

4 of 7 DOCUMENTS

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7 Nexus J. Op. 79

LENGTH: 11405 words**ARTICLE:** Note: Dinosaur TRACS: The Approaching Conflict Between Establishment Clause Jurisprudence and College Accreditation Procedures**NAME:** Timothy Sandefur ***BIO:**

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SUMMARY:

... While the scientific claims of these "creationists" have been sufficiently refuted elsewhere, we are here concerned with a different sort of tracks--that is, the Transnational Association of Christian Colleges and Schools, or TRACS, which is an accrediting body officially recognized by the Department of Education (DOE), and which has accredited the Institute for Creation Research's graduate school. ... The DOE is required to publish the criteria by which it chooses such accreditation agencies, and these criteria include such things as whether the accreditor admits members of the public to its decision making panels, or whether it encourages ethical practices in the institutions it accredits. ... In the 1971 case of *Lemon v. Kurtzman*, the Supreme Court established a three part test to judge when a state action violated that separation between church and state. ... In 1992, largely in response to the diversity controversy, Congress passed amendments to the Higher Education Act, which both restrict the Secretary from creating any new criteria for recognizing an accrediting agency simply on his own, and permit an accrediting agency to promulgate any criteria it considered relevant. ... Although accreditation is not a "governmental power" delegated to a religious institution, the government's recognition of TRACS is clearly an "affiliation" with a religious accrediting agency. ... In August, 2001, the Accrediting Commission of Career Schools and Colleges of Technology granted accreditation to the Astrological Institute in Scottsdale, making it the first astrology school accredited by a federally recognized accreditation agency. ...

TEXT:**[*79] I. Introduction**

The Institute for Creation Research in Santee, California, runs a graduate school which awards degrees in Geology, Biology, and other fields. The Institute describes itself as "A Christ-Focused Creation Ministry," ⁿ¹ and believes that scientific evidence establishes the literal truth of the Genesis creation story, including a six-day creation, about 10,000 years ago. ⁿ² This is one claim of a school of thought called "Young Earth Creationism," which also holds that dinosaur tracks and human footprints, found in the Paluxy River Bed in Texas, prove that man and dinosaurs lived contemporaneously. While the scientific claims of these "creationists" have been sufficiently refuted elsewhere, ⁿ³ we are here concerned with a different sort of tracks--that is, the Transnational Association of Christian Colleges and

Schools, or TRACS, which is an accrediting body officially recognized by the Department of Education (DOE), and which has accredited the Institute for Creation Research's graduate school. This note shall consider the implications of TRACS' recognition by the DOE on the separation of church and state. Part two will briefly address the history and process of accreditation in higher education. Part three will describe TRACS, and how it came to be officially accepted by the DOE. Parts four and five will discuss the church-state controversy involved, and whether the separation doctrine can apply in this case. Part six will discuss the case that comes closest to point, and the implications of the recent Supreme Court decision regarding state action doctrine in *Brentwood Academy*. Parts seven and eight will argue that TRACS' approval violates the separation of church and state, and suggest potential problems with my analysis.

II. What is Accreditation?

Anyone who so desires can start a school and award degrees. ⁿ⁴ But the worth of a degree, among one's academic peers, or in the job market, depends on the reputation of the school. That reputation is based in no small part on the school's accreditation. Before the 1950s, accreditation was entirely a matter of professional self-review. Accrediting bodies were made up of college officials who sought merely to maintain academic vigor. It was in the wake of the G.I. Bill and the subsequent explosion in federal spending on higher education, that accreditation became "official," and subject to government regulation. ⁿ⁵

The G.I. Bill and subsequent federal laws permitted citizens to receive grants and loans from the government to be spent at colleges, [*80] universities, and technical schools. But to avoid the problem of "fly by night" schools, the law required (and still requires) that the grants be spent only at accredited institutions. ⁿ⁶ And it permitted the Commissioner (now the Secretary) of Education to draw up a list of accrediting agencies whose judgment in such matters would be respected. ⁿ⁷ But no criteria were set forth by which the Commissioner was to compile such a list: the Commissioner's decision was "essentially ministerial." ⁿ⁸ This was not a mere oversight: both the government and the colleges recognized the need for a wide range of academic freedom from government regulation.

Today there are six regional accrediting agencies. These agencies, (for example the Western Association of Colleges and Schools (WACS)), accredit undergraduate schools within a certain geographical region. Additionally, there are a number of national accreditation groups, which focus on particular subject areas, and which approve schools regardless of their location--for example, the American Bar Association, which accredits law schools throughout the country. An accreditation agency must apply to the DOE for approval, which is granted by the Secretary after consultation with a number of advisors (specifically, the National Advisory Committee on Education, and its Accrediting Agency Evaluation Branch). ⁿ⁹ But the Secretary may ignore their advice if he chooses.

As federal involvement in higher education grew, so too grew the demand for government oversight in matters of accreditation, but this feature is essentially preserved in the present law. The DOE is required to publish the criteria by which it chooses such accreditation agencies, and these criteria include such things as whether the accreditor admits members of the public to its decision making panels, or whether it encourages ethical practices in the institutions it accredits. ⁿ¹⁰ Although an accrediting agency is not required to have specific academic standards by which it judges an institution, it is permitted to have standards other than those required by law, and the Secretary of Education is not *permitted* to have standards for an accrediting agency beyond those outlined in the law. ⁿ¹¹

The issue of accreditation, of course, became more important as government finances became more necessary to colleges and universities. Academic reputation was no longer the only element at risk: federal money, in many cases the only thing keeping a college solvent, is tied to a school's accreditation. But, as we shall see later, these accreditation agencies get around the burden of being government entities because a school is not actually *required* to have accreditation, any more than it is required to accept federal funds. ⁿ¹²

III. What is TRACS?

TRACS is very outspoken about its beliefs and accreditation guidelines. To qualify for TRACS accreditation, an

institution must adhere to a list of eleven "Biblical standards," which "shall be included in the institution's official publications." No school not endorsing these standards may be accredited by TRACS. They include:

1. The unique divine inspiration of all the canonical books of the Old and New Testaments as originally given, so that they are infallible and uniquely authoritative and free from error of any sort, in all matters with which they deal, scientific and historical as well as moral and theological.

2. Special creation of the existing space-time universe and all its basic systems and kinds of organisms in the six literal days of the creation week.

3. The full historicity and perspicuity of the biblical record of primeval history, including the literal existence of Adam and Eve as the progenitors of all people, the literal fall and resultant divine curse of the creation, and worldwide cataclysmic deluge and the origin of nations and languages at the Tower of Babel...

10. The existence of a personal, [*81] malignant being called Satan, who acts as tempter and accuser, for whom the place of eternal punishment was prepared, where all who die outside of Christ shall be confined in conscious torment for eternity. ⁿ¹³

TRACS began in 1979, and applied for federal recognition in 1987. ⁿ¹⁴ At first, recognition was denied, but in 1991, Education Secretary Lamar Alexander approved TRACS, despite the fact that his advisory panels repeatedly recommended against recognition. ⁿ¹⁵ TRACS immediately began making some questionable decisions. It accredited Jerry Falwell's Liberty University in Virginia, which lost its accreditation with the Southern Association of Christian Colleges and Schools shortly thereafter, ⁿ¹⁶ and the Institute for Creation Research, whose founder, Henry Morris, also happened to be Chairman of TRACS' Board of Directors. It also created a category for schools which it called "associate schools." While this category was not considered an official accreditation, it lent TRACS' name to a number of blatantly fraudulent institutions. ⁿ¹⁷ As a result, a federal review was instituted in 1995, which gave TRACS eighteen months to improve or be removed from the list of official accreditors. ⁿ¹⁸ TRACS did make improvements, including eliminating the "associate schools" category and changing Chairmen. Today, it remains on the DOE's list of approved accreditors. ⁿ¹⁹

IV. Church and State

The church and state issue here revolves around a number of Establishment Clause cases, ⁿ²⁰ which we will consider briefly. These include *Everson v. Board of Education*, ⁿ²¹ *Lemon v. Kurtzman*, ⁿ²² *County of Allegheny v. ACLU*, ⁿ²³ *Larkin v. Grendel's Den*, ⁿ²⁴ and the most recent, *Agostini v. Felton*. ⁿ²⁵

Everson, written in 1947, was the first case to apply the Establishment Clause to the states through the Fourteenth Amendment. While *Everson* found that the state of New Jersey's practice of funding the transportation of children to religious schools had not violated the Establishment Clause, Justice Black wrote,

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever from they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

n26

In the 1971 case of *Lemon v. Kurtzman*, the Supreme Court established a three part test to judge when a state action violated that separation between church and state. First, the statute must have a secular legislative purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Third, the statute must not foster "an excessive government entanglement with religion." ⁿ²⁷ The *Lemon* test laid the groundwork for a number of decisions, including *Edwards v. Aguillard*, ⁿ²⁸ County of Allegheny, and the 1985 case *Aguilar v. Felton*. ⁿ²⁹ *Aguilar* held that a state could not send public school teachers into a religious school to teach remedial classes, because this entailed an "excessive [*82] government entanglement with religion." *County of Allegheny*, one of the most controversial Establishment Clause cases, held that the display of a creche, or nativity scene, on public property during the Christmas season, gave an unconstitutional appearance of government endorsement of religion.

Lemon has not been without its detractors, notably Justice O'Connor, in her concurrence in *Wallace v. Jaffree*, ⁿ³⁰ and then-Justice Rehnquist's dissent in the same case, and Justice O'Connor's concurrence in *Lynch v. Donnelly*. ⁿ³¹ Justice Scalia fervently attacked it in his 1993 concurrence in *Lamb's Chapel v. Center Moriches Union Free School District*. ⁿ³² Characterizing the *Lemon* test as a "monster" from beyond the grave, Scalia argued that "Over the years...no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart." ⁿ³³ Though the Court may not have admitted it, he argued, the *Lemon* test was dead. Worse, "when we wish to strike down a practice it forbids, we invoke it...when we wish to uphold a practice it forbids, we ignore it entirely." ⁿ³⁴ He included a formidable list of cases where the Court had avoided applying *Lemon*, and a case describing *Lemon's* prongs as "no more than helpful signposts." ⁿ³⁵

O'Connor, concurring in *Jaffree*, urged that "the standards announced in *Lemon* should be reexamined in order to make them more useful in achieving the underlying purpose of the first amendment." ⁿ³⁶ But while hesitant towards the *Lemon* test, she wrote in *Donnelly* that

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval. An affirmative answer to either question should render the challenged practice invalid. ⁿ³⁷

Justice O'Connor was called on to speak for the Court in the recent case of *Agostini v. Felton*. *Agostini* was written partly in response to this criticism of *Lemon*. In reversing its decision in *Aguilar*, the Court reasserted part of the *Lemon* test, but acknowledged that "*Aguilar* is not consistent with our subsequent Establishment Clause decisions." ⁿ³⁸ However, O'Connor, in speaking for the majority, reasserted part of the *Lemon* test, saying,

Our more recent cases have undermined the assumptions upon which...*Aguilar* relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged... Likewise, we continue to explore whether the aid has the "effect" of advancing or inhibiting religion. What has changed...is our understanding of the criteria used to assess whether aid to religion has an impermissible effect. ⁿ³⁹

First, the Court has "abandoned the presumption" ⁿ⁴⁰ that a state sending its teachers into a religious school necessarily implies a union of church and state. Second, the court "departed from the rule relied on in [*School District of Grand Rapids v. Ball* ⁿ⁴¹ that all government aid that directly aids the educational function of religious schools is invalid." ⁿ⁴² *Agostini* referred to *Witters v. Washington Department of Services for the Blind*, ⁿ⁴³ in which the Court had permitted a state grant to be spent at a religious school, because it "was no different from a State's issuing a paycheck to one of its employees, knowing that the employee would donate all or part of the check to a religious institution." ⁿ⁴⁴

In short, the first two prongs of the *Lemon* test--whether the state's action was [*83] legitimately secular, and whether it had the effect of promoting or inhibiting religion--remain the same. But the third--whether that effect is "excessive," and thus impermissible under the First Amendment--seems now less stringently read. ⁿ⁴⁵

In the 1982 case of *Larkin v. Grendel's Den*, the Court struck down a Massachusetts law which permitted a church to veto the liquor licenses granted to liquor stores or bars within 500 feet of that church. The Court reasoned that "the statute, by delegating a governmental power to religious institutions, inescapably implicates the Establishment Clause." ⁿ⁴⁶ Under the *Lemon* test, the exercise of government power by a religious group, in their capacity as a religious group, would qualify as "excessive entanglement." Although *Larkin* was not decided solely on the grounds of "excessive entanglement," the retreat from the entanglement analysis in *Agostini* suggests that *Larkin's* continuing validity is questionable.

V. Accreditation and State Action.

Of course, these constitutional issues of church and state affect only *acts of the state*. A number of cases regarding accreditation have ruled that the actions of accreditation agencies are not state action. ⁿ⁴⁷ This is, as one writer says, "in keeping with the strong tradition in the United States that education is primarily a local and state responsibility, not a federal one." ⁿ⁴⁸ In *Parsons College v. North Central Association of Colleges*, ⁿ⁴⁹ the District Court ruled that "here there is no suggestion that the [accrediting] Association is an arm of the government, making its acts the acts of a state. With a corporate charter granted under the general law, the Association stands on the same footing as any private corporation, organized for profit or not." ⁿ⁵⁰ This view of accreditation agencies as private organizations has shielded them from lawsuits challenging their decisions on constitutional grounds. ⁿ⁵¹ Additionally, courts have been reluctant to second-guess the decisions of accrediting bodies. As the court noted in *Parsons College*, "generally the courts of the state have been liberal in their treatment of private associations, leaving the members to arrange their affairs as they choose." ⁿ⁵²

In *Transport Careers v. National Home Study Council*, the court directly addressed the issue of government action in the case of accreditation. The plaintiff, after losing its accreditation with the Council, sued on the grounds that it was denied constitutional protections such as due process. The court soundly dismissed this argument, saying that the plaintiff "erroneously relied on the United States Constitution... It is fundamental that the constitution does not extend its protection to those who have been injured by private conduct....Since NHSC's accreditation function does not constitute 'state action,' the constitution does not afford protection." ⁿ⁵³

It would seem then that the TRACS standards are not incorporated to the federal government through the government's recognition of TRACS as an official accreditation agency. But the question of accreditation *standards*, and their applicability to government action, does not stop there. Recently the issue came to the fore in another context: in what was referred to as "the diversity controversy."

The diversity controversy began in 1991, when the Middle States Association of Colleges and Schools adopted accreditation standards which required racial "diversity" among the students and faculty of any college seeking accreditation. ⁿ⁵⁴ Several college administrators objected, and MSACS dropped the requirement before producing a lawsuit. But it raises a good question. If an accrediting agency applies standards unrelated to the educational mission, what responsibility does the government bear for the application of those standards?

Secretary Alexander responded to the diversity controversy by remanding to his advisory panel the decision on whether to reapprove of MSACS as an accreditor. [*84] MSACS argued that he had no authority to do this, since the Secretary has no authority to impose requirements on an accreditor beyond those listed in the law. Although MSACS ended the controversy by backing down on the diversity requirement, Alexander acknowledged that accreditation necessarily carries with it the image of a government seal-of-approval. As one writer puts it,

[According to Alexander] the policy justification for federal oversight of overly prescriptive or intrusive

standards by accrediting agencies seeking the government's recognition is simple: the government should not arm a private actor with decisive federal authority and then disclaim all responsibility if that actor exercises the federal power so conferred to infringe legitimate institutional autonomy. ⁿ⁵⁵

Ironically, it was Alexander who approved of TRACS as an accrediting agency. Yet TRACS is doing precisely the same thing as MSACS, in a different way: establishing criteria for accreditation which go beyond those standards arguably connected with the educational mission of a school. ⁿ⁵⁶

This is not, however, illegal under the present laws. In 1992, largely in response to the diversity controversy, Congress passed amendments to the Higher Education Act, which both restrict the Secretary from creating any new criteria for recognizing an accrediting agency simply on his own, and permit an accrediting agency to promulgate any criteria it considered relevant. ⁿ⁵⁷ In fact, the amendment specifically forbids the Secretary to "exercise any direction, supervision or control over the curriculum, program of instruction, administration or personnel of any educational institution, school, or school system, [or] over any accrediting agency or association...except to the extent authorized by law." ⁿ⁵⁸

The Amendment includes an escape clause for religious schools (the "Religious Institutions Rule"), which permits the Secretary to maintain a school's accreditation for a period of time if that school believes the accreditor has revoked its accreditation for religious reasons. ⁿ⁵⁹ But it includes nothing to prevent the creation of blatantly "pervasively sectarian" ⁿ⁶⁰ This phrase is used to describe an institution whose "secular activities cannot be separated from institutional criteria such as those established by TRACS. One author, Lisa Baar, hits the issue squarely on the head:

On its face, the rule addresses the Secretary's concern that accrediting agencies were misusing their power to determine eligibility for federal funds by forcing religiously affiliated colleges and universities to make changes inconsistent with their religious tenets, therefore violating their religious and academic freedom... The Religious Institution Rule, however, may threaten the integrity of the accreditation process more than the Secretary felt diversity standards did. If colleges and universities may now start their own accrediting agencies to avoid having to meet standards that are difficult or unpopular, then this rule, coupled with [Secretary Lamar Alexander]'s stated intention to recognize new agencies more readily, risks the proliferation of accrediting agencies aligned by political or religious ideology, rather than by a broad interest in educational quality... [The DOE will find it] much more difficult to determine if an accrediting agency is a "reliable authority as to the quality of training offered," and, therefore, will risk the allocation of federal funds to institutions approved by ideologically rigid and unreliable accrediting agencies. ⁿ⁶¹

VI. *Sherman and Brentwood Academy*

These considerations of balancing academic freedom with institutional accountability, [*85] lay the background for a contrast with the case closest to the issue of TRACS' accreditation: *Sherman College of Straight Chiropractic v. U.S. Commissioner of Education*. ⁿ⁶² In this case, Sherman College of Straight Chiropractic was denied accreditation by the Council on Chiropractic Education (CCE). The CCE, which was organized in 1947, believed that "diagnosis of systemic diseases, not simply spinal disorders," ⁿ⁶³ was possible through chiropractic techniques, a scientifically untenable proposition, ⁿ⁶⁴ and one which Sherman rejected. CCE, a recognized accreditation agency, retaliated by refusing to accredit Sherman. Sherman then sought to prevent the Commissioner of Education from renewing CCE's recognition. When the Commissioner did renew CCE's recognition Sherman filed suit in federal district court, seeking judicial review of the Commissioner decision to recognize the CCE.

The court held that "the Commissioner's recognition action is not unreviewable agency action." ⁿ⁶⁵ The Commissioner had a "limited statutory role" in accepting such an agency, limited only to its reliability as an authority in its field. ⁿ⁶⁶ While the CCE's doctrinal statement was not representative of the field of chiropractic, the court did not believe its decisions in accreditation were therefore necessarily invalid. "Surely, educational philosophies differ," the

court wrote. "However, the Commissioner acted correctly in deciding the only issue it could legitimately determine: that CCE is a 'reliable authority' under the statute." ⁿ⁶⁷

Throughout its opinion, the *Sherman* court repeatedly described the danger of government interference in higher education. If the court required the Commissioner to "arbitrate educational standards for the nation's professions," ⁿ⁶⁸ educational independence would be endangered. "Such a precedent might ultimately require the Commissioner to become 'a specialist on the matter of educational philosophy' in every field, and would make him a 'referee in...intra-professional combat.'" ⁿ⁶⁹

Unlike the CCE, TRACS fails the test applied in *Sherman*. The court held that the Commissioner's decision to recognize CCE was "consistent with the criteria established by the regulations and was not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," ⁿ⁷⁰ but TRACS' recognition is precisely the opposite. The arbitrariness and caprice of Secretary Alexander's decision to recognize TRACS has been discussed *supra*, part III. ⁿ⁷¹ Whether that decision was "in accordance with the law" is the central question, to be considered in light of Establishment Clause jurisprudence.

Should any future court review the issue of how much state action is involved in accreditation procedures, it will also have to consider the possibly extreme implications of a recent Supreme Court decision, *Brentwood Academy v. Tennessee Secondary School Athletic Association*. ⁿ⁷² Here, the Court held that an ostensibly private organization which coordinated sporting events between high schools within the State of Tennessee was a state actor, subject to the Fourteenth Amendment's incorporation of the Bill of Rights. "The nominally private character of the Association," wrote Justice Souter for the Court, "is overborne by the pervasive entwinement of public institutions and public officials in its composition and workings, and there is no substantial reason to claim unfairness in applying constitutional standards to it." ⁿ⁷³

The factors the Court considered in finding such "pervasive entwinement," are similarly present in the DOE's relationship with its accreditation agencies. The Association in *Brentwood Academy* was composed mostly of public schools, and was "an organization of public schools represented by their officials acting in their official capacity to provide an integral element of secondary public schooling." ⁿ⁷⁴ Accreditation agencies are often composed of college officials who are unquestionably government agents--for instance, the Western Association of Colleges and Schools by-laws specify that "the Chancellor for California Community Colleges and [*86] the President of the University of Hawaii shall each appoint one member" of the commission on community colleges. ⁿ⁷⁵ These college officials' membership shows that, like the Association in *Brentwood Academy*, accreditation agencies are "organization[s] of [predominantly] public schools represented by their officials acting in their official capacity to provide an integral element of...schooling." ⁿ⁷⁶ Other factors in the *Brentwood Academy* decision were that the "nominally private entity" had been "delegated a public function by the State" and that it was "'entwined with governmental policies.'" ⁿ⁷⁷ Accreditation agencies perform a public function--one so central to government funding of higher education that it is arguably far more "governmental" in its character than the function of an athletic association--and government policies are thoroughly "entwined" with that function. The decision in *Brentwood Academy* was also premised largely on the funding of the Association, which was provided in part through the public schools that were members. Accreditation agencies are also funded through membership dues paid by member schools, including the state-sponsored universities.

There are some important distinctions between private accreditation agencies and the Association that was the subject of *Brentwood Academy*, and these distinctions might be sufficient for a future court to distinguish the decision in that case. First, the Tennessee Secondary School Association's employees were eligible for the state employees' retirement plan, ⁿ⁷⁸ but this is not the case with accreditation agencies such as WASC. More importantly, the *Brentwood Academy* decision specifically noted that there was "no substantial reason to claim unfairness in applying constitutional standards" to the Association. ⁿ⁷⁹ The Court provided no guidelines by which to determine what such a "substantial reason" would be, there would be a real danger, as the *Sherman* court noted, in viewing the actions of accreditation agencies as state action. ⁿ⁸⁰ Such danger might persuade reviewing courts not to hold that accreditation agencies are so "entwined" with government as to constitute state action.

VII. Conclusions

In *Medical Institute of Minnesota v. NATTS*,ⁿ⁸¹ the Eighth Circuit followed many other cases in holding that the decision of an accreditation agency to grant accreditation is not state action. But, as the *NATTS* court wrote, "Obviously the DOE's actions are governmental action..."ⁿ⁸² The DOE's *decision to recognize* TRACS as an official accreditation agency is state action, however, and must therefore comply with the Constitution, and the Establishment Clause.

Even after *Agostini*, the *Lemon* test remains the leading test for evaluating whether a governmental act has violated the Establishment clause.ⁿ⁸³ Even after *Agostini*, the DOE's recognition of TRACS violates the separation of church and state. TRACS' standards of Biblical inerrancy and literal creationism are representative of but a small, particular Christian sect. The Catholic Church, for instance, sees no conflict between religion and evolution, and does not hold that the Genesis story must be literally true.ⁿ⁸⁴ TRACS is a specifically Fundamentalist Protestant organization, and the schools it has accredited are specifically Fundamentalist and Protestant.ⁿ⁸⁵

Justice O'Connor has written that one of the leading reasons to avoid government endorsement of religion is that "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."ⁿ⁸⁶ This idea was especially evident in *Allegheny*, when the Court determined that a creche displayed at the county courthouse unconstitutionally conveyed an image of government endorsement. The Institute for Creation Research implies a similar government endorsement of its religious [*87] doctrine when it writes, "The Institute for Creation Research is also Accredited by the Transnational Association of Christian Colleges and Schools (TRACS), an agency which itself is recognized and approved by the U.S. Department of Education."ⁿ⁸⁷ The schools accredited by TRACS are similarly eager to flash their government-approved credentials. The American Bible College and Seminary calls itself "fully accredited" and explains "ABCS is an authorized degree-granting, private educational institution under Oklahoma Statutes, and is accredited by the Transnational Association of Christian Colleges and Schools (TRACS), an institutional accrediting body recognized by the United States Department of Education. (Degree Levels I, II, III, IV)."ⁿ⁸⁸ Trinity Baptist College says "Accreditation is a status granted to an educational institution that meets or exceeds the standards and evaluative criteria and the policies and procedures established by the Accreditation Commission and validated for educational quality. Accreditation is a voluntary process sought by colleges and is conferred by independent, autonomous bodies, such as TRACS... This organization has been recognized by the United States Department of Education as an approved accrediting agency."ⁿ⁸⁹ Clearly these institutions feel specially favored members of the political community.

But of course the Court has also said that "a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion."ⁿ⁹⁰ One might argue that ICR and other institutions are merely benefiting as an incident of government action, which is not more meant to encourage a specific religion any more than the DOE's approval of the American Bar Association was meant to encourage the specific occupation of lawyering. After all, government acceptance of private accreditation seems similar to the incidental aid allowed in *Witters*.ⁿ⁹¹ But this argument ignores the central difference. A government check paid to a school, while it may violate the rights of nonbelievers forced to support a sect of which they disapprove, does not stamp a government imprimatur on the school. On the other hand, the DOE's approval of TRACS is an approval of a narrowly sectarian educational agenda. Moreover, in TRACS' case at least, the accreditor's doctrine directly affects its reliability as an accreditor.

Religious schools serve a function in our society, and need accreditation, of course. But the DOE has already approved a number of accrediting agencies that monitor religious schools--the Association of Theological Schools, for example--which accredit non-Christian as well as Christian schools, and are not, like TRACS, bound to one specific Protestant Christian sect.ⁿ⁹² Religious accreditation agencies serve an appropriate function: that is, in accrediting religious schools, but only if they--in the words of the U.S. Code--"achieve...the stated objective for which the courses or programs are offered."ⁿ⁹³ The *content* of the courses should not be dictated by accreditors wielding (at least

indirect) government authority. There is a distinct difference between an accrediting agency that accredits schools that promote quality instruction,, and an accrediting agency that accredits schools that promote one particular religious sect. The latter does what Justice Black specifically condemned, aids one religion over another, while the former does not. Alexander's approval of TRACS, despite the repeated recommendations of his advisors, leads one to speculate as to his true intention, which was likely more than to benefit religion "incidentally." ⁿ⁹⁴

The DOE's recognition of TRACS is an unconstitutional government *imprimatur* not necessarily on the schools involved, but on TRACS itself. In *Allegheny County*, the Court ruled that "government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too [*88] deeply in such an institution's affairs." ⁿ⁹⁵ Although accreditation is not a "governmental power" delegated to a religious institution, the government's recognition of TRACS is clearly an "affiliation" with a religious accrediting agency.

TRACS recognition violates the modified *Lemon* test by having the effect of promoting one religion (and one sect of that religion) over others, and violates the *Allegheny* test by creating a symbolic alliance between state and the church. TRACS' recognition by the DOE is a violation of the First Amendment, and should be revoked.

VIII. Problems with This Analysis

It would appear that the immediate answer to the problem of Establishment-by-accreditation would be to apply the *Lemon* test to the Education Secretary's choices of accreditation bodies. The law, after all, forbids the Secretary's exercise of "direction, supervision or control over...any accrediting agency or association...*except to the extent authorized by law.*" ⁿ⁹⁶ This phrase might be read as including the Constitution's Establishment clause limits. But this interpretation could actually cause more problems.

The government's relationship to accreditation agencies and to colleges is a potentially disastrous one. As the court in *Transport Careers* wrote, "Powerful policy reasons support the decision in *Parsons College* [that the actions of an accrediting agency are not government action]. American traditions of academic freedom militate against imposing constitutional obligations upon private accrediting bodies. To do so would undermine the independence of those bodies from governmental control." ⁿ⁹⁷ One of the reasons for the widespread opposition to MSACS' diversity standards, among even the traditionally liberal college establishment, was the dangerous precedent that this would set for academic freedom. These considerations are, and should remain, central to the issue of accreditation procedures. As the *Sherman* court explained, it is vital that the Secretary not become an "educational philosopher....Such action would 'represent unwarranted intrusion by the Federal government into the private sector of aca-demia.'" ⁿ⁹⁸

The Court has held that government regulations can be imposed upon a college whenever it receives government funding. In *Bob Jones University v. United States*, ⁿ⁹⁹ the Court applied government racial-equality criteria to a school through tax deductions. In *Grove City College v. Bell* the Court required that a school abide by government regulations even where the school had never received government funds, but admitted students who used personal government loans at the school. ⁿ¹⁰⁰ Grove City has since refused to accept these loans. But even this drastic measure would not be available to schools if "constitutional obligations," (which has come to include a wide range of various government regulations and "titles") were applied to a college through its accreditation. In essence, it would nationalize every college in the country, even beyond the extent to which government interference is already present. If government regulations are attached to accreditation the way they are already attached to government funding, any pretense and academic independence from government intrusion would be eradicated.

But there does not seem to be much alternative. Either accreditation implies government endorsement or it does not. If it does, then accreditation will have to take constitutional limitations (including Supreme Court decisions) into account. If it does not, then government funding, or at least the apparent seal of approval that comes with accreditation by a recognized agency, will be directed to schools approved for narrow partisan or sectarian reasons.

But is this really a problem? Eugene Volokh, while defending proposals for vouchers in public education, has written

There's no reason to think that reasonable [*89] people will indeed assume the government is endorsing the message of religious schools: people know that the government doesn't necessarily endorse private choices that people make with government funds, any more than it endorses cabbage by letting people use food stamps to buy the food of their choice, which may include cabbage. The government doesn't endorse Catholicism by helping GIs go to Notre Dame... n101

This is quite true. But as Professor Volokh himself notes, "A [government] program that's only open to accredited schools, or only to schools that (for instance) teach at least reading, writing, and arithmetic, can be said to endorse reading, writing, and arithmetic, or the requirements involved in accreditation (e.g., success on standardized tests); but it wouldn't endorse religiosity, *which forms no part of the criteria under which schools are included.*" n102 The government's recognition of TRACS does make the religiosity--and the tenets of a narrow segment of one creed--a criterion for including schools.

Were the question confined to government funding, the answer would be simple: let the government recognize TRACS or other narrowly sectarian bodies, but refuse government funding to those particular schools. But the question is deeper. It is, as O'Connor wrote, a question of "whether the practice under review in fact conveys a message of endorsement or disapproval." n103 It's interesting to recall the court's words in *Parson's College*, that an accrediting agency "stands on the same footing as any private corporation, organized for profit or not." n104 But TRACS, with its "pervasively sectarian" and pro-creationist message, is much more like a church. Government endorsement of a corporation is one thing; endorsement of a church is another. n105

In fact, while it is a real danger that judicial second-guessing of the Secretary's decisions (or the decisions of accrediting agencies) runs the risk of making him an "educational philosopher," and having arbitrary, personal sway over all educational institutions, that sword cuts both ways. While rejecting the recognition of an accrediting agency, as the *Sherman* court was loath to do, could destroy academic freedom, the *recognition* of an accrediting agency can present the same problem--by opening the door to churches masquerading as schools. n106

These issues raise the even more troubling question of how government should treat the establishment of scientific fact. On one hand, courts are not laboratories, and judges are not scientists. It would be dangerous and improper to require courts to determine what are, and are not, established scientific truths. n107 On the other hand, courts should be able to declare that certain definitively refuted theories are flawed and inadmissible--phrenology, for example, should certainly be excluded from the range of scientific evidence. n108 Yet government sponsorship of education inevitably forces the government to answer these questions one way or the other. The state of Washington, for example, has approved curricula for awarding bachelor's and master's degrees in *astrology*, at Kepler College in Lynwood, Washington. n109 In August, 2001, the Accrediting Commission of Career Schools and Colleges of Technology granted accreditation to the Astrological Institute in Scottsdale, making it the first astrology school accredited by a federally recognized accreditation agency. n110 This cannot avoid placing an (at least indirect) government seal of approval on astrology as being a legitimate field of study.

To solve these problems, Baar recommends that the DOE "eliminate accreditation as a requirement for eligibility for federal funds altogether." n111 This would indeed eliminate the problem of government endorsement. But the purpose of the accreditation requirement at the very beginning was, as Baar says, "to ensure that schools that receive federal funds are high quality institutions rather than simply 'diploma [*90] mills.'" n112 To expect the government simply to hand out grants, scholarships, or loans without caring where those dollars go, is unrealistic--and troublesome to those concerned with government spending. Federal and state governments spent over \$ 30.8 billion dollars on higher education in 1992, and that number only increases. n113 It would be unfair to the taxpayer, if nothing less, if that number were to increase only to pay for degree mills to issue false credentials.

An alternative suggestion, backed up by many policy considerations which it is beyond the scope of this paper to address, is to simply eliminate all federal involvement in higher education. ⁿ¹¹⁴ This would solve numerous problems. Certainly one wonders why "excessive government entanglement" is to be guarded against in the context of *religion*, but not in *education*. Surely they are at least equally important. And the Constitution gives the federal government no more constitutional power to interfere in education than to interfere with religion. ⁿ¹¹⁵ A religious group *should* be free to determine the criteria by which it judges the quality of an educational institution, regardless of the scientific validity of those criteria. But at the same time, the government should not be in the position of choosing between these sets of criteria for one set on which--and thus one group on whom--to bestow its recognition. Only through a separation of state and higher education, in the same manner as the separation of church and state, is it truly possible to avoid making such choices.

But government entanglement in higher education is more than a half-century old now, and considering the frequently violent level of protest on college campuses whenever the slightest decrease in student aid is considered, this is not a politically palatable solution. There may be no regulatory solution, beyond hoping that future Secretaries of Education will be more discerning in their recognition of accrediting bodies.

As for the Institute for Creationist Studies, TRACS is recognized for the accreditation of Bible Colleges, not for scientific research schools. ICR is the only TRACS-accredited school which grants scientific degrees. While a national accrediting body may only approve schools within its range of expertise, ICR gets around this limit by openly declaring itself a "ministry." It thus has its cake and eats it too--it acts as a scientific school when it is convenient for attacking evolution, but, as it were, becomes a ministry when the *Lemon* test comes a-knocking. A statutory limit on what degrees may be granted by a school accredited by a national accrediting agency would not be unreasonable, although it would not solve the deeper problem. ⁿ¹¹⁶

While the diversity controversy has abated for now, the problem with accreditation, state endorsement, and the constitutional issues--not just of religious establishment, but of racial balancing, and of government delegation--will only grow worse. A careful review of the limits on state action is in order, and it will most likely demonstrate that whenever government becomes involved, it inevitably becomes "excessive entangled."

Legal Topics:

For related research and practice materials, see the following legal topics:
 Constitutional Law
 Bill of Rights
 Fundamental Freedoms
 Freedom of Religion
 Establishment of Religion
 Education
 Law
 Departments of Education
 State Departments of Education
 Accreditation
 Education Law
 Religion in
 Schools
 Establishment Clause
 Protections

FOOTNOTES:

n1 See Institute for Creation Research Website (visited March 24, 2002) <www.icr.org>.

n2 See, e.g., John D. Morris, *How Does 'Old Earth' Thinking Affect One's View of Scripture's Reliability?* (visited March 18, 2002), <<http://www.icr.org/pubs/btg-b/btg-116b.htm>> and John D. Morris, *Doesn't Carbon Dating Prove the Earth is Old?* (visited March 18, 2002), <<http://www.icr.org/pubs/btg-b/btg-115b.htm>>.

n3 See, e.g., PHILIP KITCHER, *ABUSING SCIENCE: THE CASE AGAINST CREATIONISM* (1982); MICHAEL RUSE, *DARWINISM DEFENDED* (1983); MARTIN GARDNER, *FADS AND FALLACIES IN THE NAME OF SCIENCE* (1957); STEPHEN JAY GOULD, *DINOSAUR IN A HAYSTACK: REFLECTIONS IN NATURAL SCIENCE* 361-63 (1995). For a list of sources on the Paluxy River Tracks, see Paul V. Heinrich, *List of References Concerning the Paluxy River Dinosaur Tracks, Somervell County, Texas* (visited March 18, 2002), <<http://www.usd.edu/anth/cultarch/paluxybib.html>>. In *Epperson v. Arkansas*, 393 U.S. 97 (1968), the Supreme Court held that "creationism" was a religious belief, and not simply an alternative scientific viewpoint. See also *McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark. 1982); *Edwards v. Aguillard*, *infra* note 28; *Webster v. New Lenox School District No. 122*, 917 F.2d 1004 (7th Cir. 1990); *Freiler v. Tangipahoa Parish Board of Education*, 185 F.3d 337 (5th Cir. 1999).

n4 Some states do regulate the use of terms such as "university." But we are here only discussing federal regulations.

n5 For a history of accreditation in post-secondary education, see Jeffrey C. Martin, *Recent Developments Concerning Accrediting Agencies in Postsecondary Education*, 57 *LAW & CONTEMP. PROBS.* 121 (1994); Matthew Finkin, *The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education*, 57 *LAW & CONTEMP. PROBS.* 91 (1994). Lisa P. Baar, *The Higher Education Amendments of 1992: Resolving the Conflict over Diversity Standards and Institutional Eligibility for Title IV Aid*, 30 *HARV. J. ON LEGIS.* 253 (1993); JOHN S. BRUBACHER, *THE COURTS AND HIGHER EDUCATION* 106-113 (1971); THOMAS E. BLACKWELL, *COLLEGE LAW* 55-57 (1961).

n6 20 U.S.C. § 1001(a). There are exceptions; for instance, a school which has "been granted preaccreditation status by such an agency or association that has been recognized by the Secretary for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time." *Id.* § 1001(a)(5).

n7 20 U.S.C. § 1001(c) (1999). See also *id.* § 1099(b).

n8 Finkin, *supra* note 5, at 95. See also WILLIAM KAPLIN, *THE LAW OF HIGHER EDUCATION* 561-580 (1986); BLACKWELL, *supra* note 5.

n9 See STEVEN LEVICOFF, *WHEN THE TRACS STOP SHORT*, (on file with the author). When this note was originally drafted, this book was only available in an online format at <<http://levicoff.tripod.com/tracs.htm>> (visited Oct. 9, 1999). (Levicoff explained that "[I] had exactly 50 copies printed... The on-line publication of *WHEN THE TRACS STOP SHORT* appears...because I continue to get requests for the book and can't be bothered with a reprint...." *Id.* at Preface To Online Edition. The website has since been removed.)

n10 The accrediting agency itself is, of course, also required to publish its standards for accreditation. See 20 U.S.C. § 1099b(c)(5).

n11 See *Id.* § 1099(b)(m).

n12 An example would be Bob Jones University in South Carolina, which, although serving about 5,000 students, is not accredited. See Bob Jones University Website (visited March 27, 2002) <<http://www.bju.edu>>.

n13 *Transnational Association of Christian Colleges and Schools Foundational Standards* (visited Oct. 9, 1999) <<http://www.tracs.org/-foundstandards.pdf>>.

n14 See TRACS' website (visited March 26, 2002), <<http://www.tracs.org>>; cf. LEVICOFF, *supra* note 9, at chapter 2.

n15 See Scott Jaschik, *Rejecting Review Board's Advice, Alexander Grants Federal Recognition to Christian Accrediting Body*, CHRON. OF HIGHER EDUC., Sept. 4, 1991 at A40. Writes Levicoff, "[Lamar] Alexander's unilateral recognition of TRACS was met with surprise by the higher education community. Thurston E. Manning, former president of the Council on Postsecondary Accreditation, said he was 'astonished' by the way Alexander had handled the case and that he could not figure out why the Secretary had recognized the group. He concluded, 'Obviously, politics come to mind.' Politics, indeed, could become the undoing of TRACS. Prior to serving in the Bush administration, Lamar Alexander was a Republican governor in Tennessee, the state in which TRACS itself is headquartered. Alexander had proven himself friendly to conservative Christian schools, not only in terms of TRACS' recognition, but also in the way he had handled the [diversity] controversy between Westminster Theological Seminary and the Middle States Association." LEVICOFF *supra* note 9 at chapter 2.

n16 SACS has since reinstated Liberty's accreditation.

n17 See LEVICOFF, *supra* note 9 at chapters 5-9.

n18 See Scott Jaschik, *Christian Accrediting Group Faulted in Federal Review*, CHRON. OF HIGHER EDUC., June 16, 1995 at A28.

n19 See U.S. DEPARTMENT OF EDUCATION, NATIONAL INSTITUTIONAL AND SPECIALIZED ACCREDITING BODIES visited March 26, 2002), <<http://www.ed.gov/offices/OPE/accreditation/natlinstandspec.html#chred>>. Although TRACS eliminated the "associate" category, it is still affiliated with a number of questionable institutions. Compare LEVICOFF, *supra* note 9, at chapters 7-9 with *List of Accredited Schools*, *infra* note 85. The law permits government funding to go to schools which are not yet fully accredited, but have been granted "preaccreditation status." While TRACS explicitly stated that its "associate" category was not a preaccreditation status, the legal ambiguity remains, and this could presumably allow government funds to go to schools which have not even been accredited by any accreditation agencies the DOE might recognize. We are not concerned here with the possibility of government funding of institutions such as ICR, but with the image of government endorsement of religious doctrine that TRACS' recognition necessarily brings.

n20 U.S. CONST. Amend. I, § 1: "Congress shall make no law respecting an establishment of religion...."

n21 330 U.S. 1 (1947).

n22 403 U.S. 602 (1971).

n23 492 U.S. 573 (1989).

n24 459 U.S. 116 (1982).

n25 521 U.S. 203 (1997).

n26 330 U.S. at 15-16 (*quoting* Reynolds v. United States, 98 U.S. 145, 164 (1878)).

n27 403 U.S. at 612-613.

n28 482 U.S. 578 (1987). This case struck down the Louisiana "creationism act," which required teachers to "balance" teaching of evolution with teaching of "creation science."

n29 473 U.S. 402 (1985).

n30 472 U.S. 38 (1985). *See id.* at 68 (O'Connor, J., concurring) ("the *Lemon* test has proved problematic."); *id.* at 108-111 (Rehnquist, J., dissenting) ("the *Lemon* test has no...ground-ing in the history of the First Amendment....")

n31 465 U.S. 668, 689 (1984) (O'Connor, J., concurring).

n32 508 U.S. 384, 397 (1993) (Justice Thomas joined in Justice Scalia's concurrence).

n33 *Id.* at 398

n34 *Id.* at 399

n35 *Id.* (quoting *Hunt v. McNair*, 413 U.S. 734, 741 (1973)).

n36 472 U.S. at 68-69.

n37 465 U.S. at 690.

n38 521 U.S. at 208.

n39 *Id.* at 222-223.

n40 *Id.*

n41 473 U.S. 373 (1985).

n42 521 U.S. at 225.

n43 474 U.S. 481 (1986).

n44 521 U.S. at 225-226.

n45 See Carlos Elizondo, *The Aftermath of Agostini: Confusion Continues as the Modified Lemon Test is Applied in Helms v. Picard*, 13 BYU J. PUB. L. 409 (Fall 1999); Brian Saccenti, *Agostini v. Felton: Shifting the Evidentiary Burden in Establishment Clause Challenges Back to the Plaintiff*, 58 MD. L. REV. 300 (1999). As the recent decision in *Mitchell v. Helms*, 530 U.S. 793 (2000), reveals, the Court now seems almost evenly divided on the issue of whether government neutrality towards religion is alone sufficient to satisfy the Establishment Clause. Justices Rehnquist, Scalia, Kennedy and Thomas seem to believe that it is; Justices Stevens, Ginsburg, and Souter do not. Justice O'Connor (the "swing vote"), and Justice Breyer emphasize the importance of the neutrality doctrine, yet remain uncomfortable with holding "that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid." *Id.* at 839 (O'Connor and Breyer, JJ, concurring in the judgment). It is thus too early to determine to what degree neutrality alone--the first of the *Lemon* criteria--has displaced the "entanglement" analysis.

n46 459 U.S. at 123.

n47 For the interesting suggestion that the government's reliance on the decisions of accrediting bodies constitutes an unconstitutional delegation of power are to be found, see Finkin, *supra* note 5 and Martin, *supra* note 5.

n48 Martin, *supra* note 5 at 124.

n49 271 F. Supp. 65 (N.D. Ill. 1967).

n50 *Id.* at 70.

n51 See *Transport Careers v. National Home Study Council*, 646 F. Supp. 1474 (N.D. Ind. 1986); *Medical Institute of Minnesota v. NATTS*, 817 F.2d 1310 (8th Cir. 1987); *Marlboro Corporation v. Association of Independent Colleges and Schools*, 556 F.2d 78 (5th Cir. 1977); *State of North Dakota v. North Central Ass'n of Colleges and Secondary Schools*, 23 F. Supp. 694 (E.D. Ill. 1938); *Wilfred Academy v. Southern Association of Colleges*, 738 F. Supp. 200 (S.D. Tex. 1990) ("the decision to deny or withdraw accreditation is viewed by this Court with great deference to the expertise of the accrediting agency." *Id.* at 208).

n52 *Parsons College*, 271 F. Supp. at 70.

n53 *Transport Careers*, 646 F. Supp. at 1478. The court noted that "the only decision holding that an accrediting body's function constitutes state action was reversed on appeal. See *Marjorie Webster Junior College v. Middle States Ass'n.*, 302 F. Supp. 459 (D.D.C. 1969), *rev'd* 432 F.2d 650..." See also *State of North Dakota v. North Central Ass'n of Colleges and Secondary Schools*, 23 F. Supp 694 (E.D. Ill., 1938) (assuming without comment that NCACS was a voluntary private organization).

n54 See *Martin*, *supra* note 5 at 126; *Finkin*, *supra* note 5 at 103 and 107; Scott Jachik, *Renewal of Recognition of Accrediting Group Delayed by U.S. over Campus Diversity Policy*, CHRON. OF HIGHER EDUC., April 17, 1991 at A22; *Baar*, *supra* note 5.

n55 *Martin*, *supra* note 5 at 130, quotes Alexander: "The existence of such a powerful relationship between federal financial aid and accreditation has distorted this picture. If a college is not accredited, it can't accept a student with a federal grant or loan. So when Middle States or some other accrediting agency makes even a suggestion to a college about what its diversity ought exactly to be, that suggestion carries with it the clout of the federal government...."

n56 More: while "diversity standards" may not be unconstitutional, TRACS has established standards which would certainly be *prima facie* unconstitutional if they were dictated by a government body. Compare U.S. CONST. amend I § 1 and *id.* Art. VI § 3 with *Regents of the University of California v. Bakke* 438 U.S. 265 (1978). Recently another accrediting agency, the American Academy for Liberal Education, has also created a controversial list of education standards that go beyond those of other accreditors. See Robin Wilson, *Does New Accreditor Promote Rigor or Curb Academic Diversity?* CHRON. OF HIGHER EDUC., April 4, 1997, at A10.

n57 See 20 U.S.C.A. § 1099b(m): "The Secretary may only recognize accrediting agencies...for the purpose of enabling such institutions to establish eligibility to participate in the programs under this chapter...."; *Id.* § 1099b(n)(3): "The Secretary shall not, under any circumstances, base decisions on the recognition or denial of accreditations or associations on criteria other than those contained in this section." See also Higher Education Act Amendments, Pub. L. No. 102-325, 499, 106 Stat. 448, 644 (g)-(n) (1992).

n58 20 U.S.C.A. § 3403(b).

n59 20 USCS § 1099b(k).

n60 This phrase is used to describe an institution whose "secular activities cannot be separated from sectarian ones." *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 755 (1976). These institutions "may receive no direct state aid of any kind." *Id.* at 758. But now lawmakers have left the door open to pervasively sectarian *accreditation agencies*, whose accreditation activities can not be se-parated from their religious mission. TRACS explicitly states that mission as the promotion of a particular brand of fundamentalist Protestantism. Justice Thomas has argued that the Court should "scrap the 'pervasively sectarian' test and reaffirm that the Constitution requires, at a minimum, neutrality not hostility toward religion." *Columbia Union College v. Clark*, 527 U.S. 1013, 1014 (1999) (Thomas, J., dissenting from denial of cert.). Yet Thomas writes, "we have held that [religious schools] may benefit from public assistance *that is made available based upon neutral, secular criteria.*" *Id.* (emphasis added). As I have pointed out, TRACS was recognized as an accreditation association in the most

questionable of ways. ICR, in calling itself a "ministry," demonstrates the dangers of wholly eliminating the "pervasively sectarian" test--they, and schools like them, could conceivably receive federal funding for an obviously narrow religious purpose, as could other schools under the present system. But aside from this question, the bad science promoted by ICR is enough of a "neutral, secular" reason for preventing *religious* accreditors from accrediting (supposedly) *scientific* institutions. See *infra* section VII.

n61 Baar, *supra* note 5 at 281. Baar specifically mentions TRACS (under its old name, the Transnational Association of Christian Schools). *Id.* at n. 122

n62 493 F. Supp. 976 (D.D.C. 1980).

n63 *Id.* at 978.

n64 For an analysis of the claims of chiropractic, see, e.g., L.A. CHOTKOWSKI, CHIROPRACTIC: THE GREATEST HOAX OF THE CENTURY? (1999); GEORGE MAGNER, CHIROPRACTIC: THE VICTIM'S PERSPECTIVE (1999); Stephen Barrett, et. al., Chirobase: *A Skeptical Guide to Chiropractic History, Theories, And Current Practices*, (visited Mar. 16, 2000) <www.chirobase.org>.

n65 493 F. Supp. at 978.

n66 *Id.* at 980.

n67 *Id.* at 981.

n68 *Id.*

n69 *Id.*, citations omitted.

n70 *Sherman*, 493 F. Supp. at 979.

n71 *See also supra* note 15.

n72 121 S. Ct. 924 (2001).

n73 *Id.* at 932.

n74 *Id.*

n75 *See* WASC Constitution, Art. III § 3(b) <<http://www.wascweb.org/senior/constitution%200701.pdf>> (visited March 24, 2002).

n76 121 S. Ct. at 932.

n77 *Id.* at 930, citations omitted.

n78 *Id.* at 932-933.

n79 *Id.*

n80 *See supra* text accompanying note 69 and *infra* text accompanying note 97.

n81 817 F.2d 1310 (8th Cir. 1987).

n82 *Id.* at 1313.

n83 As the Court put it in *Lamb's Chapel*, responding to Justice Scalia's criticism: "While we are somewhat diverted by Justice Scalia's evening at the cinema...we return to the reality that there is a proper way to inter an established decision, and *Lemon*, however frightening it might be to some, has not been overruled." 508 U.S. at 395 n.7

n84 See Randy Frame, *Pope Says Evolution "More Than Hypothesis,"* 40 CHRISTIANITY TODAY no. 14 at 72; Nicholas Kinney, *Pope Gives Blessing To Evolution Theory*, 33 NATIONAL CATHOLIC REPORTER 3. See also LEVICOFF, *supra* note 9 at chapter 3: ("One problem inherent in TRACS' requirement that schools accept the historicity and creationism tenets is that it has forced some schools to rearticulate their doctrinal statements to meet the TRACS' standards.")

n85 TRACS lists the following as its accredited institutions: American Christian College and Seminary, Oklahoma City, Oklahoma; Baptist Bible College East, Boston, Massachusetts; Beacon College & Graduate School, Columbus, Georgia; Beulah Heights Bible College, Atlanta, Georgia; California Christian College, Fresno, California; Christian Heritage College, El Cajon, California; Faith Evangelical Lutheran Seminary, Tacoma, Washington; Heritage Bible College, Dunn, North Carolina; Hillsdale Free Will Baptist College, Moore, Oklahoma; King's College and Seminary, Van Nuys, California; ICR Graduate School, Santee, California; International Baptist College, Tempe, Arizona; International College & Graduate School, Honolulu, Hawaii; Liberty University, Lynchburg, Virginia; Luther Rice Bible College & Seminary, Lithonia, Georgia; Maple Springs Baptist Bible College and Seminary, Capital Heights, Maryland; Messenger College, Joplin, Missouri; Michigan Theological Seminary, Plymouth, Michigan; Northwest Baptist Seminary, Tacoma, Washington; Northwest Graduate School of the Ministry, Redmond, Washington; Piedmont Baptist College, Winston-Salem, North Carolina; Shasta Bible College, Redding, California; Southern California Bible College & Seminary, El Cajon, California; Southern Evangelical Seminary, Charlotte, North Carolina; Temple Baptist Seminary, Chattanooga, Tennessee; Tennessee Temple University, Chattanooga, Tennessee; Trinity Baptist College, Jacksonville, Florida; Word of Life Bible Institute, Pottersville, New York. See *List of Accredited Institutions*, (visited Jan. 21, 2000) <<http://www.tracs.org/accredit.htm>> (visited March 24, 2002).

n86 *Lynch*, 465 U.S. at 688.

n87 See <<http://www.icr.org/grad/accred.htm>> (visited March 24, 2002).

n88 See <<http://www.abcs.edu/#accreditation>> (visited March 24, 2002).

n89 See <<http://www.tbc.edu/academics/accreditation.htm>> (visited March 24, 2002).

n90 *Widmar v. Vincent*, 454 U.S. 263, 276 (1981).

n91 See text accompanying note 45.

n92 See *ATS Accreditation Standards*, (visited Oct. 14, 1999) <<http://www.ats.edu/sets/acfst.htm>>. ("Prior to meeting the standards of accreditation, these schools must demonstrate that they are qualified for membership in the Association by virtue of offering graduate theological degrees, functioning within the Jewish or Christian faiths, and demonstrating that their graduates serve in positions of re-ligious leadership.")

n93 20 U.S.C.A. § 1099b (a)(4).

n94 See Jaschik, *supra* notes 15 and 18; LEVICOFF, *supra* note 9 at chapter 2.

n95 492 U.S. at 590-91

n96 20 U.S.C.A. § 3403(b).

n97 *Transport Careers*, 646 F. Supp. at 1479 n. 4.

n98 *Sherman*, 493 F. Supp. at 981.

n99 461 U.S. 574 (1983).

n100 465 U.S. 555 (1984). Since this decision, Grove City College in Pennsylvania, and Hillsdale College in Michigan, have refused to accept even government-to-student loans, in order to preserve their independence from government oversight. Hillsdale College is not to be confused with Hillsdale Free Will Baptist College in Oklahoma. Hillsdale in Michigan, my own *alma mater*, is not religiously affiliated, and is accredited by the North Central Association of Colleges and Schools. It is not affiliated with Hillsdale Free Will Baptist College, which is accredited by TRACS. Hillsdale and Grove City are the only two accredited colleges in the country which accept no government funding of any sort. See John Moore, *No Strings Attached*, 39 POLICY REVIEW, May 1, 1998; William Barnett, *Unique Selling Position*, 100 FORBES May 17, 1999; Gary Wolfram, *The Threat to Independent Education*, (visited Oct. 2, 1999) <<http://www.cato.org/pubs/pas/pa-278.html>>; See also Hillsdale College (visited Oct. 14, 1999) <<http://www.hillsdale.edu>>; Grove City College (visited Jan. 21, 2000) <www.gcc.edu>.

n101 Eugene Volokh, *Equal Treatment Is Not Establishment*, 13 NOTRE DAME J.L. ETHICS & PUB POL'Y 341 at 357-358.

n102 *Id.* at n. 32 (emphasis added).

n103 *Lynch*, 465 U.S. at 690.

n104 *Parson's College*, 271 F. Supp. at 70.

n105 As Levicoff, (a fundamentalist Christian, who has "no problem with TRACS' doctrinal statement at all") writes, "if TRACS were a church, denomination, Bible college, Christian liberal arts college, or theological seminary, they would have the right to express that doctrinal position. But they should not have that right in the context of their function as an accrediting agency recognized by the United States Government." *Supra* note 9 at chapter 3.

n106 Recall that the Supreme Court, in cases such as *R.A.V. v. State of Minnesota*, 505 U.S. 377 (1992), has halted government prohibition on types of speech, when those prohibitions are related to the content of the speech. "The government may not regulate use based on hostility--or favoritism--towards the underlying message expressed." *Id.* at 385. In the same way, government neutrality towards religion means precisely that the government may not discriminate between religions or sects, based on the content of their dogmas. Regulations must be content-neutral. Government approval of one group may send precisely the same message as government *disapproval of other groups*. This is the fundamental principle of *County of Allegheny*, where the Court said "government may not demonstrate a preference for one particular sect or creed...." The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." 492 U.S. at 605 (quoting *Larson v. Valente*, 456 U.S. 228, 244 (1982)). So to recognize the decisions of one narrow sect's accreditation body is, *ipso facto*, to disapprove of the decisions of other sects who don't have pet accreditors. There are no accreditation agencies specializing in *only* Buddhist schools, or *only* Muslim schools--or, for that matter, *only* Shiite Muslim over Sunni Muslim schools.

n107 In *United States v. Ballard*, 322 U.S. 78 (1944), the Court held it improper for a jury to consider the objective truth or falsehood of the defendants' claim that they were capable of faith-healing. "Freedom of thought," the Court noted,

embraces the right to maintain theories of life and of death and of the hereafter which are rank heresy to followers of the orthodox faiths... Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs... Yet the fact that they may be beyond the ken of mortals does not mean that they can be made suspect before the law... the religious views exposed by respondents might seem incredible, if not preposterous, to most people. But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect.

Id. at 86-87. But this runs the danger of allowing any quack scientific claim to escape judicial scrutiny--and legislative proscription--if it only wraps itself in a pretext of religious faith. The reasoning of cases such as *Employment Div. v. Smith*, 494 U.S. 872 (1990), is precisely to avoid this anomalous result, because "any society adopting such a system would be courting anarchy[.]" *Id.* at 888. A related issue in tort law is whether courts should find an actionable nuisance when a neighbor's disturbance is based on *unreasonable* fear. Compare *Everett v. Paschall*, 61 Wash. 47 (1910) (allowing suit because "the question is, not whether the fear is founded in science, but whether it exists[.]" *Id.* at 51) with *McPherson v. First Presbyterian Church*, 120 Okl. 40 (1926) ("To enjoin a threatened nuisance...the evidence must be clear and convincing, not of a possibility or apprehension, but of a reasonable probability, that the injury will be done." *Id.* at 45). Surely if a neighbor has, say, a paranoid phobia of swimming pools, a court would not require a property owner to fill in a swimming pool on his property. Yet in refusing to issue such an injunction, the court would necessarily be making an implicit pronouncement on the *factual validity* of that phobia. See PROSSER & KEETON, TORTS 628 (5th Ed. 1984) ("Business enterprise should not be required to bear the costs of suffering of those who are supersensitive").

n108 See *United States v. Downing*, 753 F.2d 1224, 1238 n. 18 (3d Cir. 1985) ("In certain cases...a court might be justified in taking judicial notice of the invalidity of the underlying basis for the evidence, e.g., astrology or phrenology.") See further *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993) (setting forth criteria for differentiating legitimate scientific evidence from pseudoscience).

n109 See Kepler College Web Site <<http://www.kepler.edu/index.html>> (visited Oct. 4, 2001). Kepler correctly notes that it is "the only college in the western hemisphere authorized to issue BA and MA degrees in Astrological Studies."

n110 See Accrediting Commission of Career Schools and Colleges of Technology School Directory <http://www.accsct.org/resource/resource_mainframe.html> (visited Oct. 24, 2001). See further Charles Kelly, *The Sky's The Limit for Future Astrologers As School Gets Accredited*, THE DES MOINES REGISTER, Oct. 7, 2001 at 6.

n111 Baar, *supra* note 5 at 294.

n112 *Id.* at 253.

n113 GEORGE ROCHE, *THE FALL OF THE IVORY TOWER* 172 (1994).

n114 See, e.g., *id.*; Wolfram, *supra* note 100. Karl Popper has pointed out that government is particularly unsuited to providing education, since the primary goal of a good education is to foster curiosity and critical thinking--while it is always in a government's best interest to foster obedience and adherence to unquestionable commands. 1 KARL POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* 120-137 (5th Ed., 1966).

n115 In fact, the Federal Convention considered, and specifically rejected, a proposal for a national university. JAMES MADISON, *NOTES ON THE DEBATES OF THE FEDERAL CONVENTION OF 1787*, 639 (Adrienne Koch ed., Norton 1966). The Convention considered the proposal unnecessary, because "the exclusive power at the seat of government will reach the object,"--that is, Congress' power to govern the Federal District would permit it to create a university if it wished. Clearly the Framers believed that, if the government were to get involved with higher education at all, it would do so only within the ten square mile Federal District.

n116 The *Sherman* court held that the Department of Education could only legitimately consider whether an accreditor is a "reliable authority." See *supra* section VI. TRACS is not a "reliable authority" for assessing degree programs in fields such as geology and biology.