

## EXCLUSION FROM PRIVATE ASSOCIATIONS

STUDENTS of politics and law have long recognized the public influence of private associations as well as their immense power over members of the associations.<sup>1</sup> However, there is considerable disagreement among commentators about what role, if any, courts ought to play in regulating the exercise of either the influence or the power.<sup>2</sup> Generally, judicial action concerning private associations has been limited to reviewing the society's duties towards its members.<sup>3</sup> In suits involving non-members seeking admission, only a few courts have ordered a private association to admit an excluded applicant.<sup>4</sup> Review of the internal actions of private associations raises many problems, for the interests of an excluded applicant must be balanced against the values of free association, group autonomy and private ordering of society. In each case a court must determine whether the particular association is a proper subject of judicial review; whether the harm to the excluded applicant justifies intervention; and whether there are suitable standards to test the validity of the group's action. This Note will examine one type of private organization — the professional association<sup>5</sup> — in an attempt to isolate some of the factors

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1. One of the earliest comments on the importance of private associations was II DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (chap. V) (1862). For examples of other works by political scientists see, MILLS, *WHITE COLLAR* (1951); TRUMAN, *THE GOVERNMENTAL PROCESS* (1955). In the legal field the classic discussion is Chafee, *The Internal Affairs of Association Not for Profit*, 43 HARV. L. REV. 993 (1930). For a complete survey of the "law of private associations" see *Developments in the Law — Judicial Control of Actions of Private Associations*, 76 HARV. L. REV. 983 (1963). Most other studies have concentrated on particular associations. See, e.g., Note, *The American Medical Association: Power, Purposes, and Politics in Organized Medicine*, 63 YALE L.J. 933 (1954).

2. Some commentators would have courts review the actions of every association strong enough to affect a large number of people. See, e.g., MILLER, *PRIVATE GOVERNMENTS AND THE CONSTITUTION* 12-14 (1959); Berle, *Constitutional Limitation on Corporate Activity — Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933 (1952). Others emphasize the importance of group autonomy and advocate judicial intervention only under special circumstances which pose a particular threat to democratic government. See, e.g., Summers, *Democracy in Private Groups and Democracy in Government* at 5 (1960) (unpublished speech); Chafee, *supra* note 1.

3. See *Developments in the Law, supra* note 1, at 1006-37.

4. See *Falcone v. County Medical Soc'y*, 34 N.J. 582, 170 A.2d 791 (1961), *affirming* 62 N.J. Super. 184, 162 A.2d 324 (1960). *Blende v. County Medical Soc'y*, 96 Ariz. 240, 393 P.2d 926 (1964). For critical comment see Note, *Judicially Compelled Admission to Medical Societies: The Falcone Case*, 75 HARV. L. REV. 1186 (1962); Note, 15 RUTGERS L. REV. 327 (1961).

5. Several characteristics of professional associations make them of particular concern to our government and legal system. Professional service is extremely important to society, yet the general public has little means of judging the competence of this service. Thus, professional associations, by promoting higher standards of competence and ethics, are performing an important public service. This frequently results in the delegation of public powers to these associations. See, *infra* notes 37-40 and accompanying text. It is important

which might justify intervening in exclusion disputes. Also the Note will suggest a workable standard for the courts to apply.

Historically, courts have treated professional associations as private, voluntary groups, and have been reluctant to intervene in their affairs.<sup>6</sup> This policy of non-interference has been more pronounced in cases involving exclusion from membership rather than expulsion from an association. In expulsion cases, courts have justified intervention on the grounds that the expelled member has been deprived of "property rights" or that the association's actions were in breach of a contractual agreement between the member and the society.<sup>7</sup> However, an individual cannot have a property right in an organization of

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that the associations exercise these powers in a manner consonant with the public's welfare. The association is also important to the members of the profession:

[A] profession can only be said to exist when there are bonds between the practitioners, and these bonds can take but one shape — that of a formal organization. Just as a number of families in primitive society do not form a state, so a number of men, though they perform similar functions, do not make a profession if they remain in isolation.

CARR-SAUNDERS, *THE PROFESSIONS* 248 (1933). It is often through membership in a professional association that the practitioner achieves recognition and status, two very important elements of professional success. See BLAU & SCOTT, *FORMAL ORGANIZATIONS* 62 (1962). The association may also have substantial economic power. See note 18 *infra* and accompanying text.

Almost all professional associations are organized on state and national levels, and many have local chapters. Membership at one level does not necessarily entail membership at another level. The primary focus of this Note will be upon membership at state or local levels, for at these levels the individual practitioner is most affected by the powers of professional organizations and the closest connections between the society and government exist.

The following professions — all of which have well-organized state and national associations open generally to all members of the profession — have been considered in preparation of this Note:

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| a) accountants | e) engineers   |
| b) architects  | f) osteopaths  |
| c) attorneys   | g) pharmacists |
| d) dentists    | h) physicians  |

This is by no means an exhaustive list of occupations entitled to be called professions, and the arguments presented in this Note may apply equally well to professions not included in this list as well as to other private organizations which exercise powers similar to those of professional associations.

6. For a full discussion of the reasons for this policy see Chafee, *supra* note 1, at 1021-23.

7. As examples of the "property" theory see *State ex rel. Waring v. Medical Soc'y*, 38 Ga. 608 (1869); *Dawkins v. Antrobus*, 17 Ch. D. 615 (1881). As examples of the "contract" theory see *Smith v. County Medical Ass'n*, 19 Cal. 2d 263, 120 P.2d 874 (1942); *Polin v. Kaplan*, 257 N.Y. 277, 177 N.E. 833 (1931). Both of these theories have been extensively criticized, and the absence of a "contractual" or "property" right does not appear to be a valid reason for non-intervention in exclusion disputes. See Note, 15 *RUTGERS L. REV.* 327, 330-32 (1961); Chafee, *supra* note 1, at 1001-07; *Developments in the Law*, *supra* note 1, at 999, 1002.

which he is not a member.<sup>8</sup> Nor can he establish the existence of a contractual relationship which will protect him. Generally there has been no legal remedy available to the practitioner denied admission to a professional society. Such associations have been free to refuse admission on any grounds. They are treated by the courts no differently from country clubs, college fraternities or the Masons. The typical judicial attitude is expressed in *Harris v. Thomas*<sup>9</sup> which involved the exclusion of an osteopath from a local medical society in Texas. The court stated that:

A voluntary association has the power to enact laws governing the admission of members. . . . Membership therein is a privilege which the society may accord or withhold at its pleasure, with which a court of equity will not interfere, even though the arbitrary rejection of the candidate may prejudice his material interests.<sup>10</sup>

Only in certain special circumstances have the courts made exceptions to this general policy. Where the state requires membership in a professional society as a prerequisite to practice, some courts have compelled the admission of duly licensed members of the profession.<sup>11</sup> Furthermore, a few state courts have intervened when there was a showing that the association's actions were designed solely to eliminate competition in violation of state antitrust law.<sup>12</sup> However, state antitrust laws afford relief only in limited circumstances, and at best provide an infrequent basis for intervention in exclusion cases.<sup>13</sup>

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8. Courts have usually used the term "property interest" in connection with a right to use the association's physical property or to share in the society's assets in the event of dissolution. See, *e.g.*, *Davis v. Scher*, 356 Mich. 291, 97 N.W.2d 137 (1959); *Stein v. Marks*, 44 Misc. 140, 89 N.Y. Supp. 921 (Sup. Ct. 1904).

9. 217 S.W. 1068 (Tex. Civ. App. 1920); *accord*, *Medical Soc'y v. Walker*, 245 Ala. 135, 16 So. 2d 321 (1944).

10. 217 S.W. at 1076-77.

11. See *People ex rel. Bartlett v. Medical Soc'y*, 32 N.Y. 187 (1865).

12. See, *e.g.*, *Group Health Co-op v. County Medical Soc'y*, 39 Wash. 2d 586, 237 P.2d 737 (1951); *Tatkin v. Superior Court*, 160 Cal. App. 2d 745, 326 P.2d 201 (Dist. Ct. App. 1958). See, *contra*, *Levin v. Sinai Hosp.*, 186 Md. 174, 46 A.2d 298 (Ct. App. 1946).

13. Generally, courts have limited application of anti-trust laws to cases where the AMA was trying to destroy a group-health plan. See, *e.g.*, *Group Health Co-op v. County Medical Soc'y*, *supra* note 12. Most anti-trust actions have been brought under state anti-trust laws because of the difficulty of proving a violation of the Sherman Act. In *American Medical Ass'n v. United States*, 317 U.S. 519 (1943), an action brought under § 3 of the Sherman Act, the Court enjoined the association's activity, but avoided ruling on whether the Sherman Act would apply to professions outside of the District of Columbia. However, in *United States v. State Medical Soc'y*, 343 U.S. 326 (1952), the Court held that the practice of medicine could not be covered by the Sherman Act since it did not involve interstate commerce. (This would seem to apply to other professions as well.) Consequently, the Court refused to compel admission into the society. Another obstacle to use of the Sherman Act is the difficulty of proving a conspiracy or injury to the public. See, *e.g.*, *Riggall v. County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 355 U.S. 954 (1958). For a general discussion of the application of anti-trust laws to medical associations see Comment, 22 U. CHI. L. REV. 694 (1955).

The New Jersey Supreme Court, in the case of *Falcone v. Medical Soc'y*,<sup>14</sup> was the first court to break completely from the traditional judicial approach toward professional societies. Dr. Falcone, a graduate of the Philadelphia College of Osteopathy, passed the New Jersey State Medical Examination, and was licensed to "practice Medicine and Surgery in the State of New Jersey."<sup>15</sup> The Philadelphia College of Osteopathy offered a complete medical course and was accredited by the New Jersey State Board of Medical Examiners, but not by the American Medical Association (AMA). Dr. Falcone later acquired a full medical degree, based partially on his previous education, from the AMA-accredited University of Milan in Italy. After starting practice in New Jersey, and becoming a staff member of several hospitals there,<sup>16</sup> Dr. Falcone applied for admission to the Middlesex County Medical Society. He was denied membership because he was a Doctor of Osteopathy, not of Medicine. The Society considered his degree from Milan unsatisfactory since that institution had given credit for his prior study. He was unable to continue serving on the hospitals' staffs because the AMA, by threatening to withdraw accreditation, forced the hospitals to hire only members of local medical societies. Since Dr. Falcone required hospital facilities in order to maintain his practice, he alleged that his rejection from the Society severely limited his professional practice, and that consequently he would suffer serious economic hardship.

The Superior Court of Middlesex County ordered Dr. Falcone admitted into the society.<sup>17</sup> In affirming this decision, the New Jersey Supreme Court recognized the traditional reluctance of courts to interfere in the affairs of private associations, but found that the economic hardship caused by the society's action justified the lower court's decision.<sup>18</sup> The Supreme Court agreed that the AMA's stranglehold over accredited hospitals gave the Middlesex society a monopoly over hospital staffing. Consequently, the Court considered it unreasonable to accept the traditional categorization of the medical society as a voluntary association, since membership in it was an economic necessity.<sup>19</sup> After a further finding that Dr. Falcone's exclusion bore "no relation to the advancement of medical science or the elevation of public standards,"<sup>20</sup> the Court held that the society's action "[ran] counter to the public policy of our State"<sup>21</sup> by reducing the value of Dr. Falcone's license.<sup>22</sup>

14. 34 N.J. 582, 170 A.2d 791 (1961), *affirming* 62 N.J. Super. 184, 162 A.2d 324 (1960).

15. 34 N.J. 582, 584, 170 A.2d 791, 793. The facts of this case are set forth at 34 N.J. at 584-87, 170 A.2d at 793-96.

16. Dr. Falcone had been accepted to these hospital staffs while a provisional member of the Middlesex Society. 34 N.J. at 586, 170 A.2d at 793.

17. 62 N.J. Super. 184, 162 A.2d 324 (1960).

18. 34 N.J. at 592, 170 A.2d at 796-97.

19. 34 N.J. at 596, 170 A.2d at 799.

20. 34 N.J. at 598, 170 A.2d at 800.

21. *Ibid.*

22. 34 N.J. at 597, 598, 170 A.2d at 799, 800.

Most commentators criticized the *Falcone* decision,<sup>23</sup> although they conceded that plaintiff's substantial economic injury provided some justification for the court's intervention.<sup>24</sup> It is submitted, however, that not only was *Falcone* decided correctly, but that its impact should not be limited to the situation in which an individual suffers economic harm as a result of the monopoly power exercised by the excluding association.<sup>25</sup> Exclusion from a professional association may result in harm which is not measurable in economic terms. An association's monopoly power in regulating and supervising professional practice<sup>26</sup> deprives the excluded practitioner of the important right to participate in decision-making concerning regulation of his occupation.<sup>27</sup> Because this regulation may have a substantial effect on the individual's practice, his exclusion appreciably diminishes the value of his license.<sup>28</sup> The practitioner can be compared to a person denied admission to a union which has a closed shop arrangement with an employer. Usually courts will order that the union either admit a qualified applicant or that the closed shop arrangement be disregarded.<sup>29</sup> However, under the latter alternative the worker earns a livelihood, but is deprived of the right to participate in union policy making which might materially affect the conditions of his employment. Thus, a sounder approach in both the union and professional context is to compel admission into the excluding organization.<sup>30</sup>

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23. See, e.g., Note, 75 HARV. L. REV. 1186, 1193 (1961); Note, 15 RUTGERS L. REV. 327, 356 (1961). The notewriters argued that if an association is compelled to admit all practitioners this would result in lower standards for the profession in general, and would damage the reputation of the society.

24. Note, 75 HARV. L. REV. 1186, 1198 (1961); Note, 15 RUTGERS L. REV. 327, 354 (1961).

25. While economic injury does provide a valid basis for intervention, there are several problems in applying an economic test. It is not clear what degree of economic harm is necessary to justify intervention. There are economic injuries, less serious than total loss of ability to practice, which might deprive an excluded applicant of the ability to practice successfully. Membership in the association may be necessary to obtain social and professional contracts necessary for referral business and professional advancement; access to publications, libraries, and meetings which help the professional keep abreast of developments in his profession; or malpractice insurance necessary for practice. Moreover, there may be instances where substantial economic injury is alleged but a court would not be justified in intervening. Exclusion from a local Elks or country club may result in substantial economic injury. (This might occur when most of a town's business leaders belong to the club and make it a practice to deal only with other members.) Yet, if a court were to intervene when an individual was excluded from such a club, all the values of private association and group autonomy would be endangered.

26. For a description of these powers see text accompanying notes 37-39 *infra*.

27. See note 43 *infra* and accompanying text.

28. See discussion in note 41 *infra* and accompanying text.

29. See *James v. Marinship Corp.*, 25 Cal. 2d 721, 155 P.2d 329 (1944).

30. Although only one court has adopted this approach in the area of union activity, *Thorman v. International Alliance of Theatrical, Stage Employees*, 49 Cal. 2d 629, 320 P.2d 494 (1958), it has been advocated by many commentators. See, e.g., *Summers, The Right to Join a Union*, 47 COLUM. L. REV. 33, 73 (1947).

This argument was advanced by the plaintiff in a recent exclusion case, *Salter v. Psychological Ass'n*.<sup>31</sup> Salter, a psychologist certified by New York, claimed that the court should compel his admission because "the Association was an arm of the state" or at the very least, exercised monopoly power over his profession, and that the association's action harmed him substantially.<sup>32</sup> Salter emphasized the non-economic interests that were jeopardized by exclusion,<sup>33</sup> chiefly his inability to be heard in the forum most concerned with the regulation and development of the practice of psychology in New York.<sup>34</sup> The court rejected Salter's petition on the grounds that he failed to prove either that the association's actions were state action, or that the association exerted monopolistic control over the profession.<sup>35</sup> However, the court did leave open the possibility that Salter's non-economic arguments might justify judicial intervention if state action were established.<sup>36</sup>

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31. 14 N.Y.2d 100, 198 N.E.2d 250, 248 N.Y.S.2d 867 (1964).

32. Brief for Appellant, pp. 10, 17, *Salter v. Psychological Ass'n*, *supra* note 31.

33. He also alleged that he would suffer economic harm resulting from injury to reputation and loss of prestige due to his exclusion from the psychological association. *Id.* at 19, 27.

34. *Id.* at 15. Salter alleged that

[b]ecause of its size, power and position, the Association obtained the legislation governing petitioner's profession and means of livelihood. It is performing the duties of the statutory State Advisory Council by undertaking to construe and implement that legislation . . . all of this having a direct impact on petitioner's professional existence. And yet, as one certified under this legislation and governed by it, petitioner is denied the right to have a voice . . . in the implementation and interpretation of the law and in any proposals for new legislation.

*Ibid.*

35. 14 N.Y.2d at 105, 248 N.Y.S.2d at 870.

36. 14 N.Y.2d at 104, 248 N.Y.S.2d at 869, 870. Due to the peculiar fact situation presented in this case the court was probably justified in reaching its decision. Not only did Salter fail to satisfy the educational requirements for membership in the association, but also these requirements were lower than those of the state certification standard. Salter had received his certification through a "grandfather" clause in the certification statute, which provided that individuals practicing in New York for twelve years prior to the passage of the certification law need not meet the educational requirements. 14 N.Y.2d at 103, 248 N.Y.S.2d at 869. Furthermore, Salter was a successful practitioner and could not show economic harm. Finally, as noted above, Salter failed to prove ties between the association and the government sufficient to constitute state action. 14 N.Y.2d at 105-06, 248 N.Y.S.2d at 870-71.

Salter's claims, however, were not entirely without merit. There was ample evidence that he was a very competent psychologist. Brief for Appellant, at 3. He was at least considered competent enough to merit state licensure, since the state statute required that individuals without the requisite educational background prove their competency to a state board of examiners. N.Y. EDUCATION LAW § 7601 (1956). Moreover, there were significant ties, albeit informal ones, between the association and the state. It was primarily through the efforts of the association that the state certification law had been passed, and the legislature had worked closely with the association in drafting the statute. Brief for Appellant, at 10. Eight of the seventeen members of the State Advisory Board were also directors of the association. *Id.* at 11. The association itself recognized these connections with the state by proclaiming itself the voice of all New York State psychologists and

Actually, with regard to many professional associations, there exists sufficient formal nexus between the state and the association to support a finding of state action. If, then, the exclusion is unreasonable, the association's action would violate the equal protection clause of the fourteenth amendment. For example, unlike the situation in the *Salter* case, extensive power over the regulation of most professions has been given to licensing boards, which are in turn formally controlled by a professional association.<sup>37</sup> Furthermore, in many states, professional groups have been delegated the authority to accredit professional schools.<sup>38</sup> This power is particularly important in states where licensure is restricted to graduates of accredited institutions.<sup>39</sup> Finally, a number of states authorize professional societies to make up and grade the licensing examination.<sup>40</sup> In all of these instances, the association exercises a significant degree of control over the individual practitioner and his manner of practice.<sup>41</sup>

Delegations of this nature have been defended on the grounds that:

They guarantee expert understanding of the problems faced by practitioners in the occupation. Above all, they give the practitioners being regulated a sense of participation in selecting their regulators and thus ensure their close cooperation in maintaining high standards of practice.<sup>42</sup>

It should be apparent then, that the most persuasive reason for reposing state regulatory authority in a professional society — its responsiveness to the members of the profession — is also the most persuasive argument for enforcing the claim of duly licensed practitioners to admission to the associa-

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claiming to be the organ through which the psychologist could have a voice in regulation of the profession. *Id.* at 11, 12. Finally, the association had frequently made exceptions to its general qualifications and admitted those with qualifications similar to *Salter's*, *id.* at 14, indicating that its standards were not absolute. Yet, in this instance, it refused to give *Salter* a hearing. *Ibid.* These facts might justify a finding that the association's actions were state action and that the society acted arbitrarily in excluding *Salter*.

37. In most states the licensing boards are either chosen directly by the professional association or from a list of nominees submitted by the association. For a detailed breakdown of the methods by which these boards are chosen see COUNCIL OF STATE GOVERNMENTS, OCCUPATIONAL LICENSING LEGISLATION IN THE STATES at 88-90 (1952). For a typical statute see N.C. GEN. STAT. § 90-93 (1958).

38. *E.g.*, W. VA. CODE ANN. § 2869(b) (1961); MONT. REV. CODES § 66-1003(a) (1947).

39. *Ibid.*

40. The American Institute of Certified Public Accountants makes up and grades the licensing exam in every state. (It has instituted a uniform test.) See, Penny, *The American Institute of CPAs — Past and Future*, JOURNAL OF ACCOUNTANCY at 33 (Jan. 1962). Similar powers have been granted other professional associations. COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 37, at 51.

41. These boards issue, suspend, and revoke licenses (and often establish the grounds for these actions), enforce the licensing statute — even to the extent of evaluating the work of licensees, establish license fees, and examine applicants for admission to the profession. They frequently determine ethical standards which may regulate how a professional may obtain clients or what fees he may charge. COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 37, at 40-47.

42. COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 37, at 38.

tion. The democratic process is best satisfied when those persons most directly affected by the licensing and regulation of professions are accorded the fullest right to participate in the decision-making process.<sup>43</sup> Since the state delegates regulatory powers to a specific organization, any practitioner outside the organization is silenced. Moreover, the public benefits when all viewpoints within a particular profession are heard before an association exercising public powers. Dissenting opinion should not be stifled by denial of admission to applicants with unpopular views. In *Falcone*, for example, it would seem that a major reason why the AMA denied Dr. Falcone admission was that he had studied osteopathy, a science abhorred by the Association.<sup>44</sup> Thus, while securing the rights of qualified practitioners seeking admission to professional associations, the court protects also the broader public interest in having a fully representative professional forum.

Judicial intervention, then, seems justified in exclusion cases involving associations to which the state has formally delegated regulatory authority. (The majority of professional organizations probably fall within this class.)<sup>45</sup> The argument for intervention, of course, may seem weaker when no formal delegation of authority exists. But, informal ties between the association and the state may be just as significant as those established by legislative enactment. Even in the absence of formal delegation, a strong society may exercise effective regulatory power over a profession. A state legislature, faced with the need to enact legislation in a short period, cannot consider extensively varying professional viewpoints concerning regulation of the profession. Instead, the legislature relies heavily upon the associations, under the assumption that internal differences among members of the profession have been resolved within the association itself. Therefore, an association may have been primarily responsible for drafting and amending the state's licensing statute;<sup>46</sup> or, as a matter of practice, the state licensing board may be composed of the association's officers.<sup>47</sup> In such a situation the harm to the pro-

43. See Summers, *supra* note 2, at 12, 13. In fact, our entire system of government is based on the right of participation in governmental decision — either directly or through elected representatives. It is not a long jump from this premise to the conclusion that there should be a right to participate in decisions of private groups, when, in effect, these groups have authority to make decisions as a result of a delegation of governmental power.

44. There is at present a trend toward absorption of osteopaths into the AMA. Note, *The American Medical Association*, *supra* note 1, at 966-67. Thus the cleavage between osteopaths and the AMA may be disappearing. However, in local societies the breach may still be significant. Ideology also seemed to be the major reason Salter was excluded. According to several members of the profession, Salter espoused an approach to psychology repugnant to the majority of the Psychological Association.

45. COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 37, at 88-90.

46. See discussion *supra* note 36. COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 37, at 57.

47. See discussion *supra* note 36. Power in professional associations tends to be centered in relatively few hands, and this may be reflected in the composition of licensing boards. For a general discussion of the tendency towards oligarchies see Note, *The American*



fessional resulting from exclusion by the association is just as substantial as the harm caused by exclusion from an association formally performing state functions. The type of economic injury considered in *Falcone* may readily result from exclusion by either type of association. Also, access to effective decisional arenas may be just as completely blocked in either situation.

For these reasons the courts should intervene in exclusion disputes when the association has established substantial informal ties with the state, although there has been no formal delegation.<sup>48</sup> In analogous areas the courts have recognized that private associations may exercise public power and thus should be prohibited from taking arbitrary or unconstitutional action. For example, in the case of *Terry v. Adams*,<sup>49</sup> the Supreme Court compelled admission of Negroes into a private association which in reality controlled a state's electoral process. And in *Marsh v. Alabama*<sup>50</sup> the Court held that a company town, though a private body, had assumed public characteristics and should be held to the same constitutional standards as government itself.<sup>51</sup> Similarly, in the area of professional regulation, a clear de facto exercise of regulatory power by the association should justify its being treated in the same manner as an association formally performing governmental functions. Alternatively, the economic monopoly position of the association might justify a state court's intervention.

Once a decision has been made to intervene in an exclusion dispute, a court must determine what standards it should apply in testing the validity of the association's action. This problem is seen by many commentators as the most serious obstacle to judicial intervention in exclusion disputes. They argue that a court, lacking expertise, cannot, and therefore should not, substitute its judgment for that of the association.<sup>52</sup>

It is submitted, however, that certification or licensure by the state provides a workable standard of review. When an applicant has been certified or licensed by the state there should be a presumption that the applicant is qualified for admission to the professional association. This rule follows the logical implications of the *Falcone* decision. Although the *Falcone* court claimed it was not evaluating standards, it did exactly that in saying that the society's rules had "no relation to the advancement of medical science or the evaluation

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*Medical Association, supra* note 1; Kahn-Freund, *Trade Union Democracy and the Law*, 22 OBITO ST. L.J. 4 (1961).

48. Courts would have to proceed on a case by case basis in determining whether an association was de facto a quasi-public body. The plaintiff would have the burden of proving that the association was performing functions supposedly performed by the state. See *supra* notes 46, 47 for two factors a court should consider. See also Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083 (1960).

49. 345 U.S. 461 (1953).

50. 326 U.S. 501 (1946).

51. *Id.* at 506-07.

52. See note 23 *supra*.

of professional standards."<sup>53</sup> In effect, the court said that the state of New Jersey found Dr. Falcone qualified, and therefore any contrary finding by the medical society was unacceptable. Making state licensure prima facie evidence of qualification for membership in a professional association places upon the association the burden of proving that a particular applicant should be excluded. The society would have to demonstrate that although the applicant had a license his admission was not in the public interest.<sup>54</sup> Absent a clear and convincing showing, a court should accept the fact of licensure as sufficient evidence of qualification and order the applicant admitted to the association.

The standard based on state licensure is clear-cut, objective and readily applicable in most cases. It minimizes the need for courts to make technical or policy determinations concerning professional qualifications. Also, it protects the right of the individual practitioner without sacrificing high standards of professional practice, since every applicant will have been judged qualified by a state board of examiners.<sup>55</sup> Moreover, the important role of professional associations in raising the ethical (as opposed to educational) standards of the profession will not be affected by applying this standard. And when an association believes that the state educational or competence qualifications are too low, it can lobby to get them raised. In the past the associations have had great success in convincing the states to impose stricter licensing laws.<sup>56</sup> Finally, adoption of the standard proposed in this Note will prevent the professional association from using its power of exclusion to form an economic cartel. Fre-

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53. 34 N.J. at 598, 170 A.2d at 800. This was the standard suggested by the lower court. 62 N.J. Super. at 202, 162 A.2d at 333.

54. The association would have to show that, although the applicant was licensed, he had violated ethical standards applicable to a member of the entire profession, or had practiced in a manner sufficient to warrant delicensure. Thus if the applicant lost a malpractice suit, advertised in a manner contrary to professional standards, or was guilty of other professional misconduct, the association might justifiably exclude him. Basically, this eliminates qualifications based on arbitrary factors such as race or political ideology, and qualifications based on educational background — since the state educational standard is determinative. However, it is possible that in rare cases an association will be able to show that the state's educational requirements are so low that the association had to have higher standards in order to insure the public of competent professional service.

55. Generally, professional associations accept state licensure as sufficient evidence of qualification. Occasionally, different classes of membership will be created, based on the number of years of practical experience, but the rights of all members will not vary significantly. See, By-Laws, American Pharmaceutical Association, Art. II § 1; By-Laws, American Institute of Certified Public Accountants, Art. II § 2; By-Laws, American Dental Association, Chap. I § 20. Very few associations have higher educational requirements.

56. The fact that the impetus for licensing legislation generally comes from occupational associations themselves, and the success of these associations in prompting the passage of this type of legislation has been noted by many commentators. See, e.g., Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 229-30 (1937); COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 37, at 57; Grant, *The Gild Returns to America I*, 4 J. OF POLITICS 303, 316-17 (1942).

quently, associations have adopted restrictive qualifications only to further their economic interests.<sup>57</sup>

Judicial intervention in exclusion cases might result in some disharmony within the affected association. Actually, there is no reason to expect that there will be very many cases in which the courts will be called upon to enforce admission, since most applicants do not have any particular difficulty in gaining entrance to professional associations. However, there will always be a few individuals excluded because of race, unpopular professional or political views, or because of other unreasonable restraints imposed by the association. In these situations, judicial intervention is justified. The resulting interference with private associations will be both insignificant and infrequent. For the most part private ordering will not be supplanted by judicial fiat, and the societies will be left a free hand in the management of their affairs.

#### ADDENDUM

Since this Note went to press, a case very much in point was decided by the New York Supreme Court. In *Kurk v. Queen's County Medical Society, Inc.*,<sup>58</sup> the court compelled a medical society to admit an excluded practitioner.

57. Numerous commentators have noted the cartelizing efforts of these associations. See, e.g., Grant, *supra* note 56, at 316-17; Gilb, *Self-Regulating Professions and the Public Welfare — A Case Study of the California Bar* (unpublished thesis, Radcliffe, 1956); Note, *The American Medical Association, Power, Purpose, and Politics in Organized Medicine*, 63 *YALE L.J.* 938, 947 (1954). Often this is accomplished by encouraging the passage of licensing legislation. See, COUNCIL OF STATE GOVERNMENTS, *op. cit. supra* note 37, at 57. Sometimes the methods are less subtle. The attempts of the AMA to destroy group health plans and to regulate fees are two examples. See *Group Health Co-op v. County Medical Soc'y*, 39 Wash. 2d 586, 237 P.2d 737 (1951); *Tatkin v. Superior Court*, 160 Cal. App. 2d 745, 326 P.2d 201 (Dist. Ct. App. 1958). In a related context see Brazier, *The Ohio Architects' Guild*, *CASES IN STATE AND LOCAL GOVERNMENT* at 41 (Frost ed. 1961).

When a private association is in a position to function as a cartel, a court should be even more willing to see that it exercises its power consonant with public policy. Such an attitude was expressed by the Supreme Court in *Silver v. Stock Exchange*, 373 U.S. 341 (1963), in which the stock exchange was found to be subject to the Sherman Act. The Court stated:

The exchanges are by their nature bodies with a limited number of members. . . . This limited-entry feature of exchanges led historically to their being treated by courts as private clubs, . . . and to their being given great latitude in disciplining errant members. . . . As exchanges became a more and more important element in our Nation's economic . . . system, however, the private-club analogy became increasingly inapposite and the ungoverned self-regulation became more and more obviously inadequate. . . .

*Id.* at 350-51.

Because of this change in character, the Court held that the stock exchange was covered by the Sherman Act, and that it could not arbitrarily exclude an individual from use of its services. Since the Sherman Act is not applicable to professional associations, see *supra* note 13, a court must find other ways of checking the actions of these groups.

58. Index No. 2796/65, New York Supreme Court, Queens County, June 10, 1965 (Shapiro, J.). (Unreported opinion.)

The facts were strikingly similar to those of the *Falcone* case; the plaintiff, though licensed to practice medicine, had been denied admission because he had received his degree from a college of osteopathy. The opinion in *Kurk* reflects substantial accord with the principles suggested in this Note. The court placed considerable reliance upon the rationale of the *Falcone* decision, that membership in the medical association is an economic necessity. But the court went further, and indicated that there are constitutional reasons which prohibited the society — “which is in many ways an arm of the state” — from excluding a licensed practitioner.<sup>60</sup>

Looking at the matter realistically, such an exclusion amounts to a curtailment of the grant which a doctor has received from this state to practice his profession in uninhibited form. Any rule or regulation of a professional society designed or calculated to effect such a purpose must be scrutinized with utmost care to see whether it is not arbitrary and unreasonable and whether in its relationship to the petitioner it does not violate his right to the equal protection and due process clauses of the 14th amendment of the United States Constitution. . . . Not even an honestly held belief that such exclusionary rules are in the public interest warrant the society in adopting and enforcing them if they are violative of the petitioner's constitutional rights.

Finally, the court indicated that professional associations must in general accept the fact of state licensure as the standard of admission:

[The Medical Society] may not constitute itself a super agency to sit in judgment upon and by its own regulations overrule and supersede the requirements laid down by the regular and legally constituted governmental agencies, thereby arrogating to itself the power to decide who is to be permitted to engage in the unlimited general practice of medicine.<sup>61</sup>

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59. See text accompanying notes 14-25 *supra*. As in *Falcone*, Dr. Kurk was denied hospital privileges as a result of exclusion from the medical society.

60. See notes 37-48 *supra* and accompanying text.

61. See text accompanying notes 53-57 *supra*.