tradeoffs.<sup>175</sup> After four years of medical training, students have detailed knowledge of the medical profession and what constitutes quality in terms of care and training.<sup>176</sup> They are assisted in their decisions by numerous detailed publications ranking hospitals and programs as well as by medical school career counselors.<sup>177</sup> Because informational asymmetries do not exist in the market for graduate medical education, a challenger to the validity of the NRMP should not need to

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170. *California Dental*, 526 U.S. at 771.

171. See Lao, *The Rule of Reason*, *supra* note 161, at 512 (discussing the varying ways in which the rules of professional organizations may limit competition). Cf. Srinivasen, *supra* note 150, at 957–58 (concluding that antitrust law still underestimates the positive role of collaboration among nonprofits in the market).

172. *California Dental*, 526 U.S. at 770. The Court cited, approvingly, *NCAA, Professional Engineers*, and *Indiana Federation* as examples of cases in which the “quick look” was appropriate. *Id.* In each of these cases, the Court inferred anticompetitive effects from the questioned agreement without requiring empirical evidence. See *supra* notes 112–55 and accompanying text.

173. See Balto, *supra* note 158, at 66 (arguing that the Court could not have meant to overrule cases such as *Professional Engineers*, given the “deference it pays” to such decisions in its discussion of the formation of the “quick look” analysis).

174. See *supra* notes 63–65 (describing informational asymmetries) and notes 18–39 (describing the market for graduate medical education).

175. Medical students “pay” for their residency training in the form of low salaries, long work hours, and little vacation time. See *supra* notes 32–39 and accompanying text. The costs of the training to them are a combination of the above factors.

176. Fourth-year medical students have completed clinical rotations through all of the major medical specialties.

177. *U.S. News & World Report* ranks United States hospitals by department (e.g., geriatrics, pediatrics, orthopedics, urology). Usnews.com:health:Best Hospitals 2003, available at <http://www.usnews.com/usnews/health/hosptl/tophosp.htm>. In addition, AAMC maintains an internet database for potential residents, containing detailed information about residency programs such as size and length of program. AAMC, FREIDA Online Specialty Training Search, *supra* note 37.

present empirical evidence of anticompetitive effects to proceed under the “quick look” analysis.

*B. The “Quick Look” Applied to the NRMP*

The “quick look” analysis begins with proof by the plaintiff of anticompetitive effects flowing from the challenged restraint.<sup>178</sup> The challenged restraints in the case of the NRMP are the restrictions on resident recruitment by member institutions. These restraints include prohibitions on member hospitals offering residencies outside of the NRMP, restrictions on bargaining between residents and hospitals before the match date, and enforcement of binding contracts between all medical students and member hospitals after completion of the match.<sup>179</sup> These restraints, combined with “a rudimentary understanding” of the economics of the graduate medical education market, make it easy to infer significant anticompetitive effects.

By prohibiting member hospitals from offering residencies outside of the match, the NRMP controls nearly 80% of the market for residencies,<sup>180</sup> enough to be considered market power under current antitrust law.<sup>181</sup> Students who wish to pursue residency training outside of the match have very few options.<sup>182</sup> For those students in the match, the situation is not much better. The “prices” that residents pay for training (i.e., low salary, long hours, little vacation time, minimal insurance benefits) are nearly identical at all member institutions.<sup>183</sup> In addition, through an extensive system of information exchange, hospitals know the prices their competitors charge.<sup>184</sup> The NRMP forbids hospitals from offering incentives to students before the match date.<sup>185</sup> Because matching creates a

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178. See *supra* notes 98–102 and accompanying text.

179. See NRMP: Residency Match, *supra* note 12, at §§ 5.0, 6.0.

180. See *supra* notes 37–41 and accompanying text.

181. See generally HOVENKAMP, ECONOMICS, *supra* note 42, at 55–59. Market power in antitrust law is generally defined as the ability to control price in the relevant market. *Id.* at 55. Market share is often used to determine market power. *Id.* at 58. An 80% market share is generally seen as enough to control prices. *Id.*

182. See *supra* notes 32–40 and accompanying text.

183. See *supra* notes 37–41 and accompanying text.

184. Retrospective salary data for hundreds of residency programs is available through the FREIDA database. AAMC, FREIDA Online Specialty Training Search, *supra* note 37. In addition, the Complaint against the NRMP alleges that the AAMC and COTH administered detailed surveys to member hospitals requesting prospective salary information as well as data on resident health insurance coverage. Complaint, *supra* note 15, at 24.

185. See NRMP: Residency Match, *supra* note 12, at § 6.0

binding contract,<sup>186</sup> medical students have no power to bargain with different hospitals over the price of their services after the match is complete.<sup>187</sup>

Member hospitals could compete through non-price means for desirable students. However, by virtually eliminating an important form of competition, one can infer that the NRMP regulations have the anticompetitive effect of raising the prices residents pay for their education.<sup>188</sup> This inference is further supported by the steep nature of the demand curve for medical residencies.<sup>189</sup> Medical students must complete a residency in order to become practicing physicians, so an increase in the cost of the program will not deter many from buying it.<sup>190</sup>

It is clear that the NRMP regulations support an inference of anticompetitive effects.<sup>191</sup> Under the “quick look”, the NRMP must offer procompetitive justifications for its system in order to survive scrutiny.<sup>192</sup> There are two principal justifications for the NRMP program, one economic and one based on social welfare concerns.<sup>193</sup>

In terms of economics, the NRMP could argue that the matching program drastically reduces the transaction costs of pairing hospitals with students. Before the match, hospitals and potential residents found each other without the help of a centralized program.<sup>194</sup> The process was less streamlined and involved more effort from both parties.<sup>195</sup> In addition, hospitals under the old system would announce their chosen residents early in order to beat their competition.<sup>196</sup> Many students were forced to choose a program before knowing all of the schools to which they had been accepted.<sup>197</sup> In this way, the universal date that the match provides does correct an informational asymmetry.

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186. *Id.* at § 5.1

187. *See, e.g.*, Miller & Greaney, *supra* note 137, at 914. Both applicants and hospital programs that violate the NRMP rules for participation can be sanctioned. *Id.* Such programs can be identified as “violators” and prohibited from participation in the match for several years. *Id.* Applicant “violators” can have their applications for residency programs withdrawn. *Id.*

188. This inference is similar to the one made by the court in *Indiana Federation*.

189. *See generally* HOVENKAMP, *ECONOMICS*, *supra* note 42, at 6–7. In economics, a demand curve is inelastic when an increase in price will produce only a small decrease in demand. *Id.* Because medical students are required to complete a residency before beginning their practice, it would take a nearly astronomical price increase to make many decide they should not “buy” a residency.

190. *See* National Board of Medical Examiners, at <http://www.nbme.org>.

191. *See supra* notes 179–90 and accompanying text.

192. *See supra* notes 98–102 and accompanying text.

193. *See infra* notes 194–200 and accompanying text.

194. *See supra* notes 24–26 and accompanying text.

195. *See supra* notes 24–26 and accompanying text.

196. *See* LUNDMERER, *supra* note 19, at 90–94.

197. *Id.*

The NRMP could also argue that it serves a public health and safety function by correcting externalities. As explained above, a medical resident does not receive the total value his or her education has to offer.<sup>198</sup> Some of the value is passed to the public who enjoy good quality health care from adequately trained professionals.<sup>199</sup> The NRMP could argue that price competition by residents could drive prices so “low” (higher salaries and less time at work) that they fail to take into account the public value of resident training. If that happened, the public would suffer from poor care.<sup>200</sup>

The NRMP may convince a court to accept its justifications for the residency matching program. Although the Court rejected a similar health and safety rationale in *Professional Engineers*,<sup>201</sup> the Third Circuit’s consideration of noneconomic benefits in *Brown University* may persuade a court at least to explore the NRMP’s theory.<sup>202</sup> However, even if the NRMP succeeds in proving procompetitive justifications for the match, it will fail at the next step of analysis: consideration of less restrictive means of achieving the proffered benefits.<sup>203</sup> The next Part of this Note proposes how the NRMP could achieve its goals without such severe anticompetitive effects.

## VII. PROPOSAL

The matching program was originally conceived to correct perceived failure in the free market system for residencies.<sup>204</sup> However, there are less restrictive ways of keeping transaction costs low, avoiding informational problems, and eliminating externalities.

In the free market for residencies, hospitals often created informational problems by requiring students to choose programs before they had received all possible acceptances.<sup>205</sup> This problem could be corrected

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198. See *supra* note 72.

199. See *supra* notes 72–77 and accompanying text.

200. 435 U.S. at 684. This argument is similar to the argument made by the defendant organization in *Professional Engineers*. *Id.* It argued that because the bidders for engineering projects would not suffer all of the losses from a badly constructed project (the losses would be shared by the unfortunate people on a badly built bridge when it came apart), they were likely to undervalue the engineers’ services if price competition was allowed. *Id.* This underevaluation would produce safety problems for the public at large. *Id.*

201. *Id.* at 696.

202. See *supra* notes 141–49 and accompanying text.

203. For a description of the third step of analysis under the rule of reason, see *supra* notes 95–96 and accompanying text.

204. See *supra* notes 24–27 and accompanying text.

205. See *supra* notes 24–25 and accompanying text.

using a simple set of dates. Students would interview for positions with hospitals as they currently do. However, instead of listing choices and waiting for a computer to match candidates, hospitals would offer medical students positions as is customary in a free labor market. If all hospitals were required to make their offers by a certain date, and were required to hold offers open until a certain later date, the information problem would be avoided.<sup>206</sup>

Because students would have the power to reject job offers and bargain with employers in between the two set dates, hospitals would compete vigorously over students, offering better salaries, benefits, or working conditions to attract desired candidates. The transaction costs of the new system would only be slightly higher than under the current match, since hospitals would only have to negotiate with those students to whom they had given offers.<sup>207</sup>

Hospitals would not be forced to offer all of their programs through the new system. The NRMP could encourage member hospitals to do so by offering benefits such as greater exposure or a chance to join a standardized interviewing service. The hospitals not offering programs through the date system would proceed the old-fashioned way—through résumés and interviewing. Students could choose a residency using either system, or could apply for positions through both in order to have more options. This minimally regulated system of resident employment would retain the benefits of the current program and eliminate anticompetitive effects.

Opponents of a free market system could still argue that in a free market, externalities would cause the price of graduate medical education to dip below its value, leading to deterioration in the quality of health care.<sup>208</sup> However, externalities are already addressed by an accreditation program that ensures that all residency programs offer a minimally acceptable standard of education.<sup>209</sup> Such minimum quality standards make it impossible for medical students to choose a program of study that

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206. A resident recruiting program could work similarly to that currently used by law students to find employment with law firms and some governmental employers. For a detailed description of the law school recruiting program, see National Association for Law Placement, at <http://www.nalp.org>.

207. Hospitals in the current system interview candidates to determine where to rank them on the hospitals' lists, so the costs associated with interviewing would not differ under the new system. Personal Communication with Timothy S. Crall, Medical Student (Jan. 11, 2002).

208. See Srinivasen, *supra* note 150, at 931–34 (explaining how nonprofit regulation can allocate resources far more efficiently than the free market alone in situations involving market failure).

209. See Lao, *supra* note 61, at 1084 (explaining how accreditation ensures a socially acceptable level of quality in legal education, correcting for the externality problem).

is dangerous to society. There is no reason that students should not be able to make price/quality tradeoffs down to that minimum level.<sup>210</sup>

Proponents of the NRMP may be correct in asserting that a minimum level of regulation is necessary to correct market failures that would otherwise plague the market for graduate medical education.<sup>211</sup> However, the broad, anticompetitive policies of the NRMP are not necessary and currently suppress competition in the residency market.<sup>212</sup> Thus, the NRMP program fails to withstand antitrust scrutiny under a “quick look” analysis and should be invalidated in favor of a program which fosters competition.

### VIII. CONCLUSION

Before the Supreme Court’s decision in *Goldfarb*, the policies of the NRMP might have been immune from antitrust scrutiny.<sup>213</sup> However, *Goldfarb* and its offspring make it clear that nonprofit and professional organizations must bring their conduct in line with the requirements of the Sherman Act.<sup>214</sup> Furthermore, these decisions emphasize that the nonprofit status of an organization is relevant only when the structure of the marketplace allows nonprofit or professional regulation to promote competition.<sup>215</sup> The idea that competition itself is unhealthy has not been accepted.<sup>216</sup> *Brown University* and *California Dental* do not alter this standard.<sup>217</sup> They simply emphasize that in certain situations courts must look more closely at nonprofit regulation to determine whether sufficient procompetitive effects exist to sanction regulation.<sup>218</sup>

Under modern antitrust jurisprudence, the actions of the NRMP do not offer benefits to competition that could not be attained through less restrictive means.<sup>219</sup> Therefore, the NRMP should be invalidated and

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210. See *supra* notes 63–71 and accompanying text.

211. See *supra* notes 24–27 and accompanying text.

212. See *supra* notes 32–39 and accompanying text.

213. See *supra* note 104 and accompanying text.

214. See *supra* notes 105–36 and accompanying text.

215. *Id.*

216. *Id.*

217. See *supra* notes 137–62 and accompanying text.

218. *Id.*

219. See *supra* notes 104–203 and accompanying text.

replaced with a system that promotes competition in the market for graduate medical education.

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