

RECENT DEVELOPMENTS IN TRADE REGULATIONS

THE LIABILITY OF PRIVATE ACCREDITING ASSOCIATIONS UNDER THE SHERMAN ACT, THE CONSTITUTION, AND THE COMMON LAW

Plaintiff in *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools*,¹ is a two-year, proprietary college for women located in the District of Columbia.² Defendant Middle States is a nonprofit corporation which conducts a program of evaluation and accreditation of educational institutions primarily in the Middle Atlantic area, including the District of Columbia.³ On several occasions Marjorie Webster submitted applications to

¹ 302 F. Supp. 459 (D.D.C. 1969), appeal docketed, No. 23351, D.C. Cir., Aug. 5, 1969. A stay of the district court's injunction was granted by the court of appeals on Sept. 26, 1969.

² Marjorie Webster was founded in 1920 in the District of Columbia by Miss Marjorie Webster and her mother. Although originally a partnership, in 1927 Marjorie Webster became incorporated. The school is presently a closely-held corporation with all of the stock owned by the Webster family. *Id.* at 472.

Marjorie Webster offers courses of instruction in seven departments: Liberal Arts, Physical Education, Kindergarten Education, Communications, Secretarial, Art, and Retail Merchandising. Students are enrolled in either terminal or transfer programs. Marjorie Webster will give transfer recommendations only to those students who have enrolled in the transfer program. The school awards an Associate in Arts (AA) degree to students who successfully complete the required curricula. All other graduates are given certificates. *Id.*

³ Middle States was organized under the Education Laws of the State of New York on May 27, 1966 as a nonprofit, non-stock corporation. It is the successor to the Middle States Association of Colleges and Secondary Schools, an unincorporated association founded in 1887 by a group of nonprofit liberal arts institutions. According to its charter, the purpose of the association is

to encourage the achievement of higher quality and to facilitate the development of better working relations among the higher institutions, secondary schools, and other educational agencies in the Middle States.

Id. at 473.

In addition to these general purposes, Middle States serves as an accrediting body. Applicants for accreditation must undergo an intensive institutional evaluation. A major part of this evaluation is conducted by the applying institution, with the assistance of a visiting team of educators drawn from Middle States' member schools. The purpose of the evaluation is to ascertain the goals of the institution and to assess the ability of the existing program to accomplish these goals. Once the evaluation is completed, the visiting team submits a report of its findings and recommends to the Commission on Institutions of Higher Education, a Middle States agency, that accreditation be granted or denied. The final decision, however, rests with the Higher Education Commission. If accreditation is granted, the applicant automatically becomes a member of Middle States. *Id.* at 474.

The membership of Middle States includes 346 nonprofit, liberal arts institutions of higher education located in Delaware, Maryland, New Jersey, New York, Pennsylvania, the District of Columbia, Puerto Rico, the Virgin Islands, and the Canal Zone. Middle States is one of six regional accrediting associations which accredit nonprofit, liberal arts institutions. On March 2, 1964, the six associations established the Federation of Regional Accrediting Commissions of Higher Education to represent the regional associations in matters of common interest. *Id.* at 473, 475.

Middle States seeking evaluation and accreditation.⁴ On each of these occasions Middle States refused to consider Marjorie Webster for evaluation solely on the basis that Marjorie Webster was a profit-making institution and, as such, could not qualify for accreditation by Middle States.⁵ Following the rejection of its application in 1966, Marjorie Webster instituted legal proceedings against Middle States, seeking a permanent injunction enjoining Middle States from enforcing its exclusionary rule.

Marjorie Webster sought to sustain the action on three inter-related theories. First, it alleged that Middle States and its member institutions had formed a combination or conspiracy in restraint of Marjorie Webster's trade in the District of Columbia in violation of Section 3 of the Sherman Antitrust Act.⁶ Second, Marjorie Webster contended that Middle States' refusal to consider its application for accreditation was arbitrary, discriminatory and unreasonable, and consequently violated the due process and equal protection clauses of the United States Constitution.⁷ Third, Marjorie Webster asserted that Middle States' exclusionary policy violated the common law con-

⁴ In 1928, Marjorie Webster corresponded with Middle States regarding accreditation. On that occasion Middle States noted that Marjorie Webster's lack of a liberal arts program precluded it from membership in Middle States. Subsequent rejections relied upon the fact that Marjorie Webster was a profit-making institution. Defendant's Brief on Motion for Summary Judgment at 7.

⁵ Since 1928 Middle States has required that to be eligible for accreditation a school must be "nonprofit with a governing board representing the public interest." 302 F. Supp. at 475. The Middle States Higher Commission has accordingly never evaluated or accredited a proprietary institution. Middle States reassessed its position in 1957 and appointed a special committee to study this problem. After the committee recommended that the nonprofit criterion be retained, Middle States reaffirmed its exclusionary rule. In 1964 the Federation issued a policy statement concerning accreditation criteria which also included the non-profit requirement. *Id.*

⁶ Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in . . . the District of Columbia . . . is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

15 U.S.C. § 3 (1964).

The action was brought pursuant to § 16 of the Clayton Act which reads as follows:

Any . . . corporation . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity.

15 U.S.C. § 26 (1964).

Jurisdiction was based on § 12 of the Clayton Act:

Any suit, action, or proceeding under the antitrust laws against a corporation may be brought in any district wherein it may be found or transacts business.

15 U.S.C. § 22 (1964). The court relied upon *Levin v. Joint Comm'n on Accreditation of Hosps.*, 354 F.2d 515 (D.C. Cir. 1965) and found that Middle States' contacts with the District of Columbia were sufficient in nature and degree to permit suit under § 12 of the Clayton Act. 302 F. Supp. at 464.

trolling the activities of private associations. The District Court for the District of Columbia found for Marjorie Webster on all counts, and awarded "[a]n injunction prohibiting [Middle States] from excluding [Marjorie Webster] from accreditation because of its proprietary character and ordering [Middle States] to accredit [Marjorie Webster] if it shall otherwise qualify."⁸

This comment will examine the legal foundation of the result reached in *Webster* and then explore the legal and social ramifications of the decision. Particular emphasis will be given to the propriety and legality of placing higher education, including the accrediting activities of private associations, within the ambit of the Sherman Antitrust Act. The legal justification for the court's conclusion that Middle States is a quasi-governmental body and thus subject to the restraints imposed by the due process clause of the Constitution will also be discussed. Finally, the legal basis for the common law cause of action, in which the court attempts to regulate the internal affairs of a private association, will be considered.

I. THE SHERMAN ACT

Section 3 of the Sherman Antitrust Act prohibits "[e]very contract, combination, . . . or conspiracy . . . in restraint of trade or commerce in . . . the District of Columbia"⁹ In general this section embraces contracts, combinations, and conspiracies which operate to the prejudice of the public interest by unduly restricting competition or unduly obstructing the course of trade.¹⁰ Any activity which has or may have that effect comes within the purview of section 3. The variety of activities which are proscribed are quite numerous; they may arise in all types of businesses or business transactions. Thus, in order for a plaintiff to successfully establish that a defendant has violated section 3, the plaintiff must allege and prove: (1) that the defendant has conspired or combined with others, (2) that the plaintiff is engaged in "trade or commerce," and (3) that the defendant's restraint of plaintiff's trade is unreasonable.

In light of the necessity for a plaintiff to allege and prove the above elements in a section 3 case, Marjorie Webster argued that it was engaged in "trade or commerce" within the meaning of section 3, and that Middle States and its member institutions combined to re-

⁷ Jurisdiction and venue for this count were based upon 28 U.S.C. § 1391(c) (1964), which reads as follows:

A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

The court also concluded that it had jurisdiction over Middle States on this count. 302 F. Supp. at 459. See also D. C. Code Ann. § 11-521(a) (1) (1967).

⁸ 302 F. Supp. at 478.

⁹ 15 U.S.C. § 3 (1964).

¹⁰ See generally W. Thornton, A Treatise on Combinations in Restraint of Trade 234b-37 (1928); 1 H. Toulmin, Jr., A Treatise on the Anti-trust Laws of the United States 93-112 (1949).

strain Marjorie Webster's trade in the District of Columbia. Furthermore, the school asserted that Middle States' exclusionary rule was unreasonable, for it resulted in the prevention or inhibition of competition "from profit-oriented institutions of higher learning such as Marjorie Webster. In support of this last allegation Marjorie Webster noted the difficulties encountered by non-accredited institutions in recruiting high school graduates and placing transfer students in four-year colleges. Contending that it possessed all the qualifications necessary for accreditation by Middle States except the nonprofit requirement, Marjorie Webster concluded that the nonprofit requirement of Middle States was unreasonable *per se*,¹¹ and constituted a violation of the Sherman Act.

Middle States denied that it had conspired specifically to restrain Marjorie Webster's trade. It further maintained that neither it nor Marjorie Webster was engaged in "trade" within the meaning of the Sherman Act. Middle States also claimed that its regulation excluding profit-oriented institutions was not unreasonable. While admitting that accreditation was important to institutions of higher education, Middle States denied that it was essential to the successful operation of such institutions. Middle States also argued that a profit-making institution such as Marjorie Webster is unable to make a total commitment of its financial resources to the educational process. This it concluded adversely affects the quality of the educational program provided by such a school.

After considering the arguments of both parties, the *Webster* court concluded, in spite of the absence of any evidence showing a conspiracy by Middle States to injure Marjorie Webster, that Middle States and its members did combine to restrain Marjorie Webster's trade.¹² Although appreciating the lack of precedent in applying the antitrust laws to the field of higher education, the court nevertheless held that Marjorie Webster was engaged in "trade" within the meaning of section 3.¹³ Finally, the court disregarded the "per se" test and applied the "rule of reason,"¹⁴ finding "that the exclusionary criterion

¹¹ The "per se" test applies to practices which are found to be totally lacking in redeeming value, and are likely to have a detrimental effect on competition. 302 F. Supp. at 467. For example, price fixing and group boycotts are practices commonly considered *per se* violations of the antitrust laws. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). For an interesting comment on the role of the "per se" test in the antitrust laws, see Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 Mich. L. Rev. 1139 (1952).

¹² 302 F. Supp. at 466.

¹³ 302 F. Supp. at 459. Before reaching that decision the court indicated that Marjorie Webster's status as a "trade", not Middle States', was the issue for determination. It stated that it is a well-recognized principle of law "that when the organization at which the restraint is directed is in trade, it is immaterial whether the offending association is so engaged." *Id.* at 466.

¹⁴ *Id.* at 467. The "rule of reason" is applied when the combination or conspiracy is "not so devoid of potential benefit or so inherently harmful as to fall into the [per se] category . . ." When a court makes the above determination, it must then examine the history and nature of the restraint to ascertain its reasonableness. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). For an excellent article on the "rule

does inhibit Webster's ability to compete in the field of higher education and does not further the stated objectives of the associations. Such a discriminatory exclusion without evidence to justify it must be found arbitrary and unreasonable."¹⁵

A. Higher Education and "Trade"

The *Webster* court's holding that a private institution of higher learning such as Marjorie Webster is engaged in "trade" is a novel result and constitutes a misapplication of the Sherman Act. Although the exact holding of the case concerns itself with a profit-making institution, the court sweepingly includes the activities of nonprofit as well as profit-making schools within the scope of the Act.¹⁶

In order to assess the conclusion reached by the court, it is instructive to examine the legislative history of the Act.¹⁷ The Sherman Act was enacted in 1890 during the era of the great industrial monopolies.¹⁸ The Act was intended to eliminate a number of evils which these monopolies had generated, such as price fixing, the limiting of production, and the lowering of quality in the monopolized articles.¹⁹ Congress felt that such monopolies, bent on destroying market competition, were inimicable to the public good.²⁰ In order to curb these abuses of the free enterprise system, Congress worded the Act broadly rather than enumerating the various types of proscribed activities.²¹ With reference to such general wording, Senator Edmunds stated:

[A]fter most careful and earnest consideration by the Judiciary Committee of the Senate it was agreed by every member that it was quite impracticable to include by specific description all the acts which should come within the meaning and purpose of the words "trade" and "commerce" . . . by precise and all-inclusive definitions; and that these were truly matters for judicial consideration.²²

Although the Sherman Act is worded broadly, it is doubtful that Congress intended the Act to apply to the activities of educational associations. Congressional debate is silent with respect to the status of higher education under the Act. This is perhaps understandable since higher education represented the antithesis of the problem which concerned Congress. The legislative history indicates clearly that the

of reason," see Adams, *The "Rule of Reason": Workable Competition or Workable Monopoly?*, 63 *Yale L.J.* 348 (1954).

¹⁵ 302 F. Supp. at 469.

¹⁶ "A new and pivotal question here for determination is the applicability of the antitrust laws to the field of education." *Id.* at 465. Although the language suggests that the court has included all higher education within the Sherman Act, it might be argued that this language is merely dictum.

¹⁷ See generally 1 H. Toulmin, Jr., *supra* note 10, at 1-23.

¹⁸ See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-93 (1940).

¹⁹ See *id.* at 493; *Standard Oil Co. v. United States*, 221 U.S. 1, 50 (1911).

²⁰ See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940).

²¹ See *id.* at 489.

²² *Id.* at n. 10.

Act was intended to break up the large corporate trusts that were injuring the public.²³ The Act was passed in "response to popular demand aroused by the fear of gigantic industrial and commercial enterprises which threatened to seize control of the manufacturing and marketing of consumer goods of all kinds."²⁴ Conversely, educational institutions have traditionally been non-profit, public-service organizations directed at aiding the intellectual development of those seeking their services.

Congress did not create a new cause of action when it enacted the Sherman Act, but merely codified and applied "old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."²⁵ Thus, where the legislative history is silent, congressional intent can be ascertained only by examining these common law principles.

American common law of unfair competition traditionally involved commercial activities.²⁶ The law attempted to prevent restraints

²³ See *id.* at 492-93.

²⁴ C. Gregory, *Labor and the Law* 202 (2d rev. ed. 1958).

²⁵ 1 H. Toulmin, Jr., *supra* note 10, at 7.

²⁶ See, e.g., *Craft v. McConoughy*, 79 Ill. 346 (1875); *Stanton v. Allen*, 5 Denio 434 (N.Y. 1848); *Hooker & Woodward v. Vandewater*, 4 Denio 349 (N.Y. 1848); *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 666 (1880).

American common law of unfair competition follows closely English common law. W. Thornton, *supra* note 10, at 81. The evils of monopolies first became widely known in England during the reign of Queen Elizabeth (1558-1603) when the Crown granted "patents of monopoly" as rewards for faithful service. *Id.* at 34. This expedient was used in lieu of direct payments from the royal coffers, which were not sufficient to adequately compensate the numerous individuals who distinguished themselves during Elizabeth's long reign. *Id.* At one time or another, monopolies were awarded for the production of salt, iron, currants, oil, and many other commercial items. *Id.* The monopolists, free of competition, could raise prices at will, and often charged exorbitant amounts. *Id.* at 35.

The legality of these monopolies was finally tested in 1602 in *Darcy v. Allin*, 74 Eng. Rep. 1131 (K.B. 1602). The case involved a patent for the manufacture of playing cards. The plaintiff sued the defendant for patent infringement. The defendant asserted, however, that the patent was illegal. In finding for the defendant, the court noted that monopolies served only the private gain of the patentees and invariably resulted in an increase in prices, a reduction in quality of goods, and the impoverishment of those who were once involved in the trade. *Id.* at 1139. In 1623, Parliament passed a statute which embodied the principles of the *Darcy* decision. W. Thornton, *supra* note 10, at 38.

At English common law a contract in restraint of trade was distinct from a patent of monopoly. The former was an agreement in which one party bound himself not to engage in a particular occupation or trade. *Id.* at 46. Even though such a contract had the effect of lessening competition, it was not considered criminal. 1 H. Toulmin, Jr., *supra*, note 10, at 52. However, because it was credited with having the dual effect of depriving the public of the contracting laborer's skills, and depriving the laborer of his livelihood, the contract was considered void and unenforceable. *Id.* at 47-50.

In the United States, a contract in restraint of trade took on additional importance; it was the means to the monopolization of an industry. In most states there was decisional law which treated these contracts as unenforceable. See, e.g., *Brown v. Jacob's Pharmacy Co.*, 115 Ga. 429, 41 S.E. 553 (1902); *American Livestock Comm'n v. Chicago Livestock Exch.*, 143 Ill. 210, 32 N.E. 274 (1892); *Cummings v. Union Blue-stone Co.*, 164 N.Y. 401, 58 N.E. 525 (1900). The common law in the United States was aimed at preventing public harm caused by monopolies in the consumer goods industries.

or monopolies which were entered into for the purpose of pecuniary gain.²⁷ In *Apex Hosiery Co. v. Leader*, Justice Stone described the types of contracts which were proscribed at common law:

They were contracts for the restriction or suppression of competition in the market, agreements to fix prices, divide marketing territories, apportion customers, restrict production and the like practices, which tend to raise prices or otherwise take from buyers or consumers the advantages which accrue to them from free competition in the market.²⁸

On the other hand, none of the common law antitrust cases applied the common law doctrine to non-commercial activities.²⁹ Furthermore, there are no English or American cases where the doctrine has been applied to higher education.³⁰ Since common law antitrust principles were never applied to higher education, it is unlikely that Congress intended the Sherman Act to so apply. The Supreme Court, in dictum, has itself recognized that the activities of educational institutions are not subject to the Sherman Act.³¹

In *Atlantic Cleaners & Dyers, Inc. v. United States*,³² the Supreme Court considered the scope of "trade or commerce" as used in Section 3 of the Sherman Act. The United States brought an action to enjoin a combination or conspiracy in restraint of trade or commerce in the cleaning and dyeing industry in the District of Columbia. The defendants were engaged in the wholesale business of cleaning, dyeing, and renovating clothing at plants located in the District of Columbia. The Government alleged that in August, 1928, the defendants met and agreed to fix prices and to assign to one another specific retailers as exclusive customers. The defendants admitted this fact but argued that they were nevertheless immune from the Act. They asserted that they were engaged solely in the rendering of a service to products that had already been transferred to the ultimate consumers. The defendants contended that such an activity was not "trade or commerce" within the meaning of the Sherman Act.

The district court struck this defense on motion by the Government and entered the decree sought. On direct appeal to the Supreme Court,³³ the only issue for determination was the scope of section 3. The Court held that it was broad enough to encompass the activities of the defendants and affirmed the decree of the district court.³⁴ In reaching its decision the Supreme Court noted that Congress intended the

²⁷ See, e.g., *Craft v. McConoughy*, 79 Ill. 346 (1875); *Stanton v. Allen*, 5 Denio 434 (N.Y. 1848).

²⁸ 310 U.S. at 497.

²⁹ Brief for Appellant at 46, *Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secondary Schools*, — F.2d — (D.C. Cir. 1970).

³⁰ Brief, for Appellant at 47.

³¹ *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 436 (1932).

³² *Id.*

³³ Direct appeal is authorized by 15 U.S.C. § 29 (1964).

³⁴ 286 U.S. at 437.

word "trade" as used in the Act to be given a broad interpretation.³⁵ The Court concluded that a definition which properly described the breadth of the word "trade" was that offered by Justice Story in *The Schooner Nymph*,³⁶ when he interpreted the Coasting and Fishery Act of 1793.³⁷ Justice Story stated: "Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or a livelihood, *not in the liberal arts or in the learned professions*, it is constantly called a trade."³⁸ (Emphasis added.) The Court adopted this definition and held that the activities of the defendants were within its scope.³⁹

Significantly, this definition specifically excludes the liberal arts and the learned professions. The basis for this exclusion may lie in the fact that neither the liberal arts nor the learned professions possess the type of competitive or commercial characteristics that are common to other occupations. In any event, the fact remains that the Supreme Court did adopt this definition when interpreting the meaning of the word "trade" in the Sherman Act.

The *Webster* court refused to accept *The Schooner Nymph* definition of "trade" as adopted by the Supreme Court in *Atlantic Cleaners*.⁴⁰ Instead, the *Webster* court relied on the interpretation of the word "trade"⁴¹ offered by the District of Columbia Court of Appeals in *United States v. American Medical Ass'n*.⁴² [T]he word 'trade' when embraced in the phrase 'restraint of trade' [includes] *all occupations in which men are engaged for a livelihood*.⁴³ (Emphasis added.) However, the vitality of this definition is questionable in light of the subsequent disposition of this case by the Supreme Court.⁴⁴ Although the Supreme Court did not specifically reject this all-inclusive definition, it refused to adopt it.

The *AMA* case involved an action in which the United States charged the American Medical Association (AMA)⁴⁵ with forming a conspiracy in restraint of the trade of Group Health Association, Inc., a nonprofit cooperative which provided medical services for its members and their dependents. The indictment also charged that the de-

³⁵ Id. at 435 (by implication).

³⁶ 18 F. Cas. 506 (No. 10,388) (C.C.D. Me. 1834). It appears that Justice Story used Samuel Johnson's definition of trade: "Occupation; particular employment, whether manual or mercantile, distinguished from the liberal arts or learned professions." S. Johnson, *Dictionary of the English Language* (7th ed. 1785).

³⁷ Act of Feb. 18, 1793, ch. 8, § 32, 1 Stat. 316.

³⁸ 18 F. Cas. at 507.

³⁹ 286 U.S. at 436-37.

⁴⁰ 302 F. Supp. at 465.

⁴¹ Id.

⁴² 110 F.2d 703 (D.C. Cir. 1940), rev'g 28 F. Supp. 752 (D.D.C. 1939).

⁴³ Id. at 710.

⁴⁴ *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), aff'g 130 F.2d 233 (D.C. Cir. 1942).

⁴⁵ Other defendants in the case were the Medical Society of the District of Columbia, Harris County Medical Society, Washington Academy of Surgery, and several individuals.

fendants, in violation of section 3, restrained the trade of doctors employed by Group Health, and hospitals utilized by Group Health members.

According to the government, the AMA attempted to prevent Group Health from attracting doctors to its staff or retaining those already on it by threatening doctors with expulsion from the AMA if they worked for Group Health. The AMA also threatened disciplinary action against doctors who afford consultation privileges to Group Health physicians and against hospitals which admitted Group Health doctors to their courtesy staffs.

The district court sustained a demurrer by the AMA on the grounds that the practice of medicine was not "trade" within the meaning of the Sherman Act,⁴⁶ and that the indictment was vague and uncertain and did not clearly charge the commission of a crime.⁴⁷ The district court based its holding upon the fact that *The Schooner Nymph* definition of the word "trade" excluded medicine and that this definition was adopted by the Supreme Court in *Atlantic Cleaners*.⁴⁸

The court of appeals reversed the district court and held that all occupations in which men were engaged for a livelihood, including the practice of medicine, were "trade" for the purpose of the Sherman Act.⁴⁹ In reaching this conclusion the court reiterated the well-established principle that proper interpretation of the Act is achieved only by analyzing its legislative history. Such analysis established that Congress adopted the common law meaning of "trade." Citing English⁵⁰ and American⁵¹ common law cases which considered restraints on the practice of medicine "restraints of trade," the court of appeals concluded that the practice of medicine was "trade" for purposes of the Sherman Act.

With regard to the AMA's contention that the Supreme Court had excluded the learned professions, including the practice of medicine, from the scope of the Sherman Act by virtue of its adoption of *The Schooner Nymph* definition in *Atlantic Cleaners*, the court of appeals stated that the only question before the Court in *Atlantic Cleaners* was whether the word "trade" was broad enough to include the cleaning and dyeing industry.⁵² The court of appeals then concluded:

To reinforce its reasoning, the Court quoted language which happened to exclude the learned professions, but this limitation was not responsive to the question at hand [whether cleaning and dyeing was trade] and was purely casual, and in the circumstances ought not, we think, to be regarded as

⁴⁶ United States v. American Medical Ass'n, 28 F. Supp. 752, 755 (D.D.C. 1939).

⁴⁷ Id. at 757.

⁴⁸ Id. at 755.

⁴⁹ 110 F.2d at 710.

⁵⁰ See, e.g., *Horne v. Graves*, 131 Eng. Rep. 284 (C.P. 1831).

⁵¹ See, e.g., *Cook v. Johnson*, 47 Conn. 175 (1879); *Haldeman v. Simonton*, 55 Iowa 144, 7 N.W. 493 (1880).

⁵² 110 F.2d at 709.

a proper guide in deciding the important question in this [AMA] case.⁵³

After deciding in favor of the government on the other contested issues, the court of appeals remanded the case to the district court for trial on the merits, where a jury subsequently convicted the AMA of violating Section 3 of the Sherman Act.

The AMA appealed to the court of appeals⁵⁴ and argued that the Supreme Court, in *Apex Hosiery Co. v. Leader*,⁵⁵ had repudiated the reasoning of the first AMA court of appeals decision which held that the practice of medicine was "trade" within the meaning of the Sherman Act.⁵⁶ In *Apex Hosiery* the Supreme Court held that the end sought by the Sherman Act was the "prevention of restraints to free competition in business and commercial transactions . . ."⁵⁷ The AMA argued that the practice of medicine was not a commercial transaction, and hence was not intended by Congress to be covered by the Sherman Act.⁵⁸ Rejecting this argument, the court of appeals reaffirmed its earlier opinion, holding that the practice of medicine was "trade" for purposes of the Act.⁵⁹ The court asserted that even exempting medicine from the Sherman Act would not exculpate the defendants because they had restrained the activities of Group Health, an association that provided a business service.⁶⁰

On further appeal the Supreme Court affirmed,⁶¹ but refused to decide whether the practice of medicine was "trade" within the meaning of the Sherman Act.⁶² Instead, the Court based its decision solely on the fact that the AMA had restrained the activities of Group Health.⁶³

Group Health is a membership corporation engaged in business or trade. Its corporate activity is the consummation of the cooperative effort of its members to obtain for themselves and their families medical service and hospitalization on a risk-sharing prepayment basis. The corporation collects its funds from members. With these funds physicians are employed and hospitalization procured on behalf of members and their dependents. The fact that it is coöperative, and procures service and facilities on behalf of its members only, does not remove its activities from the sphere of business.⁶⁴

⁵³ Id.

⁵⁴ *American Medical Ass'n. v. United States*, 130 F.2d 233 (D.C. Cir. 1942).

⁵⁵ 310 U.S. 469 (1940).

⁵⁶ 130 F.2d at 235.

⁵⁷ 310 U.S. at 493.

⁵⁸ 130 F.2d at 235, 237.

⁵⁹ Id. at 235-37.

⁶⁰ Id. at 238.

⁶¹ 317 U.S. 519 (1943).

⁶² Id. at 528.

⁶³ Id.

⁶⁴ Id.

The refusal of the Supreme Court to consider whether the practice of medicine was "trade" within the meaning of the Sherman Act is an implicit rejection of the all inclusive definition offered in the first *AMA* court of appeals decision and relied upon by the *Webster* court.

Not only did the Supreme Court fail to adopt the court of appeal's definition of the word "trade," but it also refused to comment on *The Schooner Nymph* definition adopted in *Atlantic Cleaners*. The status of *The Schooner Nymph* definition remained in doubt until the Supreme Court decided *United States v. National Ass'n of Real Estate Bds.*⁶⁵ ten years later.

At issue in the *Real Estate Boards* case was whether the sale of personal services was "trade" within the meaning of Section 3 of the Act. The defendants claimed an exemption under Section 6 of the Clayton Act,⁶⁶ which states that the labor of humans is not an article of commerce. The Court rejected this contention and cited, in addition to *The Schooner Nymph* definition, the definition⁶⁷ offered by the court of appeals in the first *AMA* case which purported to include *all* occupations in the term "trade."⁶⁸ However, with respect to the *AMA* definition, the Supreme Court stipulated that it was not "intimating an opinion on the correctness of the application of the term to the professions."⁶⁹

Since the first application of *The Schooner Nymph* definition to Section 3 of the Sherman Act, the Supreme Court has had two opportunities to reject or modify it. In the *AMA* case the Court refused to act in spite of several common law cases associating medicine with antitrust actions. In the *Real Estate Boards* case the Court again refused to overrule *The Schooner Nymph* definition. Thus it appears that the Supreme Court still recognizes the validity of the definition in its entirety. Since this definition excludes higher education as well as the learned professions, it is submitted that the *Webster* decision has failed to recognize an important legal precedent. Instead the *Webster* court has relied upon a definition appearing in a court of appeals decision which has been implicitly rejected by the Supreme Court.

The *Webster* court maintained, however, that higher education, as a result of its phenomenal growth and expansion in the United States, has taken on many of the attributes of business and should consequently be considered a "trade."⁷⁰ To deny this, the court said, would be "to ignore the obvious and challenge reality."⁷¹ The implication to be drawn from this is that even if education was once an activity exempted from the Sherman Act, it has lost that privilege, and must now be treated as any other large business or commercial enterprise.

⁶⁵ 339 U.S. 485 (1950).

⁶⁶ 15 U.S.C. § 17 (1964).

⁶⁷ 339 U.S. at 490-91.

⁶⁸ *Id.* at 491.

⁶⁹ *Id.* at 492.

⁷⁰ 302 F. Supp. at 465-66.

⁷¹ *Id.* at 466.

The assumption underlying this argument—that the commercialization of an activity automatically brings such an activity within the ambit of the Act—is invalid. The exigencies of our society have required colleges and universities to adjust their operations accordingly. Physical growth and the adoption of certain business techniques are unavoidable by-products of this effort. Although higher education has become commercialized in some respects, this, in itself, is insufficient to bring the activities of educational institutions within the definition of “trade.” As previously mentioned, the purpose of higher education is to serve the community. As such, higher education can be distinguished from the business and commercial enterprises that have traditionally been considered “trade.”

The *Webster* court, in holding that Marjorie Webster was engaged in “trade,” placed emphasis upon the fact that the school was profit-oriented: “Middle States can hardly deny that plaintiff is engaged in trade since the plaintiff’s proprietary character is the reason for the membership exclusion and the *sine qua non* of this proceeding.”⁷² Apparently the court is suggesting that even if higher education is generally not subject to the Sherman Act, this exemption would not apply to Marjorie Webster, a profit-making institution. Undeniably, the Sherman Act was intended to control abuses generated by the profit system. But the Act was directed at certain *activities* or *occupations*, profit or nonprofit, which were exploiting the consumer. The Supreme Court has itself recognized that the lack of profit motive will not, in itself, exclude an activity from the Sherman Act.⁷³ Correlatively, the existence of a profit motive should not automatically make the activity a “trade” within the meaning of section 3.⁷⁴ Moreover, *The Schooner Nymph* definition, which has been adopted by the Supreme Court, specifically excepts the liberal arts from the definition of “trade,” regardless of whether the institution is engaged in making a profit. Therefore, the question of Marjorie Webster’s status under the Sherman Act can not be answered by simply emphasizing that it, unlike other institutions, is engaged in making a profit.

B. Reasonableness of Restraint

Having established that Marjorie Webster was engaged in “trade,” the *Webster* court then examined the nature of the alleged restraint. It utilized the guidelines offered by Justice Brandeis⁷⁵ in the majority opinion in *Chicago Bd. of Trade v. United States*:⁷⁶

But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of

⁷² *Id.*

⁷³ See, e.g., *American Medical Ass’n v. United States*, 317 U.S. 519, 528 (1943).

⁷⁴ See Brief for Appellant at 39-40, *Marjorie Webster Junior College, Inc. v. Middle States Ass’n of Colleges & Secondary Schools*, — F.2d — (D.C. Cir. 1970).

⁷⁵ 302 F. Supp. at 467.

⁷⁶ 246 U.S. 231 (1918).

trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. *To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.*⁷⁷ (Emphasis added.)

Application of the Brandeis guidelines led the *Webster* court to conclude not only that the exclusionary rule inhibited Marjorie Webster's ability to compete, but also that the rule did not further the objectives of Middle States.⁷⁸ Both of these findings are incorrect, and it is submitted that the application of the entire Brandeis test supports the proposition that the restraint imposed was reasonable.

The *Webster* court found that Middle States had acquired monopoly power over regional accreditation, and, in denying it to Marjorie Webster, had deprived the institution of a "significant business service."⁷⁹ Citing *Associated Press v. United States*⁸⁰ and *Silver v. New York Stock Exch.*⁸¹ as authority, the *Webster* court held that the denial of accreditation was actionable under the antitrust laws as an unreasonable restraint of trade.⁸² The facts in *Associated Press* and *Silver* are, however, clearly distinguishable from the facts in *Webster*.

In *Associated Press* the Government had charged in the nonprofit membership association with promulgating bylaws which constituted restraints of trade in violation of the Sherman Act. According to the Associated Press (AP) bylaws, an applicant could not be admitted to membership if he competed with an AP member, unless the member consented. Also, AP members were forbidden to disseminate AP news to non-member newspapers. The District Court for the Southern District of New York entered summary judgment for the government, and issued an injunction prohibiting enforcement of these bylaws.⁸³ On direct appeal the Supreme Court affirmed,⁸⁴ stating: "It is apparent that the exclusive right to publish news in a given field, furnished by the AP and all of its members, gives many newspapers a competitive advantage over their rivals."⁸⁵

⁷⁷ Id. at 238.

⁷⁸ 302 F. Supp. at 469.

⁷⁹ Id. at 468-69.

⁸⁰ 326 U.S. 1 (1945).

⁸¹ 373 U.S. 341 (1963).

⁸² 302 F. Supp. at 467, 469.

⁸³ *United States v. Associated Press*, 52 F. Supp. 362, 363 (S.D.N.Y. 1943).

⁸⁴ 326 U.S. 1 (1945).

⁸⁵ Id. at 17.

The service provided by AP is significantly different from the accreditation granted by Middle States. Accreditation is more an honorarium than a business service. It identifies the accredited school as an institution which subscribes to and has achieved the standards and goals promulgated by the other members of the voluntary accrediting association. Unlike membership in the AP, accreditation cannot be purchased, it must be earned. Although accreditation helps a school's competitive position and increases its stature, its primary function is to set standards and to recognize institutions that have achieved these standards. The AP, on the other hand, is a true business service which is only incidentally concerned with the improvement of newspaper quality.

In *Silver* the service denied was access to information regarding stock market transactions. Silver, a Texas stockbroker, was not a member of the New York Stock Exchange (the Exchange), but had arranged for direct telephone communications with several Exchange members for the purpose of obtaining current information on market activities. The Exchange ordered the lines disconnected without granting Silver a hearing, which resulted in a severe loss to Silver's business. The District Court for the Southern District of New York entered summary judgment for Silver,⁸⁶ but the Second Circuit Court of Appeals reversed.⁸⁷ The Supreme Court granted certiorari,⁸⁸ and held that denial of this service, at least without granting Silver a hearing, was a violation of the antitrust laws.⁸⁹ This service, as in *Associated Press*, was so vital to the occupation in which the plaintiff was engaged that denial of the service put him at a severe competitive disadvantage. Indeed, Silver's inability to utilize this service had resulted in one of his companies going out of business. Marjorie Webster, on the other hand, has prospered in spite of the fact that it has not received accreditation. There is no indication that Marjorie Webster has suffered any noticeable financial injury. Its profits have increased during the years 1961-1969 by over 200 percent.⁹⁰ It receives over 90 percent of its revenue from student tuitions,⁹¹ and still rejects over 200 students per year.⁹² Admittedly, Marjorie Webster is not held in the same esteem as accredited schools. This lack of esteem, however, has not affected its competitive position, and it is ludicrous to conclude that it has been denied a "significant business service."

In addition to finding that Marjorie Webster had been denied a "significant business service," the court concluded that Middle States' exclusionary rule did not further the objectives of the association.⁹³ Rather than testing the nexus between Middle States' objectives

⁸⁶ *Silver v. New York Stock Exch.* 196 F. Supp. 209 (S.D.N.Y. 1961).

⁸⁷ *Silver v. New York Stock Exch.* 302 F.2d 714 (2d Cir. 1962).

⁸⁸ 371 U.S. 808 (1962).

⁸⁹ 373 U.S. at 365.

⁹⁰ Brief for Appellant, at 32.

⁹¹ Defendant's Proposed Findings of Fact at 65.

⁹² *Id.* at 66.

⁹³ 302 F. Supp. at 469.

and its exclusionary rule, the court substituted its judgment for what Middle States' objectives should be:

Educational excellence is determined not by the method of financing but by the quality of the program. Middle States' position . . . ignores the alternative possibility that the profit motive might result in a more efficient use of resources, producing a better product at a lower price.⁹⁴

The *Webster* court has unjustifiably thrust upon Middle States an objective—the encouragement of economic efficiency—which it does not have. The purpose of Middle States is to foster the improvement of higher education. The rules of the association were established by professional educators who felt that “proprietary ownership limits the full development of an institution of higher education.”⁹⁵ This philosophy is not mere conjecture but is based upon the sad experience of profit-making schools⁹⁶ and the conditions which normally accompany the existence of a profit motive.⁹⁷

Admittedly, there is nothing inherently evil in making a profit. However, profit considerations are detrimental to those factors which are vital to an effective and progressive educational institution. Of these factors, two of the most important are the quality of the administration and the role of the faculty.

Middle States considers the directing force wielded by the president of a college or university an essential element in achieving and maintaining educational excellence.⁹⁸ Individuals of the caliber and stature required for such a position cannot function in an owner-employee relationship. “They must define the institution in their own persons, the proprietary configuration will not allow them to do so.”⁹⁹

Similarly, the faculty has its special role in an educational institution, and proprietary control would undermine this role. The faculty has the burden of establishing and operating the educational program. They have the responsibility for making many difficult academic decisions and must be allowed to do so without fear of retaliation. Middle States correctly justifies its position that a proprietary school is ill-suited to attracting or retaining a qualified faculty:

A college is a vastly more complex establishment than a business is, with involutions of responsibility and a dispersion of power which nearly defies analysis. The reason is that the kind of people who do the best work in higher education, the kind who give it its vision, drive, and authority, flourish best in this atmosphere; indeed the best of them will accept no other, and have no need to.

⁹⁴ Id. at 468.

⁹⁵ Memorandum from the President of Middle States to the Principals, Headmasters, and Presidents of Member Institutions, August 1, 1969, at 4.

⁹⁶ Daniel Webster; Meet Marjorie Webster, 55 A.B.A.J. 1186, 1187 (1969).

⁹⁷ Brief for Appellant, at 9.

⁹⁸ Memorandum, supra note 95, at 3.

⁹⁹ Id.

A labyrinth of academic organization, professional responsibilities, individual involvement, academic freedom, tenure, and all manner of consequent understandings has grown up to protect it. To implant all this mechanism in the employed body of a business corporation, and to attain thereby under the terms of private ownership the relationships which infuse and sustain a faculty, is unthinkable.¹⁰⁰

Still another factor which influenced Middle States in promulgating its exclusionary rule is the adverse affect which the profit motive might have on the unity of purpose necessary in an educational institution.¹⁰¹ This unity of purpose, a total commitment to the educational task, is one of the most important criteria for evaluating a school. The existence of a profit motive destroys this unity of purpose and jeopardizes the ultimate goal of higher education—the attainment of academic excellence.

The real danger in proprietary institutions is that profit considerations might take precedence over educational considerations. In many situations the best educational decision may be financially unwise. Whether an institution should add to its faculty in order to accommodate a larger student body, or increase the size of its library to better serve its existing enrollment, are just two situations where a conflict in objectives might lead to a wrong decision. Also, certain activities, such as scientific research, might be relegated to a position of low priority solely because of their small return on investment.

Another problem inherent in proprietary institutions is their susceptibility to rapid change. The death of the owner or the sale of the controlling interest could affect the quality of the institution. "[T]he thought that the owner of a proprietary institution could change its nature overnight is utterly repugnant to the academic community."¹⁰² The present procedure of Middle States is to review accredited schools every ten years.¹⁰³ It was able to adopt this procedure only because the goals of nonprofit institutions are relatively stable. If proprietary schools were accredited, Middle States would be required to re-evaluate these schools each time a significant portion of their ownerships was transferred. Such a change in procedure would probably be administratively and financially impracticable.

Finally, the need for controversy and tension within educational institutions militates against the accreditation of proprietary schools. The hallmark of a great university is its encouragement of diverse and new ideas. "[T]he continuous dissension within a common commitment, is what keeps . . . the institution in a healthy turmoil."¹⁰⁴ It is doubtful whether this "healthy turmoil" would be fostered, or even permitted, in a proprietary institution.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.* at 4.

¹⁰³ Defendant's Proposed Findings of Fact at 30.

¹⁰⁴ Memorandum, *supra* note 95, at 4.

LIABILITY OF PRIVATE ACCREDITING ASSOCIATIONS

Thus it appears that Middle States has justification for fearing that when educational decision-making has been put in the hands of individuals who are concerned with making a profit, it is probable that quality will suffer, or at least fail to enjoy the undisputed primacy possible only in a nonprofit institution. The nonprofit criterion, although not assuring educational excellence, reduces the hazards which were considered above.

II. THE CONSTITUTION

As mentioned earlier Marjorie Webster also alleged that Middle States violated the due process clause of the Constitution by excluding the institution from consideration solely because of its profit-making character.¹⁰⁵ Marjorie Webster asserted that Middle States was a private association performing a state function and was thus subject to constitutional restraints. Alternatively it argued that Middle States exercised delegated powers of governmental nature. This, it concluded, would also limit the activities Marjorie Webster could constitutionally perform. Middle States, on the other hand, denied that it was engaged either in the performance of a state function or that it was exercising delegated powers. Thus it concluded that its internal policies were not subject to judicial scrutiny. The court, however, agreed with Marjorie Webster, and held that Middle States was engaged in a quasi-governmental activity and was therefore subject to constitutional constraints.¹⁰⁶ It further found that the evidence adduced with respect to the Sherman Act was applicable to the constitutional argument, and that this evidence clearly demonstrated that Middle States' exclusionary rule was arbitrary, discriminatory, and unreasonable and was thus unconstitutional.¹⁰⁷

In support of its holding the *Webster* court noted the role accreditation plays in the granting of federal funds to students attending educational institutions.¹⁰⁸ Federal funds will often not be released unless the program followed by the student has been accredited by a nationally recognized or regional accrediting association.¹⁰⁹ The court noted that the United States Office of Education has an agreement with Middle States whereby an applicant for regional accreditation may qualify for federal funding assistance pending the processing of its application.¹¹⁰ The *Webster* court did not consider, however, that provision had been made in the cited legislation for institutions without

¹⁰⁵ See p. 286 *supra*.

¹⁰⁶ 302 F. Supp. at 470.

¹⁰⁷ *Id.* at 471.

¹⁰⁸ *Id.* at 470.

¹⁰⁹ See, e.g., 38 U.S.C. § 1653 (1964). This section pertains to assistance given by the Veterans Administration to Korean War veterans attending either nonprofit or proprietary schools.

¹¹⁰ 302 F. Supp. at 470.

regional accreditation to qualify for the federal program by means of direct application to government accrediting agencies.¹¹¹

The authorities relied upon by the *Webster* court do not support its holding that Middle States is a quasi-governmental agency. For instance, in *Evans v. Newton*¹¹² the contested activity was the operation of a park. The park had been willed to the city of Macon, Georgia, with the stipulation that its use was to be restricted to Caucasians. When the city desegregated the park, a suit was brought in a state court in which the court was asked to appoint private trustees who would continue the segregationist policy. The Georgia court appointed the trustees. After the Georgia Supreme Court affirmed,¹¹³ the United States Supreme Court reversed and ordered the park returned to public ownership. The Court noted that, in spite of the transfer, the park was still maintained with municipal funds, and that over the years it had acquired an aura of public ownership that could not be removed simply by returning it to private trustees.¹¹⁴ In its opinion the Supreme Court was careful to note that the mere provision of services by a private enterprise similar to those offered by the government was not sufficient to impose constitutional constraints.¹¹⁵ Government control or assistance must be present before the activity can be considered subject to such constraints. Middle States, however, has never been subject to governmental control regarding its accrediting activities. Hence, to hold that it is subject to constitutional constraints merely because it is engaged in a service that is also rendered by some governmental agencies is an unwarranted extension of the principle of the *Evans* case.

*Marsh v. Alabama*¹¹⁶ and *Terry v. Adams*,¹¹⁷ the other cases cited by the *Webster* court, may also be distinguished. Generally they hold that some activities, such as the conduct of elections or the operations of a municipality, are so fundamentally governmental in nature as to automatically subject them to constitutional constraints. To consider accreditation to be this type of basic governmental function is unjustified. In the United States accreditation has historically been a non-governmental undertaking.

By accepting the regional accreditation offered by Middle States as an adequate indication of institutional quality, the Government has not delegated any of its obligations or services. It has allowed applicants for federal assistance to *substitute* this evaluation in lieu of one by a governmental agency for purposes of determining eligibility for federal programs. The Government is merely using Middle States as a facility; it has not delegated any powers to Middle States.

¹¹¹ 38 U.S.C. § 1654 (1964). This section outlines the procedure for securing accreditation from agencies which each state is authorized to establish.

¹¹² 382 U.S. 296 (1966).

¹¹³ 220 Ga. 280, 138 S.E.2d 573 (1964).

¹¹⁴ 382 U.S. at 301.

¹¹⁵ *Id.* at 300.

¹¹⁶ 326 U.S. 501 (1946).

¹¹⁷ 345 U.S. 461 (1953).

III. COMMON LAW

Marjorie Webster also contended that Middle States' refusal to consider its application for accreditation constituted a violation of the common law pertaining to the operation and conduct of the internal affairs of private associations. The college argued that Middle States had acquired monopoly power over accreditation, and that accreditation was an economic necessity. It was further contended that Middle States was unreasonably denying accreditation and, hence, was subject to judicial regulation. Middle States countered by denying that it possessed such power or that it was using what powers it did have unreasonably. Middle States also disputed the allegation that Marjorie Webster was being injured by lack of regional accreditation. The *Webster* court applied the same evidence adduced with respect to the antitrust aspects of the case, and found that without regional accreditation the ability of Marjorie Webster to continue to operate successfully was doubtful.¹¹⁸ Relying on *Falcone v. Middlesex County Medical Soc'y*,¹¹⁹ the *Webster* court held that judicial intervention was justified and granted the relief sought by Marjorie Webster.¹²⁰

In *Falcone* the New Jersey Supreme Court affirmed a decision of the trial court which ordered the medical society to admit to membership a duly licensed physician.¹²¹ Doctor Falcone had been excluded by the defendant-society solely because he was not a graduate of a four-year, AMA-approved medical school. As a result of the exclusion, Dr. Falcone was unable to use the facilities of local hospitals, and was, in effect, prevented from practicing his profession. In holding that judicial intervention was warranted, the *Falcone* court noted two factors. First, the effect of the exclusion was to limit the privilege granted by the state-issued license.¹²² Second, the exclusion resulted in severe financial loss to the plaintiff.¹²³ Middle States' refusal to accredit profit-oriented institutions also stems from a professional concern for standards. However, it does not limit any state-granted rights or privileges. As previously mentioned, Marjorie Webster has not suffered severe financial injury. Thus, the two critical facts present in *Falcone* are absent in *Webster*.

Another common law case involving a private membership association, but not cited by the *Webster* court, is *Grillo v. Board of Realtors*.¹²⁴ The association in *Grillo* was a trade association which offered its members the benefits of a multiple listing real estate service. Grillo, an unsuccessful applicant for membership, was denied access to this service. Although Grillo did not establish severe financial loss as a result of this denial, the court found that the action of the as-

¹¹⁸ 302 F. Supp. at 428.

¹¹⁹ 34 N.J. 582, 170 A.2d 791 (1961).

¹²⁰ 302 F. Supp. at 469.

¹²¹ 34 N.J. at 598, 170 A.2d at 800.

¹²² *Id.* at 597, 170 A.2d at 799.

¹²³ *Id.* at 587, 170 A.2d at 794.

¹²⁴ 91 N.J. Super. 202, 219 A.2d 635 (Ch. 1966).

sociation was illegal.¹²⁵ In reaching this decision the court employed a "business advantage" test similar to that developed in cases adjudicated under the antitrust laws.¹²⁶ Grillo was awarded monetary damages and the association was compelled to make the service available to all licensed real estate brokers.

Comparing *Falcone* with *Grillo*, it appears that the courts employ different standards when scrutinizing the membership criteria of professional associations as opposed to trade associations. Professional groups can validly impose restrictions on their membership to improve professional standards so long as they do not significantly limit state-granted privileges or *severely* affect the financial situation of the individuals excluded. Trade associations, on the other hand, cannot utilize standards which deprive an individual or business of a "business advantage." Hence, a less stringent test is applied in the case of trade associations. The *Webster* court, however, failed to differentiate between judicial intervention in the activities of private professional associations as distinguished from private trade associations. Instead of requiring the *severe* financial injury which the *Falcone* case demanded for judicial relief, the court implicitly utilized the "business advantage" test—a test which is not applicable to professional associations.

CONCLUSION

Historically, the accrediting activities of private, professional associations have been accorded special deference by the courts.¹²⁷ The basis for this deference lies in the very nature of the accrediting process; it is a service-oriented function that requires an expertise the judiciary lacks. In *Parsons College v. North Central Ass'n of Colleges & Secondary Schools*,¹²⁸ the court noted this expertise:

In this field, the courts are traditionally . . . hesitant to intervene. The public benefits of accreditation, dispensing information and exposing misrepresentation, would not be enhanced by judicial intrusion. Evaluation by the peers of the college, enabled by experience to make comparative judgments, will best serve the paramount interest in the highest practicable standards in higher education.¹²⁹

Through this form of self-government, accredited colleges and universities in the United States have maintained high standards of quality.

¹²⁵ Id. at 225, 219 A.2d at 648.

¹²⁶ Id. at 222, 219 A.2d at 646.

¹²⁷ See, e.g., *United States v. Bar Ass'n*, 197 F.2d 408 (D.C. Cir. 1952); *North Dakota v. North Cent. Ass'n of Colleges & Secondary Schools*, 99 F.2d 697 (7th Cir. 1938); *Parsons College v. North Cent. Ass'n of Colleges & Secondary Schools*, 271 F. Supp. 65 (N.D. Ill. 1967); *Salter v. New York State Psychological Ass'n*, 14 N.Y.2d 100, 198 N.E.2d 250, 248 N.Y.S.2d 867 (1964).

¹²⁸ 271 F. Supp. 65 (N.D. Ill. 1967).

¹²⁹ Id. at 74.

LIABILITY OF PRIVATE ACCREDITING ASSOCIATIONS

Admittedly, accrediting associations are not, and should not be, immune from judicial review. Any review of standards, however, should be confined to instances where the association has either applied its policies in an arbitrary or discriminatory manner, or advocated policies that are manifestly inconsistent with its announced goals. The *Webster* court has, however, struck down the nonprofit standard of Middle States without proof of either situation.

Should it be upheld, the *Webster* decision might severely injure the effectiveness of accrediting associations. Subjecting accrediting associations to law suits may discourage the maintenance of standards conducive to the improvement of higher education. Rather than risk involvement in costly litigation, the association may be induced to grant accreditation to all applicants approaching the standards normally required. This progressive lowering of quality could eventually destroy the accrediting activities of private associations as effective instruments of self-regulation.

ROBERT A. O'NEIL