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THE LEGAL BASIS FOR DEGREE GRANTING AUTHORITY IN THE UNITED STATES

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Summary

This paper discusses the three methods (federal, state, and tribal) through which an institution can obtain degree-granting authority in the United States. Given the frequency and dominance of state actions in this area, the paper focuses primarily on degree authority granted by states by charter or other state action and discusses legal cases that have arisen from disputes over the acquisition of degree-granting authority.

It also discusses the relationship between states, accreditors, and the federal government with regard to degree-granting authority. The degree mill problem is discussed briefly, with reference to more detailed studies. The problem of religious exemptions is discussed, as are the unique degree-authority issues facing California and that state's response.

Recommendations for good practices in states are included.

Alan Contreras, Administrator of the Oregon Office of Degree Authorization, is a leading expert in the legal basis and current practices relative to state authorization of higher education institutions. The analysis and opinions are those of the author. SHEEO is pleased to provide a forum for discussion of these and related topics, and would welcome comments and alternative viewpoints.

The legal basis for degree-granting authority in the United States

“In practical affairs, [a degree] introduces its possessor to the confidence and patronage of the general public. Its legal character gives it a moral and material credit in the estimation of the world, and makes it thereby a valuable property right of great pecuniary value.” *Supreme Court of Vermont in Townshend v. Gray*

Alan L. Contreras

There have been many discussions among higher education leaders in recent years regarding the problem of diploma mills and suppliers of nonstandard or invalid educational documents. One key question that is often poorly answered is: what makes a real degree genuine and a bogus degree false? There are many ways to approach this question, but one baseline seems essential, that of legality. A clear line can be drawn between degree-granters that have legal authority to grant degrees and those that do not. This is the firmest rampart from which society can be victorious in the fight against degree mills. My purpose in this article is to set forth the current law that governs the authority to issue degrees in the U.S. This area of law has not had a careful collation of materials for many years, and I hope that my work will provide a useful baseline for discussions of the issues.¹

It is important to note at the outset that the legal authority to issue degrees is not the same thing as the qualitative oversight of college programs, a much broader and more complex issue. It is also worth noting that a college having the legal authority to issue degrees is no guarantee that its degree programs are good or even adequate. One reason that the role of accreditors has increased in value over time is that some states have had poor or nonexistent approval standards.

For an example of what can happen when a state fails to exercise adequate oversight of degree-granters, examine the entity that did business in California and Wyoming under the name Kennedy-Western University and later changed its name to Warren National University. The published record of the Government Accountability Office and the resulting U.S. Senate and House hearings provide a window inside the world of state authorization when done badly.²

The question of how best to deal with degree mills in the labor market has been handled with admirable thoroughness by Dr. Creola Johnson in two recent law review articles,³ and the overall problem of bogus degrees has been discussed in other recent articles and books,⁴ so I will not revisit that territory except insofar as it overlaps with the degree-authority issues that are my concern.

¹ A very useful compendium of cases is EDWARD C. ELLIOT & M. M. CHAMBERS, *THE COLLEGES AND THE COURTS* (1936).

² *Hearings Before the Committee on Governmental Affairs, United States Senate, 108th Congress, Second Session, MAY 11-12, 2004.*

³ Creola Johnson, *Degrees of Deception: are consumers and employers being duped by online diploma mills and universities?* 32 *JOURNAL OF COLLEGE AND UNIVERSITY LAW* 411-490 (2006) and *Credentialism and the proliferation of fake degrees: the employer pretends to need a degree; the employee pretends to have one.* 23 *HOFSTRA LABOR AND EMPLOYMENT LAW JOURNAL* 269-343 (2006).

⁴ The degree mill problem is sometimes hard to describe to people who are not familiar with it. The most recent overview, including case studies, is George Gollin, Emily Lawrence and Alan Contreras, *Complexities in legislative suppression of unsavory degree providers*, accepted for publication in *STANFORD LAW AND POLICY REVIEW* in 2010. By far the best compendium of information about the subject of fake degrees is ALLEN EZELL & JOHN BEAR, *DEGREE MILLS* (2005). An excellent older reference with significant historical material is DAVID STEWART and HENRY SPILLE, *DIPLOMA MILLS: DEGREES OF FRAUD* (ACE/MacMillan, 1988), which in turn refers to a useful 1963 dissertation later published by the Am. Council on Education as ROBERT REID, *DEGREE MILLS IN THE UNITED STATES* (University Microfilms, 1966).

The nature of degrees

In order to understand why certain credentials are not valid college degrees, and why some degree-granters are called degree mills or diploma mills,⁵ it is necessary to know what constitutes a *valid* degree. What this really means is that we need to know how a degree-granter obtains the formal authority to give someone a degree. It is of some value to anyone interested in this subject to examine the historical origin of U.S. degree-granting colleges and universities.⁶ These are the entities that today issue degrees in the U.S. However, pieces of paper that are called college degrees are also routinely sold by degree mills and diploma mills of various kinds, and can also be obtained from foreign countries.

A degree is a type of public credential, an *academic* credential.⁷ A public credential is distinguished from other kinds of awards and recognitions in that it is used outside private life for a specific purpose. Legitimate degrees are given for certain accomplishments in fields of knowledge, within a structure that involves qualified teachers who evaluate student performance against a set of generally accepted norms. The institution then awards credit hours based on that student work (under the U.S. system, a system not used in many other nations), and when sufficient credits of the right kind are gathered by the student, that student is eligible for the award of a degree by the institution.

Society has other kinds of public credentials, some of which are sometimes mistaken for degrees. The credentials most often confused with degrees are RN (Registered Nurse) and CPA (Certified Public Accountant), which represent an individual's certification, usually by a state licensing board, to practice as a professional. These are not degrees,⁸ although the licensees usually hold degrees upon which the licensure is based, e.g., a Bachelor of Science in Nursing or a BS in Accounting,

Once a degree mill degree is issued and in use, what can be done about it? There are a number of ways that someone interested in eliminating bogus degrees can approach the issue. There is more case law and commentary on this subject than on the basic question of degree authority. In particular, see Johnson above for an excellent look at the issue from a labor law and employer-based perspective. See also Joan Van Tol, *Detecting, deterring and punishing the use of fraudulent academic credentials: a play in two acts*, 30 SANTA CLARA LAW REVIEW 791-827 (1990), a case-based guide to what kinds of fakery actually happen. For a broad look at academic corruption issues, see Vincent Johnson, *Corruption in education: a global legal challenge*, 48 SANTA CLARA LAW REVIEW 1 (2008).

The unique problems created by fake accreditors are set forth in ALLEN EZELL, *ACCREDITATION MILLS* (2007). This small book is not widely available and must be ordered directly from the Am. Assn. of Collegiate Registrars and Admissions Officers (AACRAO). A good technical guide to evaluation of degrees and transcripts called *GUIDE TO BOGUS INSTITUTIONS AND DOCUMENTS* has also been issued by AACRAO.

A useful commentary on the degree mill problem in Canada can be found in registrar Louis Ariano's 2004 conference paper downloadable from <http://arucc2004.centennialcollege.ca/documents/A3.pdf>.

⁵ The terms "diploma mill" and "degree mill" are often used interchangeably, but experts consider them to have different meanings: A diploma mill provides a fake educational document, but without any actual evidence or documentation, although it may bear the name of a genuine educational institution. A degree mill provides a degree with what purports to be documentation, but it is issued by a fake college. The term diploma mill is in more common usage and can be used as generic for both reptiles.

⁶ There are many excellent books on the subject of how U.S. colleges and universities came to be what they are today. Readers interested in the subject should certainly consider reading JOHN BRUBACHER & WILLIS RUDY, *HIGHER EDUCATION IN TRANSITION* (1958); LAWRENCE VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* (1965); ROGER GEIGER, *TO ADVANCE KNOWLEDGE: THE GROWTH OF AMERICAN RESEARCH UNIVERSITIES, 1900-1940* (1986, *rev'd* Transaction Publications, 2004); and *THE AMERICAN COLLEGE IN THE NINETEENTH CENTURY* (Roger Geiger, ed., 2000).

More recent works covering the later 20th Century, such as GRAHAM & DIAMOND, *THE RISE OF AMERICAN RESEARCH UNIVERSITIES* (1997) and PHILIP ALTBACH, ROBERT BERDAHL & PATRICIA GUMPORT, *AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY* (Second ed., 2005) are good collections of material on modern challenges.

⁷ The question of what constitutes an academic vs. "nonacademic" degree is best addressed separately and is not discussed here. The word "academic" would seem unquestionable, but in one recent situation, a college that applied for state approval asserted that it did not fall under a state education agency's rules because it issued executive degrees, not academic degrees.

⁸ The Court of Appeals of the District of Columbia mistakenly treated the designation "CPA" as a degree in the leading federal case on degree authority (*Nat'l Assn. of Certified Public Accountants v. United States*, 292 F. 668, 53 App. D.C. 391), but that error in dicta does not detract from the explanatory utility of the case.

respectively, in these common fields. Some common ecclesiastical designations also carry letter-code designations, e.g., CSJ (Community of St. Joseph) or OSB (Order of St. Benedict). These are also public credentials used for group identification but are not degrees.⁹

An excellent detailed overview of the history and structure of genuine U.S. degrees, including reasons why U.S. degree labels have historically not matched up well with those in foreign countries, has been issued by the Carnegie Commission on Education.¹⁰ Degree structures in Europe are now somewhat in flux, and degrees and credit structures that look more like those in the U.S. may become more common. The Council for Higher Education Accreditation (CHEA) offers a helpful, more basic description on its Web site of what constitutes a degree.¹¹

The basis of degree-granting authority

A degree is valid if it is *properly granted* (that is, not fraudulently or mistakenly granted) by an entity that has the *legal authority* to do so. There are three sources of authority to issue college degrees in or from the United States. A college can obtain that authority from Congress, a state government, or a recognized sovereign Indian tribe. Tribal authority is not quite the same as federal authority, because although only federally recognized tribes operate colleges, once a tribe is recognized there is no apparent barrier to its chartering a college, though funding one is another matter.

The three-source theory derives primarily from the Tenth Amendment, commonly referred to as the “Reserved Powers Clause,”¹² which recognizes that the Federal government’s powers are limited to those granted by the Constitution; all other powers remain with the States or the people. Historically, education has been considered one of the most sacrosanct of these “reserved powers:” the states early acquired and have maintained a firm grip on education, about which the Constitution is entirely silent. Except with regard to requirements wrapped around the provision of Federal funds, the Congress has (at least until relatively recently) generally avoided asserting significant direct authority in this area.

The baseline that can always be used to determine whether a U.S. entity is a genuine college or a degree mill is therefore the answer to this question: which *government* authorized it to issue degrees? If it can’t show that it is authorized to issue degrees by Congress, a state, or an Indian tribe, the school purporting to offer a U.S. degree is a degree mill and its degrees may be treated as invalid, with possible exceptions for some degrees issued by religious schools exempt under state law, discussed below.

This paper focuses on issues surrounding state authority to authorize colleges, as that is how almost all U.S. colleges obtain their authority. But first, a very brief look at the other two sources of authority.

Federal authority

Congress rarely establishes degree-granting institutions. Examples are the military service academies and a small number of related institutions such as the Community College of the Air

⁹ One of the best overviews of the alphabet soup of degrees and related credentials is LEE PORTER, *DEGREES FOR SALE* (1972). This book, one of the earliest full-scale treatments of the degree mill problem, is also an excellent reference on what a real degree is and means, though in one chapter it mistakenly asserts that a charter as an educational entity automatically confers degree authority.

¹⁰ STEPHEN H. SPURR, *ACADEMIC DEGREE STRUCTURES: INNOVATIVE APPROACHES* (1970).

¹¹ See http://www.chea.org/pdf/Value_of_Degree.pdf.

¹² The Tenth Amendment reads: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

Force. In addition, the federal government has a unique relationship to certain colleges operating in the District of Columbia.

A few colleges operated by the Department of the Interior Bureau of Indian Affairs are, technically, federally authorized, though they also operate with tribal authority and therefore might be called “hybrids” in the tripartite taxonomy of approvals.

Certain issues related to the federal presence in degree-authority cases are discussed below, where they fit more naturally into distinct subsets of oversight problems than they would in a discussion of the very small direct federal role in degree authorization. In general, federal authorization of degree-granting is not a significant factor in U.S. education.

Tribal authority

The right of federally recognized Indian tribes to charter degree-granting colleges without state approval is widely accepted by state authorities. I have not reviewed case law on this issue because it is tangential to my purpose. There are a small number of colleges that are chartered by Indian tribes. The most well-known of these are schools such as Salish Kootenai College (Flathead Nation) in Montana and Sinte Gleska University (Lakota Sioux Nation) in South Dakota.¹³

It is worth mentioning that tribal chartering authority does not convey accreditation any more than federal or state authority does. State laws requiring that certain degrees be granted by an accredited institution or program in order to be used (e.g., for professional licensure) are not affected by the original source of degree authority, as any college can choose whether or not to become accredited, whatever the source of its initial charter or authorization.

State action to authorize degree-granting institutions

By far the majority (over 98 percent) of U.S. degree-granting institutions, amounting to well over 4,000 colleges¹⁴ as of 2009, operate under the legal authority given them by state governments. State authorization is the normal method through which degree-granting colleges are established, although the nature of the legal basis for state degree-granting authority has rarely been discussed by courts or commentators. Broader understanding of the importance of state roles in this area is needed, as the recent lapse in this authority in California clearly demonstrates. The prominent if unusual example of California is examined in detail in the closing sections of this paper, since it has significant implications for students, other states, and all of higher education.

State-conferred degree authorization appears in three basic forms:¹⁵ public institutions actually owned or operated by the state or one of its subdivisions (such as a community college district), nonpublic institutions that have some kind of formal authorization to offer degrees, and schools formally exempt from state authorization requirements on religious grounds.¹⁶

This paper focuses on one subspecies of degree-granter (nonpublic colleges) and one kind of state law and process (the process through which nonpublics obtain degree-granting authority)

¹³ There are 36 member colleges (plus one in Canada) of the American Indian Higher Education Consortium (AIHEC) as of March, 2009. For an excellent overview of how tribal colleges become established, see JOHN TIPPECONNIC, SUSAN FAIRCLOTH, CHERYL CRAZY BULL & GEORGE GIPP, *A GUIDE TO ESTABLISHING A TRIBALLY CONTROLLED COLLEGE OR UNIVERSITY* (2007, AIHEC, <http://www.aihec.org/>). For a good summary of the federal and tribal universe of approvals, see WILLIAM KAPLIN & BARBARA LEE, *THE LAW OF HIGHER EDUCATION* (Fourth Edition, 2006). Section 1.3.3 discusses federal and tribal authority.

¹⁴ About 4,200 accredited U.S. colleges are listed in the *DIRECTORY OF HIGHER EDUCATION* (2009)

¹⁵ A good overview of the basic forms of state approval can be found in BRUCE CHALOUX, *STATE OVERSIGHT OF THE PRIVATE AND PROPRIETARY SECTOR* (1985). This publication was issued by the State Higher Education Executive Officers Association, but is now available only from the ERIC educational publication database.

¹⁶ Religious exemption is controversial, raises a variety of legal and policy issues, and is allowed in fewer than half of the states.

because this is the arena in which most of the issues surrounding degree mills and dubious degrees arise. It has also been the source of most litigation regarding degree-granting authority, and of much discussion in the unique legal situations that have caused problems in California and Texas, discussed below.

States authorize nonpublic colleges to issue degrees in three ways:

1. Authorization by direct charter or some other kind of *sui generis* state action that approves specific schools by name. Many older charters were issued directly by legislative action or even, in their earliest form, by royal decree. Some California charters were issued by the state's Supreme Court.
2. Authorization via a system of statutes and regulatory standards under which a regulatory agency grants authorization through a letter or formal license.
3. Authorization by *de facto* delegation of state authority to a religious body via state "religious exemption" statutes.

An excellent summary of key issues in the state regulatory environment, concentrating on technical requirements of each state, is set forth by Goldstein et al.¹⁷

1. Degree authorization by charter

Direct approval by charter or school-by-school legislative action is rare today, although there is no legal barrier (and some advantages) to it being done. However, it is the source of degree-granting authority of many older schools like Harvard, Dartmouth, and William and Mary. Even some relatively new institutions, particularly in the West, were established that way; schools such as Willamette University (1842, still independent) and Western Oregon University (1856, now public) were established by charter issued by the territorial government prior to Oregon's statehood in 1859.¹⁸ Whitman College in Washington was also established by territorial government charter (1882).¹⁹

Approval of this kind, based on historic norms (nine of the early grants of authority were royal charters issued prior to Independence) generally goes unnoticed and uninvestigated because of the nature of the schools: reputable, established, and nonprofit. It is precisely because these institutions have been around so long that no one looks carefully at their basic legal status; nor do many officials realize that the charter, that ancient and musty document, in fact has very significant legal consequences. A good discussion of the importance of charters can be found in Gordon R. Clapp's *The College Charter*,²⁰ which sets forth the state of the law at that time regarding the nature, importance, and limits of charters that give colleges degree-granting authority. It is noteworthy that the major cases discussed in Clapp's overview are still good authority today, as far as can be determined in a curiously quiet backwater of education law.

Clapp notes that much law related to the rights of nonpublic colleges flows from the *Dartmouth College* case,²¹ one of the few higher education cases that has remained among the Supreme Court's greatest hits. The two main post-*Dartmouth* trends of law that he discusses are the contract-related

¹⁷ MICHAEL B. GOLDSTEIN, AARON D. LACEY AND NICHOLAS S. JANIGA, THE STATE OF STATE REGULATION OF CROSS-BORDER POSTSECONDARY EDUCATION: A SURVEY AND REPORT ON THE BASES FOR THE ASSERTION OF STATE AUTHORITY TO REGULATE DISTANCE LEARNING (2006). Dow, Lohnes; Washington, DC.

¹⁸ CHARLES CAREY, GENERAL HISTORY OF OREGON (Third ed., 1971).

¹⁹ JAMES H. HITCHMAN, LIBERAL ARTS COLLEGES IN OREGON AND WASHINGTON 1842-1980 (1981). Occasional Paper No 17, Center for Pacific Northwest Studies, Western Washington University.

²⁰ Gordon Clapp, *The College Charter*, JOURNAL OF HIGHER EDUCATION, 5:79-87 (1934).

²¹ Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819).

cases that have to do with the relationship between states and colleges, and the minor rivulet of degree-authority cases, which are the ones that interest us in the present study.

The tangled early history of the chartered colleges is discussed in a number of books. A brief look at Harvard's early legal status gives an idea of collegiate establishment under unusual conditions:

Although no mention of the power to grant academic degrees is to be found in the Harvard College charter of 1650, the institution conferred nine bachelor of arts degrees as early as 1642. This was a bold action; it amounted to an unauthorized assumption of sovereign powers.²² ... Despite the cloud that hung over the legality of Harvard's charter, the college was able to carry on without interference until 1684, when the colonial charter of Massachusetts was revoked. With that revocation even any appearance of legality for Harvard's incorporation vanished too. ... Consequently Harvard operated without a charter till 1707. In that year the Massachusetts legislature, standing on the thin ice that the charter of 1650 had never been formally repealed or annulled, directed the college authorities to regulate themselves from time to time according to the provisions of the original document.²³

The issue of degree-granting authority has rarely been addressed by the courts; however, there are enough decisions to establish a solid and consistent baseline from which a discussion of this issue can proceed.

The leading federal case (indeed, almost the only federal case outside the Federal Trade Commission) is *Nat'l Assn. of Certified Public Accountants v. United States*, in which the Court of Appeals for the District of Columbia concluded that a corporation established under a general statute for educational purposes did not, solely by being so incorporated, acquire degree-granting authority.²⁴ The court held that degree-granting authority had to be granted in express terms by the government; in that case, Congress.

The court, following a general principle expressed earlier by the U.S. Supreme Court,²⁵ expressly denied the association's "bootstrapping" claim that an educational corporation could give itself degree-granting authority by listing it in the documents of incorporation, noting the following principle consistent with previous and subsequent state cases:

Thus we see that, when Congress desired to give a corporation that power, it did so in express terms. From this it must be inferred that, where it did not expressly grant such power, it intended to withhold it ... when Congress thought it proper to vest a corporation with the right to confer degrees, it said so in express terms, and was not willing to leave the matter to conjecture.²⁶

The U.S. Supreme Court decided not to hear an appeal from this decision, leaving the federal law of private-college degree-granting authority somewhat delicately poised. However, the court in the

²² JOHN BRUBACHER & WILLIS RUDY, *HIGHER EDUCATION IN TRANSITION: AN AMERICAN HISTORY 1636-1956* (1958), p. 22.

²³ *Id.* at 32.

²⁴ 53 App. D.C. 391, 292 F. 668 (1923), *cert den.* Oct. 6, 1923. Clapp erroneously called this a U.S. Supreme Court case.

²⁵ The general principle that "bootstrapping" corporate powers through a bare declaration in corporate documents is not possible was enunciated by the Supreme Court in *Oregon Railway & Navigation Co. v. Oregonian Railway Co.*, 130 U.S. 25, 9 Sup. Ct. 413, 32 L.Ed. 55 (1892).

²⁶ *Accountants* at 394.

Accountants case was in effect following earlier decisions by state supreme courts, which serve to buttress the basic rule.

The Vermont Supreme Court in *Townshend v. Gray*²⁷ concluded that a corporation had no power to grant degrees under the state's corporation laws unless the legislature itself had expressly included that power in the entity's charter. The Vermont court's impeccable statement of the situation is equally applicable today:

No express power to confer degrees can be found in the Statute under which this medical college was organized, and hence the power to confer degrees must be classed as incidental to the general powers of a corporation formed for the purpose of maintaining a literary or scientific institution, if it exists at all. ...

The power to confer degrees, not being conferred explicitly by the statute ... clearly does not exist at all. ...

Every state in the union has chartered these institutions, and it is believed that none of them has ever supposed that, with all the widely enumerated powers delegated to them, it had the power to confer degrees of any kind unless such power was expressly conferred in its charter. ... Such has, manifestly, been the legislative idea respecting the necessity of special authority from the lawmaking power of the government touching the right to confer degrees.

To hold that the Legislature, by a general law, intended that any three men in any town of the State, however illiterate or irresponsible, might organize and flood the state with doctors of medicine, doctors of law, doctors of divinity, masters of arts, civil engineers and all the other various titles that everywhere in the civilized world have signified high attainments and special equipment for professional work, is to liken it to the witty French minister who threatened to create so many dukes that it would be no honor to be one, and a burning disgrace not to be one.²⁸

This case deserves to be viewed as the *de facto* leading state case on the subject (partly because the opinion is so clearly written), along with the rather turbid older *Medical College* case²⁹ below (from which Vermont shamelessly lifted the phrase about French dukes). The *Townshend* case was cited as recently as 1982 (see below under *Religious exemptions*), for essentially the same principle, that degree-granting authority is held *in pectore* by state legislatures and must be granted explicitly.³⁰

In the earlier *Medical College* case, not quite so clearly enunciated as *Townshend*, the Supreme Court of Pennsylvania also made clear that degree-granting authority must be expressly granted by the state legislature. It concluded that "... we look in vain for any such authority among the powers which shall belong to a corporation established under the provisions of this act, and if we do not find it there, we have not power to certify as to it..."³¹ where the association's documentation confers powers not specified in the act. In short, because the state's incorporation statute did not expressly

²⁷ 62 Vt. 373, 19 A. 635 (1890).

²⁸ *Townshend* at 636-637.

²⁹ *The Medical College of Philadelphia Case*, 3 Whart. 445 (1838).

³⁰ Although the term *in pectore* originates with Catholic practice, under which a pope can privately name a cardinal "in the breast" to be formally announced later, it seems an appropriate way to describe the special way in which a legislative body holds certain privileges (such as degree authority) closely, to be conferred in express ways as the body sees fit.

³¹ *Medical College* at 455.

include a right to issue degrees as a purpose for which an entity could incorporate, the court could not recognize such a right in the corporation that was asserting it in an application for incorporation as a college.

The court again clearly distinguished between such activities as literary and scientific work, which it considered reasonably within the powers of corporations, and degree-granting authority, which could be granted to a college only by *express* action of the state legislature. The Pennsylvania opinion is somewhat convoluted, and readers who venture into its murky corridors will understand why the Vermont opinion is held in higher regard.

Additional cases with essentially the same result in similar degree-authority conflicts can be found in the states of Maryland, Pennsylvania, and Massachusetts.³² All of these cases conclude that degree-granting authority is legally separate from corporate existence or educational authority and requires an express legislative grant of power. A more recent opinion by the Pennsylvania Attorney General takes the same view.³³

An alternate view by the Missouri Supreme Court in another very old case is something of an outlier, holding that degree-granting authority is implied when a college is brought into existence by formal state charter.³⁴ Elliot and Chambers commented dryly that the Vermont decision in *Townshend* was “probably socially wiser.”³⁵

2. Degree authorization by state agency action

In addition to charters, there is the common, everyday process of state authorization³⁶ via an approval agency. Applying for state authorization and meeting state standards is the way that many U.S. colleges (especially those established in the past 75 years) obtained their authority to issue degrees. This is almost universally true for colleges operating outside their state of origin, but secondary approvals of that kind are not of interest here because they always relate to schools that have already obtained their initial authorization. State processes have engendered a number of disputes over the years, perhaps most notably the *Nova University* case,³⁷ but because these have not produced many cases dealing with the ways that colleges obtain their *original* degree authority, they are not discussed in any detail herein.

³² *Regents of University of Maryland v. Williams*, 9 Gill and J. 365, 31 Am. D. 72 (1838); *In re Duquesne College Charter* (Com. Pl.) 12 Pa. Co. Ct. R. 491, 2 Pa. Dist. R. 555 (1891); *Kerr v. Shurtleff*, 218 Mass. 167, 105 N.E. 871 (1914).

³³ Opinion of Attorney General Packer to John C. Pittenger, Pennsylvania Secretary of Education, issued Dec. 18, 1973, 63 Pa. D. & C.2d. 436, 1973 WL 41066, Pa. Dept. of Justice. The Attorney General made clear that degree-granting authority had to be explicit in law, and also embarked on a short informative history of the meaning of the words “diploma” and “degree” and how they had diverged in the past hundred years.

³⁴ *State ex rel. Granville v. Gregory*, 83 Mo. 123, 53 Am. Rep. 565 (1884). In this case the college was established by express state charter that simply didn’t mention degree-granting, rather than starting itself as a corporation.

³⁵ COLLEGES AND THE COURTS, p. 203.

³⁶ States use various terms such as licensure, authorization, approval and the like. Although these sometimes have slightly different meanings, I use the term *authorization* to encompass all formal state conferral of degree-granting authority by a non-legislative body.

³⁷ *Nova University v. Board of Governors of the U. of N. Carolina*, 267 S.E.2d. 596, (N.C. Ct. App 1980), *aff’d*, 287 S.E.2d. 872 (N.C. 1982). This case also reaffirmed the states’ basic authority over education. The *Nova University* case deals mainly with the issue of how one state can regulate activities of a college based in another state. However, the court decided the case in such a way that the result has some ancillary effect on our primary field of interest. *Nova*, an authorized Florida degree-granter, offered courses in North Carolina. The state objected on grounds that it had not granted *Nova* the authority to issue degrees in North Carolina. *Nova* responded by saying that the degrees were granted in Florida. The court held that because the right to teach and the right to issue degrees were not the same, a statute that regulated degree-granting did not reach so far as to allow the state to regulate teaching. However, when *Nova* challenged the District of Columbia statute, the college lost, primarily because the DC law applied equally to local and nonlocal providers. *Nova University v. Educational Institution Licensure Commission*, 483 A.2d 1172 (D.C. 1984).

Courts have in some cases³⁸ held that state laws were insufficiently specific in how they established standards for private degree-granters, but that problem relates more to the execution of such laws than to their conceptual basis.

3. Religious “exemptions” and degree-granting authority

Many colleges began under the authority of churches or denominations. That is one of the traditional ways that colleges came to the U.S. and to the states—indeed, it is one of the primary original mechanisms for the establishment of colleges.³⁹ Just as Harvard had to dance on the tightrope between a Royal charter and a legislative one, one commentator notes that early Catholic colleges “had to obtain special approval from the state before they could grant college degrees.”⁴⁰

This method of church-based degree-granting authority is, in effect, still used, but with only the most nominal state attention.⁴¹ There are many so-called ‘religious exempt’ colleges around the U.S., but in every case the exemption is expressly established by the state legislature. This is therefore a hybrid system under which the state delegates its degree authorization powers to churches that want to issue degrees.⁴²

There have been attempts by various religious organizations to assert a free-standing (that is, independent of state law) right to issue degrees under a First Amendment free exercise theory. Results at the appellate level are largely supportive of state control of degree-granting by religious institutions, with only one significant outlier, a convoluted decision by a confused Texas Supreme Court, discussed below.

One leading case for the position that degree-granting, as such, is a secular activity that is inherently the province of Caesar is the *Shelton College* case.⁴³ In that case, a religious college argued that because its beliefs precluded it from applying for state licensure of a degree-granting institution, it should be allowed to issue degrees because doing so was a protected function under the First Amendment. The court disagreed, concluding that

“... the State’s program for licensing institutions of higher education is applicable to sectarian institutions and that facially it does not unduly interfere with the free exercise of religion nor create an excessive state entanglement with religion.”⁴⁴

Shelton College’s defense was complicated by the fact that it issued degrees in fields other than religious studies, e.g., English, education, business, etc. The Supreme Court of Tennessee reached a result similar to Shelton in the *Clarksville School* case, and an outcome that should be viewed as the national exemplar.⁴⁵ This case also involved a religious college, but one that only issued degrees in

³⁸ *Packer Collegiate Institute v. University of the State of New York*, 81 N.E.2d. 80 (N.Y. 1948) noted a lack of sufficient standards and what subjects they should cover; *State v. Williams*, 117 S.E. 2d. 444 (N.C. 1960) dealt with similar issues.

³⁹ An excellent look at the underpinnings of mainstream religious college authority from a Catholic perspective is Peter J. Harrington, *Civil and Canon Law Issues Affecting American Catholic Higher Education 1948-1998: an Overview and the ACCU Perspective*. 26 JOURNAL OF COLLEGE AND UNIVERSITY LAW 67 (1999).

⁴⁰ *Id.* at 70.

⁴¹ See Alan L. Contreras, *Rendering unto Caesar: do religious exemption laws produce an ungodly number of diploma mills?* In prep. 2009.

⁴² An alternate view is that the law recognizes that churches have an innate right to train their leaders and this right necessarily includes degree-granting authority. This view is more difficult to support on historical grounds, as degree-granting authority was effectively a royal monopoly for so long prior to colleges coming to American shores.

⁴³ *New Jersey State Board of Higher Education v. Board of Directors of Shelton College*, 90 N.J. 470, 448 A.2d 988 (1982). It was really two cases decided 15 years apart, but the key case for degree authority is the 1982 case.

⁴⁴ *Shelton College* at 998.

⁴⁵ *State ex rel. McLemore v. Clarksville School of Theology*, 636 S.W.2d. 706, 5 Ed. Law Rep. 1294 (1982).

religious fields. The Tennessee court concluded that the issuance of degrees, even in religious subjects, was a matter for state control, because although the school's *educational* function was protected under a free exercise theory, the state has sole authority over all *degree-granting*.

In a similar case from Ohio involving a school that issued only religious degrees, the result was as in *Clarksville School*: degrees could not be issued without state authorization.⁴⁶ In that case, the trial judge found that the school could continue “teaching or offering to teach courses of instruction the content of which is wholly of a religious nature; provided, however, that no degrees or diplomas are issued, awarded or granted.”⁴⁷ The Attorneys General of Arkansas, Texas, Kentucky, and Nevada have expressed similar views as to degrees; diplomas are generally considered a more generic unprotected term.⁴⁸ The *Shelton College* and *Clarksville School* cases, and their progeny, are generally considered the leading cases and the logical result, but it is worth mentioning one case that reached a different conclusion and has created a certain turbidity in the legal waters.⁴⁹

The major church-degree outlier, the *HEB Ministries* case,⁵⁰ includes an apparent error of understanding by a Texas Supreme Court plurality. In this case, which reversed a ruling of the Texas Court of Appeals, the issue was whether the state could require Tyndale seminary, which lacked recognized accreditation or a state license to operate as a college, to obtain state approval prior to calling itself a seminary or issuing academic credentials. The case covered several discrete issues including use of the term “seminary,” state involvement in religious curricula, accreditation requirements, and degree-granting authority.

The court concluded that a seminary has a First Amendment right to issue religious credentials in religious fields without state oversight or approval. Both the seminary and the court went through considerable contortions to claim that they were not discussing degrees when in fact that is what they were doing. The seminary issued graduation documents using invented terms such as “Bachelor Level Diploma in Biblical Studies” as well as traditional Master of Arts and PhD diplomas that it baldly declared were not degrees.⁵¹

The court noted that Tyndale had never asserted that the state could not control use of the term “degree” and rather casually concluded that “... HEB Ministries does not complain of the statute’s

⁴⁶ State Board of School and College Registration v. Ohio St. Matthew University of St. Matthew Church of God, Case No. 72-AP-130, Court of Appeals for Franklin County, Ohio (1972), unpublished, also cited by Nevada Atty. General Robert List in letter opinion cited in Note 43.

⁴⁷ *id.* at 5.

⁴⁸ Arkansas Atty. Gen. letter opinion 2001-163, July 31, 2001, issued to State Sen. Ed Wilkinson; Op. Tex. Att’y Gen No. JC-0200 (2000), cited at 661 by the Texas Supreme Court in the HEB Ministries case but not reviewed in full for this article; 1988-91 Ky. Op. Atty. Gen 2-533, Ky. OAG 91-14, 1991 WL 53810 (Ky. A.G.), letter opinion of January 23, 1991 to Gary S. Cox, Executive Director, Kentucky Council on Higher Education; Nevada Atty. Gen. letter opinion issued Sep. 7, 1973 to Merlin Anderson, Administrator, Commission on Postsecondary Institutional Authorization. The date on the Arkansas letter may be erroneous in the original.

⁴⁹ There is a second case that I would not mention except for erroneous information published about it. For many years, a Louisiana degree mill called LaSalle University sold degrees despite the state’s efforts to close it. At one point the school put a church on its property and asserted that it was exempt from state oversight under the state’s religious exemption law. LaSalle asserted a claim in meetings with state officials that even its degrees in chemistry and similar fields were protected as religious under Louisiana’s religious exemption law because “all knowledge was divinely inspired” (letter from John Kay, retired chief of college approval for Louisiana, to the author). This would be of relatively minor note except that it is repeated in an inflated form in Ezell and Bear’s book on degree mills (see Note 4), which states that the Louisiana Supreme Court accepted this assertion. This is not correct. The only Louisiana appellate case relates to the tax status issue. See *Ieyoub v. World Christian Church*, 649 So.2d. 771, 94 0364 (La.App. 1 Cir 1994). In this case the Louisiana Court of Appeals held that the state had to accept at face value the school’s statement that it was a 501(c)(3) tax-exempt organization and could not require the school to prove it. See also *Rodrigue v. LaSalle University*, 1997 WL 680575 (E.D. La., 1997, unpublished), in which a RICO claim against the degree mill was denied for technical reasons.

⁵⁰ *HEB Ministries Inc. et al. v. Texas Higher Education Coordinating Board et al.* 235 SW 3d 627, 226 Ed. Law Rep. 348, 50 Tex. Sup. Ct. J. 1094.

⁵¹ The Coordinating Board correctly argued that the words associate, bachelor, master, and doctor were inherently degree claims or awards when used in an educational setting; the court plurality disagreed in several statements within the opinion.

restriction on the use of the word ‘degree’, and we do not consider whether it is permissible.”⁵² The dissents, which take up half the opinion and are exceptionally well-researched (if sometimes opaquely written) on the matter of degree authority, somewhat neutralize the effect of the plurality decision.

The Texas Supreme Court would have been well advised to follow the sage counsel of the Massachusetts Supreme Court, which concluded, in a similar case regarding a secular degree that a school claimed was not a degree:

"Degree," as used in this statute, is any academic rank recognized by colleges and universities having a reputable character as institutions of learning, or any form of expression composed in whole or in part of words recognized as indicative of academic rank, alone or in combination with other words, so that there is conveyed to the ordinary mind the idea of some collegiate, university or scholastic distinction.

While this definition may not include all instances, it is sufficiently accurate for the present case. The ordinary diploma of public or private schools, simply certifying to the completion of a course of study, does not contravene the statute. But when a title like "Doctor," commonly associated with unusual skill acquired by academic or professional study in schools or colleges, is conferred either separately or associated with other words, the statute is violated.⁵³

The HEB Ministries decision provides an exceptionally blurry precedent because the court declared that the question of degree-granting authority was *not before the court*.⁵⁴

It should now be clear that the portion of the Texas plurality opinion that assumes that a non-degree can be called by names such as bachelor, master, or doctor was wrongly decided; the dissenting justices are correct on that question. However, because it relates only to certain religious colleges and its unique logic, for lack of a better phrase, is unlikely to be repeated, its effect on degree-authority law is likely to remain quite limited.

State delegation of authority to accreditors

One of the fascinating changes in U.S. higher education over the past fifty years or so has been the emergence of quasi-public entities called accrediting agencies or commissions as *de facto* wielders of government authority.⁵⁵ Accreditors have existed longer than that, but their functions have changed over time. One of the reasons that the actual *law* of degree-granting authority has become so poorly recognized in recent decades is that it has been buried behind so many layers of accreditational crinolines that no one realizes that it is still there. The recent implosion of California’s college authorization process (see below) has blown away all but the filmiest wisp of cover for this problem.

It is fairly common for people not familiar with U.S. higher education to assume that accrediting bodies are the sources of a college’s legal authority to issue degrees. That is incorrect. While

⁵² HEB Ministries at 661.

⁵³ Commonwealth v. New England College of Chiropractic, 221 Mass 190, 108 N.E. 895 (1915).

⁵⁴ “In fact, the Coordinating Board found that Tyndale awarded degrees, and HEB Ministries did not appeal that determination” Justice Jefferson, in dissent.

⁵⁵ See Lucien Capone III, A Guidebook to Due Process for Accreditors (2007), and his What, Me Worry? An Overview of Legal Concerns for Accreditors (2003), both prepared as conference papers for the Association of Specialized and Professional Accreditors and available from the association.

accreditation agencies, which are themselves private membership associations, are indeed relied upon by many governmental entities to perform certain qualitative, evaluative, or certification functions, they do not themselves have, and have never had, the direct power to *authorize* the existence of a college or a degree program. Although accrediting agencies are well aware of the nature of their authority, this distinction causes more confusion than it should in state legislatures, and even within higher education.

A state may delegate *qualitative oversight* of degree programs at a state-authorized private college (or indeed a public institution) to an accrediting body, although in accepting that role the accrediting body may find itself seen as acting as a quasi-governmental entity subject to certain legal norms such as those regarding due process. In some cases, private evaluative agencies such as accreditors or professional bodies may in fact provide better quality control than a state could. However, states should take seriously their own responsibility for the quality of degrees issued under their authority.

Research for this paper revealed no evidence that any state has ever delegated its power to *authorize* a college to issue degrees to a private accrediting body. Could a state do so? That is unclear, and could not be done without affecting the character of the accrediting agency. Such an agency that was delegated government powers might be treated as a state actor for legal purposes, creating expectations of due process and perhaps rendering the accreditor subject to public meetings and records requirements.⁵⁶

In addition to serving the traditional role of qualitative oversight and insurer of similarity, accreditors have been delegated, though the federal recognition process, certain gatekeeping functions related to college eligibility for financial aid and other programs. In that context, federal law states that colleges must have state approval *in addition to* and *prior to* accreditation.⁵⁷ State authorization is a completely separate and simultaneous requirement for student aid eligibility, and *current* authorization must be demonstrable at all times.⁵⁸ It is unclear what would happen if an accrediting body attempted to serve as the state approving agency as well as a federally recognized accreditor.

Federal recognition of state authorization

The U.S. Department of Education recognizes the states' primacy in determining degree-granting authority in the regulatory structure for eligibility for financial aid programs, which provides the following definition:

Legally authorized: The legal status granted to an institution through a charter, license, or other *written document* issued by the *appropriate agency* or official of the *State* in which the institution is physically located.⁵⁹ (Emphasis added.)

⁵⁶ Degree authorization is not an innate power in accreditors, and they do not have mechanisms to do it, as they cannot currently issue charters or licenses and would need a formal grant of state authority to do so. It is not clear whether existing case law and federal rules, which sets forth quite clearly the rule that degree-granting authority must be assigned by *express* state action, would limit a state's ability to delegate authorization authority.

⁵⁷ 34 CFR 600.4(a)(3) requires state authorization; 34 CFR 600.4(a)(5)(i) requires accreditation or pre-accreditation. The CFR 600.5 series covers proprietary schools.

⁵⁸ E-mails from Linda Burkhardt, U.S. Department of Education Region X, to author, December 5, 2007, reading "State approval and accrediting go hand in hand. Loss of either will result in a loss of institutional eligibility. ... State approval is one requirement and accreditation is another requirement. Both must be met at all times."

⁵⁹ Definitions are in 34 CFR 600.2. The state authorization requirement is at 34 CFR 600.4(a)(1). These in turn are rooted in 20 U.S.C. 1001(a)(2), which says that an educational institution must be "legally authorized within each state to provide a program of education beyond secondary education."

There is little case law related to the question of how the federal government reacts to or classifies state authorization requirements. One reason for this is that education is, absent Congressional action, the province of the states. The bulk of federal law (or at least federal money) related to the legal status of colleges flows from eligibility requirements for college students for federal financial aid such as Pell Grants or Stafford Loans.⁶⁰

Federal law defining which colleges are eligible for student financial aid provides that in order for a college to be eligible for financial aid programs, it must be authorized by the state it is in. In addition, it must be accredited. The language quoted above would seem reasonably straightforward, yet in a previous and crucially different misinterpretation of the rules by the federal *Financial Aid Handbook*, this section of law was of some significance in a case impinging directly on the question of state authority over degree-granting.

In the *Sistema Universitario* case,⁶¹ the Court of Appeals for the First Circuit concluded that for purposes of determining whether a college is eligible for federal aid, the U.S. Secretary of Education is allowed, perhaps even required, to determine whether a college in fact has appropriate *state* legal authority to operate in the state it is in, even when that state (in this case Puerto Rico, treated as a state for purposes of this statute) may take a different view. Puerto Rico's decision to recognize the college retroactively was disallowed for purposes of Title IV eligibility by the Secretary of Education.

The court's reasoning, which at first seems slightly out of true, is in fact rather carefully focused, and is based on the idea that because the Secretary is custodian of federal dollars, determinations of eligibility are necessarily in the Secretary's hands and can't become dependent on possible rogue approvals (or denials) by a state government. This is unobjectionable as far as it goes, but one of the legs that it stood on when it was decided in 2000 was faulty.

The court leaned with moderate weight on a specific provision in the federal *Financial Aid Handbook* in use at that time, which offered the following guidance to colleges in the 2000-2001 edition of the *Handbook*:

To qualify under any of the three institutional definitions, a school must be legally authorized by the state in which it offers an educational program to provide the program. The state's legal authorization may be provided by the licensing board or educational agency. In some cases, the school's charter is its legal authorization. *In other cases, a school is considered to be legally authorized if state law does not require it to have a license or other formal approval.* (Emphasis added.)

The last sentence, which was contrary to the plain language of the actual rule, was used by the court as a pivot-point from which the state's approval authority could be undermined in favor of the Secretary's ability to determine eligibility.

In 2003 the *Handbook* was revised,⁶² and the revised language, still in use in the 2008-09 *Handbook*, reads as follows:

To qualify as an eligible institution under any of the three institutional definitions, a school must be legally authorized by the state in which it offers an educational program to provide the program. The state's legal authorization is the legal status granted to a school through a charter, license, or other written document issued by an appropriate agency or official of the state in which the school is located. It may be

⁶⁰ 34 CFR 600.4, 600.5 and 600.6.

⁶¹ *Sistema Universitario v. Riley* (234 F3d. 772).

⁶² Annual changes to the *Financial Aid Handbook* can be tracked and compared at the U.S. Department of Education's Web site <http://www.ifap.ed.gov/ifap/index.jsp>.

provided by a licensing board or educational agency. In some cases, the school's charter is its legal authorization.⁶³

The Department of Education intentionally removed the “silence is authorization” language, which was unsupported in the relevant Code of Federal Regulations (CFR), from the *Handbook*. A requirement that the authorization be in writing has been added, bringing the *Handbook* in line with the rule and with case law. The court did not make much of the disconnection between what is in the CFR and what was in the *Handbook*, but in fact the *Handbook*'s erroneous interpretive wording caused a misunderstanding of what the law really is. Ghost approvals of this kind (asserted to be in effect in California since June 30, 2007) appear unsupported by law.

For this reason, the *Sistema* case, although still a reasonable basis for the Secretary's authority over federal funds, is no longer of much consequence to the narrower matter of whether the Secretary has the ability to decide that a college has state authority for the issuance of degrees in the absence of a tangible, affirmative, state-issued document that says so.

It is extremely unlikely that even under the misinterpretation accepted by the court in the *Sistema* case, a determination made by the Secretary of Education regarding whether state approval of a given college did or did not exist would be binding in any way on a state. The decision carefully rooted that aspect of the ruling solely in the Secretary's responsibility for federal funds, and said nothing about state authority over colleges outside that context.

State Authorization and FTC rules

The Federal Trade Commission has been involved in the question of degree authority for some decades. FTC rules expressly place upon certain schools under its jurisdiction (for purposes of anti-fraud regulations) a requirement of state approval and makes clear that such approval must be expressly granted and cannot be inferred from a corporate charter.⁶⁴

The principal FTC case dealing with state authority over degree authorization, which also touches on the meaning of “degree,” is the *Cramwell Institute* case.⁶⁵ In this case the FTC found that it was a violation of federal trade law for a company to issue degrees without authority, and noted that:

The evidence shows that degrees are lawfully conferred only by duly authorized, accredited and recognized educational institutions of higher learning as evidence of, and in recognition of, prescribed and substantially standardized scholastic attainments in various fields by students of said institutions. Unless such degrees are so well earned and conferred, they do not constitute degrees in the accepted meaning of said term and are of no meaning and effect whatever. A diploma is a mere paper evidence of the attainment of the degree. All of the evidence in this connection ... shows that the respondent has no authority to award degrees or diplomas.

⁶³ The one-page section of the 2008-09 *Financial Aid Handbook* that explains the state authorization requirement is in Chapter 1, Institutional Eligibility, subsection 2-3.

⁶⁴ 16 CFR 254.1 - Definitions.

(a) Accredited. A school or course has been evaluated and found to meet established criteria by an accrediting agency or association recognized for such purposes by the U.S. Department of Education.

(b) Approved. A school or course has been recognized by a State or Federal agency as meeting educational standards or other related qualifications as prescribed by that agency for the school or course to which the term is applied. The term is not and should not be used interchangeably with accredited. The term approved is not justified by the mere grant of a corporate charter to operate or license to do business as a school and should not be used unless the represented approval has been affirmatively required or authorized by State or Federal law.

⁶⁵ In the Matter of Joseph Jayko trading as Cramwell Institute, Etc. 55 FTC 242 (1958).

In the educational field, the words “diploma” and “degree” have come to have a well-established meaning.⁶⁶

The FTC has compiled a significant reference to its own older degree mill cases⁶⁷ and continues to prosecute such cases today if it has sufficient resources. Finally, the FTC maintains on its Web site a degree mill warning page that provides good basic information for people encountering a dubious degree supplier.⁶⁸

Recognition of state degree-granting authorization in Department of Veterans Affairs rules

Veterans benefits are available to certain veterans who attend postsecondary institutions. Eligibility requires state authorization of the educational provider, but also uses accreditation as a proxy or a separate source of authority—or attempts to. The attempt takes the form of a statement that if the state has no law through which degree-granting is authorized, accreditation may be used as a substitute. The attempt does not succeed.⁶⁹ We have seen that both state and federal courts require express grants of authority for *any* college to issue degrees; there is no such thing in the U.S. as a legitimate degree-granter that does not have governmental degree-granting authorization. Accreditation by itself cannot confer degree-granting authority.

The Sacramento Quake of ‘07 and the partial repairs of ‘09

What happens to previously authorized or potential applicant colleges when a state allows its oversight and authorization of nonpublic degree-granting institutions to lapse, or abandons it altogether? This is a rare situation, currently manifest only in California. California formerly had a statute that required some colleges to be licensed, and exempted certain other colleges from state approval requirements.⁷⁰ The legislature allowed it to expire on June 30, 2007, in view of the apparent weaknesses in the existing authority and the inability of the specialized state agency to use this authority effectively.⁷¹ An excellent short history of the rolling blackout of California

⁶⁶ Cramwell at 269 and 279.

⁶⁷ 2 CCH Trade Regulation Reports §5083, pages 10,501-10,506 is a repository of older diploma mill cases.

⁶⁸ The Federal Trade Commission site is *Avoid Fake-Degree Burns by Researching Academic Credentials*.

<http://www.ftc.gov/bcp/edu/pubs/business/resources/bus65.shtm>.

⁶⁹ Eligibility for veteran’s educational benefits is governed by 38 CFR 21.4200, which includes the following definitions:

(h) Institution of higher learning. This term means:

(1) A college, university, or similar institution, including a technical or business school, offering postsecondary level academic instruction that leads to an associate or higher degree if the school is empowered by the appropriate State education authority under State law to grant an associate or higher degree.

(2) When there is no State law to authorize the granting of a degree, a school which:

(i) Is accredited for degree programs by a recognized accrediting agency, or

(ii) Is a recognized candidate for accreditation as a degree-granting school by one of the national or regional accrediting associations and has been licensed or chartered by the appropriate State authority as a degree-granting institution.

(3) A hospital offering medical-dental internships or residencies approved in accordance with §21.4265(a) without regard to whether the hospital grants a post-secondary degree.

(4) An educational institution which:

(i) Is not located in a State,

(ii) Offers a course leading to a standard college degree or the equivalent, and

(iii) Is recognized as an institution of higher learning by the secretary of education (or comparable official) of the country in which the educational institution is located. (Authority: 38 U.S.C. 3452).

⁷⁰ Codified as California Education Code, Title 5 Division 7.5, Private Postsecondary Education.

⁷¹ Having seen the former agency in action, I concur with this decision. For a front-row seat on the astonishing array of problems that the Bureau of Private Postsecondary faced and failed to solve, see BENJAMIN M. FRANK, INITIAL REPORT, CALIFORNIA

postsecondary education oversight can be found in a series of documents produced by the California Postsecondary Education Commission.⁷²

The state has had no authorization laws at all regarding nonpublic higher education from July 1, 2007 through this writing in September, 2009. As a consequence, degree mills from the Tijuana River to Mt. Shasta argue that because it has no laws, no state approval is required to issue degrees and that anyone establishing a corporate existence can issue valid degrees. Degree mills such as Breyer State University, Canyon College, and Novus University have recently relocated to California from Alabama, Idaho, and Mississippi, respectively, owing to this hole in the law. Even genuine accredited colleges make this spurious argument (as does a letter from the state's Secretary of Education⁷³).

The previous law was dubious not only because of its history of poor enforcement but because it failed to recognize the state's duty to authorize degree-granting. It attempted to once again hand off *de facto* collegiate authorization of some institutions ((i.e. those accredited by the Western Association of Schools and Colleges (WASC), a regional accreditor) to the accreditor itself. This offloading onto the Western Association⁷⁴ has long been known to be a bad idea. As one of the major explications of accreditation law put it,

Accrediting agencies' involvement in state licensure has further blurred the line between private accreditation and governmental action. Western has gone further than any of the other accrediting agencies by involving itself in state licensure. Under California's licensing statute, which Western actively supported, Western-accredited colleges and universities are exempt from the state licensure requirement. Moreover, the California licensing statute restricts the authority of state agencies to investigate complaints against Western-accredited colleges and universities. Western's involvement in state licensing caused COPA⁷⁵ to issue the following warning to Western:

In this situation, the accrediting body actively seeks to have its accreditation serve in lieu of licensure; if the accreditation is so used, there is a real possibility that the accrediting body will be found to be engaging in a state action (or at least a quasi-governmental action), namely, serving as

DEPARTMENT OF CONSUMER AFFAIRS BUREAU FOR PRIVATE POSTSECONDARY AND VOCATIONAL EDUCATION OPERATIONS AND ADMINISTRATIVE MONITOR, Sep. 26, 2005, a 200-page tour of horrors. I am obliged to add, based on my personal knowledge of the situation, that some of the staff who worked at the now-defunct Bureau for Private Postsecondary were very competent professionals. However, the overall operational posture of the agency, its byzantine and ineffective funding methods, chronic understaffing and status as something of a pariah within state government made it almost unable to function.

⁷² The best starting point for an overview of the California situation is THE STATE'S RELIANCE ON NON-GOVERNMENTAL ACCREDITATION, PART TWO, produced by the California Postsecondary Education Commission (CPEC) in April, 1991. This clear, well-presented document provides both historical context and a modern political reality-check on oversight of private colleges in California, with recommendations for the future. There are other publications of that agency that are useful, including THE EFFECTIVENESS OF CALIFORNIA'S OVERSIGHT OF PRIVATE POSTSECONDARY AND VOCATIONAL EDUCATION (CPEC Report 95-13, October 1995) and an older, very detailed discussion, PUBLIC POLICY, ACCREDITATION AND STATE APPROVAL IN CALIFORNIA (CPEC Report 84-28, July 1984). An excellent historical overview of California law, including a facsimile of the 1850 act allowing the incorporation of colleges and information on how California law has changed over the years, is included in CPEC's PROTECTING THE INTEGRITY OF CALIFORNIA DEGREES (1989).

⁷³ A letter from Glen W. Thomas, Secretary of Education of California, to the Oregon Office of Degree Authorization on March 24, 2009 includes the statement that in California "no approval is required to issue degrees." All available court decisions indicate that government approval is always required to issue degrees. Complete statutory silence regarding degree authorization appears to preclude the authorization of degree-granting colleges, *but see* the alternate view discussed in main text.

⁷⁴ It should be noted that the Western Association's members have made clear that they want the Association, not the state, overseeing them. The Association staff works for the members and the members understandably want nothing to do with the problems that have plagued the Bureau for Private Postsecondary Education over the years.

⁷⁵ COPA was the Council on Postsecondary Accreditation, predecessor of the current Council on Higher Education Accreditation.

*an active participant in granting state licensure to an educational institution. Such a conclusion could result in imposing on the accrediting body the legal obligations imposed on a state agency, such as open meetings, [and] due process procedures*⁷⁶

The California legislature has attempted to fix this problem twice. In 2008 the legislature passed Senate Bill 823, but it was vetoed by the governor. In 2009 the legislature again acted with passage of California Assembly Bill 48, which addresses some of these issues but does not confer degree authorization on any named schools. At the time of this writing, this workable compromise awaits a decision from Gov. Schwarzenegger as to whether he will sign or veto it. If AB 48 becomes law, the major problem will be solved for the future. The Western Association, which recognizes that state approval necessarily precedes accreditation, has expressed laudable willingness to work with a newly constituted Bureau of Private Postsecondary Education to create a mutually workable process for approving new private colleges that require or seek accreditation.⁷⁷ But it has taken too long—many colleges have now issued degrees that in my view lack a valid legal basis. The legislation does not seem to recognize this and at some point the legislature may need to grant these institutions post-facto authorization to grant degrees.

In California, the decisions and lack of decisions appear to work to the advantage of those private institutions that hold state charters antedating statutory requirements. These schools are, in effect, protected from competition by the state's 2007 policy decision, which in my reading of the law appears to disallow any new private colleges to operate in California (if we assume that California courts would follow the previous line of decisions requiring express authorization).

However tempting the “silence is consent” view is to colleges that find themselves devoid of any other option, I contend that it is unsupported in law. The absence of degree authorization for a California nonpublic college lacking a charter that expressly authorizes it to grant degrees simply precludes it from issuing valid degrees after July 1, 2007. Because such colleges have no inherent right as educational corporations to issue degrees, they need government authorization to do so. They can exist *as educational institutions*; they simply lack degree-granting authority. Of course, no such college has stopped issuing degrees.

The contending theory that silence constitutes authorization is still heard from California-based education offices. But I do not believe that the concept is viable, as I advised the California secretary of Education and several legislators.⁷⁸ There is simply no historical or legal basis for the idea that anyone may issue a degree without specific authorization from one of the three sources of potential authority. No U.S. court has ever recognized a private right of degree authority (that is, a personalized right to issue degrees without government authorization flowing from the Ninth⁷⁹ or

⁷⁶ Michael W. Prairie and Lori A. Chamberlain, *Due Process in the Accreditation Context*, 21 JOURNAL OF COLLEGE AND UNIVERSITY LAW 61, at 67-68 (1994). This article is a superb overview of the issues in which accreditors can become tangled.

⁷⁷ E-mail from Richard Winn, WASC, to the author, Sep. 28, 2009.

⁷⁸ Several California colleges operate in Oregon, and my office needs to have proof that they have degree-issuance powers in their home state. When we could not obtain this from the schools, we contacted Glen Thomas, California Secretary of Education, who informed us that state authorization is not necessary to establish degree-granting powers in California. This is obviously incorrect (*but see* discussion of alternate views of how such approval can be provided), so we sent a summary of the issues and cases to a number of California officials on April 4, 2009 (copy on file at Oregon Office of Degree Authorization).

⁷⁹ For an interesting discussion of possible assertions of education-related rights under the Ninth Amendment, see pages 145-153 in DANIEL FARBER, *RETAINED BY THE PEOPLE: THE “SILENT” NINTH AMENDMENT AND THE CONSTITUTIONAL RIGHTS AMERICANS DON’T KNOW THEY HAVE* (2007). This is an excellent introduction to this sleeping giant of the Constitution. Farber only discusses rights related to K-12 education, but his guided tour of the largely empty but still living chambers of the Ninth Amendment is well worthwhile.

Tenth Amendment), and that is all a business license or corporate filing consists of in this context.⁸⁰

To sum up my argument, the authorization of degree-granting entities is inherently a governmental function in the U.S., as it is in almost all nations. Although a state may decide not to authorize any degree-granting colleges, if it wants to allow any to exist, it has to make an affirmative written act to do that.

It follows that from the period July 1, 2007 through this writing, degrees issued at California nonpublic colleges lacking state charters that expressly confer degree-granting authority were not legally issued owing to the absence of institutional degree-granting authority conferred by the state. This lacuna could, however, be retroactively repaired by the legislature if it authorizes colleges by name.

It would be remiss not to acknowledge a significant alternate view of the California situation. A noted higher education law expert considers my conclusions about California to place too much weight on the requirement that degree-granting authority be express and in writing. To simplify, his view is that the Tenth Amendment allows states to permit the establishment of degree-granting institutions via a silent statutory scheme (as California Secretary of Education Glen Thomas asserts) if a state so chooses, though he notes that such degrees may represent substandard or nonexistent student work and need not be recognized as valid outside the authorizing state.

I contend, in contrast, that the weight of court decisions requires an active statutory or charter system. This issue is very important not only with regard to the activities of genuine colleges, but to the prevention of degree mills and the proper classification of the bogus degrees that they issue. Under the “silence is authorization” view, entities selling degrees to all comers would have a legal status identical to that of legitimate private institutions. This outcome seems irrational as well as bad policy, and could lead to suits for equal recognition in employment or licensure of all degrees, those that are recognized and legitimate and others that are clearly bogus. Even if California fixes its statute, the issue may arise in other states, and is therefore worth continued discussion.

⁸⁰ It is conceivable that someone unfamiliar with American law will argue that because every college has either a business license or is registered as a nonprofit, it has authority to issue degrees because its registry filing mentions education as one of its tasks. This argument, were the state to accept it contrary to the bulk of state and federal legal precedent, would result in the state taking the view that all degree mills and fake colleges are genuine and that their degrees must be accepted on the same basis. Many degree mills have business licenses or are incorporated. It would also follow that any business could issue degrees merely by adding “degree-granting” to its business purpose. The courts that have addressed this issue have not allowed this outcome.

Conclusions and Recommendations

To be valid, a degree must be issued by an entity that has legal authority to do so. A college that operates without federal or tribal authorization to issue degrees must have degree-granting authority conferred upon it by a state government, whether by charter, express statutory authorization by school name or by written authorization issued by a state agency with statutory authority to do so. I know of no court decision holding that a completely silent statutory scheme means that any entity (indeed, any human) may issue degrees. While contending interpretations of existing law are possible, to me, the facial absurdity of the probably outcome militates against alternative interpretations.

To avoid problems regarding potentially invalid degrees, degree-granting authority should, in the case of schools lacking a charter that expressly confers degree-granting powers for an indefinite period, remain in place at all times in the state's legal structure. Any states that have old or legally shaky statutory provisions for the authorization of degree-granting institutions should examine them with care to make sure that no schools are falling through the legal cracks, or could in the future.

Degree-granting authorization cannot be conferred by an accrediting body unless a state formally delegates that authority to the accreditor, in which case the state, to avoid Commerce Clause issues, should have a mechanism in place through which new degree-granters from other states can enter and operate even if they are not accredited by the local accrediting body.

Accreditors that are formally delegated state authority to confer degree-granting powers may become state actors subject to legal expectations of quasi-governmental or governmental bodies. Whether this is good (by causing decision-making by accrediting organizations, and the expectations and standards of such organizations, to be more transparent) or bad (by discouraging candor and placing negative accreditation reviews in the public view) is largely a policy question, not a legal one.

States that have religious exemptions for degree-granting institutions should adopt statutes that ensure that such degree suppliers actually have legitimate academic programs and are only allowed to issue degrees with religious titles.

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