LAW AND CONTEMPORARY PROBLEMS

Volume 57 Autumn 1994 Number 4

FOREWORD: THE PLACE OF PRIVATE ACCREDITING AMONG THE INSTRUMENTS OF GOVERNMENT

CLARK C. HAVIGHURST*

I

INTRODUCTION

The impressive degree to which the U.S. economy depends upon private organizations rather than public regulators to establish quality standards for industrial products and service providers is the kind of thing on which a modern Alexis de Tocqueville could be expected to remark. One can only conjecture, of course, how that same widely hypothesized observer of the modern scene might feel about political scientists who lump private certifying, credentialing, and accrediting agencies under the acronym "quangos"—quasi-autonomous nongovernmental organizations. But he or she would certainly be struck by the ubiquity of such entities and by the extent to which they perform in professional, educational, and industrial fields tasks that might be assumed to fall within the province of government. It is another question, however, whether an admirer of American pluralism, as de Tocqueville was, would still be impressed by private accrediting after taking a closer look at it today.

Although this symposium lacks a contributor of de Tocqueville's stature, our authors trenchantly describe and evaluate some recent experiences with government reliance on private accreditors in lieu of direct public regulation. The symposium focuses particular attention on the fields of health care and education in the belief that experiences with accrediting in these two fields can be usefully shared and compared. The symposium was also conceived as a search for some larger lessons concerning the legal and policy implications of

* Special Editor; William Neal Reynolds Professor of Law, Duke University.

letting private accreditors identify entities eligible to participate in public programs or to assist government in other ways in protecting consumers. Although it concentrates on placing private accrediting among the instruments of government, the symposium inevitably raises general questions about the reliability of private accreditors and similar bodies as agents of the public interest and about their compatibility with competitive markets, consumer choice, consumer welfare, and pluralism itself. Separate articles address the responsibilities of accreditors for handling sensitive information,[1] their liability for misjudgments causing injury to consumers,[2] and their status under the antitrust laws.[3]

The symposium originated in a program organized by the education and health care committees of the American Bar Association's Section of Administrative Law and Regulatory Practice and held in May 1993 in Alexandria, Virginia.

II

ACCREDITING DESCRIBED

Accreditation can be defined as the formal expression by a private body of an authoritative opinion concerning the acceptability, under objective quality standards fairly applied, of the services rendered by a particular institutional provider. Accrediting parallels in all pertinent respects comparable activity by other private bodies in certifying the quality of industrial products or in credentialing technical personnel in various fields. The private setting and application of quality standards differs in some respects but is not always distinguishable from the setting of compatibility standards in such high-tech fields as telecommunications, where products of independent producers must work together as components of larger systems. Although this symposium focuses on private accrediting of institutions, many of the issues raised pertain equally to private quality-assurance initiatives of other kinds.

Private accrediting is commonly sponsored by special interests in one or more of the affected fields. The actual range of interests participating in a particular program is a significant variable, however, since an accreditor might represent a full spectrum of affected interests, including consumer organizations, or instead be controlled by narrow interests at the industry's core. In many cases, the goals of an accrediting program are less altruistic than its sponsors would have the general public and policymakers believe. The central purpose is usually to reassure consumers and other users concerning the quality of the industry's products or services. The other side of this quality-assurance coin,

---

1. Timothy Stoltzfus Jost, *Confidentiality and Disclosure in Accreditation*, 57 LAW & CONTEMP. PROBS. 171 (Autumn 1994).

2. Peter H. Schuck, *Tort Liability to Those Injured by Negligent Accreditation Decisions*, 57 LAW & CONTEMP. PROBS. 185 (Autumn 1994).

3. Clark C. Havighurst & Peter M. Brody, *Accrediting and the Sherman Act*, 57 LAW & CONTEMP. PROBS. 199 (Autumn 1994).

however, is that unapproved products or services are implicitly disparaged and put at a competitive disadvantage (or worse) in the marketplace. A closely related objective of most programs is the political one of preventing or assuaging public concerns that might lead government to regulate the field or to regulate it more aggressively. Where government already has a regulatory presence, private groups may hope that it will respect their standards and seals of approval instead of exercising independent regulatory judgment.

Each accredited field features a slightly different interplay both among competing and cooperating interest groups and between those groups and various branches of government. These dynamics produce significantly different governance regimes for various areas of the economy, featuring different roles for market forces and consumer choice, for public officials, and for private interests involved in the accrediting effort. There are opportunities here for scholars to evaluate private accrediting as an instrument for achieving appropriate quality assurance in particular contexts and to discover general principles that explain behavior observed in a wide variety of cases. Falling somewhere between politics and microeconomics and having effects that are more de facto than de jure, private accrediting and similar activities appear to constitute a neglected field of study.

III

ACCREDITATION AS INFORMATION AND OPINION

Although accrediting is commonly characterized as a form of industry self-regulation, standing alone it lacks the direct sanctions that true regulators can impose. Unlike public licensure, for example, it is not exclusionary. To be sure, accreditation may have great, even decisive, influence in the marketplace. But its effects are, in the last analysis, the result of independent choices by those who choose independently to rely on it. Even when government itself adopts an accreditor's opinion as its own for regulatory purposes, it is that act of government, not the action of the private body, that has the crucial exclusionary effect.[4] Clear thinking about accrediting requires keeping in mind that effects achieved by publishing advice that others may follow are fundamentally

---

4. In discussing whether a private credentialing board was engaged in state action and was thus bound by constitutional norms, a federal appeals court recently stated:

> That states make certification by the Board a prerequisite for some public positions does not convert the Board into a state actor .... If the Board's certification processes are unreliable, that may be a reason why the state should not depend on them; public beliefs that they are reliable (and consequent willingness to rely) do not bestow governmental power on the Board. State and local governments are responsible for their own decisions, and persons aggrieved by those decisions must complain against their authors (the states themselves) rather than against the Board.

Sanjuan v. American Bd. of Psychiatry and Neurology, Inc., 1994 WL 654411, at *2 (7th Cir. Nov. 21, 1994); *see also* McKeesport Hosp. v. Accreditation Council for Graduate Medical Educ., 24 F.3d 519 (3d Cir. 1994) (holding recognition of educational accreditor by licensing board did not alter accreditor's private character).

distinguishable, in a democracy, from effects achieved by coercive means, public or private. Thus, for example, antitrust analysts should be careful about characterizing as a restraint of trade the collective expression of an opinion, however influential that opinion may be.[5]

Viewing an accrediting program as a vehicle for expressing private opinions rather than as a surrogate for public regulation should lend it special legitimacy in a constitutional system respectful of free speech.[6] Indeed, it would seem that private accreditation should qualify for some constitutional protection as a form of "commercial speech." Such speech—so far defined only to include commercial advertising[7]—has been given a degree of protection under the First Amendment specifically because it provides information potentially valuable both to consumers in making market choices and to the market economy as a whole in allocating resources to their best uses.[8] On the other hand, commercial speech receives less constitutional protection than political speech because the financial interests of commercial speakers are deemed to create special dangers to consumers that are a legitimate concern of government. Private accrediting likewise provides information that is potentially beneficial to consumers but apt to be distorted by conflicts of interests.

Although viewing private accrediting as performing only informational functions may give it some constitutional legitimacy, it should also cost it some credibility in the marketplace—by calling attention to its private character and the unaccountability of its sponsors. Today, private accrediting organizations enjoy more status, credibility, and influence than, as private entities with special interests, they probably deserve. Whereas consumers are generally skeptical of commercial advertising and recognize it as the selling effort it is, private accreditors are widely perceived to provide authoritative, objective advice. Their stature results in large measure because they are usually constituted to incorporate potential sources of effective dissent, so that they are rarely contradicted or criticized by anyone speaking with comparable authority. So constituted, such bodies can resolve issues in private rather than having them debated in public. Because the search for truth will sometimes suffer, it would seem that the utterances of private accrediting bodies deserve at least as much

---

5. *See* Havighurst & Brody, *supra* note 3, at 118-22.

6. In an antitrust case in which a professional association had officially stated its disapproval of a particular medical technology, the court opined that "the remedy [for allegedly giving deceptive advice to consumers] is not antitrust litigation but more speech—the marketplace of ideas." Schachar v. American Academy of Ophthalmology, Inc., 870 F.2d 397, 400 (7th Cir. 1989).

7. *See, e.g.*, Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 66-67 (1983) (listing factors identifying commercial speech); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (stating test for commercial speech); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (striking down ban on pharmacists' advertising of prices for prescription drugs).

8. *See Virginia Citizens*, 425 U.S. at 765 ("So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

public scrutiny as is given to unfair or deceptive advertising. In any event, thinking of accrediting as private speech invites its analysis in terms of its effects on the supply and quality of information available to consumers and not merely as an extension of government. At the very least, serious policy questions can be raised about government actions that exalt private accreditors or shelter the information and opinion they produce from testing in the marketplace of ideas.

Viewed from the perspective of economics, private accrediting can be highly valued as a response to the information deficits that inevitably plague consumers shopping for complex goods or services. Information and opinion concerning commercial goods and services are classic examples of so-called public goods since they are not consumed when they are used. Because it is difficult for a producer of information to prevent its use by those who have not paid for it, unsubsidized producers lack incentives to produce as much information or opinion as consumers would be willing to pay for. For this reason, most commercial information, including private accreditation, originates not from objective sources producing what consumers demand but from firms or industry groups having an economic or ideological interest in influencing consumers in a certain way. Although information from such sources has social value, consumers can be easily misled, especially if they lack alternative sources of authoritative information. Thus, a strong case can be made for actively preserving and encouraging competition in accrediting and, more generally, for maintaining a dynamic marketplace of ideas in which information flows from a plurality of sources and in which the quality of information produced by each supplier is subject to constant evaluation and criticism. In economic markets as in politics, control of information is a potent instrument of power. Government, it would seem, should avoid complicity with private groups that dominate the production of authoritative information on which underinformed consumers must rely in making market choices.

IV

GOVERNMENT RELIANCE ON PRIVATE ACCREDITORS

With an understanding of private accrediting principally as a source of information to consumers and their agents, it is fruitful to focus, as this symposium does, on government's explicit reliance on private accreditors in carrying out its regulatory and consumer-protection responsibilities and in administering specific public programs. There are numerous examples of reliance by government regulators on private accreditors and the like in controlling entry into or prescribing performance in private markets. Local building codes and similarly prescriptive regulatory measures frequently incorporate by reference product certifications issued by private standard-setting organizations. State regulators also commonly make completion of a privately accredited training program a criterion for licensure in particular occupations.

In the Clinical Laboratories Improvements Act of 1988,[9] Congress provided that labs accredited by federally designated accreditors will be deemed to meet federal regulatory requirements. In June 1994, the Administrative Conference of the United States proposed wider use by government of "audited self-regulation"—defined as "congressional or agency delegation of power to a private self-regulatory organization to implement and enforce laws or agency regulations with respect to the regulated entities, with powers of independent action and review retained by the agency."[10] This recent proposal is especially pertinent here because it suggests principles for government to use in deciding whether to charge a private entity with public regulatory responsibilities and in overseeing its performance.

This symposium focuses principally on government reliance on private accreditors not for explicit self-regulation but to screen educational institutions or institutional providers of health care for participation in public programs. In the health care field, which is the subject of the first three articles herein,[11] private accreditors have long mediated between government and private institutions providing health services or training various types of health care personnel. The Joint Commission on Accreditation of Health Care Organizations (the "JCAHO" or the "Joint Commission"), whose privileged position as an accreditor of hospitals under the Medicare program is treated in the first article,[12] is only the most prominent of many accrediting programs established under the auspices of the organized medical profession. These programs have effectively forestalled direct government interference in many aspects of health care, thus protecting prerogatives of practicing physicians. Carrying out a congressional mandate, the Health Care Financing Administration ("HCFA") has recently undertaken to rely on private accreditors to screen institutions of many additional kinds for participation in Medicare.[13] This initiative makes

---

9. 42 U.S.C. § 263a (1988); 55 Fed. Reg. 33,936 (1990) (proposed regulations).

10. Administrative Conference of the United States, The Use of Audited Self-Regulation as a Regulatory Technique, Recommendation 94-1 (adopted June 16, 1994), 59 Fed. Reg. 44,701 (1994); *see* DOUGLAS C. MICHAEL, FEDERAL AGENCY USE OF AUDITED SELF-REGULATION AS A REGULATORY TECHNIQUE (1993) (Preliminary Draft for the Administrative Conference of the United States) (to be published in 47 ADMIN. L. REV., No. 2 (1995)).

11. In order of appearance: Timothy Stoltzfus Jost, *Medicare and the Joint Commission on Accreditation of Healthcare Organizations: A Healthy Relationship?*, 57 LAW & CONTEMP. PROBS. 15 (Autumn 1994); Eleanor D. Kinney, *Private Accreditation as a Substitute for Direct Government Regulation in Public Health Insurance Programs: When Is It Appropriate?*, 57 LAW & CONTEMP. PROBS. 47 (Autumn 1994); Michael J. Astrue, *Health Care Reform and the Constitutional Limits on Private Accreditation as an Alternative to Direct Government Regulation*, 57 LAW & CONTEMP. PROBS. 75 (Autumn 1994).

12. Jost, *supra* note 11.

13. *See* 42 U.S.C. § 1395bb (1988 & Supp. V 1993); Medicare Program: Granting and Withdrawal of Deeming Authority to National Accreditation Organizations, 58 Fed. Reg. 61,816 (1993) (to be codified at 42 C.F.R. pts. 401, 488, 489) (final regulations effecting legislation to widen reliance on private accreditors of a variety of health care providers). There was widespread resistance to government reliance on private accreditation of nursing homes when the Reagan Administration proposed it in the early 1980s, and Congress has not yet authorized HCFA to employ private accreditors in certifying providers under the Medicaid program. *See id.* at 61,822-24. For developments

this a good time to consider the federal government's experience in involving private groups in the performance of quality-assurance tasks in public programs.

Accrediting is prevalent in education in large part because the first amendment tradition has long discouraged government from engaging in direct regulation of educational institutions. Recent legislation addressed to abuses in certain government-funded education programs, however, has tightened the relationship between government and private accreditors.[14] In addition to one article examining the innovative manner in which this legislation is being implemented in regulations,[15] two articles in the symposium review the role of government in overseeing educational accreditors.[16] Special attention is paid to issues that have recently arisen with respect to controversial, "politically correct" accrediting requirements that some publicly recognized private bodies have sought to impose. The developments reviewed here open new questions about the nature of private accrediting in, and the relationship of government to, the sensitive field of education. Because many educational accreditors operate in the health care field and are relied upon in occupational licensure, there are important intersections between the two fields treated separately in this symposium.

There are several possible explanations for letting private organizations perform the public function of selecting providers to render services under public programs. One explanation might be that government is simply privatizing the enforcement of publicly established standards in an effort to reduce the public payroll, to move enforcement costs off-budget, and to finance regulation through fees paid by firms seeking accreditation. It is unclear whether HCFA, in selecting accreditors of home health agencies ("HHAs"),[17] has simply enlisted private entities to enforce federally prescribed standards at providers' expense or has given private accreditors some discretion both in setting standards and in verifying compliance. In its 1987 proposal to recognize both the JCAHO and the Community Health Accreditation Program of the National League for Nursing ("CHAP") as accreditors of HHAs, HCFA seemed willing to overlook some major differences between Medicare's written standards and a private accreditor's requirements.[18] Although it stressed that the precise requirements and procedures adopted were less important than the

---

with respect to home health agencies, see 57 Fed. Reg. 22,773 (1992) (final HCFA regulation recognizing the National League for Nursing's Community Health Accreditation Program, or CHAP); 58 Fed. Reg. 35,007 (1993) (final notice recognizing the JCAHO as a competing accreditor).

14. 20 U.S.C. §§ 1058, 1061, 1085, 1088, 1141, 1401, 2471, 3381 (1988 & Supp. IV 1992); 34 C.F.R. § 602 (1993).

15. Mark L. Pelesh, *Regulations Under the Higher Education Amendments of 1992: A Case Study in Negotiated Rulemaking*, 57 LAW & CONTEMP. PROBS. 151 (Autumn 1994).

16. Matthew W. Finkin, *The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education*, 57 LAW & CONTEMP. PROBS. 89 (Autumn 1994); Jeffrey C. Martin, *Recent Developments Concerning Accrediting Agencies in Postsecondary Education*, 57 LAW & CONTEMP. PROBS. 121 (Autumn 1994).

17. *See supra* note 14.

18. *See* 52 Feg. Reg. 49,510 (1987).

general reliability of the private organization to detect deficient services, its later notice recognizing CHAP indicated that CHAP had tailored most if not all of its accreditation requirements and procedures to be "equal or superior to" HCFA's requirements and procedures.[19] HCFA's more recent regulations require a "crosswalk" between Medicare's requirements and those of the private accreditor. But HCFA's comments stress that, although an accreditor's "standards, taken as a whole, [must be] at least as stringent as those established by HCFA," they need not be identical.[20] It would seem significant that, HCFA, rather than hiring private entities to enforce public standards against HHAs, selected two organizations that have not only different sponsorship but significantly different philosophies of health care.

Another possible reason for public reliance on private accrediting might be a desire on the part of government to delegate policymaking responsibilities to private interests. Such delegation would raise constitutional questions. In *Cospito v. Heckler*,[21] a federal appeals court, perhaps seeking to avoid a constitutional issue, adopted a highly strained construction of legislation (since repealed) under which the predecessor of the JCAHO not only accredited psychiatric hospitals to participate in Medicare but was also apparently expected to set the standards to be used by HCFA in appraising such hospitals. Although the court acknowledged that "Congress may seek private assistance in 'matters of a more or less technical nature,'"[22] it is questionable whether quality standards for psychiatric hospitals are merely technical in character. There are real policy choices to be made, after all, between the values of the medical profession and the interests of patients and taxpayers. It seems probable that, in *Cospito*, the Joint Commission, representing the interests and views of psychiatrists, was using disaccreditation, despite its adverse effect on institutionalized patients, to advance professional objectives against political resistance to paying higher costs. Indeed, professionals often use threats of disaccreditation strategically or collusively to strengthen their colleagues' claims on institutional or public resources.[23] In any event, the general authority of the JCAHO to confer so-called "deemed status" on hospitals is not unconstitutional, because HCFA retains the authority to revoke such status if it finds that the accreditor is not providing adequate assurance of compliance with federal standards, either

---

19. 56 Fed. Reg. 43,929 (1991). Even so, there has been criticism that HCFA was too lenient in approving CHAP. UNITED STATES GENERAL ACCOUNTING OFFICE, HOME HEALTH CARE: HCFA EVALUATION OF COMMUNITY HEALTH ACCREDITATION PROGRAM INADEQUATE (April 1992) (stressing alleged shortcomings other than CHAP's standards per se). Scrutiny of the JCAHO's HHA accreditation program took a similar course. *See* 57 Fed. Reg. 4044 (1992) (proposed regulation).

20. 58 Fed. Reg. 61,816, 61,826 (1993); *see also id.* at 61,827 (indicating that it would be acceptable if "less stringent requirements in one area . . . are balanced by more stringent requirements in a closely related requirement elsewhere in the standards").

21. 742 F.2d 72 (3d Cir. 1984).

22. *Id.* at 88 n.25 (quoting A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935)).

23. This occurs most obviously perhaps in higher education, where the demands of particular programs on university administrators are often backed by their accreditors.

in general or in a specific instance. Comparable "look-behind" authority is generally provided whenever private accreditors are recognized by government.

The constitutional issue of delegation aside, there remains in each case the important policy question whether government has conferred excessive self-regulatory power on dominant private interests. Government recognition places the physician-dominated JCAHO, for example, in a good position to resolve innumerable important questions about how hospitals should be operated and evaluated; indeed, the Joint Commission for many years appeared to be more interested in organizational issues in hospitals than in the outcomes of patient care—that is, to be more concerned about how well a hospital treats its physicians than about how well it treats patients. At both the state and federal levels, medical and other professional organizations enjoy comparable regulatory powers because of government reliance on a designated private accreditor. For example, only graduates of medical schools accredited by a joint venture of medical interests are eligible for state licensure—an arrangement that over time has perpetuated a particular ideology of medical care.[24] A similar arrangement in pharmacy is currently being used to increase, without public deliberation, the length of training that pharmacists must receive before being admitted to the profession.[25]

To be sure, provisions in the Higher Education Amendments of 1992 address specifically the relationship between a professional organization and the accreditors of educational programs in the affected profession, requiring that a recognized accreditor be "separate and independent" from any industry group.[26] Yet the statutory definition of independence permits governance by a self-perpetuating board of professional society insiders, with only a small minority of board-selected "public members."[27] There is also a grandfather clause under which a professional organization can itself continue as a recognized accreditor as long as the independence of its accrediting is not shown to be compromised.[28] Once again it must be asked whether government should ever entrust vital policymaking functions exclusively to groups with interest conflicts that will inevitably affect their judgment on difficult issues. It is unlikely that government retention of look-behind authority can fully overcome the systematic biases of industry insiders against consumers, taxpayers, or both.

---

24. *See* Clark C. Havighurst & Nancy M.P. King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective* (pt. 2), 9 AM. J.L. & MED. 263, 321-23 (1983); Letter from Clark C. Havighurst & Gaylord Cummins to Ernest L. Boyer, U.S. Comm'r of Educ. (Designate) (March 9, 1977) (argument in opposition to government recognition of profession-dominated accreditor of medical schools), *reprinted in part in* CLARK C. HAVIGHURST, HEALTH CARE LAW AND POLICY 438-43 (1988).

25. *See* Havighurst & Brody, *supra* note 3, at 202, 209.

26. Higher Education Amendments of 1992, Pub. L. No. 102-325, sec. 499, § 496(a)(3), 106 Stat. 448, 642 (codified as amended at 20 U.S.C.A. § 1099b(a)(3) (West Supp. 1994)).

27. *Id.* § 496(b), 106 Stat. at 643-44 (codified as amended at 20 U.S.C.A. § 1099b(b)).

28. *Id.* § 496(a)(3)(C), 106 Stat. at 642 (codified as amended at 20 U.S.C.A. § 1099b(a)(3)(C)).

V

COMPETITION AND PLURALISM IN ACCREDITING

Perhaps the most appealing reason why government might rely on private accreditation is to foster pluralism in the regulatory state. Here again it is important whether one is witnessing merely privatized enforcement of public standards or government reliance on the judgment of reputable private organizations having their own standards and their own ideas about what constitutes quality and how it should be measured. Although it might seem that a delegation issue arises if a recognized accrediting body sets its own standards rather than enforcing the government's, that problem would seem to disappear if the government, in addition to periodically evaluating the accreditor's integrity under general statutory criteria, were willing to recognize alternative accreditors. In that case, the accreditor would not be performing tasks tantamount to regulation; institutions which it refuses to accredit could qualify by obtaining recognition by another accreditor meeting minimum government criteria. By encouraging competition rather than monopoly in accrediting, government could foster pluralism in the market for accredited services while still providing meaningful protection for consumers. Deeper understanding of both the informational benefits and possible abuses of private accrediting could well lead to creative uses of it—to protect consumers not only against poor-quality services but also against both overregulation by government and the exercise of de facto regulatory power by private groups.

Many observers may doubt the desirability or feasibility of competition in accrediting, possibly fearing that multiple accreditors would only confuse consumers. Indeed, some observers value accrediting precisely because it relieves consumers of the need to think for themselves about technically difficult matters. Yet there are better answers to information problems than appointing a single arbiter, public or private, to resolve issues in which consumers have important, possibly differing stakes. Ironically, one better answer is more accrediting, another tier of it to assure consumers and others that accreditation by a particular program can be trusted and has positive informational value. There are in fact numerous programs for accrediting accreditors and even some examples of accreditors that accredit accreditors of accreditors. (Thus, educational institutions certify individuals as having met their standards and are accredited in turn by private bodies that themselves are recognized by some higher authority, public and private.) Indeed, recognition of an accreditor by a government agency could perform a valuable informational service to the general public, verifying that the accreditor is in fact what it claims to be. Unfortunately, however, government too often slips into a regulatory mode, selecting one accreditor as, in effect, the official one or expecting competing accreditors to enforce essentially the same requirements. Thus, consumers may be trapped in their own ignorance, deprived of alternative information and

opinion on which they and their agents might rely, and forced to rely instead on decisionmakers who may have more than the interests of consumers in mind.

Actual competition in accrediting might not always be feasible because of economies of scale that make it difficult for a given field to support more than a single setter and implementer of quality standards. Nevertheless, such considerations do not warrant government in designating a single accreditor beholden to special interests in an industry to speak to and for consumers on critical issues. The public could be served better in two ways: either by an accreditor that incorporated all affected interests, including representatives of purchasers or consumer organizations, or by an accreditor that represented only a limited set of interests. In the latter case, consumers would benefit because the accreditor, even if it was alone in the field, would be exposed to criticism by other players. The resulting loss of prestige and credibility might cause government and others to reconsider their reliance on the accreditor and would at least force it to explain itself and to respond to competing claims. Such competition in the marketplace of ideas should be valued by government. It could be fostered not only by being open to new accreditors but also by discouraging collusion among competing interest groups to suppress public debate by controlling the supply of information and opinion in a particular field.[29]

To be sure, the absence of actual competition in accrediting in a given field would not always be a bad thing. Indeed, an absence of both competing accreditors and overt criticism of the dominant one could be merely a sign that the accreditor monopolist was doing a creditable job. New entry into accrediting is likely, after all, only when neglected or excluded interests are frustrated. Thus, in the 1970s, the American Physical Therapy Association broke off a joint venture with the American Medical Association for accrediting therapist training and set up a competing accrediting program in the belief that therapists were not being trained to their full potential. Similarly, the competition that has arisen in home health accrediting was inspired in some measure by deep philosophical and other differences between medicine and nursing. At the moment, the hospice field may be ripe for the creation of a new accreditor because of discontent with the approach employed by the JCAHO in accrediting hospice programs. The possibility of such new entry—that is, potential competition—may often help to ensure adequate performance by a dominant accreditor.

Nevertheless, if the dominant accreditor encompasses all the principal special interests in the field, apparent harmony could be misleading. It might be that real conflicts are being reconciled within the accrediting organization and actively prevented from being played out in the marketplace. Historically, the JCAHO has served as a vehicle through which hospital and physician interests

---

29. On the antitrust implications of anticompetitive joint ventures in accrediting, see Havighurst & Brody, *supra* note 3, at 230-41.

could cooperate in setting standards for hospitals and could limit both public debate and competition over many issues having cost as well as quality implications. Recently, however, both hospital and physician groups, as well as consumer organizations, have become openly critical of the Joint Commission as an accreditor of hospitals, with some observers in each camp even suggesting that new accrediting arrangements may be needed.[30] The eruption of public debate among the interests sponsoring the Joint Commission is more likely a healthy than a disturbing development, signifying dissension in and possible breakup of the cartel that has long controlled the production of information and opinion concerning the quality of care in hospitals. In any event, if government is interested in promoting pluralism and markets in which consumers choose for themselves, it should avoid supporting accrediting monopolies, especially those controlled by special interests.[31]

Another possible objection to competition in accrediting is the belief that all firms will seek accreditation from each available accreditor, raising their costs and defeating hopes that accrediting will help consumers differentiate among competing providers. Pressures to seek multiple accreditation might reflect either competitive pressure to maintain a corporate image or a desire to minimize the consequences of losing one accreditation. The 1992 Higher Education Amendments include a statutory limitation on "dual accreditation."[32] Although multiple educational accreditors are contemplated, an institution must give acceptable reasons for obtaining accreditation from more than one recognized accrediting body.[33] Presumably, this interesting provision was designed to reduce the pressure to obtain dual accreditation while still encouraging competition among accreditors. The presence of alternative accreditors would seem to offer the best protection against enforcement of political correctness and other accrediting requirements that, even though they may reflect the honestly held opinions of the accreditors, involve issues that should be kept open to debate and resolution in the marketplace.

A final possible fear is that competition among accreditors would simply encourage laxity in standards and oversight, as accreditors promise desirable credentials at low cost and with relatively little risk of disapproval. The danger of laxity in enforcement will be greater, however, to the extent that government expects competing accreditors to enforce the same standards. If competing accreditors each employed evaluation methods of their own devising, competition could focus on differentiating providers rather than on merely verifying

30. *See* Linda Oberman, *Provider, Consumer Groups Blast Accrediting Body*, AM. MED. NEWS, Jan. 2, 1995, at 1.

31. It is, of course, always problematic whether modern government truly values pluralism and consumer choice.

32. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 499 ("Sec. 496(i)"), 106 Stat. 448, 645 (codified as amended at 20 U.S.C.A. § 1099b(i) (West Supp. 1994)).

33. Query what reasons would or should suffice.

compliance with generally applicable minimum requirements.[34] Some accreditors might be more demanding than others, setting more than minimum standards as a way of signalling superior quality to consumers and others. This possibility reveals why, despite economies of scale, many fields might support multiple accreditors. When competing accreditors each employ their own standards or their own methods of evaluation, they are performing different, not duplicative, services for the consuming public.

Thus, competition in accrediting would be most valuable to the public if it were embraced expressly to foster pluralism in situations where government deems some form of quality assurance to be necessary. True pluralism requires that accrediting organizations have significant discretion both in defining and in measuring the quality of services. The virtues of pluralism, as it might be promoted by competition in accrediting, can be seen most easily perhaps in the field of education. In the well-known *Marjorie Webster Junior College* case, a federal court of appeals upheld an accreditor's allegedly arbitrary policy of not accrediting proprietary schools, arguing that a legitimate issue of "educational philosophy" was involved.[35] Although one may wonder whether the author of the opinion would have been as quick to approve the accreditor's action if he had not shared its doubts about for-profit education,[36] the case nicely illustrates the desirability of letting private groups give effect to their different values, even in programs that enjoy governmental recognition. The court astutely observed that the plaintiff was "free to join with other proprietary institutions in setting up an association for the accreditation of institutions of such character."[37] Although the Department of Education has long tended to enfranchise a single accreditor for each type of educational program in each geographic area, the Department in 1988 rejected suggestions that it should discourage competition among accreditors as a way of avoiding public confusion, stating as follows: "[A]rbitrarily limiting the number of accrediting bodies serves no educational purpose. The Secretary wishes to foster appropriate competition among accrediting bodies and does not wish to see the recognition process used in such a way as to create a monopoly in any educational field."[38]

---

34. The Higher Education Amendments of 1992 also restrict the ability of an institution losing accreditation to obtain alternative accreditation at that point, thus curbing accreditor competition focusing on laxity. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, sec. 499, § 496(l)(2), 106 Stat. 448, 646 (codified as amended at 20 U.S.C.A. § 1099b(l)(2) (West Supp. 1994)).

35. Marjorie Webster Jr. College, Inc. v. Middle States Ass'n of Colleges and Secondary Sch., Inc., 432 F.2d 650, 656 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

36. *Cf.* David L. Bazelon, *FCC Regulation of the Telecommunication Press*, 1975 DUKE L.J. 213, 229-34 (article by author of *Marjorie Webster* opinion expressing his concerns about the effects of the profit motive on the integrity of broadcast journalism).

37. *Marjorie Webster*, 432 F.2d at 658. In a case in which a school of chiropractic complained about being denied recognition it desired, the court stated, "Plaintiffs themselves emphasize their distinct view of the chiropractic profession. The proper channel for their efforts is to establish their own chiropractic accrediting agency and secure federal recognition for it." Sherman College of Straight Chiropractic v. United States Comm'r of Educ., 493 F. Supp. 976, 980 (D.D.C. 1980).

38. 53 Fed. Reg. 25,088, 25,096 (1988).

In other fields as well, control of an accrediting program by special interests may give them control of the only accessible source of authoritative information and opinion about many quality-related issues of interest to consumers. By effectively foreclosing public awareness and public discussion of those issues, industry and professional groups can exercise both political and market power. By the same token, fostering competition in accrediting and in the production of information and opinion bearing on consumer concerns could liberate consumers both from their own ignorance and from domination by those who would exploit them by limiting their options. Perhaps this symposium will contribute to realizing the untapped potential of private accrediting as a vehicle for restoring in the regulatory state at least some of the pluralism that Alexis de Tocqueville once found so impressive in this nation.