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ABSTRACT

In general, there is little uniformity in the response of the states to the prolem of regulating the quality of accredited higher education. States' statutory schemes vary from absence of any mention of higher education to far-reaching legislation that assumes vast powers over higher education. The pattern that does emerge from an examination of state regulation schemes is that nonprofit, nonvocational, regionally accredited institutions of higher education are often free of any significant regulation. Innovative programs, including external degree programs, that cross state boundaries are almost never mentioned in statutes. As part of a nation-wide study, this document tries to determine through an analysis of state statutes and regulations the approaches that states are taking toward external degree programs. This document highlights the scope and limits of state power to regulate innovative education programs. It covers: state regulation of higher education; legal restraints on state regulation of external degree programs the "commerce clause"; and legal restraints on state regulations of external degree programs-due process of law. (Author/KE)

STATE REGULATION OF EXTERNAL DEGREE PROGRAMS

BY

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Adapted From

LEGAL AND OTHER CONSTRAINTS TO
THE DEVELOPMENT OF EXTERNAL DEGREE PROGRAMS

A Study Performed Under Grant NE-G-00-3-0208
to Catholic University School of Law
By the U.S. National Institute of Education

(This paper serves as the basis for Mr. Granat's presentation at the American Association for Higher Education's National Conference on Higher Education in Chicago on March 24, 1975, at a session co-sponsored by AAHE and the Institute for Educational Leadership.)

The conclusions and recommendations of this paper are those of the principal investigator and do not reflect the views of the Columbus School of Law, Catholic University, the National Institute of Education or any other agency of the United States Government.

1 State Regulation of Higher Education

1.1 Introduction

In general, there is little uniformity in the response of the states to the problem of regulating the quality of accredited higher education. States statutory schemes vary from absence of any mention of higher education to far-reaching legislation that assumes vast powers over higher education. The pattern that does emerge from an examination of state regulatory schemes is that nonprofit, non-vocational, regionally accredited institutions of higher education are often free of any significant regulation.

Innovative programs, including external degree programs that cross state boundaries are almost never mentioned in statutes. As part of a nation-wide study supported by the National Institute of Education we tried to determine through an analysis of state statutes and regulations the approaches that states are taking towards external degree programs. The full report, available from NIE, contains a detailed analysis of regulations which apply to accredited innovative programs operating in every state. This paper highlights the scope and limits of state power to regulate innovative education programs.

1.2 Regulatory Patterns

State authority over higher education is commonly asserted at the time of incorporation, or at the time a school begins to operate, grant degrees, or use collegiate names.

Regulation at the time of incorporation ranges from routine incorporation provisions that apply to every type of nonprofit corporation to substantive educational criteria that must be met to the satisfaction either of a special educational board or the regular corporation authority.

State regulation also takes the form of regulation applied as a condition of operation, degree-granting or use of a collegiate name. Typically, these regulatory schemes delegate responsibility for formulating standards to an educational board. The few requirements that are contained in the statutes concern such diverse subjects as registration, bond requirements, licensure

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of agents, financial resources, character of applicants, qualifications of faculty and physical resources. These licensing schemes also frequently contain penalties and less frequently, procedures for withdrawal of permits. Many state schemes which do contain developed plans for regulation are notable for their practice of exempting schools which are accredited institutions. At least twenty states exempt accredited institutions of higher education from state regulations.[1] The exemption is worded in a variety of ways: "Accredited by accrediting agency recognized by state;"[2] "accredited by regional accrediting agency;"[3] approved by Northwestern Association of Secondary and Higher Schools;"[4] "accredited and permitted to award degrees by state in which campus is located;"[5] "accredited by accrediting agency recognized by U.S. Office of Education;"[6] "which offer credits transferrable to schools accredited by accrediting agency recognized by U.S. Office of Education;"[7] or just "accredited"[8] without specifying by whom.

For example, the state of Florida has established a detailed regulatory scheme for nonpublic colleges,[9] which provides for a strong enforcement agency known as the State Board of Independent Colleges and Universities. Unfortunately, excluded from the licensing and regulation requirements of the chapter are:[10]

> "(c) Colleges accredited by an accrediting agency recognized by the United States Office of Education or the state board of education."

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1 Alabama (T.52, §644(i) and (k); Alaska (§14.47. 130); Arizona; Florida (246.021(1)(c)); Georgia (32-2304(b)(g)); Idaho (33-2402(3)); Kansas (§72-4920(f)); Maryland (Art.77, §146); Mississippi (§75-60-5(f)); Nevada (§394.200(f)); New Mexico (§73-41-3); Oklahoma (T.70,§4103); Oregon (§351.710); Pennsylvania (T.24, §2732); Rhode Island (§16-50-3); South Carolina (§21-743(b)); Vermont (Title 16,#174, Section (c)); Virginia (§22-330-18); West Virginia (§18-26-13a); Wisconsin (§38.51(a)).

2 Idaho, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.

3 Oklahoma

4 Oregon

5 Virginia

6 Alabama, Florida, Nevada, New Mexico, and South Carolina

7 Kansas

8 Maryland; Mississippi

9 Chap. 246, Florida Statutes, See generally, Rules and Regulations of Florida, State Board of Independent Colleges and Universities, Chapter 6A-13, 1972-73.

10 Chap. 246 Section 246.021(1)(c).

Similarly, the regulatory scheme in the state of Vermont provides that:"

> "This section shall not apply to an institution of higher education operating in Vermont but chartered in another state and accredited by the state applicable regional accrediting agency recognized by the state board...

This pattern of reliance on the decisions of private groups is of critical importance, because it means that in many cases an institution is totally free of state supervision once it achieves accreditation.

1.3 Foreign Schools

Many external degree programs and other forms of innovative education have substantial operations in states other than the state of their original incorporation, or than the state where degree-granting authority was first procured.

The effect of a state's regulatory scheme on a foreign school is unclear. Existing statutes are usually designed for state domiciled schools. Few statutes mention foreign schools, and they often do so in a correspondence-vocational school context that does not include most liberal arts institutions. It is frequently difficult to determine whether a statute is intended to be applied to a foreign school. Thus, it was unclear whether a Massachusetts statute which regulated the granting of degrees should be interpreted to apply to an out-of-state school which has a branch in Massachusetts, when the classes and students were in Massachusetts, but the degree came from the out-of-state campus. Chapter 69, Section 31A of the Massachusetts General laws provide that:[12]

> "No educational institution located within the commonwealth shall award degrees unless authorized to do so by the commonwealth."

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[11] Title 16, #174 Postsecondary educational institutions; degrees, name, Section (c).

[12] General laws of Massachusetts, Chapter 69, Section 31A, (1964,66).

The out-of-state institution argued that since it wasn't located within the state it was not subject to degree regulation by the commonwealth. To compound the confusion different states interpret similar statutory language differently, and information about these interpretations is difficult to obtain.

State statutes which require foreign corporations (corporations which are domiciled in another state) to register with a local corporation authority are another form of state regulation with a potential effect on innovative education. The registration requirement is an important method of gathering information about corporations doing business in the state, and of providing convenience in litigation against foreign corporations.

1.4 Innovative Education

As part of our statutory search we attempted to determine which states had requirements which might have a restraining effect if applied to innovative education.

Vagueness and lack of specificity emerged as the most prominent characteristic of state statutes and regulations. A requirement that a school have "adequate facilities" could be interpreted in such a manner as to bar many innovative programs from operation, or could be interpreted in a manner sympathetic to the special aspects of innovative education. Because the administrative interpretations are so frequently unwritten one can conclude that the uncertainty of what to expect from a state board alone can exert a significant effect on the development of innovative education in a state. Although state statutes generally avoid specificity, when specific criteria are established they are generally insensitive to the problems presented by external degree programs, and in some cases could have a restraining effect on external degree programs if enforced. Minimum residence requirements for degrees present the most striking example of state regulation which stifles innovation. For example, the state of Arkansas requires that:[13]

> "No educational institution shall confer degrees upon students for mere correspondence courses, or upon any student who has not studied in residence for one (1) scholastic year.

Because of this provision a British Open University type program could not be operated in Arkansas.

[13] Arkansas Statutes 64-1408.

Statutes which fix minimum endowments as prerequisites to operation could conceivably hamper innovative programs, especially when programs operate in many states, and must meet maximum standards in each state. An example of such a provision is that Pennsylvania requires that:[14]

> "A minimum protective endowment of at least five hundred thousand dollars ($500,000), beyond all indebtedness and assets invested in buildings and apparatus for the exclusive purpose of promoting institution."

This provision has already been used to exclude a nation-wide program from operating in the state of Pennsylvania because $500,000 of liquid assets were not on deposit within the state--a clearly unreasonable burden.[15] Faculty requirements, such as requirements that a school "[h]ave at least eight regular professors who devote all their time to the instruction of its college or university classes..."[16] or a requirement that 75% of the faculty be full-time preclude the operation of many non-traditional models.[17] Credit hour requirements for degrees commit states to traditional measures of learning.[18] Finally, requirements like that of Nevada,[19] that schools teach one year of constitutional law and history, but not reach any subject except a foreign language in a language other than English, testify to the basic obsolescence of most state attempts at quality control.

1.5 Conclusion

The attitude manifested by most state statutes towards innovative education is at present one of indifference. Of those states which do in some manner supervise private higher education the majority exempt accredited schools, thus leaving whatever regulation that is to be done to a private group. In those states where statutory provisions exist for the regulation of private higher education, special provisions for innovative education are rare.

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[14] College and University Standards Law, Act of May 7, 1937, P.L. 585,Section 312(1).

[15] See discussion pp. 4-6; 4-10.

[16] Pennsylvania College and University Standards Law, Act of May 7, 1937, P.L. 585, Section 312(2).

[17] Oregon Application Procedures and Standards for Approving Institutions for Degree Granting Authority; OLS 351.710 to 351.760 and OLS 351.990.

[18] Committee for Higher Education, "Policies and Procedures for Licensing and Accrediting Institutions of Higher Learning in Connecticut, "Section 10-330-18(c)(1970). See also Analysis of Virginia in Appendix A.

[19] Nevada Revised Statutes, 394.140, 394.150.

2.0 Legal Constraints on State Regulation of External Degree Programs: "The Commerce Clause"

Activities in "interstate commerce" constitute a well-known exception to state "doing business" statutes. It is well settled that a corporation of one state may go into another without obtaining the latter's permission if its activities are restricted to those in interstate commerce, and any statute of the latter state which obstructs or burdens the exercise of this privilege is void under the commerce clause of the U.S. Constitution.

The most significant external degree programs, such as the UWW consortium and Antioch College, and multi-state open-university type programs all operate across state lines. State legislators and education officials trying to control the quality of such programs must therefore be sensitive to the requirements of the commerce clause as they seek to regulate enterprises which are increasingly becoming national in scope.

The commerce clause in the United States Constitution grants Congress power "to regulate commerce...among the several States..."[1] As construed by the courts this language gives the Federal government very extensive authority to regulate, and to preempt state regulation of, activities in or affecting interstate commerce,[2] including higher education activities.[3] The major questions under the commerce clause today do not concern this clear Federal authority but rather the authority of the States, in the absence of federal action, to regulate activities in or affecting interstate commerce. To what extent does the commerce clause act as an implied, self-executing bar to state regulation of matters falling within the clause's scope but not regulated by Congress?[4]

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[1] Art. I,§8, #3. The full text provides that:

> The Congress shall have power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;...

See generally Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Schwartz, Constitutional Law ch. 4 (1972).

[2] See, e.g., Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964). As to preemption, see, e.g., Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

[3] See Maryland v. Wirtz, 392 U.S. 183 (1968); Cornell University, 183 NLRB No. 41, 74 LRRM 1269 (1970).

[4] See generally Dowling, "Interstate Commerce and State Power," 27 VA. L. Rev. 1 (1940); Shelley, "The Negative Implications of the Commerce Clause," 3 U. Chi. L. Rev. 556 (1936).

2.1 Higher Education as "Interstate" Commerce

State regulation of higher education will be subject to commerce clause restrictions only to the extent that higher education activities can be characterized as "interstate" (as opposed to "intrastate") within the meaning of the clause. "Interstate commerce" is a comprehensive term. It encompasses "all commercial intercourse between different states and all component parts of that intercourse."[5] It includes the movement of persons and goods as well as information and ideas.[6] It is not limited to proprietary or business activities.[7]

Education activities have specifically been considered as "commerce" within the clause's contemplation. In International Textbook Co. v. Pigg[8] a Pennsylvania corporation which operated several correspondence schools, sued one of its Kansas students for the balance due on a course of instruction in commercial law. The question was whether the action could be maintained in a Kansas court even though the plaintiff had failed to comply with various provisions of Kansas' foreign corporation statute. The Supreme Court held that plaintiff's business "was, in its essential characteristics, commerce among the States"[9] which would be unconstitutionally burdened if subjected to Kansas' registration requirements. The interstate characteristics of the correspondence school were described to be the:

> regular and, practically, continuous intercourse between the Textbook Company, located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode--looking at the contracts between the Textbook Company and its scholars--involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction.[10]

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[5] Dahnke-Walker Co. v. Bondurant, 257 U.S. 282, 290-91 (1921).

[6] Furst v. Brewster, 282 U.S. 493, 497-98 (1931); Western Union Tel. Co. v. Pendleton, 122 U.S. 347, 356 (1837).

[7] Edwards v. California, 314 U.S. 160 (1941); Caminetti v. U.S., 242 U.S. 470, 484-45, 491-92 (1917).

[8] 217 U.S. 91 (1910)

[9] Id. at 106.

[10] Id.

Many of the current and projected innovations in higher education would rather clearly shade into this general conception of interstate commerce, e.g. programs relying wholly or partly upon interstate mails, radio or television communications, computer hook-ups, or transient instructors; colleges with branch campuses in more than one state, where there are patterns of interaction between the campuses; colleges or programs "without walls" whose students and personnel engage in educational activities in an interstate context. More localized operations with more firmly established physical locations may also shade into the interstate category to the extent they solicit consumers (students) in an interstate market, have a student body which commutes to and from other states on a periodic basis; have cooperative instructional agreements or pooling-of-resources agreements with schools in other states; or have business and management operations (e.g. alumni offices, recruiting or guidance centers, management consultant services) dispersed interstate.

Most such institutions and programs, of course, are not likely to be considered by the courts as purely interstate.[11] The problem is not simply one of determining whether education is, or takes place "in", interstate commerce. Higher education today is a diverse mixture of interstate and intrastate operations and transactions, and it is important under the commerce clause to separate the interstate from the intrastate aspects of each regulated institution or program. While this may be difficult in the abstract, it is usually manageable in concrete cases.[12] If the predominant portion of the regulated institution's activities can be characterized as interstate, or if the particular activity or transaction being regulated is interstate, the commerce clause poses a potential limitation on the state's regulatory power.

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[11] Cf. International Textbook Co. v. Pigg, supra.

[12] See, e.g., Eli Lilly & Co. v. Sav-On Drugs, 366 U.S. 276 (1961), where the Supreme Court distinguished between the intrastate and the interstate activities of a foreign corporation engaged in interstate commerce. (See the discussion of the case under Point IV, infra.) Activities identified as intrastate included the maintenance of an office within the state, the assignment of a sales and office staff to work within the state, and the use of such employees to promote sales between retailers and wholesalers located within the state.

2.2 Discrimination Against Interstate Enterprises

It is clearly established that state regulations may not single out and discriminate against interstate commerce or enterprises of extrastate origin in favor of intrastate commerce or enterprises.[13] Thus if a state were to impose more burdensome requirements upon (or grant fewer privileges to) higher education institutions or programs engaged in interstate commerce than it does upon those operating purely intrastate, or if it imposed more burdensome requirements on (or granted fewer privileges to) foreign educational corporations than upon domiciliaries, the regulations would likely contravene the commerce clause. States must treat interstate education activities in an evenhanded, non-discriminatory manner.

2.3 Protection of Local Economic Interests

Where a state's regulations are applied in common to both inter and intra-state enterprises in a particular field, they may nevertheless be invalid under the commerce clause if their predominant purpose and effect is to protect local economic interests at the expense of interstate commerce. The leading case is Baldwin v. Seelig, where New York State sought to apply its minimum purchase price regulations to a New York milk dealer purchasing milk in Vermont. The Supreme Court unanimously invalidated this application of the law because "the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition with the products of another state or the labor of its residents..."[14]

While economically based state regulations are thus highly suspect under the commerce clause, they are not invariably invalid. In Milk Control Bd. v. Eisenberg Farm Prod.,[15] for instance, Pennsylvania applied licensing, bonding, and minimum purchase price regulations to a domiciliary milk processer buying in-state for shipment out-of-state. The Supreme Court upheld the regulatory scheme because it promoted local interests in fair-dealing and general economic well-being by aiming primarily at local industry and only incidentally burdening interstate commerce. But when the state's regulatory involvement is

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13 See, e.g., Hale v. Bimco Trading Co., 306 U.S. 375 (1939); Welton v. Missouri, 91 U.S. 275 (1876). Cf. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (state regulation found to discriminate against interstate commerce even though it also applied to some intrastate commerce).

14 294 U.S. 511, 522, 527, (1935). See also Polar Ice Creame & Creaming v. Andrews, 375 U.S. 361 (1964)(Florida milk purchase and allocation scheme unanimously invalidated on authority of Baldwin).

15 306 U.S. 346 (1939).

more clearly based upon economic protectionism or has more substantial anti-competitive effects--in short, where the regulation is "imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests"--the regulation will fall under the commerce clause.16/

This principle would have its clearest application to higher education in situations where a state seeks generally to restrict the number of new schools or programs, or specifically to restrict the number of innovative schools or programs, establishing operations within the state. Even though such regulations applied alike to in-state and foreign institutions, their application to the latter would be constitutionally suspect if based primarily upon economic anti-competitive considerations. In H.P. Hood and Sons v. DuMond, for example, a Massachusetts dairy corporation operated three milk receiving depots in New York at which it purchased milk from New York producers and shipped it to Massachusetts for sale. When the corporation applied to the New York Commissioner of Agriculture for a license to establish a fourth such depot, he rejected the application. The ground for denial was the Commissioner's inability to make the required statutory finding that "issuance of the license will not tend to a destructive competition in a market already adequately served..." The Supreme Court overturned the Commissioner's decision under the general principle that "the State may not promote its own economic advantages by curtailment or burdening of interstate commerce."17/

16 H.P. Hood & Sons v. DuMond, 336 U.S. 525, 530-31 (1949) (5-4 decision distinguishing Eisenberg, supra.) See also Polar Ice Cream & Creamery, supra note 10, a later dairy case where the Court emphasized the same point: '[T]he State may not, in the sole interest of promoting the economic welfare of its dairy farmers, insulate...[its] milk industry from competition from other States.' Id. at 377.

17 H.P. Hood & Sons v. Dumond, supra note 11, at 532, citing Baldwin v. Seelig, supra note 10. See also Buck v. Kuy Kendall, 267 U.S. 307 (1925), where the Court invalidated a state refusal to issue a certificate of "public convenience and necessity" to an interstate common carrier because the territory where the carrier planned to operate was already adequately served.

2.4 Validity of State Regulation

So long as the state avoids the pitfalls described in Points 2.2 and 2.3, it may exercise considerable regulatory authority, under its police powers, over higher education operations touching upon or affecting interstate commerce. The general rule, reaffirmed by a unanimous Supreme Court in 1970, is that:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[18]

The promotion of local health and safety is clearly a "legitimate local public interest" under this rule.[19] So too is prevention of "fraud, misrepresentation, incompetence, and sharp practice," and promotion of "responsibility and fair dealing"[20] interests particularly applicable to regulation of higher education. But as Point 4.3.3 above suggests, economic interests are not always legitimate. The Court generally distinguishes between economic and other state interests, as Hood, supra, explains:

> [The] distinction between the power of a State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.[21]

While some interests generally characterizable as "economic" may retain legitimacy even under this standard,[22] they are not likely to be weighed as heavily by the courts as interests in health, safety, and fair-dealing.

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18 Pike v. Bruce Church, 397 U.S. 137, 142 (1970). See also Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945).

19 See, e.g., Huron Portland Cement v. Detroit, 362 U.S. 440 (1960) (health); South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177 (1938) (safety).

20 Robertson v. Calif., 328 U.S. 440 (1946); Union Brokerage v. Jensen, 322 U.S. 202 (1944); see also California v. Thompson, 313 U.S. 109 (1941) ("Fraudulent or unconscionable conduct... is peculiarly a subject of local concern and the appropriate subject of local regulation").

21 Id. at 533.

22 See generally Point III, supra. Compare H.P. Hood & Sons v. DuMond, supra note 11, at 552-555 (Black, J., dissenting) and 560-573 (Frankfurter, J., dissenting).

Moreover, even these latter interests may be scrutinized by the courts to determine their strength in the context of a particular case. It is not enough that the State put a legitimate label on its alleged interest; the interest must be real and demonstrable,[23] and it must not be invoked to justify what is actually an attempt to protect local economic advantage.[24]

Once a legitimate state regulatory interest is identified, and evaluated, the next step is to trace the nature and extent of burden which the regulation imposes upon interstate commerce. If, for instance, a state were to regulate certain aspects of higher education to promote fair dealing, the strength of the state interest would be weighed against the burden which the regulation places on the interstate operations of the regulated programs or institutions. The heavier the burden, the more likely the regulation will be invalid under the commerce clause even if it promotes a strong state interest.[25]

The Supreme Court has permitted states a wide range of authority under the legal formulation set out in this Point. Usually the state is best off if its regulation is premised upon some local event which can be segmented from purely interstate activity and separately identified as an appropriate subject of state regulation. In Eli Lilly v. Sav-On-Drugs,[26] for instance, the Court held that a foreign corporation doing interstate business can be required to register in a state where it also does a substantial amount of intrastate business. The corporation's intrastate and interstate operations were viewed as separable, and the substantial intrastate business was considered appropriate for state regulation which the corporation could not "escape...merely because it is also engaged in interstate commerce."[27] But in an earlier case cited approvingly in Eli Lilly, International Textbook v. Pigg (see Section 2.1 above), where the foreign corporation's local business was insubstantial and merely incidental to its interstate business, registration requirements were held invalid.

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23 See Southern Pacific Co. V. Arizona, supra note 13.

24 H.P. Hood & Sons v. Dumond, supra note 11, at 538; See Dean Milk Co. v. City of Madison, supra note 9; Collings v. New Hampshire, 171 U.S. 30 (1898).

25 See Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959).

26 366 U.S. 276 (1961).

27 Id. at 279.

Similarly, in California v. Thomson,[28] the Court permitted the licensing and bonding of a local transportation agent selling interstate trips because he was not engaged in the interstate transportation itself and licensing him did not restrict the interstate flow of traffic. In Union Brokerage v. Jensen,[29] the Court permitted the licensing of a foreign corporation engaged in custom house brokerage of foreign commerce because the corporation had "localized its business"[30] and Minnesota had a "special interest... brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce"[31] And in Robertson v. California,[32] the Court permitted licensing and bonding of insurance agents representing foreign corporations because the regulations applied only to agents acting within the state and the state had a "special interest" in the agent's localized pursuit of his phase of the interstate insurance business.

These cases illustrate the breadth of authority a state retains under the commerce clause to regulate higher education, including foreign institutions establishing programs or appointing agents in the state. But the legal formulation set out in this Point does contain limits which narrow the state's authority even where it has met the requirements in Points 4.3.3 and 4.3.4 above. In particular, a state apparently cannot require the registration of a foreign school whose business is exclusively (or almost exclusively) interstate[33]. A state cannot entirely exclude a foreign corporation engaged in interstate commerce except for the most compelling reasons.[34] Any financial burdens which a state imposes upon interstate business must be "sufficiently small fairly to represent the cost of governmental supervision"[35] of the enterprise entering the state, and other burdens must be limited to those necessary "for the protection of the local interest affected..."[36]

28 313 U.S. 109 (1941).

29 322 U.S. 202 (1944).

30 Id. at 210.

31 Id. at 212.

32 328 U.S. 440 (1946).

33 International Textbook Co. v. Pigg. Point I, supra. See generally Annot., 92 ALR 2d 522 (1963). But see Fry Roofing Co. v. Wood, 344 U.S. 157 (1952) (state may license common carrier engaged exclusively in interstate commerce when there is no discretion to deny license and no burdensome conditions attach); Robertson v. Calif., supra note 15.

34 Robertson v. Calif., supra note 15, at 449, 459-60; Sioux Remedy Co. v. Cope, 235 U.S. 197, 203-04 (1914); cf. Edwards v. Calif., supra note 7.

35 Union Brokerage v. Jensen, supra note 15, at 210.

36 Robertson v. Calif. supra note 15, at 459; see Dean Milk Co. v. City of Madison, supra note 9.

3.0 Legal Restraints on State Regulations of External Degree Programs: Due Process of Law

3.1 Substantive Due Process

State licensing and regulation of higher education raises some of the most fundamental questions of American legal and political thought.[1] The proliferation of state controls has raised problems of fairness, protectionism, academic freedom, and repressiveness, yet often important consumer interest are denied the protection of the state that they require.

This discussion treats questions of the legal limits, other than the commerce clause limits discussed above, on a state's power to regulate private higher education. These limits, unlike those under the commerce clause, do not depend on a finding that a school is engaged in interstate activity. Specific legal criteria and their application to existing and new schools are explored; problems arising from the nature of the authority given to an administrative body, and the problem of granting power to private groups is considered; finally, the procedural safeguards that clothe the school's relationship with the state are presented.

The state, acting under its police powers, may regulate private schools within the limits of the school's due process rights.[2] The due process clause, once widely used by courts to invalidate legislation,[3] retains some of its

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1 This is the question of the proper balance between the individual's "right" to pursue an occupation, and the state's role in regulating individual's activities for some common good. For a broader discussion of the issues raised by state licensure see Reich, The New Property, 73 Yale L.J. 733 (1964). Critics of occupational licensure include the following. (cited in Wallace, Occupational Licensing, 14 WM. & MARY L. REV. 46, 48 n. 10): M. FRIEDMAN, CAPITALIST AND FREEDOM 137-60 (1962); W. GELHORN, INDIVIDUAL FREEDOM and GOVERNMENTAL RESTRAINTS 105-51 (1956); D. Lees, Economic Consequences of the Professions (1966); Doyle, The Fence-Me-In Laws, 205 Harpers 89 (1952); Graves, Professional and Occupational Restrictions, 13 TEMP. L.Q. 334 (1939)Hauft & Hamrick, Haphazard Regimentation Under Licensing Statutes, 17 N.C.L. REV. 1 (1938); Silverman, Bennett & Lechliter, Control by Licensing Over Entry into the Market, 8 LAW & CONTEMP. Probl. 234 (1941)).

2 State v. Williams, 253 N.C. 337, 117 SE 2d 444 (1960); State v. Nuss, 114 N,W. 2d 633 (S.D. 1962); 66 Am Jur 2d Schools 309 (1965).

3 Representative Supreme Court cases which utilize substantive due process concepts are: Cappage v. Kansas, 326 U.S. 1 (1914) Lochner v. New York, 198 U.S. 45 (1909).

The Supreme Court, and other federal courts, no longer invalidates legislation on the basis of substantive due process. See, North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc., 94 S. Ct. 407 (1973) (reversing state decision which relied on substantive due process to invalidate a state requirement that pharmacies not be operated by corporations, unless pharmacists controlled the corporations); Lee Optical Co. v. Williamson, 348 U.S. 483 (1955); United States v. Caroline Products, 304 U.S. 144 (1938). Nebbia v. New York, 291 U.S. 502 (1933) ("The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of businesses may be prohibited; and the right to conduct a business, or to pursue a calling, may be prohibited.") (citations omitted)

former powers in the state courts, where regulatory schemes are still scrutinized for deficiences under the due process guarantees of the state constitutions.[4] The application of substantive due process to invalidate a statute depends on whether the statute regulates a business which is affected with a public interest (a "natural monopoly") and whether the statute is designed to protect the general welfare. Licensing requirements and regulations, imposed on occupations and businesses under the former rationale have been accorded varying treatment in the state courts. Regulation has generally been upheld where the public interest involved is found to be substantial,[5] and the burden imposed not undue.[6]

Relatively little authority exists concerning the permissible limits of schools regulation.[7] An early case made it clear that states cannot arbitrarily interfere with schools.[8] A statute prohibiting certain private schools from collecting more than $25 tuition in advance was found to fit this description.[9]

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4 See Paulsen, The Persistence of Substantive Due Process in the States, 34 Minn. L. Rev. 91 (1950); Hetherington, State Economic Regulation and Substantive Due Process of Law, 53 N.W. U.L. REV. 226,244-48 (1958) [hereinafter cited as HETHERINGTON]. Cases illustrating the application of the doctrine in the state courts are: Pennsylvania State Board of Pharmacy v. Pastor, 272 A.2d 487 (1971) (statute which prohibited advertising of drug prices unconstitutional); Estell v. City of Birmingham, 286 So 2d 866 (Ala. Ct. Crim. App. 1973) ("anti-scalping" statute unconstitutional); People v. Brown, 407 Ill. 565, 95 N.E. 2d 888 (1950) (licensing requirement for plumbers unconstitutional); Moore v. Sutton, 185 Va. 481, 39 S.E.2d 348 (1946) (licensing requirement for photographers unconstitutional). Although the state courts are bound by the Supreme Court's interpretation of the 14th Amendment, and therefore seemingly obliged to reject the substantive due process doctrine, the state courts have continued to apply substantive due process. This circumvention of current federal constitutional doctrine has been accomplished in some cases by reliance on due process provisions of state constitutions, and in other cases by inattention to more recent pronouncements of the Supreme Court.

5 Hetherington at 229.

6 Hetherington at 240, 234 n. 154.

7 A good discussion of prior cases is found in State v. Williams, 253 N.C. 337, 117 S.E. 2d 444 (1960).

8 Pierce v. Society of Sisters, 268 U.S. 510 (1924). This case established that schools have a constitutional right to due process.

9 State v. Buss, 114 N.W. 2d 633 (S.D. S. Ct. 1962).

New York's private trade school act was found unconstitutional insofar as it directed the Regents to condition licenses on their approval of the tuition charged by these schools.[10] A state cannot regulate schools teaching a foreign language in an oppressive manner.[11] A statute which prohibited a lawful educational corporation from operating without the consent of the voters in the area was held unconstitutional.[12] On the other hand, the state may require schools to procure licenses to operate,[13] and regulate the granting of degrees[14] and the name used by a college[15]

The principle which emerges from these cases is that "[t]he state has a limited right, under the police power, to regulate private schools and their agents and solicitors, provided: (1) there is a manifest present need which affects the health, morals or safety of the public generally, (2) the regulations are not arbitrary, discriminatory, oppressive or otherwise unreasonable..."[16]

Because of the importance of education to the public, and the difficulty of protecting consumers from unscrupulous practices, courts are unlikely to invalidate most regulatory schemes.

State regulatory schemes are more likely to encounter difficulties when their purpose is to limit the number of schools operating in a given area. An example of this sort of regulation is seen in New York, where permission to operate in the state is dependent on a showing of "need" for the proposed institution.[17] When the regulation imposed is this burdensome, the state

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10 Grow System School v. Board of Regents, 277 App. Div. 122, 98 NYS 2d 834 (S. Ct. 1950).

11 Farrington v. Tokushege, 11 F2d 710 (9th Cir. 1926); see Meyer v. Nebraska, 262 U.S. 390 (1923).

12 Columbia Trust Co. v. Lincoln Institute of Kentucky, 138 Ky. 804, 129 SW 113 (Ct. App. 1910).

13 People v. American Socialist Soc., 202 App. Div. 640, 195 NYS 801 (Sup. Ct. 1922) (upheld against First Amendment and due process challenge requirement that school not allow teaching or overthrow of government).

14 Shelton College v. State Board of Education, 48 N.J. 501, 226 A.2d 612 (1967).

15 Institute of the Metropolis, Inc. v. University of the State of New York, 274 N.Y. 504, 10 N.E. 2d 504 (1937).

16 State v. Williams, 253 N.C. 337, 117 S.E. 2d 444, 450 (1960).

17 §§3.56, 5.21 of Title VIII of the Official Compilation of Codes, Rules, and Regulations of the State of New York.

must demonstrate that the business so regulated is affected with a "public interest." This is often traced to a now discredited Supreme Court decision, in which the Court invalidated a requirement that ice companies procure a certificate of necessity prior to operation.[18] The Court held this form of regulation was unconstitutional because manufacturing ice was an "ordinary business", which was "essentially private" in nature, and not a "natural monopoly", or an "enterprise in its nature dependent upon the grant of public privileges".[19] The opinion also referred to a "[c]ommon right to engage in a lawful private business." Justice Brandeis' dissent indicated the direction the Court would take later. The present status of Liebmann and the "affected with a public interest" doctrine in the federal courts is treated in Boylan v. United States.[20]

Many states have certificate of need requirements that apply to new hospital construction.[21] This article is an extensive examination of the efficacy of certificates of need as a device to regulate the growth of hospitals. The Supreme Court of North Carolina, which has a long history of searching legislation for violations of substantive due process[22] declared this requirement to be a violation of due process clause of the state's constitution because the court could find no benefits accruing to the public from the requirement. The court explained that although the state's right to regulate hospitals was undisputed when the "right to engage in a business" is withheld a strong sharing of public advantage must be made. A New York court considering a similar statute applied to nursing homes held the statute was constitutional.[23]

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18 New State Ice Co. v. Liebmann, 285 U.S. 262, (1931).

19 285 U.S. at 277, 279.

20 310 F. 2d 493 (9th Cir. 1962).

21 Havighurst, "Regulation of Health Facilities and Services by Certificate of Need", 59 VA. L. Rev. 1143, 1144 (1973).

22 See, State v. Ballance, 229 N.C. 764, 51 S.E. 2d 731 (1949); Roller v. Allen, 245 N.C. 516, 96 S.E.2d 851 (1957).

23 Attoma v. State Department of Social Welfare, 26 App. Div. 2d 12,270 NYS 2d 167 (1966).

A 1948 Pennsylvania case[24] concerned the state's attempt to regulate Hertz by requiring it to possess a certificate of public convenience and necessity before it could rent cars. The court held that the business of leasing cars was not sufficiently imbued with a public interest to be subject to this kind of regulation consistently with the due process guarantees of the state and federal constitutions. After observing that there was no certain test for when a business was affected with a public interest, the court concluded that the "capacity for monopolistic use in the performance of a service to the public in general" was a reliable indication that a business was affected with the public interest.[25] These cases demonstrate that only when an industry is found to possess the characteristics of a natural monopoly will state legislations restricting entry into the field be upheld.

The economic justification for state perpetuation of a monopoly is readily apparent when discussing telephone companies or other public utilities where inefficiency in use of resources will lead to detriment to the consumer. However, restricting the number of competitors in an industry that is not a natural monopoly[26] will work a sacrifice of the ordinary benefits of competition:

> "The belief that competition results in deterioration of a product is true only in the pure public utility case. In other situations competition tends to improve the "quality" of the product. More importantly, competition widens the range of types of goods that are available to buyers. If competition among liquor dealers lowers the price of existing liquor and brings into the market additional lower priced liquors, the consumer benefits since he has a wider range of choices."[27]

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24 Hertz Drivyurself Stations v. Siggins, 359 Pa. 25, 58 A. 2d 464 (1948).

25 58 A. 2d at 471. Two other cases following Hertz have struck down certificate of need requirements applied to the renting of motor vehicles: Hertz Corp. v. Heltzel, 217 Ore. 205, 341 P. 2d 1063 (1959), and State ex rel Schrath v. Condry, 139 W. Va. 827, 83 S.E. 2d 470 (1954). One case which reached a contrary decision is, Corpus Christi v. Texas Driverless Co., 187 S.W. 2d 484 (Tex. Civ. App. 1945, modified on other grounds, 144 Tex 288, 190 S.W. 2d 484. A good discussion of constitutional limitations on certificate of need requirements is found in Visco v. State, 95 Ariz. 154, 388 P.2d 155 (1964).

26 The nature of a "natural monopoly" is explained in this passage from Barron, Business and Professional Licensing-California, A Representative Example,' 18 STAN. L. REV, 640, 642 (1966): Conceptually, there are industries in

which the nature of the resources that are used in production is such that one producer can supply the entire market for the product at a lower real cost (use fewer resources) than can several producers. In this natural monopoly situation the existence of more than one producer will have one or both of two effects: (1) Each seller will have excess capacity, and such capacity, together with low or declining costs of using it, will lead to successive price reductions until the price of the product declines to the level of out-of-pocket costs. Eventually, only one seller will survive, and the consumer will be faced with a true monopoly. (2) While this "ruinous" competition continues, firms, in an effort to cut costs, may reduce the quality of the product to the detriment of the buyer.

Where this condition is thought to exist, the police power may be used to grant monopolistic production of the product by means of a public utility "license." The price and output of the public utility are regulated by the public in an effort to secure production of the product at nonmonopolistic prices.

27 Id. at 658.

There are no reported cases concerning the constitutionality of a requirement of a certificate of need to operate a school. If the "natural monopoly" justification is a prerequisite to this form of regulation, then it seems unlikely that higher education can be so regulated. Although an overabundance of schools creates a drain on the state's educational resources, less drastic measures than limiting the entrance of new schools can be devised to prevent waste.

One commentator urged courts to consider whether legislatures might have used less extreme measures to accomplish their goals.[28]

In conclusion, most state regulation of higher education is within the bounds of even the most strict interpretation of the state's authority under the due process clause. However, state regulation which is so extreme as to actually prohibit the operation of a school for reasons unrelated to its educational quality may encounter difficulties in some state courts.

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28 Struve, The Less-Restorative-Alternative Principle and Economic Due Process, 80 HARV. L. REV 1463 (1967).

3.2 Procedural Due Process

The most important safeguards provided under the rubric of "due process" are the panoply of procedural rights assured one who is harmed by state action. Without case law on the rights of school licensees one cannot determine exactly what procedures are required at each stage of administrative action, but the parameters of due process can be determined.

The basic rule governing due process is that the

> "extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'.... Accordingly...'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action'".29/

A recent case, Blackwell College of Business v. Attorney General,30/ is illustrative of the due process requirements that schools have with reference to governmental licensing.

The college was approved by the Immigration and Naturalization Service (INS) for attendance by nonimmigrant alien students. INS, on the basis of an investigation it had undertaken, informed the school that its approval was to be withdrawn, and then gave it an opportunity to have an "interview" with an administrative officer. The administrative officer was the same person who had informed the school of the withdrawal of approval. Finally, no participation by counsel was afforded. The court characterized the proceedings as "formless and uncharted".31/

The court's enumeration of procedures that must be followed in the future comprise a checklist for due process scrutiny. First, notice that it specifies in reasonable detail thatgrounds of dissatisfaction must be given32/

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29 Richardson v. Perales, 402 U.S. 389, 401-02 (1970); quoting from Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

30 454 F. 2d 928 (D.C. Cir. 1971).

31 Id.

32 The court also concluded that INS was subject to the Administrative Procedure Act, which requires that before an agency institutes proceedings, it give (1) notice and (2) "opportunity to demonstrate or achieve compliance with all lawful requirements," (5 U.S.C., para 558(c)). This procedure is not necessarily required of agencies not subject to the APA.

A hearing must be provided, before a different administrative officer than the one who did the initial investigation.

The nature of the charge against the school determines the school's right to confront and cross-examine witnesses. If the charge involves documentary records, then the school may contest the records with other records or live witnesses. If the charge is founded on hearsay (which is not admissable under an exception to the hearsay rule) then the school has a right of cross-examination and confrontation.

Counsel is permitted in all proceedings, and a record must be made.

Most cases involving the withdrawal of a license to operate, or other equally important state action, would seem to call for procedures at least as strict as these.[33]

The most serious due process deficiency of state licensing boards is the presence of members of the regulated industry on the decision-making board. The Supreme Court has said that "(a)n impartial decision maker is essential."[34] Thus, the issues of fairness implicit in an argument against delegation to private parties become paramount under due process. Gibson v. Berryhill[35] involved a conflict between independent optometrists (the Association) and optometrists who were employed by other persons. Alabama had established a state licensing board, which was restricted in membership to optometrists who belonged to the Association. Under these circumstances, the Court concluded that the Board should not adjudicate proceedings involving the non-Association members, because the Board members has a pecuniary interest in the outcome.[36]

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33 In Blackwell, the court stated that Blackwell's "[a]pproval status was a valuable asset in the nature of a license...", but did not discuss the degree of harm visited on the aggrieved school. However, the court did state that the interest of the government was that approval be withdrawn only after due process was given, because of the government's interest in allowing students to enter. This reasoning would eliminate a need to balance the government's interest against that of the individual, because there is always a governmental policy that programs be fairly administered, and would lead to the conclusion that full due process should always be accorded.

34 Goldberg v. Kelly, 397 U.S. 254, 271 (1969).

35 411 U.S. 564 (1973).

36 But see, People v. Murphy (364 Mich. 364 Mich. 363, 110 N.W. 2d 805 (1961), where on similar facts the opposite decision was reached.

3.3 Delegation of Legislative Power

Legislative acts establishing a licensing scheme for schools may simply name a board and direct it to issue or withhold licenses. The act may note the problem perceived by the legislature, the general areas in which criteria must be met, and even specific requirements to be satisfied by applicants. The bodies to which authority is delegated may or may not adopt regulations and procedures for review of its decisions.

The question which arises when power to implement an Act is given to an administrative agency is whether there has been an unconstitutional delegation of legislative power. 37/ It is traditionally believed that "the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority".38/ Courts have attempted to distinguish between administration of a law, and the "making" of a law.39/

Two cases involving regulation of private schools illustrate the application of these principles. In Packer Collegiate Institute v. University of State of New York 40/ a private school refused to register with the regents of New York, instead moving for a declaratory judgment that was unconstitutional. The statute requiring registration contained no standards circumscribing the Regents' authority, stating simply that schools must register "under regulations prescribed by the board of regents"41/

37 The federal courts are no longer likely to find an unconstitutional delegation of power, but the doctrine persists in many state courts. Davis, Administrative Law Text 2.06 (1972).

38 Cooley, Constitutional Limitations 163 (7th ed. 1903). The Constitutional logic underlying this belief is that: Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

39 The distinction made is "[b]etween the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law."
Cincinnati, W.& Z.R. v. Clinton, 1 Ohio St., 77,88 (1852), quoted with approval in Field v. Clark, 143 U.S. 649, 693-94(1892). See DAVIS, ADMINISTRATIVE LAW TEXT 2.06 (3rded.1972) for an excellent discussion of this issue.

40 296 N.Y. 184, 81 N.E. 2d 80 (1948).

41 81 N.E. 2d at 81.

The court struck the statute down as violative of the New York constitution,42/ stating that "[T]he legislature has not only failed to set out standards or tests by which the qualifications of the schools might be measured, but has not specified, even in most general terms, what the subject matter of the regulations is to be. . . .there must be a clearly delimited field of action and, also, standards for action therein."43/

In State v. Williams44/ the defendant was convicted under the penal section of an act which licensed solicitors for private schools, and the schools themselves. Here the statutory scheme stated the purpose of the legislation, and provided that the State Board of Education should examine the sales methods and instructional programs of the school. The court found the legislature's failure to specify the standards which should govern the Board's approval fatal to the constitutionality of the scheme. The court quoted from another case in which an agency had been given authority to suspend "habitual violators" with no standards to control its determination:

> "'...(w)hile the legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of the law is made to depend..., it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion...'"45/

Other cases have taken an opposite tack. Thus, a statute giving authority to an Alcoholic Beverage Control Commission to grant liquor licenses unless the Board found the location was not a "suitable one" was upheld. 46/ Similarily, a statute that gave fire departments authority to "make all needful rules and regulations with respect to the department and the management of the money to be paid to the treasurer"47/ survived a

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42 Article III, para 1 "The legislative power of this state shall be vested in the senate and and assembly."

43 81 N.E. 2d at 82.

44 253 N.C. 337, 117 S.E. 2d 444) (1960).

45 Harvell v. Scheidt, 249 N.C. 699, 107 S.E. 2d 549, 551 (1959), quoting from Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52, 74 S.E. 2d 310 (1953).

Accord, Revco Southeast Drug Centers, Inc. v. North Carolina Board of Pharmacy, 204 S.E. 2d 38 (Ct. App, N.C. 1974) where the court declared unconstitutional a statute giving a board of pharmacists authority to adopt a code of professional conduct "[a]ppropriate to

the establishment and maintenance of a high standard of integrity and dignity in the practice of the profession" because no guidelines were provided.

See also 16 C.J.S. 138 and cases cited in Davis, Administrative Law Treatise, 1958, 2.11.

46 Terry v. Pratt, 187 S.E. 2d 884 (S.C. Sup. Ct. 1972).

47 People v. Mayor of City of Belleville, 174 N.E. 2d 678 (S Ct. Ill. 1961).

constitutional challenge. The court reiterated that the power to make laws cannot be delegated, but found that the legislature "may delegate to others those things which the legislature might properly do, but cannot do understandingly or advantageously." 48/

The vagaries of state law regarding delegation are perhaps best illustrated by two cases, 49/ one from New York, 50/ and the other from Florida. 51/ In both, a statute delegated power to a state board to issue certificates to "psychologists", providing penalties for the use of that title without possession of a certificate. The New York court rejected the assertion that the statute's failure to define "psychologist" rendered the delegation unconstitutional because there were no legislative standards prescribed to guide the board. The Florida statute was successfully challenged on the grounds, inter alia, that the portion of the statute requiring the Board to give an examination in "psychology" failed to define or delimit the field.

The typical opinion by a state court regarding delegation has been characterized by Kenneth Culp-Davis:

> "It says that (1) legislative power may not be delegated, (2) that 'filling up the details' is not an exercise of legislative power, (3) that legislative power is not delegated if the Legislature has laid down a standard to guide the exercise of the power, and (4) that presence or absence of vague verbalisms like "public interest" or "just and reasonable" make all the difference between valid legislation and unlawful delegation. 52/

Davis' thesis, which is apparently meeting with approval in some courts, is that attention to the standards accompanying a delegation of power is misplaced, and that courts should concern themselves rather with the administrative safeguards governing the exercise of power. In this respect problems of vague deligations may be better treated in terms of procedure due process.

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48 Id. at 681.

49 Both cases are discussed at Davis, Administrative Law Treatise, para. 2.11, 1970 Supplement.

50 Diemer v. Diemer, 8 N.Y. 2d 197, 168 N.E. 2d 649, 203 N.Y.S. 2d 821 (1960), appeal dismissed, 365 U.S. 298 (1961).

51 Husband v. Cassel, 130 So. 2d 69 (Fla. 1961).

52 DAVIS, Administrative Law Tex -39 (1972)

In conclusion, a school denied a license by an administrative board for arbitrary reasons, or no reason at all, might well meet with success in persuading a court to examine whether the legislature should have granted uncontrolled power to an administrative board. 53/

Another issue which emerges from examining state regulatory schemes is their reliance on private groups for their implementation and aid in regulation. One form this reliance takes in statutes regulating education is a provision that all out of state schools operating in the state be accredited by a private accrediting association. Other states merely exempt accredited schools from some, or all, of their licensing schemes. Schools operating in the state may be required to be as good as local schools. Finally, the very board entrusted with the operation of the statute may be composed of the presidents and owners of local schools.

All of these provisions in a regulatory scheme are arguably delegations of legislative authority to private groups. The law concerning delegations to private groups is unclear, but generally courts hold delegations of legislative authority to private parties unconstitutional, with the discrepancy in conclusions the result of disagreements over when a delegation has been made. 54/

The provision found in some state statutes that schools be of comparable quality to already established schools may be sufficiently comparable to a statutory provision that wages paid public employees be at "prevailing" rates as to be similarily unconstitutional. 55/

Many state regulatory schemes provide for the formation of a board composed of representatives of schools in the state to implement the act. 56/ Here the nature of the board's authority is crucial, for where

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53 Davis, despite his general opposition to reliance on the nondelegation doctrine, states: "In many state courts, cases still can be won by asserting the non-delegation doctrine, and perhaps this should be so to the extent that legislative bodies behave irresponsibly in delegating without providing either adequate standards or adequate safeguards". Id. at 51.

54 Davis, Treatise, 2.14 See discussion of cases there, and in 1970 Supplement, 2.14.

55 The cases are divided over the validity of prevailing wage provisions. See, Davis, Treatise, 2.14; Annot. 18 A.L.R. 3rd 944, 8; Schryrer v. Schirmer, 171 N.W. 2d 634 (S.D.S. Ct. 1969); Kugler v. Yocum, 71 Cal. Rptr. 687, 445 P. 2d 303 (1968).

56 It should be stressed that the composition of the board, the manner in which appointments are made, and other considerations relating to the public nature of the board would be critically important to an argument that an unlawful delegation had taken place. The argument can be made that any state board is a public administrative agency, regardless of the members occupations. See, Simon v. Cameron, 337 F. Supp. 1380 (D. Calif. 1970). This contention has been criticized by Jaffee, in his article, Law Making by Private Groups, 51 HARV. L. REV.201,232 (1937).

it is merely given an advisory function it is more difficult to argue that a delegation of power has occurred.

Where real regulatory power is given to an interested board of school representatives the Supreme Courts' statement in Carter v. Carter Coal Co., 57/ which concerned the constitutionality of an Act giving the power to set wages and prices to the majority of owners and miners, is still relevant:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. . . . [O]ne person may not be entrusted with the power to regulate the business of another, and especially of a competitor".

An extreme example of delegation to private groups is found in Allen v. California Board of Barber Examiners 58/ where the State Board of Barber Examiners, which consisted of four barbers and one public representative, was given the authority to fix minimum prices. The court held the statute was unconstitutional, because,

> "'When the power which the legislature purports to confer is the power to regulate the business of one's competitors. . . a real danger of abuse arises, and the courts accordingly insist upon stringent standards to contain and guide the exercise of the delegated power'". 59/

The reference to standards may indicate a trend towards judicial examination of the actual operations of a private regulatory group. 60/ Of course, price-fixing by barbers is generally considered worlds apart from the regulation of schools by educators. One can forsee circumstances, as when competition among schools for sparse monies is pronounce that courts might be reluctant to allow competitors to be entrusted with regulatory powers. Again, as discussed before, due process has been held to include a requirement of an unbiased decision maker, thereby achieving the same result.

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57 298 U.S. 238 (1936).

58 25 Cal. App. 3rd 1017, 102 Cal. Rptr. 368 (Ct. App. 1972).

59 Allen v. California Board of Barber Examiners, 25 Cal. App. 3rd at 1018, 102 Cal. Rptr, at 370, quoting from Wilke and Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control, 65 Cal. 2d 349, 367, 55 Cal. Rptr. 23, 35, 420 P. 2d 735, 747. For another case similar to Allen see State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436 254 P. 2d 2d 29

60 In this case the court found the legislative direction to the Board "to consider all conditions affecting the industry, including costs, and the relation of these conditions to the public health, welfare and safety" (Allen at 25 Cal. App. 1020, 102 Cal. Rptr. 371) an inadequate standard. See Jaffee, Law Making by Private Groups, 51 Harv. L. Rev. 201 at 251 (1937) where he questions the efficacy of such standards, as a control upon private groups, because of the fundamental lack of public administrative control.

When a state only permits accredited schools to operate in the state, or subjects them to more favorable treatment than non-accredited schools one can question whether an unlawful delegation of authority has been made to the accrediting agencies.

Two cases dealing with this contention as applied to accreditation of schools will be discussed.

In Colorado Polytechnic College v. State Board for Community Colleges and Occupational Education 61/ the plaintiff college challenged a statute which prohibited educational institutions from granting degrees unless the majority of the credits earned at the institution were "generally acceptable or transferable to at least one college or university accredited by. . ."62/ one of the six regional accrediting agencies as an unlawful delegation of legislative powers. The court rejected this assertion stating: [W]e deem it entirely appropriate in the field of higher education to leave recognition of academic achievement to these institutions and associations which are uniquely qualified by professional training and experience to make such judgments. Necessity fixes a point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules for the purpose of avoiding an unconstitutional delegation of authority. 63/

A similar constitutional challenge was raised to a state bar association rule that required graduation from law school approved by the American Bar Association as a prerequisite to graduation. 64/ The court discussed the practical necessity for general rules governing bar admissions because of the difficulty of evaluating all law schools, and found the rule valid because it was reasonable method of achieving the purposes of the bar association.65/

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61 476 P. 2d 38 (Col. Sup. Ct. 1970).

62 C.R.S. 124-21-2(5) (Perm. Supp. 1965)

63 476 P. 2d at 42.

64 Application of Schatz, 497 P. 2d 153 (S. Ct. Wash. 1972).

65 The court relied on Rosenthal v. State Bar Examining Committee, 165 A. 211 (S. Ct. Conn. 1933), which was a similar case, in reaching its decision. Other cases upholding this requirement are Herrington v. State Board of Bar Examiners, 60 N.M. 393, 291 P. 2d 1108 (1958) and Hackin v. Lockwood, 361 F. 2d 499 (9th Cir. 1966); In re Stephenson, 42 L.W. 2030, 6/25/73 Alaska S. Ct.

The courts in both these cases were concerned with the reasonableness of relying on accrediting associations, not whether the delegation was unlawful because of the lack of safeguards surrounding the state's reliance on these agencies. The dissent in the latter case argued that the state bar association neither adopted its own standards for acceptable law schools, nor enforced compliance with them 66/ thus effectuating "[a]n unconstitutional transfer of public sovereignty to a private organization." 67/ but this argument was not discussed in the majority's opinion. 68/

Judicial reluctance to invalidate reliance on accreditation can be explained as a relaxation of judicial scrutiny where the private action is undertaken for reasons independent of the statute. 69/ One can question this presupposition of disinterestness given the entaglement between accrediting associations and governmental actions, 70/ but at present there is no indication that courts will interfere, in non-delegation grounds, with state reliance on accrediting associations.

A limitation to the legislature's ability to empower accrediting agencies to screen applicants, is found in a principle of nondelegation which makes statutes which adopt future laws unconstitutional. A statute enacted in 1947, which prevented anyone not a graduate of an accredited medical school from being licensed, was declared unconstitutional because at the time the statute was passed there was no list of accredited foreign medical schools, and none were formulated for the next three years. 71/ The court stated:

> "Legislative power is nondelegable. When the legislature declares that schools on an existing list are accredited schools and those not on are not, it is legislating; but when it declares that accredited schools shall be those on a list thereafter to be promulgated, irrespective of the authority promulgating such list, it is attempting to delegate legislative power and such an act is unconstitutional."

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66 497 P. 2d at 161.

67 497, P. 2d at 157.

68 The reliance by these two courts on evidence of reasonableness suggests an equal protection analysis was utilized. In the field of hospital accreditation a statute requiring that abortions be performed in hospitals accredited by a private group was upheld as a constitutional delegation of governmental power because it was neither "[a]rbitrary, unreasonable, nor discriminatory". People v. Bark lale, 105 Cal. Rptr. 1, 503 P. 2d 257 (1972). The Supreme Court, in Doe v. Bolton, 410 U.S. 179 (1973), invalidated a statute requiring accreditation of facilities where abortions were performed stating that", 'It is a requirement that simply is not 'based on differences that are reasonably related to the purposes of the Act in which it is found'". (Morey v. Dovd, 354 U.S. 457 (1957)).

69 Davis, Treatise 2.14. (1958)

70 See Jaffee, pp. 228-31.

71 State v. Urquhart, 310 P. 2d 261, 264 (Sup. Ct. Wash. 1957).

In another case that part of a state statute prohibiting "subversives" from holding public positions, which defined membership in a "subversive organization" to include membership in any organization placed on the United States Attorney General's list was held unconstitutional because, inter alia, it adopted future federal rules. 72/

The relevance of this principle to a statute which exempts accredited schools is that new schools are constantly being added, so that under this principle a statute purporting to embrace new lists would be void. 73/

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72 Norstrand v. Balmer, 335 P. 2d 10 (Wash. Sup. Ct. 1959).

73 Courts will, where possible, interpret statutes as only incorporating the list, or standard, in effect at the time the statute was enacted, thus choosing to interpret the statute as constitutional. Seale v. McKennon, 336 P. 2d 340 (Ore. Sup. Ct. 1959). People v. DeSilva, 32 Mich. App. 707, 189 N.W. 2d 362 (Ct. App. 1971).