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# OKLAHOMA CITY UNIVERSITY LAW REVIEW

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VOLUME 44

NUMBER 1

SUMMER 2019

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## ARTICLE

### KEEPING COLLEGE PRICED: THE BOOTLEGGERS AND BAPTIST STORY OF HIGHER EDUCATION ACCREDITATION

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Accreditation, professional licensing, and other tools that regulate the provision of services have always been something of a double-edged sword. On the one hand, they can protect consumers from charlatans and low-quality providers, and in technical areas where consumers often do not feel able to judge quality accurately—areas such as emergency medical care—they can provide an assurance of excellence. On the other hand, however, these tools can also become a barrier to entry in a market, enabling existing providers to use licensing to thwart competition. When that happens, licensing does not assure quality, but instead protects

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inefficient and inferior products.<sup>1</sup>

With these words, Lindsey Burke and Stuart M. Butler frame a question of critical importance to students, parents, administrators of traditional universities, and entrepreneurs seeking to change the traditional university model. Who does accreditation really benefit? Since the passage of the Veterans Readjustment Act of 1952 (the “Korean War GI Bill”), private accrediting agencies have held the purse strings to all federal student aid.<sup>2</sup> Today, seven regional accrediting agencies and thirteen national accrediting agencies (including five faith-based agencies) act as the gatekeepers of these federal monies.<sup>3</sup> No college or university can access federal funds—nearly \$125 billion of aid in 2016 alone—without receiving the imprimatur of one of these recognized accrediting agencies.<sup>4</sup> But why is that a problem? If these accrediting agencies were simply acting as disinterested quality controllers, then there would be no problem. After the Servicemen’s Readjustment Act of 1944 (the original “GI Bill”) was passed with “very few restrictions . . . on where the veterans could [apply these federal dollars], . . . there were widespread reports of abuse” that diploma mills were receiving much of this money and leaving veterans without an adequate education.<sup>5</sup> To address this problem, Congress designed the system of accreditation we know today—one with the stated public interest purpose of providing quality assurance.<sup>6</sup> Proponents of the current system of accreditation argue that the framework presently in place ultimately benefits both students and the public at large by fulfilling quality assurance and information signaling functions. Applying

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1. Lindsey M. Burke & Stuart M. Butler, *Accreditation: Removing the Barrier to Higher Education Reform*, HERITAGE FOUNDATION (Sept. 21, 2012), <https://eric.ed.gov/?id=ED535877> [<https://perma.cc/292J-SYLX>].

2. Andrew Gillen et al., *The Inmates Running the Asylum? An Analysis of Higher Education Accreditation*, CTR. FOR C. AFFORDABILITY & PRODUCTIVITY 4 (Oct. 2010), <https://files.eric.ed.gov/fulltext/ED536283.pdf> [<https://perma.cc/6G84-RF72>].

3. Burke & Butler, *supra* note 1; *CHEA- and USDE-Recognized Accrediting Organizations*, COUNCIL OF HIGHER EDUC. ACCREDITATION (Apr. 1, 2018), [https://docs.google.com/viewerng/viewer?url=https://www.chea.org/sites/default/files/other-content/CHEA-USDE-Recognized-Accrediting-Organizations\\_0.pdf](https://docs.google.com/viewerng/viewer?url=https://www.chea.org/sites/default/files/other-content/CHEA-USDE-Recognized-Accrediting-Organizations_0.pdf).

4. FEDERAL STUDENT AID FY 2016 ANNUAL REPORT 8, FED. STUDENT AID, OFF. OF THE U.S. DEPT. OF EDUC., [HTTPS://STUDENTAID.ED.GOV/SA/SITES/DEFAULT/FILES/FY\\_2016\\_ANNUAL\\_REPORT\\_508.PDF](https://studentaid.ed.gov/sa/sites/default/files/fy_2016_annual_report_508.pdf) [[HTTPS://PERMA.CC/JH37-KQMU](https://perma.cc/JH37-KQMU)] (2016).

5. Gillen et al., *supra* note 2.

6. *Id.*

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principles of public choice theory, the goal of this paper is to determine whether higher education accreditation really lives up to its public interest promise. Specifically, using Bruce Yandle's "Bootleggers and Baptists" model, we examine whether the accreditation system in this country exclusively serves the public interest by ensuring that institutions are meeting high standards of excellence or whether this system instead serves some other interest.<sup>7</sup>

Before exploring this question in Part I, we briefly outline the history of accreditation in this country, focusing especially on what the system looked like before the Korean War GI Bill, how this system changed after 1952, and how the incentives changed in 1965 for universities seeking federal funds. In Part II, we lay out the public choice lens through which we intend to explore the issue of higher education accreditation—Yandle's "Baptists and Bootleggers" model. We discuss the public interest ("Baptist") arguments many policy advocates have raised in favor of accreditation in Part III, and after examining data on student performance and other anecdotal observations by university administrators and scholars, we consider whether the quantitative and the qualitative evidence supports the public interest story. In Part IV, we turn to the public choice ("Bootleggers") account of the current accreditation system. We hypothesize that the current system of higher education accreditation acts as a cartel aimed at keeping the price of a college education high, with few incentives for anything beyond minimum quality standards. We test this hypothesis by analyzing the opposition raised by universities and accrediting agencies alike to 34 C.F.R. § 600.9—a regulation promulgated in October 2010 dealing with the state's power to deny federal funds to schools that fail to meet its independent authorization requirements, even if the school is already accredited by one of the recognized accrediting agencies. In Part V, considering both the public interest and public choice accounts, we argue that the current system of compulsory accreditation should be abolished and should be replaced by a system run independently by each state. Ultimately, competition between the states, both for students and for new and innovative universities, would result in reforms that the accreditors have no incentive to pursue under the current system.

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7. Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, AEI J. ON GOV'T AND SOC'Y 15-16 (MAY/JUNE 1983), <https://object.cato.org/sites/cato.org/files/serials/files/regulation/1983/5/v7n3-3.pdf> [<https://perma.cc/D5P7-5U97>].

## I. BACKGROUND

A. *A Brief History of Accreditation in the United States*

The accreditation system in this country has come a long way since its inception in the late nineteenth century.<sup>8</sup> As Andrew Gillen, David Bennett, and Richard Vedder observe, “[a]ccreditation developed from a need in the late 19th century to define what a college-level education was and to distinguish institutions that possessed adequate capabilities for undertaking such studies.”<sup>9</sup> At this time, accreditation was simply a voluntary means for universities to group themselves together with other similarly situated institutions.<sup>10</sup> In an era without school rankings, accreditation allowed “serious educational institutions to differentiate themselves from institutions that were ‘colleges’ in name only.”<sup>11</sup> By the turn of the twentieth century, many of these regional accrediting associations had developed common institutional standards that required both member institutions and colleges seeking membership to meet.<sup>12</sup> These standards generally measured “quality” in terms of inputs, and, thus, to ensure uniform “quality,” these accrediting associations required minimum standards in areas such as faculty size, library size, length of academic programs, and endowment size.<sup>13</sup> Discussing these early standards, Gillen, Bennett, and Vedder note that, because no federal

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8. Burke & Butler, *supra* note 1, at 8.

9. Gillen et al., *supra* note 2, at 3.

10. See Joshua C. Hall, *Higher-Education Accreditation: Market Regulation or Government Regulation?*, 17 THE INDEP. REV. 233 (2012).

11. *Why Accreditation Doesn't Work and What Policy Makers Can Do About It*, AM. COUNCIL OF TRUSTEES AND ALUMNI 12 (July 2007), [http://www.goacta.org/images/download/why\\_accreditation\\_doesnt\\_work.pdf](http://www.goacta.org/images/download/why_accreditation_doesnt_work.pdf) [<https://perma.cc/X5U5-RT7Z>] [hereinafter *Why Accreditation Doesn't Work*].

America's accreditation system emerged in the late 19th century as a voluntary system for serious educational institutions to differentiate themselves from institutions that were 'colleges' in name only. There was a competition among the private accrediting organizations that enabled market forces to maintain a necessary level of quality. The knowledge that institutions could drop accreditation kept associations from becoming dictatorial or attempting inappropriately to influence the content of education.

*Id.*

12. Gillen et al., *supra* note 2, at 3.

13. *Id.* at 3. See also *id.* at 8 (“It is also useful to note that of the standards that were adopted, the vast majority were quantitative measures of inputs and financial resources, with a few standards pertaining to degree requirements or outcomes.”).

money was at stake at this time, the standards were not adopted with a public accountability purpose.<sup>14</sup> Rather, accreditors at the time “were mostly concerned with distinguishing among classes of institutions.”<sup>15</sup> Thus, because “[c]olleges that could afford vast libraries, credentialed teachers, etc. were quite different from those that could not,” these measures adequately served the accreditors’ purposes.<sup>16</sup> At the same time, competition among accrediting associations “enabled market forces to maintain a necessary level of quality.”<sup>17</sup>

In 1952, Congress sought to impose a new purpose on these private accrediting associations—that of ensuring public accountability—and concomitantly set in motion a new system that no longer relied on market forces to ensure the accreditors’ commitment to quality.<sup>18</sup> Following the passage of the original GI Bill in 1944, there were widespread reports that the federal student aid granted to veterans was often going to “diploma mills that did not provide [these former servicemen with] an adequate education.”<sup>19</sup> Under the original GI Bill, the only restriction on an institution’s eligibility to receive federal student aid was that of state authorization and, at that time, according to Gillen, Bennett, and Vedder, receiving state authorization was little more than a formal requirement.<sup>20</sup> The Korean War GI Bill of 1952 completely changed the accreditation

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14. *Id.* at 8. See also *Accreditation, Professional Interest and the Public Interest: Conflict or Convergence?*, COUNCIL OF HIGHER EDUCATION ACCREDITATION (Oct. 31, 2006), <https://www.chea.org/accreditation-professional-interest-and-public-interest-conflict-or-convergence> [https://perma.cc/76J5-K5HS] [hereinafter *Conflict or Convergence?*] (Eaton, the President of CHEA (an advocacy group for accreditors), reveals that accreditation was created “first and foremost, to serve higher education institutions and programs.”).

15. Gillen et al., *supra* note 2, at 7.

16. *Id.* at 8-9.

17. *Why Accreditation Doesn’t Work*, *supra* note 11, at 12. See Gillen et al., *supra* note 2, at 13 (“Those institutions that were accredited by reputable accreditors stood out as better than those that were not (or were accredited by a lesser accrediting body.”).

18. Gillen et al., *supra* note 2, at 8.

Some critics of accreditation have thus described the regional accreditation system as cartel-like, with each accreditor granted a regional monopoly with a guaranteed market for customers without having to provide much benefit. As a result, there is little to no competition between accreditors for the right to certify a college or university as eligible for federal student aid.

*Id.* at 29.

19. *Id.* at 4.

20. *Id.*

landscape.<sup>21</sup> The states were no longer the exclusive regulators of higher education.<sup>22</sup> Instead, the Bill required the Commissioner of Education to “publish a list of nationally recognized accrediting . . . associations [to] which” would fall the task of determining the schools eligible to receive federal student aid.<sup>23</sup> Accordingly, Commissioner Ed McGrath later named the six accrediting agencies that currently oversee the regional accreditation system that prevails today.<sup>24</sup>

Although the Korean War GI Bill assigned this new public accountability function to accrediting agencies, the standards employed by the agencies remained relatively unchanged.<sup>25</sup> As Gillen, Bennett, and Vedder put it, “[t]o get accredited, one basically had to mimic other colleges in terms of input usage.”<sup>26</sup> These costly requirements discouraged both diploma mills and legitimate upstart colleges from seeking accreditation.<sup>27</sup> Because the federal funds dispersed at this time were both limited and temporary, it was simply not worth it to these smaller institutions to go through the costly process of accreditation.<sup>28</sup> In 1965,

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21. *Id.*

22. Barbara Brittingham, *Accreditation in the United States: How Did We Get To Where We Are?*, 145 NEW DIRECTIONS FOR HIGHER EDUC. 7 (2009).

The federal program to recognize accrediting organizations . . . began quietly. From what has been called the second GI Bill, providing support for returning veterans from the Korean War, the federal government began to rely on accreditation organizations to identify institutions educationally worthy of taxpayer investment in the form of federal financial aid to students.

*Id.* at 21.

23. Matthew W. Finkin, *Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulate*, 2 J.L. & EDUC. 339, 346 (1973) (quoting The Veterans’ Readjustment Assistance Act of 1952, Pub. L. No. 82-550, §253 (1952)).

24. Gillen et al., *supra* note 2, at 4. Although not required by the 1952 Korean War GI Bill, the regional accreditation system established by the Commissioner of Education meant the end of competition between accreditors for member universities and member colleges.

25. *Id.* at 9-10.

26. *Id.* at 9.

27. *Why Accreditation Doesn’t Work*, *supra* note 11, at 12.

28. *Id.* See also *Veterans Readjustment Act of 1952: Hearings Before the Special Subcommittee on Veterans’ Education and Rehabilitation Benefits of The Committee On Labor And Public Welfare United States Senate*, 82nd Cong. 102 (1952) (statement of R.W. Kent, Director) (“It would be very easy for a group of fly-by-night profit schools to set up an accrediting agency that would look good on the surface but would accredit substandard schools and thereby dodge completely the provision of this section . . . I realize that under present conditions, where we are not in an all-out shooting war that the number of veterans involved may not be large enough to induce some of the abuses we had under the old GI

with the passage of the Higher Education Act (“HEA”), the federal government established a permanent system of federal student aid that promised massive amounts of federal funds to accredited colleges and universities, who alone were eligible to receive it.<sup>29</sup> If the 1952 Korean War GI Bill changed the accreditation landscape, then the 1965 HEA completely changed the game. As Gillen, Bennett, and Vedder observe, “[w]hereas in earlier years colleges would only take part in accreditation if the benefits (e.g. signaling quality and/or helping the institution) outweighed the costs, accreditation was now viewed as a near necessity, regardless of its benefits in these dimensions.”<sup>30</sup> Since 1965, universities of all kinds have had a powerful incentive to pursue accreditation, and the accrediting agencies have enjoyed a captive audience on whom to impose their standards.<sup>31</sup>

## II. THE PUBLIC INTEREST STORY AND ITS PROBLEMS

### *A. What Public Goods Do Accreditors Claim to Provide?*

In order to determine whether or not the current system of accreditation has lived up to its public interest promise, we must examine what that public interest promise is exactly. What public goods do accreditors claim to provide?

According to Judith Eaton, a leading advocate in favor of accreditation and the President of the Council of Higher Education Accreditation (“CHEA”),<sup>32</sup> “[w]hen accreditation was created 100 years ago, it sought,

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bill. However, it seems to me this new legislation should be made foolproof so that if we should get into a shooting war, we will be prepared to prevent repetition of these abuses.”).

29. Gillen et al., *supra* note 2, at 4-5.

30. *Id.* at 6.

31. *See id.* at 4 (“[W]ith the passage of the 1965 Higher Education Act (HEA), accreditation would become a near necessity.”); Burke & Butler, *supra* note 1, at 8 (“Once a voluntary decision on the part of universities, accreditation is now a de facto requirement for institutions to be eligible even to open their doors or for their students to receive federal aid.”); *Why Accreditation Doesn’t Work*, *supra* note 11, at 12 (“Because this happened at a time when the importance of student aid in college budgets was growing, accreditation changed from a voluntary service to a nearly universal obligatory review. Since students who attend unaccredited colleges are ineligible for federal student aid, a loss of or failure to receive ‘accredited’ status would be a death knell for many institutions.”).

32. The Council of Higher Education Accreditation (“CHEA”) is “a ‘national advocate and institutional voice for promoting academic quality through accreditation.’” *CHEA At-A-Glance*, COUNCIL OF HIGHER EDUC. ACCREDITATION, [https://www.chea.org/userfiles/uploads/chea-at-a-glance\\_2015.pdf](https://www.chea.org/userfiles/uploads/chea-at-a-glance_2015.pdf)

first and foremost, to serve higher education institutions and programs.”<sup>33</sup> As CHEA explains, “[a]ccreditation was and is routinely acknowledged by higher education as its primary means to assure academic quality.”<sup>34</sup> Thus, accreditation serves the higher education community by acting as a mechanism for academic quality assurance and for quality improvement.<sup>35</sup>

Because, as accreditors argue, accreditation signals academic quality, accreditors serve the public interest by identifying to students, to the federal government, and to members of the private sector those institutions or programs that meet “at least threshold standards for [their] facult[ies], curricul[a], student services and libraries.”<sup>36</sup> Accreditation benefits consumers by separating those institutions they can trust from those they cannot trust. Indeed, as a recent CHEA promotional video put it, “[b]eing accredited means you can trust what the school or program tells you about its courses, its teachers, the services it provides, and what tuition and other fees will cost.”<sup>37</sup> Since 1952, accreditation has also served an important function for the government.<sup>38</sup> With over \$100 billion disbursed every year

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[<https://perma.cc/2SDS-6ZEG>]. With membership that consists of three thousand degree-granting member institutions, it is the “[l]argest institutional higher education membership organization in the United States.” *Id.*

33. *Conflict or Convergence?*, *supra* note 14. See also Gillen et al., *supra* note 2, at 4 (“By 1945, the North Central Association’s rhetoric had shifted from that of assuring high quality to that of ‘providing service’ to its member institutions. During this time, accreditation increasingly sought to accomplish continued improvement in higher education rather than the rigid enforcement of universal standards. In doing so, a new mission for accreditation was added: In addition to sorting colleges by quality as before, it was now also supposed to help institutions improve.”).

34. *Conflict or Convergence?*, *supra* note 14. See also *Role of the accrediting agency in postsecondary accreditation*, DAPIP, <http://ope.ed.gov/accreditation/> [<https://perma.cc/UM3F-Y3YL>] (“The goal of accreditation is to ensure that education provided by institutions of higher education meets acceptable levels of quality. Accrediting agencies, which are private educational associations of regional or national scope, develop evaluation criteria and conduct peer evaluations to assess whether or not those criteria are met.”).

35. *Conflict or Convergence?*, *supra* note 14 (“[A]ccreditation itself is a community of professionals, men and women who have considerable expertise and experience in quality review, assessment, quality assurance and quality improvement.”).

36. Judith S. Eaton, *Accreditation and Recognition in the United States*, COUNCIL OF HIGHER EDUC. ACCREDITATION 18 (Nov. 15, 2015), [https://docs.google.com/viewerng/viewer?url=https://www.chea.org/sites/default/files/other-content/AccredRecogUS\\_0.pdf](https://docs.google.com/viewerng/viewer?url=https://www.chea.org/sites/default/files/other-content/AccredRecogUS_0.pdf) [<https://perma.cc/Z7MY-7DFY>].

37. COUNCIL OF HIGHER EDUC. ACCREDITATION, *Accreditation and Its Value to You*, YouTube (Feb. 3, 2011), <https://www.youtube.com/watch?v=yGGfBNTLSBI>.

38. See Gillen et al., *supra* note 2, at 4.



in federal student aid, accreditors provide assurance to the government that only quality institutions have access to these federal dollars.<sup>39</sup> Further, accreditation “[e]ngender[s] private sector confidence” in that it provides employers with a tool for measuring the credentials of job applicants and for deciding whether to offer tuition support to employees pursuing additional education.<sup>40</sup>

All of the benefits cited by accreditors, however, depend critically on the efficacy of the accreditor’s quality assurance measures. Is an accrediting agency’s stamp of approval actually reflective of an institution’s quality?<sup>41</sup>

### *B. Is Accreditation an Accurate Indicator of Institutional Quality?*

The accrediting agencies would respond with a resounding “yes”! But it is important to understand how these agencies measure “quality.” As many scholars and commentators have noted, the accrediting agencies largely measure “quality” in terms of inputs<sup>42</sup>—that is, for example, the size of an institution’s physical infrastructure,<sup>43</sup> the size of its non-faculty

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39. Eaton, *supra* note 36, at 21 (“It adds value to the society through assuring quality, enabling government to make sound judgments about the use of public funds, aiding the private sector in decisions about financial support and easing transfer of credit.”).

40. *Id.* at 19.

41. See *Accreditation and Its Value to You*, *supra* note 37 (“When a college, university, or vocational school says that it is ‘accredited,’ it is saying it has been reviewed by experts and has a seal of approval.”).

42. See Gillen et al., *supra* note 2, at 9; *Why Accreditation Doesn’t Work*, *supra* note 11, at 6; Burke & Butler, *supra* note 1, at 7; George C. Leef & Roxana D. Burris, *Can College Accreditation Live Up to Its Promise?*, AM. COUNCIL OF TRUSTEES AND ALUMNI 13 (Jul. 2002), [https://www.goacta.org/images/download/can\\_accreditation\\_live\\_up\\_to\\_its\\_promise.pdf](https://www.goacta.org/images/download/can_accreditation_live_up_to_its_promise.pdf) [<https://perma.cc/UA63-STRQ>].

43. See, e.g., *2013 Handbook of Accreditation Revised*, W. ASSOC. OF SCH. & C. Pt. 2 § 3.5 (2013), <https://www.wscuc.org/book/export/html/924> [<https://perma.cc/495C-8MVM>] [hereinafter *WASC Handbook*] (“The institution provides access to information and technology resources sufficient in scope, quality, currency, and kind at physical sites and online, as appropriate, to support its academic offerings and the research and scholarship of its faculty, staff, and students. These information resources, services, and facilities are consistent with the institution’s educational objectives and are aligned with student learning outcomes.”); *Resource Manual for the Principles of Accreditation: Foundations for Quality Enhancement*, S. ASSOC. OF COLLEGES & SCH. COMMISSION ON C. 21, 32 (2012), <http://www.sacscoc.org/pdf/2012PrinciplesOfAccreditation.pdf> [<https://perma.cc/4227-N739>] [hereinafter *SACS Manual*] (The institution has adequate physical resources to support the mission of the institution and the scope of its programs

staff,<sup>44</sup> the size of its faculty,<sup>45</sup> the workload intensity both of faculty and of administrative staff,<sup>46</sup> the qualifications of faculty,<sup>47</sup> the length of degree programs,<sup>48</sup> and the institution's commitment to strategic planning

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and services. . . . The institution operates and maintains physical facilities, both on and off campus, that appropriately serve the needs of the institution's educational programs, support services, and other mission-related activities."); *NWCCU Standards*, N.W. COMMISSION ON C. & U. §§ 2.G.1, 2.G.3, <http://www.nwccu.org/accreditation/standards-policies/standards/> [<https://perma.cc/P72P-TB3M>] ("Consistent with its mission, core themes, and characteristics, the institution creates and maintains physical facilities that are accessible, safe, secure, and sufficient in quantity and quality to ensure healthful learning and working environments that support the institution's mission, programs, and services. . . . The institution develops, implements, and reviews regularly a master plan for its physical development that is consistent with its mission, core themes, and long-range educational and financial plans.").

44. See, e.g., *SACS Manual*, *supra* note 43, at 31 ("The institution [must have] a sufficient number of qualified [library] staff . . . The institution [must have] a sufficient number of qualified [student affairs] staff."); *WASC Handbook*, *supra* note 43, Pt. II § 3.1 ("The institution [must have] a sufficient number" of staff.); *NWCCU Standards*, *supra* note 43, § 2.B.1 ("The institution employs a sufficient number of qualified personnel . . .").

45. See, e.g., *SACS Manual*, *supra* note 43, at 20 ("The number of full-time faculty members is adequate to support the mission of the institution and to ensure the quality and integrity of each of its academic programs"); *WASC Handbook*, *supra* note 43, Pt. II § 3.1 ("The faculty and staff are sufficient in number, professional qualification, and diversity to achieve the institution's educational objectives, establish and oversee academic policies, and ensure the integrity and continuity of its academic and co-curricular programs wherever and however delivered."); *NWCCU Standards*, *supra* note 43, § 2.B.4 ("[T]he institution employs appropriately qualified faculty sufficient in number . . .").

46. See, e.g., *WASC Handbook*, *supra* note 43, Pt. II § 3.2 ("Faculty and staff recruitment, hiring, orientation, workload, incentives, and evaluation practices are aligned with institutional purposes and educational objectives.") (emphasis added). See also *NWCCU Standards*, *supra* note 43, § 2.B.5 ("Faculty responsibilities and workloads are commensurate with the institution's expectations for teaching, service, scholarship, research, and/or artistic creation.").

47. See, e.g., *SACS Manual*, *supra* note 43, at 30 ("At least 25 percent of the course hours in each major at the baccalaureate level are taught by faculty members holding an appropriate terminal degree—usually the earned doctorate or the equivalent of the terminal degree."); *id.* ("When determining acceptable qualifications of its faculty, an institution gives primary consideration to the highest earned degree in the discipline.").

48. See, e.g., *SACS Manual*, *supra* note 43, at 19 (associate's degrees must be at least 60 hours or the equivalent, bachelor's degrees must be at least 120 hours or the equivalent, master's degrees must be at least 30 hours or the equivalent, and institutions must provide a justification for "all degrees that include fewer than the required number of semester hours or its equivalent unit."); *id.* at 19 (institution must require fifteen hours of "general education" courses for an associate's degree and thirty hours of such courses for a bachelor's degree); *NWCCU Standards*, *supra* note 43, § 2.C.9.

for the future.<sup>49</sup> While these requirements do succeed in driving up the cost of education, they are dubious measures of an institution's capacity to teach students meaningful skills.<sup>50</sup> As Leef and Burris argue,

[t]he accreditation system is not based on an evaluation of the results of an institution, but rather upon an evaluation of its inputs and processes. If the inputs and processes look good, acceptable educational quality is assumed. It is as if an organization decided which automobiles would be allowed to be sold by checking to make sure that each car model had tires, doors, an engine and so forth and had been assembled by workers with proper training—but without actually driving any cars.<sup>51</sup>

This is not to say that the accrediting agencies completely ignore student outcomes. In response to concerns that the accrediting agencies were not properly gauging academic quality, in 1992, Congress passed a new amendment to the Higher Education Act, requiring accreditors to chart student learning outcomes.<sup>52</sup> As Gillen, Bennett, and Vedder suggest, however, “the college lobby has ensured that these are self designed assessments.”<sup>53</sup> In other words, although an accreditor now must obtain data from institutions concerning student achievement, the standards the institution must meet are based on the school's own evaluation of its success at meeting the goals that it set for itself.<sup>54</sup> The problem with this

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49. See, e.g., *SACS Manual*, *supra* note 43, at 18 (“The institution engages in ongoing, integrated, and institution-wide research-based planning and evaluation processes that (1) incorporate a systematic review of institutional mission, goals, and outcomes; (2) result in continuing improvement in institutional quality; and (3) demonstrate the institution is effectively accomplishing its mission.”); *NWCCU Standards*, *supra* note 43, § 3.A.

50. Gillen et al., *supra* note 2, at 9 (“It should go without saying that just because a university spends enough money on libraries or research, or has ‘low enough’ teaching loads does not guarantee that it is providing an education worth the public’s (or even the student’s personal) investment.”).

51. Leef & Burris, *supra* note 42, at 7.

52. See Matthew W. Finkin, *The Unfolding Tendency in the Federal Relationship to Private Accreditation in Higher Education*, 57 *LAW & CONTEMP. PROB.* 89, 102-03 (1994).

53. Gillen et al., *supra* note 2, at 9.

54. *Id.* at 9-10. See, e.g., *SACS Manual*, *supra* note 43, at 39 (“The institution evaluates success with respect to student achievement consistent with its mission. Criteria may include: enrollment data; retention, graduation, course completion, and job placement rates; state licensing examinations; student portfolios; or other means of demonstrating achievement of goals.”); *Standards for Accreditation*, NEW ENGLAND ASSOC. OF SCH. & C. § 2.6 (2016), <https://cihe.neasc.org/standards-policies/standards-accreditation/standards->

method of evaluation, as Leef and Burris reason, is that it gives an institution the incentive to cheat on quality:

The difficulty with reliance on schools themselves to police educational quality is that they have a strong incentive to make themselves look good to accreditors (and other outside observers), while offering the kind of easy, entertaining courses that many students expect and even demand. Schools will comply with whatever standards the accreditors may write regarding student achievement, while at the same time continuing to offer the sort of easy-going courses that satisfy most students.<sup>55</sup>

Because the accreditors only require this vague self-policing, agencies have no way of ensuring uniform educational outcomes across institutions.<sup>56</sup> Further, the accrediting agencies do not undertake a course-by-course evaluation of a school's programs to ensure overall academic

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effective-july-1-2016 [<https://perma.cc/33QL-4XRB>] [hereinafter *NEASC Standards*] (“The institution regularly and systematically evaluates the achievement of its mission and purposes, giving primary focus to the realization of its educational objectives. Its system of evaluation is designed to provide valid information to support institutional improvement. The institution’s evaluation efforts are effective for addressing its unique circumstances. These efforts use both quantitative and qualitative methods.”). *See also WASC Handbook*, *supra* note 43, Pt. III § 2 (WASC relies on a system of self-reporting to ensure compliance with its standards—“Compliance with Standards: Review under the WSCUC Standards and Compliance with Federal Requirements; Inventory of Education Effectiveness Indicators”).

55. Leef & Burris, *supra* note 42, at 22.

56. Gillen et al., *supra* note 2, at 10 (“The Spellings’ Commission on the Future of Higher Education was highly critical of the system’s failure to provide ‘solid evidence, comparable across institutions, of how much students learn in colleges or whether they learn more at one college or another.’”). In recent years, the regional accreditors have focused more on the language and process of assessment. *See e.g., WASC Handbook*, *supra* note 43, Pt. I (“A new context for higher education has formed the backdrop for the 2013 Handbook. Colleges and universities have been under increasing pressure to become more accountable for student academic achievement; to be more transparent in reporting the results of accreditation; and to demonstrate their contribution to the public good. Accounting for quality is a matter of public trust, given the billions of dollars government provides higher education through direct investment in institutions, federal and state financial aid for students, and tax exemptions for public and non-profit institutions. These factors lie behind the Commission’s decision to rebalance the dual role of accreditation to support both public accountability and institutional improvement.”). While the accreditation guidelines speak of high-quality learning, what that means is still the results of self-assessment. *See WASC Handbook*, *supra* note 43, Pt. III (Student Success: Student Learning, Retention, and Graduation).

rigor.<sup>57</sup> In short, much of the “quality” that accrediting agencies seek to maximize (e.g., financial resources, faculty staffing levels, physical infrastructure) is not meaningful relative to student learning and performance—performance that has markedly declined in recent years.<sup>58</sup>

### C. Weighing the Costs of Accreditation.

Having considered the benefits of accreditation apart from the access it provides to federal funds, we now briefly consider its costs. Accreditation imposes both direct and indirect costs on colleges and universities.<sup>59</sup> Whereas direct costs include expenditures for “membership fees, site visits, [and] evaluations,” indirect costs involve the much more substantial spending necessary to comply with an accreditor’s recommendation (e.g., the cost of building a new building at the recommendation of an agency).<sup>60</sup> According to Gillen, Bennett, and Vedder, the direct yearly cost to universities is fairly low—around \$63,000 per institution.<sup>61</sup>

The indirect costs of compliance, however, are both far more substantial and far more difficult to quantify as they also “entail significant

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57. Burke & Butler, *supra* note 1 (“[T]he general problem is that once an institution is accredited, its courses are as well—no matter whether the content or quality of a specific course reaches the standard implied by accreditation.”) (citing courses entitled “Lady Gaga and the Sociology of Fame” and “The Science of Superheroes”); *see, e.g.*, Jack Butler, *College Offers Course Devoted Entirely to Pornography*, THE COLLEGE FIX (Mar. 29, 2013), <https://www.thecollegefix.com/college-offers-course-devoted-entirely-to-pornography/> [<https://perma.cc/JSA7-AEHZ>] (The instructing professor at WASC accredited Pasadena City College said “he hopes students come out of the course with a better personal understanding of some of the seminal issues of pornography, such as: ‘why we love porn . . . why some people are deeply troubled by it . . . and how both to make decisions about porn in their own lives and how to have conversations about porn with others.’”).

58. Hank Brown, *The Rise of the Accreditor as Big Man on Campus*, WSJ (Jan. 14, 2013), <https://www.wsj.com/articles/SB10001424127887323442804578232232920012910> [<https://perma.cc/P2HY-D7XS>] (“According to the 2003 National Assessment of Adult Literacy, conducted by the Department of Education’s National Center for Education Statistics, the literacy of college-educated citizens dropped significantly between 1992 and 2003. Of college graduates, only 31% were classified as proficient in reading compared with 40% in 1992.”).

59. Gillen et al., *supra* note 2, at 23.

60. *Id.*

61. *Id.*

opportunity costs.”<sup>62</sup> As the American Council of Trustees and Alumni (“ACTA”) points out, with the decreasing number of professors available to teach courses, some universities have had to consolidate class sections, increasing the size of classes to make up for the shortfall.<sup>63</sup> Thus, accrediting mandates have forced many students to bear the cost of learning in larger classes.<sup>64</sup> Although there has been little empirical research done as to what effect larger class sizes have on a college student’s ability to learn,<sup>65</sup> intuitively, as one University of Richmond study recently found with respect to college business classes, larger class sizes affect the “clarity of presentations,” the “effectiveness of the teaching methods,” the instructor’s ability to keep students interested, and the “timeliness of feedback on assignments.”<sup>66</sup>

The cost to new universities of obtaining accreditation is substantial. As Michael Clifford, an investor in for-profit colleges, has estimated, the cost to a new school to obtain accreditation is about \$10 million and ten years of effort with “only a 50-50 chance of success.”<sup>67</sup> But it is not solely new schools that bear these costs. Even schools with pristine academic credentials bear substantial costs as a result of accreditation. Stanford University, universally ranked as one of the top five universities in the world, “spends 8 cents of every tuition dollar on accreditation.”<sup>68</sup>

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62. Gillen et al., *supra* note 2, at 23.

63. *Why Accreditation Doesn't Work*, *supra* note 11, at 9.

64. See Eric P. Bettinger & Bridget Terry Long, *Mass Instruction or Higher Learning? The Impact of College Class Size on Student Retention and Graduation*, 13 EDUCATION FINANCE AND POLICY 97-118 (Winter 2018).

65. *Id.* at 118 (finding an increase in college class size increases dropout rates and a reduction in on-time degree completion); Giacomo De Giorgi et al., *Class Size and Class Heterogeneity*, 10 J. OF EUR. ECON. ASS'N 795-830 (2012) (Italian study finding significantly lower wages and less achievement after graduation correlated with how large introductory lectures were).

66. James Monk & Robert M. Schmidt, *The Impact of Class Size and Numbers of Students on Outcomes in Higher Education*, 11 B.E.J. OF ECON. ANALYSIS & POL'Y 1, 11 (2011).

67. See Gillen et al., *supra* note 2, at 22; Daniel Golden, *Your Taxes Support For-Profits as They Buy Colleges*, BLOOMBERG NEWS (Mar. 4, 2009) at 1 - Your Taxes, [https://www.anderson.ucla.edu/documents/areas/adm/loeb/11\\_141updated.pdf](https://www.anderson.ucla.edu/documents/areas/adm/loeb/11_141updated.pdf) [<https://perma.cc/K43C-RRP7>]. As Clifford reveals in his interview with Golden, he has participated in the acquisition of four debt-ridden non-profit universities. Clifford has found that buying these non-profit colleges is the most cost-effective way for a for-profit school to obtain accreditation.

68. Richard DeMillo, *Accreditation—or Real Quality Assurance?*, THE JAMES G. MARTIN CTR. FOR ACAD. RENEWAL (Jan. 16, 2013), <http://www.popecenter.org/commentaries/article.html?id=2792> [<https://perma.cc/VCT3->

Fortunately, the costs imposed by accreditation do not threaten the very existence of schools like Stanford or Princeton. As Richard Vedder suggests, one cannot say the same for smaller liberal arts colleges like Urbana University.<sup>69</sup> With forty-one percent of its students receiving Pell Grants and an endowment of less than \$3,000 per student, Urbana certainly could not survive without accreditation.<sup>70</sup> Yet, the cost of maintaining accreditation looms large. “[O]ften inane accreditation procedures that are minor annoyances to Princeton can be significant cost factors to a school like Urbana.”<sup>71</sup>

With large costs and unclear benefits in terms of quality assurance, one must wonder why such a system persists. Why would Congress and regulated institutions want such an inefficient system?

### III. BOOTLEGGERS AND BAPTISTS

In 1983, Bruce Yandle asked himself this same question as he reflected on the tendency of government officials to choose the highest cost regulatory approach they can find.<sup>72</sup> He recalled that, at first, he thought that this behavior suggested a tremendous ignorance of basic economic principles on the part of these regulators.<sup>73</sup> As he conversed with many of them, however, he learned “to [his] surprise, many regulators

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ZHG3]. *See also* Shirley M. Tilghman, The Uses and Misuses of Accreditation (Nov. 9, 2012) (“Let me quote from a letter that John Etchemendy, the provost of Stanford University, sent to WASC last year, highlighting their experience with reaccreditation: ‘We have been engaged in our reaccreditation project for more than four years and have approximately two more years until we are finished. . . . With three submissions and two visits, it is hard to find peer reviewers willing to be part of the process because of the duration of the review. . . . In one count a few years ago, we determined that the cost of staff time devoted to the accreditation process in that year alone was nearly \$849,000. Furthermore, this figure only describes staff and faculty whose effort is partially allocated to the process, and does not account for the time and effort of more than 50 faculty and staff who are working on the accreditation review in less formal roles. Thus the true expense is far greater on an annual basis and the opportunity cost is incalculable.’”).

69. Richard Vedder, *Princeton and Urbana Universities: A Tale of Two Schools*, THE CHRONICLE OF HIGHER EDUC. (Feb. 24, 2012), <https://www.chronicle.com/blogs/innovations/princeton-and-urbana-universities-a-tale-of-two-schools/31660> [<https://perma.cc/AHG2-XZ39>].

70. *Id.*

71. *Id.*

72. Yandle, *supra* note 7, at 13.

73. *Id.*

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knew quite a bit about economics.”<sup>74</sup> Even more shocking, after talking with many industry representatives, he learned that those regulated “were not always opposed to the costly rules [imposed by these government regulators] and occasionally were even fearful that we would succeed in getting rid of some of them.”<sup>75</sup> Initially, these insights puzzled Yandle.<sup>76</sup> Why would the government choose to implement policies that seem more costly when more efficient approaches were available? And why would regulated industries prefer these costly measures?

Considering these insights, Yandle developed a new way of understanding the incentives that drive both the regulators and the regulated. Originally, he had thought that the “regulators really intended to minimize costs but somehow proceeded to make crazy mistakes.”<sup>77</sup> Under his new theory, he “began to assume that they were not trying to minimize costs at all—at least not the costs [he] had been concerned with.”<sup>78</sup> Instead, the regulators were concerned with minimizing their costs—that is, “[t]he costs of making a mistake,” “[t]he costs of enforcement,” and “political costs.”<sup>79</sup> Regulators, Yandle suggested, often prefer simple rules applied across the board because “simple rules . . . require fewer decisions where mistakes can be made.”<sup>80</sup> Likewise, simple rules are easier to enforce than those that are more complex.<sup>81</sup> Such rules also might appear to be more equitable.<sup>82</sup> Because regulators are usually accountable in some way to legislators, the appearance of fairness is very important as a “legislator is likely to be unhappy with regulators . . . who fail, in the legislator’s view, to remember the industries and the workers in his area.”<sup>83</sup> Regulated industries, on the other hand, “want protection from competition, from technological change, and from losses that threaten profits and jobs.”<sup>84</sup> The right kind of regulations can accomplish all of these anticompetitive goals, while at the same time “giving the citizenry the impression that the only goal is to serve the public interest.”<sup>85</sup>

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74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*



Yandle calls this idea the “Bootleggers and Baptists” theory of regulation: “Bootleggers, you will remember, support Sunday closing laws that shut down all the local bars and liquor stores. Baptists support the same laws and lobby vigorously for them. Both parties gain, while the regulators are content because the law is easy to administer.”<sup>86</sup>

With the government and private interest groups benefiting as a result of a given anticompetitive law that appears to serve the public interest, the barriers to meaningful reform are institutional—that is, unless there are changes in the demand and supply of regulation.<sup>87</sup>

Given the inefficiency and the ineffectiveness of the current higher education accreditation system, the question remains—does Yandle’s Bootleggers and Baptists theory have any application to the system of higher education accreditation as we know it?

#### IV. HIGHER EDUCATION ACCREDITATION: A BOOTLEGGERS AND BAPTISTS STORY?

Under Yandle’s theory, the government and interest groups have different reasons for promoting regulations that are inefficient overall. Generally speaking, interests groups want protection from competition, and regulators want to minimize *their* costs.<sup>88</sup> But the key to a good Bootleggers and Baptists story “is an overarching public concern to be addressed (like the problem of alcohol) whose ‘solution’ allows resources to be distributed from the public purse to particular groups or from one group to another (as from bartenders to bootleggers).”<sup>89</sup> In Section II.A., we discussed some of these public concerns when we considered the public goods—such as quality assurance and information signaling—that

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86. *Id.*

87. *Id.* at 14.

What all this implies is that the challenges of regulatory reform are institutional. Regulation is relief for some and a burden for others, so that reform is a burden for some and a relief for others. The fact that a regulation has come into being as a result of a costly political exchange means that reform can hardly be gained easily. This is not to suggest that all is for naught, that there are no opportunities for reducing net (overall) regulatory costs or removing the protective regulatory cocoons woven so tightly and carefully around this activity and that. But it is to say that we can scarcely expect full-scale deregulation to occur often. Not when the Baptists and the bootleggers vote together.

*Id.*

88. *Id.* at 13.

89. *Id.* at 14.

accreditation purportedly provides. We now reflect on the accrediting agencies' and the government's interests in the current accreditation system in order to gauge how well Yandle's story applies in this context.

Unlike most other regulated sectors, higher education is primarily self-regulated.<sup>90</sup> In other words, while the Environmental Protection Agency, for instance, sets the emission standards that apply to businesses, accrediting commissions made up of members elected by member institutions set the standards for accreditation and thereby determine whether or not a given university can access federal funds.<sup>91</sup> While advocates for accreditation argue that this structure is one of the strengths of accreditation,<sup>92</sup> even these advocates recognize that there is, at the very least, a potential for conflict.<sup>93</sup> As Gillen, Bennett, and Vedder have suggested, however, this potential has long been realized:

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90. *Conflict or Convergence?*, *supra* note 14.

91. See, e.g., *ACS WASC Bylaws and Policy Manual*, WESTERN ASSOC. OF S. & C. CONST. art. 2, § 2, <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=2ahUKEwjixPzG1rLhAhVhmK0KHe1SCjEQFjAAegQIABAC&url=http%3A%2F%2Fwww.acs-wasc.org%2Fwp-content%2Fuploads%2F2018%2F09%2FACS-WASC-Bylaws-and-Policy-Manual-June-2018-FINAL.pdf&usg=AOvVaw0NwEWuNN9P5RuC7sP2JUEC> [https://perma.cc/32PG-RFPQ]; *Commission Organization*, SOUTHERN ASSOC. OF C. & SCH. COMM'N ON C., <http://www.sacscoc.org/commorg1.asp> [https://perma.cc/FZ5G-ATN4]; *Bylaws*, NORTHWEST COMM'N ON C. & U. art. 3, § 3.3, <http://www.nwccu.org/about-nwccu/bylaws/> [https://perma.cc/5ALA-9ZHW] (member institutions must choose the agencies commissioners both from among the public and from the diversity of higher education institutions in the Northwest region); *Bylaws of the Higher Learning Commission*, HIGHER LEARNING COMM'N art. 6, § 1 (June 28, 2010), [http://download.hlcommission.org/policy/HLCBylaws\\_POL.pdf](http://download.hlcommission.org/policy/HLCBylaws_POL.pdf) [https://perma.cc/VAV5-S489].

92. See Judith Eaton, *Federalizing Accreditation: A Quandary for Higher Education*, COUNCIL OF HIGHER EDUCATION ACCREDITATION (Feb. 16, 2011), <https://www.chea.org/federalizing-accreditation-quandary-higher-education> [https://perma.cc/U7VY-ADMX] [hereinafter *Federalizing Accreditation*] (arguing that "it is precisely the traditional, disciplined distance of government authority over higher education that has enabled the establishment of our diverse, effective and highly respected higher education enterprise").

93. See *Conflict or Convergence*, *supra* note 14 ("Institutions and programs not only established these [accrediting] bodies, but remain key sources of ongoing finance and governance. The financing of accreditation by those who are accredited means that there is ongoing pressure on accreditation to avoid conflict of interest such as deriving financial benefit from expanding the number of accredited institutions or programs. Governing accreditation by those who are themselves accredited raises other conflict concerns, such as avoiding temptation to relax the rigor of quality standards in order to expand membership.").

One might even view accreditation as a “cartel” made up of various participants with the goal of restricting competition from non-members of the cartel. Ultimately, it’s not surprising that “a system that is created, maintained, paid for and governed by institutions is necessarily more likely to look out for institutional interests.” One of the ways in which they do so is by keeping standards low: “when the people who decide what constitutes academic quality will themselves be judged on academic quality, it’s no wonder that the bar is set low.”<sup>94</sup>

In this view, accrediting agencies protect institutional interests by keeping barriers to entry high, such that member universities face little competition from emerging non-member universities and by keeping quality standards among member institutions low.<sup>95</sup> Thus, accrediting standards requiring a high level of expensive inputs (e.g., an institution’s physical infrastructure, the size of its faculty and its non-faculty staff) to make accreditation practically unattainable for many upstart universities.<sup>96</sup> At the same time, with quality monitored by accrediting commissions composed of member institution electors—many of whom are often faculty or staff of these institutions—the commissions on their own have little incentive to raise quality standards in a meaningful way for fear that their own institutions could not meet those standards. Further, individually, commissioners are accountable to no one but the member institutions who elect them. Therefore, the commission, as a whole, has an incentive not to raise standards higher than those that these institutions will be willing to meet. The current system supports this hypothesis, as accreditors do not judge the “quality” of a university based on clear objective criteria. Rather, the agencies base their judgments about an institution’s quality on its inputs<sup>97</sup> and on the institution’s own subjective

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94. Gillen et al., *supra* note 2, at 9.

95. *Id.* at 43.

96. *Id.*

Perhaps accreditors are essentially acting as a cartel, seeking to restrict entry into the sector without imposing too much of a burden on existing cartel members. This can be accomplished by defining and enforcing detailed standards that existing members can already meet, such as classroom space and library size, but that new entrants would find prohibitively costly. If this is the case, standards would not be imposed for anything that would impose more costs on existing colleges than on new entrants.

*Id.*

97. See *supra* notes 42-49.

judgment as to how it has met the goals that an institution has set for itself.<sup>98</sup>

If, as was traditionally the case, accreditation is the only practical impediment to obtaining federal funds,<sup>99</sup> the accrediting agencies also have an effective means of punishing defection—the threat of losing (or never gaining) accreditation and the federal funds that come with it.<sup>100</sup> Although the agencies have rarely wielded this tool for reasons of educational quality, in recent years, these agencies have not been shy about threatening to punish schools for reasons that have nothing to do with academics or with quality.<sup>101</sup>

In 2007, for instance, the University of California drew fire from Western Association of Schools and Colleges (“WASC”) when it attempted to address runaway administrative costs by making modest salary and benefit changes.<sup>102</sup> For years, school administrators had accepted exorbitant salaries that had gone unapproved by the university’s Board of Regents as required by the school’s compensation policy.<sup>103</sup> As the Board attempted to deal with this problem, WASC also forced it to expend precious time and resources responding to WASC’s criticisms, including the complaint “that the Regents are sometimes unnecessarily

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98. See *supra* note 54.

99. Although the HEA of 1965 required both accreditation and state authorization, according to the Department of Education, there has been much concern that states are providing little or no oversight and, instead, relying completely on accreditors to provide quality assurance. See Program Integrity Issues, 75 Fed. Reg. 66,859 (Oct. 29, 2010) (to be codified at 34 C.F.R. pt. 600, 602, 603 et al.) (The Department of Education cited this reason for establishing minimum requirements that a state must fulfill in order to authorize a post-secondary school: “We are concerned that States have not consistently provided adequate oversight, and thus we believe Federal funds and students are at risk as we have anecdotally observed institutions shopping for States with little or no oversight.”). See also 34 C.F.R. § 600.9 (1990).

100. See Brown, *supra* note 58 (“Frankly, there’s nothing more intimidating to schools—public or private—than the threat of losing accreditation and with it federal financial aid.”).

101. See Gillen et al., *supra* note 2, at 12 (“While accreditation is rarely denied or revoked for educational reasons, there are institutions that are denied accreditation, so we know that the accreditors are providing certification of *something*. Unfortunately, that ‘something’ has little relation to the quality of education provided.”).

102. See Brown, *supra* note 58.

103. James J. Duderstadt, *Task Force on UC Compensation, Accountability, and Transparency*, THE U. OF CALI., (April 2006) [https://deepblue.lib.umich.edu/bitstream/handle/2027.42/89391/2006\\_UC\\_Compensation\\_Task\\_Force.pdf?sequence=1&isAllowed=y](https://deepblue.lib.umich.edu/bitstream/handle/2027.42/89391/2006_UC_Compensation_Task_Force.pdf?sequence=1&isAllowed=y) [https://perma.cc/B8VB-J6BT].

harsh in their treatment of UC administrators, faculty, and staff.”<sup>104</sup>

Similarly, the Southern Association of Colleges and Schools (“SACS”) officially sanctioned the University of Virginia (“UVA”) and placed its accreditation on warning status.<sup>105</sup> Why? It was not because of academic quality. Indeed, UVA is consistently ranked among the top universities in the country.<sup>106</sup> Rather, the SACS official sanction came as a result of its Board of Visitors’ decision to remove the university president, Teresa Sullivan, in favor of one more focused on cost controls.<sup>107</sup> Between 2003 and 2009, administrative costs at the university had risen 68.9% compared to the 42.4% rise in spending on teaching.<sup>108</sup> At the same time, alumni donations had dropped by almost half.<sup>109</sup> In 2010, the Board had hired Sullivan to put UVA’s fiscal house in order.<sup>110</sup> After her election, however, Sullivan made it clear that she was not going to take aggressive measures to effect full-scale reform.<sup>111</sup> Sullivan preferred, as she called it, an “incrementalist approach.”<sup>112</sup> In her view, UVA was “pretty lean,” and she “worr[ied] about getting leaner.”<sup>113</sup> Meanwhile, the Board was concerned that the University was falling behind other top universities, such as Harvard and MIT, who had entered the digital age with innovative online offerings.<sup>114</sup> It also demanded more accountability

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104. John T. Casteen III et al., *Report of the WASC Special Visit Team: University of California* 15 (October 23-October 24, 2007), [https://www.ucop.edu/institutional-research-academic-planning/\\_files/uc\\_visit\\_wasc.pdf](https://www.ucop.edu/institutional-research-academic-planning/_files/uc_visit_wasc.pdf).

105. See Brown, *supra* note 58.

106. *Facts & Figures: A Leader From Day One*, THE U. OF VA., <http://www.virginia.edu/facts> [<http://www.virginia.edu/facts>].

107. Brown, *supra* note 58.

108. *The Virginia Fracas: U.Va.’s faculty revolts when the trustees move against the status quo*, WALL STREET JOURNAL (June 25, 2012), <https://www.wsj.com/articles/SB10001424052702304765304577481043087404280> [<https://perma.cc/JYQ8-8ACL>].

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Statement from Helen Dragas, Rector, University of Va. (Jun. 21, 2012) [http://www.readthehook.com/files/article-documents/dragas\\_statement\\_120621\\_final.pdf](http://www.readthehook.com/files/article-documents/dragas_statement_120621_final.pdf) [<https://perma.cc/C7M8-YD25>] [hereinafter Dragas]; Marian Anderfuren, *As Deans Ask Sullivan’s Reinstatement, Dragas Offers Further Explanation for Her Removal; BOV Sets Special Meeting*, UVA TODAY (June 21, 2012), <https://news.virginia.edu/content/deans-ask-sullivans-reinstatement-dragas-offers-further-explanation-her-removal-bov-sets> [<https://perma.cc/PU5F-CNBZ>].

in terms of faculty productivity and academic quality.<sup>115</sup> In June 2012, Helen Dragas, UVA Rector, asked for Sullivan's resignation on behalf of a supermajority of the Board.<sup>116</sup> This decision was supported by the UVA Faculty Senate which passed a no-confidence vote shortly after Dragas asked for Sullivan's resignation.<sup>117</sup> Although the Board later reversed this decision, SACS sanctioned UVA, placing its accreditation status up for review based on the University's failure "to demonstrate compliance with Core Requirement 2.2 (Governing board) and Comprehensive Standard 3.7.5 (Faculty role in governance) of the Principles of Accreditation."<sup>118</sup> Again, as Executive Vice President and Provost John D. Simon noted in the University's official statement, "[t]his action does not imply any criticism of the University's academic quality and programs."<sup>119</sup> Instead, by this action, SACS effectively diverted the University's focus from critical issues of quality and of cost-containment to unrelated issues of university governance. Rather than developing smart and aggressive measures to balance fiscal concerns and to innovate, the Board was "provid[ing] clarity on procedures for electing and removing presidents, set[ting] up comprehensive guidelines for evaluating a president's performance, and provid[ing] more direct involvement by faculty in board deliberations."<sup>120</sup> UVA was on defense to protect its accreditation, on which depended both its access to federal funds and, in a very real way, its survival.

The tremendous lengths that innovative online universities, such as Western Governors' University (WGU),<sup>121</sup> have had to endure in order to

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115. Dragas, *supra* note 114.

116. *The Virginia Fracas: U.Va.'s faculty revolts when the trustees move against the status quo*, *supra* note 108.

117. *Id.*

118. Southern Association of Colleges and Schools Commission on Colleges, Disclosure Statement Regarding the Status of University of Virginia Charlottesville (Dec. 20, 2012) (on file with authors).

119. SACS *Issues Warning to University*, UVA TODAY (Dec. 11 2012) <http://news.virginia.edu/content/sacs-issues-warning-university> [<https://perma.cc/JF6D-TR46>].

120. *Id.*

121. Burke & Butler, *supra* note 1.

Founded by 19 governors, Western Governors University provides online competency-based degrees. WGU is a fully accredited competency-based model for the country. . . . Western Governors University's model is distinct, save for a few other institutions such as University Now's New Charter University: Students pay for tuition every six months and are assessed a flat-rate fee, paying only for the amount of time it takes to complete a particular program. Students

obtain accreditation further evidences the barriers that accreditors have erected to protect their institutional interests—barriers that have prevented lower cost and higher quality education.<sup>122</sup> WGU began as an idea conceived at a meeting of the Western Governors Association in 1995.<sup>123</sup> These state governors were concerned that their state university systems were not providing enough skilled graduates to ensure the quality workforce that the states needed.<sup>124</sup> With the costs of education rising and state funds dwindling, these governors wanted to develop an innovative system that actually expanded access to educational opportunities.<sup>125</sup> Further, to ensure the skill of graduates, they wanted a system that would reward competency, not time spent in the classroom.<sup>126</sup> To realize this dream, ten governors donated \$100,000 apiece to establish WGU, a non-profit, private university offering only online courses.<sup>127</sup> But, this money “would be the only state funding the [University] would receive.”<sup>128</sup> Although the governors were hesitant to pursue accreditation, as it “was part of the problem, not the solution,”<sup>129</sup> it became clear that, in order to compete with other institutions and to obtain some credibility in the

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finishing in less time save money; the faster a student progresses, WGU notes, the more money the student saves. The university does not ‘rely on classes in the traditional sense.’ Instead of accumulating credit hours based on the amount of time spent in a particular course, students complete assessments measuring skills in a given subject area. . . . - While WGU was the first fully online university to receive accreditation, this distinction (such as it is) required a long, drawn-out process. But the years-long bureaucratic slog culminated in WGU’s earning accreditation from four agencies.

*Id.* at 14.

122. Richard Vedder, *Accreditors—Hip Deep in Politics*, MINDING THE CAMPUS (Mar. 22, 2013), [https://www.mindingthecampus.org/2013/03/22/the\\_politicization\\_of\\_accredit/](https://www.mindingthecampus.org/2013/03/22/the_politicization_of_accredit/) [https://perma.cc/4LA2-G9JK] (“The accrediting agencies are controlled by academics from traditional institutions who want any excuse to use their accrediting power to suppress the for-profit schools that have captured close to 10 percent of the market.”).

123. Chip Johnstone, *Odyssey of an Innovation: The Regional Accreditation of Western Governors University*, THE COUNCIL FOR ADULT & EXPERIENTIAL LEARNING (Mar. 31, 2006), <https://archive.wgu.edu/system/files/artifact-files/20060331%20-%20Odyssey%20of%20an%20Innovation-%20The%20Regional%20Accreditation%20of%20Western%20Governors%20University.pdf> [https://perma.cc/FGR6-EKYG].

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

academic arena, they had to pursue accreditation.<sup>130</sup> They also hoped that they might effect educational change if they attempted to work within the accreditation system.<sup>131</sup> The process to obtain regional accreditation, however, took so long—seven years—that it is a wonder that the school was able to remain open.<sup>132</sup> By 2000, two years after WGU began accepting applications, the entire University had only two hundred students.<sup>133</sup> As WGU slogged through the bureaucratic accrediting process, many other online universities bypassed the entire system by purchasing bankrupt traditional universities and assuming their accreditation.<sup>134</sup> Although WGU eventually obtained accreditation and has since flourished with over 25,000 students enrolled,<sup>135</sup> as Chip Johnstone, Provost and Academic Vice President of WGU notes, “[i]t will be a rare institution, especially a private one, that can sustain itself throughout the five to eight years that it ordinarily takes to achieve initial regional accreditation. That is the one way in which the regional process most threatens the survival of innovation.”<sup>136</sup>

Of course, in order for the accrediting agencies to have the enormous power they now enjoy over federal dollars, they must have the federal government’s blessing. As Yandle suggested, government regulators often choose the approach that minimizes *their own* costs, regardless of how inefficient that approach might be overall.<sup>137</sup> According to Leef and Burris, a majority in both houses of Congress chose to delegate this power over federal funds to these private accreditors because they “fear[ed] a backlash from the education community if the government set standards for colleges

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130. *Id.*

131. *Id.*

132. *Id.*

133. John Gravois, *The College For-profits should Fear*, WASHINGTON MONTHLY 42 (Sept./Oct. 2011), <https://washingtonmonthly.com/magazine/septoct-2011/the-college-for-profits-should-fear-2/> [<https://perma.cc/VZ8A-B875>].

134. *Id.* See also Golden, *supra* note 67.

135. *Id.* at 44-45. Note that, although Western Governors’ University has the “lowest graduation rate” among private, nonprofit universities, as John Gravois points out, the numbers are very deceptive: “As a matter of policy, the government determines graduation rates by looking only at students who are attending college for the first time and on a full-time basis—in short, the most conventional undergraduates. Like most schools that serve the ‘nontraditional’ demographic, WGU points out that this set of criteria leaves out the vast bulk of its own student body.” See also Lynn O’Shaughnessy, *50 private colleges with best, worst grad rates*, CBS NEWS (Oct. 8, 2012), <https://www.cbsnews.com/news/50-private-colleges-with-best-worst-grad-rates/> [<https://perma.cc/PTK5-KTX5>].

136. Johnstone, *supra* note 123.

137. Yandle, *supra* note 7, at 13.



and universities.”<sup>138</sup> Consistent with Yandle’s theory, legislators chose a system that minimized their own political liability.<sup>139</sup> Originally, the system also minimized costs of enforcement because, under the 1952 Korean War GI Bill, the Commissioner of Education needed only to designate a list of accrediting agencies he determined to be reliable authorities.<sup>140</sup>

As the years have gone by and the failures of the accreditation system have become more and more evident, the costs to the government have changed and, as a result, it has become increasingly involved in regulating these private regulators of higher education.<sup>141</sup> As Gillen, Bennett, and Vedder observe, there was even some discussion prior to the 1992 Reauthorization of the Higher Education Act to sever completely the tie between accreditation and federal funding.<sup>142</sup> Although Congress did not take this tack, it responded with the 1992 Amendments “designed to strengthen the requirements that accrediting agencies would have to meet in order to be recognized by the Department of Education.”<sup>143</sup> Among these Amendments were provisions that required the accrediting agencies “to use certain procedures, including periodic on-site inspections and reviews, well-trained and knowledgeable accreditation teams, and to make public the information on their standards, appeal procedures, and the accreditation status of each institution under its jurisdiction.”<sup>144</sup>

The government’s increasing involvement in accreditation remains consistent with Yandle’s theory.<sup>145</sup> The government, he explained, might begin to change its approach to regulation in response to changes in the

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138. Leef & Burris, *supra* note 42, at 35.

139. See Yandle, *supra* note 7, at 13.

140. See Gillen et al., *supra* note 2, at 4.

141. See Leef & Burris, *supra* note 42, at 10 (“By the early 1990s, default rates on federally guaranteed student loans had reached about \$3 billion annually. Congress searched for a means of reducing those losses, and came to view the accreditation process as contributing to the accountability problem in the student aid programs. In 1992, the Education Department Inspector General testified before the House Education and Labor Committee that, ‘billions of dollars available to students each year through loans and grants are at risk, in part because the recognition process does not assure that the accrediting agencies use appropriate and effective policies to accredit schools.’ Thus, the accrediting associations were assigned the blame, at least in part, for the managerial problems of the federal student loan program.”).

142. Gillen et al., *supra* note 2, at 5.

143. Leef & Burris, *supra* note 42, at 10.

144. *Id.* at 11.

145. Yandle, *supra* note 7, at 13-14.

supply and demand for regulation.<sup>146</sup> Prior to the 1992 Amendments, a high annual rate of default on federally guaranteed student loans and an impression that the accreditation system was partly to blame changed the supply and demand for government oversight over accreditation.<sup>147</sup> The government has progressively increased its oversight of accrediting agencies by requiring the accreditors to fulfill a number of requirements in order for them to be recognized as accrediting agencies by the Department of Education.<sup>148</sup>

The higher education community's response to these heightened requirements further suggests that quality assurance is not foremost in these accreditors' minds. Indeed, on October 29, 2010, the Department of Education promulgated 34 C.F.R. § 600.9—a regulation that laid out minimum requirements that a state must follow in order for it to authorize a post-secondary school.<sup>149</sup> Prior to promulgating this regulation, state authorization was a requirement to receiving federal funds.<sup>150</sup> What licensure actually entailed, however, was left to the discretion of the state.<sup>151</sup> As the Department of Education noted in responding to comments concerning § 600.9, it issued this regulation because of concerns that states were not providing “adequate oversight.”<sup>152</sup> To address these concerns, this regulation would require the states to serve as “an additional check on institutional integrity.”<sup>153</sup> Specifically, the regulation required states to establish a third-party “process to review and appropriately act on complaints concerning the institution including enforcing applicable State laws.”<sup>154</sup> It also conditioned state licensure on the institution's compliance with “any applicable State approval or licensure requirements.”<sup>155</sup> Section

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146. *See id.* at 14-16. To the extent that this new regulatory approach reflects a change in the thinking both of members of Congress and of regulators at the Department of Education, then this change reflects a change in the supply of regulation. But, to the extent that pressure from voters and pro-market higher education reform groups, such as ACTA, have motivated this change in regulatory policy, then this change also reflects a change in the demand for regulation.

147. Leef & Burris, *supra* note 42, at 10.

148. *See Federalizing Accreditation*, *supra* note 92.

149. 34 C.F.R. § 600.9 (2018).

150. 20 U.S.C. § 1001(a)(2) (2012).

151. *Id.* § 1001(a)(5).

152. Program Integrity Issues, 75 Fed. Reg. 66,859 (Oct. 29, 2010) (to be codified at 34 C.F.R. pt. 600, 602, 603, et al.).

153. *Id.* at 66,866.

154. 34 C.F.R. § 600.9 (a)(1) (2018).

155. *Id.* § 600.9 (a)(1)(B).

600.9 did not give the state any new power.<sup>156</sup> Under 20 U.S.C. § 1001(a)(2), the states already had the power to withhold federal funds by refusing to license an institution of higher education.<sup>157</sup> Rather, the regulation defined the “minimum standards” that the state must meet in order to fulfill the duty Congress delegated to the state to authorize institutions eligible to receive federal funds.<sup>158</sup> In effect, because of the accreditors’ consistent failure with respect to quality assurance, the Department of Education appealed to the states to step up and to provide the “additional check on institutional integrity” that the Higher Education Act of 1965 and its subsequent reauthorizations envisioned.<sup>159</sup>

The response from the accreditation community was blistering. Although the regulation gave states no new authority, accreditors were up in arms.<sup>160</sup> Molly Corbett Broad, President of the American Council on Education, wrote a letter on behalf of sixty higher education associations and accrediting organizations to the Department of Education’s Secretary, Arne Duncan, asking the Secretary to rescind § 600.9 in its entirety.<sup>161</sup> In

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156. *Id.* § 600.9.

157. 20 U.S.C. § 1001(a)(2) (2012).

158. Program Integrity Issues, 75 Fed. Reg. at 66,858; 20 U.S.C. § 1001(a)(2) (2012).

159. See Program Integrity Issues, 75 Fed. Reg. at 66,858 (“In accordance with the provisions of the HEA, the Department is establishing minimum standards to determine whether an institution is legally authorized to offer postsecondary education by a State for purposes of Federal programs. The proposed regulations do not seek to regulate what a State must do, but instead considers whether a State authorization is sufficient for an institution that participates, or seeks to participate, in Federal programs.”). See also 20 U.S.C. § 1001(a)(2) (2012).

160. *Clients Lobbying on H.R. 2117: Protecting Academic Freedom in High Education Act*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/bills/sum.php?id=hr2117-112> [https://perma.cc/8SQX-JZRK]. According to OpenSecrets.org, both SACS independently and the American Council on Education (whose President penned letters to the Secretary of Education, the House Committee on Education and the Workforce, and the Senate Committee on Health, Education, Labor, and Pensions on behalf of five of the six regional accrediting agencies) lobbied in support of H.R. 2127 in 112<sup>th</sup> Congress to repeal § 600.9. Note that H.R. 2127 passed the House but died in the Senate. See *Career College Ass’n v. Duncan*, 796 F. Supp. 2d 108 (D.D.C. 2011); *Ass’n of Private Sector Colleges v. Duncan*, 681 F.3d 427 (D.C. Cir. 2012). Note that Association for Private Sector Colleges and Universities brought a lawsuit in the United States District Court for the District of Columbia challenging § 600.9. In a decision that was affirmed by the D.C. Circuit, the court vacated a provision related to state authorization of distance education (§ 600.9 (c)), but left the rest of the regulation untouched.

161. Letter from Molly Corbett Broad, President American Council on Education, to Secretary Arne Duncan, U.S. Department of Education (Mar. 2, 2011) (on file with authors).

similar letters to the House Committee on Education and the Workforce and the Senate Committee on Health, Education, Labor and Pensions, Broad appealed to Congress to take action to expressly repeal these regulations.<sup>162</sup> In particular, she criticized the state authorization provision as “a significant intrusion into prerogatives properly reserved to the states.”<sup>163</sup> Despite Ms. Broad’s rhetorically appealing assertion that § 600.9 removed discretion from the states, the text of the regulation belies her argument. Under § 600.9 (a)–(1)–(i)–(B), a state “*may* exempt the institution from any State approval or licensure requirements based on the institution’s accreditation by one or more accrediting agencies recognized by the Secretary or based upon the institution being in operation for at least 20 years.”<sup>164</sup> The discretion to grant or to deny that exemption, however, rests with the state. Further, although the regulation does require the state to set up a “process to review and appropriately act on complaints concerning the institution including enforcing applicable State laws,”<sup>165</sup> the regulation does not require the state to pass any particular regulations or to establish any particular process.<sup>166</sup> This regulation did not threaten state autonomy—it threatened the accreditors’ supremacy.

While the 1992 Reauthorization of the Higher Education Act had sought to improve quality by instituting controls over the accrediting agencies themselves<sup>167</sup>—controls that, as we have discussed, the accrediting agencies could evade by putting in place vague and meaningless quality standards—this new Department of Education regulation actually threatened the status quo by requiring the state to fill its role as an overseer of quality independent of the accrediting agencies.<sup>168</sup>

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162. Letter from Molly Corbett Broad, President American Council on Education, to the Honorable John Kline and The Honorable George Miller, Chairman and Ranking member – respectively – of the U.S. House Committee on Education and the Workforce (Apr. 26, 2011) (on file with authors); letter from Molly Corbett Broad, President American Council on Education, to the Honorable Tom Harkin and The Honorable Michael B. Enzi, Chairman and Ranking member – respectively – of the U.S. Senate Health, Education, Labor and Pensions Workforce (Apr. 26, 2011) (on file with authors).

163. *Id.*

164. 34 C.F.R. § 600.9 (a)(1)(i)(B) (2018) (emphasis added).

165. *Id.* § 600.9 (a)(1).

166. Department of Education, 75 Fed. Reg. 66,832, 66,858 (Oct. 29, 2010) (to be codified at 34 C.F.R. pts. 600, 602, 603) (“The proposed regulations do not seek to regulate what a State must do, but instead considers whether a State authorization is sufficient for an institution that participates, or seeks to participate, in Federal programs.”).

167. See Leef & Burris, *supra* note 42, at 10.

168. Note that § 600.9 (a)(1)(i)(B) allows a state to “exempt the institution from any

As Judith S. Eaton lamented, § 600.9 “may require that states not only authorize institutions to operate but now also monitor that operation, affecting both public and private institutions, in some cases mirroring accreditation.”<sup>169</sup> Ultimately, this was the fear—that the government had set up an independent system that “mirrored” accreditation, that states could undermine the accreditation cartel if they chose to take a more active role in overseeing higher education. In Broad’s letters to the House and Senate Committees on higher education, she bristled at the thought of “inappropriate state involvement in the academic decision-making of private non-profit institutions, in particular for religiously affiliated institutions.”<sup>170</sup> What Broad left unsaid in this letter—written on behalf of five of the then-six regional accreditors—is that, as SACS’ recent sanctioning of the University of Virginia suggests, “inappropriate involvement in the academic decision-making” had hitherto been the exclusive province of the accrediting agencies. While Broad’s parade of horrors includes concerns about the plight of non-profit religious affiliated institutions, she failed to mention that the accreditors themselves have a long history of *inappropriately* interfering in the prerogatives of non-profit religious institutions. In the early 1990s, for instance, WASC held up the reaccreditation of St. Thomas Aquinas College, an eminent conservative Catholic institution known for its rigorous Great Books program, because it refused to allow accreditors “to single out minority students for a special meeting with the [accrediting] team members in order to address special ‘minority issues.’”<sup>171</sup> The College took this stand because it was its policy, grounded in the intellectual tradition to which the school is so devoted, to deal with students without regard to their race.<sup>172</sup> Although WASC ultimately relented and reaccredited Aquinas in 1993,<sup>173</sup> the incident exemplifies a critical point relative to the concerns

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State approval or licensure requirements based on the institution’s accreditation by one or more accrediting agencies recognized by the Secretary or based upon the institution being in operation for at least 20 years.” The discretion to grant or deny that exemption, however, rests with the state. 34 C.F.R. § 600.9 (a)(1)(i)(B) (2018).

169. See Eaton, *supra* note 92.

170. See Broad, *supra* note 162.

171. Linda Seebach, *Accreditation Standards Threaten Diversity of Opinion on University Campuses*, LOS ANGELES DAILY NEWS (Nov. 4 1993), <http://www.sun-sentinel.com/news/fl-xpm-1993-11-04-9311030493-story.html> [<https://perma.cc/4SS3-4J36>].

172. *Id.* See also M. Ali Raza et al., *The Ups and Downs of Affirmative Action Preferences* 116 (1999).

173. Raza, *supra* note 172, at 116.

that Broad raises in her letters to Congress. The accrediting agencies are not concerned about institutional autonomy. They are not concerned about the plight of non-profit religious institutions of higher learning. They are concerned about state oversight undermining the status quo.

For decades, the accreditors have enjoyed a system by which quality standards have remained low while the costs of complying with these standards have remained high. Competition from an independent state system of oversight threatens in a number of ways the comfortable cartel the accreditors have managed for all of these years. First, if state oversight vastly improves the quality of colleges and universities in an observable manner, Congress could decide to scrap entirely the private accreditation condition for obtaining federal funds, as members of Congress considered doing in 1992.<sup>174</sup> While private accreditation would likely remain, an institution's incentive to seek it would vastly change, as would the accreditors' ability to extract monopoly rents from member institutions.<sup>175</sup> Second, if the states took seriously their role of authorizing institutions of higher education and ensuring educational quality, state licensure could become an independent and meaningful mark of quality for consumers, employers, and other graduate institutions. Thus, schools—such as Christendom College, St. Thomas Aquinas College, and Hillsdale College—that choose not to accept federal funds<sup>176</sup> could forego the costly accreditation process entirely by obtaining an independent stamp of quality assurance from the states in which they operate. This development would again eliminate the accreditors' ability to extract rents from such institutions.

The question remains, however, would a system of strong state involvement in higher education quality assurance be desirable? Going forward, how should Congress reform the system?

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174. Gillen et al., *supra* note 2, at 5.

175. Gillen et al., *supra* note 2, at 31 (“Accreditation would once again be completely voluntary, and because accreditors would no longer have quasi-governmental power, they could no longer essentially force institutions to do what they wished. This would allow colleges to ignore inappropriate recommendations from accreditors.”).

176. *Financial Aid*, THOMAS AQUINAS C., <https://thomasaquinas.edu/admission/financial-aid> [https://perma.cc/V673-HX4W]; *About Federal Funding*, CHRISTENDOM C., <https://www.christendom.edu/admissions/financial-aid/about-federal-funding/> [https://perma.cc/6ZC8-EHLW]; *Quality Education. Affordable Cost.*, HILLSDALE C., <https://www.hillsdale.edu/admissions-aid/financial-aid/> [https://perma.cc/W6UK-BVST].

## V. RECOMMENDATIONS

The current system of higher education quality assurance is broken. In the past, the Department of Education has taken a step toward fixing these issues by encouraging stronger state involvement in quality assurance through its promulgation of § 600.9. We recommend, however, that Congress go a step further by completely severing the tie between eligibility to accept federal funds and higher education accreditation. Congress should fully entrust the job of quality assurance to the states, with state authorization being the only prerequisite for eligibility to receive federal dollars. Such a proposal would likely receive the same kind of backlash that the promulgation of § 600.9 evoked—charges that requiring state authorization would lead to “inappropriate state involvement” in academic decision-making.<sup>177</sup> But, for many reasons, this system would better serve the interests of academic freedom and of quality assurance.

Unlike regional accreditors, state officials are politically accountable.<sup>178</sup> While regional accreditors can make costly demands on colleges and intervene in a university’s decision-making with impunity, state officials are either elected or accountable to someone who is elected. The level of direct accountability would depend, of course, upon the system that the state established. State constitutions or statutes could create an entirely new elected office responsible for authorizing all universities that operate within the state. The individual holding this position would be directly accountable to the people, and his interest in reelection would prevent him from instituting requirements that impinge upon academic or religious freedom or that substantially raise tuition costs.

Although voters are often individually rationally ignorant, collectively they have an incentive to monitor the actions of elected officials for

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177. See, e.g., Letter from Molly Corbett Broad to the Honorable John Kline and The Honorable George Miller, *supra* note 155; Letter from Molly Corbett Broad to the Honorable Tom Harkin and The Honorable Michael B. Enzi, *supra* note 155.

178. Citizens also enjoy the protections of the Bill of Rights with respect to government actors. By contrast, they have very little legal protection from the actions of accrediting agencies. In reviewing the actions of accreditors, courts have held that these bodies which are even more unaccountable than independent government agencies deserve even more deference than federal agencies do. See, e.g., *Thomas M. Cooley Law Sch. v. Am. Bar Ass’n*, 459 F.3d 705, 713 (6th Cir. 2006) (“We emphasize, however, that while principles of federal administrative law provide guidance in our analysis, judicial review of accreditation decisions is more limited than review under the [Administrative Procedure Act.]”).

deviations from what the median voter might want.<sup>179</sup> Higher education is an industry within states. Universities directly employ citizens; most young people attend college after high school;<sup>180</sup> businesses benefit from the influx of out-of-state students who become new customers; and state industries need members of a skilled work force. Because any measures would directly affect so many citizens, voters, on the margin, will determine that the benefits of remaining informed on issues of higher education outweigh its costs. Further, most of the costs of monitoring could be borne by private watchdog groups who sound the alarm when an official does something improper, as PIRGs—the Public Interest Research Groups—currently do. In short, as Yandle might put it, voters’ demand for higher quality and lower cost higher education could incentivize state officials to increase the supply by developing outcome-based methods of assessing an institution’s performance and by encouraging low-cost and innovative new educational programs. Because they are not publicly accountable—elected by traditional universities institutionally opposed to innovation—the accreditors have no incentive to pursue such reforms.

Another force would prevent a state from instituting heavy-handed or unnecessarily costly measures—that is, competition from other states in the markets both for students and for universities. States have an incentive to attract out-of-state students and to persuade in-state students to remain at home. At public universities, these out-of-state students pay substantially higher tuition rates than in-state students do. As Scott Jaschik observes, “the parents who must pay those bills vote in other states, so these tuition dollars are much less politically costly than those gained by raising in-state rates.”<sup>181</sup> Out-of-state students subsidize the tuition of state residents. At the same time, states must compete with the other states for these students. This competition should drive states to pursue measures that lower costs both for in-state and for out-of-state students and that increase the quality of universities within the state so that students will flock to them and, perhaps, decide to remain in the state after graduation, becoming permanent members of the tax base. As members of the Western

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179. See Bruce Bender & John R. Lott, JR., *Legislator Voting and Shirking: A Critical Review of the Literature*, 87 *Public Choice* 67, 73 (1996).

180. *College Enrollment and Work Activity of Recent High School and College Graduates Summary*, BUREAU OF LABOR STATISTICS (Apr. 26, 2018), <https://www.bls.gov/news.release/hsgec.nr0.htm> [<https://perma.cc/X3NU-SBMS>].

181. Scott Jaschik, *Out-of-State Dreams*, INSIDE HIGHER ED (Oct. 16 2009), <https://www.insidehighered.com/news/2009/10/16/out-state-dreams> [<https://perma.cc/AQ5D-2QFZ>].



Governors Association recognized when they considered opening the fully online, competency-based university now known as WGU, states have a strong incentive to keep costs low so that industries within each state will have the skilled work forces needed to make that state's economy grow.<sup>182</sup> Because the state currently *shares* responsibility for quality assurance with unaccountable accreditors, the state has abdicated much of its authority in this arena.

Gillen, Bennett, and Vedder have considered and promptly rejected the idea of a centralized federal agency acting as an accreditor: "Rather than maintaining or encouraging diversity, every institution would be pushed towards a common politically popular vision once a set of universal standards were in place. In other words, an FDA for education 'would represent the ultimate in centralization, standardization and uniformity.'"<sup>183</sup> By contrast, a state-centered approach to quality assurance would also allow the states to experiment with different methods of measuring and of achieving student outcomes. As methods of measuring student success improved, the market for higher education would function better because consumers would have more information available to them on the academic quality of institutions. States could choose to specialize in academic quality, as Delaware has done in the area of corporate law. Such specialization would not only benefit higher education in general, as other states might adopt some of the quality measures the specialist state has developed, but it would also benefit the state which would become known for its quality institutions and which might attract for-profit distance universities looking for a mark of quality.

The market for universities—as states compete to attract new, innovative, and cost-effective means to educate its citizens—would also lower barriers to entry for new, innovative universities. If, for instance, one state imposed requirements on a new online university that were too onerous, that university could look to forty-nine other states for authorization. At the same time, market forces and public accountability would prevent a state from becoming a haven for diploma mills.

Critical to our hypothesis is that voters keep their states accountable—that they demand reform and hold the state to its promises. If they do, the

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182. Johnstone, *supra* note 119.

183. Gillen et al., *supra* note 2, at 34 (quoting Robert C. Dickerson, *Recalibrating The Accreditation-Federal Relationship*, COUNCIL FOR HIGHER EDUC. ACCREDITATION, [https://www.chea.org/sites/default/files/presentations/2009\\_AC\\_Recalibrating\\_the\\_Accreditation-Federal\\_Relationship\\_Dickeson\\_wp.pdf](https://www.chea.org/sites/default/files/presentations/2009_AC_Recalibrating_the_Accreditation-Federal_Relationship_Dickeson_wp.pdf) [<https://perma.cc/GKF8-8DUK>]).

states could spearhead much needed reform in higher education—reform that the accreditors have no incentive to pursue and that states have little incentive to undertake as long as they can pass the blame on to someone else.

## VI. CONCLUSION

The higher education system in this country is broken and, for over half of a century, the accreditation system presently in place has done little but exacerbate the problems. The key to reform is voter education on what the accreditation system is and what it is not. As we have shown throughout this paper, accreditation says *little to nothing* about the academic quality of an institution. Further, the costs associated with obtaining this meaningless mark of approval have contributed to making higher education unobtainable to some students and impractical for others. Although we attempted to provide some suggestions for reform, our intent in this paper was not to provide a “silver bullet” solution for a complicated problem. Ultimately, it was to show that the accreditors—bodies run by the institutions that they govern—do not have the proper incentives to effect meaningful reform. Left to its own device, the state does not have an incentive to effect these reforms either. However, educated and involved voters create the incentive for state officials to act—not in the public interest, but in a way that rationally responds to the demands that voters place upon them.