# What makes a degree real?[1]

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In order to understand why certain credentials are not valid college degrees, and why some degree-granters are called degree mills or diploma mills, 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.

A degree is a type of public credential, an *academic* credential. 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.

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:

1. **Congress**,
2. a **state government**,
3. or a recognized sovereign **Indian tribe**.

The three-source theory derives primarily from the Tenth Amendment, commonly referred to as the "Reserved Powers Clause,"[2] 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.

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[1] This outline is condensed and adapted from the author's monograph *The legal basis for degree-granting authority in the United States*. State Higher Education Executive Officers, 2009.

[2] 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."

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 the question: which *government* authorized it to issue degrees? This outline 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 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.

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. 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 colleges,[3] operate under the legal authority given them by state governments. State authorization is the normal method through

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

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. State-conferred degree authorization appears in three basic forms:

1. **public institutions** actually owned or operated by the state or one of its subdivisions (such as a community college district),
2. **nonpublic institutions** that have some kind of formal authorization to offer degrees, and
3. schools formally **exempt from state authorization requirements on religious grounds**.[4]

This outline 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) 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 claim to 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.
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. This approach is problematic and is not discussed in detail here.[5]

*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

[4] Religious exemption is controversial, raises a variety of legal and policy issues, and is allowed in fewer than half of the states.
[5] See Contreras (2009), *Legal basis*, *supra* and see also Contreras, *Why are religious diploma mills always neo-Protestant?* Free Inquiry, June, 2009.

like Harvard, Dartmouth, and William and Mary. The issue of degree-granting authority originating from charters has rarely been addressed by the courts; however, there are enough decisions to establish a solid and consistent baseline: degree-granting powers must be explicit.[6] A more recent opinion by the Pennsylvania Attorney General takes the same view.[7]
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.[8]

*2. Degree authorization by state agency action*

In addition to charters, there is the common, everyday process of state authorization[9] 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. State processes have engendered a number of disputes over the years, perhaps most notably the *Nova University* case,[10] 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.

Courts have in some cases[11] 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—

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[6] See the following: Nat'l Assn. of Certified Public Accountants v. United States, 53 App. D.C. 391, 292 F. 668 (1923), *cert den.* Oct. 6, 1923; Townshend v. Gray, 62 Vt. 373, 19 A. 635 (1890), The Medical College of Philadelphia Case, 3 Whart. 445 (1838); 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).
[7] Opinion of Attorney General Packel to John C. Pittenger, Pennsylvania Secetary 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.
[8] 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.
[9] 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.
[10] 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. See also Nova University v. Educational Institution Licensure Commission, 483 A.2d 1172 (D.C. 1984).
[11] 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.

indeed, it is one of the primary original mechanisms for the establishment of colleges.[12] 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."[13]

This method of church-based degree-granting authority is, in effect, still used, but with only the most nominal state attention.[14] 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.[15] Courts have consistently held that the issuance of degrees is not a religious act but one controlled by secular authorities.[16] The Attorneys General of Arkansas, Texas, Kentucky, and Nevada have expressed similar views as to degrees.[17]

## A cautionary note about interpreting court decisions

When a Florida federal court concluded in 1995 that the state's statute against the use of bogus credentials was in part unconstitutional, it concluded that because unaccredited Pacific Western University held a California license to issue degrees, users of those degrees could not be barred from stating that they held the credential.[18] The court decided the case correctly, so far as it went, but the afterlife of the case has shown a troubling lack of attention to detail by those who have subsequently engaged with these issues.

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[12] 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).

[13] Id. at 70.

[14] See Alan L. Contreras, *Rendering unto Caesar: do religious exemption laws produce an ungodly number of diploma mills?* Chapter in upcoming book on state authorization of colleges.

[15] 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.

[16] 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. See also State ex rel. McLemore v. Clarksville School of Theology, 636 S.W.2d. 706, 5 Ed. Law Rep. 1294 (1982); 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. One case that reached a different conclusion is an outlier and was not well considered by the court: 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.

[17] 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.

[18] Strang v. Satz, 884 F.Supp. 504.

A Florida prosecutor recently declined to pursue a case of falsely claiming a degree against police officers who were using fake degrees in part because he mistakenly thought *Strang* precluded the prosecution.[19] In fact, *Strang* only dealt with use of a *genuine* (albeit unaccredited) degree, while the police officers were using degrees that were *fake*, that is, they were sold by an entity that did not have the legal authority to issue degrees at all. Using such a credential is no different than using one run off on a home laser printer.

The Florida statute made it illegal to use an unaccredited degree as a credential, and this wording created some confusion when people used the term "unaccredited" to mean the same as "diploma mill." They are not the same. The court in *Strang v. Satz* came to the following perfectly reasonable conclusion:

> Commercial speech must be truthful and must relate to lawful activity in order to receive protection under the First Amendment. The parties do not dispute the fact that the speech at issue is both truthful and concerns lawful activity. The speech is thus protected commercial speech.

Readers of the case may read this language to mean that any claim of a degree from an unaccredited college is necessarily truthful and that all such claims carry a First Amendment protection. That is not a correct reading.

The entity from which Dr. Strang acquired his degree held a license to issue degrees from the State of California. That is what made Strang's degree claim truthful. Had his purported degree been from an entity such as "Redding University," which also claims to be located in California, the speech would not have been truthful because Redding University does not have a license to issue degrees—it is a mail-order degree mill.

It is therefore not possible for a degree claimant to *truthfully* state that he holds a *degree* from Redding University. Because it has no license to issue degrees, any claim of such degrees is by definition untruthful because they are *not degrees*. Only a claim of a degree issued by a school that has the legal authority to issue degrees can be truthful.

[19] Press release from Stephen B. Russell, 20th Judicial Circuit of Florida, August 11, 2006, accessed on the web on April 6, 2010.

**A short note on non-U.S. degrees**

In general, the requirements for degree legitimacy outside the U.S. are similar to those for U.S. degrees. There are certain basic standards that can always be applied to a degree issued in another country. One version of these standards is set forth in Oregon law:[20]

> (3) A claimant of a non-U.S. degree issued by a degree supplier not accredited by a U.S. accreditor may submit to the Office information proving that the supplier issuing the degree has the following characteristics.
> (a) The supplier is operating legally as a degree-granting institution in its host country.
> (b) The host country has a postsecondary approval system equivalent to U.S. accreditation in that it applies qualitative measures by a neutral external party recognized in that role by the government.
> (c) The supplier has been approved through the demonstrable application of appropriate standards by the host country's accreditor equivalent.
> (d) All degrees issued by the supplier are legally valid for use and professional licensure within the host country.

Although there are other ways of approaching international validity, the standards set forth above are good ones that will screen out most bogus degrees.

[20] OAR 583-050-0014(3)