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Recent Decisions: Antitrust Law - Group Boycotts - Private Associations [*Marjorie Webster junior College, Inc. v. Middle States Association of Recent Decisions: Colleges & Secondary Schools, Inc.*, 302 F. Supp. 459 (D.D.C. 1969)]

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the basis of a card majority may refuse and require the union to petition for an election.[33] However, it will be interesting to observe the Board's reaction to those still zealous employers who choose to embark upon a preelection campaign at the risk of crossing that imaginary *Gissel* line drawn between those unfair labor practices that do or do not invalidate an election.

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ANTITRUST LAW — GROUP BOYCOTTS — PRIVATE ASSOCIATIONS

Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools, Inc., 302 F. Supp. 459 (D.D.C. 1969).

When the term "accredited" is applied to an educational institution, one may correctly assume that because the institution has met certain minimum standards of quality, the credits or degrees that it awards will be generally accepted at face value. Given the fact that much of society has made education a prerequisite to participation in its most lucrative occupations, the desirability of attending an accredited institution is greatly enhanced. The organizations responsible for accrediting institutions of higher learning therefore possess the power to control each institution's access to its very lifeblood — a capable student body. Liberal arts institutions are accredited by six regional associations, which, until recently, have exercised their power with complete autonomy. The question of whether the power of these associations to promulgate and enforce educational standards is subject to judicial supervision was recently presented to the District Court for the District of Columbia in *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*[1]

Marjorie Webster Junior College (Webster) is a junior college for women located in the District of Columbia. Middle States Association of Colleges and Secondary Schools (Middle States), a private, voluntary, nonprofit educational association, is one of the six

[33] This was the result in Aaron Bros. Co., 158 N.L.R.B. 1077 (1966). However, an employer may be forced to bargain if he has independent knowledge of the union's majority or if he refuses to bargain because he doubts the appropriateness of the unit rather than the existence of a majority. 395 U.S. at 594.

regional accrediting associations in the United States, and, as such, exercises a regional monopoly over the accreditation of liberal arts institutions. Although it had been accredited by the District of Columbia since 1947, Webster sought recognition by Middle States because accreditation by such regional associations is viewed more favorably by both educators and the public. One of Middle States' eligibility criteria prescribed that only *nonprofit* institutions would be considered for accreditation. Because Webster is a *proprietary* corporation, Middle States refused to evaluate it for accreditation. Thereupon, Webster brought an action to enjoin Middle States from applying its nonprofit criterion, seeking relief under two separate counts.

The first count invoked the injunctive relief which section 16 of the Clayton Act[2] provides for parties threatened with injury resulting from restraints of trade in violation of section 3 of the Sherman Antitrust Act.[3] The second count sought identical relief based upon both the due process clause of the fifth amendment and the common law of private associations. The court granted relief under each count, holding that Middle States' nonprofit criterion both constituted a restraint of trade in violation of section 3 of the Sherman Act and represented an arbitrary requirement which, when imposed by a quasi-governmental organization, violated the fifth amendment's due process requirement and the common law proscription against arbitrary exclusion from private associations.

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[1] 302 F. Supp. 459 (D.D.C. 1969).

[2] 15 U.S.C. § 26 (1964), which provides: "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws . . . ."

[3] 15 U.S.C. § 3 (1964) [hereinafter cited as Sherman Act], which provides: "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." In effect, the section applies the proscriptions of section 1 to the District of Columbia and the territories, thereby obviating the section 1 requirement that the restraint involve interstate commerce. When the challenging institution is located in a *state*, the interstate commerce requirement could be construed so as to bar recovery under the Act. While undoubtedly nonresidents will comprise a significant portion of the plaintiff's student body, it has been held that students who travel from one state to another to attend a university are not part of interstate commerce. Marston v. Ann Arbor Property Managers Ass'n, 302 F. Supp. 1276 (E.D. Mich. 1969). The reasoning of the *Marston* court is less than convincing when one considers the Supreme Court's expansive interpretations of the scope of interstate commerce. *See* Maryland v. Wirtz, 392 U.S. 183 (1968); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); Boynton v. Virginia, 364 U.S. 454 (1960). However, antitrust actions have been dismissed on the ground that the effect on interstate commerce was not substantial. Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964); Page v. Work, 290 F.2d 323 (9th Cir.), *cert. denied*, 368 U.S. 875 (1961); Elizabeth Hospital, Inc. v. Richardson, 269 F.2d 167 (8th Cir.), *cert. denied*, 361 U.S. 884 (1959).

Because section 3 of the Act prohibits only restraints of "trade or commerce," the *Webster* court was presented with a case of first impression: Whether an institution of higher learning is engaged in trade within the context of the Act? The traditional definition of trade was given by Mr. Justice Story in *The Nymph*:[4] "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 the learned professions*, it is constantly called a trade."[5] In *United States v. American Medical Association*,[6] the Court of Appeals for the District of Columbia Circuit made a significant departure from the *Nymph* definition, holding that the practice of medicine constituted trade under the Act.[7] However, it relied heavily on Mr. Chief Justice White's statement in *Standard Oil Co. v. United States*,[8] an early landmark in the antitrust area, that the Act covered those restraints of trade that were recognized at com-

[4] 18 F. Cas. 506 (No. 10,388) (C.C.D. Me. 1834).

[5] *Id.* at 507 (emphasis added). In *The Nymph*, Mr. Justice Story concluded that the word trade, as used in the statute, *included* a mackeral fishery. Within the context of the Act, the *Nymph* definition was adopted by the Supreme Court in Atlantic Cleaners & Dyers, Inc. v. United States, 286 U.S. 427, 436 (1932), and United States v. National Ass'n of Real Estate Bds., 339 U.S. 485, 492 (1950). In both cases the definition was used to expand the concept of trade — to include dry cleaners and real estate brokers — rather than to contract it. Thus, in each case the exclusion of the liberal arts and the learned professions from the definition can be regarded as dictum.

[6] 110 F.2d 703 (D.C. Cir.), *cert. denied*, 310 U.S. 644 (1940).

[7] In *AMA*, Group Health Association was a nonprofit cooperative, practicing contract medicine in the District of Columbia. In order to discourage the practice of contract medicine, the local branch of the American Medical Association threatened to — and in some instances did — expel members who worked for Group Health, or who consulted with Group Health physicians. Further, it coerced the area hospitals into depriving Group Health's patients of the use of their facilities. The Association was charged, under the criminal provisions of the Act [15 U.S.C. § 1 (1964)] with conspiring to restrain Group Health's trade. The district court sustained a demurrer to the indictment, but the court of appeals reversed, holding that Group Health was engaged in trade under the Act [110 F.2d 703 (D.C. Cir.), *cert. denied*, 310 U.S. 644 (1940)], and sent the case back for trial. The Association was convicted, and the conviction was affirmed. American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), *aff'd*, 317 U.S. 519 (1943). In affirming the conviction, the Supreme Court sustained the finding that Group Health was engaged in trade under the Act. 317 U.S. at 528. *But see* United States v. Oregon Medical Soc'y, 95 F. Supp. 103 (D. Ore. 1950), *aff'd*, 343 U.S. 326 (1952), where the district court found that prepaid medical plans did not constitute trade or commerce within the meaning of the Act. The Supreme Court affirmed the dismissal of the complaint, but on the ground that since the government failed to prove a concerted refusal to deal on the part of the defendants, the Court did not have to decide whether such a refusal would violate the antitrust laws. 343 U.S. at 336. It held that the district court's finding that the prepaid medical plans were not a part of interstate commerce was not clearly erroneous, but it refrained from discussing the district court's finding that the medical plans did not constitute trade. *See also* Riggall v. Washington County Medical Soc'y, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958).

[8] 221 U.S. 1 (1911).

mon law.[9] At common law the unreasonable restraint of a physician's practice did constitute a restraint of trade.[10] Thus, although *AMA* expanded the traditional definition of trade to include some professional activity, it impliedly restricted that expansion to those activities that were actionable restraints at common law: Accreditation was not such an activity.

The *Webster* court focused on the expansive trend established by the aforementioned decisions rather than upon the decisions' technical rationales. After noting that "[t]he indubitable effects of all these cases, English and American, is to enlarge the common acceptance of the word 'trade' when embraced in the phrase 'restraint of trade' to cover all occupations in which men are engaged for a livelihood,"[11] the court proceeded to review the trade aspects of higher education. It mentioned some of the ancillary indicia of trade — faculty salaries, building programs, dining halls, and bookstores — before coming to the crux of the issue:

> Webster is a corporation engaged in business for profit. Its corporate activity consists of offering educational facilities and services in exchange for the tuition charged students. . . . 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.[12]

Because *Webster's* fact situation restricts to proprietary schools the court's determination of who is engaged in trade under the Act, its language respecting higher education in general must be regarded as dictum. But even this narrow interpretation would expand the meaning of the word trade beyond the scope of that term as originally envisaged by Congress. While it can be safely assumed that Congress did not have the plight of unaccredited junior colleges in mind when it drafted the Act,[13] it did have in mind the public

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[9] *Id.* at 59.

[10] *See* Pratt v. British Medical Ass'n, [1919] 1 K.B. 244 (1918). *See also* Atkyns v. Kinnier, 154 Eng. Rep. 1429 (Ex. 1850); Hayward v. Young, 2 Chitty 407 (K.B. 1818); Davis v. Mason, 101 Eng. Rep. 69 (K.B. 1793). The issue usually arose when a physician took on an apprentice who then contracted with the physician not to practice independently, within a specified area, for a designated number of years. If the apprentice breached the contract, the physician would bring an action on a bond made by the apprentice to insure his compliance. The apprentice would then defend on the ground that the contract constituted an unreasonable restraint of trade.

[11] The court was quoting from United States v. American Medical Ass'n, 110 F.2d 703, 710 (D.C. Cir.), *cert. denied*, 310 U.S. 644 (1940).

[12] 302 F. Supp. at 466.

[13] The legislative history of the Act is summarized in I H. TOULMIN, ANTI-TRUST LAWS 1-23 (1949). The Act was directed at the large combinations of capital

interest in free and open competition.[14] Given the preferred position of education in today's society, the public interest in unrestricted competition in that area is manifest. Thus, because the *Webster* court was faced with both an injury to a private business entity[15] and a consequent public injury, the inclusion of proprietary educational institutions within the ambit of the word trade does not represent an unwarranted extension of the Act.[16]

Once the threshold issue of trade *vel non* is answered in the affirmative, in order for a violation of the Act to occur, there must also exist a "contract, combination or conspiracy"[17] in restraint of that trade. In *Webster* this requirement was easily met. Because membership in Middle States was concomitant with accreditation, the accredited members of Middle States constituted the requisite "combination." Further, in view of the fact that no specific intent is required to find a violation of the Act,[18] it was of no consequence

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which had accumulated after the civil war and were stifling competition. *See, e.g.*, 21 CONG. REC. 2456-57 (1890) (remarks of Senator Sherman).

[14] *See* I H. TOULMIN, *supra* note 13, at 96 n.11. *See also* Apex Hosiery Co. v. Leader, 310 U.S. 469, 490 n.11 (1940).

[15] Webster offers 2-year terminal and transfer courses. The students enrolled in the transfer course usually plan to transfer to a 4-year institution after graduating from Webster. As a result of Webster's lack of regional accreditation, complications could arise when its students attempt to transfer their credits earned at Webster. Foreseeing these complications, a student will be less likely to attend Webster than a similar but accredited junior college. Thus, it can be argued that Webster is operating at a competitive disadvantage in its recruitment of students, and this is sufficient injury to entitle it to the protection of the Act. Associated Press v. United States, 326 U.S. 1, 17 (1945); *see* Silver v. New York Stock Exch., 373 U.S. 341, 347 (1963).

[16] A more difficult question will arise, however, if, under the antitrust laws, a *nonprofit* school charges a regional accrediting agency with arbitrary action. In finding that hospitals in the District of Columbia were engaged in trade under the Act, the court in American Medical Ass'n v. United States, 130 F.2d 233 (D.C. Cir. 1942), said: "It is not necessary, in order to constitute trade or business, that it shall be carried on for a profit." *Id.* at 237. Practically all colleges and universities provide educational services in exchange for their students' tuition and they actively compete in the recruitment of these students. The public injury that results from restraints on competition in the educational field is no less severe because a nonprofit school is restrained. The fact that all of the funds received by nonprofit institutions are invested in the educational process — rather than only partly so with the remainder in the pockets of the trustees — should not deprive them of the protection of the Act. Although there is language in *Webster* which can be read to favor the extension of the term trade to all higher education [302 F. Supp. at 465-66], the holding is necessarily restricted to its facts. If and when a court upholds an action under the Act by a nonprofit school, that court will have to set definable limits to the expansion of the trade definition.

[17] *See* note 3 *supra.*

[18] United States v. Griffith, 334 U.S. 100, 105 (1948):

> It is, however, not always necessary to find a specific intent to restrain trade or to build a monopoly in order to find that the anti-trust laws have been violated. It is sufficient that a restraint of trade or monopoly results as the consequence of a defendant's conduct or business arrangements.

that the members of Middle States did not combine for the express purpose of restraining Webster's trade.

Although Middle States was literally a "combination," there remained the question of whether the Act should be applied against a salutary organization whose raison d'être is public service. The Act traditionally has been invoked against commercially oriented restraints of trade — situations wherein the party applying the restraint received some economic benefit.[19] Apart from being noncommercially oriented, Middle States performs a highly necessary and valuable function: It exists only to set standards through which the quality of an institution's educational product can be determined, and to aid institutions in achieving, maintaining, and improving that quality. There are, however, no analytical reasons why the Act should not be applied to noncommercial restraints. Section 3 prohibits *every* combination in restraint of trade,[20] and when an association such as Middle States possesses monopoly power in an area of vital public concern, it is important that it not act arbitrarily. Thus, in the absence of a more adequate remedy,[21] the Act provides a vehicle for controlling both economically oriented and service-minded organizations.

When a "combination" has been identified, the courts have applied one of two theories in determining the type of conduct which constitutes a violation of the Act. First, certain agreements or practices, because of their inherent anticompetitive nature and total lack of redeeming qualities, have been held illegal per se.[22] In such situations, when prohibited conduct is found, the Act's sanctions have been invoked without consideration of whether the activity was reasonable under the particular circumstances.[23] A second

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[19] *See* Coons, *Non-Commercial Purpose as a Sherman Act Defense*, 56 NW. U.L. REV. 705 (1962). In Council of Defense v. International Magazine Co., 267 F. 390 (8th Cir. 1920), the court held that a boycott of Hearst publications in the State of New Mexico was prohibited by the Act. The patriotic Council of Defense was retaliating against Mr. Hearst, because of antiwar comments appearing in his newspapers, by discouraging the distribution and purchase of his publications throughout New Mexico. This is the only Sherman Act case involving a restraint of trade for a purely noncommercial purpose.

[20] *See* note 3 *supra.*

[21] *See* text accompanying note 47 *infra.*

[22] *See, e.g.*, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (group boycotts); Northern Pac. Ry. v. United States, 356 U.S. 1 (1958) (tying arrangements); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing); United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (division of markets).

[23] In United States v. Container Corp. of America, 393 U.S. 333, 341 (1969), Mr. Justice Marshall, dissenting, remarked:

theory applied by the courts is the so-called "rule of reason." Under this rationale, the courts reason that all commercial agreements restrain trade to some extent. Thus, when the activity in issue does not fall within one of the per se categories, the courts have considered the reasonableness of the restraint in light of the surrounding circumstances,[24] and only restraints found unreasonable after such an examination have been held to violate the Act.[25]

The situation presented in *Webster* was, in antitrust terms, a "concerted refusal to deal," or "group boycott." In applying its nonprofit criterion, Middle States refused to deal with, or boycotted, Webster. Although the Supreme Court has applied the per se rule to group boycotts,[26] the lower federal courts have narrowly construed the rule, demonstrating their preference for the rule of reason.[27] This reluctance to apply the per se rule is quite justifiable in view of the wide variety of practices which have been termed group boycotts.[28] For example, in *Klor's, Inc. v. Broadway-Hale*

> They [per se rules] are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.

[24] The guidelines for determining reasonableness set down by Mr. Justice Brandeis in Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918), are often utilized by courts when implementing the rule of reason:

> [T]he 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. *Id.* at 238.

[25] *See, e.g.*, Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).

[26] *See* Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1940).

[27] *See* Deesen v. Professional Golfer's Ass'n of America, 358 F.2d 165 (9th Cir. 1966); Roofire Alarm Co. v. Royal Indem. Co., 202 F. Supp. 166 (E.D. Tenn. 1962), *aff'd*, 313 F.2d 635 (6th Cir.), *cert. denied*, 373 U.S. 949 (1963).

[28] No court would seriously consider applying the per se rule to every practice which can be brought within the term "group boycott." Certainly a basketball league can reasonably refuse to employ a player who has bet on games. *Cf.* Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1951). And a golfer's association can reasonably refuse to allow an unqualified nonmember to compete in its tournaments. Deesen v. Professional Golfer's Ass'n of America, 358 F.2d 165 (9th Cir. 1966). In each of these situations there exists a concerted refusal to deal with the plaintiff on the part of the members of the association.

An even better example of the inapplicability of a blanket per se approach can be drawn from Radiant Burners v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961). In *Radiant*, the defendant association (AGA) operated laboratories which tested gas burners for, among other things, safety. When a burner passed the tests it received

Stores, Inc.[29] and *Fashion Originators' Guild of America v. FTC*[30] — leading cases which have applied the per se rule — there were unique elements involved. In *Klor's*, the defendant department store chain used its great buying power to coerce manufacturers and distributors of appliances not to sell to Klor's, or only to sell to it on discriminatory terms, thereby attempting to drive Klor's out of the market. In *Fashion Originators*, the defendant guild was composed of manufacturers and designers of women's clothing and the textiles from which such clothing is made. They purposely refused to deal with retailers who sold garments made by manufacturers who had copied the guild's unpatented designs. The guild established extensive machinery to impose punitive measures on those members who deviated from its rules. A court would understandably be reluctant to apply a per se rule in cases where there is neither direct coercion, as in *Klor's*, nor a regulatory body perscribing rules and administering penalties, as in *Fashion Originators*. Moreover, in cases such as *Webster*, where there is not only a lack of coercion, but also a socially beneficial purpose involved, there is even less reason for application of the per se approach.[31]

The *Webster* court adopted the rule of reason approach, and, after a trial lasting almost 3 months, found that Middle States acted arbitrarily and unreasonably in refusing to evaluate Webster for accreditation. The court stated:

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the AGA's "seal of approval." The public utilities in the area, who were members of the AGA, refused to provide gas for those burners which had not been approved. Plaintiff's burner had been submitted for approval twice, but with no success. It was thus effectively excluded from the market because consumers will not buy burners for which they cannot obtain gas. The district court dismissed the complaint, but the Supreme Court reversed, holding that the refusal to provide plaintiff's burners with gas was a per se violation. Taking the plaintiff's allegations to be true, however, its burners were equal in quality or superior to those presently on the market, and the tests were subjectively influenced by members of the AGA, who were competitors of the plaintiff. Assuming the same fact situation, except that the tests were administered with complete objectivity, a per se approach would result in holding the defendants culpable for refusing to provide gas for an unsafe burner.

[29] 359 U.S. 207 (1959).

[30] 312 U.S. 457 (1941).

[31] *See* Handler, *Recent Developments in Antitrust Law 1958-1959*, 59 COLUM. L. REV. 843, 862 (1959); Note, *Concerted Refusals to Deal Under the Antitrust Laws*, 71 HARV. L. REV. 1531, 1532 (1958). The *Klor's* court, in distinguishing Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940) (where one of the factors which led the Court to decide that a labor union had not violated the Act, was that, as in *Klor's*, the restraint *did not affect market prices*), said: "[T]he Court in *Apex* recognized that the Act is aimed primarily at combinations having *commercial objectives* and is applied only to a very *limited extent* to organizations, like labor unions, which normally have *other objectives*." 359 U.S. at 213 n.7 (emphasis added). This language may be interpreted to condone a rule of reason approach in cases where the boycott is noncommercially oriented.

> Educational excellence is determined not by the method of financing but by the quality of the program. . . . [T]he profit motive might result in a more efficient use of resources, producing a better product at a lower price. . . . There is nothing inherently evil in making a profit and nothing commendable in operating at a loss.[32]

Thereupon it enjoined Middle States from applying its nonprofit criterion to Webster.

The second count was actually a combination of two separate theories: the common law of private associations, and the due process clause of the fifth amendment. The general rule in regard to private, voluntary associations is that membership is a privilege, not a right, and, therefore, the courts will not provide a remedy for arbitrary exclusion.[33] However, in 1930 Professor Chafee formulated what he called the "Strangle-hold Policy."[34] He pointed out that when the rule of judicial noninterference in the affairs of private associations arose, exclusion from a social or fraternal society resulted in little more than hurt feelings. But with the rise of powerful trade and professional associations, exclusion might operate as a complete bar to earning a living at one's chosen occupation. When an association gains such a "strangle-hold" in a particular occupational area, judicial intervention becomes appropriate.

In *Falcone v. Middlesex County Medical Society*,[35] the New Jersey Supreme Court adopted Professor Chafee's theory. Therein the local medical society refused to admit to membership a physician who, although licensed and qualified, did not meet the society's requirement of 4 years attendance at a medical school approved by the American Medical Association. The area hospitals required that a physician be a member of the society in order to use their facilities. On these facts, the court found that membership in the society was an "economic necessity" for Dr. Falcone, and directed the society to admit him. Thus, an exception to the rule of judicial noninterference was found to exist when a private association has a monopoly on the employment opportunities in a particular field.[36]

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[32] 302 F. Supp. at 468. For a discourse on the merits of proprietary education, see Manne, *Scholar v. Profits*, BARRON'S, Aug. 25, 1969, at 1.

[33] 6 AM. JUR. 2D *Associations and Clubs* § 18 (1963) & cases cited therein.

[34] Chafee, *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1021-23 (1930).

[35] 34 N.J. 582, 170 A.2d 791 (1961).

[36] *See* Hurwitz v. Directors Guild of America, Inc., 364 F.2d 67 (2d Cir. 1966); James v. Marinship Corp., 25 Cal. 2d 721, 155 P.2d 329 (1944); Kurk v. Medical Soc'y of Queens County, Inc., 46 Misc. 2d 790, 260 N.Y.S.2d 520 (Sup. Ct.), *rev'd on other grounds*, 24 App. Div. 897, 264 N.Y.S.2d 859 (1965).

The *Webster* court was correct in affording relief under the common law of private associations. As membership in Middle States was concomitant with accreditation, a denial of accreditation amounted to a denial of membership. Although until *Webster* the common law remedy had been restricted to situations where membership was an economic *necessity*, judicial intervention is equally as justifiable when an organization exercises complete control over *access* to a commercial pursuit. Private associations, such as the regional accrediting agencies, exist in areas of great public concern, and their internal regulations — unlike those of secret societies and churches[37] — are properly subject to judicial scrutiny. But caution must be exercised in the application of this supervisory power lest it destroy the autonomy on which such private associations thrive.[38] With respect to accrediting agencies, it is certainly better that educators possessing the required expertise, rather than the courts, set the standards for accreditation and decide which institutions meet them. The courts must carefully balance the association's power and the degree of its abuse against the value of private autonomy. When, as was true in *Webster*, the degree of power and extent of abuse are sufficient to outweigh the deference paid to expertise, judicial interference is most appropriate.[39]

The final argument raised in *Webster* was premised upon a line of cases holding that when a private association performs an essentially governmental function, it falls subject to the due process provisions of the Federal Constitution.[40] Although a number of arguments can be made for applying the public function rationale to regional accrediting agencies,[41] this approach was rather sum-

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[37] *See* Chafee, *supra* note 34, at 1024. Professor Chafee analogizes the obscure rules of secret societies and the theology of the churches to a "dismal swamp" where judicial intervention is inadvisable.

[38] *Id.* at 1027-28.

[39] *See* Comment, *The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Government Regulation*, 52 CORNELL L.Q. 104, 115 (1966). Judicial intervention, of course, should be limited to cases in which the action of the agency is either arbitrary or unreasonable. If the agency's conclusions have some basis in reason, the opinion of the court should not be substituted for that of the expert.

[40] *Cf.* Evans v. Newton, 382 U.S. 296 (1966); Terry v. Adams, 345 U.S. 461 (1953); Marsh v. Alabama, 326 U.S. 501 (1946). Although these cases dealt with factual situations wherein private organizations were performing — in a manner violative of the 14th amendment — functions normally allocated to state governments, the principal of quasi-governmental function applies equally in the fifth amendment-federal government context.

[41] *See* Comment, *supra* note 39 *passim*, wherein the author reviews these arguments. For present purposes, three are most relevant: First, some states adopt the agency's standards in accrediting their public institutions. Second, the public tends to

marily rejected in *Parsons College v. North Central Association of Colleges & Secondary Schools.*[42] However, relying heavily on the agency's role in the distribution of federal funds, the *Webster* court adopted it, finding that Webster's right to due process of law had been violated by Middle States' application of its nonproprietary criterion. This was an unwarranted extension of the quasi-government theory. Middle States is not a private body performing what has traditionally been a governmental function.[43] It is a private body performing what has always been a private activity. The government's use of Middle States' expertise in implementing some of its programs does not make Middle States an arm of government. The Constitution restricts only governmental activity; it has left to the legislatures and the courts the task of providing remedies against abusive private action.

Given the inappropriateness of the constitutional theory, the question raised by *Webster* is which of the two remaining theories relied upon by the court — antitrust and the common law of associations — represents the most appropriate rationale under which to enjoin future abuses of power by noncommercially oriented associations? The common law affords relief when a private right has been violated: The antitrust laws view restraints of competition as not only private, but public wrongs.[44] This concept of public injury is derived from the fact that often such restraints occur in a context where the injured party is either unaware of the injury,

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look on accreditation as a state rather than a private function. The third and strongest argument is that federal aid-to-education funds are usually restricted to regionally accredited schools. Thus, the decisions of the regional associations are *adopted* by the government in determining whether or not a school or its students will receive federal funds.

[42] 271 F. Supp. 65 (N.D. Ill. 1967). Parsons College lost its accreditation. It invoked a claim of due process on the theory that loss of accreditation would affect its federal aid. In denying relief, the court said:

> The fact that the acts of the Association in granting or denying accreditation may have some effect under governmental programs of assistance to schools or colleges does not subject it to the constitutional limits applicable to government, any more than a private employer whose decision to hire or fire may affect the employee's eligibility for governmental unemployment compensation. *Id.* at 70.

The court's analogy, however, disregards the association's monopolization of the accreditation process. Even so, the requirements of due process were observed in *Parsons*, and the loss of accreditation was due to more than Parsons' having become a proprietary institution. *See* Koerner, *The Life and Hard Times of Parsons College*, SATURDAY REV., July 19, 1969, at 53. *See also* Salter v. New York Psychological Ass'n, 14 N.Y.2d 100, 198 N.E.2d 250, 248 N.Y.S.2d 867 (1964).

[43] *See* cases cited note 40 *supra.*

[44] Sherman Act, 15 U.S.C. § 4 (1964); *see* 21 CONG. REC. 2461 (1890) (remarks of Senator Sherman).

or, although aware of the injury, cannot be expected to redress it. In these situations there is a definite need for the Federal Government to assume the role of parens patriae and enter the fray as a party plaintiff. However, because accrediting agencies and similar organizations act against the public interest *only* when they arbitrarily exclude individual institutional applicants, such applicants may reasonably be expected to pursue common law remedies. Further, the antitrust laws are, in large part, punitive measures, the violation of which may result in treble damages[45] and/or criminal convictions.[46] It seems incongruous to subject to those penalties an organization, performing a socially beneficial function, whose only "crime" may consist of an *honest error* in judgment. It is difficult to conceive of a fact situation where the defendant's actions would support the award of punitive damages at common law: the antitrust remedies are simply too harsh when applied in the present context. Consequently, the common law of private associations with its traditional civil remedies of both injunctive relief and damages furnishes the most appropriate theory for granting relief in *Webster*-type situations.[47]

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[45] Clayton Act, 15 U.S.C. § 15 (1964).

[46] Sherman Act, 15 U.S.C. § 1 (1964).

[47] However, if the appellate courts uphold *Webster* on the antitrust theory, the question will then arise whether the application of the Act to noncommercially oriented boycotts in general presents problems beyond those posed by the Act's extremely harsh damage provisions. How, for example, will the courts react if the Act is consequently invoked against boycotts having a so-called "higher purpose" — those instituted by civil rights groups for example? One writer has suggested that where such a noncommercial purpose exists, antitrust liability should depend upon a weighing of the anticompetitive effects of the activity against the policy advantage of the purpose and the likelihood of its realization through the means adopted. Coons, *supra* note 19, at 747. This type of rule, however, would place a court in the position of deciding what is a sufficiently "worthy cause," and results in a subjective application of the law that has no place in the antitrust area. When a noncommercial purpose exists, the courts can obviate this difficulty by restricting the application of the Act to those situations where there is a monopolistic control of facilities, free access to which is vital to the public welfare. *See* Associated Press v. United States, 326 U.S. 1, 25 (1945) (Frankfurter, J., concurring); United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1911); Wyman, *The Law of the Public Callings as a Solution of the Trust Problem* (pts. 1-2), 17 HARV. L. REV. 156, 217 (1903). This requirement of both monopoly power and required access will enable the courts to enforce the Act against entities similar to accrediting agencies, while exempting restraints directed toward a "higher purpose."