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COMMENTS

THE LEGAL STATUS OF THE EDUCATIONAL ACCREDITING AGENCY: PROBLEMS IN JUDICIAL SUPERVISION AND GOVERNMENTAL REGULATION*

The educational accrediting agency is a powerful instrumentality in the United States—able, with minimal governmental interference, to set policies and standards in an area of vital concern to the public. As education becomes more complex, and as our society increasingly relies upon educational training and upon the standards by which that training is evaluated, the impact which the accrediting agency will have upon educational institutions and students enrolled in them will correspondingly increase.¹ For all its influence, however, the accrediting agency occupies an ambiguous legal position. Therefore, in order to lay the framework for a more thorough understanding of the status of accrediting agencies in our legal system, this Comment will analyze the actual and potential judicial and legislative restraints on their activities.

I

THE ACCREDITING PROCESS AND ITS ROLE IN THE UNITED STATES

Most foreign countries have established ministries of education or comparable governmental organs at national, state, or local levels, to oversee their higher educational systems.² The situation in the United States, however, is quite different. The federal government has never attempted to vest complete authority

* The authors wish to express their appreciation to Mr. Michael H. Cardozo, Executive Director of the Association of American Law Schools and former Professor of Law at the Cornell Law School, who suggested this study and aided in its development. They also thank those thirty regional and professional accrediting agencies which replied to questionnaires which were sent out to obtain background information for this study.

¹ See Selden, *The Washington Post*, Oct. 10, 1962, p. A20, col. 6 (letter to the editor):

Disaccreditation of a college or university by a regional association not only stigmatizes the institution but jeopardizes the admission of students who may wish to transfer to other institutions. It may hinder the admission of graduates to graduate schools. And it places in question the accreditation of professional programs of study, offered by the disapproved institution. Further, disaccreditation of a professional school is most serious for the students who may later seek licensure for professional practice in a state in which admission to take the licensure examination is partially dependent upon graduation from an accredited institution.

See also California State Senate, Report of Fact Finding Comm'n on Education 148 (Gen. Sess. 1962) where it was stated: "In recent years, accreditation has come to have a vital meaning in higher education, even to the point of spelling life or death for many of our collegiate institutions."

² For example, in the United Kingdom, the University Grants Committee (England's Ministry of Education has little authority over universities) significantly influences higher education through the disbursement of tax funds to the universities, which are dependent for the most part upon public funds for their support. Only the Crown, upon recommendation of the Privy Council, can charter new universities, but the University Grants Committee can still exert ultimate control over education through its purse-string power. See Selden, "The Governance of Higher Education," *The Educational Record* 317, 320-21 (1964) (published by the American Council on Education, Washington, D.C.).

³ Although the regional associations do accredit secondary schools, they are primarily concerned with higher education. This comment will be limited accordingly.

over higher education³ in a single body,⁴ and state regulation has been relatively insignificant.⁵

As a result of governmental noninterference, the upper educational structure in the United States, dominated by the largely autonomous university, lacked one of the most characteristic attributes of foreign systems—a single, authoritative body to establish uniform, national standards and, therefore, a basis for comparison and reliance by the public. To remedy this defect, private accrediting agencies were created, having as their goal the formulation of standards of proficiency by which educational institutions could be qualitatively evaluated.⁶

A. *Internal Management of the Accrediting Process*

At the head of the educational accrediting system is the National Commission on Accrediting,⁷ created in 1950 (following a recommendation by a committee of college presidents) in order to alleviate the chaos and confusion which then pervaded the accrediting field.⁸ Its primary purpose is to “accredit” accrediting agencies.⁹ At present, six regional¹⁰ and approximately thirty¹¹

⁴ See section beginning prior to note 170 infra.

⁵ See section beginning prior to note 130 infra.

⁶ “Accreditation” has been defined as “a process whereby an organization or an agency recognizes a college or university or a program of study, as having met certain pre-determined qualification standards.” Selden, *Accreditation: A Struggle Over Standards in Higher Education* 6 (1960).

⁷ The National Commission has a constituent membership of seven national organizations: American Association of Junior Colleges, American Association of Land-Grant Colleges and State Universities, Association of American Colleges, Association of American Universities, Association of State Colleges and Universities, Association of Urban Universities, and the State Universities Association. Its institutional membership approximates thirteen hundred colleges and universities whose dues finance its operations. A board of 40-50 college presidents, selected by the constituent members, establishes the Commission's policies and criteria.

⁸ The 1949 Joint Committee on Accrediting, composed of college presidents, issued a statement recommending that colleges and universities unite in a plan of “simplifying procedures, reducing the number of agencies, emphasizing the qualitative appraisal of institutional achievement, eliminating duplication of examination of institutions, and preserving institutional autonomy in the fulfillment of educational objectives.” National Commission on Accrediting, *The Past and the Future: Historical Sketch and Annual Report* 4-5 (April 1965). At that time the number of accrediting agencies was increasing, but there was little cohesion or interdependency between them; it was almost impossible for colleges and universities to conform to the varying standards of the many associations. The National Commission was formed in accordance with the Joint Committee's stated objectives and given the specific responsibility of coordinating “the activities of the approved accrediting agencies in order to avoid duplication and overlapping of functions . . .” National Commission on Accrediting, *Constitution*.

⁹ The National Commission, in order to promote unification and coordination, has attempted to keep the number of approved agencies within reasonable bounds. A professional accrediting agency will not be admitted to the National Commission's membership unless a definite need in the particular area exists and the agency's jurisdiction will not encroach upon that of an existing member association.

¹⁰ North Central Association of Colleges and Secondary Schools, Northwest Association of Secondary and Higher Schools, Western Association of Schools and Colleges, Southern Association of Colleges and Schools, New England Association of Colleges and Secondary Schools, and the Middle States Association of Colleges and Secondary Schools.

For a description of the duties and functions of the regional associations, see Selden, “Where Do We Go From Here?” 29 *Exceptional Children* 203, 204 (No. 5, Jan. 1963); *Accreditation in Higher Education* 42-73 (Blauch, ed. 1959).

¹¹ National Architectural Accrediting Board, National Association of Schools of Art, American Association of Collegiate Schools of Business, American Chemical Society, American Dental Association, Engineers' Council for Professional Development, Association of American Law Schools, Society of American Foresters, American Council on Education

professional accrediting agencies have met the National Commission's criteria for acceptance.¹² In general, a regional agency accredits the public and private universities and colleges within its jurisdiction, evaluating each institution's over-all program while concentrating on the undergraduate level. Professional agencies approve specific programs of study, and their jurisdiction is national in scope. The National Commission has attempted to assure some degree of uniformity and interrelation between the regional and professional associations by requiring that a professional agency¹³ make "continual and reasonable efforts to coordinate its accrediting procedures with the several regional accrediting associations" and rely "on the regional associations to evaluate the general qualities of institutions."¹⁴ Although there are variations among each agency's techniques and procedures of accreditation, they can be described generally as follows:¹⁵ (1) the association establishes certain minimum standards which each educational institution must meet in order to receive accreditation; (2) representatives of the association visit each institution to observe and interview;¹⁶ (3) the information obtained, in addition to data submitted by the school itself following a process of self-analysis, is presented to a review committee; (4) accreditation is granted or denied, each decision being appealable to a higher internal body.¹⁷

B. *Accrediting Agencies' Insistence Upon Autonomy*

Accrediting agencies have reconciled the conflicting interests of unity on the one hand, and institutional autonomy on the other.¹⁸ The National Com-

for Journalism, American Society of Landscape Architects, American Bar Association, American Library Association, American Medical Association, Liaison Committee on Medical Education, National Association of Schools of Music, National League for Nursing, Inc., American Optometric Association, American Council on Pharmaceutical Education, American Psychological Association, American Public Health Association, Council on Social Work Education, American Speech and Hearing Association, National Council for Accreditation of Teacher Education, American Association of Theological Schools in the United States and Canada, and the American Veterinary Medical Association.

For a description of the duties and functions of the professional associations, see National Commission on Accrediting, "Procedures of Accrediting Education in the Professions" (March 1964) (series of reports issued by the Commission); Gitler, "Accreditation: Agencies, Practices, and Procedures," 1 *Journal of Education for Librarianship* 61-74 (No. 2, 1960).

¹² See National Commission on Accrediting, *Facts About the Commission: Criteria for Recognized Accrediting Agencies* (pamph., 1964).

¹³ The National Commission once made a concerted effort to abolish the professional agencies in order to place all accreditation authority in the regional associations. A number of educators felt that the professional associations interfered too often in administrative decisions and that the regional groups would be better equipped to promote conformity and uniformity. The movement failed, however, after meeting heavy resistance from professors and the professional agencies themselves. See National Commission on Accrediting, *Historical Sketch and Annual Report*, supra note 8.

¹⁴ National Commission on Accrediting, supra note 12.

¹⁵ See generally the authorities cited in notes 10 and 11 supra.

¹⁶ Generally the visiting committees are composed of professors, administrative officials, and other representatives of accredited institutions. But in professional associations, prominent members of the profession, not necessarily attached to accredited institutions, often help conduct the investigations.

¹⁷ See text accompanying notes 45-46 infra.

¹⁸ The National Commission requires that an agency "recognize the right of an institution to be appraised in the light of its own stated purposes so long as those purposes demonstrably fall within the definitions of general quality established by the agency." National Commission on Accrediting, supra note 12, No. 11(b).

mission and the regional and professional associations for the most part have refrained from interfering with an educational institution's exercise of discretion in individual matters.¹⁹ Accrediting agencies are concerned primarily with the general policies of institutions and insist that these policies be consistent with agency standards. Isolated violations of a standard will not result in censure or disaccreditation if the course of action taken is consistent with the broad educational aims of the school.²⁰ This compromise produces some degree of uniformity and thereby promotes reliance on accreditation; yet it also allows room for innovation and freedom of action by each institution.

It is this emphasis on institutional autonomy which underlies one of the primary, and perhaps most controversial, policies of accrediting agencies. They generally refuse to recognize any institution not professing "integrity of operation"²¹—i.e., freedom from political and governmental interference.²² Insistence upon integrity of operation led the Southern Association of Colleges and Schools to threaten disaccreditation of all state colleges and universities in Mississippi when the governor of the state became involved in the 1962 racial problems of Mississippi's schools.²³ This same demand for operational integrity led the Southern Association to threaten disaccreditation of North Carolina University in 1965,²⁴ after the state legislature had passed a statute forbidding any subversive or communist-affiliated individual, or anyone pleading the fifth amendment in governmental investigations into subversive activities, from speaking on state campuses.²⁵

Interference with the educational process, however, need not necessarily come from government. For example, a series of faculty dismissals at St. John's University recently led to an investigation by the Middle States Association of Colleges and Secondary Schools.²⁶ A major issue in the faculty-administration

¹⁹ National Commission on Accrediting, Constitution:

The acts, rulings, and recommendations of the Commission with respect to accrediting are not binding upon the individual institutional members, whose freedom of action and self-government remain inviolate. Nevertheless, all member institutions . . . obligate themselves to consult with and inform the Commission before undertaking action contrary to the rulings and recommendations of the Commission.

²⁰ See Cardozo, "Accreditation of Law Schools in the United States," 18 J. Legal Ed. 423-24 (1966).

²¹ William K. Selden, former Executive Secretary of the National Commission, has said that "no college or university which is subject to dictation or interference in its internal affairs by a Governor can be considered to possess integrity of operation." The Washington Post, Oct. 10, 1962, p. A20, col. 6 (letter to the editor).

²² "One of the fundamental and basic traditions of this country has been the freedom of higher education from political interference and dictation." Selden, "Current National Issues in Accreditation," 30 Junior College Journal 534, 538 (May 1960).

²³ See N.Y. Times, Nov. 29, 1962, p. 40, col. 4; id., Oct. 10, 1962, p. 33, col. 6; id., Sept. 27, 1962, p. 28 col. 3. See also The Washington Post, supra note 21.

²⁴ N.Y. Times, Nov. 7, 1965, p. 124, col. 4; id., Oct. 17, 1965, p. 62, col. 3; id., June 5, 1965, p. 31, col. 2.

²⁵ N.C. Gen. Stat. § 116-99 (Supp. 1963). The statute is extensively discussed in Comment, 42 N.C.L. Rev. 179 (1963). This threat of disaccreditation was subsequently withdrawn by the Southern Association when a special session of the North Carolina General Assembly amended the provision barring Communist speakers. N. Y. Times, Dec. 2, 1965, p. 45, col. 1. The amended statute gives trustees of the state university authority to regulate the appearances of Communist speakers. N.C. Gen. Stat. § 116-99 (Supp. 1965). Some problems still arise under the new law. See N. Y. Times, Feb. 8, 1966, p. 42, col. 5 (city ed.).

²⁶ N.Y. Times, May 1, 1966, p. 1, col. 1; id., April 30, 1966, p. 25, col. 1; id., Jan. 1, 1966, p. 21 col. 1.

conflict there concerned the status of academic freedom in the environment of a church-related school.²⁷ Similarly, in a case recently filed in the United States District Court for the District of Columbia,²⁸ the Middle States Association refused to accredit a proprietary school because of its profit motive.²⁹ Since the accrediting agency may believe that educational quality is impaired by the influence of a board of directors seeking profit for the corporation's shareholders, operational integrity could also be at the basis of this dispute.

These incidents indicate that refusals and withdrawals of accreditation present problems of increasing importance. Since courts may soon become the forum for controversies (as in the proprietary school case), it is important to explore the possible approaches which they may adopt in determining (1) whether judicial relief is available, and (2) if so, under what circumstances and measured by what standards.

. II

JUDICIAL SUPERVISION OF ACCREDITATION ACTIVITIES

The educational accrediting agency is a private, nonprofit,³⁰ voluntary association.³¹ As such, it belongs to a broad and rather loosely defined legal category, encompassing any body of individuals or groups which have united in a somewhat formal structure to effectuate common purposes and goals.³² Though there is a substantial body of authority which purports to affect voluntary associations in general, the common law has not yet been forced to define and regulate the educational accrediting agency in particular. These agencies have certain distinctive characteristics which seem beyond the scope of general association law, and, at any rate, that law is too broad to be determinative of the extent to which accrediting agencies can be supervised by the courts.

Most educational accrediting agencies are now incorporated,³³ and this has helped to clarify their legal status.³⁴ But it does not solve the difficult problems

²⁷ *Id.*, Jan. 11, 1966, p. 18, col. 1, 3; *id.*, April 24, 1966, p. 57, col. 1. See also *id.*, Dec. 17, 1965, p. 1, col. 6.

²⁸ *Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools*, Civil No. 1515-66, U.S. Dist. Ct., D.C., (complaint filed June 10, 1966).

²⁹ *Complaint, Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools*, *supra* note 28.

³⁰ This nonprofit aspect of educational accrediting agencies separates them from business enterprises, such as joint-stock associations, which are more susceptible to governmental regulation because of their commercial character.

³¹ See generally 7 C.J.S. "Associations" § 1 (1937); 4 Am. Jur. "Associations and Clubs" §§ 1-3 (1936). See also *North Dakota v. North Central Ass'n of Colleges & Secondary Schools*, 23 F. Supp. 694 (E.D. Ill.), *aff'd*, 99 F.2d 697 (7th Cir. 1938). The National Commission on Accrediting recognizes only "voluntary, non-profit" accrediting agencies. National Commission on Accrediting, *supra* note 12, No. 1.

³² See Oleck, *Non-Profit Corporations and Associations* §§ 4, 17 (1956); *Developments in the Law, "Judicial Control of Actions of Private Associations,"* 76 Harv. L. Rev. 983, 985 (1963) [hereinafter cited as *Developments in the Law*].

³³ Of the 28 accrediting agencies which responded to questionnaires, 23 were incorporated. Many have only recently attained this status; the Middle States Association, for instance, was incorporated early in 1966 in New York. Apparently, the primary reason for incorporation is the desire to insulate association officers from potential personal liability. See Ga. Code Ann. § 3-121 (1962) for an example of a statute under which officers of unincorporated associations could be held personally liable. This protection from personal liability after incorporation is offset by the problems and cost of refileing for a tax exemption under Int. Rev. Code of 1954, § 501(c), incorporation being a "material change" under that statute. Rev. Rul. 617, 1958-2 Cum. Bull. 260.

³⁴ Nonprofit and general corporation laws help define the legal structure of an educa-

of when refusals to accredit and withdrawals of accreditation may be challenged, and of what substantive law to apply in such actions. Here the law of voluntary associations, to the extent that it applies, provides the only available starting point.³⁵

A. *Prerequisites to Judicial Interference With an Association's Internal Affairs*

Courts have generally adhered to a policy of noninterference with the internal affairs of associations.³⁶ Because they are private and voluntary, because they usually operate in areas of little concern to the public, and because they are designed to thrive on autonomy, associations have generally been free from court supervision. When the problem is one concerning membership, a non-member denied admission usually has no basis for bringing suit since he has no right to participate in the organization.³⁷ A member who has been expelled has a somewhat better basis for court intervention, but it too is quite limited. When a party joins an association, a kind of contractual relationship is said to arise, with the rules of the association serving as the terms of the contract.³⁸ The member agrees, at least implicitly, to abide by the rules of the association and to accept its decisions as binding. Therefore, because he has accepted the association's authority as basic to the relationship into which he has voluntarily entered, he cannot normally obtain judicial relief.³⁹

The common-law membership cases are relevant in analyzing the legal impact of accreditation activities, since all of the regional and some of the professional accrediting agencies extend membership status to accredited schools. In many of the professional agencies, on the other hand, membership is not a consequence of accreditation. On the basis of the common law, therefore, it could be argued that schools accredited by the latter agencies, being nonmembers, normally have no claim to judicial relief whatsoever. But this distinction would seem to be of little relevance within the context of accreditation. It is submitted that accreditation itself is a type of membership status which deserves protection from wrongful acts of the accrediting body. The operative factor in each instance

tional accrediting agency. See note 157 *infra*. Incorporation also helps to solve the problem of diversity jurisdiction and of legal entity status for purposes of suit. See note 158 *infra* and accompanying text.

³⁵ If an organization is incorporated it is sometimes not considered a part of the voluntary associations category. See 7 C.J.S. "Associations" § 1(c)(1) (1937). It seems that for purposes of the present analysis, however, the substantive law of voluntary associations would be equally applicable to the incorporated accrediting agency. See, e.g., *Chapman v. American Legion*, 244 Ala. 553, 14 So. 2d 225 (1943); *Gold Knob Outdoor Advertising Co. v. Outdoor Advertising Ass'n*, 225 S.W.2d 645 (Tex. Civ. App. 1949); Chafee, "The Internal Affairs of Associations Not for Profit," 43 Harv. L. Rev. 993, 996 (1930) ("for the most part the presence or absence of the corporate form does not seem to affect our problems").

³⁶ See generally Annots., 20 A.L.R.2d 531, 537-39 (1951); 175 A.L.R. 438, 506 (1948).

³⁷ See note 71 *infra* and accompanying text.

³⁸ *Dingwall v. Amalgamated Ass'n of Street Ry. Employees*, 4 Cal. App. 565, 569, 88 Pac. 597, 599 (Dist. Ct. App. 1906); *Radio Station KHF v. Local 297, American Fed'n of Musicians*, 169 Kan. 596, 602, 220 P.2d 199, 205 (1950); *Brown v. Stoerkel*, 74 Mich. 269, 276, 41 N.W. 921, 923 (1889).

³⁹ No inference that associations are completely controlled by ordinary principles of contract is here intended. The contract analogy is not sound in all situations. Chafee, *supra* note 35, at 1001-07. But the analogy is useful to illustrate generally the nature of associational relationships, and it helps explain the judicial self-restraint evident in this area.

is that the school comes to rely on its accredited status and stands to be greatly harmed when that status is questioned or withdrawn.

Assuming, then, that a situation arises in which judicial intervention may be warranted (this problem will be subsequently discussed), there are two roadblocks which must first be passed: exhaustion of remedies and the lack of a proper remedy.

(1) *Exhaustion of Remedies.* Before a member may seek judicial relief from wrongful acts of the association, he must exhaust all remedies available to him within the framework of the association⁴⁰—unless this would be futile or could not provide proper redress.⁴¹ Though a good argument to the contrary can be made,⁴² the rule requiring exhaustion does not apply to nonmembers, since they have never agreed to abide by the rules of the association providing for internal appeal.⁴³

The doctrine of exhaustion of remedies is applicable to suits against an educational accrediting agency.⁴⁴ Since procedures for internal appeal have generally been established,⁴⁵ exhaustion may be an issue in future litigation. The National Commission on Accrediting, in fact, requires as a condition for recognition that an agency provide "a regular means whereby the chief administrative officer of an institution may appeal to the final authority in that agency."⁴⁶ Procedures established pursuant to this provision would permit internal appeal by schools seeking accreditation as well as by schools already accredited, although under the prevailing view of exhaustion an applicant school would not be barred from the courts for failure to do so.

(2) *Availability of Proper Remedy.* The remedy for wrongful acts of an educational accrediting agency is likely to be equitable in nature, and this presents another possible limitation on access to the courts. Traditionally, equity protected only property rights, and a party aggrieved by the act of a voluntary association had to allege violation of a property interest before equity would intervene.⁴⁷ Since the reputation of a school is the predominant interest affected by accreditation activities, and since this is arguably a personal interest, it might be difficult to obtain equitable relief from the acts of an accrediting

⁴⁰ See generally Annots., 20 A.L.R.2d 344, 384-87 (1951); 20 A.L.R.2d 421, 486-87 (1951); 20 A.L.R.2d 531, 564-65 (1951); Developments in the Law, supra note 32, at 1069-80.

⁴¹ *Blenko v. Schmeltz*, 362 Pa. 365, 372-73, 67 A.2d 99, 102 (1949); *Brown v. Harris County Medical Soc'y*, 194 S.W. 1179, 1181 (Tex. Civ. App. 1917).

⁴² See Developments in the Law, supra note 32, at 1072; Comment, "Exhaustion of Remedies in Private, Voluntary Associations," 65 Yale L.J. 369, 387 (1956).

⁴³ See *Porth v. Local 201, United Bhd. of Carpenters*, 171 Kan. 177, 180-81, 231 P.2d 252, 254-55 (1951) (by implication); Comment, "Exhaustion of Remedies in Private, Voluntary Associations," 65 Yale L.J. 369, 386-87 (1956).

⁴⁴ *North Dakota v. North Central Ass'n of Colleges & Secondary Schools*, 23 F. Supp. 694, 700 (E.D. Ill. 1938).

⁴⁵ See National Commission on Accrediting, supra note 11.

⁴⁶ National Commission on Accrediting, supra note 12, No. 7. In its constitution, the National Commission is also pledged to "establish a method or procedure whereby member institutions may present grievances with respect to actions of accrediting agencies." National Commission on Accrediting, Constitution, purpose No. 8. Since under this provision "the Commission does not adjudicate the question of whether a particular institution should be accredited by a particular agency," National Commission on Accrediting, supra note 12, it is not a procedure which a school would be required to pursue under the exhaustion doctrine. Rather, it is a method by which the National Commission itself can promote the internal solution of conflicts and thereby prevent judicial intervention.

⁴⁷ *Rigby v. Connol*, 14 Ch. D. 482 (1880); *Chafee*, supra note 35, at 998.

agency in a jurisdiction which still adheres to the traditional view. However, this view is of declining importance today. Under the modern approach, equity will protect personal interests as well as property rights.⁴⁸ Since this new view extends to actions against voluntary associations,⁴⁹ it should serve to liberalize access to equity for relief from wrongful acts of accrediting agencies.

Mandamus is a second possible remedy.⁵⁰ Although the writ generally does not issue to enforce purely private rights, "the fact that a private association . . . is incorporated may be held enough to permit the use of mandamus to compel the performance of its corporate duties, even though they would not ordinarily be considered public in nature."⁵¹ Alternatively, the fact that educational accrediting associations occupy a quasi-public status⁵² may make mandamus a proper remedy for their wrongful acts.⁵³

At any rate, a school would have to show that it had been harmed by the action of an educational accrediting agency before a court would recognize its claim. Harm is likely to result in two situations: (1) expulsion cases—the withdrawal, or threat of withdrawal, of accreditation; and (2) exclusion cases—the withholding of accreditation from an applicant school.⁵⁴

B. *Expulsion Cases: Withdrawal or Threatened Withdrawal of Accreditation*

Recent incidents in Mississippi, in North Carolina, and at St. John's University illustrate the types of problems which may arise when an agency resorts to actual or threatened expulsion.⁵⁵ Though these incidents never resulted in litigation, one expulsion controversy has come before the courts. In *North Dakota v. North Central Ass'n of Colleges and Secondary Schools*,⁵⁶ the Governor of North Dakota filed suit for a temporary injunction to restrain the

⁴⁸ See Annot., 175 A.L.R. 438 (1948); see generally *Developments in the Law*, supra note 32, at 999-1000.

⁴⁹ *Berrien v. Pollitzer*, 165 F.2d 21 (D.C. 1947); see Annot., 175 A.L.R. 438 (1948).

⁵⁰ Declaratory judgment is another possibility, particularly if the problem is one of threatened disaccreditation. A fourth alternative is a tort action. Defamation would be the most likely possibility. See generally *Developments in the Law*, supra note 32, at 1005. A defamation action could be useful in cases of wrongful refusal of accreditation as well as in cases of actual or threatened withdrawal, since any such action by an accrediting agency is likely to be widely publicized and can vitally affect a school's reputation. There may be a difficulty, however, in categorizing a damages action in any of the conventional tort classifications. See *Morrison v. NBC*, 24 App. Div. 2d 284, 266 N.Y.S.2d 406 (1st Dep't 1965) for an example of the possible schematic problems which could result. There, the court found actionable injury based on harm to a professor's academic reputation, even though the complaint sounded in none of the traditional tort categories, including defamation.

⁵¹ Chafee, supra note 35, at 1013. See also *Developments in the Law*, supra note 32, at 1096. For cases indicating the unavailability of mandamus against an unincorporated association, see Annot., 137 A.L.R. 311 (1942).

⁵² See text accompanying notes 107-128 infra.

⁵³ The writ has issued in the past against bodies exercising public educational duties. See, e.g., *Stephens v. Humphrey*, 145 Ark. 172, 224 S.W. 442 (1920); *Cook v. School Dist. No. 80*, 266 Ill. 164, 107 N.E. 327 (1914).

⁵⁴ This Comment is concerned only with actions brought against an accrediting agency by a school. It is worth considering, however, whether a student at a school whose accreditation has been withdrawn, or whose application for accreditation has been refused, could bring suit against the accrediting agency. Harm to the student is likely, since many states will not license persons to practice in certain professions unless they have graduated from accredited schools. See notes 107-09 infra and accompanying text. But there would be problems in formulating a theory of recovery. See *Morrison v. NBC*, supra note 50. And if a tort action were brought, proximate cause would be a major obstacle.

⁵⁵ See notes 23-27 supra and accompanying text.

⁵⁶ 23 F. Supp. 694 (E.D. Ill.), aff'd, 99 F.2d 697 (7th Cir. 1938).

North Central Association from withdrawing the State Agricultural College from its accredited list. The Association had investigated the school after the state's Board of Administration fired several of the school's personnel, allegedly without cause and without opportunity to be heard. When the investigation revealed that the firing had affected the morale of the faculty and jeopardized the quality of education, the Association threatened disaccreditation. The court denied the governor's request for an injunction, concluding that "in the absence of fraud, collusion, arbitrariness, or breach of contract, such as give rise to a civil action, the decisions of such voluntary associations must be accepted in litigation before the court as conclusive"⁵⁷

Though this decision provides a beginning for analyzing the question of whether or not a withdrawal or threatened withdrawal of accreditation is unlawful, it is only a beginning. More helpful is Chafee's analysis of the three requirements of lawful expulsion from a voluntary association.⁵⁸

Under the first requirement, expulsion must be accomplished consistently with the rules of the association. If the action is violative of the rules, the associational contract⁵⁹ will have been breached and judicial relief will generally be available.⁶⁰ Secondly, the expulsion proceedings must have been undertaken in good faith.⁶¹ This requirement is broad enough to encompass the "fraud, collusion, or arbitrariness" standard of the *North Central Association* case,⁶² as well as similar standards of malice, partiality, or prejudice; evidence of any of these elements can amount to bad faith, thereby serving as a basis for invalidating the expulsion even if it technically had been done in accordance with the rules. The third requirement is that the action taken, and the rules upon which it was premised, are not contrary to "natural justice."⁶³ This test is similar to that of good faith in that it embodies notions of fairness, but it is more concerned with the procedures used than with the motives behind the action taken. The concept of "natural justice" is nebulous at best; it is sufficient here to say that it requires, primarily, that the expelled member be afforded procedural safeguards such as notice and an opportunity to be heard.⁶⁴

In testing the validity of a withdrawal of accreditation by an educational accrediting agency, however, the above would provide only a framework; general principles are of limited use, since the precise inquiry in any case should depend upon the type of association involved.

⁵⁷ *Id.* at 699. *Accord*, *Robinson v. Illinois High School Ass'n*, 45 Ill. App. 2d 277, 195 N.E.2d 38 (1963), cert. denied, 379 U.S. 960 (1965); *State ex rel. Ohio High School Athletic Ass'n v. Judges of the Court of Common Pleas*, 173 Ohio St. 239, 181 N.E.2d 261 (1962.) The courts in these cases relied upon the "contract theory" of associations (discussed in text accompanying notes 38-39 *supra*). This theory is often the legal basis for the judicial policy of noninterference with the internal affairs of voluntary associations.

⁵⁸ Chafee, *supra* note 35, at 1014-20. These requirements originated with the case of *Dawkins v. Antrobus*, 17 Ch. D. 615 (1881).

⁵⁹ See text accompanying notes 38-39, 57 *supra*.

⁶⁰ *Lawson v. Hewell*, 118 Cal. 613, 50 Pac. 763 (1897); *Anthony v. Syracuse Univ.*, 224 App. Div. 487, 231 N.Y. Supp. 435 (4th Dep't 1928); *Annot.*, 20 A.L.R.2d 531, 546-47 (1951); Chafee, *supra* note 35, at 1018-20.

⁶¹ *Stevenson v. Holstein-Friesian Ass'n*, 30 F.2d 625, 627-28 (2d Cir. 1929); *Annots.*, 20 A.L.R.2d 344, 361-64 (1951); 20 A.L.R.2d 531, 544-46 (1951); Chafee, *supra* note 35, at 1020.

⁶² See note 57 *supra* and accompanying text.

⁶³ Chafee, *supra* note 35, at 1015-18; *Annots.*, 20 A.L.R.2d 344, 352 (1951); 20 A.L.R.2d 531, 539 (1951).

⁶⁴ See text accompanying notes 92-97 *infra*.

[T]he law of associations does not wholly depend upon the consensual elements of the relation between the member and the group, but such elements may be supplemented, modified, or disregarded *according to the function of the particular group in the community*.⁶⁵

This thesis has particular relevance in the accrediting field. Because of public concern for and reliance upon accreditation, courts might be more likely to invalidate a disaccreditation which is contrary to the public interest than one which is consistent with it. Because of the quasi-public function of accrediting agencies,⁶⁶ courts might inquire as to whether the disaccreditation is appropriate to the agency's purposes.⁶⁷ And because of the extreme consequences of disaccreditation upon the school involved, courts would probably be more inclined to interfere with the affairs of an accrediting agency than with those of other associations.⁶⁸

On the other hand, the accrediting agency's interest in autonomy and its special competence in formulating educational standards are important considerations; courts may desire both to preserve the value of autonomy⁶⁹ and to defer to the expertise of the agency.⁷⁰ The weight to be accorded these arguments, as opposed to those above, is uncertain. But it seems clear that a court should recognize both groups of arguments, evaluate the strength of the factors in each, and balance one group against the other.

C. *Exclusion Cases: the Refusal of an Applicant's Request for Accreditation*

The factors involved in determining the validity of an expulsion, discussed above, would be relevant if a court were to reach the merits in an exclusion case. But the primary question is the threshold one: under what circumstances is judicial intervention warranted?

An applicant that has been denied membership in a voluntary association stands in a far different position than does an expelled member. Judicial relief from wrongful expulsion is granted to protect rights previously gained through membership itself; a nonmember seeking admission has the benefit of none of those rights. As a general rule, a court cannot compel the granting of membership in a voluntary association, for that membership is a privilege and not a right; no matter how arbitrary or unjust the rejection may be, there is no legal remedy.⁷¹

This rule is subject to one major exception. When a private association is the only group operating in an area of vital public concern, it enjoys a sort of monopoly power; if that power, because of public reliance upon it, becomes great enough to make membership a necessity for successful operation in that area, courts may intervene.⁷² If the applicant meets the admission standards

⁶⁵ Chafee, *supra* note 35, at 1005. [Emphasis added.]

⁶⁶ See text accompanying notes 107-28 *infra*.

⁶⁷ See generally *Developments in the Law*, *supra* note 32, at 996, 1011.

⁶⁸ See generally Chafee, *supra* note 35, at 1021-22; *Developments in the Law*, *supra* note 32, at 996.

⁶⁹ See generally Chafee, *supra* note 35, at 1027-29.

⁷⁰ See text accompanying notes 80-81; see generally Chafee, *supra* note 35, at 1023-26.

⁷¹ *Kronen v. Pacific Coast Soc'y of Orthodontists*, 237 Cal. App. 2d 289, 301, 46 Cal. Rptr. 808, 816 (Dist. Ct. App. 1965), cert. denied, 384 U.S. 905 (1966); *Gold Knob Outdoor Advertising Co. v. Outdoor Advertising Ass'n*, 225 S.W.2d 645, 646 (Tex. Civ. App. 1949); *Annot.*, 89 A.L.R.2d 964, 966-68, 971-74 (1951).

⁷² *James v. Marinship Corp.*, 25 Cal. 2d 721, 731, 155 P.2d 329, 335 (1944); *Falcone v.*

of the group—at least insofar as they are not contrary to public policy—and his admission would not subvert the group's basic purposes, the granting of membership in the association may be compelled. This principle has been applied to labor unions⁷³ and professional associations,⁷⁴ and similar reasoning may well be applicable to educational accrediting associations. Society has come to rely on accreditation as a means of judging the quality of education; employers, schools, and especially state licensing boards now depend heavily upon educational standards maintained through the process of accreditation.⁷⁵ Because of this public reliance, and because of the action and policy of the National Commission—which has successfully cut down the number of accrediting agencies so that normally only one agency is recognized in each region or profession⁷⁶—accreditation has become akin to a monopoly power. The accrediting agency, seen in this light, is not a truly "voluntary" association,⁷⁷ since accreditation is a virtual necessity for the successful operation of a school. Neither is it a truly "private" association,⁷⁸ for it fulfills a public function and may more properly be classed as a quasi-public agency.⁷⁹ These factors—monopoly power and public function—may render an accrediting agency's admission policies susceptible to judicial scrutiny. Thus, an unjust or arbitrary refusal to accredit would not seem to be beyond the jurisdiction of the courts.

The method of operation of the accrediting agency, however, militates against judicial acceptance of the supervisory role suggested above. Accrediting agencies do not monitor every act of member schools. Rather, they set general standards⁸⁰ and require that schools meet those standards to be eligible for accreditation. This standard-setting role necessitates expertise. The educators and members of the professions set the standards and formulate the policies for enforcing them, and courts, lacking such expertise, should be reluctant to interfere.⁸¹ If the agency is functioning for the benefit of the public and, to that end, its

Medical Soc'y of Middlesex County, 34 N.J. 582, 170 A.2d 791 (1962); *Kurk v. Medical Soc'y of Queens County, Inc.*, 46 Misc. 2d 790, 260 N.Y.S.2d 520 (Sup. Ct. Queens County 1965), rev'd on other grounds, 24 App. Div. 2d 897, 264 N.Y.S.2d 859 (2d Dep't 1965). See also Chafee, *supra* note 35, at 1022-23; *Developments in the Law*, *supra* note 32, at 993-94, 1040.

⁷³ *James v. Marinship Corp.*, *supra* note 72:

Where a union has . . . attained a monopoly of the supply of labor . . . such a union occupies a quasi-public position . . . and it has certain corresponding obligations. It may no longer claim the same freedom from legal restraint enjoyed by golf clubs or fraternal associations. Its asserted right to choose its own members does not merely relate to social relations; it affects the fundamental right to work for a living.

⁷⁴ *Falcone v. Medical Soc'y of Middlesex County*, *supra* note 72, at 597, 170 A.2d at 799: [T]he County Medical Society possesses . . . a virtual monopoly over the use of local hospital facilities . . . Public policy strongly dictates that this power should not be unbridled but should be viewed judicially as a fiduciary power to be exercised in a reasonable and lawful manner

See also *Kurk v. Medical Soc'y of Queens County, Inc.*, *supra* note 72.

⁷⁵ See text accompanying notes 107-11 *infra*.

⁷⁶ See notes 8-9 *supra*.

⁷⁷ See note 31 *supra* and accompanying text.

⁷⁸ See text accompanying note 30 *supra*.

⁷⁹ See text accompanying notes 107-28 *infra*.

⁸⁰ For a general discussion of the private association as a vehicle for setting and enforcing standards, see *Developments in the Law*, *supra* note 32, at 1046-49. See also text accompanying note 20 *supra*.

⁸¹ See generally Chafee, *supra* note 35, at 1023-26.

standards are cast in the public interest, judicial scrutiny should yield to the competence of the accrediting specialists.

The acceptance of jurisdiction in exclusion cases, then, should depend upon a balancing of three factors: (1) the extent of the accrediting agency's monopoly power; (2) the degree to which that monopoly power is being abused; and (3) the extent to which the accrediting agency is relying on its special competence, *i.e.*, interpreting and enforcing its own standards. The stronger the reliance of society upon the standards of the agency, the greater is the harm the agency can impose upon an excluded school and the greater is the monopoly power of the agency. The less publicly-oriented are the actions and policies of the agency, the greater is the likelihood that the monopoly power is being abused. When the degree of power and extent of abuse become significant enough to outweigh the deference paid expertise, courts may justifiably intervene.⁸²

D. *Procedural Safeguards in Accreditation Proceedings*

Procedural regularity is relevant in testing the validity of any expulsion or exclusion from an educational accrediting agency. Proper notice of the proceedings and of adverse information being considered, adequate opportunity to present a defense, and a fair hearing on each material issue are all important considerations. An accredited school would seem to have a more obvious claim to such treatment than an applicant school seeking accreditation, because many of its rights may stem from the fact of accreditation itself.⁸³ But because accrediting agencies fulfill a public function and utilize a kind of monopoly power,⁸⁴ courts may require that fair procedures be employed even in exclusion cases. This would be especially true if the fourteenth amendment were found to apply.⁸⁵

Fair procedures may be required of an accrediting agency on three different levels. At the lowest level, courts might insist that an accrediting agency follow its own procedural rules.⁸⁶ Violation of its constitution or by-laws, causing an

⁸² See *Complaint, Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools*, Civil No. 1515-66, U.S. Dist. Ct., D.C. (filed June 10, 1966). The case is discussed at text accompanying notes 28 and 29 *supra*, and 187-94 *infra*. Though it is brought under the federal antitrust laws, it presents factual allegations which could well be used to test the above theories. Plaintiff alleges that defendant and the other regional associations have "conspired for the purpose of . . . monopolizing . . . for non-profit institutions the field of higher education," *id.*, p. 5, allegation 4; that "continued adherence to defendant's policy of excluding proprietary institutions from eligibility for evaluation and accreditation will result in irreparable damage to plaintiff, and . . . thereby eliminate plaintiff from competition in the field of higher education," *id.*, p. 10, allegation 12; and that "the conduct of defendant . . . is clearly opposed to the public interest . . .," *id.*, p. 9, allegation 10. On the other hand, defendant seems to be relying on its special competence in refusing to accredit proprietary institutions. But it is interesting to note in this regard that defendant has not inspected plaintiff school and found that its quality does not meet the standards of the agency; rather, defendant has refused to accept plaintiff's application for evaluation and accreditation. Under these circumstances, an argument that defendant is relying on its own special competence might carry less weight than it would if defendant had actually inspected plaintiff school and found it to be of substandard quality.

⁸³ See text accompanying note 71 *supra*.

⁸⁴ See text accompanying notes 75-79 *supra*.

⁸⁵ See text accompanying notes 98-128 *infra*.

⁸⁶ See notes 59-60 *supra* and accompanying text.

irregularity in the proceedings, may void the agency's decision; the extent of the irregularity and the degree of unfairness it engenders, however, are necessary considerations.⁸⁷ The lack of a mere technical formality would not be grounds for court review.⁸⁸

In most instances, procedural safeguards would be afforded both accredited and nonaccredited schools at the lowest level. Accrediting agencies generally establish fair and comprehensive procedures governing their decisions on the extension or revocation of accreditation. The National Commission on Accrediting, in fact, requires that all approved agencies follow procedures whereby the institution concerned evaluates itself as part of the accrediting process,⁸⁹ its faculty and staff have opportunity to consult with the visitation team,⁹⁰ a written report of the evaluation is made available to the institution, and an opportunity to comment upon it is extended.⁹¹ But problems may arise concerning the fairness of procedures used at the time of the actual decision on accreditation, rather than at the time of the evaluation. The second level of procedural safeguards then becomes more important.

The procedures of an association, at the second level, should conform to accepted standards of administrative procedure.⁹² Application of this theory may depend on the character of the right being protected.⁹³ But it is not necessary that the procedures be provided for in the rules, and the theory would operate even if the rules explicitly provided that normal administrative procedures need not be followed. Fair hearing,⁹⁴ proper notice of the proceedings⁹⁵ and of the charges levied,⁹⁶ and the opportunity to present a defense⁹⁷ have all been afforded members of associations under this approach. Educational accrediting agencies, it seems, would similarly be required to comply with such standards. The interests involved and the potential for harm inherent in disaccreditation (and perhaps the refusal to accredit) indicate that fair proceedings can be obtained only by affording appropriate procedural safeguards.

At the highest level, procedures conforming to the due process clause of the fourteenth amendment arguably could be required of an educational accrediting

⁸⁷ See generally Annots., 20 A.L.R.2d 344, 364-80 (1951); 20 A.L.R.2d 531, 550-53 (1951).

⁸⁸ See *Yeomans v. Union League Club*, 225 Ill. App. 234 (1922); Annot., 20 A.L.R.2d 344, 369-70 (1951).

⁸⁹ National Commission on Accrediting, *Facts About the Commission: Criteria for Recognized Accrediting Agencies No. 11(i)* (pamph., 1964).

⁹⁰ *Id.*, No. 11(k).

⁹¹ *Id.*, No. 11(l).

⁹² This requirement is similar to the "natural justice" test. See text accompanying notes 63-64, *supra*.

⁹³ *E.g.*, members of benevolent societies are usually entitled to notice and hearing before expulsion. See Annot., 27 A.L.R. 1512, 1513-14 (1923). This is because a "property interest" is involved, the presence of which requires that "fundamental due process must be observed." *Schwankert v. New Jersey State Patrolmen's Benevolent Ass'n*, 77 N.J. Super. 224, 228-30, 185 A.2d 877, 880-81 (Super. Ct. 1962).

⁹⁴ *Virgin v. American College of Surgeons*, 42 Ill. App. 2d 352, 192 N.E.2d 414 (1963). See Annots., 20 A.L.R.2d 344, 353 (1951); 20 A.L.R.2d 531, 540 (1951).

⁹⁵ *Swital v. Real Estate Comm'r*, 116 Cal. App. 2d 677, 254 P.2d 587 (Dist. Ct. App. 1953). See Annots., 20 A.L.R.2d 344, 355-56 (1951); 20 A.L.R.2d 531, 542 (1951).

⁹⁶ *Stein v. Marks*, 44 Misc. 140, 89 N.Y. Supp. 921 (Sup. Ct. N.Y. County 1904). See Annot., 20 A.L.R.2d 344, 356-58 (1951).

⁹⁷ *Norman v. Roosevelt Democratic Club*, 17 Misc. 2d 219, 184 N.Y.S.2d 980 (Sup. Ct. Kings County 1959). See Annots., 20 A.L.R.2d 344, 358-60 (1950), 20 A.L.R.2d 531, 543-44 (1951).

agency in an expulsion or exclusion case. As a general rule only public bodies are within the purview of the fourteenth amendment⁹⁸—the test being one of “state action”⁹⁹—and private associations are not subject to its restraints.¹⁰⁰ But there are two exceptions. Where (a) an otherwise private organization is performing a function which is essentially public (the “quasi-governmental function” theory)¹⁰¹ or (b) a private organization pursuing purely private activities derives a major source of power and control from the state (the “government contacts” theory),¹⁰² due process may apply. There are arguments for applying both theories to the educational accrediting agency.

(1) *Quasi-Governmental Function*. Two landmark Supreme Court cases illustrate the quasi-governmental function theory. In *Marsh v. Alabama*,¹⁰³ the fourteenth amendment was applied to a privately-owned company town, apparently on the theory that it was fulfilling the same function as a public municipality, thereby giving the public an interest in its activities equal to that which it would have if the town were publicly owned.¹⁰⁴ In *Terry v. Adams*,¹⁰⁵ the Court applied the fifteenth amendment to the “Jaybird Association,” a private political organization, because its elections were an integral part of the state’s elective process with an effect equivalent to that of a public election. Both organizations operated in an area of public concern with the tacit approval of the state. In such cases, the underlying problem may properly be one of determining “the extent to which the private group has moved toward a relationship to the public which gives the public the obligation to police on a constitutional basis”¹⁰⁶ the activities of the group.

Many of the aspects of accreditation indicate that it might be a quasi-governmental function. It is doubtful that any one of them standing alone would be sufficient to warrant application of fourteenth amendment due process, but when viewed together, they became significant.

(a) State licensing statutes¹⁰⁷ and licensing board regulations¹⁰⁸ often stipulate that a person applying for a license to practice a profession in the state must have pursued a program of study approved by that profession’s accrediting agency.¹⁰⁹ States have thereby accepted the standards of accrediting agencies

⁹⁸ Civil Rights Cases, 109 U.S. 3, 11-19 (1883).

⁹⁹ See generally Pasley, “Exclusion and Expulsion from Non-Profit Organizations—The Civil Rights Aspect,” 14 Clev.-Mar. L. Rev. 203 (1965); Abernathy, “Expansion of the State Action Concept Under the Fourteenth Amendment,” 43 Cornell L.Q. 375 (1958).

¹⁰⁰ See, e.g., *State ex rel. Dame v. LeFevre*, 251 Wis. 146, 151-52, 28 N.W.2d 349, 352-53 (1947).

¹⁰¹ See *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946); cf. *Evans v. Newton*, 382 U.S. 296 (1966), 51 Cornell L.Q. 862 (1966).

¹⁰² See, e.g., *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963); *Guillory v. Administrators of Tulane Univ.*, 212 F. Supp. 674 (E.D. La. 1962).

¹⁰³ *Supra* note 101.

¹⁰⁴ *Marsh v. Alabama*, *supra* note 101, at 507.

¹⁰⁵ *Supra* note 101.

¹⁰⁶ Williams, “The Twilight of State Action,” 41 Texas L. Rev. 347, 378 (1963).

¹⁰⁷ E.g., *Ariz. Rev. Stat. Ann. § 32-823(4)* (Supp. 1965) (podiatry); *Kan. Stat. Ann. § 65-1631* (1964) (pharmacy); *R.I. Gen. Laws Ann. § 5-25-4* (Supp. 1965) (veterinary); *W. Va. Code Ann. § 2869(b)* (1961) (medicine); see *Ex parte Gerino*, 143 Cal. 412, 417-18, 77 Pac. 166, 168 (1904). See generally Council of State Gov’ts, *Occupational Licensing Legislation in the States* (1952).

¹⁰⁸ See *Jones v. State Bd. of Medical Registration*, 111 Kan. 813, 208 Pac. 639 (1922).

¹⁰⁹ Strictly speaking, this argument for application of the 14th amendment would apply

as criteria to be used in determining eligibility for governmental privilege.¹¹⁰ This being so, accrediting agencies, by providing lists of approved schools, are assuming the state-delegated function of formulating licensing standards.¹¹¹

(b) Most states charter colleges and universities within their jurisdiction.¹¹² Chartering is analogous to licensing; it is the grant of a state privilege whereby the school is recognized as one fit to operate within the state. But, in reality, effective exercise of that privilege may depend ultimately upon the action of accrediting agencies. Their standards of educational excellence are so heavily relied upon by the public that failure to meet them may bar successful operation by the school. The control thereby engendered makes the accrediting agency into a kind of secondary licensing authority; when its standards are higher than the state's, power to allow or to curtail the state-granted privilege is in its hands.¹¹³

(c) Many states measure the educational quality of their own schools by reference to the standards promulgated by the regional and national accrediting agencies. This is particularly relevant when public schools are concerned. Professional agencies accredit undergraduate and graduate programs of state colleges; regional agencies accredit state colleges as well as public secondary and elementary schools.¹¹⁴ In doing so with the tacit or express approval of

only to the professional accrediting agencies. But in practice it has some application to the regional agencies as well, since they cooperate with the professional agencies in evaluating schools and visitation committees are often composed of members of both types of agencies. See National Commission on Accrediting, *Procedures of Accrediting Education in the Profession* (a series of reports published in 1964); National Commission on Accrediting, *supra* note 89, No. 10. Also, a person seeking a professional license must usually have attended an accredited undergraduate college in order to be admitted to an accredited professional school. In this sense, nonprofessional accreditation is a vital link in the process of professional licensure.

¹¹⁰ See American Medical Association, *A History of the Council on Medical Education and Hospitals* 24-25 (1959):

In some instances the medical practice act of the state makes the use of these lists [the Council of Medical Education's list of approved schools] mandatory. Elsewhere they are employed by regulation of the boards. Thus the "approved lists" of the Council have come to have the force of law . . .

See also Selden, "Where Do We Go From Here?" 29 *Exceptional Children* 204 (No. 5, Jan. 1963).

¹¹¹ It is significant in this respect that it is the stated purpose of many accrediting agencies to assist licensing authorities in granting state privilege. The American Council on Pharmaceutical Education, for example, seeks "to provide a list of accredited colleges of Pharmacy for the use of state boards of pharmaceutical examiners . . ." National Commission on Accrediting, *supra* note 109, "Accreditation in Pharmacy" 1 (1964).

¹¹² Selden, "The Place of Accreditation in the Governance of Higher Education," *Liberal Education*, p. 2 (No. 3, Oct. 1964).

¹¹³ In *Kurk v. Medical Society of Queens County, Inc.*, 46 Misc. 2d 790, 260 N.Y.S.2d 520 (Sup. Ct. Queens County 1965), *rev'd* on other grounds, 24 App. Div. 2d 897, 264 N.Y.S.2d 859 (2d Dep't 1965), a doctor licensed by the state was refused admission to the local medical society. The exclusion had the effect of curtailing the doctor's practice, since facilities of the area hospitals were available only to society members. The court, in compelling admission, expressed the view that the society may have violated the doctor's 14th amendment rights. *Id.* at 796, 260 N.Y.S.2d at 525-26. The court's theory seems to have been that the society, by setting higher standards than the state, was controlling the privilege which the state had accorded the doctor. *Id.* at 796-800, 260 N.Y.S.2d at 525-29. See also Note, "Judicially Compelled Admission to Medical Societies," 75 *Harv. L. Rev.* 1186, 1188 (1962).

¹¹⁴ E.g., the Southern Association of Colleges and Schools currently accredits 2,681 secondary schools and 870 elementary schools, most of which are public, and 411 institutions of higher learning, many of which are public. Opinion letter of July 29, 1965, from Harry V. Lamon, Jr., General Counsel for the Southern Association, to T. W. Bruton, Atty. Gen. of North Carolina, on file at the Cornell Law Library.

the state, they are setting standards for public educational institutions—traditionally a governmental function.

But even where private schools are concerned, state reliance on the agencies is significant. There are many specific purposes,¹¹⁵ other than licensing, for which various state agencies must approve schools and programs of study. Rather than make their own evaluations, many states accept the accreditation of a private agency.¹¹⁶ Alternatively, if they independently evaluate schools, states may do so on the basis of criteria established by a private agency.¹¹⁷ In effect, many states are allowing the accrediting agency to assume the state function of "policing" educational development within the state and evaluating it for governmental purposes.

(2) *Government Contacts.* The case of *Guillory v. Administrators of Tulane Univ.*¹¹⁸ provides an excellent example of the government contacts test as applied in the education field. The issue was whether Tulane could be constitutionally compelled to admit Negro students. Though the school was private, plaintiffs alleged that it had sufficient contacts with the state to justify a finding of state action. The court held that membership of state officials on the school board, use of state funds and property by the school, a state tax exemption for school property, and a reversionary interest of the state in certain school property,¹¹⁹ were not sufficient to amount to state action.

Educational accrediting agencies seemingly have more contacts with the state than did Tulane. The arguments relating to quasi-governmental function are also significant for purposes of the contacts approach, since these functions are a "source of power and control"¹²⁰ for the agencies. In addition, some agencies operate largely on state funds,¹²¹ since dues are paid by public schools which in turn are financed by the state.¹²² State departments of education are often eligible for agency membership¹²³ and office-holding,¹²⁴ and their representatives

¹¹⁵ One example is disbursement of state scholarship funds. California, for instance, recognizes the Western College Association for purposes of accrediting under its State Scholarship Act. California State Senate, Report of Fact Finding Comm'n on Education 162 (Gen. Sess. 1962). Another example is approval of teacher training institutions; California also recognizes the W.C.A. for this purpose. *Id.* at 159; Cal. Admin. Code, title 5 § 821. A third example involves eligibility for employment by state and local agencies. "Graduate Professional Schools of Social Work," a pamphlet published in 1965 by the Council on Social Work Education, states that "a legal status is attached to the accrediting function in social work through legislation, rules, and regulations governing the employment of social work personnel by federal, state, and local agencies."

¹¹⁶ Wilkins, "Accreditation in the States," in *Accreditation In Higher Education* 41 (Blauch, ed. 1959); see, e.g., Cal. Admin. Code, tit. 5 § 821.

¹¹⁷ Wilkins *supra* note 116.

¹¹⁸ 212 F. Supp. 674 (E.D. La. 1962).

¹¹⁹ *Id.* at 683.

¹²⁰ "What gives . . . [organizations] their constitutional character is their source of power and control." *Ibid.*

¹²¹ State economic aid would not in itself be sufficient to constitute state action, unless it were very substantial. But when economic aid is coupled with other factors, state action may be found. See Pasley, *supra* note 99, at 210. See also Lewis, "The Meaning of State Action," 60 Colum. L. Rev. 1083, 1102-08 (1960).

¹²² E.g., in the fiscal year 1964-65, the Southern Association was paid more than \$7,000 by state-owned institutions in North Carolina alone. Memorandum of Sept. 22, 1965, from T. W. Bruton, Atty. Gen. of North Carolina, to Thad Eure, Sec. of State of North Carolina, on file at the Cornell Law Library.

¹²³ See, e.g., Northwest Association of Secondary & Higher Schools, Constitution, art. III §§ 1, 2(c) (rev. 1960); Southern Association of Colleges & Schools, By-Laws, art. IV § 4.01.

¹²⁴ *Id.* § 4.03.

may be appointed to agency commissions.¹²⁵ And finally, educational accrediting associations are intimately, though indirectly, connected with the distribution of funds under federal "aid-to-education" statutes.¹²⁶ Most of these statutes provide that only accredited schools are eligible for federal aid,¹²⁷ and since programs are administered through the states, accreditation becomes a screening procedure in the state's selection process.¹²⁸

Taken together, the above arguments indicate that either under the quasi-governmental power theory, the government contacts theory, or a combination of the two, an accrediting agency's action might be tantamount to state action. If so, then to the extent, if any, that procedural safeguards at the lower two levels do not secure rights to proper notice and fair hearing for an expelled or excluded school, fourteenth amendment due process may be able to fill the void.

III

GOVERNMENTAL REGULATION OF ACCREDITATION

Even if the activities of the regional and professional accrediting agencies do not amount to state action, they are nevertheless affected with a public interest to a significant degree. The previous section has examined the quasi-public character of private accrediting agencies and enumerated their many contacts with both federal and state governments. An earlier section has explored the monopolistic tendencies implicit in accreditation.¹²⁹ While these facets of the accrediting process indicate that the agencies are susceptible to governmental regulation, such regulation has not as yet been implemented on a large scale at either the federal or the state level.

¹²⁵ The Commission on Secondary Schools of the Southern Association has, as a member, "the person from each state connected with the state department of education who shall be the state director of secondary schools . . ." By-laws, art. VII § 703(a)(1). See also Northwest Association of Secondary & Higher Schools, Constitution, art. V § 6(a) (rev. 1960).

¹²⁶ See text accompanying notes 175-86 *infra*.

¹²⁷ E.g., Section 401 of the Higher Education Facilities Act of 1963, 77 Stat. 374, 20 U.S.C. § 751 (1964) reads in pertinent part:

As used in this chapter—

...

(f) the term "institution of higher education" means any educational institution in any state which—

...

(5) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph . . .

¹²⁸ Strictly speaking, accreditation in this light is closer to federal than to state action. But it is relevant for our purposes because it restricts the state's ability to select applicants for its allotted share of the federal funds. See *Simpkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), where a private hospital was held subject to the fourteenth amendment because it was an integral part of a state-federal plan to allocate federal funds for the construction of hospitals. It should also be noted that the federal aid-to-education statutes raise the question of applicability of fifth amendment due process to educational accrediting agencies. The fifth amendment was also applied to the private hospital in the *Cone* case. An affirmative argument would be bolstered by the fact that accrediting agencies are officially recognized by the United States Commissioner of Education. See notes 176-78 *infra* and accompanying text. Furthermore, some of the agencies finance their accrediting activities partly with federal grants. See, e.g., National Commission on Accrediting, "Accreditation in Psychology," p. 4 (pamph., March 1964).

¹²⁹ See text accompanying notes 72-82 *supra*.

A. State Regulation of Accrediting Agencies and Activities

The United States Constitution neither delegates power to regulate education to the federal government nor prohibits it to the states. Presumably, then, the power resides in the states by virtue of the tenth amendment.¹³⁰ Since education has traditionally been affected with a public interest, state regulation of it is an adjunct of the police power¹³¹ and subject to the limitations normally placed on that power. In other words, regulation must be reasonable, rather than arbitrary and capricious,¹³² and must bear a real and substantial relation to the evils it was enacted to eradicate.¹³³ Within this framework, there appear to be three primary methods by which a state can control, to varying extents, the private accreditation activities carried on within its borders: (1) indirect regulation through competition—the establishment of state (public) accrediting agencies; (2) direct regulation through legislation specifically aimed at private accrediting agencies; and (3) regulation through use of statutes applicable to corporations and associations in general.

(1) *Establishment of State Accrediting Agencies.* State legislatures can indirectly regulate accrediting agencies by delegating to a state agency the authority to establish accrediting procedures and standards. Though such action would undoubtedly detract from the importance of private associations,¹³⁴ it would not alleviate the need for uniformity throughout the states. If educational standards are to be widely relied upon, they cannot vary from state to state. Absent the creation of a multi-state educational agency, only the private accrediting associations are capable of maintaining the necessary uniformity over a wide geographical area.¹³⁵

It is clear that a state is able, under the police power, to implement procedures for qualitatively evaluating private educational institutions.¹³⁶ Establishment

¹³⁰ This is not to say that the federal government has no interest in education nor any ability to regulate it by various means. As to the federal government's participation in the accrediting process, see text accompanying notes 170-86 *infra*.

¹³¹ See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *State v. Williams*, 253 N.C. 337, 117 S.E.2d 444 (1960); *Schneider v. Pullen*, 198 Md. 64, 81 A.2d 226 (1951); 47 Am. Jur. "Schools" § 221 (1943). Of course, if the question were regulation of a purely public school, or of purely public education in general, legislative power would be complete, absent some limitation in the state or federal constitution. *South Dakota H.S. Interscholastic Activities Ass'n v. St. Mary's Inter-Parochial High School*, 141 N.W.2d 477, 480 (S.D. 1966). Police power limitations apply only to regulation of private schools and private educational activities. *Ibid*.

¹³² *Washington ex rel. Seattle Title Trust Co. v. Roherge*, 278 U.S. 116 (1928); *Grow System School v. Board of Regents*, 277 App. Div. 122, 98 N.Y.S.2d 834 (3d Dep't 1950).

¹³³ *State v. Williams*, *supra* note 131; *Grow System School v. Board of Regents*, *supra* note 132; *Columbia Trust Co. v. Lincoln Institute*, 138 Ky. 804, 811, 129 S.W. 113, 115 (1910).

¹³⁴ California State Senate, Report of Senate Fact Finding Committee on Education 147 (Gen. Sess. 1962) ("State accreditation could do much to negate the accomplishment of the federally recognized private accrediting agencies which have done a yeoman's job in building and maintaining the quality of higher education . . .").

¹³⁵ See Selden, "Government Concern with Accreditation," *New England Ass'n Review* 8 (May, 1960).

¹³⁶ *Grow System School v. Board of Regents*, *supra* note 132, at 125, 98 N.Y.S.2d at 837: It may well be that the power to regulate certain phases of private school operation such as the nature of curriculum, the qualifications of teachers and the like, is a necessary and indispensable corollary to the State's supervisory jurisdiction over education in general.

Cf. note 131 *supra*.

of minimum standards is directed at elimination of fraudulent degree-granting institutions which cause harm both to the student and to persons relying on their degrees.¹³⁷ Since it is within the public interest to control such an evil, states can do so if their regulatory provisions are reasonable.

At present New York is the only state which has instituted comprehensive regulation of educational quality.¹³⁸ Though in most states some agency has been authorized to carry out actual accreditation of one form or another,¹³⁹ the authority is often utilized only to a limited extent or not at all.¹⁴⁰ Frequently the state will choose to rely on the private accrediting agencies.¹⁴¹ A few years ago, for example, the Fact Finding Committee on Education of the California State Senate held extensive hearings on the advisability of state reliance upon the accreditation activities of the Western College Association (the regional agency which accredits California schools).¹⁴² It concluded that "there is no necessity for the State to enter directly into the accrediting field, and it should not do so."¹⁴³

(2) *Direct Legislative Regulation of Accrediting Agencies.* The second means by which states can regulate accrediting is through direct legislative supervision of the voluntary agencies. The extent to which this can be done depends upon the public or quasi-public status of the agencies.¹⁴⁴ If, under an extreme view, they were considered to be public bodies, legislative control over them would not be restrained by the traditional limits placed upon the police power,¹⁴⁵ since police power limitations are inapplicable where private rights are not being affected.

In *South Dakota H.S. Interscholastic Ass'n v. St. Mary's Inter-Parochial High School*,¹⁴⁶ the court upheld the constitutionality of a state statute¹⁴⁷ making all accredited private high schools eligible for membership in the plaintiff asso-

¹³⁷ See generally California State Senate, *supra* note 134, at 146-47.

¹³⁸ The New York Board of Regents exercises authority over all educational institutions within the state, both public and private. In conjunction with its authority over professional licensing, the Board registers (a form of accreditation) professional programs of study offered in educational institutions throughout the world. See Selden, *Accreditation: A Struggle Over Standards in Higher Education* 51-53 (1960).

¹³⁹ E.g., Cal. Ed. Code § 13101; S.D. Code § 15.0905 (Supp. 1960); New Rev. Stat. §§ 79-328, 79-1247.02 (Supp. 1963); see generally Wilkins, *supra* note 116, at 31-34.

¹⁴⁰ Selden, noting that state regulation has been irregularly exercised, stated:

It is true that in most states an institution must first obtain a legal charter before it may offer instruction and award degrees. It is also true that in many states colleges and universities are subject to approval, registration, review or accreditation, as the terms are used in different states, by officially designated legal authorities. Despite the legal basis for these controls they are not enforced with any consistency throughout the country, and in some states their enforcement is so lax that it would be considered ludicrous if it were not a matter of serious threat to the social welfare.

Selden, "The Place of Accreditation in the Governance of Higher Education," *Liberal Education*, p. 2 (No. 3, Oct. 1964). See also California State Senate, *supra* note 134, at 146.

¹⁴¹ See notes 115-17 *supra* and accompanying text.

¹⁴² California State Senate, *supra* note 134, at 145-67.

¹⁴³ *Id.* at 147.

¹⁴⁴ See the discussion of the exclusion cases at text accompanying notes 72-79 *supra*, and the discussion of state action at text accompanying notes 98-128 *supra*. See also text accompanying notes 131-33 *supra*.

¹⁴⁵ *Waugh v. Board of Trustees of Univ. of Mississippi*, 237 U.S. 589, 595-97 (1915); *South Dakota H.S. Interscholastic Activities Ass'n v. St. Mary's Inter-Parochial High School*, 141 N.W.2d 477, 480 (S.D. 1966).

¹⁴⁶ 141 N.W.2d 477 (S.D. 1966).

¹⁴⁷ S.D. Laws of 1964, Ch. 51.

ciation. Plaintiff was a private organization designed to coordinate interscholastic activities within the state. However, it was run by public school officials, and only public schools, upon a two-thirds vote of existing members, could be admitted to membership. The court held that the extent of the state police power was not relevant and that the public character of the association,¹⁴⁸ together with the monopoly power it exhibited in controlling interscholastic activities,¹⁴⁹ justified the statute.

The regional and national accrediting agencies are not as "public" as the South Dakota association, since so many of the colleges accredited by them are private.¹⁵⁰ It does not appear that they can be regulated to the same degree, though such an argument seemingly could be made.¹⁵¹ More likely, state regulation of their activities must be based upon the police power¹⁵² and is necessarily limited by the traditional restraints upon that power.¹⁵³ At any rate, the encompassing nature of the public interest in the field of educational accreditation¹⁵⁴ furnishes a broad base for exercising the police power. The distinction between absolute legislative power and the police power is therefore of little significance.

(3) *Application of General Corporation and Association Statutes.* There is little statutory law attempting to regulate the organization or operation of non-profit associations, and the few statutory schemes which do exist are not at all comprehensive.¹⁵⁵ But most of the accrediting agencies are incorporated,¹⁵⁶ and the corporation statutes¹⁵⁷ and procedural provisions¹⁵⁸ which apply to them because of their corporate character are somewhat more significant. Nevertheless, these statutes concentrate upon the structures and internal operating procedures of nonprofit corporations, and do little to substantively control their activities.¹⁵⁹

¹⁴⁸ South Dakota H.S. Interscholastic Activities Ass'n v. St. Mary's Inter-Parochial High School, *supra* note 145.

¹⁴⁹ *Id.* at 481.

¹⁵⁰ The fact that a private university is chartered by the state and has an educational purpose does not make it public. Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819); Guillery v. Administrators of Tulane Univ., 212 F. Supp. 674 (E.D. La. 1962). See generally Comment, 10 S.D.L. Rev. 102 (1965).

¹⁵¹ Since many of the regional associations accredit high schools (most of which are public) as well as colleges, there is a better argument for including them within the reasoning of the South Dakota Interscholastic case than there is for including professional associations.

¹⁵² See *State v. Nuss*, 79 S.D. 522, 114 N.W.2d 633 (1962) and cases cited note 132 *supra*.

¹⁵³ See notes 132-33 *supra* and accompanying text.

¹⁵⁴ See text accompanying notes 72-79, 98-128 *supra*.

¹⁵⁵ See, e.g., Cal. Corps. Code, §§ 21000-21401; N.J. Rev. Stat. Ann., §§ 15:1-15:16 (N.J. Ass'n's Not for Profit Law).

¹⁵⁶ See note 33 *supra*.

¹⁵⁷ See Boyer, *Nonprofit Corporation Statutes: A Critique and Proposal* 245-53 (1957); Oleck, *Non-Profit Corporations and Associations* 8-12 (1956), for detailed compilations of the state statutes.

¹⁵⁸ Once incorporated, an accrediting agency is unquestionably a legal entity for purposes of service of process and for purposes of diversity jurisdiction. Unincorporated associations, on the other hand, are treated by some states as aggregates of individuals for purposes of suit, *Developments in the Law, "Judicial Control of Actions of Private Associations,"* 76 Harv. L. Rev. 983, 1081-82 (1963), and are treated by the federal courts as aggregates for purposes of diversity jurisdiction. *United Steelworkers v. Bouligny*, 382 U.S. 145 (1965), 51 Cornell L.Q. 827 (1966). Also, incorporation is usually sufficient to bring an association within the terms of state statutes codifying the common law writs of mandamus (see, e.g., N.Y. Civ. Prac. §§ 7801-06 and 8 Weinstein, Korn & Miller, *New York Civil Practice* § 7802.01 (1964)) and quo warranto (see, e.g., Pa. Stat. Ann. tit. 12 § 2038 (1951)).

¹⁵⁹ The variation in the nature and purposes of nonprofit corporations makes it difficult to formulate all-inclusive statutory schemes. In encountering this problem, most states have

Foreign corporation qualification statutes are perhaps the most important of the general statutes.¹⁶⁰ Historically, states have made no attempt to apply these provisions to educational accrediting agencies.¹⁶¹ One recent incident, however, may forecast greater state effort in this area. North Carolina requested the Southern Association of Schools and Colleges, one of the six regional associations, to qualify pursuant to a "conducting affairs" statute.¹⁶² Though the Southern Association argued in an opinion letter to the Secretary of State that the qualification statute did not apply to its activities, the Secretary's opinion did not change.¹⁶³ Court action was avoided when the Southern Association voluntarily qualified and paid the fees.

Generally, if a corporation "transacts business" or is "doing business" within the state, it may be required to qualify. It would seem that these terms—containing the word "business"—comprehend some form of commercial transaction for profit. However, early decisions were consistent in holding that the qualification provisions applied to nonprofit corporations as well as to corporations for profit.¹⁶⁴

Though it can be argued that the "conducting affairs" test of the North Carolina statute requires fewer contacts with the state than does a "doing business" test,¹⁶⁵ it seems that the criteria should be the same.¹⁶⁶ Whatever the test, an

attempted to define nonprofit corporations either (a) in terms of their purposes, e.g., religious, educational, scientific, or social, or (b) merely in terms of the lack of financial profit for the members. See Legislation, "Nonprofit Corporations—Definitions," 17 Vand. L. Rev. 336 (1963), which cites and analyzes the various statutory provisions. Accrediting agencies definitely fall into the latter category and may, depending upon the state's interpretation of "educational," fall into the former.

¹⁶⁰ Due to the protection of the Constitution's privileges and immunities clause, there have been few attempts to subject noncorporate organizations to qualification statutes. Recently New Hampshire has enacted a partnership qualification statute, N.H. Rev. Stat. Ann. Ch. 305A (Supp. 1965), but the constitutionality of this statute is somewhat doubtful. Though the nonprofit association possesses many more corporate attributes than does the partnership, and thus would be more likely to meet the Constitution's requirements regarding qualification, this question has not been answered. See Note, 52 Cornell L.Q. 157 (1966).

¹⁶¹ Of the educational accrediting agencies from which questionnaires were received, only one (see text accompanying notes 162-63 *infra*) has been required to qualify formally in a foreign state. Qualification statutes are to be distinguished from "assumed name" statutes, which apply to nonprofit organizations. See Annot., 45 A.L.R. 198 (1926).

¹⁶² North Carolina's Non-Profit Corporation Act provides that "a foreign corporation shall procure a certificate of authority from the Secretary of State before it shall conduct affairs in this state." N.C. Gen. Stat. § 55A-58 (1965). The Secretary of State is directed to require all such corporations to comply. N.C. Gen. Stat. § 55A-76(d) (1965).

¹⁶³ See opinion letter of July 29, 1965, from Harry V. Lamon, Jr., Gen. Counsel for the Southern Ass'n, to T. W. Bruton, Atty. Gen. N.C., on file at the Cornell Law Library. Perhaps the threat of the Southern Association to disaccredit North Carolina University (see text accompanying notes 24-25 *supra*) was linked to this request for qualification. By forcing qualification, North Carolina obtained a simple method of service of process if any actions were contemplated, and a very limited degree of regulatory power.

¹⁶⁴ General Conference v. Berkey, 156 Cal. 466, 105 Pac. 411 (1909); State v. Knights of the Ku Klux Klan, 117 Kan. 564, 232 Pac. 254 (1925); Pacific Wool Growers v. Commissioner, 305 Mass. 197, 25 N.E.2d 208 (1940); Pierce v. Grand Army of the Republic, 220 Minn. 552, 20 N.W.2d 489 (1945); Knights of the Ku Klux Klan v. Commonwealth, 138 Va. 500, 122 S.E. 122 (1924); Pacific Typesetting Co. v. International Typographical Union, 125 Wash. 273, 216 Pac. 358 (1923). But see Eaton v. Woman's Home Missionary Soc'y, 264 Ill. 88, 105 N.E. 746 (1914); City of San Antonio v. Salvation Army, 127 S.W. 860 (Tex. Civ. App. 1910). The rationale advanced is that a corporation is "doing business" if it conducts activity in promotion of the purposes for which it was organized, whether or not those purposes are for pecuniary gain.

¹⁶⁵ The "conducting affairs" test was first adopted in the Model Non-Profit Corporation Act, and is now the test in eight states other than North Carolina. See note 157 *supra*.

¹⁶⁶ There are no judicial opinions comparing the two phrases. The North Carolina

accrediting agency's normal activities in a particular state do not appear to meet it. The primary contact an accrediting agency has with a foreign state is through its visitation committees,¹⁶⁷ which spend two or three days observing and interviewing at an applicant school. The committees are not composed of employees of the accrediting agencies but of college professors and administrators, and of members of professions whose programs of study are being examined. Furthermore, these committees make no final decisions as to accreditation; their reports are forwarded to the agency's headquarters, where they are combined with a great deal of other information which is relevant in making the final decision. There is considerable authority that the mere entering of a state to gather information does not constitute "doing business."¹⁶⁸ Though the visitation committee may inspect schools within a particular state throughout the year, thereby fulfilling the "continuous contact" requirement of the doing-business test, all other elements traditionally considered to be determinative of that test are lacking.¹⁶⁹

B. *Federal Regulation of Accrediting Agencies and Activities*

The federal government does not, and never has, assumed a major role in the accreditation process.¹⁷⁰ Its restraint stems from a long tradition of state and local control of education¹⁷¹ as well as from a realization that greater activity in the area would have "serious educational and political implications."¹⁷²

Attorney General has contended that the "conducting affairs" test requires fewer contacts. See Memorandum from Att'y Gen. of North Carolina to Secretary of State of North Carolina, Sept. 22, 1965, on file at the Cornell Law Library. It can also be argued, however, that it requires more contacts, since the criteria for nonprofit corporations should be narrower than for profit corporations. Qualification statutes are primarily aimed at obtaining an agent for service of process so that residents who transact business with a foreign corporation may obtain jurisdiction over it. The relatively few possibilities for suit against a nonprofit corporation, as compared with the many suits arising out of the activities of a corporation for profit, might warrant a narrower test.

¹⁶⁷ According to the questionnaires received, the great majority of accrediting agencies maintain permanent offices in only one state, generally the state of incorporation. Therefore, this cannot often be used as the basis for requiring qualification.

¹⁶⁸ See, e.g., *Ford, Bacon & Davis, Inc. v. Terminal Warehouse Co.*, 207 Wis. 467, 240 N.W. 796 (1932). Defendant corporation was found not to be doing business when its employees secured data and information for use by executives in another state. See also *Walker v. General Features Corp.*, 319 F.2d 583 (10th Cir. 1963); *Aero Service Corp. v. Benson*, 84 Idaho 416, 374 P.2d 277 (1962).

¹⁶⁹ Even though an accrediting agency is not "doing business" for purposes of qualification, it may still be "doing business" for purposes of in personam jurisdiction. It is well established that the test for the latter requires fewer contacts than the test for the former. Yet it seems that the normal accrediting agency may not be doing even enough business in a particular foreign state to subject it to personal jurisdiction. See, e.g., *Kane v. Stockbridge School*, 33 Misc. 2d 103, 228 N.Y.S.2d 904 (Sup. Ct. Nassau County 1962), where the court concluded that the defendant nonprofit corporation was not "doing business" where its sole contact was the holding of interviews with prospective students. See also *Weinburg v. Colonial Williamsburg, Inc.*, 215 F. Supp. 633 (E.D.N.Y. 1963); *Benson v. Brattleboro Retreat*, 103 N.H. 28, 164 A.2d 560 (1960); *Zucker v. Baker*, 35 Misc. 2d 841, 231 N.Y.S.2d 332 (Sup. Ct. Queens County, 1962); Note, 51 Cornell L.Q. 586 (1966). If the suit is based upon wrongful exclusion or expulsion, it would also be difficult to subject accrediting agencies to jurisdiction based upon long-arm, single-act statutes. Since so much information other than that gathered by the visitation committee is used in making a decision on accreditation, it is at least doubtful that the cause of action "arises out of" the visitation.

¹⁷⁰ See generally Sanders, "The United States Office of Education and Accreditation," in *Accreditation in Higher Education* 15-21 (Blauch, ed. 1959); Selden, *supra* note 138, ch. 5.

¹⁷¹ Sanders, *supra* note 170, at 15; Selden, *supra* note 138, at 45; see text accompanying notes 130-31 *supra*.

¹⁷² Sanders, *supra* note 170, at 21.

At present, no federal agency has authority to regulate directly the activities of educational accrediting agencies,¹⁷³ nor is it likely that legislative proposals to bestow such authority are forthcoming.¹⁷⁴ Nevertheless, some indirect regulatory power has been obtained through provisions in federal aid-to-education statutes, and recently, federal antitrust laws have been mentioned as a potential source of additional regulatory power.

(1) *Accreditation and the Aid-to-Education Statutes.* Statutes providing for distribution of funds to educational institutions evidence the federal government's concern with accreditation. These statutes, through the exercise of "purse-strings" control,¹⁷⁵ have given the United States Office of Education an enhanced role in the accrediting process. Through their provisions, the Commissioner of Education has two major methods of indirectly regulating accrediting agencies: (a) by a process of official recognition; and (b) by the use of limited power to accredit schools for purposes of federal-aid eligibility.

(a) *Official Recognition.* The Veterans Readjustment Assistance Act of 1952 authorized the Commissioner to "publish a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by an educational institution . . ." ¹⁷⁶ Similar authorization has been extended to him in subsequent educational legislation.¹⁷⁷ Since a grant of federal funds usually depends in part upon the accredited status of the institution, and since the statutes prescribe that accreditation must come from an agency recognized by the Commissioner,¹⁷⁸ his power can be quite significant. Obviously, a private agency's status is increased by delegating to it the responsibility for determining who is eligible for financial aid; it follows that denial of such responsibility, or the threat of denial, can create an important regulatory influence upon the agencies.

(b) *Accreditation Power of the Commissioner.* Except for limited functions under recent statutory provisions, the Office of Education does not itself accredit educational institutions. On only one occasion has it ever attempted to do so. In the early 1900's, what was then the Bureau of Education prepared a list of

¹⁷³ See Letter of March 8, 1966, from Peter P. Muirhead, Associate Comm'r for Higher Education of the U.S. Office of Education, to Congressman Howard W. Robison of New York, on file at the Cornell Law Library. See also California State Senate, *supra* note 134, at 145-46.

¹⁷⁴ See memorandum of May 19, 1966, from the Education and Public Welfare Division; Legislative Reference Service Library of Congress, to Congressman Howard W. Robison of New York, in which it was stated that "to the best of our knowledge, there have been no legislative proposals in this area, and we have neither 'heard' nor read anything indicating that such proposals are likely to be forthcoming." The memorandum is on file at the Cornell Law Library.

¹⁷⁵ Purse-strings control is the most likely method by which the federal government could influence education and private accrediting bodies in particular. Since the regional and national associations are interstate in nature, the interstate commerce clause is another possible source of power. But it is not likely that accreditation is itself commerce, and the effect it has upon commerce is difficult to ascertain.

¹⁷⁶ 38 U.S.C. § 1653(a) (1964).

¹⁷⁷ See, e.g., 79 Stat. 1251 (1965), 20 U.S.C. § 403 (Supp. I 1965); 77 Stat. 374 (1963), 20 U.S.C. § 751(f) (1964); 79 Stat. 1247 (1965), 20 U.S.C. § 1085 (Supp. I 1965); 79 Stat. 1269 (1965), 20 U.S.C. § 1141 (Supp. I 1965); 79 Stat. 679 (1965), 15 U.S.C. § 1352 (Supp. I 1965).

¹⁷⁸ 79 Stat. 1247 (1965), 20 U.S.C. § 1085 (Supp. I 1965); 77 Stat. 374 (1963), 20 U.S.C. § 751(f) (1964); 79 Stat. 1251 (1965), 20 U.S.C. § 403 (Supp. I 1965); 79 Stat. 1037 (1965) 20 U.S.C. §§ 981-96 (Supp. I 1965); 79 Stat. 1269 (1965), 20 U.S.C. § 1141 (Supp. I 1965).

classified colleges.¹⁷⁹ Strong opposition to it induced President Taft to withhold publication, and when President Wilson took office he also refused to release the list. Though the list never was published, the episode emphasized the need for a reliable measure of educational quality and spurred the development of accreditation by private groups. Similarly, it helped define the more passive role of data-gatherer and disseminator, in aid of private groups, for the Office of Education.¹⁸⁰

Yet, with the growing importance of federal aid to education, the Office has become more active in rating schools. Its activity takes one of two basic forms. Under some statutes the Commissioner can set his own standards if there is no recognized agency to accredit schools in a particular category.¹⁸¹ Though these provisions give the Commissioner actual accreditation power, it is quite limited. But by exercising restraint in the recognition of accrediting agencies, the Commissioner could broaden it considerably.

The Commissioner's second form of accreditation power operates when an applicant for federal aid is unaccredited but there is a recognized agency in the field. Under these provisions, if the Commissioner determines that there is "satisfactory assurance" that a school will meet the agency's accreditation standards "within a reasonable time," it will be deemed to be accredited for purposes of federal grants under the applicable statute.¹⁸² The power is significant, since it may be used to bestow a kind of official governmental status upon an unaccredited school. Carried to its extreme, it could considerably weaken the

¹⁷⁹ Schools were placed into one of four categories, the sole criterion being the success of their graduates in master's degree programs. Selden, *supra* note 138, at 46.

¹⁸⁰ Sanders, *supra* note 170, at 17-20; Selden, *supra* note 138, at 46-47.

¹⁸¹ 79 Stat. 1247 (1965), 20 U.S.C. § 1085(a) (Supp. I 1965) (reduced-interest student loan insurance under Higher Education Resources and Student Assistance Act):

If the Commissioner determines that . . . there is no nationally recognized accrediting agency or association qualified to accredit schools in [a particular] . . . category, he shall, pending the establishment of such an accrediting agency or association, appoint an advisory committee, composed of persons specially qualified to evaluate training provided by schools in such category, which shall (i) prescribe the standards of content, scope, and quality which must be met in order to qualify schools in such category to participate in the program pursuant to this part, and (ii) determine whether particular schools . . . meet those standards.

For provisions to the same effect, see 79 Stat. 1048 (1965), 20 U.S.C. § 996(a) (Supp. I 1965) (vocational student loan insurance); 79 Stat. 1251 (1965), 20 U.S.C. § 403(b) (Supp. I 1965) (national defense loans and fellowships); 77 Stat. 76 (1963), 20 U.S.C. § 751(f)(5) (1964) (Higher Education Facilities Act of 1963); 79 Stat. 679 (1965), 15 U.S.C. § 1352 (Supp. I 1965) (State Technical Services Act of 1965).

¹⁸² 79 Stat. 1251 (1965), 20 U.S.C. § 403(b) (Supp. I 1965) (national defense loans and fellowships under the Higher Education Resources and Student Assistance Act):

The term 'institution of higher education' means an educational institution in any State which . . . (5) is accredited by a nationally recognized accrediting agency or association approved by the Commissioner for this purpose or, if not so accredited, (A) is an institution with respect to which the Commissioner has determined that there is satisfactory assurance, considering the resources available to the institution, the period of time, if any, during which it has operated, the effort it is making to meet accreditation standards, and the purpose for which this determination is being made, that the institution will meet the accreditation standards of such an agency or association within a reasonable time

See also 79 Stat. 1247 (1965), 20 U.S.C. § 1085(a)(5)(A) (Supp. I 1965); 77 Stat. 376 (1963), 20 U.S.C. § 751(f)(5) (1964); 79 Stat. 1226 (1965), 20 U.S.C. § 1026 (Supp. I 1965); 78 Stat. 918 (1964), as amended, 79 Stat. 1058 (1965), 42 U.S.C. § 298(b)(f) (Supp. I 1965).

significance of accreditation by the private accrediting agencies, detracting from their importance in the same manner that state accreditation would.¹⁸³

The federal-aid statutes indicate, however, that the relationship between the Office of Education and the national and regional accrediting agencies is one of cooperation rather than competition. The statutes explicitly make accreditation by private agencies a foremost standard in identifying schools eligible for federal grants.¹⁸⁴ Even when the Commissioner deems a school to be accredited by virtue of its satisfactory progress, the standards of the accrediting body, not those of the Commissioner, provide the measure of progress.¹⁸⁵ And in many instances statutes explicitly require that an institution shall be deemed accredited only "after consultation with the appropriate accreditation body or bodies . . ."¹⁸⁶ It appears that the power to recognize accreditation, bestowed on the Commissioner by virtue of these statutes, was not intended to be used as a regulatory device, but rather is a necessary aspect of the implementation of federal programs.

(2) *Accreditation and the Antitrust Laws.* In order to apply for accreditation by one of the six regional agencies, the interested institution must be a non-profit organization.¹⁸⁷ Because of this policy, Marjorie Webster Junior College, Inc., a closely-held business corporation, was recently denied accreditation by the Middle States Association of Colleges and Secondary Schools, Inc.¹⁸⁸ As a result of this denial, Marjorie Webster has brought an action against Middle States,¹⁸⁹ alleging violations of Section 3 of the Sherman Act,¹⁹⁰ and praying that Middle States be enjoined from including the "nonprofit" criterion among its standards. Specifically, the complaint alleges that Middle States and the other regional agencies "have unlawfully agreed, combined and conspired for the purpose of restraining the trade of proprietary institutions of higher education . . . and for the further purpose of monopolizing and attempting to monopolize for non-profit institutions the field of higher education . . ."¹⁹¹

This attempt to invoke the antitrust laws raises the question of whether education falls within the meaning of "trade" or "commerce" as used in the Sherman Act. The successful use of the antitrust laws to challenge restraints in the dis-

¹⁸³ See note 134 *supra* and accompanying text.

¹⁸⁴ See statutes cited in note 178 *supra*.

¹⁸⁵ See note 182 *supra* and accompanying text.

¹⁸⁶ 79 Stat. 1056 (1965), 42 U.S.C. § 293a(b)(1)(B) (1964), as amended, 42 U.S.C. § 293a(b)(1)(B) (Supp. I 1965); 79 Stat. 1053 (1965), 42 U.S.C. § 295f(3)(b)(2) (Supp. I 1965); 78 Stat. 918 (1964), 42 U.S.C. § 298(b)(f) (1964). See also 79 Stat. 1229 (1965), 20 U.S.C. § 1052(c) (Supp. I 1965). Peter P. Muirhead, Associate Comm'r for Higher Education of the Office of Education, has said that "the certification of satisfactory assurance by the accrediting agencies represents a significant departure from their previous practices but is a tribute to their cooperativeness rather than a response to Federal regulation." Letter of March 8, 1966, to Congressman Howard W. Robison of New York, on file at the Cornell Law Library.

¹⁸⁷ See complaint, p. 7, allegation 7(b) and (c), *Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools*, Civil No. 1515-66, U.S. Dist. Ct., D.C. (filed June 10, 1966).

¹⁸⁸ See text accompanying notes 28-29, 82 *supra*.

¹⁸⁹ *Marjorie Webster Jr. College, Inc. v. Middle State Ass'n of Colleges & Secondary Schools*, Civil No. 1515-66, U.S. Dist. Ct., D.C. (complaint filed June 10, 1966).

¹⁹⁰ 26 Stat. 209 (1890), 15 U.S.C. § 3 (1964).

¹⁹¹ Complaint, p. 5, allegation 4, *Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools*, *supra* note 189.

semination of news items¹⁹² and in the production of sporting events¹⁹³ gives some support to an argument that education is within the purview of the act. Those cases indicate that application of the antitrust laws is not restricted to the sale of material goods such as automobiles, and it seems, therefore, that whether the Sherman Act applies to the "sale" of education for profit is at least an open question.

A second issue in the *Marjorie Webster* case is whether the restraint (assuming it is covered by the Sherman Act) is unreasonable.¹⁹⁴ It is arguable that governance by a board of directors representing the financial interests of the shareholders interferes with the quality of education, and that it is therefore reasonable for an accrediting agency to create and enforce a standard recognizing this fact. On the other hand, it might seem unreasonable to refuse even to accept an application from a proprietary school. Even assuming that most proprietary schools do not merit accreditation, this might not justify the refusal to accredit a school meeting the qualitative standards of the agency simply because it is a business corporation. Whatever the outcome, *Marjorie Webster* should provide an interesting analysis of the applicability of the federal antitrust laws to education and their possible use to regulate educational accrediting agencies.

IV

RECOMMENDATIONS

Educational accrediting agencies thrive on autonomy, and rightly so. As Professor Chafee wrote many years ago:

The value of autonomy is a final reason which may incline the courts to leave associations alone . . . Like individuals, they will usually do most for the community if they are free to determine their own lives for the present and the future. A due regard for the corresponding interests of others is desirable, but must be somewhat enforced by public opinion.¹⁹⁵

Due to the special competence of educational accrediting agencies, this autonomy is of paramount importance. "The courts, like the legislatures, can hardly profess to be better qualified to decide how teaching shall be carried on than are the teachers and their administrative associates."¹⁹⁶ But this does not mean that courts should never interfere; the monopoly power of the agencies, coupled with the public function they fulfill, may make some supervision necessary. The extent of supervision, however, should be carefully limited. Courts should seek to distinguish between the "substance"¹⁹⁷ and the "procedure"¹⁹⁸ of agency activities. If a very restrictive role is taken as to the former, and an

¹⁹² *Associated Press v. United States*, 326 U.S. 1 (1945).

¹⁹³ *Radovich v. National Football League*, 352 U.S. 445 (1957).

¹⁹⁴ For a recent discussion of reasonableness and lack of anticompetitive purpose as defenses to suits under the Sherman Act, in a context similar to *Marjorie Webster*, see *Deesen v. Professional Golfers' Ass'n*, 358 F.2d 165 (9th Cir.), cert. denied, 35 U.S.L. Week 3113 (U.S. Oct. 11, 1966).

¹⁹⁵ Chafee, "The Internal Affairs of Associations Not for Profit," 43 *Harv. L. Rev.* 993, 1027 (1930).

¹⁹⁶ *Id.* at 1028-29.

¹⁹⁷ "Substance" refers to the actual standards or policies of the agency—its measurement of educational quality and the methods, in general, by which it determines what these measures should be and how they should be implemented.

¹⁹⁸ "Procedure" refers to the process by which an accreditation decision is made in the individual case.

active role as to the latter, courts will be able to preserve group autonomy on the one hand while protecting the public interest on the other.

In the substantive area, expertise is prominent and should be given free rein, so long as the agency is in fact relying on that expertise. The court's role should be limited to balancing the factors discussed earlier,¹⁹⁹ in order to determine: (1) whether it should accept jurisdiction over the dispute, and (2) whether, on the merits, the exclusion or expulsion should be invalidated. As regards procedure, however, the three levels of procedural safeguards²⁰⁰ are important, and courts should be careful to see that all of them (assuming the highest level is found to apply) are followed. This will assure that fair methods are used and that each interested school is given ample opportunity to present its case. Such supervision should do much to protect the public's interest, yet it does not prevent the experts from originally setting and enforcing their own standards without court modification.

Little distinction should be made between exclusion and expulsion. A school whose accreditation has been withdrawn has only a slightly better argument for court intervention than does a school which has been denied accreditation—that argument stemming from past compliance with and reliance upon the accrediting agency's rules and policies. Ultimately, however, this factor must yield to the public interest factor. All schools are equally concerned with the activity of accrediting agencies; their successful operation may depend on it. And the concern of the public is the same, whether the school is accredited or not. All schools, therefore, should receive equal treatment in situations where accreditation is at stake.

To the extent that some control over the general policies and functions of an accrediting agency (*i.e.*, the "substance") is needed, state regulation by legislatures and departments of education poses a better alternative than does judicial supervision. Legislators and administrators are more likely to respond to public opinion and to invoke the recommendations of experts. But state regulation should seldom be necessary and should be kept to a minimum. Educational accrediting agencies are regional and national in scope; regulation by different states would hinder the uniformity so necessary to an agency's effective functioning, would lessen the possibilities of autonomous operation, and would make cooperation among colleges more difficult. The answer may be one of respectful cooperation with government rather than one of regulation by government.²⁰¹ At the state level, accrediting agencies foster cooperation between themselves and state departments of education and licensing boards. At the national level, the National Commission on Accrediting cooperates with the Office of Education and fosters cooperation among all accrediting agencies, professional as well as

¹⁹⁹ See text accompanying notes 61-62 *supra*.

²⁰⁰ See text accompanying notes 83-128 *supra*.

²⁰¹ This does not mean that government should be inactive as far as accreditation is concerned. Legislation can and should actively support the functioning of the private accrediting agencies. The federal aid-to-education statutes (see text accompanying notes 175-86) illustrate this type of government support at the federal level; professional licensing statutes (see notes 107-11 and accompanying text) do so at the state level. This could also be the best technique for regulating the accrediting agencies if such regulation were to become necessary. By withdrawing or extending (or threatening withdrawal of or suggesting extension of) the powers granted to accrediting agencies by statute or administrative rules, state and federal governments can exert a persuasive influence on the agencies.

regional. An interlocking framework of cooperation—among the agencies and between agency and government—overseen by the National Commission, would provide the most workable solution. Through such a framework, independence can be maintained, yet responsiveness to the public interest can be preserved. The courts and legislatures should need to examine the operation of the system only occasionally in order to keep it running smoothly. The private educational accrediting agency, then, can continue to develop as the uniquely-American method for maintaining standards of educational quality.

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