Fordham Law Review

Volume 82 | Issue 4 Article 7

2014

Mortgaging the American Dream: The Misplaced Role of Accreditation in the Federal Student Loan System

Kathleen Negri

MORTGAGING THE AMERICAN DREAM: THE MISPLACED ROLE OF ACCREDITATION IN THE FEDERAL STUDENT LOAN SYSTEM

*Kathleen Negri**

In 2013, outstanding student loan balances in the United States exceeded $994 billion. This growing volume of student debt has had far-reaching consequences for both individual borrowers and society as a whole. In many ways, the federal student loan program, available to students under the Higher Education Act (HEA), has achieved its goal of making higher education more accessible. Undergraduate college enrollment increased from 10.5 million students in 1980 to 17.6 million students in 2009. Despite the benefit of increased enrollment, however, the federal loan program has been criticized for increasing student loan debt and contributing to the "student loan crisis." This student loan crisis threatens to undermine the purpose of the HEA by making higher education less accessible to Americans.

Higher education institutions must be accredited to be eligible for Title IV federal funding under the HEA. The federal government relies on accreditation to assess the academic quality of the institutions and programs to which it provides federal funding. This federal funding-accreditation relationship, riddled with conflicts of interest, has been ineffective in regulating student loans, contributing to the mounting student loan debt. This Note examines the relationship between the federal student loan system and accrediting bodies through economic theory, ultimately arguing that the HEA be amended to decouple accreditation and federal student loans.

TABLE OF CONTENTS

* J.D. Candidate, 2015, Fordham University School of Law; B.S., 2012, Villanova University. Many thanks to Professor John Pfaff for his guidance during the writing of this Note and to the Villanova School of Business for first teaching me the importance of understanding economics. I am also forever grateful to my family and friends for their endless support and encouragement.

> "Education is the key to opportunity in our society, and equality of educational opportunity must be the birthright of every citizen."[1]

INTRODUCTION

Throughout history, education has been regarded as an integral part of the American dream, an individual's pathway to opportunity and success.[2] When President Lyndon B. Johnson signed the Higher Education Act of 1965[3] (HEA), providing federal financial assistance to postsecondary students, he was hoping to reduce financial barriers and provide equal access to higher education.[4]

Since 1965, however, changing political, social, and economic factors have turned this American dream into American debt. From 2004 to 2012, the number of student borrowers increased 70 percent.[5] In 2013, outstanding student loan balances in the United States exceeded $994 billion.[6] Students, the government, and, ultimately, taxpayers, shoulder the burden of this student loan crisis.[7]

Under the HEA, higher education institutions must be accredited by a recognized accrediting body in order to be eligible for these Title IV federal

1. Presidential Statement Announcing the Calling of a White House Conference on Education, 2 PUB. PAPERS 291 (June 1, 1965).

2. *See generally* Joseph E. Stiglitz, *Student Debt and the Crushing of the American Dream*, N.Y. TIMES (May 12, 2013, 9:09 PM), http://opinionator.blogs.nytimes.com/2013/05/12/student-debt-and-the-crushing-of-the-american-dream/?_php=true&_type=blogs&_r=0.

3. Pub. L. No. 89-329, 79 Stat. 1219 (codified at 20 U.S.C. §§ 1001 to 1161aa-1).

4. *See* Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 505 (2000).

5. *See* DONGHOON LEE, FED. RESERVE BANK OF N.Y., HOUSEHOLD DEBT AND CREDIT: STUDENT DEBT 7 (2013), *available at* http://www.newyorkfed.org/newsevents/mediaadvisory/2013/Lee022813.pdf.

6. RESEARCH & STATISTICS GRP. MICROECONOMIC STUDIES, FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 1 (2013), *available at* http://www.newyorkfed.org/research/national_economy/householdcredit/DistrictReport_Q22013.pdf [hereinafter RESEARCH & STATISTICS GRP.].

7. *See infra* Part I.A.3.

funds, earning accreditation the role of the gatekeeper of federal funds.[8] The rise of the student loan crisis has led to increased scrutiny of the accreditation industry. This federal funding-accreditation relationship, riddled with conflicts of interest, has been ineffective in regulating student loans, contributing to the mounting student loan debt.[9]

This Note examines the relationship between the federal student loan program and accrediting bodies through economic theory. Part I of this Note describes the institutional frameworks of the federal funding and accreditation industries and how these two mismatched programs interact.[10] Part II of this Note introduces two economic concepts at the core of the dilemma: agency theory and principles of valuation.[11] Part III discusses the relationship between federal funding and accreditation through the lens of agency theory, revealing the conflicting incentives of the government and accreditors.[12] Part III also considers proposed solutions to the principal-agent problem, including decoupling the accreditation and federal student loan programs.[13] Finally, Part IV of this Note discusses the failure of government regulation of accreditation, in part because these regulations require a definition of "quality" education.[14] Part IV concludes that decoupling accreditation and federal student loans is therefore a necessary step to the solvency and survival of the federal student loan program.[15]

I. BACKGROUND ON THE STUDENT LOAN CRISIS

Part I of this Note discusses the background and institutional frameworks that have led to the current student loan crisis. Part I.A discusses the federal student loan system and the impact of rising levels of student loan debt on individual borrowers and the U.S. economy. Part I.B then discusses the structure of the accreditation industry and this industry's role as a gatekeeper for federal student loans.

A. The Rise of Student Loans

In recent years, an increasing number of Americans have turned to student loans to finance higher education.[16] The level of student loan debt nearly tripled between 2004 and 2012.[17] As of June 30, 2013, outstanding student loan balances in the United States reached a historical high of $994 billion.[18] This growing debt volume, coupled with increasing delinquency

8. *See infra* Part I.B.
9. *See infra* Part III.A–B.
10. *See infra* Part I.
11. *See infra* Part II.
12. *See infra* Part III.
13. *See infra* Part III.
14. *See infra* Part IV.
15. *See infra* Part IV.
16. *See* LEE, *supra* note 5, at 2.
17. *Id.* at 9.
18. *See* RESEARCH & STATISTICS GRP., *supra* note 6.

rates, has led to a debate about how to manage—and potentially reform—student loan programs.

This section first discusses how federal student loan programs operate. It then briefly reviews the private market for student loans. Finally, it addresses the student loan crisis and the effect this mounting debt has on both individual student borrowers and the national economy.

1. Federal Student Loan Programs

Students seeking to finance higher education through loans can look to either government programs or private lenders, but government loans dominate the student loan market.[19] The HEA, enacted in 1965 to increase access to higher education for all Americans, created the current federal student loan system.[20] This section discusses (a) the structure of the federal loan system and (b) the institutional eligibility rules that regulate which higher education institutions can receive this federal funding.

a. The Structure of Federal Loan Programs

When the HEA was initially enacted in 1965, Title IV provided for fixed-interest, government-subsidized loans, that were issued through banking institutions and backed by the full faith and credit of the U.S. government.[21] The HEA has been reauthorized nine times since its inception—most recently in 2008—and is set for renewal in 2014.[22]

In 2010, the Student Aid and Fiscal Responsibility Act (SAFRA), part of the Health Care and Education Reconciliation Act, restructured the federal student loan program.[23] Under this new structure, the government is now the sole originator of Title IV federal student loans, eliminating the middleman role of banks in the loan process.[24] The current federal student loan regime promotes access to higher education by providing better loan

---

19. *See infra* Part I.A.2 (discussing the private loan market).

20. *See* Roots, *supra* note 4, at 504–05 (noting that while loans were offered as early as 1958, the HEA created the modern federal loan system); *see also* Matthew A. McGuire, Note, *Subprime Education: For-Profit Colleges and the Problem with Title IV Federal Student Aid*, 62 DUKE L.J. 119, 140 (2012).

21. *See* William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. ECON. & POL'Y 485, 495 (2011).

22. *See What You Need To Know About Reauthorization*, CHRON. HIGHER EDUC. (Sept. 19, 2013), http://chronicle.com/article/What-You-Need-to-Know-About/141697/. The 2008 reauthorization of the HEA was called the Higher Education Opportunity Act ("HEOA"). *See Higher Education Opportunity Act—2008*, U.S. DEP'T EDUC. (June 25, 2010), http://www2.ed.gov/policy/highered/leg/hea08/index.html. For the purposes of this Note, HEA refers to the Higher Education Act as amended.

23. Student Aid and Fiscal Responsibility Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

24. *See* Howard, *supra* note 21, at 485. Before SAFRA, the government used banking institutions as middlemen and would subsidize and guarantee the loans these banks issued. *Id.* The Department of Education seeks to save $68 billion dollars over the next eleven years by eliminating the middleman banks. *See* Statement by President Barack Obama Upon Signing H.R.4872 (Mar. 30, 2010), 2010 U.S.C.C.A.N. S12, S15.

terms than students would receive in the private loan market.[25] Loans are issued as part of the Federal Direct Loan Program and the Federal Perkins Loan Program.[26]

Under the Direct Loan Program, the U.S. Department of Education (USDE) issues loans directly to higher education institutions that borrowers attend.[27] There are two major sources of direct loans: Stafford Loans and Parents Loans for Undergraduates (PLUS).[28]

There are three types of Stafford Loans available to students. First, unsubsidized Stafford Loans are available for undergraduate and graduate students.[29] Second, subsidized Stafford Loans are available for undergraduate students who can demonstrate financial need.[30] These subsidized loans have lower borrowing limits and interest rates are set at a spread above the ten-year Treasury note rate.[31] Third, graduate Stafford Loans have a higher borrowing limit with interest rates slightly higher than the undergraduate subsidized Stafford Loan.[32]

The second category of Direct Loans is the PLUS Loan.[33] Parents of undergraduates can borrow up to the cost of student attendance—including tuition, housing, and expenses—through a PLUS Loan.[34] Interest rates are higher for PLUS Loans, and parents must pass a credit check to qualify.[35] Graduate PLUS Loans are available for graduate students who exhaust their financing options under Stafford Loans.[36]

In addition to Stafford and PLUS Direct Loans, the government operates the Perkins Loan Program. While the government lends money under direct loans, schools are the lenders for Perkins Loans.[37] The government provides schools with a level of funding, which participating schools must

25. *See Federal Student Loan Programs—Overview*, NEW AM. FOUND. (Oct. 18, 2013 4:47 PM), http://febp.newamerica.net/background-analysis/federal-student-loan-programs-overview.

26. *See Federal Student Loan Programs*, U.S. DEP'T EDUC. (June 2013), http://studentaid.ed.gov/sites/default/files/federal-loan-programs.pdf.

27. *See id.* Though the government issues loans directly under this program, the government hires private companies to process disbursements and loan repayments. *See Loan Servicers*, U.S. DEP'T EDUC., http://studentaid.ed.gov/repay-loans/understand/servicers#who-is-my-loan-servicer (last visited Feb. 24, 2014).

28. *See Federal Student Loan Programs—Overview*, *supra* note 25. In addition to Stafford and PLUS Loans, the government offers Direct Consolidation Loans that allow borrowers to consolidate multiple federal loans into a single loan with a single interest rate. *Id.*

29. *See Federal Student Loan Programs—Overview*, *supra* note 25.

30. *See id.* The amount a student can borrow for subsidized Stafford Loans depends on the student's classification as "dependent" or "independent." *Id.* Independent students are those who: are over 24 years old; have served in the military; are married; have legal dependents; were an orphan until eighteen years old; or have unusual circumstances. *Id.* These independent students have higher borrowing limits. *Id.*

31. *See id.*

32. *See id.*

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.*

37. *See Federal Student Loan Programs*, *supra* note 26.

match and loan to students.[38] This program provides low-interest loans for students with "exceptional financial need."[39]

Students borrowing through the Direct Loan or Perkins Program have several repayment options. The standard repayment scheme is a ten-year, monthly repayment plan.[40] Students have the option of extending their repayment schedules if they have higher student loan balances.[41] For those borrowers who exceed a certain debt-to-income ratio, SAFRA introduced income-based repayment, which sets monthly payments at 10 percent of income and forgives unpaid loans after between twenty and twenty-five years (depending on the type of loan).[42]

b. Institutional Eligibility Rules

Students are given access to the federal student loan programs described above with few prerequisites. Loans are available to students who typically have "little or no credit or employment history" without regard for field of study or academic performance.[43] While some programs require a showing of financial need, these programs exist to make loans readily available and to encourage financing of higher education.[44] Instead of assessing students' ability to repay loans, the USDE attempts to regulate the higher education institutions that receive the Title IV funding.[45]

There are two major requirements for all higher education institutions and additional requirements for for-profit institutions. First, higher education institutions must be accredited by a USDE-recognized accrediting body to receive Title IV funding.[46] Second, the higher education institution cannot have an unacceptably high cohort default rate on existing Title IV loans.[47]

For-profit institutions are subject to additional requirements, because these schools are criticized for having a higher percentage of students relying on government loans and defaulting on these loans.[48] The 90/10

---

38. *See Federal Student Loan Programs—Overview*, *supra* note 25.

39. *See Perkins Loans*, U.S. DEP'T EDUC., http://studentaid.ed.gov/types/loans/perkins (last visited Feb. 24, 2014).

40. *See Federal Student Loan Programs—Overview*, *supra* note 25.

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See* McGuire, *supra* note 20, at 145–49 (discussing institutional eligibility rules including cohort default rates and the "90/10 rule").

46. *See infra* Part I.B (discussing the accreditation process).

47. *See* 34 C.F.R. § 668.206 (2013). A cohort default rate measures the number of students who default on student loans during a particular period compared to the number of students who began repayment during that period. *See id.* § 668.183 (defining and specifying how institutions are to calculate cohort default rates). Borrowers are in default if they are 270 to 360 days behind payment within the first three years of repayment, depending on the type of loan. *See id.*

48. For an evaluation of the for-profit education industry, see generally DANIEL L. BENNETT, ADAM R. LUCCHESI & RICHARD K. VEDDER, CTR. FOR COLL. AFFORDABILITY & PRODUCTIVITY, FOR-PROFIT HIGHER EDUCATION: GROWTH, INNOVATION AND REGULATION

rule requires for-profit institutions to receive at least 10 percent of their revenue from non–Title IV sources.[49] Additionally, these schools must offer programs that prepare students for "gainful employment in a recognized occupation."[50]

In 2011, the USDE proposed additional institutional eligibility requirements that would revise the definition of "gainful employment."[51] The USDE promulgated regulations redefining gainful employment standards based on student outcomes, including loan repayment and debt-to-earnings ratios.[52] The D.C. Circuit held these rules to be arbitrary and capricious.[53] As of the publication of this Note, the USDE is redrafting similar rules.[54]

2. The Private Loan Market

Though federal student loans are the primary form of student aid, students can also obtain private loans from banking institutions.[55] There are an estimated $150 billion of private student loans outstanding, approximately one-fifth of the federal loan volume.[56] Prior to the 2008

(2010), *available at* http://www.centerforcollegeaffordability.org/uploads/ForProfit_HigherEd.pdf. Critics of the for-profit industry argue that these institutions encourage "higher debt burdens and default rates." *See* Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 441 (2012). Supporters, on the other hand, argue that for-profit institutions offer "innovative practices" that could benefit higher education. *See* Ben Wildavsky, *For-Profit Lessons for All*, INSIDE HIGHER ED (Mar. 1, 2012), http://www.insidehighered.com/views/2012/03/01/essay-what-nonprofit-higher-ed-can-learn-profit-sector. This Note addresses for-profit and nonprofit educational institutions alike.

49. *See* Braucher, *supra* note 48, at 455–56.

50. 20 U.S.C. § 1002(b)(1)(A) (2012). These institutional eligibility requirements are meant to ensure that students receiving federal loans attend quality institutions that prepare these students for careers and allow them to repay their loans; however, the efficacy of these requirements is often questioned. For example, cohort default rate rules are often criticized for being inaccurate because the default rate focuses on a narrow timeframe. *See* McGuire, *supra* note 20, at 145–46 ("[The] calculations are far too narrow to have any impact . . . ."). Additionally, almost half of student loans are in grace periods or deferment, and are therefore not included in cohort default rates. *See* RESEARCH & STATISTICS GRP., *supra* note 6, at 1 n.2. Similarly, the 90/10 rule is easily satisfied because other forms of federal funding are calculated as part of the 10 percent, including veterans loans and training grants. *See* Braucher, *supra* note 48, at 455–56. This Note focuses on the ineffectiveness of accreditation as a gatekeeper to federal loans. *See infra* Part I.B.

51. *See* McGuire, *supra* note 20, at 127–28.

52. *See id.*

53. *See* Ass'n of Private Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 137 (D.C. Cir. 2012).

54. *See Negotiated Rulemaking 2013–2014—Gainful Employment*, U.S. DEP'T EDUC. (Dec. 16, 2013), http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/gainfulemployment.html (discussing the scheduling of negotiated rulemaking sessions to resume discussions of the proposed gainful employment rules).

55. This Note focuses on federal loan programs; however, the private student loan market supplements the public market. For a more in-depth discussion of the private loan market, see CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS (2012), *available at* http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf.

56. *Id.* at 3.

financial crisis, this private market was highly unregulated.[57] Private loans are riskier for students as they tend to have higher variable interest rates and lack repayment flexibility.[58] Financial institutions packaged and sold Student Loan Asset-Backed Securities (SLABS), similar to mortgage-backed securities, without supervision.[59]

The Dodd-Frank Wall Street and Consumer Protection Act[60] (Dodd-Frank) began a new era of regulation of the private student loan market in response to the packaging of these SLABS.[61] Dodd-Frank tightened lending standards for banks.[62] These banks, finding it more difficult to sell student loans in this regulated market, are offering fewer loans or exiting the student loan market entirely.[63]

3. The Student Loan Crisis

The federal student loan program has, in many ways, achieved its goal of making higher education more accessible. Undergraduate college enrollment increased from 10.5 million students in 1980 to 17.6 million students in 2009.[64] Many argue that this increased enrollment benefited American society by creating a more qualified, higher-paid workforce, ultimately improving the quality of life.[65]

Despite the benefits of the federal loan system, the program has been criticized for increasing student loan debt and contributing to the "student loan crisis."[66] Student loan debt—the only category of household debt that

---

57. *See id.* at 28.

58. *See id.* at 3.

59. *See id.* at 17–18, 22–23.

60. Pub. L. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 7, 12, 15, 18, 22, 31, and 42 U.S.C.).

61. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 55, at 68.

62. *See id.* at 3–4.

63. *See, e.g.*, Dan Fitzpatrick & Robin Sidel, *J.P. Morgan To End Student-Loan Business*, WALL ST. J. (Sept. 5, 2013, 7:51 PM), http://online.wsj.com/news/articles/SB10001424127887323623304579057091084420988 (discussing J.P. Morgan Chase's departure from the student loan business).

64. Christopher Avery & Sarah Turner, *Student Loans: Do College Students Borrow Too Much—Or Not Enough?*, 26 J. ECON. PERSP. 165, 167 (2012).

65. *See* C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79, 101 (2007) (noting that federal loans allow millions of Americans to "enjoy a quality of life that would have been impossible without an education"); Bradley J.B. Toben & Carolyn P. Osolinik, *Nonprofit Student Lenders and Risk Retention: How the Dodd-Frank Act Threatens Students' Access to Higher Education and the Viability of Nonprofit Student Lenders*, 64 BAYLOR L. REV. 158, 165–66 (2012) (discussing the benefits of postsecondary education, including reduced reliance on public assistance, healthier lifestyles, and reduced crime rates). This increased quality of life is often measured by the income premium that higher education graduates earn. *See generally* ANTHONY P. CARNEVALE ET AL., GEORGETOWN UNIV. CTR. ON EDUC. AND THE WORKFORCE, THE COLLEGE PAYOFF: EDUCATION, OCCUPATIONS, LIFETIME EARNINGS (2011), *available at* http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/collegepayoff-complete.pdf (concluding that workers with bachelor's degrees on average earn 84 percent more over a lifetime than those with only high school diplomas).

66. There is significant debate about whether the exponential increase in student loan debt has fueled a higher education "bubble." *Compare* Michael C. Macchiarola & Arun

rose during the Great Recession—is second in volume only to mortgage debt.[67] The number of borrowers and the average balance per borrower each increased 70 percent between 2004 and 2012.[68]

This high volume of lending propels an increase in tuition costs, furthering the need for student loans in an unending cycle.[69] Schools, knowing that the government will continue to fund student loans, raise tuition to "capture the federal money in circulation."[70] Many criticize the federal student loan program for contributing to the problem that it seeks to solve: the unaffordability of higher education.[71]

The high volume of student debt and the federal student loan system have far-reaching consequences for both individual borrowers and society as a whole. The program has resulted in (1) high default rates on loans, (2) reduced mobility of students after graduation, and (3) a hindrance of economic growth.

First, default rates have risen with the level of student debt.[72] Students defaulting on loans are faced with substantial fees and may have their wages garnished.[73] Defaults on student loans tarnish a borrower's credit score, lowering the student's ability to purchase a home or car in the

Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal To Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL'Y 67, 67 (2010) (arguing that the student loan markets are showing the "hallmarks of a bubble"), *and* Andrew Woodman, *The Student Loan Bubble: How the Mortgage Crisis Can Inform the Bankruptcy Courts*, 6 ALB. GOV'T L. REV. 179, 186–91 (2013) (describing the creation of the student loan bubble), *with* Christopher Matthews, *Stop Calling Student Loans a "Bubble"!*, TIME (Mar. 7, 2013), http://business.time.com/2013/03/07/viewpoint-stop-calling-student-loans-a-bubble/ (accusing Americans of having "[b]ubble-phobia"), *and* Jordan Weissman, *No, the Student Loan Crisis Is Not a Bubble*, ATLANTIC (Sept. 6, 2013 10:28 AM), http://www.theatlantic.com/business/archive/2013/09/no-the-student-loan-crisis-is-not-a-bubble/279398/ ("[I]t's not helpful to think of student lending . . . in terms of bubbles at all."). For the purposes of this Note, the rise in student debt is referred to only as a student loan "crisis."

67. *See* LEE, *supra* note 5, at 5.

68. *Id.* at 9.

69. *See* Roots, *supra* note 4, at 506–08 (discussing federal aid as a factor contributing to rising tuition).

70. *Id.*

71. William Bennett, the secretary of education during the Reagan Administration, developed the theory that financial aid encourages colleges to raise tuition, now known as the "Bennett Theory." *See* William J. Bennett, *Our Greedy Colleges*, N.Y. TIMES, Feb. 18, 1987, at A31 ("[I]ncreases in financial aid . . . have enabled colleges and universities blithely to raise their tuitions, confident that Federal loan subsidies would help cushion the increase."); *see also* Macchiarola & Abraham, *supra* note 66, at 71 ("[G]overnment efforts at 'access' have spurred a dramatic increase in the cost of education."); Stephanie Riegg Cellini & Claudia Goldin, *Does Federal Student Aid Raise Tuition? New Evidence on For-Profit Colleges* 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 17827, 2012) (finding that for-profit institutions with Title IV funding have higher tuitions, and Title IV–funded programs within institutions have higher tuitions than programs within the same institution that are not funded by Title IV).

72. The national cohort default rate steadily increased from 6.7 percent in 2007 to 10 percent in 2011. *See Federal Student Loan Default Rates*, NEW AM. FOUND. (Nov. 21, 2013, 9:46 PM), http://febp.newamerica.net/background-analysis/federal-student-loan-default-rates.

73. *See* Braucher, *supra* note 48, at 476.

future.[74] The government and taxpayers ultimately bear the burden of this default both because the government is not repaid and because defaulting borrowers are more reliant on public assistance in the future.[75]

Second, even if students do not default on their federal loans, high levels of indebtedness reduce students' mobility after graduation.[76] Students who chose higher education to expand their opportunities are finding themselves with limited options.[77] Those with high debt burdens must seek employment that compensates them to repay their debts, deterring them from less lucrative careers.[78] There is also a concern that this debt crisis is increasing income disparities, creating a "two-tiered" education system that distinguishes between those with loans and those without loans.[79]

Finally, the student loan crisis could hinder the growth of the U.S. economy.[80] Students and families burdened with high levels of student loan debt may refrain from investing in homes, taking out loans for businesses, or purchasing other consumer goods.[81] Reduced levels of consumption and investment slow economic growth, particularly as the economy continues to recover from the Great Recession.[82]

The student loan crisis ultimately threatens to undermine the purpose of the HEA by making higher education less accessible to Americans. Students are faced with higher tuition costs and mounting debt, which leads to default, immobility, and stagnant economic growth.[83] The government similarly increases its debt burdens as the number of loan defaults rises.[84] These effects of a student loan debt crisis have sparked debate about if, and

---

74. *See id.* (citing Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386, 34,387 (June 13, 2011) (to be codified at 34 C.F.R. pt. 668)); *see also* Anne Marie Chaker, *Students Borrow More Than Ever for College*, WALL ST. J., Sept. 3, 2009, at D1 (reporting that, in a 2006 survey of 1,508 college graduates under age thirty-five, student loans forced 44 percent of those graduates to postpone purchasing a house and 28 percent to delay having children). Student loans have these long-term effects in part because they are not dischargeable in bankruptcy absent a showing of undue hardship, an incredibly high standard that few students can meet. *See* Braucher, *supra* note 48, at 473 (noting that the undue hardship standard is a "life sentence").

75. *See* Roots, *supra* note 4, at 509–10 ("[S]tudent loan defaults cost the U.S. Treasury billions of dollars per year."); *see also* Woodman, *supra* note 66, at 181 (describing the Treasury as "provid[ing] a backstop in the case of default").

76. *See* Roots, *supra* note 4, at 521–22 (discussing postgraduate limitations).

77. *See id.*

78. *See id.*; *see also* Clive R. Belfield, *Student Loans and Repayment Rates: The Role of For-Profit Colleges*, 54 RES. HIGHER EDUC. 1, 2 (2013) (discussing how debt influences labor market decisions).

79. *See* Roots, *supra* note 4, at 524–26; *see also* Belfield, *supra* note 78, at 3 (noting that debt burdens and default rates are higher among minorities).

80. *See* Stiglitz, *supra* note 2 ("Student debt also is a drag on the slow [economic] recovery that began in 2009.").

81. *See id.*

82. *See id.*

83. *See supra* notes 72–82 and accompanying text.

84. *See supra* note 75 and accompanying text.

how, the federal student loan program should be reformed to reduce student debt.[85]

B. Accreditation: The Gatekeeper to Federal Funds

As discussed in Part I.A, federal student loans are available to students who attend higher education institutions that meet a number of institutional eligibility requirements.[86] One of these requirements is that these institutions be accredited by a USDE-recognized accrediting body, earning accreditors the title of the gatekeeper to federal funds.[87] Part I.B discusses: (1) the structure of the accreditation industry; (2) the process of accreditation; (3) the role accreditation plays in the distribution of federal funds; and (4) the regulation of the accreditation industry.

1. The Structure of the Accreditation Industry

Despite the important role accreditation plays as an enforcer of academic quality and a gatekeeper to federal funds, the American public does not understand the accreditation industry.[88] This section evaluates both the purpose of this "obscure and opaque" industry[89] and the key players in the industry.

a. The Purposes of Accreditation

Modern accreditation began in the late-nineteenth century with the formation of the New England Association of Schools and the Middle States Association of Colleges.[90] Academics formed these organizations to

---

85. The debate and speculation about the student loan debt crisis largely arose in the wake of the Great Recession. Some believe that the mortgage crisis of 2008 and the student loan crisis are similar. For an extensive comparison of the student debt crisis and the mortgage bubble, see generally Braucher, *supra* note 48, Woodman, *supra* note 66, and McGuire, *supra* note 20. Despite these similarities, there is still debate about whether the student debt crisis poses a similar risk to the economy as the mortgage crisis did before the Great Recession. *Compare* Antony Davies & James R. Harrigan, *Why the Education Bubble Will Be Worse Than the Housing Bubble*, U.S. NEWS & WORLD REP. (June 12, 2012), http://www.usnews.com/opinion/blogs/economic-intelligence/2012/06/12/the-government-shouldnt-subsidize-higher-education (arguing that harsh bankruptcy standards and the inability to resell an education make student loans more threatening than mortgages), *with* Jeff Macke, *Student Loans Are a Societal Problem, Not an Economic Threat*, YAHOO FIN. (Sept. 10, 2013 9:29 AM), http://finance.yahoo.com/blogs/breakout/student-loans-societal-problem-not-economic-threat-economist-132904880.html (arguing that there is "minimal systemic risk" associated with student debt).

86. *See supra* notes 43–54 and accompanying text.

87. *See infra* Part I.B.3.

88. Charles Powell, *Accreditation, Assessment, and Compliance: Addressing the Cyclical Challenges of Public Confidence in American Education*, 3 J. ASSESSMENT & INSTITUTIONAL EFFECTIVENESS 54, 55 (2013).

89. *Id.* at 62.

90. *See* HANK BROWN, AM. ENTER. INST., CTR. ON HIGHER EDUC. REFORM, PROTECTING STUDENTS AND TAXPAYERS: THE FEDERAL GOVERNMENT'S FAILED REGULATORY APPROACH AND STEPS FOR REFORM 2 (2013), http://www.goacta.org/images/download/protecting_students_and_taxpayers_report.pdf.

define the bachelor's degree and to encourage best practices among colleges.[91]

Today, higher education institutions voluntarily[92] engage in the accreditation process, which remains a "nongovernmental, self-regulatory, peer review system."[93] This peer-review system encompasses both quality assurance and quality improvement.[94] Accreditors assure quality by setting universal standards that all institutions must achieve, and improve quality by working with institutions to develop processes to better their educational standards.[95] Quality assurance and quality improvement reflect "the core values of [American academia]: peer review, the centrality of [institutional] mission, institutional autonomy, and academic freedom."[96] Accrediting agencies judge academic quality based on a school's ability to fulfill its institutional mission, acknowledging the diversity of these institutions' goals.[97]

The modern accreditation industry serves four main purposes. First, accrediting agencies assist institutions with self-analysis and self-improvement.[98] Second, they engender public confidence by signaling to students that an institution has a "seal of approval" and meets certain standards.[99] Third, accreditation creates a level of uniformity among higher education institutions, enabling students to transfer between schools.[100] Finally, and most importantly for the purposes of this Note, accreditation determines an institution's eligibility for federal funding.[101]

---

91. *See id.*

92. Though accreditation is considered a "voluntary" process, students who attend unaccredited institutions are ineligible for federal student loans and grants. *See infra* Part I.B.3; *see also* LINDSEY M. BURKE & STUART M. BUTLER, HERITAGE FOUND., ACCREDITATION: REMOVING THE BARRIER TO HIGHER EDUCATION REFORM 8 (2012), *available at* http://files.eric.ed.gov/fulltext/ED535877.pdf (discussing how accreditation has become a "de facto requirement" for institutions). Because federal student aid and subsidies have become an "increasingly large share" of institutions' budgets, institutions have little choice but to seek accreditation. *See id.* at 11.

93. Barbara Brittingham, *Accreditation in the United States: How Did We Get to Where We Are?*, 2009 NEW DIRECTIONS FOR HIGHER EDUC. 7, 10; *see also What Is Accreditation?*, ADVANCED, http://www.advanc-ed.org/what-accreditation (last visited Feb. 24, 2014).

94. *See* JUDITH S. EATON, COUNCIL FOR HIGHER EDUC. ACCREDITATION, AN OVERVIEW OF U.S. ACCREDITATION 9 (2012), *available at* http://www.chea.org/pdf/Overview%20of%20US%20Accreditation%202012.pdf.

95. *See* JUDITH S. EATON, COUNCIL FOR HIGHER EDUC. ACCREDITATION, ACCREDITATION AND RECOGNITION IN THE UNITED STATES 2 (2012), *available at* http://www.chea.org/pdf/AccredRecogUS_2012.pdf.

96. *See* Judith S. Eaton, *The Future of Accreditation*, 40 PLANNING FOR HIGHER EDUC. 8, 9 (2012).

97. *See* EATON, *supra* note 94, at 3.

98. *See* BROWN, *supra* note 90, at 1.

99. *Id.* at 5.

100. *See id.* at 1.

101. *See id.* ("[S]ince federal funding is the lifeblood of most higher education institutions, accreditation determines whether a school can remain financially viable."); *see also infra* Part I.B.3 (discussing the connection between federal funding and accreditation).

b. The Players in Accreditation

There are several key players in the accreditation process: the educational institutions, accrediting organizations, recognition bodies, and the government.[102]

Higher education institutions create, fund, and participate in accrediting organizations.[103] Accrediting organizations review and accredit educational institutions and programs.[104] Institutions and programs in turn pay annual dues once they are accredited and fees for accreditation visits.[105] Accreditation is a peer-review process wherein educators evaluate each other and are primarily responsible for setting the industry's academic standards; therefore, accrediting organizations are products of and "derive their legitimacy" from higher education as opposed to the government.[106]

Accrediting agencies are private, nongovernmental, nonprofit organizations responsible for running the "decentralized and complex" accreditation process.[107] There are four general categories of accrediting agencies in the United States: (1) regional accreditors, which review institutions in a geographical region of the United States;[108] (2) national faith-related accreditors, which review religiously affiliated and doctrinally based institutions; (3) national career-related accreditors, which review "single-purpose institutions"; and (4) programmatic accreditors, which review specific programs and professions (e.g., law and medicine).[109] The Council for Higher Education Accreditation (CHEA), a private organization, coordinates the broad range of accrediting agencies.[110]

The USDE asserts control by reviewing and regulating these accrediting organizations.[111] The government engages in a process known as recognition to determine which accrediting agencies are reliable judges of

---

102. *See* EATON, *supra* note 95, at 3.

103. *See id.* at 4.

104. *See id.* at 3–4.

105. *See id.* at 7.

106. *See* EATON, *supra* note 94, at 2; *see also* Jon F. Wergin, *Five Essential Tensions in Accreditation*, *in* INQUIRY, EVIDENCE, AND EXCELLENCE: THE PROMISE AND PRACTICE OF QUALITY ASSURANCE 27, 27 (Mark LaCelle-Peterson & Diana Rigden eds., 2012) ("Unlike virtually every other country, public accountability for quality [in the United States] is not a function of government agency but of peer review.").

107. EATON, *supra* note 94, at 1.

108. There are six USDE-recognized regional accreditors in the United States that "form the heart of accreditation in America." *See* BROWN, *supra* note 90, at 2. Regional accreditation is viewed as a more traditional path for institutions, and regional accreditors are often considered to be more reliable authorities. *See* Doug Lederman, *Tussling Over Transfer of Credit*, INSIDE HIGHER ED (Feb. 26, 2007), http://www.insidehighered.com/news/2007/02/26/transfer (discussing how some schools reject academic transfer credits from nationally, but not regionally accredited colleges).

109. *See* EATON, *supra* note 94, at 2; *see also* Powell, *supra* note 88, at 65–66 (discussing the different scopes of regional versus national accreditors and institutional versus programmatic accreditors).

110. *See* EATON, *supra* note 94, at 6.

111. *See id.* at 5. CHEA also coordinates accrediting activity in the United States and recognizes institutions. *See id.* For a more extensive discussion of recognition, see *infra* Part I.B.4.

quality.[112] As of December 2011, there were seven USDE-recognized regional accreditors, four national faith-related accreditors, seven national career-related accreditors, and thirty-six programmatic accreditors.[113]

The USDE and the secretary of education are responsible for promulgating rules under the HEA to regulate these recognized accrediting agencies.[114] The USDE also appoints members to the National Advisory Committee on Institutional Quality and Integrity (NACIQI).[115] NACIQI is responsible for advising the secretary and helping to generate the standards for recognition.[116]

2. The Process of Accreditation

Higher education institutions may seek two different types of accreditation: institutional accreditation and/or programmatic or specialized accreditation.[117] When a school receives institutional accreditation, this seal of approval applies to the entire college or university and necessarily includes all programs and courses offered at that school.[118] Programmatic or specialized accreditation, on the other hand, applies to particular departments, schools, or programs within a university.[119]

The process of accreditation is similar for both institutional and programmatic accreditation. Institutions are first required to engage in "self-study."[120] During the self-study phase, the institution evaluates its own performance based on the accrediting agency's standards and submits a written summary to the agency.[121] The agency then begins a peer-review process during which faculty and academic administrators review the institution's self-study results.[122]

Next, the accrediting agency sends a team to the institution for a site visit.[123] This team may include public, nonacademic members with an interest in higher education.[124] Finally, a decisionmaking commission of

---

112. *See* BURKE & BUTLER, *supra* note 92, at 5.

113. *See* EATON, *supra* note 95, at 4, 25. There are additional accrediting agencies that have been recognized by the CHEA, but not the USDE. *See infra* Part I.B.4.

114. *See* BURKE & BUTLER, *supra* note 92, at 5–6.

115. *See id.*

116. *See* 20 U.S.C. § 1011c(c)(1) (2012); *see also infra* Part I.B.4 (discussing the role of NACIQI).

117. *See* BURKE & BUTLER, *supra* note 92, at 6–7.

118. *See id.*

119. *See id.* Institutions seeking programmatic accreditation of a particular program, department, or school often already have institutional accreditation. *See id.* These institutions may seek additional programmatic accreditation as a "quality control measure for specific programs or departments" or to make their graduates eligible for credentialing examinations. *Id.*; *see also Accreditation in the U.S.*, U.S. DEP'T EDUC. (Jan. 16, 2014), http://www2.ed.gov/admins/finaid/accred/accreditation.html.

120. *See* EATON, *supra* note 94, at 4.

121. *See id.*

122. *See id.*

123. *See id.*

124. *See id.* at 5.

the accrediting agency reviews the results of the studies, visits, and determines if an institution is worthy of accreditation.[125]

Each accrediting agency creates its own guidelines for accreditation; however, the regional accrediting agencies focus on similar qualities in the institutions they review. For example, the Middle States Commission on Higher Education, a USDE-recognized accrediting body, requires its evaluators to consider the totality of the circumstances in reviewing an institution's credentials.[126] Evaluators assess institutional resources (both human and financial), leadership and governance, and administration as part of the self-study.[127] Each of these standards is interpreted in the "context of the institution's mission and situation."[128] Similarly, evaluators consider student admissions, student support services, faculty, and educational offerings to determine if these programs and services further this mission.[129]

After evaluating the institution based on the agency's standards, the agency determines if an institution should be granted or denied accreditation.[130] The accrediting agency continues to monitor and periodically review those institutions that receive accreditation.[131] If an accrediting agency decides to revoke accreditation at any time, the institution has a right of appeal under the HEA.[132]

3. Accreditation and Federal Funding

As discussed in Part I.B.1 of this Note, higher education institutions have relied on accreditation to ensure academic quality and earn public trust since the nineteenth century;[133] however, in the last sixty years, accreditation has taken on a new role by providing access to billions of dollars of federal funds.[134] Higher education institutions must be accredited by a USDE-recognized accrediting body to be eligible for Title IV federal funding under the HEA.[135] The federal government relies on accreditation

125. *See id.*

126. *See* MIDDLE STATES COMM'N ON HIGHER EDUC., CHARACTERISTICS OF EXCELLENCE IN HIGHER EDUCATION: REQUIREMENTS OF AFFILIATION AND STANDARDS FOR ACCREDITATION, at viii (2011), *available at* http://www.msche.org/publications/CHX-2011-WEB.pdf.

127. *Id.* at ix–xi.

128. *Id.* at viii; *see also* EATON, *supra* note 94, at 3 ("Institutional mission is central to judgments of academic quality."). The Middle States Commission on Higher Education, similar to other accrediting agencies, sets broad guidelines for the institution's mission: the institutional purpose must be defined, indicating what the institution intends to accomplish and whom it hopes to serve. *See* MIDDLE STATES COMM'N ON HIGHER EDUC., *supra* note 126, at ix.

129. *See* MIDDLE STATES COMM'N ON HIGHER EDUC., *supra* note 126, at x.

130. *See* EATON, *supra* note 94, at 4–5.

131. *See id.*

132. 20 U.S.C. § 1099b(a)(6)(c) (2012).

133. *See* BROWN, *supra* note 90, at 2–3.

134. *See* Powell, *supra* note 88, at 63.

135. *See* 20 U.S.C. § 1002 (listing the requirements of institutions of higher education that receive federal funding); *see also* Austin Smith, *Subprime Goes to College*, N.Y. POST

to assess the academic quality of the institutions and programs for which it provides federal funding.[136]

The link between federal funding of education and academic accreditation originated with the Veterans' Readjustment Assistance Act of 1952[137] (known as the GI Bill).[138] The GI Bill provided funding for "thousands of [World War II] veterans to return to school."[139] Many private educational institutions sprang up in response to the flood of federal funds in the education industry.[140] Because many of these private institutions were of "questionable quality," the government limited funding eligibility to only those students enrolled at institutions accredited by recognized accreditation bodies.[141] The government chose to rely on accreditation as a check on institutional quality rather than develop its own system of quality review.[142] Accreditation thus became the key to the government's funds, sparking an increase in the number of institutions seeking accreditation.[143]

4. Regulating Accreditation

Given the responsibility of accrediting agencies of evaluating educational quality and indirectly controlling the distribution of federal funds, these agencies must be held accountable for their decisions.[144] This section addresses two important checks on accrediting bodies: the competitive market and the government.[145]

a. The Competitive Market

First, the marketplace for public confidence plays a role in holding accrediting agencies accountable for their decisions.[146] Public confidence in the accrediting agency's seal of approval is essential to its continued survival.[147] If an accrediting agency loses public trust, institutions will choose other accrediting agencies to evaluate their quality.

(June 6, 2010, 4:28 AM), http://nypost.com/2010/06/06/subprime-goes-to-college/. For a full discussion of Title IV federal funding, see *supra* Part I.A.

136. *See* EATON, *supra* note 95, at 18 (noting that federal and state funds are often contingent on an institution's accredited status). The relationship between state governments and accrediting agencies is beyond the scope of this Note, which focuses only on Title IV federal funding.

137. Pub. L. No. 82-550, 66 Stat. 663.

138. *See* Powell, *supra* note 88, at 57–58; *see also* BROWN, *supra* note 90, at 2–3.

139. *See* Powell, *supra* note 88, at 57–58.

140. *See id.*

141. *See id.*

142. *See* Brittingham, *supra* note 93, at 13 (discussing the history and development of accreditation).

143. *See id.* at 13–14.

144. *See* Wergin, *supra* note 106, at 27–28.

145. *See id.* at 28.

146. *See id.*

147. *See id.* at 27–28.

Though the threat of competition among accreditors is theoretically a check on accrediting agencies' power, many argue that accrediting agencies have formed a cartel[148] that insulates them from the influence of the competitive market.[149] The government has maintained this cartel by recognizing only a limited number of accreditors.[150] This is particularly true for regional accreditors, who have divided the country into regional cartels, virtually eliminating an institution's ability to choose another accreditor.[151] Therefore, the competitive market is not necessarily an effective regulator of accreditation.

b. Government Regulation

Second, the federal government regulates accrediting agencies through the HEA.[152] Accrediting agencies and the government have had a long and increasingly complicated relationship.[153] Institutional independence and autonomy have always been the mark of U.S. higher education.[154] In recent years, however, the government has been exercising increased control over accrediting agencies.[155]

The goal of this regulation is to reconcile the tension between the government's traditional hands-off approach to education and the desire to confirm that federal funds are only distributed to quality institutions. The HEA seeks to ensure that the accrediting agencies responsible for monitoring the quality of higher education are legitimate organizations capable of determining which institutions are worthy of federal funds.[156]

---

148. A cartel is defined as "[a]n association of firms with common interests, seeking to prevent extreme or unfair competition, allocate markets, or share knowledge." BLACK'S LAW DICTIONARY 243 (9th ed. 2009).

149. *See* Jane S. Shaw, *Breaking the Barriers to Entry*, JOHN WILLIAM POPE CTR. FOR HIGHER EDUC. POL'Y (Nov. 16, 2012), http://www.popecenter.org/commentaries/article.html?id=2764; *see also* Anne D. Neal, *Seeking Higher-Ed Accountability: Ending Federal Accreditation*, CHANGE MAG., Sept.–Oct. 2008, at 24.

150. *See* Shaw, *supra* note 149.

151. *See* Neal, *supra* note 149, at 27.

152. Higher Education Act, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. §§ 1070–99 (1988)).

153. *See* Brittingham, *supra* note 93, at 14–16.

154. *See* Leah K. Matthews, Toward Institutional Autonomy or Nationalization? A Case Study of the Federal Role in U.S. Higher Education Accreditation 7 (Apr. 30, 2012) (unpublished Ph.D. dissertation, George Mason University) (on file with *Fordham Law Review*).

155. *See* Powell, *supra* note 88, at 60; *see also* Wergin, *supra* note 106, at 28–29 (noting that the USDE has become "far more intrusive in the past decade"). Given the increased amount of student loan debt and the federal investment in the higher education system, the government wants to ensure that it is providing funding only to quality institutions. *See supra* Part I.A. The government is seeking to prevent the creation of diploma mills, for-profit institutions that continue to accept federal funding without ever providing any value to students. *See* Wergin, *supra* note 106, at 29.

156. *See* Judith S. Eaton, *What Future for Accreditation: The Challenge and Opportunity of the Accreditation-Federal Government Relationship*, *in* INQUIRY, EVIDENCE, AND EXCELLENCE: THE PROMISE AND PRACTICE OF QUALITY ASSURANCE, *supra* note 106, at 77, 79.

Two of the most significant forms of government regulation of accrediting agencies are (i) the process of recognition and (ii) governance regulations.

i. Recognition

Recognition is the main process by which the government regulates accrediting agencies.[157] Through recognition, the USDE "scrutinizes and judges accrediting organizations . . . for their capacity to serve as these reliable authorities" on the quality of higher education for the purpose of receiving funds under the HEA.[158] Recognition is essentially a means of accrediting the accreditors.[159] The secretary of education periodically publishes a list of recognized agencies in the *Federal Register*, giving the public and higher education institutions notice of which accrediting agencies have government approval.[160]

While accreditation is strictly a nongovernmental activity, recognition is a product of government regulation under the HEA.[161] Though the HEA is very general in its standards for recognition, it delegates authority to the USDE and the secretary of education to promulgate regulations establishing specific criteria for recognition.[162] These regulations provide (i) detailed eligibility requirements for agencies seeking recognition, (ii) substantive and procedural controls over agencies' accreditation processes, and (iii) procedural requirements for the recognition process.

First, the regulations establish the eligibility requirements for agencies seeking recognition. An agency seeking recognition must establish the scope of its accrediting activities, including the geographic area and degree level it will accredit.[163] The agency must also show that it: (1) granted accreditation or preaccreditation[164] to institutions; or (2) conducted accrediting activities for at least two years prior to seeking recognition.[165] Similarly, the agency must demonstrate that its standards and procedures for accreditation are widely accepted by educators, institutions, licensing bodies, or employers.[166] These and other eligibility requirements indicate that accrediting agencies must have an established reputation before seeking accreditation.

157. *See id.* CHEA also regulates accrediting agencies through an independent recognition process. *See supra* note 111. CHEA recognition, though valuable for building public confidence, is not relevant to the distribution of federal funds.

158. *See* Eaton, *supra* note 156, at 79.

159. *See* EATON, *supra* note 94, at 9; *see also* BURKE & BUTLER, *supra* note 92, at 6.

160. 34 C.F.R. § 602.2(a) (2013).

161. 20 U.S.C. § 1099b (2012).

162. *Id.* § 1099b(a).

163. 34 C.F.R. §§ 602.11–.12.

164. Preaccreditation is defined as the status an accrediting agency grants to an institution for a limited time, signifying that the institution is "progressing towards accreditation and is likely to attain accreditation before the expiration of that limited period of time." 34 C.F.R. § 602.3.

165. *Id.* § 602.12.

166. *Id.* § 602.13.

Second, the HEA and USDE regulations establish substantive requirements for a recognized accrediting agency's accrediting process. The HEA requires that accrediting agencies establish criteria for institutional or programmatic accreditation that include an "appropriate measure . . . of student achievement."[167] The agency seeking recognition must consistently apply standards that "respect the stated mission of the institution of higher education . . . and that ensure that the courses or programs of instruction . . . are of sufficient quality to achieve . . . the stated objective."[168] The HEA instructs accrediting agencies to evaluate higher education institutions' fulfillment of their stated missions, as discussed in Part I.B.2.

While accrediting agencies are largely free to create their own substantive criteria for assessing institutions, the HEA provides general guidelines that the agencies must follow.[169] Accrediting agencies must assess ten features of an institution, including student achievement, curricula, faculty, facilities, fiscal and administrative capacity, student support services, and admissions processes.[170]

The agency must also develop a system of review to show its standards are adequate and comprehensive.[171] These guidelines provide very basic requirements of an accrediting agency's assessment process.[172] Agencies are required to assess the curricula, faculty, and student support services, but the HEA does not provide guidance as to how to measure any of these qualities.[173]

Third, the HEA and USDE regulations establish procedural requirements for applying the substantive standards of the accrediting process.[174] An agency seeking recognition must demonstrate that it evaluates whether an institution has achieved educational objectives "consistent with its mission."[175] The agency must require institutions to engage in a self-study process and conduct at least one on-site review.[176] After generating its own report about the institution's self-analysis, the agency can make an accreditation decision.[177]

---

167. 20 U.S.C. § 1099b(a).
168. *Id.* § 1099b(a)(4)(A).
169. *Id.* § 1099b(a)(5).
170. *Id.* (listing all ten aspects of a higher education institution that accrediting bodies consider).
171. 34 C.F.R. § 602.21.
172. *See id.*
173. 20 U.S.C. § 1099b.
174. Another key procedural regulation is the requirement that all accrediting agency procedures satisfy due process. *See* 34 C.F.R. § 602.25. This due process requirement subjects agency decisions to judicial review and is the subject of extensive legislation that is beyond the scope of this Note. For an overview of due process and accreditation, see generally Michael W. Prairie & Lori A. Chamberlain, *Due Process in the Accreditation Context*, 21 J.C. & U.L. 61 (1994).
175. 34 C.F.R. § 602.17.
176. *Id.*
177. *Id.* The agency must also have established controls to ensure that its standards are applied consistently throughout this process. *Id.* § 602.18.

In addition to the eligibility, substantive, and procedural requirements outlined as part of the recognition process of government regulation, the HEA and USDE regulations control the application process for recognition.[178] This process mirrors the accreditation process the agency undertakes in reviewing institutions. First, the agency seeking recognition submits an application to the USDE including evidence of its compliance with the substantive and procedural requirements of the accreditation process discussed above.[179] The USDE may conduct site visits of the accrediting agency and observe the accreditors' on-site visits to institutions or during accreditation meetings.[180]

After the USDE reviews the accrediting agency's application for recognition, it makes a recommendation and submits all application materials to the NACIQI.[181] Accrediting agencies and third parties are free to make presentations at NACIQI meetings.[182] After NACIQI makes a recommendation to the secretary, the USDE make a final decision about the recognition status of an accrediting agency.[183]

ii. Governance Standards

In addition to the regulations related to recognition, the HEA and USDE regulations control the governance and organizational structure of accrediting agencies. These governance standards require that accrediting agencies be "separate and independent."[184] "Separate and independent" accrediting agencies must establish rules to avoid conflicts of interests, have a certain proportion of public members on their decisionmaking bodies, and meet certain other requirements.[185] However, 34 C.F.R. § 602.14(d) provides an exception to these independence requirements for any agencies recognized prior to October 1, 1991.[186]

178. The recognition process described here applies to initial recognition. An agency that has already been recognized by the USDE may apply for continued recognition when it is time for periodic review (every five years), or when the scope of its accrediting activity has changed. *See Accreditation in the U.S.*, *supra* note 119. The differences between these recognition processes are beyond the scope of this Note.

179. 34 C.F.R. § 602.31.

180. *See National Recognition of Accrediting Agencies by the U.S. Secretary of Education*, U.S. DEP'T EDUC., http://www2.ed.gov/admins/finaid/accred/accreditation_pg3.html (last modified Feb. 12, 2014).

181. *See id.*

182. *See id.*

183. *See id.* Despite this extensively regulated process, critics argue that recognition does little to police accreditors as none of the six USDE-recognized regional accreditors has ever lost recognition. *See, e.g.*, Sarah Molinero, Note, *Reexamining the Examiners: The Need for Increased Government Regulation of Accreditation in Higher Education*, 51 DUQ. L. REV. 833, 857 (2013).

184. 34 C.F.R. § 602.14(a)(1)(iii).

185. *Id.* § 602.14(b).

186. *Id.* § 602.14(d). In addition to being recognized since 1991, these accrediting bodies must show that (i) related trade associations play no role in their decisionmaking policies, (ii) such trade associations do not receive any nonpublic information, and (iii) the agency has "sufficient budgetary and administrative autonomy" to independently accredit schools. *Id.*

II. ECONOMIC THEORIES

Part I of this Note discussed the intertwining institutional frameworks of the federal student loan program and accreditation. Part II discusses two economic theories that are at the core of the federal funding-accreditation dilemma: (A) agency costs and (B) principles of valuation. These theories help to explain why the USDE and accreditors differ in their approaches to evaluating education.

A. Agency Theory

First, agency theory helps to explain the relationship between the USDE and accreditors. This section addresses (1) the general economic principles of agency theory and agency costs, (2) how agency theory manifests in different contexts, and (3) how principals can regulate agents to reduce agency costs.

1. Agency Theory Generally

Agency theory is an economic theory that is defined as the "analytic expression of the contractual relationship of two (or more) parties, in which one party, designated as the principal, engages another party, designated as the agent, to perform some service on behalf of the principal."[187] This theory reflects that idea that the principal and agent, though acting as cooperating parties, may have different goals and interests that cause the agent to act in a way that does not serve the principal's needs.[188]

A principal-agent relationship may cause an "agency problem" or impose "agency costs" when (1) the principal and agent have divergent interests and (2) the principal has difficulty assessing the agent's actions.[189] Divergent interests occur when the desires or goals of the principal and agent conflict.[190] Agency theory rests on the assumption that actors—whether individuals, governments, firms, or organizations—act in their own self-interest to fulfill their own desires.[191]

These divergent interests only impose agency costs on the principal, however, if the principal cannot verify or assess the agent's actions.[192] If the information available to both the principal and agent is identical, the principal can perfectly monitor the agent's actions and identify and rectify an agent's opportunistic behavior.[193] However, information asymmetries

187. Jussi Kivisto, *The Government–Higher Education Institution Relationship: Theoretical Considerations From the Perspective of Agency Theory*, 11 TERTIARY EDUC. & MGMT. 1, 1 (2005).

188. *See* Kathleen M. Eisenhardt, *Agency Theory: An Assessment and Review*, 14 ACAD. MGMT. REV. 57, 58 (1989).

189. *See* Kivisto, *supra* note 187, at 1–2.

190. *See id.*

191. *See* Eisenhardt, *supra* note 188, at 59, 64. For organizations and firms, it can additionally be assumed that there is "partial goal conflict among participants," suggesting that there is an internal divergence of interests as well. *Id.* at 59.

192. *See* Kivisto, *supra* note 187, at 1–2.

193. *See id.*

make it difficult for the principal to monitor and assess an agent's behavior.[194]

2. Agency Theory in Different Contexts

Agency theory is often discussed in the context of the corporate structure.[195] Corporations are faced with an agency problem because they are owned by one group of people—shareholders—and managed by another group of people—directors—who may have different ideas about how the corporation should operate.[196] Though this shareholder-manager dilemma is considered the archetypal principal-agent scenario, agency theory can be applied in circumstances in which the interests at stake change,[197] including government outsourcing[198] and the nonprofit sector.[199]

First, principals and agents in the government context have additional behavioral influences that affect their decisions.[200] The government often relies on private actors or government agencies to create regulatory standards.[201] Principals and agents in this situation are faced with political influences that affect the self-interested choices they make.[202] Parties have additional constituents and strategies to consider in making their decisions.[203] The impact of these constituents must be considered when evaluating the divergent interests of the principal and agent.

Second, the nonprofit sector also presents unique challenges for principal-agent relationships. Often the government acts as a principal in relationships with an agent nonprofit organization.[204] The principal (government) seeks to maximize the services received by the nonprofit

---

194. *See id.*

195. *See* Eisenhardt, *supra* note 188, at 59 (discussing the influential articles exploring agency theory in the corporate context); *see also* Eleanor Brown, Donors, Ideologues, and Bureaucrats: The Principal-Agent Relationship Between Government and the Nonprofit Sector 1 (June 2006) (unpublished manuscript) (on file with *Fordham Law Review*).

196. In the corporate context, shareholder owners are not able to "perfectly monitor the behavior of managers." *See* Brown, *supra* note 195, at 1. Therefore, shareholders cannot always correct behavior that deviates from the shareholders' interests, creating agency costs.

197. *See* Eisenhardt, *supra* note 188, at 57 (noting that agency theory has been used by scholars in accounting, economics, finance, marketing, political science, organizational behavior, and sociology); *see also* Kivisto, *supra* note 187, at 2.

198. *See generally* Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003) (discussing how the government's reliance on private firms to regulate industries implicates agency theory).

199. *See generally* Brown, *supra* note 195 (discussing the tension between donors, managers, and the government in the nonprofit sector).

200. *See* Shapiro, *supra* note 198, at 416–17 (discussing political influences on principal and agent behavior).

201. *See id.* at 406–07 ("An agency's reliance on private actors to write regulatory standards creates agency problems.").

202. *See id.* at 416–17 (discussing that the decision to employ private firms may involve political influences).

203. *See id.*

204. *See* Brown, *supra* note 195, at 1 (considering "the role of government as principal and the nonprofit sector as a set of agents from whom, collectively, the government wants to maximize service provision").

organization, typically the provision of consumption goods and services.[205] Just as the government actor must consider political effects of its decisions, nonprofit agents often consider ideological interests.[206] The principal may have different ideologies that cause a rift between the principal and agent.[207]

Both the government and nonprofit relationships present the possibility of "dual agency" or the "compounded agency" problem.[208] Compounded agency addresses the complexity of multiple, simultaneous conflicts of interest in relationships.[209] These complex scenarios often arise in the context of public-private partnerships.[210] In these relationships, a public organization (e.g., a government agency) acts as agent for the public consumers.[211] The public organization, as agent for the public, hires a private actor—a for-profit or nonprofit organization—to perform a service for the public actor.[212] This private actor is therefore an agent to the public actor and also an indirect agent for public consumers.[213] These complex relationships increase the risk of divergent interests and information asymmetries.[214]

3. Reducing Agency Costs

When a principal-agent relationship imposes agency costs on the principal, the principal can take certain steps to motivate the agent to behave in accordance with the principal's interests and thus reduce these costs.[215] Positivist agency theory involves (1) identifying situations in which a principal and agent are likely to have conflicting goals and (2) generating governance mechanisms that can limit the potential self-serving behavior of the agent.[216] This section discusses two types of

205. *See id.* These goods and services range from food and shelter to healthcare and education. *See id.* at 2–3. In addition to provision of services, the government also looks to the nonprofit sector to "safeguard certain basic liberties and freedoms." *Id.* at 2.

206. *See id.* at 5 (discussing the concern that donors only donate to nonprofits when there is a "good ideological match" between their ideology and the nonprofit's purpose).

207. *See id.* (discussing ideological matches).

208. *See* Jeff W. Trailer et al., *A Compounded Agency Problem: An Empirical Examination of Public-Private Partnerships*, 5 J. AM. ACAD. BUS. CAMBRIDGE 308, 308 (2004).

209. *See id.*

210. *See id.*

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.* (discussing that there are "[m]ultiple, conflicting goals [that] inherently exist" in these relationships).

215. *See* Eisenhardt, *supra* note 188, at 58 ("[T]he focus of [agency] theory is on determining the most efficient contract governing the principal-agent relationship."); *see also* Kivisto, *supra* note 187, at 7–8 (discussing the contract options that balance the tradeoffs of measuring behavior and measuring outcomes).

216. *See* Eisenhardt, *supra* note 188, at 59.

governance mechanisms—behavior-based and outcome-based monitoring—and when each type of governance is most effective.[217]

Behavior-based monitoring focuses on reducing the informational asymmetries that exist between the principal and agent.[218] Reducing information asymmetries allows the principal to detect and correct the agent's self-serving behavior.[219] Behavior-based monitoring may involve developing reporting structures, supervising budgeting systems, or using boards of directors to oversee agents' activities.[220]

Outcome-based evaluations focus on reducing the conflicts of interest between principals and agents.[221] These evaluations tie the agent's reward to certain outcomes, aligning the preferences of the agent with those of the principal.[222]

The benefits of behavior-based monitoring and outcome-based evaluations depend on the principal-agent relationship and the nature of the task the agent is performing. Principals deciding whether to use outcome-based or behavior-based governance mechanisms to reduce agency costs should consider the extent to which (i) the principal's and agent's goals conflict, (ii) the agent's task is programmable, (iii) the outcome is uncertain, and (iv) the outcome is measurable.[223]

First, goal conflict assessment considers how divergent the parties' goals and interests are.[224] If there is a major conflict between the principal and agent's goals, outcome-based evaluations tend to be more appropriate and the principal should attempt to align the agent's incentives to its desired outcomes.[225]

Second, task programmability evaluates the degree to which the agent's behaviors can be specified in advance.[226] If a principal can easily dictate the actions that the agent must take to achieve the principal's goal, then behavior-based governance may be more appropriate.[227]

Third, outcome uncertainty measures the extent to which the outcome depends on the agent's work versus how much the outcome depends on the external environment.[228] If the agent's work has little connection to the

217. *See id.* at 60 (noting that principals must determine the "optimal contract, behavior versus outcome"); *see also* Kivisto, *supra* note 187, at 6.

218. *See* Kivisto, *supra* note 187, at 6.

219. *See id.*

220. *See id.*

221. *See* Eisenhardt, *supra* note 188, at 59–60.

222. *See id.*; *see also* Kivisto, *supra* note 187, at 6.

223. These four factors are a nonexhaustive list. Other factors that can be taken into consideration include the nature of the agency relationship and the risk aversion of the parties. *See* Kivisto, *supra* note 187, at 8–12; *see also* Eisenhardt, *supra* note 188, at 61–62.

224. *See* Kivisto, *supra* note 187, at 11.

225. *See id.*

226. *See id.* at 10–11.

227. *See id.* at 11.

228. *See id.* at 9.

outcome, it is "not reasonable to base the contract on outcomes."[229] Thus, behavior-based mechanisms are more appropriate in these situations.[230]

Finally, outcome measurability refers to the ease with which a principal can measure the agent's productivity or success in completing an assigned task.[231] In deciding if an outcome is measurable, principals should consider if outcomes could be defined and effectively measured.[232] Generally, when outcomes are easily measured, the task lends itself to outcome-based evaluation mechanisms.[233]

Although these four factors are considerations in determining the effectiveness of outcome-based and behavior-based governance, there are drawbacks to both forms of monitoring. Both types of governance mechanisms increase measurement costs, namely, the cost of monitoring and evaluating the other party in a transaction.[234] Principals must consider these costs in deciding to employ governance mechanisms.[235]

The relationships described with respect to federal student loans and accreditation in Part I.A and I.B, respectively, present an agency problem. This agency problem is discussed further in Part III of this Note.

B. Principles of Valuation

Assessing a principal-agent relationship using the four factors described above often involves measuring and valuing the activities and goals of both the principal and agent. This section addresses (1) the subjective theory of value and (2) proposed methods to value education, both of which illuminate the government-accreditor agency relationship and the potential solutions to this particularly problematic agency relationship.

1. The Subjective Theory of Value

According to the subjective theory of value,[236] a good or service's value depends on the utility that good or service provides to the individual consumer, rather than any objective or intrinsic quality of the good or service itself.[237] "Utility" is the economic term for the "satisfaction an

229. *Id.* When there are a variety of external factors that can influence outcomes, outcome-based contracts are unattractive because the outcome will not necessarily reflect the agent's actions. *Id.*

230. *See id.*

231. *See id.* at 8.

232. *See id.*

233. *See id.*

234. *See* Shapiro, *supra* note 198, at 393–95.

235. *See id.*

236. The Austrian School of Economics first proposed the subjective theory of value. THOMAS C. TAYLOR, AN INTRODUCTION TO AUSTRIAN ECONOMICS 40 (1980). This theory soon replaced the labor theory in mainstream economics. *See infra* note 237.

237. *See* TAYLOR, *supra* note 236, at 40 ("[Value] does not reside objectively and intrinsically in the things themselves, apart from the individual who is making an evaluation."). The notion that a good's value is not based on its inherent qualities is opposed by the labor theory of value. *See* Herbert Hovenkamp, *The Marginalist Revolution in Legal Thought*, 46 VAND. L. REV. 305, 352 (1993). According to the labor theory of value, a

individual actor derives from achieving an end."[238] The subjective theory of value holds that measuring this utility is problematic because of its subjective nature.[239] Individuals have different preferences and derive various amounts of satisfaction from different goods.[240] Individuals rank their choices and seek the alternative that maximizes their utility.[241]

In evaluating how an individual ranks her choices among goods and services, the subjective theory of value focuses on the principle of diminishing marginal utility.[242] According to this principle, the value of an additional unit of a good provides less utility than the preceding unit of that good.[243]

The existence of individual subjective hierarchies of goods and the principle of diminishing marginal utility explain pricing in the market.[244] The individual, subjective evaluations of goods and services in the market affect both the supply and demand of goods.[245] These subjective preferences affect the amount of money that consumers allocate to goods and services, thus determining price.[246]

---

good's value is "a function of that which [was] invested" in producing the good. *Id.* Subjective value theory replaced the labor theory in mainstream economics during the "marginalist revolution" of the 1870s. Leland Yeager, *Why Subjectivism?*, 1 REV. AUSTRIAN ECON. 5, 15 (1987). Further analysis of the labor theory of value is beyond the scope of this Note.

238. Joseph Becker, *Procrustean Jurisprudence: An Austrian School Economic Critique of the Separation and Regulation of Liberties in the Twentieth Century United States*, 15 N. ILL. U. L. REV. 671, 693–94 (1995).

239. *Id.* at 694.

240. *See* TAYLOR, *supra* note 236, at 40–41 ("The extent to which a thing gives satisfaction is always personal.").

241. *See* Alexander Tabarrok, *Subjective Value Theory: A Reformulation*, AUSTRIAN ECON. NEWSL. (The Ludwig von Mises Inst., Auburn, Ala.), Fall 1990, at 6. The concept of "utility" or "satisfaction" is often incorrectly equated with happiness in the context of the subjective theory of value. *Id.* Utility is independent of human emotions; humans may make choices based on their values that do not necessarily make them happier. *Id.*

242. *See* Becker, *supra* note 238, at 694–95.

243. *See id.* Diminishing marginal utility and the subjective theory of value explain the "water-diamond paradox" in economics: why water, though essential to human life, has a lower price than diamonds. *See* TAYLOR, *supra* note 236, at 41–44. Given the scarcity of diamonds and the relative abundance of water, the principle of diminishing marginal utility dictates that the next unit of water will be devoted to a use of lesser importance. *See id.* These prices would change if an individual were faced with the choice between all water and all diamonds in existence; however the subjective theory of value focuses on a definite amount of goods rather than the whole category of goods. *See id.*

244. *See* Tabarrok, *supra* note 241, at 7 (stating that the purpose of subjective value theory is to explain prices).

245. *See* Yeager, *supra* note 237, at 15 (noting that "subjective factors operate on both sides" of supply and demand).

246. *See* TAYLOR, *supra* note 236, at 48.

2. Methods of Valuing Education

Despite the subjective theory of value, education experts in government, accreditation, and the private sector try to value "quality higher education."[247] Many applaud the benefits of education—increasing skilled workers, promoting American competitiveness in technological development, increasing participation in democratic society[248]—but how are these benefits quantified?[249] Should universities be assessed for quality at the institutional level, programmatic level, or class level?[250]

Ultimately, there is no "generally accepted understanding" of what a quality higher education entails.[251] This section addresses competing theories for how education should be valued: (a) a financial perspective; (b) measuring inputs; (c) measuring outputs; and (d) comprehensive rating systems.

a. Financial Valuation of Education

First, a purely financial valuation of education focuses on the student's financial costs and benefits of attending higher education.[252] A student's decision to seek higher education is therefore based on a comparison of the present discounted value of benefits and the present discounted value of the cost of attending.[253] Benefits are measured by the gains in future earnings,[254] while costs include tuition, fees, and foregone wages.[255]

---

247. Despite the repeated attempts to value education, some suggest that a common standard of valuation would destroy the "diversity of opinion about what a college education means," which has "been seen as a strength of American higher education." *See, e.g.*, Doug Lederman, *What Degrees Should Mean*, INSIDE HIGHER ED (Jan. 25, 2011), http://www.insidehighered.com/news/2011/01/25/defining_what_a_college_degree_recipient_should_know_and_be_able_to_do (suggesting that commonality among educational standards should not be the goal).

248. For a discussion of the benefits of higher education, see *supra* note 65 and accompanying text.

249. *See* Wergin, *supra* note 106, at 27 (discussing the "quality conundrum").

250. *See* GEORGE C. LEEF & ROXANA D. BURRIS, AM. COUNCIL OF TRS. & ALUMNI, CAN COLLEGE ACCREDITATION LIVE UP TO ITS PROMISE? 7, 18–19 (2002), *available at* http://www.chea.org/pdf/CanAccreditationFulfillPromise.pdf.

251. *See* Lederman, *supra* note 247 (quoting Jamie P. Merisotis, president and chief executive officer of the Lumina Foundation, who suggests that this undefined concept of "quality" has frustrated policymakers, employers, and students). *But see* Press Release, U.S. Dep't of Educ., Assessing Value and Opportunity in Higher Educ. (Sept. 20, 2013), *available at* http://www.ed.gov/news/speeches/assessing-value-and-opportunity-higher-education (rejecting "the idea that the value of a college education is so elusive, so inexpressible that no ratings system can ever meaningfully help consumers determine its value").

252. *See* Avery & Turner, *supra* note 64, at 172–77 (discussing education using an investment analysis).

253. *See id.* at 172.

254. *See id.* A college degree is estimated to provide an 84 percent income premium. *See* CARNEVALE ET AL., *supra* note 65, at 1.

255. *See* Avery & Turner, *supra* note 64, at 172.

This valuation methodology is criticized because it fails to consider the "substantial variation" in these metrics from student to student.[256] Students' costs and benefits vary depending on a number of factors, including their success in completing school and their choice of occupation.[257] Critics claim that this method is oversimplified and fails to consider individual differences, the difficulty of predicting costs and benefits, and nonfinancial and intangible benefits of education.[258]

b. Input Valuation

Second, some suggest valuing schools based on their educational inputs, such as the facilities and capacity of the school.[259] Accrediting agencies have traditionally focused on inputs when assessing quality and have assumed that a school with proper inputs and processes provides acceptable quality education.[260] The American Council of Trustees and Alumni (ACTA), skeptical of using inputs to measure quality, has compared this methodology to a car inspection: "If the accrediting process were applied to automobile inspections, cars would 'pass' as long as they had tires, doors, and an engine—without anyone ever turning the key to see if the car actually operated."[261] Critics of this method, including ACTA, argue that inputs have a "dubious link to student performance, skill acquisition, and employability," and therefore do not reflect quality of education.[262]

c. Output Valuation

Those who criticize input valuation may prefer that educational quality be measured by student outputs. Assessing quality based on outputs could involve measuring tangible statistical data or measuring learning outcomes. Statistical data may include graduation rates, employment rates, and graduate earnings.[263] These measurements are criticized for the same reasons financial valuations fail to assess quality: they vary widely by student and fail to capture the intangible benefits of education.[264]

In addition to statistical outcomes, some encourage assessing quality based on more flexible student outcomes. For example, the Lumina Foundation has developed a Degree Qualification Profile to assess learning

---

256. *Id.* at 177.

257. *See id.*

258. *See id.*

259. *See* LEEF & BURRIS, *supra* note 250, at 7, 18–19; *see also* BURKE & BUTLER, *supra* note 92, at 8–9.

260. *See* LEEF & BURRIS, *supra* note 250, at 7.

261. *See* BURKE & BUTLER, *supra* note 92, at 9 (quoting AM. COUNCIL TRUSTEES & ALUMNI, WHY ACCREDITATION DOESN'T WORK AND WHAT POLICYMAKERS CAN DO ABOUT IT 6 (2007), *available at* http://www.goacta.org/images/download/why_accreditation_doesnt_work.pdf).

262. *See id.* at 8–9.

263. *See* Press Release, U.S. Dep't of Educ., *supra* note 251.

264. *See supra* notes 256–58 and accompanying text.

outcomes as a reflection of educational quality.[265] This profile seeks to set minimum standards for qualified schools at different degree levels in five areas of learning: applied learning, intellectual skills, specialized knowledge, broad integrative knowledge, and civic learning.[266] These measurements escape the inflexibility of the financial valuations; however, the Lumina Profile and other student learning outcome methodologies are very fluid concepts that could be interpreted in many different ways by the evaluator.[267]

d. Comprehensive Rating Systems

Finally, comprehensive rating systems seek to combine the methodologies of financial, input, and output valuation. The USDE has proposed a composite rating system that would compare similar institutions based on their access, affordability, and outcomes.[268] As of the writing of this Note, the USDE is soliciting feedback from industry experts as to which factors it should consider in measuring "quality."[269]

Government's venture into school ratings has troubled some industry experts. Some fear that this rating system will focus too much on outcomes, thus discounting schools that produce public servants, teachers, and military members who earn less money but provide a significant social benefit.[270]

Debate over the comprehensive rating system and the varying opinions for measuring "quality" education evince a tension in the higher education industry: how do you enforce accountability among higher education institutions and accreditors if you cannot agree on an intended outcome?[271]

III. THE FUNDING-ACCREDITATION DILEMMA & PROPOSED SOLUTIONS

Analyzed in light of the economic theories discussed in Part II of this Note, the accreditation industry and federal student loan program discussed in Part I are fraught with structural flaws. Part III first discusses the funding-accreditation dilemma in general. It then addresses the principal-agent relationship that exists between the government and accreditors. Finally, it considers five proposed solutions to remedy the principal-agent problem and structural flaws of the accreditation-federal funding system.

---

265. *See generally* LUMINA FOUND. FOR EDUC., THE DEGREE QUALIFICATIONS PROFILE (2011), *available at* http://www.luminafoundation.org/publications/The_Degree_Qualifications_Profile.pdf.

266. *See id.* at 18–20.

267. *See* Powell, *supra* note 88, at 66.

268. *See* Press Release, U.S. Dep't of Educ., *supra* note 251.

269. *See id.*

270. *See id.*; *see also* BURKE & BUTLER, *supra* note 92, at 2 (suggesting that "federal scorecards" be avoided to allow market forces to determine quality).

271. *See* Lederman, *supra* note 247.

A. The Funding-Accreditation Dilemma Generally

Accreditation was formerly a voluntary process used to ensure the quality of higher education through a peer-review process that allowed schools to distinguish themselves and earn public trust.[272] When the government tied accreditation to federal funding, using accreditation as a "proxy for quality," it made accreditation a de facto requirement for all institutions.[273]

The federal student loan crisis has brought the role of accreditation as a primary gatekeeper for federal loans under intense scrutiny.[274] Despite accreditation's gatekeeping role, loan balances are skyrocketing, defaults are increasing, and students are being overburdened with debt.[275]

One of the key reasons accreditation has been ineffective as a gatekeeper is because the relationships among the many players in the higher education industry generate agency costs.[276] The accreditation-federal funding system is riddled with conflicts of interest and divergent incentives, stemming mostly from conflicting views over how to define a "quality" education.[277] The government has been increasing its involvement in accreditation in an attempt to impose accountability and reduce these agency costs.[278] However, debate still remains as to whether the government has been effective in its attempt to impose accountability or whether government involvement in education is limiting institutional autonomy.

B. Government and Accreditors: A Principal-Agent Relationship

In the higher education federal funding system discussed above, a principal-agent relationship exists between the government and accreditors.[279] As discussed in Part II.A of this Note, agency costs exist when a principal hires an agent to perform a service and the principal and agent (1) have divergent interests and (2) do not have equal access to information.[280] This section analyzes the divergent incentives and information asymmetries between the government and accreditors.

---

272. *See supra* Part I.B.
273. *See* LEEF & BURRIS, *supra* note 250, at 2.
274. *See supra* Part I.A.
275. *See id.*
276. *See infra* Part III.B.
277. *See infra* Part III.B.
278. *See* Eaton, *supra* note 96, at 12–13 (discussing the increasing role of government regulation in accreditation).
279. *See* Matthews, *supra* note 154, at 25–26. There are other principal-agent relationships in this industry that contribute to the system's ineffectiveness but are beyond the scope of this Note. For example, the government can be viewed as a principal that uses the schools as agents to educate the public. Accrediting agencies are also viewed as agents for the public (both directly, and indirectly through their accountability to the federal government). This Note focuses only on the principal-agent relationship between the government and accreditors.
280. *See supra* Part II.A.1.

The government principal has authorized the agent accreditors to carry out quality assurance on its behalf;[281] however, these accreditors, accountable to many constituents, do not necessarily evaluate schools with government interests in mind.[282] The "inherent contradictions" between the government and accreditors have led to inconsistent standards that contribute to the ineffectiveness of accreditation's gatekeeping.[283] The government and accrediting bodies have divergent interests with respect to the funding-accreditation dilemma: while the government focuses on external accountability, accreditors focus more on quality improvement.[284]

The government is focused on accountability and wants to ensure that billions of dollars of federal student loans are only distributed to quality institutions.[285] The USDE's proposed federal scorecard plan to rate colleges reflects the government's concern with the access, affordability, and outcomes of higher education.[286] The government's ultimate concern is consumer protection and financial accountability—including loan repayment.[287] The USDE wants accreditation to play this "consumer protection role," which would involve providing instant information, quantitative standards, and bright-line judgments in assessing educational quality.[288] The government seeks "public confidence, quality, and transparency," rather than the peer-review process that has been the hallmark of accreditation.[289]

In addition to the government's interest in controlling the use of its federal loans, the government has multiple constituents to which it is accountable.[290] As discussed in Part II.A.2, government actors in principal-agent relationships are faced with political pressure, public opinion, and lobbyists.[291] Thus, the government may be influenced by competing pressures to increase college enrollment and lower tuition.[292]

While the government is focused on accountability, accrediting bodies are focused on assessment and quality improvement.[293] Accreditors do not

281. *See* Matthews, *supra* note 154, at 25 (discussing that the HEA made the government-accreditation relationship "take on the qualities of a principal-agent dynamic").

282. *See id.* at 25–26.

283. *See* Powell, *supra* note 88, at 66–67.

284. Victor M.H. Borden, *The Accountability/Improvement Paradox*, INSIDE HIGHER ED (Apr. 30, 2010), http://www.insidehighered.com/views/2010/04/30/borden (discussing the tension between "the academy's internally driven efforts . . . to improve their programs and practices, and calls for accountability by various policy bodies representing the 'consuming public'").

285. *See* Press Release, U.S. Dep't of Educ., *supra* note 251.

286. *See id.*

287. *See* Eaton, *supra* note 156, at 82–83.

288. *See id.*

289. *See* Powell, *supra* note 88, at 67–68.

290. *See supra* Part II.A.2 (discussing the additional complexities of principal-agent relationships involving the government).

291. *See supra* Part II.A.2.

292. *See, e.g.*, Roots, *supra* note 4, at 504–05 (discussing that the HEA was enacted to increase access to higher education for Americans); McGuire, *supra* note 20, at 119–21.

293. *See* EATON, *supra* note 94, at 1.

see their role as a consumer protection advocate.[294] Accreditors have focused on a more nuanced system of quality review that involves working with institutions to improve their processes.[295] While a consumer protection role would require accreditors to be accountable to those outside the education industry, the peer-review, self-regulating accreditation industry operates as though it is accountable to the higher education community.[296] Accreditors want to focus on institutional autonomy and academic freedom;[297] however, regulators pressure accreditors to focus more on learning outcomes and standards.[298]

The accreditation industry's interest in the quality of education necessarily includes that education be separate from government interference.[299] Accreditors are concerned that increasing government involvement could lead to the USDE acting as a "co-accreditor," challenging accrediting bodies' decisions and increasing control over the assessment process.[300]

In addition to quality improvement, accrediting bodies have an interest in maintaining collegiality in the higher education industry for both reputational and financial reasons.[301] First, there is a "high degree of collegiality in the [accreditation] process" because teams that evaluate schools are generally composed of faculty from other colleges and universities in the region—the same colleges and universities that will then be accredited by faculty of the school being assessed.[302] Reviewing committee members often know each other and have a desire to stay on good terms with the repeat players in the process.[303] Ultimately, these reputational concerns incentivize accrediting bodies to approve accreditation.[304]

294. *See* McGuire, *supra* note 20, at 152 ("[A]ccreditors themselves continue to insist that their role is to evaluate educational institutions as educators, not to uphold the integrity of the Title IV system."); *see also* Eaton, *supra* note 156, at 83 ("Consumer protection is important and valuable, but . . . not effectively met using accreditation as the vehicle to achieve this goal.").

295. *See* Eaton, *supra* note 156, at 82–83 (noting that accreditation is not meant to provide bright-line rules or quantifiable standards).

296. *See id.* at 88.

297. *See id.* (discussing how the "fundamental features" of accreditation are "incompatible" with the standardization imposed by external actors).

298. *See* Powell, *supra* note 88, at 60.

299. *See generally* COUNCIL FOR HIGHER EDUC. ACCREDITATION, THE CHEA INITIATIVE FINAL REPORT (2012), *available at* http://www.chea.org/pdf/TheCHEAInitiative_Final_Report8.pdf (discussing concerns about the imbalance in the public-private partnership between the government and accreditors).

300. *See id.* at 6 (noting that government attempts to engage in academic judgments are undesirable).

301. *See* BURKE & BUTLER, *supra* note 92, at 9.

302. *See* LEEF & BURRIS, *supra* note 250, at 13–14.

303. *See id.* at 37–38.

304. *See* BURKE & BUTLER, *supra* note 92, at 9 ("[T]hese conflicts of interest have created a system whereby accreditation agencies are inclined to protect the interests of existing colleges and universities.").

In addition to reputational concerns, financial concerns make collegiality a key interest of accreditors. Accrediting agencies are funded in large part by the colleges and universities that pay dues.[305] Withdrawing accreditation would therefore limit the accrediting agencies' funds, biasing accrediting agencies in favor of approving accreditation.[306]

In addition to these divergent interests—public accountability versus institutional assessment—there are information asymmetries between accreditors and the government. The accreditors have knowledge about the institutions they assess because of the long-term collegial relationships formed with these institutions.[307] This information is generally not publicly available, as accreditors publish limited information about their assessments.[308] These information asymmetries and divergent interests generate agency costs as the government attempts to regulate accreditors.

C. Proposals for Reform

Public debate about the effectiveness of the accreditation process and the growing level of student loan debt have led to calls for reform of the accreditation-funding relationship. The government monitors accrediting agencies using a number of regulations discussed in Part I.B.4 of this Note.[309] Though these regulations attempt to align the incentives of accrediting bodies and the government and thereby reduce agency costs, they are largely ineffective in doing so.[310] This section discusses several proposals for modifying the accreditation and federal student loan system.[311]

---

305. *See id.*

306. *See id.*; *see also* LEEF & BURRIS, *supra* note 250, at 37; McGuire, *supra* note 20, at 151–52 (discussing the pressure exerted upon accrediting agencies because of their financial dependence on the institutions they oversee).

307. *See supra* notes 301–04 and accompanying text.

308. *See* LEEF & BURRIS, *supra* note 250, at 39 (discussing that schools do not release critical accreditation reviews).

309. *See supra* Part I.B.4.

310. The government's primary form of control over accrediting bodies is the threat of revoking recognition, which was discussed in Part I.B.4, *supra*; however, the government has never revoked the recognition of the six regional accreditors, so this is an empty threat. *See supra* note 183. Similarly, the substantive requirements accreditors must follow are vague and leave much to the accrediting agencies' discretion. *See supra* notes 167–70 and accompanying text. Finally, the USDE-imposed governance standards are ineffective because many accreditors are exempt from the requirements. *See supra* notes 184–86 and accompanying text.

311. For a discussion of the benefits and drawbacks of these proposals, see *infra* Part IV. In addition to these proposed changes to the relationship between accreditation and federal funding, there are many ways that the accreditation industry and student loan system can be independently modified to make them each more effective; however, this Note focuses only on how the relationship between the two parties can be made more effective.

1. Proposal One: Maintain the Status Quo

The first proposal is to keep the accreditation and federal funding systems functioning as they are today. Those who feel that the rise in student loan debts does not reflect a "crisis" often claim that increased debt signals increased investment in the industry.[312] If there is no "student loan crisis," there is no need to overhaul the system. Additionally, proponents of the status quo suggest that the market for education is efficient: students can differentiate between high and low quality institutions regardless of government or accreditation involvement.[313]

2. Proposal Two: Change the Pay Structure

The second proposal is to change the pay structure of the accrediting industry to cut the financial ties between higher education institutions and the accrediting bodies. Because higher education institutions pay dues to the accrediting bodies of which they are members, accrediting bodies have an incentive to continue granting accreditation regardless of academic quality.[314] Cutting this tie and allowing the government to directly fund accreditation could reduce this incentive and make the accrediting bodies more accountable to the government.

3. Proposal Three: Define "Quality" Education

Third, the government could reform the accreditation-funding relationship by specifically defining standards for how quality should be assessed, increasing government regulation.[315] In defining quality, the government could employ any of the measures discussed above in Part II.B.2.

One group of proponents for this reform suggests that the government impose a common framework of quality assessment on accreditors that ties quality to standard learning outcomes or student performance outcomes.[316] This system could dictate how accreditors are to evaluate the institutions they accredit.

Another group of proponents suggest a government definition of quality that would supplement the existing accreditation system. The USDE-proposed rating system seeks to create this accreditation supplement by valuing education based on a number of factors.[317]

---

312. *See supra* notes 66, 85 (discussing the argument that the increase in student loan debt is not a crisis or a bubble that could seriously affect the U.S. economy).

313. *See* McGuire, *supra* note 20, at 142–43 (rejecting the idea that students can evaluate the quality of education before attending under the current regime).

314. *See supra* notes 305–06 and accompanying text.

315. *See generally* Press Release, U.S. Dep't of Educ., *supra* note 251 (proposing a college rating system that would measure quality).

316. *See, e.g.*, Molinero, *supra* note 183, at 855 (discussing commentators who argue for "common degree framework" set by the government under which quality can be standardized based on learning outcomes).

317. *See supra* Part II.B.2.

4. Proposal Four: Encourage Competition Among Accreditors

The fourth proposal commonly suggested is that the government should increase the number of recognized accrediting bodies.[318] Recognizing more accrediting bodies would break the current "accreditation monopoly."[319] This would show accreditors that they are not "too big to fail" and incentivize them to follow government interests or face losing recognition status.[320]

5. Proposal Five: Decouple Accreditation and Federal Student Loans

Finally, the fifth proposal for reform is to decouple the accreditation and federal funding systems.[321] Under this new system, accreditation would continue to function as a private assessment tool, while the government would provide Title IV funding to higher education institutions of its choice, depending on any institutional requirements it may pass.

Each of these proposals has far-reaching effects on accreditation, the government, higher education institutions, and the public. For the reasons discussed in Part IV, decoupling accreditation and federal funding is the best solution to address the agency costs that are inherent in the current system.

IV. DECOUPLING ACCREDITATION AND FEDERAL STUDENT LOANS

The proposed solutions discussed in Part III of this Note attempt to remedy the agency costs created by the current federal funding-accreditation regime. Of these proposed solutions, decoupling the two regimes is the best way to address the agency costs and flaws in the system, ultimately returning autonomy to both accreditors and federal lenders.

Part IV first explains the failure of outcome-based and behavior-based governance mechanisms in reducing agency costs. It then discusses why decoupling accreditation and federal funding is the best solution to this dilemma.

A. The Failure of Outcome-Based and Behavior-Based Governance

As discussed in Part III of this Note, the relationship between the federal student loan program and the accreditation industry creates agency costs because of the divergent views of how educational quality should be measured.[322] Agency costs are often reduced using behavior-based or

318. *See* Molinero, *supra* note 183, at 857–58; *see also* Neal, *supra* note 149, at 29.
319. *See* Neal, *supra* note 149, at 29.
320. *See* Molinero, *supra* note 183, at 858.
321. *See, e.g.*, BROWN, *supra* note 90, at 2; BURKE & BUTLER, *supra* note 92, at 2; LEEF & BURRIS, *supra* note 250, at 49–50; Neal, *supra* note 149, at 28.
322. *See supra* Part III.B.

outcome-based governance mechanisms.[323] These governance mechanisms align the parties' incentives and increase the principal's control over the agent, ultimately reducing the agent's self-serving behavior.[324]

There are four key factors that assess if behavior-based or outcome-based monitoring is effective: goal conflict, task programmability, outcome uncertainty, and outcome measurability.[325] Evaluating these four factors in the context of the federal funding-accreditation relationship suggests that neither behavior-based nor outcome-based governance will be effective in reducing agency costs as both forms of governance presuppose a more defined goal.

First, there is a divisive conflict between the federal government and accrediting agencies' goals.[326] Though both parties ultimately seek to ensure quality education, the parties' definitions of "quality" are incompatible.[327] While the government is focused on external accountability and the consumer protection role of accreditation, accreditors focus on quality improvement and collegiality in the industry.[328] These conflicting views of accreditation are exacerbated by the compounded agency problem: public opinion, politicians, and lobbyists influence the government, while educational institutions influence accreditors, creating a web of conflicting interests and loyalties.[329] These conflicting goals suggest that outcome-based measurement would be a more appropriate governance method.

Second, task programmability also suggests that outcome-based evaluations would be more effective than behavior-based governance. If an agent's behavior cannot be easily specified in advance, behavior-based monitoring is unlikely to be effective.[330] Here, there are several reasons why the task of accreditation is not programmable. If the government dictated the process of accreditation, it would essentially become a government function. Prescribing accreditation would be equivalent to defining quality, allowing the government to regulate higher education.[331] This would contradict the tradition of institutional independence that is the cornerstone of higher education in the United States.[332] Programming the task of accreditation would violate these principles, suggesting that

323. *See supra* Part II.A.3 (discussing positivist agency theory).
324. *See supra* Part II.A.3.
325. *See supra* Part II.A.3.
326. *See supra* notes 282–306 and accompanying text.
327. *See supra* notes 282–306 and accompanying text.
328. *See supra* notes 282–306 and accompanying text.
329. *See supra* notes 200–14 and accompanying text (discussing compounded agency problems in general); *see also supra* Part III.B (discussing how the compounded agency problem manifests in the government-accreditor relationship).
330. *See supra* notes 226–27 and accompanying text.
331. Judith S. Eaton, *The Future of Accreditation?*, INSIDE HIGHER ED (Mar. 24, 2008), http://www.insidehighered.com/views/2008/03/24/eaton#ixzz2nmxJ8100.
332. *See supra* note 154 and accompanying text.

behavior-based governance is an inappropriate manner of addressing agency costs.[333]

Third, a consideration of outcome uncertainty suggests that neither outcome-based nor behavior-based monitoring would be effective because no outcome has been specified. If an agent's work has little connection to the desired outcome, behavior-based mechanisms are more appropriate than outcome-based governance.[334] The government's desired outcome is ensuring that its billions of dollars are invested in quality institutions; however "quality" has not been defined.[335] In order to measure the extent to which quality education depends on accreditors' actions, there must be a generally accepted definition of "quality education." For the reasons discussed below, it is impossible to measure quality; thus outcome uncertainty suggests that neither outcome-based nor behavior-based governance would be effective.

Finally, though an evaluation of goal conflict and task programmability suggests that outcome-based governance could reduce agency costs, a consideration of outcome measurability shows that these evaluations would be impossible. Similar to outcome uncertainty, outcome measurability presupposes that an outcome is defined. Because the outcome of "quality education" is not defined, the outcome is not measurable and outcome-based governance would be ineffective.

Ultimately, the four factors above reveal a fundamental flaw underlying both outcome-based and behavior-based governance: we do not know how to define or measure a "quality education." Any outcome-based governance that would tie the agent's reward to government desired outcomes are ineffective because there is no clear desired outcome. Similarly, increasing regulation of accreditors' behaviors and increasing oversight fail absent a clear definition of "quality."[336]

As discussed in Part II.B.2, there are several methods of defining and measuring educational quality.[337] Each method fails to fully capture all aspects of quality because the value of education depends entirely on the subjective perceptions of the individual.[338] There is no inherent objective value of education. Rather, it depends on the student's hierarchical ranking of choices based on their individual circumstances.[339] Individuals take a number of factors into consideration in determining the value of education: financial constraints, existing education level, intended career path, personal ideologies, individual preferences for subject matter, etc. Any

333. An additional issue presented by task programmability is that for accreditation, the task and outcome are inextricably linked; therefore, defining the task would necessarily involve defining the outcome, as discussed later in this section.

334. *See supra* notes 228–30 and accompanying text.

335. *See supra* Part II.B.

336. An additional drawback to these governing mechanisms is the cost of monitoring outcomes or behavior. *See supra* notes 234–35 and accompanying text.

337. *See supra* Part II.B.2.

338. *See supra* Part II.B.1.

339. *See supra* Part II.B.1.

standardized value of education for all students would be inaccurate because of these individual preferences.

The subjective nature of educational quality renders both outcome-based and behavior-based governance of accrediting bodies ineffective. In light of the agency costs that exist and the ineffectiveness of these controls, the government should sever the tie between accreditation and federal funding.

B. Decoupling Accreditation and Federal Student Loans

Amending the HEA to decouple accreditation and federal funding for student loans is the most effective means of reducing agency costs and student loan burdens. This section addresses (1) the flaws of the proposals for reform mentioned in Part III, (2) the benefits of decoupling the systems, and (3) the potential criticisms of this decoupling solution.

1. Flawed Proposals for Reform

The first four proposals discussed in Part III will not solve the principal-agent dilemma posed by the current federal funding-accreditation relationship. First, those who argue that no changes are necessary believe that rising student loan debts do not signal a crisis.[340] However, as discussed in Part I.A, the unprecedented rise in student loan debt has led to increased default rates and higher tuition costs, burdening both individual borrowers and the economy as a whole.[341] These burdens have ultimately made education less accessible, undermining the purpose of the HEA.[342] Therefore, some type of reform of the federal funding-accreditation system is necessary.

The second proposed reform, changing the pay structure, is a method of outcome-based governance that seeks to eliminate the conflict of interest inherent in the existing fee structure.[343] This proposal fails to address two concerns: (1) divergent interests beyond the financial conflict of interest and (2) the lack of a defined outcome. First, while separating the financial tie between higher education institutions and accreditors may reduce the financial incentives to accredit schools, it does not address the issue of collegiality among evaluators or fundamental ideological differences.[344] Second, as previously discussed, this outcome-based monitoring would not be effective unless the government conditioned payment on the achievement of a defined outcome.[345] If the government provided funding without tying it to a defined metric, the incentives of the accreditors may not change.

340. *See supra* notes 66, 85 (discussing the argument that the increase in student loan debt is not a crisis or a bubble that could seriously affect the U.S. economy).

341. *See supra* Part I.A.3.

342. *See supra* Part I.A.3.

343. *See supra* notes 305–06 and accompanying text.

344. *See supra* notes 301–06 and accompanying text.

345. *See supra* Part IV.A.

Similarly, the third proposal's suggestion that the government should define quality would not be a successful reform measure. As discussed above, the subjective theory of value and the highly individualized nature of educational choices dictate that a single definition of "quality" would be arbitrary and fail to capture the costs and benefits of higher education.[346]

Finally, while encouraging competition among accreditors is a valuable reform, the fourth proposal fails to contend with accreditors' and the government's divergent interests.[347] Increased competition among accreditors would break the cartel held by current accreditors.[348] Accreditors would be faced with the threat of losing USDE recognition if they did not thoroughly evaluate schools. However, as discussed above, without clear instruction about how the government wants accreditors to evaluate schools, this is an empty threat. Therefore, increasing competition among accreditors alone will not solve the agency problem.[349]

2. The Benefits of Decoupling

Unlike the reform proposals discussed above, severing the ties between accreditation and federal funding will solve the principal-agent dilemma and encourage transparency in the industry, ultimately helping students make informed decisions. Decoupling accreditation and federal funding will (a) serve the government's and accreditors' interests while returning independence to institutions; (b) encourage innovation in the higher education industry; (c) generate competition among accreditors; and (d) increase transparency in the industry.

a. Fulfilling the Government's and Accreditors' Interests

The divergent interests of the government and accreditors in the federal funding-accreditation system have resulted in neither party's goals being accomplished.[350] Accreditation, once a badge of quality, has become a de facto requirement now that it is linked to federal funding.[351] Under the current regime, accreditation's other functions—for instance, easing transfer among schools and improving best practices—are inconsequential compared to its role as a gatekeeper of federal funds.[352] Thus, accreditors' goals of quality assurance and improvement are not being met. Similarly, government interests are not being served under the current regime because accreditors are ill suited to the consumer protection role.[353]

346. *See supra* Parts II.B, IV.A.
347. *See supra* notes 284–306 and accompanying text.
348. *See supra* notes 148–51 and accompanying text.
349. Decoupling the accreditation and federal loan systems will result in competition among accreditors, and will therefore capture these benefits. *See infra* Part IV.B.2.
350. *See supra* notes 284–306 and accompanying text.
351. *See supra* note 92 and accompanying text.
352. *See supra* notes 98–101 and accompanying text.
353. *See supra* Part III.B.

Decoupling accreditation and federal funding will restore institutional autonomy to both accreditors and the USDE. First, accreditation, which was intended to be a nongovernmental peer-review process, will regain its independence from government interference.[354] Accreditors will be free to evaluate schools using their own criteria and standards for quality. Furthermore, the separation would give accreditors the freedom to develop more complex evaluation processes; rather than providing a binary "yes or no" response to schools, accreditors could create more granular assessment of schools and perhaps create a graded system of accreditation.[355]

Similarly, decoupling student loans and accreditation would allow the government to develop its own system for determining federal student loan funding, focusing on its interest in public accountability and consumer protection. The government would have more flexibility once freed of the binary gatekeeping accreditation offers.[356] The government could introduce a form of risk-based pricing, allowing interest rates or volume of student loans to vary depending on a school or program's performance. By separating student loans and accreditation, the government and accreditors could create these tailored programs.

b. Encouraging Innovation in Higher Education

In addition to returning institutional autonomy to the USDE and accreditors, allowing them to more effectively meet their goals, decoupling accreditation and student loans would encourage innovation in the higher education industry. The current accreditation scheme stifles innovation because accreditation focuses on traditional business models of higher education institutions.[357] Therefore, nontraditional higher education, including many online or distance programs, have been unable to get federal funding.[358] By separating accreditation and student loans, the government could encourage diversity in the education industry. Less expensive models of education could be developed to compete with the traditional models. Because each student values education subjectively, these nontraditional models may be a more appropriate fit for some students.[359]

c. Generating Competition Among Accreditors

Third, if the government removes itself from the accreditation process, there would be more competition within the accreditation industry. The current system, which emphasizes the role of accreditation in the federal loan system, values those accreditors that have received USDE

354. *See supra* Part III.B.
355. *See* LEEF & BURRIS, *supra* note 250, at 43–44.
356. *See id.*
357. *See* BURKE & BUTLER, *supra* note 92, at 18–19.
358. *See id.*
359. *See id.*

recognition.[360] This recognition process blocks new accreditors from entering the industry in several ways. First, the existing recognized accreditors act as a barrier to entry in that they have reputations for credibility.[361] Additionally, in order to receive USDE recognition, accreditors must have two years of experience accrediting schools.[362] Given the existing accreditors' entrenchment in the higher education industry, this requirement is difficult to meet.

If the government played no role in the accreditation process, more accreditors could enter the industry. These accreditors, faced with increased competition, would be forced to demonstrate to the public that they add value to the education industry. In distinguishing themselves from their competitors, these accreditors would be incentivized to make their processes public, which is discussed further below.

d. Increasing Transparency in the Industry

Finally, decoupling accreditation and the federal student loan program would increase transparency in both the higher education and student loan industries, allowing students to make more informed choices about higher education and loans. Separating the loan and accreditation process would create two separate systems that provide students with two different types of information.

First, the government lender would provide information in the consumer protection role, providing financial data about particular schools and loan choices.[363] Second, the accrediting agencies would continue to assess schools at a more granular level, focusing on more intangible indications of "quality." These accreditors, competing against potential new accreditors in the industry, would have an incentive to disclose the methods they use to assess quality, including the metrics and results that are typically kept confidential.[364]

Both the financial information collected by the government lender and the more intangible assessments conducted by accreditors provide students with information to help inform their choice of education and financing. Rather than simply telling students that a school is accredited and thus eligible for funding, a decoupled regime would provide more detailed information. Students with more information can make more rational decisions about which schools to attend and which type and amount of loan to choose, based on their subjective value determinations.

---

360. *See supra* notes 148–51 and accompanying text.

361. *See supra* notes 133–36 and accompanying text (discussing how higher education institutions must be accredited by a recognized accrediting body to receive funding).

362. *See supra* note 165 and accompanying text.

363. Determining how the government should choose who receives loans is beyond the scope of this Note; however, the government should maintain its consumer protection role by focusing more on financial metrics and factors that affect a student's ability to repay the loan, acting as a lender, rather than focusing on pedagogical issues.

364. *See supra* note 308 and accompanying text.

3. Criticisms of Decoupling

Despite the benefits of decoupling discussed above, critics of this plan may argue that it could lead to (a) a new bureaucracy, (b) the elimination of accreditation, and (c) government funding being diverted to the "wrong" schools. While decoupling accreditation and federal student loans would effect major changes in the higher education industry, each of these criticisms overstates the negative consequences of such a change.

a. Creating a New Bureaucracy

First, critics may argue that once the government is no longer relying on accreditation to assess quality, it will form a new bureaucracy faced with the same dilemma of determining which schools should receive federal funding. The USDE's proposed federal scorecards, a composite rating system, suggest that the government is already moving towards creating its own requirements for funding.[365]

While decoupling accreditation and student loans will force the government to make independent decisions about which schools and programs it will fund, the government can do so without creating a new bureaucracy. The government is a lender for student loans, and should base its requirements for these loans on statistical data that indicates if the loans will be repaid, avoiding pedagogical judgments. Market forces and public opinion will assess the quality of a school's educational program, so there will be no need for a bureaucracy to grade or rate educational quality.

b. Eliminating the Role of Accreditation

Critics may further argue that allowing the government to create its own standards for student loans would essentially eliminate the need for accreditation. While accreditors would be faced with increased competition and would perhaps be forced to change their behaviors, they would not necessarily be rendered useless. Accreditation serves many purposes beyond its gatekeeping role: assisting institutions with self-improvement, engendering public confidence, enabling students to transfer among schools, and creating standards for professional degrees.[366] Accreditation would continue to serve these purposes even if the process was independent from the federal loan system, as it was for decades before the enactment of the GI Bill.[367]

365. *See supra* notes 268–69 and accompanying text.
366. *See supra* notes 98–101 and accompanying text.
367. *See supra* Part I.B.3.

c. Funding the "Wrong" Schools

Finally, some critics may fear that under a decoupled regime, accredited schools may not receive funding while unaccredited schools continue to be funded. If federal student loans are independent of accreditation, schools will fall into one of four categories: (1) accredited with funding, (2) unaccredited without funding, (3) accredited without funding, and (4) unaccredited with funding. Though the first two categories are the same as under the current federal funding-accreditation system, the third and fourth categories present unique situations.

First, this decoupling solution may result in a group of accredited but unfunded institutions.[368] Because many institutions rely on federal student loans, these institutions may be forced to close despite their accredited status.[369] However, this criticism fails to consider alternative funding options. A shrinking public student loans market would incentivize students to look to the private student loan market.[370] Additionally, these schools would be encouraged to change their behavior to entice students to attend. They could increase scholarships, lower tuition rates, or create new payment programs for students. The government should not fund risky loans with little hope of being repaid simply because an institution has been accredited.

The second potential new category of schools under a decoupled regime would be unaccredited institutions receiving federal funding for student loans. Given the subjective nature of "quality education,"[371] however, the government should focus on its role as a lender regardless of the institution's accreditation status. The government should allow the private market to assess a school's quality, and base its lending decisions on more objective criteria. Additionally, as discussed above, providing student loan funding to unaccredited schools could foster innovation in the higher education industry.

CONCLUSION

The relationship between the student loan program and accreditation contributes to the growing student loan crisis. In this relationship, the government and accreditors have divergent interests: the government is concerned with consumer protection and ensuring that its loans are distributed to "quality institutions," while accreditors focus on long-term "quality" improvement and collegiality. The government's attempt to align these incentives through increased control over the accreditation industry has been ineffective because these regulations require a definition of "quality" education. The highly individualized nature of educational

---

368. The government will also be able to classify schools into different tiers of funding, rather than simply deciding funding on an all-or-nothing basis.

369. *See supra* notes 92, 101 and accompanying text.

370. Increased demand for private loans would incentivize private lenders to loan to students, supervised by Dodd-Frank regulations. *See supra* Part I.A.2.

371. *See supra* Part II.B.

choices and the subjective theory of value dictate that any single definition of "quality" would be arbitrary and fail to capture the true value of education.

Amending the HEA to decouple federal student loans and accreditation would allow the government and accreditors to develop their own methods of evaluating higher education institutions. In addition to eliminating the agency problem, severing the tie between these two programs would increase the amount of information available in the market, allowing students to make more rational subjective decisions about their education and finances. This increased transparency, combined with a more prudent federal student loan program, would ultimately help reduce the effects of the student loan crisis.