The Journal of Law and Education

Volume 14
Issue 2 *2*

Article 4

4-1985

Accrediting Church-Related Schools: A First Amendment Analysis

Matthew B. Durrant

Accrediting Church-Related Schools: A First Amendment Analysis†

MATTHEW B. DURRANT*

I. Introduction

Unlike most European countries, the United States has established no federal governmental agency to directly regulate higher education.[1] Until recently, the states, too, refrained from significantly regulating higher education, limiting themselves to the minimal measures of incorporating, chartering, and licensing postsecondary institutions.[2] The regulatory void resulting from the inactivity of the federal and state governments has been filled by various private accrediting agencies that now wield significant power. Accredited status is important to virtually all postsecondary schools and essential to the continued operation of many. It not only brings prestige, but is a requirement for access to federal educational funding,[3] free transfer of credits for students, and, in the case of professional schools, state licensure for graduates.[4]

Educational institutions seeking accreditation are evaluated on the basis of minimal educational standards established by the accrediting agencies. These standards have traditionally involved such considerations as the educational purpose of the institution, faculty qualifications, curriculum, organization, administration, financial resources, physical plant, library,

---

* Law Clerk to Judge Monroe G. McKay, United States Court of Appeals for the Tenth Circuit. B.A., Brigham Young University, 1981; J.D., Harvard University, 1984. The author wishes to thank Professor Victor Brudney for his valuable criticism and advice.

† A substantially similar article bearing the same title appears in 38 ARK. L. REV. 301 (1984).

[1] H. ORLANS, PRIVATE ACCREDITATION AND PUBLIC ELIGIBLITY (1975); The U.S. Department of Education does not directly accredit postsecondary educational institutions. *See infra* text accompanying notes 51-57.

[2] Millard, *Postsecondary Education and "The Best Interests of the People of the States,"* 50 J. HIGHER EDUC. 121, 123 (1979). Over the past decade and a half, however, most states have significantly increased their regulatory role. *Id.* Some states still require no more than incorporation. *Id.* at 126-27.

[3] *See infra* text accompanying notes 58-60.

[4] For example, in most states, only those graduates who have graduated from an accredited law school are eligible to be admitted to the bar. *See infra* text accompanying notes 95 and 96.

etc.[5] Because of the secular focus of these traditional accrediting standards, the accreditation of church-related schools did not interfere with those schools' sectarian functions. In recent years, however, some accrediting officials have grown increasingly skeptical of the capacity of church-related schools to provide an adequate education. Of particular concern are those schools' purported lack of diversity, their consideration of religious belief in admissions and hiring decisions,[6] their religion-based conduct requirements,[7] and their practice of teaching in a manner informed by religious belief.[8] As a result of this concern, some accrediting agencies have promulgated standards aimed at restricting, directly and indirectly, the sectarian character of church-related schools.

The use of accrediting standards that affect the religious function of church-related schools raises the question of whether the religion clauses of the first amendment[9] place any constraints upon accrediting agencies in evaluating such schools. This inquiry requires an examination of the accreditation process under both the establishment and free exercise clauses, as well as an exploration of how the clauses work together to inform the issue. The first question that needs to be addressed, however, is whether the accreditation process involves state action, for the religion clauses proscribe only *governmental* restriction of religious liberty. Essential to this inquiry is an examination of the nature and function of the various accrediting agencies.

II. Accrediting Agencies and Religious Criteria

A. The Accrediting Agencies

There are essentially two types of educational accrediting agencies: institutional and specialized (programmatic). Institutional accrediting agencies evaluate an institution as a whole. There are six regional associations that function as institutional accrediting agencies.[10] The numerous special-

---

[5] *See* F. Harcleroad & F. Dickey, *Educational Auditing and Voluntary Institutional Accrediting*, 22-26 (1975) (ERIC/Higher Education Research Report No. 1).

[6] *See infra* text accompanying notes 15-43.

[7] *Id.*

[8] *See infra* text accompanying notes 44-47.

[9] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST., amend. I.

[10] Middle States Association of Colleges and Secondary Schools, New England Association of Schools and Colleges, North Central Association of Colleges and Schools, Northwest Association of Schools and Colleges, Southern Association of Colleges and Schools, Western Association of Schools and Colleges. NATIONALLY RECOGNIZED ACCREDITING AGENCIES AND ASSOCIATIONS 9-10 (1983) (A publication of the Department of Education's Office of Postsecondary Education).

ized accrediting agencies[11] assess particular programs, departments, or schools, usually within a larger postsecondary institution, although some accredit free-standing professional schools and other specialized or vocational institutions as well, and in that sense perform both a specialized and an institutional accrediting function.[12] Thus, any one university may be subject to accreditation as a whole by a regional association at the same time that its college and professional schools are subject to various specialized accrediting agencies.

Virtually all federal educational funding is contingent upon accreditation by an agency recognized by the Department of Education.[13] The Department recognizes the six regional accrediting associations, as well as numerous specialized agencies.[14]

B. Accrediting Standards Raising First Amendment Questions

To date, three accrediting bodies have employed accrediting standards significantly affecting the sectarian function of church-related schools: the American Bar Association (ABA), a law school accrediting body recognized by the federal government; the American Association of Law Schools (AALS), a law school accrediting body that, although not recognized by the federal government, has significant ties with state governments; and the Northwest Association of Schools and Colleges (NASC), a secondary and postsecondary school accrediting body recognized by the federal government.

1. ABA and AALS: Prohibition of Religious Discrimination

The AALS and the ABA have long prohibited "discrimination or segregation on the ground of race or color" by law schools seeking to achieve or retain accredited status.[15] In 1969, the AALS amended its bylaws to prohibit discrimination upon the bases of sex, national origin, and religion as well:

> The law school shall maintain equality of opportunity without discrimination

---

[11] *Id.* at 10-17. *E.g.*, the American Bar Association, the Council on Social Work Education, and the National Association of Schools of Music.

[12] *Id.* at 2. *See* Young, *New Pressures on Accreditation*, 50 J. HIGHER EDUC. 132, 133 (1979); Conway, *The Commissioner's Authority to List Accrediting Agencies and Associations*, 50 J. HIGHER EDUC. 158, 159 (1979).

[13] *See infra* text accompanying notes 58-60.

[14] NATIONALLY RECOGNIZED ACCREDITING AGENCIES AND ASSOCIATIONS, *supra* note 10, at 9-17.

[15] *See* Hawkins, *Accredition of Church-Related Schools*, 32 J. LEGAL EDUC. 172 n.3 (1982). The account of the accreditation of the Brigham Young University (BYU) and Oral Roberts University (ORU) law schools that follows was drawn primarily from this article.

or segregation on the ground of race, color, religion, national origin, or sex.[16]

The ABA followed suit in 1970 with the promulgation of Standard 211.[17]

This prohibition of discrimination on the basis of religion has subjected those church-related law schools that have sought accreditation since its adoption to closer scrutiny than their nonsectarian counterparts.[18] Brigham Young University's J. Reuben Clark Law School, owned and operated by the Church of Jesus Christ of Latter-day Saints ("Mormon"), was one such school. Two aspects of the BYU law school raised concern among ABA and AALS officials in regard to the standard prohibiting religious discrimination: (1) the practice of charging fifty percent higher tuition to those students who were not members of the Mormon Church; and (2) an honor code under which faculty and students agree to abstain from the use of alcohol, tobacco, tea, coffee, and harmful drugs, to avoid premarital and extramarital sex, to be honest and respect the property and personal rights of others, and to comply with dress and grooming standards.[19]

Although some ABA accreditation officials were concerned that BYU's tuition differential appeared to be a literal violation of Standard 211's prohibition of discrimination on the basis of religion, BYU successfully argued that the higher tuition for those students who were not members of the Mormon Church was in principle indistinguishable from the nonresident tuition surcharge of state universities.[20]

Some ABA officials argued that inasmuch as the BYU conduct code was derived from religious beliefs, it constituted a form of religious discrimination because, even though imposed on all students and faculty, compliance would be more burdensome for those who did not share the religious values of the Mormon Church.[21] It was further argued that even if BYU did not deliberately favor Mormons in its admissions and hiring decisions, the effect of its conduct code, coupled with the tuition differential, was to produce a *de facto* preference for a predominantly Mormon student body and faculty.[22]

---

[16] American Association of Law Schools, Bylaws § 6-4.

[17] APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE, Standard 211 (1977).

[18] Hawkins, *supra* note 15, at 173.

[19] *Id.* at 175.

[20] *Id.* at 174. BYU argued that because the Mormon Church pays all of the capital costs and contributes two-thirds of the law school's operating costs, Mormon students had made and would continue to make a substantial contribution to the law school in addition to their tuition, through tithes and offerings to their church. *Id.*

[21] *Id.* at 174-75.

[22] *Id.* at 176.

The ABA concluded that because the code of conduct was voluntarily agreed to by students and faculty and prescribed conduct rather than belief, it did not run afoul of Standard 211's prohibition of religious discrimination.[23] The ABA further found that BYU had not violated the discrimination standard in its admissions and hiring in that it had not purposefully discriminated against members of other religions and had made special efforts to recruit non-Mormon students and faculty.[24] BYU's law school received provisional accreditation from the ABA in 1974 and full accreditation in 1977.[25]

The AALS inspection team that examined BYU's law school explicitly found that there had been no invidious exclusion or intended discrimination on the grounds of religion.[26] Nevertheless, the AALS Executive Committee and the Accreditation Committee were concerned about whether Bylaw 6-4's prohibition of religious discrimination had been violated, and delayed final action upon BYU's application for membership.[27] Over the next two years the Executive Committee considered several amendments to Bylaw 6-4 addressing the problems raised by church-related law schools, but finally decided to consider their admission on a case-by-case basis under the existing bylaw's general prohibition of religious discrimination.[28] The AALS approved BYU for membership at the annual meeting of the Association in January of 1982.[29]

The accreditation of Oral Roberts University's O.W. Coburn School of Law presented a different problem. ORU has a code of conduct similar to BYU's, but has a religious belief requirement as well. The ORU law school requires students seeking admission, as well as individuals seeking faculty positions, to sign a statement affirming their religious belief in Jesus Christ and committing to follow the example of Jesus Christ.[30]

---

[23] *Id.* at 175.
[24] *Id.* at 176.
[25] *Id.* at 173.
[26] *Id.* at 179.
[27] *Id.*
[28] *Id.* at 179-81.
[29] *Id.* at 173.
[30] The ORU "Code of Honor Pledge" reads as follows:

> Recognizing that our Lord and Savior, Jesus Christ, is the Whole Man, it is my aim to follow His footsteps and to develop in the same ways in which He did. . . .
>
> I pledge, by the help of God, to work diligently, toward the ideal of the 'whole man'. . . .
>
> I will endeavor to seek the Will of God for my life and to exemplify Christlike character, through my daily personal prayer life and study of the Word of God, and through faithful group worship on and off campus.
>
> I will yield my personality to the healing and maturing power of the Holy Spirit and earnestly strive to manifest God's love toward my fellowman by following Christ's example. . . .

ORU's law school began conducting classes in the fall of 1979, and in August of 1980 applied to the ABA for provisional accreditation. ORU's request was denied by the Accreditation Committee of the ABA's Section of Legal Education and Admissions to the Bar, in part because it found that the religious belief requirement violated Standard 211 as it was then written.[31] ORU appealed the Accreditation Committee's decision to the Council of the Section of Legal Education and Admissions to the Bar,[32] which remanded the case to the Accreditation Committee. The Committee was to determine whether the Oral Roberts law school could qualify under a proposed amendment to Standard 211, which made the requirement prohibiting religious discrimination subject to the exception "that a school may adopt programs and policies having to do with the school's religious tradition" provided they do not "constitute invidious discrimination among applicants for admission or employment."[33] Before the Committee's rehearing, ORU sued the ABA in the United States District Court for the Northern District of Illinois,[34] claiming that the denial of accreditation to its law school on the basis of its religious belief requirement violated the first and fourteenth amendments as an abridgement of religious freedom.

After a hearing on ORU's motion for a preliminary injunction, the district court issued an order that "the defendant ABA is enjoined from denying provisional accreditation to ORU's Law School . . . on the basis of ABA Standard 211's prohibition against religious restrictions. . . ."[35] The court stayed enforcement of the order until after the meeting of the ABA's House of Delegates in August of 1981.[36]

In August, the Council of the ABA's Section of Legal Education and Admissions to the Bar proposed a revised amendment to Standard 211, including this provision:

> Nothing herein shall be construed to prevent a law school from having a religious affiliation and purpose and adopting policies of admission and employment that directly relate to such affiliation and purpose so long as notice of such policies has been provided to applicants, students, faculty and employees.[37]

The Council recommended provisional accreditation of the ORU law school, provided this revised amendment to Standard 211 was adopted

---

[31] Oral Roberts Univ. v. American Bar Assoc., No. 81-C-3171 (N.D. Ill. July 17, 1981), 8 LEGAL AFF. MANUAL 205 (1981).

[32] *Id.* at 206-07.

[33] Hawkins, *supra* note 15, at 181-82.

[34] *Oral Roberts*, 8 LEGAL AFF. MANUAL at 205, 209 (1981).

[35] *Id.* at 209.

[36] *Id.*

[37] *Id.* at 211 n.6.

by the House of Delegates.[38] On August 12, 1981, following a lengthy debate, the House adopted the revised amendment by a vote of 147 to 127.[39] The House then voted to grant provisional approval to ORU's law school.[40]

The controversy surrounding Standard 211 has continued. At the ABA's Mid-Winter Meeting of the ABA House of Delegates in January of 1982, a motion to rescind the 1981 amendment was defeated.[41] The following August at the ABA's Annual Meeting, a modification of the amendment was approved by the House of Delegates that read:

> [Standard 211] does not prevent a law school from having a religious affiliation and purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation and purpose so long as (1) notice of these policies has been given to applicants, students, faculty and staff before their affiliation with the law school, and (2) the religious affiliation, purpose and policies do not contravene any other Standard, including Standard 405(d) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation and purpose of the law school, but shall not be applied to preclude a diverse student body in terms of race, color, religion, national origin, or sex. This Standard permits religious polices as to admission and employment only to the extent that they are protected by the United States Constitution. It shall be administered as if the First Amendment of the United States Constitution governs its application.[42]

Perhaps of eventual broader import than the ABA and AALS nondiscrimination standards is the Department of Education's requirement that all accrediting agencies seeking recognition foster nondiscriminatory practices in admissions and employment by the educational institutions they accredit.[43] If this general prohibition of nondiscriminatory practices is read by accrediting agencies as prohibiting discrimination by church-related schools in favor of members of the sponsoring church, the first amendment questions already raised by the accreditation of law schools will need to be faced in the accreditation of colleges and universities as well.

2. NASC: Restriction of Religious Pedagogy

Accrediting standards that prohibit religious discrimination are not the only ones that implicate the religion clauses when applied to church-related

---

[38] *Id.* at 210.

[39] *Id.*

[40] 50 U.S.L.W. 2093, 2102 (Aug. 18, 1981). To date, ORU's approval remains provisional.

[41] 50 U.S.L.W. 2447-48 (Feb. 2, 1982).

[42] APPROVAL OF LAW SCHOOLS: AMERICAN BAR ASSOCIATION STANDARDS AND RULES OF PROCEDURE Standard 211(d) (1983).

[43] *See infra* note 61.

schools. The Northwest Association of Schools and Colleges (NASC), a regional accrediting association that accredits both secondary and postsecondary schools, recently revised its eligibility requirements. In May of 1983 an *ad hoc* committee appointed by the Commission on Colleges of the Association to draft revisions of the Association's eligibility requirements proposed, among others, the following standards: (1) If the institution is "owned by or related to an outside agency, such as a church . . . its mission [must not be] to advance the beliefs of its sponsoring organization or to present knowledge slanted to conform with those beliefs." (2) The institution must have a governing board, "two-thirds or more majority of whose voting members represent the general public interest. . . ." (3) A majority of the institution's courses must not "foster discrimination among ethical, intellectual, social, and religious values. . . ." (4) Its faculty and students must be "free to examine and test all knowledge appropriate to their disciplines as judged by the academic community in general." (5) It must follow "nondiscriminatory policies in dealing with students, staff, and faculty."[44]

These proposed standards were subsequently revised by a task force appointed by the NASC Chairman of Commissioners, and again by the Commission in December of 1983.[45] The revised eligibility standards submitted to the NASC membership for a vote[46] did not include item (2) above. Item (1) was modified to read:

> Although it is understood that an educational institution would be in reasonable harmony with its founding and sustaining organizations, a high degree of intellectual independence of its faculties and students is expected. An institution owned by or related to an outside agency, such as a church, . . . should ensure that it maintains an atmosphere in which intellectual freedom and independence exist.

Item (3) was modified by the word "perhaps" immediately preceding "religious values." Items (4) and (5) were left intact. The NASC membership subsequently approved the new eligibility requirements, which became effective September 1, 1984.[47]

III. Accrediting Agencies as State Actors

A. Federal Entanglement by Virtue of Surrogate Status

The Supreme Court has never addressed the question of whether accrediting agencies are state actors. It has stated as a general matter,

---

[44] Commission on Colleges, NASC Summer Meeting Minutes 9-11 (1983).

[45] Memorandum to chief administrative officers of member postsecondary institutions from James F. Bemis, Executive Director of the NASC (December 30, 1983).

[46] *Id.*

[47] Telephone interview with James F. Bemis, Executive Director of the NASC (January 29, 1985).

however, that "conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."[48] There is no easily applied test for determining when the level of governmental involvement in the activities of a private organization is of sufficient significance to merit the imposition of constitutional constraints. Rather, "courts must make a particularized inquiry into the circumstances of each case and reach this decision by 'sifting facts and weighing circumstances.' "[49] It is clear, however, that "the government's involvement need not be either exclusive or direct; governmental action may be found even though the government's participation 'was peripheral, or its action was only one of several co-operative forces leading to the constitutional violation.' "[50]

An analysis of the current relationship between the federal government and the various accrediting agencies is aided by an historical understanding of accreditation in the United States. Created in 1867, the Department of Education was for many years concerned only with the compilation and dissemination of statistical information about educational institutions.[51] In 1910 the Department first undertook a form of accreditation by preparing a list classifying colleges on the basis of the success of their graduates in masters degree programs. When several copies of the list inadvertently became public knowledge, the reaction of the educational community was sufficiently intense to cause President William Howard Taft to request that the list be withheld.[52]

Since the government's initial ill-fated attempt at direct accreditation, it has not completely refrained from the task. The Department of Agriculture for a time accredited veterinary schools.[53] The Nurse Training Act of 1965 included a provision that authorized the U.S. Commissioner of Education to accredit nurse training programs.[54] After intensive discussions, however, both within the United States Office of Education (USOE) and with outside consultants, the decision was made not to implement this authority.[55] Furthermore, in 1968, Congress, at the behest of the Commissioner of Education, deleted this accreditation authority from the Health Professions Services Act, which superseded the Nurse

---

[48] Evans v. Newton, 382 U.S. 296 (1966).
[49] *Burton*, 365 U.S. at 722.
[50] United States v. Guest, 383 U.S. 745 (1966).
[51] W. SELDEN, ACCREDITATION 46 (1960).
[52] *Id.*
[53] Orlands, *supra* note 1, at 3-4.
[54] Proffitt, *The Federal Connection for Accreditation*, 50 J. HIGHER EDUC. 145, 146 (1979).
[55] *Id.* at 146-47.

Training Act.[56] Today, the federal government plays a direct role only where no accrediting agency exists to accredit an institution that seeks federal educational aid. In such a case the Commissioner may, with the assistance of a special advisory committee, directly approve the school for the receipt of aid.[57]

While the federal government currently refrains for the most part from direct accreditation of institutions of higher learning, it is nevertheless significantly involved in the accreditation process by virtue of its control of accrediting agencies. This control relationship was initiated by the Veterans' Readjustment Act of 1952,[58] which made access to federal funding in aid of veterans contingent upon accreditation by a government-approved accrediting agency, and which, predictably, made governmental approval of extreme importance to the accrediting agencies. The current version of the Act reads: "[F]or the purposes of this chapter, the Commissioner shall publish a list of nationally recognized agencies or associations which he determines to be reliable authority as to the quality of training offered by an educational institution."[59] Since the Veterans' Readjustment Act, postsecondary educational legislation has similarly made access to funding contingent upon accreditation. Thus, accreditation is now a prerequisite for virtually all forms of federal educational aid.[60]

Governmental "recognition" has in this way become essential to the viability of most accrediting agencies and is a powerful lever in effecting governmental control over the standards employed by agencies in the accreditation process. Since 1965, the federal government has expanded this control primarily through issuing a series of increasingly detailed criteria for recognition.[61]

---

[56] *Id.* at 147.

[57] Millard, *supra* note 2, at 125.

[58] Pub. L. No. 82-550 § 253, 66 Stat. 675 (1958).

[59] 38 U.S.C. § 1775(a) (1976).

[60] *See* Proffitt, *supra* note 54, at 145-46; There are actually two conditions of eligibility: (1) the institution must be legally authorized to operate in its state; and (2) must be accredited by a recognized accrediting agency, or show that its credits are accepted by three other accredited institutions. *See* Millard, *supra* note 2, at 125.

[61] In 1967 the Federation of Regional Accrediting Commissions of Higher Education made the following statement:

> For the past two and one-half years the six regional accrediting associations have operated as service agencies to the U.S. Office of Education in helping to determine the eligibility for participation in federal aid programs for newly-founded institutions. . . . In effect, it may be construed that the regional accrediting associations have broken with their tradition of complete autonomy and have become party to an implied contract with the USOE. This relationship with the USOE appears to have seriously altered the philosophical and operational independence of the regional associations from governmental entanglement.

Proffitt, *supra* note 54, at 152.

At least with respect to "recognized" accrediting agencies, it would appear that the federal government has "so far insinuated itself into a position of interdependence . . . that it must be recognized as a joint participant in the challenged activity. . . ."[62] The government uses these agencies as its agents to determine eligibility for federal funding, a function that the government could do and almost certainly would do itself if the accrediting agencies did not exist. Moreover, the government controls in a significant way the process by which these agencies perform accrediting activities.

Five lower federal courts have faced the question of whether accrediting agencies are state actors by virtue of their relationship with the federal government. Two of the three district courts to consider the issue found the defendant accrediting agencies to be state actors. Neither circuit court that faced the issue felt bound to decide it, but one indicated strongly in dictum that it would have found the defendant accrediting agency to be a state actor had it been required to reach the question.

The most extensive discussion of the problem was by the district court in *Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges and Secondary Schools, Inc.*[63] There, the plaintiff junior college alleged that the Middle States Association, a regional accrediting agency recognized by the Department of Education, had violated the due process clause by denying its accreditation because of its proprietary character.[64] The defendant Association argued that it was not subject to constitutional due process constraints because it was a voluntary membership organization not organized at the request or under the aegis of any governmental agency and did not perform a traditional governmental function.[65] The District Court for the District of Columbia rejected these

---

One policy that the government has sought to implement through this mechanism is that of nondiscrimination. Criteria and Procedures for Recognition of Nationally Recognized Accrediting Agencies and Associations, 34 C.F.R. § 603.6(b)(4) (1983). Examples of other requirements that the federal government has made of those accrediting agencies seeking recognition include the following: the agency must fully disclose its evaluative standards; it must provide advance notice of proposed or revised standards to all affected institutions and provide them with an opportunity to comment; it must assure due process in its accrediting procedures; its policies, evaluation methods, and decisions must be accepted throughout the United States by educators, educational institutions, licensing bodies, practitioners, and employers; the composition of its policy and decisionmaking bodies must reflect the "community of interests directly affected by the scope of its accreditation." *Id.* at § 603.6.

[62] *Burton*, 365 U.S. at 725.

[63] 302 F. Supp. 459 (D.D.C. 1969), *rev'd*, 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970).

[64] The Association required that an institution seeking accreditation be "a nonprofit organization with a governing board representing the public interest." *Marjorie Webster*, 302 F. Supp. at 462. The plaintiff also alleged that the defendant had violated section 3 of the Sherman Act. *Id.*

[65] *Id.*

arguments and found that the Middle States Association acted in a "quasi-governmental capacity by virtue of its role in the distribution of Federal funds under the 'aid to education statutes,' " and that its denial of accredited status to Marjorie Webster Junior College solely on the basis of the school's proprietary character was arbitrary and unreasonable and thus violated the fifth amendment.[66]

The Court of Appeals for the District of Columbia[67] did not reach the state action issue, finding that even if the Association was a state actor it had not violated the due process clause.[68]

A Massachusetts federal district court, in *Marlboro Corporation v. Association of Independent Schools*,[69] found that the activities of the Association of Independent Colleges and Schools, a specialized accrediting agency recognized by the Department of Education, did not constitute governmental action because the Association was comprised only of private institutions.[70]

On appeal,[71] the First Circuit—like the D.C. Circuit in *Marjorie Webster*—did not reach the state action question, finding that even if the Association's accrediting activities did not constitute state action, the Association had not violated the plaintiff's procedural rights. The court did, however, strongly indicate in dictum that it agreed with the *Marjorie Webster* district court's conclusion that accrediting agencies act as surrogates for the federal government and are therefore state actors:

> While it is true that there is no governmental participation in AICS, . . . the Commission has actively sought and received the federal recognition that makes its grant of accreditation a prerequisite to federal programs eligibility. It appears that if AICS or an agency like it did not perform the accreditation function, 'government would soon step in to fill the void.'[72]

---

[66] *Id.* at 470-71. The court relied in part on the testimony of John Proffitt, Director of the Accreditation and Institutional Eligibility Staff of the Office of Education, who stated:

> Accreditation has become, fundamentally speaking, a service aspect to the Federal Government in determining the eligibility for funding. This has arisen as a result of the language written into Federal funding assistance legislation by Congress.

Id. at 470. The court also found for the plaintiff on its Sherman Act claim. *Id.* at 471.

[67] Marjorie Webster Junior College, Inc. v. Middle States Assoc. of College and Secondary Schools, Inc., 432 F.2d 650 (D.C. Cir. 1970), *cert. denied*, 400 U.S. 965 (1970).

[68] The court found that the plaintiff junior college had not shown that the denial of accredited status was without reasonable basis. *Marjorie Webster*, 432 F.2d at 658-69. The court also found the Sherman Act to be inapplicable. *Id.* at 654.

[69] 416 F. Supp. 958 (D. Mass.), *rev'd*, 556 F.2d 78 (1st Cir. 1976).

[70] *Marlboro*, 416 F. Supp. at 959.

[71] Marlboro Corp. v. Independent Colleges and Schools, Inc., 556 F.2d 78 (1st Cir. 1976).

[72] *Id.* at 80 (citations omitted).

Although the *Oral Roberts* court[73] did not explicitly discuss the state action question, implicit in its order[74] was a finding that the ABA's accrediting activities were state action because the first amendment proscribes only state inhibition of religious liberty. This implicit finding that the ABA is a state actor is strongly supported by the district court opinion in *Marjorie Webster* and the First Circuit's dictum in *Marlboro*. The "surrogate" analysis in those cases applies to the NASC as well. The NASC is a regional accrediting association, as is the Middle States Association, which the *Marjorie Webster* district court found to be a state actor. Both the ABA and the NASC are recognized by the federal government as agencies whose accrediting decisions determine access to federal funding. Although it seems clear that the ABA and NASC are state actors by virtue of their role as surrogates of the federal government, a different analysis must be applied to the AALS, which is not a "recognized" agency. Although not a surrogate of the federal government for funding purposes, the AALS may nevertheless be a state actor by virtue of its relationship with state governments.

B. State Entanglement

In addition to involvement with the federal government, an accrediting agency may be a state actor by virtue of its involvement with state governments.[75] Several circuit courts have held that the National Collegiate Athletic Association, an association similar in some important respects to accrediting agencies, is a state actor. The Fifth Circuit in *Parish v. National Collegiate Athletic Association*,[76] noting that "[s]tate participation in or support of nominally private activity is a well recognized basis for a finding of state action,"[77] found the NCAA to be a state actor, in part because "state-supported educational institutions and their members and officers play a substantial, although admittedly not pervasive, role in the NCAA's program."[78] The *Parish* court further stated

---

[73] Oral Roberts Univ. v. American Bar Assoc., No. 81-C-3171 (N.D. Ill. July 17, 1981), 8 LEGAL AFF. MANUAL 205 (1981).

[74] "[T]he defendant ABA is enjoined from denying provisional accreditation to ORU's Law School in whole or in part on the basis of ABA Standard 211's prohibition against religious restrictions. . . ." *Id.* at 209.

[75] Both the free exercise clause, Cantwell v. Connecticut, 317 U.S. 296, 303 (1940), and the establishment clause, Everson v. Board of Educ., 330 U.S. 1,15 (1947), have been held applicable to state action by the incorporation of their values into the due process clause of the fourteenth amendment. For a discussion of the history of this incorporation, see Justice Brennan's concurring opinion in Abington School Dist. v. Schempp, 374 U.S. 203, 253-58 (1962).

[76] 506 F.2d 1028 (5th Cir. 1975).

[77] *Id.* at 1032.

[78] *Id.*

that "we cannot ignore the states'—as well as the federal government's—traditional interest in all aspects of this country's educational system."[79] The court included, as a separate basis for holding that state action existed, a finding that the NCAA was performing a "traditional governmental function."[80]

The Court of Appeals for the District of Columbia has also found the NCAA to be a state actor. In doing so, it considered the following facts relevant:

> Approximately half of the NCAA's 655 institutional members are state- or federally-supported. . . . [T]he public institutions provide the vast majority of the NCAA's capital. . . . Both the President and Secretary-Treasurer were representatives of public instrumentalities and . . . state instrumentalities traditionally provided the majority of the members of the governing Council and the various committees.[81]

Upon the basis of these and other facts, the court concluded that "governmental involvement, while not exclusive, is 'significant,' and that all NCAA actions appear 'impregnated with a governmental character.' "[82]

The Ninth Circuit, as well, has found the NCAA to be a state actor based upon the same analysis,[83] as have several district courts.[84]

The NASC has accredited 151 postsecondary educational institutions, a majority of which are state schools.[85] The Association's current president is a representative of a state university.[86] Its current first vice-president is a representative of a state department of education.[87] The Association's site inspection teams are comprised primarily of full-time faculty and staff of other accredited institutions.[88] Activities of the Association are funded for the most part by dues from member institutions.[89]

---

[79] *Id.*

[80] *Id.* at 1032-33.

[81] Howard University v. NCAA, 510 F.2d 213, 219 (D.C. Cir. 1975).

[82] *Id.* at 219-20.

[83] Associated Students, Inc. v. NCAA, 493 F.2d 1251, 1254-55 (9th Cir. 1974).

[84] Smith v. Southern Methodist Univ., CA-3-74-895B (N.D. Tex. 1974); Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973); Curtis v. NCAA, C-712088 ACW (N.D. Cal. 1972). *See also* Note, *Judicial Review of Disputes Between Athletes and the National Collegiate Athletic Association*, 24 STAN. L. REV. 903, 916-28 (1972). Although one district court in California has found the activities of the NCAA not to be state action, McDonald v. NCAA, 370 F. Supp. 625 (C.D. Cal. 1974), that holding was undercut by the Ninth Circuit's subsequent decision in *Associated Students*. For a criticism of the *McDonald* decision, see *Howard University*, 510 F.2d at 219.

[85] Telephone interview with James F. Bemis, Executive Director of the NASC (January 29, 1985).

[86] *Id.*

[87] *Id.*

[88] Telephone interview with James F. Bemis, Executive Director of the NASC (April 6, 1984).

[89] *Id.*

Of the 151 member schools of the AALS, sixty-six are state institutions.[90] The nine-member executive committee includes six representatives of state law schools.[91] Two-thirds of the Association's funding is through the dues of member institutions.[92]

Like the NCAA, then, the NASC and the AALS are "joined in a mutually beneficial relationship [with the states], and in fact may be fairly said to form the type of symbiotic relationship between public and private entities which triggers constitutional scrutiny."[93] As the court noted in *Parish*, "[I]t would be a strange doctrine indeed to hold that the states could avoid the restrictions placed upon them by the Constitution by banding together to form or to support a 'private' organization to which they have relinquished some portion of their governmental power."[94]

This "state entanglement" analysis may be an additional ground for concluding that the ABA is a state actor in its accrediting function. Although the ABA is not comprised of representatives of public schools to the degree that the AALS and the six regional accrediting associations are, it is entangled with state governments in another, perhaps even more significant, way. The ABA's express policy with respect to the effect of its own accreditation is that "every candidate for admission to the bar should have graduated from a law school approved by the American Bar Association. . . ."[95] Accordingly, most state courts have promulgated a rule that applicants for bar examinations must have graduated from a law school accredited by the ABA. It would be "a strange doctrine indeed" for a state to be able to avoid the restriction placed upon it by the Constitution by delegating the function of establishing attorney licensure standards to the ABA.[96]

---

[90] ASSOCIATION INFORMATION, Appendix A (April 1983) (Published by the AALS) (supplemented by a telephone interview with Wendy Ernst, Secretary to Millard H. Rudd, Executive Director of the AALS (January 29, 1985)).

[91] Telephone interview with Wendy Ernst, Secretary to Millard H. Rudd, Executive Director of the AALS (January 29, 1985).

[92] Telephone interview with Millard H. Rudd, Executive Director of the AALS (April 6, 1984).

[93] *Howard University*, 510 F.2d at 220.

[94] *Parish*, 506 F.2d at 1033.

[95] APPROVAL OF LAW SCHOOLS: ABA STANDARDS AND RULES OF PROCEDURE § 102 (1977).

[96] In Hoover v. Ronwin, ___ U.S. ___, 104 S.Ct. 1989 (1984), the Supreme Court held that the grading of bar exams by a committee appointed by the Arizona Supreme Court constituted state action for purposes of Sherman Act immunity. The Court found that the members of the committee were "each members of an official body selected and appointed by the Arizona Supreme Court. Indeed, it is conceded that they were state officers. The court gave the members of the Committee discretion in compiling and grading the bar examinations, but retained strict supervisory powers and ultimate full authority over its action." *Id.* at 1997. The accreditation function of the ABA is not subject to the same level of governmental control and supervision. Thus, *Hoover* does not

Thus, while the contours of the state action analysis vary with respect to the NASC, the ABA, and the AALS, a strong argument can be made that each is a state actor. Access to state educational funding has been made contingent upon the decisions of accrediting agencies that are recognized and regulated by the federal government, as are the ABA and the NASC. The ABA performs the state-delegated function of establishing attorney licensure standards. The NASC and the AALS are comprised largely of representatives from state institutions, and a substantial portion of their funding comes from such institutions.

IV. Establishment and Free Exercise Infringements: Analytical Framework

If the various accrediting agencies are indeed state actors, the inquiry must then turn to whether their actions with respect to church-related schools infringe either the establishment or free exercise strictures of the first amendment. The at once complementary and contradictory nature of the free exercise and establishment clauses has led to considerable conceptual confusion. In one sense, the religion clauses are mutually reinforcing. Ensuring religious liberty under the free exercise clause is, in large measure, a means of protecting against the church/state union that the establishment clause proscribes, and vice versa.[97] In another sense, the clauses are in tension. Either clause expanded to its logical extreme would consume the other.[98] Perhaps not surprisingly, the tensions have led to an obtuse, self-contradictory, and complicated body of law. Much of the confusion is attributable to judicial analyses viewing one clause or the other in isolation, rather than in dynamic union.

In traditional establishment clause analysis, three questions are posed: (1) Is the purpose of the governmental regulation to advance or inhibit religion? (2) Is the primary effect of the governmental regulation to advance or inhibit religion? and (3) Will enforcement of the regulation result in excessive governmental entanglement with religion?[99]

---

conclusively resolve the question of whether that accreditation function constitutes state action for first amendment purposes. Nevertheless, *Hoover* is, in a broad sense, supportive of the position that the ABA's accreditation function is state action. The grading of exams by committees like the one in *Hoover* and the accreditation of law schools by the ABA are both components in the licensing process that have been delegated to these bodies by the states, which have retained the ultimate authority to determine who should be admitted to the practice of law.

[97] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 814-15 (1978).

[98] *See id.*

[99] *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236 (1968); Lemon v. Kurtzman, 403 U.S. 602 (1971). For a more detailed discussion of the history of establishment clause litigation, see Mott, *The Supreme Court and the Establishment Clause: From Separation to Accomodation and Beyond*, 14 J. L. & EDUC. 111 (1985).

Traditional free exercise clause analysis raises three questions as well: (1) Is the sincere exercise of religion involved? (2) Does the state's action burden this exercise? (3) Is the burden justified by a compelling state interest for which there is no less restrictive alternative means of achievement?[100]

These tests overlap substantially. For example, a state regulation that has the purpose or primary effect of inhibiting religion under establishment clause analysis would appear inevitably to implicate the free exercise clause. An "entanglement" under the third tier of establishment clause analysis certainly, in most cases, will be a "burden" under the second tier of free exercise clause analysis.

Despite this close conceptual relationship, the Supreme Court has developed the two tests separately and often created cases as if they raised concerns under only one clause or the other. The Court did undertake both free exercise and establishment clause analyses in its landmark case of *Everson v. Board of Education*,[101] but later cases concerning aid to private schools focused almost entirely on the establishment clause. At issue in *Everson* was the constitutionality of a New Jersey program that reimbursed the parents of parochial school students for expenses incurred in transporting their children to and from school via the public bus system. In the first part of its first amendment analysis, the Court found that the free exercise clause prohibited the exclusion of the parents of parochial school students from a program aiding all other schoolchildren.[102] The Court further found that the program did not impermissibly aid religion in violation of the establishment clause because it was part of a larger program that provided state-financed transportation for students at all schools, both public and private, that met New Jersey's secular educational requirements.[103]

Subsequent cases involving state aid to church-related schools, ignoring the free exercise clause analysis articulated in the *Everson* decision, analyzed the problem solely on the basis of an expanded establishment clause analysis that asked the following question:

> [W]hat are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular

---

[100] *See, e.g.* Sherbert v. Verner, 374 U.S. 398 (1963).
[101] 330 U.S. 1 (1947).
[102] *Id.* at 16.
[103] *Id.* at 17-18.

> legislative purpose and a primary effect that neither advances nor inhibits religion.[104]

Walz v. Tax Commission further expanded establishment clause analysis, articulating an "entanglement" test.[105] This entanglement test proved to be central to the Court's analysis in two companion cases decided the year following *Walz*, *Lemon v. Kurtzman*[106] and *Farley v. DiCenso*.[107] In those cases, the Court explicitly bypassed the secular effect tier of the establishment clause analysis,[108] and found the statutes to be unconstitutional as giving rise to excessive governmental entanglement with religion, regardless of whether their primary effect was secular.[109]

Following the *Lemon* decision, the Court struck down direct grants for the maintenance and repair of school facilities,[110] reimbursement for the costs of state-mandated testing and recordkeeping,[111] reimbursement for tuition,[112] the loan of instructional material and equipment,[113] and the provision of auxiliary services such as counseling, psychological services, and speech and hearing therapy.[114]

In *Wolman v. Walter*,[115] for the first time since *Lemon*, the Court upheld a form of aid to parochial schools other than textbooks, allowing also a sanitized version of the testing and scoring reimbursement program struck down in *Levitt*,[116] as well as the provision of diagnostic and therapeutic services. While *Wolman* was a minor victory for advocates of state aid to religious schools, the Court's recent decision in *Mueller v. Allen*[117] was a major one. In that case the Court upheld a Minnesota law permitting state taxpayers to claim a deduction from gross income for tuition and other educational expenses. Of central importance in the Court's

---

[104] *Allen*, 392 U.S. at 243 (quoting Abington School Dist. v. Schempp, 374 U.S. 203 (1963)) (approving a program for the lending of textbooks free of charge to parochial school students as being secular in purpose and effect because it aided parochial school and nonsectarian schools alike).

[105] 397 U.S. 664 (1970) (concluding that a state property tax exemption for religious properties would result in less governmental entanglement with religion than would taxation, *id.* at 674-75).

[106] *Id.*

[107] 403 U.S. 602 (1971) (dealing with statutes supplementing teacher salaries and the cost of textbooks and instructional materials for nonpublic schools providing secular educational services).

[108] *Id.*

[109] *Id.* at 613-14.

[110] Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973).

[111] Levitt v. Committee for Public Educ., 413 U.S. 472 (1973).

[112] Sloan v. Lemon, 413 U.S. 825 (1973).

[113] Meek v. Pittenger, 421 U.S. 349 (1975).

[114] *Id.*

[115] 433 U.S. 229 (1977).

[116] In *Levitt*, the nonpublic schools controlled the content of the tests involved, raising the danger of religious influence. In this program, test content was controlled by the state. *Id.* at 240-41.

[117] 463 U.S. 338, 103 S. Ct. 3062 (1983).

analysis was the fact that the deduction at issue was available for tuition expenses incurred by all parents, at both private and public schools.[118] The Court found this aspect of the program determinative, even though statistical data clearly indicated that the deduction would primarily benefit parents of children attending church-related schools.[119]

While *Mueller* seems to signify increased tolerance of government programs in aid of elementary and secondary schools, the Court has long been tolerant of aid to church-related postsecondary schools. Although in cases involving postsecondary schools the Court has applied the same three-tiered establishment clause analysis that it developed in cases involving state aid to church-related elementary and secondary schools, it has never struck down a government program in aid of the former. Over the past two decades, the Court has allowed aid to postsecondary schools in the form of federal construction grants,[120] state revenue bond issues,[121] and annual federal noncategorical grants.[122] Apparently, the principal reason for the Court's greater tolerance of aid to postsecondary institutions is its perception that more mature students are less susceptible to religious indoctrination.[123]

The analytical framework that follows draws on the "tests" that the Supreme Court has developed separately for what it perceives to be "establishment clause" and "free exercise clause" cases. The accreditation process will be examined in relation to both religion clauses. Most importantly, however, this framework focuses on the meshing of the clauses, thereby permitting a full exploration of the manner in which they work together to help resolve the problems raised by the accreditation of church-related schools. Three questions are posed: (1) Does the conferral of accredited status upon a church-related school constitute impermissible state aid to religion? (2) Does the regulation inherent in the accreditation process impermissibly restrict religious liberty when applied to church-related schools? (3) Does the denial of accredited status on the basis of an accrediting standard restricting the religious function of church-related schools impermissibly burden free exercise?

V. Does the Conferral of Accredited Status Upon a Church-Related School Constitute Impermissible State Aid to Religion?

Although the most obvious problem raised by the accreditation of

---

[118] *Id.* at ____, 103 S.Ct. at 3068.
[119] *See id.* at ____, 103 S.Ct. at 3070.
[120] Tilton v. Richardson, 403 U.S. 672 (1971).
[121] Hunt v. McNair, 413 U.S. 734 (1973).
[122] Roemer v. Maryland Public Works Bd., 426 U.S. 736 (1976).
[123] *See Tilton*, 403 U.S. at 686.

church-related schools is whether the regulation inherent in the process restricts religious liberty in violation of the free exercise clause, any question involving governmental aid to religious institutions has important establishment clause dimensions as well. One cannot settle the question of whether an accrediting agency *must* accredit church-related schools under the free exercise clause without first inquiring whether it *may* accredit such schools under the establishment clause. The conferral of accredited status is undeniably a substantial benefit. The Supreme Court has consistently rejected the argument, however, that " 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause."[124]

The first question that must be posed under traditional establishment clause analysis is whether the broad purpose of the accreditation process is secular. This question requires little discussion, for the Court has found a secular purpose for any legislation that is even arguably secular.[125] Even in those decisions where the Court has struck down educational aid programs on other grounds, it has found them to have a secular purpose.[126] The broad purpose of the accreditation process—the assurance of a minimal level of educational quality—is clearly a secular one. It is essentially identical to the statutory purpose, sustained in *Lemon*, of maintaining "minimum standards in all schools [the state] allows to operate,"[127] as well as those purposes sustained in other cases involving aid to church-related schools.[128]

The second question that must be considered in examining whether the accreditation process impermissibly aids religion is whether it has "the primary effect of advancing the sectarian aims of the non-public schools."[129] In *Mueller*, the Court viewed the breadth of the class that benefitted from the aid program to be the most important element of this inquiry. The tax deductions at issue were available to parents of children attending both public and private schools. The Court found that "the provision of benefits to so broad a spectrum of groups is an impor-

---

[124] *Mueller*, 463 U.S. at ____, 103 S.Ct. at 3065.

[125] Only twice has the Supreme Court struck down otherwise valid legislation as being insufficiently secular in purpose. *See* Stone v. Graham, 449 U.S. 39, 41-42 (1980) (per curiam) (holding that the Ten Commandments may not be posted in public schools); Epperson v. Arkansas, 393 U.S. 97, 107-09 (1968) (holding unconstitutional a statute that banned the teaching of evolution in public schools).

[126] *See, e.g., Lemon*, 403 U.S. 602; *Meek*, 421 U.S. 439; *Wolman*, 433 U.S. 229.

[127] *Lemon*, 403 U.S. at 613.

[128] *See, e.g.*, Committee for Public Educ. v. Regan, 444 U.S. 646, 654 (1980).

[129] *Id.* at 662; *Lemon*, 403 U.S. at 612-13; This tier of the establishment clause analysis also asks whether the aid has the primary effect of *inhibiting* religion, a question that will be addressed in the next section.

tant index of secular effect"[130] and went on to distinguish the assistance program in *Nyquist*, a tuition reimbursement scheme found violative of the establishment clause, on the basis that it aided only parents of children at nonpublic schools.[131] The Court further noted that in both *Allen* and *Everson*, two cases in which governmental aid to church-related schools was sustained, the beneficiary class consisted of the parents of schoolchildren in both public and private schools.[132] The beneficiary class of the accreditation process is similarly broad. All schools, both public and private, may seek accredited status.

VI. Does the Regulation Inherent in the Accreditation Process Impermissibly Restrict Religious Liberty When Applied to Church-Related Schools?

A. Burden on Religious Liberty under Establishment Clause Analysis

The third tier of the traditional establishment clause analysis, and the most problematic with respect to accreditation, involves entanglement. The Supreme Court first inquired into whether a government program fostered excessive governmental entanglement with religion in *Walz*, but it did not address the nuances of this "entanglement test" until *Lemon*. In the latter case, the Court explicitly bypassed the "primary effect" tier of establishment clause analysis and proceeded to find the statute at issue—which provided salary subsidies to teachers at church-related schools—to be violative of the entanglement clause test.[133] The Court held that any governmental aid to parochial schools must be strictly confined to those aspects of the schools that serve a purely secular function.[134] The Court recognized, however, that to confine most forms of aid to the secular aspects of such pervasively sectarian schools would inevitably inhibit their sectarian mission because it would require "state inspection and evaluation of the religious content of a religious organization" and thus create a relationship between church and government "pregnant with dangers of excessive government direction of church schools and hence of churches."[135] The Court further found that the entanglement tier of the analysis prohibited programs such as the salary subsidies at issue because of their "divisive political potential."[136]

---

[130] *Mueller*, 463 U.S. at ____, 103 S.Ct. at 3068.
[131] *Id.*
[132] *Id.*
[133] *Lemon*, 403 U.S. at 613-14.
[134] *Id.* at 616.
[135] *Id.* at 620.
[136] *Id.* at 622.

The multifaceted nature of this entanglement analysis has given rise to certain conceptual difficulties. In addition to creating an insoluble paradox for the state and parochial schools,[137] this test seems largely redundant with the establishment clause inquiry into whether the purpose or effect of a governmental aid program is to inhibit religion.[138] Moreover, the Court's application of the entanglement analysis to church-related institutions of higher learning has rendered results quite different from those rendered in the elementary and postsecondary school context.[139]

The Court's decision in *Mueller* cuts back substantially on the complicated doctrine that had grown up around the establishment clause, and around the entanglement test in particular. Traditionally, under the entanglement test, the Court had looked both to whether the aided school was so pervasively sectarian that any aid to its secular function would inevitably aid its sectarian function and to whether the aid program would give rise to excessive governmental surveillance of the sectarian function. In *Mueller*, however, under the entanglement tier of the analysis, the Court looked only to whether the Minnesota statute gave rise to "comprehensive, discriminating, and continuing state surveillance" of religion.[140] It made no inquiry under its entanglement analysis into whether the program impermissibly aided the religious aspects of parochial schools.[141] Further, the Court indicated the demise of the "political divisiveness" inquiry under the entanglement test.[142] The *Mueller* Court's increased tolerance of governmental aid to church-related parochial schools is attributable, at least in part, to its perception that the establishment clause had been given undue weight in this area.

> At this point in this 20th Century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic process—or even of deep political division along religious lines—is remote and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court.[143]

---

[137] *Id.* at 668 (White, J., concurring in part and dissenting in part).

[138] *See Roemer*, 426 U.S. at 769 (White, J., concurring in judgment).

[139] *See supra* text accompanying notes 120-27.

[140] *Mueller*, 463 U.S. at ____, 103 S.Ct. at 3071.

[141] The impermissible aid inquiry was confined to the second tier of the Court's analysis, the crucial element of which was the breadth of the beneficiary class, not the degree to which sectarianism pervaded the aided schools. The Court also considered the fact that the state assistance at issue flowed directly to private individuals to be "of some importance . . . , albeit only one among many to be considered." *Id.* at ____, 103 S.Ct. at 3069 (citation omitted).

[142] *Id.*.

[143] *Id.* (quoting *Wolman*, 433 U.S. at 263 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

Thus, the inquiry under the *Mueller* entanglement test focuses not on whether a program in aid of church-related schools will aid their sectarian function, or whether it will give rise to political divisiveness, but whether the program will result in the state insinuating itself into a position of control over religion.

While the determination of whether a state program gives rise to "comprehensive, discrimination, and continuing state surveillance"[144] of the religious function of church-related schools purports to be an establishment clause inquiry, it is equally a free exercise clause inquiry. The vice of state surveillance of and control over religion is that it restricts free exercise. That part of the second tier of traditional establishment clause analysis that asks whether a program has the primary effect of inhibiting religion also has free exercise dimensions. The result of this analytic dovetailing is that doctrines developed under both religion clauses must be consulted in order to determine whether religious liberty has been unconstitutionally restricted by a government program.

The conferral of accredited status is more than just a benefit; regulation is inherent in the accreditation process. Just as governmental aid to church-related schools is not absolutely proscribed by the first amendment, neither is governmental regulation of church-related schools. The Supreme Court "has long recognized that religious schools pursue two goals, religious instruction and secular education."[145] This recognition was the premise of the Court's holding in *Pierce v. Society of Sisters*,[146] where it struck down a state law requiring that all children attend publicly operated schools. The Court reasoned that the state's interest in secular education could be adequately served by requiring private schools to meet state-imposed requirements as to quality and nature of curriculum. Since *Pierce*, the Court has consistently reaffirmed the "power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."[147] In *Lemon*, although the Court found that the teacher salary subsidies at issue violated the establishment clause, in part because their implementation would result in state inspection and evaluation of the religious content of a religious organization, it said that "[a] State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate."[148]

---

[144] *Mueller*, 463 U.S. at ___ 103 S.Ct. at 3071.
[145] *Allen*, 392 U.S. at 245.
[146] 268 U.S. 510 (1925).
[147] *Allen*, 392 U.S. at 245-46.
[148] *Lemon*, 403 U.S. at 613.

The inquiry must be, then, not whether regulation is permissible as to secular aspects of church-related schools, but whether the regulation at issue unduly infringes on the religious function of such schools. Whether the accreditation process impermissibly entangles government in the religious function of church-related schools depends on the particular accrediting standard employed. A standard requiring that candidate church-related institutions not espouse a mission advancing religious belief,[149] or that they foster the ability to distinguish between religious values,[150] would seem to require close examination of every aspect of curriculum and pedagogy—precisely the kind of surveillance of and intrusion into the religious mission of church-related schools that the Supreme Court has condemned under the establishment clause. An accrediting standard prohibiting religious discrimination that is interpreted so broadly as to preclude religion-based conduct requirements and *de facto* religious discrimination[151] might likewise require a substantial investigatory intrusion into such schools' religious mission.

B. Burden on Religious Liberty Under Free Exercise Clause Analysis

The intrusive surveillance with which the entanglement inquiry of establishment clause analysis is concerned would constitute a burden on religious exercise under free exercise clause analysis as well, although the burdens against which the free exercise clause protects are not limited to those involving entanglement.[152]

Under traditional free exercise clause analysis, the first inquiry is whether the exercise of religion is involved at all; the second, whether the religious exercise is burdened; and the third, whether a compelling state interest nevertheless justifies the imposition of that burden. It is clear that the sectarian function of church-related schools is an exercise of religion under the first tier of free exercise analysis. As the Supreme Court has stated on numerous occasions, the sectarian function of church-related schools is a fundamental element of their religious mission.[153] Essential to this sectarian function is the ability to teach secular courses in a manner informed by a theistic rather than humanistic conception of ultimate truth, and to do so within a religiously influenced environment. Indeed, such

---

[149] *See supra* text accompanying note 44.

[150] *Id.*

[151] *See supra* text accompanying notes 15-29.

[152] *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Thomas v. Review Bd. of the Indiana Employment Sec. Div., 450 U.S. 707 (1981).

[153] *See, e.g., Lemon*, 403 U.S. 603, 657 (1971) (Brennan, J., concurring).

is the *raison d'etre* of church-related schools. Accordingly, there can be little doubt that accrediting standards requiring that a church-related school not "advance the beliefs of its sponsoring organization,"[154] "foster discrimination among . . . religious values[155] or abandon religion-based codes of conduct, have an effect on religious exercise. Other standards, although not on their face aimed at the sectarian mission of church-related schools, may also affect religious exercise, depending upon their application.[156]

Religious exclusivity is also an important component of the religious mission of some schools. It seems clear that admissions and hiring decisions made by a church-related school on the basis of religiously grounded criteria is religious exercise for purposes of the first tier of free exercise clause analysis. The Supreme Court recently acknowledged this view in *Bob Jones University v. United States*,[157] in which it upheld the denial of tax-exempt status to the school because of its racially discriminatory admissions practices. The Court questioned whether the denial of tax benefits to the school was a constitutionally significant burden and found that, even if it were, the governmental interest in eradicating racial discrimination in education was sufficiently compelling to outweigh it. The Court assumed, however, that the implementation of the religion-based admissions standard constituted an exercise of religious belief for purposes of the first tier of free exercise clause analysis.[158]

Teaching courses in a manner informed by religious beliefs and values, fostering an environment influenced by such beliefs and values, and making admissions and hiring decisions on the basis of religious considerations are important elements of the sectarian mission of many church-related schools, and as such, are religious exercise for purposes of free exercise clause analysis. The questions remain, however, whether accrediting standards affecting this religious exercise burden it in a constitutionally signifi-

---

[154] *See supra* text accompanying note 44.

[155] *Id.*

[156] The Supreme Court has stated that "[a] regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion." Wisconsin v. Yoder, 406 U.S. 205, 220 (1972). Suppose, for example, that an accreditation standard requiring that a majority of the voting members of the governing board of a church-related school represent the general public interest, *see supra* text accompanying note 44, were applied to preclude a board majority of church officials. Or suppose that an accrediting standard requiring that a school's faculty and students be "free to examine and test all knowledge appropriate to their disciplines as judged by the academic community in general", *see supra* text accompanying note 44, were applied so as to prevent a Catholic school from prohibiting live fetal experimentation by its faculty. Such applications of apparently neutral standards would undeniably affect the religious mission of those schools.

[157] 461 U.S. 574 (1983).

[158] *Id.* at 603.

cant manner, and, if so, whether they are nevertheless justified by a compelling state interest for which there is no less restrictive alternative means of achievement.

VII. Does the Denial of Accredited Status on the Basis of an Accrediting Standard Restricting the Religious Function of Church-Related Schools Impermissibly Burden Free Exercise?

A. Is the Denial of Accredited Status a Constitutionally Significant Burden?

Accrediting standards that make accreditation contingent upon the restriction of religious exercise are not as severe a burden as a law prohibiting that exercise altogether. Nevertheless, the Supreme Court has established that the denial of an otherwise available benefit on the basis of religious exercise is a constitutionally proscribed burden on that exercise. The first case to so hold was *Everson*, in which the Court made separate analyses under each religion clause. The Court first found that the free exercise clause:

> commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.[159]

Recognizing the tension that exists between the religion clauses in this context, the Court then addressed the establishment clause question and found that the bus fare reimbursement program at issue did not impermissibly aid religion because it was part of a larger program that provided state-financed transportation for students at all schools, both public and private, that had met New Jersey's secular educational requirements. Thus, the assurance of governmental neutrality with respect to religion did not require the exclusion of parochial school students or, indirectly, the schools themselves from a benefit for which they qualified on the basis of a neutral principle as members of a broad beneficiary class. Indeed, the free exercise clause mandated inclusion in such circumstances. In the subsequent cases involving state aid to church-related schools, however, this free exercise analysis has been ignored. The Court has addressed only the question of whether aid to church-related schools under the various state and federal programs at issue was permissible under the establishment clause, not whether it was mandated by the free exer-

---

[159] *Everson*, 330 U.S. at 16.

cise clause. Justice White recognized this omission in his separate opinion in *Lemon*:

> The Establishment Clause . . . coexists in the First Amendment with the Free Exercise Clause and the latter is surely relevant in cases such as these. Where a state program seeks to ensure the proper education of its young, in private as well as public schools, free exercise considerations at least counsel against refusing support for students attending parochial schools simply because in that setting they are also being instructed in the tenets of the faith they are constitutionally free to practice.[160]

While the *Everson* free exercise clause analysis has been ignored in subsequent cases involving governmental aid to religion, it has nevertheless proved pivotal in two other cases involving the denial of state benefits on the basis of religion. In *Sherbert v. Verner*,[161] the Court stated that "conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms."[162] At issue in *Sherbert* was whether South Carolina could deny unemployment benefits to a Seventh-day Adventist who was discharged from her employment because she would not work on Saturday, the Sabbath Day of her faith. The Court rejected South Carolina's argument that, because employment compensation is a "privilege" rather than a "right," its denial to the plaintiff did not violate the free exercise clause: "It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing conditions upon a benefit or privilege."[163]

In *Thomas v. Review Board*,[164] the plaintiff, a Jehovah's Witness, terminated his employment when he was transferred by his employer to a department that produced turrets for military tanks because his religious beliefs forbade participation in the production of armaments.[165] He was denied unemployment compensation because his termination was not based upon "good cause [arising] in connection with [his] work," as required by the Indiana unemployment statute.[166] The Court relied on *Everson* and *Sherbert* in finding that "a person may not be compelled to choose between the exercise of a First Amendment right and participation in an otherwise available public program."[167]

---

[160] *Lemon*, 403 U.S. at 665 (White, J., concurring in part and dissenting in part).
[161] 374 U.S. 398 (1963).
[162] *Id.* at 405.
[163] *Id.* at 404.
[164] 450 U.S. 707 (1981).
[165] *Id.* at 709.
[166] *Id.* at 712.
[167] *Id.* at 716.

The conferral of accredited status is a substantial benefit; it is extremely important to virtually all church-related institutions of higher education, and essential to the continued operation of many. Because in most states only graduates of an accredited law school are eligible for bar admission,[168] the successful operation of a law school is no less threatened by the denial of accredited status than it would be by a law making its continued operation illegal. Many church-related colleges and universities could continue to exist even if denied accredited status and the other benefits which derive from accreditation, but many could not survive. In either event, the denial of accredited status on the basis of a religious exercise is a constitutionally significant burden on that exercise.

B. Does a Compelling State Interest Justify the Burden?

An accrediting standard restricting religious liberty may nevertheless serve as the basis for denial of accredited status to a church-related school if it is justified by a compelling state interest for which there are no less restrictive alternative means of achievement.[169] *Sherbert* was the first case in which the Court explicitly applied this "least restrictive alternative/compelling state interest" mode of analysis, an analysis originally developed in free speech cases.[170] In *Sherbert*, the Court found that the state did not meet its burden of showing that there were no less restrictive means of preventing fraudulent claims by those feigning religious objections to Saturday work than the denial of benefits to all who claimed that they could not work on Saturday because of their religious beliefs.[171] The Court went on to find that the state did not have a compelling interest in preventing the administrative problems arising from the allowance of an exemption.[172]

---

[168] *See supra* text accompanying note 96.

[169] This doctrine has been developed exclusively under the free exercise clause. The balancing process under the establishment clause has been incorporated into the three tiers of that analysis. TRIBE, *supra* note 97, at 848 n.1. Professor Tribe has suggested a doctrine that "would require government to justify policies creating a significant risk of entanglement with religion by invoking a compelling secular justification." *Id.*

[170] *See, e.g.*, NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 487-90 (1960); TRIBE, *supra* note 97 at 854.

[171] *Sherbert*, 374 U.S. 407.

[172] *Id.* at 409. Professor Tribe views *Sherbert* as signalling future restriction of those state interests adjudged sufficiently compelling to justify intrusions on religious liberty:

> *Sherbert* further establishes that cost-saving and efficiency—and therefore presumably other even more diffuse concerns—do not constitute sufficient justification for a substantial, albeit indirect, intrusion on religious freedom. If this principle is to be taken seriously, it compels reconsideration of a variety of issues. The most obvious candidates for review are those cases in which government has been allowed to restrict religion not to prevent a focused harm to a specific victim but to serve a diffuse societal goal.

TRIBE, *supra* note 97, at 855.

The central justification for the accreditation process has traditionally been a perceived need to assure a minimal level of educational quality. In recent years, however, accrediting agencies have also begun to implement the broader social policy of nondiscrimination.[173] It has been argued that in addition to serving this broader social policy, the prohibition of discrimination by accrediting agencies is essential to the assurance of a minimal level of educational quality.[174] Accordingly, the next question that must be considered in regard to an accrediting standard affecting the sectarian function of church-related schools—be it a restriction on pedagogy, upon religion-based conduct standards, or upon admissions and hiring decisions—is whether the assurance of a minimal level of educational quality at the postsecondary level is a compelling state interest.

In *Wisconsin v. Yoder*, the Court held that only "those [governmental] interets of the highest order and those not otherwise served"[175] justify the restriction of religious liberty. The Court found that, while Wisconsin's interest in requiring that its citizens receive the degree of education necessary to prepare them to "participate effectively and intelligently in our open political system"[176] may be compelling, compulsory education of Amish children beyond the eighth grade "would do little to serve those interests."[177] By this measure, as the level of education increases, the state's interest in the education of its citizens diminishes. Thus, there is some question whether the accreditation of undergraduate institutions serves a compelling interest. It may well be, however, that a different rationale would apply with respect to the state's interest in assuring the competence of professionals.

Even assuming that the state's interest in assuring a minimal level of educational quality at the postsecondary level is compelling, however, an accrediting standard restricting religious liberty may not be used if it does not clearly serve that interest or if that interest can be protected by alternative standards.[178] Standards prohibiting discrimination by church-

---

[173] *See supra* text accompanying notes 18 and 44.

[174] *See* Vernon, *The Importance of Intellectual Diversity to Educational Quality*, 32 J. LEGAL EDUC. 189 (1982).

[175] 406 U.S. 205, 215 (1972).

[176] *Id.* at 221.

[177] *Id.* at 221-22. Professor Tribe sees *Yoder* as further evidence of movement by the Court "in the direction of . . . tightening the required showing of threat" in compelling interest analysis. TRIBE, *supra* note 97, at 858.

[178] In New Jersey Bd. of Higher Educ. v. Shelton College, 448 A.2d 988 (N.J. 1982), a church-related school sought an exemption from state statutes prohibiting the conferral of baccalaureate degrees by an institution that had not been licensed by the State Board of Education. The New Jersey Supreme Court found that application of the statutes to the school did violate the first amendment because the statutes were "supported by a strong interest in maintaining minimum academic

related institutions in favor of church members have been defended as protecting the diversity that is necessary to minimal educational quality. The notion that religious diversity is essential to the provision of such a level of educational quality is speculative at best.[179] Religious homogeneity does not necessarily preclude geographical, racial, socioeconomic, or intellectual diversity.[180] Moreover, although religious homogeneity may be seen as contravening one particular state interest, it serves other interests. For instance, even if religious homogeneity does suppress academic diversity within a particular institution, it correspondingly *promotes* academic diversity *among* institutions.[181] Further, the state may well have an interest in preserving a school's religious character because of the unique social contributions of which church-related schools are capable.[182]

The accrediting agency bears the burden[183] of proving that a church-related school must have a religiously diverse student body and faculty in order to provide a minimal level of educational quality. Such a burden would seem extremely difficult to carry. Similarly, it would be difficult to show that the assurance of a minimal level of educational quality requires a church-related school to abandon its religious mission,[184] to foster the ability to distinguish between religious values,[185] to abandon religion-

---

standards and preserving the basic integrity of the baccalaureate degree," *id.* at 996, and were minor and unobtrusive. *Id.* at 997. The court noted, however, that "should the Board exercise its discretion in a manner that unnecessarily intrudes into Shelton's religious affairs, the college would then be free to challenge the constitutionality of such action." *Id.* at 998.

[179] Hawkins, *supra* note 15, at 184-85.

[180] One empirical study compared various characteristics of BYU law students with those of students at other law schools, and found that "in terms of most of the law relevant career interests and opinions examined and most of the OPI-measured personality characteristics, the [Brigham Young University] students appear quite similar (in both average characteristics and heterogeneity) to students at other law schools for whom comparable data are available." Hedegard, *The Impact of Legal Education: An In-Depth Examination of Career Relevant Interests, Attitudes, and Personality Traits among First-Year Law Students*, 199 A.B.F. RESEARCH J. 793, 859 (1979).

[181] *See* Hawkins, *supra* note 15, at 185.

[182] The [church-related law school] has a unique opportunity in at least two respects: it is totally independent, and it is free to emphasize that there is indeed a moral basis for our fundamental law; and it is free to examine and explore whether it is sound educational policy to train people first in the skills of a professional monopoly and leave it to some vague, undetermined, unregulated, undefined future to learn the moral and ethical precepts that ought to guide the exercise of such an important monopoly in a civilized society.

The Honorable Warren E. Burger, Chief Justice of the United States Supreme Court, The Role of the Lawyer in Modern Society (address delivered at the dedication of the J. Reuben Clark Law School, Brigham Young University (Sept. 5, 1975)); Hawkins, *supra* note 15, at 185.

[183] *See Yoder*, 406 U.S. at 227.

[184] *See supra* text accompanying note 44.

[185] *Id.*

based conduct requirements,[186] or to otherwise divorce its religious mission from its pedagogy and curriculum.

In determining whether the state's broad social policy interest in preventing discrimination is sufficiently compelling to justify the inhibition of the religious mission of church-related schools, it is important to distinguish discrimination by a church in favor of its own members from other forms of discrimination. The *Bob Jones*[187] Court, in holding that the denial of tax-exempt status to an educational institution because of its religion-based policy of racial discrimination did not violate the free exercise clause, stated:

> The governmental interest at stake here is compelling. . . . [T]he Government has a fundamental, overriding interest in eradicating racial discrimination in education—discrimination that prevailed, with official approval, for the first 165 years of this Nation's history. That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs. The interests asserted by petitioners cannot be accommodated with that compelling governmental interest . . . and no 'less restrictive means' are available to achieve the governmental interest.[188]

A strong case can be made that the state's interest in eradicating invidious discrimination against particular religious groups is compelling. There is some evidence that the AALS amendment to Bylaw 6-4 was intended to eliminate this form of discrimination.[189] Those on the AALS Executive Committee who added the words "sex," "national origin," and "religion," to the original bylaw that proscribed only discrimination on the ground of race or color, "recall only that the discussion of religious discrimination consisted of nothing more than vague references to alleged past practices of invidious quotas that limited the number of Jews or Catholics admitted by some institutions."[190]

Discrimination by a church or church organization in favor of those who share its beliefs is of a profoundly different texture. It is a form of discrimination protected by the Constitution as vital to the right of religious associational freedom. It is noninvidious; it stigmatizes no individual or group of individuals. The drafters of the Civil Rights Acts recognized the constitutionally protected status of such discrimination.

---

[186] *See supra* text accompanying notes 19-29.

[187] 461 U.S. 574 (1983).

[188] *Id.* at 604 (citations omitted).

[189] "There is no significant 'legislative history' on the adoption of ABA Standard 211, since at that time the ABA's Section of Legal Education and Admissions to the Bar did not keep detailed minutes of Council and Section meetings." Hawkins, *supra* note 15, at 174 n.5.

[190] *Id.* at 172 n.3.

Titles VII and VIII exempt from the Acts' prohibition of religious discrimination churches and church organizations who discriminate in favor of their own members.[191] The exemption from Title VII's strictures provided by Section 702 applies to all the activities of a church. The Supreme Court has yet to address the question of Section 702's constitutionality, but even if the Court were to find the exemption to be overly broad,[192] its very existence militates against the notion that the government's "fundamental, overriding interest in eradicating"[193] this form of discrimination is sufficiently compelling to justify the restriction of religious liberty.[194]

Although the current version of Standard 211, the ABA's nondiscrimination standard,[195] expressly adopts first amendment limitations, the exemption it provides to church-related law schools is impermissibly narrow. While Standard 211 allows a church-related law school to adopt an admissions and hiring policy that prefers "persons adhering to the religious affiliation and purpose of the law school," it adds that this policy "shall

---

[191] Section 702 of the 1964 Civil Rights Act, as amended in 1972, provides that Title VII's prohibition against discrimination on the basis of race, color, religion, sex, or national origin "shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000(e)(1) (1976). Title VIII of the Civil Rights Act of 1968 provides: "Nothing in this chapter shall prohibit a religious organization . . . from limiting the sale, rental, or occupancy of a dwelling which it owns or operates for other than a commercial purpose to persons of the same religion, or from giving preference to such persons, unless membership in such religion is restricted on account of race, color, or national origin." 42 U.S.C. § 3607 (1976).

[192] *See* King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974) (The court, noting that "[t]he sponsors of the 1972 exemption were chiefly concerned to preserve the statutory power of sectarian schools and colleges to discriminate on religious grounds in the hiring of all of their employees," *id.* at 54, held that a sectarian licensee of a radio station was not protected from discriminating on religious grounds in all its activities.).

[193] *Bob Jones*, 461 U.S. at 604.

[194] In Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971), a three-judge district court recognized the distinction between discrimination by a church-related school in favor of those who share its belief and racial discrimination. That court upheld the refusal of the Internal Revenue Service to grant tax-exempt status to private nonsectarian schools with racially discriminatory admissions policies. Although it intimated that it might be permissible for the IRS to deny tax-exempt status to racially discriminatory religious schools, *id.* at 1169, it recognized that discrimination by such schools in favor of members of the sponsoring church presented a different problem. The court stated:

> The special constitutional provisions ensuring freedom of religion also ensure freedom of religious schools, with policies restricted in furtherance of religious purposes. Section 503 of the Model Anti-Discrimination Act . . . permits religious educational institutions 'to limit admission or give preference to applicants of the same religion.' *Id.*

Cf., I.R.C. § 501(i)(1980) (The amendment distinguishes between racial and religious discrimination by ensuring tax-exempt status for clubs that limit membership to members of a particular religion while denying tax-exemption to clubs that discriminate on the basis of race or color.).

[195] *See supra* text accompanying notes 37-42.

not be applied to preclude a diverse student body in terms of race, color, religion, national origin or sex." The foregoing analysis demonstrates that the first amendment protects a church-related school—regardless of the resulting effect on religious diversity—in preferring in its admissions and hiring decisions those who share the beliefs of the sponsoring church.

VII. Conclusion

A strong argument can be made that the accreditation function of bodies such as the NASC, ABA, and AALS constitutes state action for first amendment purposes. A full examination of the first amendment problem that the accreditation process poses for church-related schools requires an analysis encompassing both religion clauses and exploring their interaction.

Because church-related schools are aided only as members of a broad beneficiary class in order to effect a secular purpose—the assurance of a minimal level of educational quality—the conferral of accredited status upon such schools does not constitute impermissible state aid to religion under the establishment clause.

The regulation inherent in the accreditation process need not impermissibly inhibit religious liberty, provided accrediting standards are used that do not restrict the religious function of church-related schools. Impermissible restrictions may take the form of intrusive surveillance of this religious function, prohibited by both the establishment and free exercise clauses, or they may otherwise burden religious exercises in violation of the free exercise clause.

Even if the assurance of a minimal level of educational quality is a compelling state interest, accrediting agencies do not have unfettered discretion in employing accrediting standards to protect that interest. To the extent that an accrediting agency can assure a minimal level of educational quality without resort to standards restricting the religious function of church-related schools, it is compelled to do so by the religion clauses of the first amendment.