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Improving Higher Education Regulation

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IMPROVING HIGHER EDUCATION REGULATION

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Last fall, the U.S. Department of Education released an updated "College Scorecard," an online system providing a voluminous amount of data on the nation's colleges and universities.[1] The scorecard is the outcome of a three-year effort, announced by President Obama to much fanfare during the 2012 campaign, to create a "college rating system" that would assess the nation's higher education institutions on their cost of attendance, student graduation rates, and graduates' post-college earnings.[2] It would also determine the allocation of federal funding to those institutions.

After three years of withering attack from college leaders across the nation, the Obama Administration backed off and announced last summer that, in addition to updating the scorecard, it would focus its efforts on methods to promote "innovation" within the higher education sector.[3] Although the rating system has failed to take root (at least for now), the debate that it instigated over the appropriate methods for the federal government to regulate higher education was instructive about the challenges legislators face as they continue to discuss the (already two years late) reauthorization of the Higher Education Act.

It is not surprising that higher education leaders are opposed to greater federal regulation. As chronicled in a major report released last summer by the Task Force on the Regulation of Higher Education, the sector also has valid complaints about the inappropriately burdensome nature of many

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[1] *Fact Sheet: Empowering Students to Choose the College that is Right for Them*, THE WHITE HOUSE (Sept. 12, 2015), https://www.whitehouse.gov/the-press-office/2015/09/12/fact-sheet-empowering-students-choose-college-right-them.

[2] Megan Slack, *President Obama Explains His Plan to Combat Rising College Costs*, THE WHITE HOUSE (Aug. 22, 2013), https://www.whitehouse.gov/blog/2013/08/22/president-obama-explains-his-plan-combat-rising-college-costs.

[3] Doug Lederman et. al., *Rating (and Berating) the Ratings*, INSIDE HIGHER ED (Feb. 7, 2014), https://www.insidehighered.com/news/2014/02/07/colleges-and-analysts-respond-obama-ratings-proposal; *Helping Families Navigate Their Higher Education Options*, DEPT. EDUC. (June 25, 2015), https://www.ed.gov/content/helping-families-navigate-their-higher-education-options.

current federal regulations.[4] However, the dramatic increase in federal student support (some $160 billion in FY 15) over the past decade, combined with growing concerns about the productivity of the higher education sector, make it likely that demands for greater accountability from the industry about outcomes, and particularly student outcomes, will continue.

So, what is the way forward? Reformers of the system of higher education seek feasible and effective ways to use law and regulation to improve the access to and quality of higher education in America. They want to know how the Higher Education Act should be amended. They want the right approach.

The debate over the Obama Administration's college rating proposal probably reveals more than just that the right approach cannot lie with general performance-based ratings. It may be that the right approach is to take several approaches.

To succeed in improving higher education demands that we start with first principles. Higher education is, after all, only one of many sectors the government regulates. Looking at the debate over higher education reform from the vantage point of the regulation in general, and in light of the main types of regulation, can help us to understand better how higher education could be more productively overseen. Such an analysis also suggests some potential compromises that could promote greater productivity from the higher education sector while at the same time reducing some of its regulatory burdens.

In this series of essays, I identify a path forward that both Democrats and Republicans can, and are starting to, recognize. Success on this path will not depend on the implementation of an overarching system of college ratings, or any other single fix. Rather, it will call for wisely selecting and tailoring an appropriate mix of different regulatory tools.

I. TYPES OF REGULATION

To understand the challenges with the current regulatory structure of higher education, as well as the challenges of reforming that structure, it helps to understand the potential and limitations of the different approaches to regulation more generally.

As my colleague Cary Coglianese has written, the government has many different regulatory tools in its belt, and it regulates different industries in different ways.[5] Three main approaches to regulation are "command and control," performance-based, and management-based. Each approach has strengths and weaknesses. Selecting the type of regulation to apply to a sector of the economy will have major impacts on the targeted institutions and on the potential for success in achieving regulatory goals.

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[4] AM. COUNCIL ON EDUC., RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES: REPORT OF THE TASK FORCE ON FEDERAL REGULATION OF HIGHER EDUCATION (2015), https://www.acenet.edu/Documents/Higher-Education-Regulations-Task-Force-Report.pdf.

[5] Cary Coglianese, *Regulation's Four Core Components*, REGUL. REV. (Sept. 17, 2012), https://www.theregreview.org/2012/09/17/regulations-four-core-components.

Traditionally, the majority of regulations have taken the form of what is frequently referred to as command-and-control regulation (also sometimes called "means-based" or "technology-based"). Under this approach, the regulatory agency sets forth methods, materials, and the processes by which the regulated entity must operate. The now dissolved U.S. Atomic Energy Commission, for example, directed which technology must be used in approved nuclear power plants and regulated the processes by which companies produce nuclear power.[6]

Command-and-control regulation, in theory, creates certainty—for the government, the regulated entity, and the public—that a body of experts have carefully developed the safest and most efficient mode of operation for the sector. This type of regulation is relatively easy for the regulator to observe and evaluate, and therefore to determine compliance. However, many have critiqued command and control as a highly expensive form of regulation, as one that increases the costs of products to the public, and as stifling of innovation.[7] Critics also question whether regulators have the ability to develop the most efficient technological or procedural safeguards.[8]

As critiques of government bureaucracy have increased in recent decades, support for an alternative to command and control has grown. With one such alternative, performance-based regulation, the regulator does not dictate the materials or processes the regulated entity must use to achieve societal goals, but rather sets ultimate production standards that the entity must meet. This approach allows the regulated entity the flexibility to determine the most efficient way to meet that standard. Take, for example, carbon monoxide emission regulations implemented under the Clean Air Act, which do not require the use of specific technologies or processes, but rather leave those choices to the regulated industries and instead mandate that emissions cannot exceed a set limit. In every administration since at least the Clinton Administration, performance-based regulation has been advocated quite explicitly within White House directives to regulators working in a variety of areas. It is an approach with bipartisan support.

Advocates of performance-based regulation argue that it promotes innovation and reduces costs by encouraging the regulated entity to figure out the best way to achieve societal goals.[9] The evidence for such claims, however, is not nearly as powerful as the intuition that flexibility should lower costs.[10]

Performance-based standards have their own limitations in practice, including fundamental disagreements over what the goals should be and how

[6] Alice Buck, *The Atomic Energy Commission*, July 1983, http://energy.gov/sites/prod/files/AEC%20History.pdf.

[7] Dwight R. Lee, *The High Cost of Command and Control*, FOUND. FOR ECON. EDUC. (Aug. 1, 2001), http://fee.org/articles/the-high-cost-of-command-and-control.

[8] *See* Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L. REV. 325 (1996).

[9] Cary Coglianese, Jennifer Nash & Todd Olmstead, *Performance-Based Regulation: Prospects and Limitations in Health, Safety and Environmental Protection*, 55 ADMIN. L. REV. 705 (2003), at 723.

[10] *Id.* at 707.

performance standards should be set. Sometimes critics of performance-based regulation question whether government can measure performance accurately.

Performance standards can have the perverse effect of privileging certain societal goals over others depending on the shape of the standards. If not monitored and enforced well, they also can lead to bad behavior by actors under pressure to produce results. The recent Volkswagen scandal, where the company rigged its emission systems to enable cars that violated federal emissions standards to pass the tests, is only the latest example of this problem.[11] Examples even closer to home are the numerous cheating scandals in the nation's elementary and secondary schools, brought on by pressure from federal performance standards.

In addition, when applied to heterogeneous institutions, uniform performance standards can still operate inefficiently by imposing a one-size-fits-all performance goal. It might not always be cost-effective to have every institution meet the same standard.

So, even though performance-based regulation continues to have strong advocates, policymakers rightfully question whether it is the answer in every case.

A third approach to regulation, called management-based regulation, has recently received increasing attention. Interest in it seems strongest in settings where a regulated sector is filled with highly heterogeneous institutions, and where the goals of regulation are diffuse and hard to measure.[12] In these settings, mandating specific processes or setting hard and fast performance standards would not be appropriate. However, to protect society from damage or to produce societal benefits, the government requires the entity to "self-regulate."[13] The institution does this by engaging in a meaningful assessment and planning process that determines both the institution's goals and the efforts they will undertake to achieve these goals.

Under management-based regulation, the entity sets the standards and evaluates itself (or through a third, non-governmental party) to determine whether it has achieved these goals. The benefits of management-based regulation are that it, theoretically, promotes innovation by enabling institutions to develop, and therefore buy into, their own standards. It is also cost effective, as the government does not have to take on the significant regulatory burden of developing the goals and measuring the sector's success in achieving them.

One prominent example of the management-based approach arises in the area of food safety, where many countries have adopted the Hazards

[11] Cary Coglianese, *What Volkswagen Reveals about the Limits of Performance-Based Regulation*, REGUL. REV. (Oct. 5, 2015), https://www.theregreview.org/2015/10/05/coglianese-volkswagen-performance-based-regulation.

[12] Cary Coglianese & David Lazer, *Management-Based Regulation: Using Private Management to Achieve Public Goals*, 37 L. & SOC'Y REV. 691 (2003), at 720.

[13] *See* Cary Coglianese, Management-Based Regulation: Implications for Public Policy (OECD, Paper No. GOV/PGC/REG(2008)5, 2008), https://www.oecd.org/gov/regulatory-policy/41628947.pdf.

Analysis and Critical Control Points approach that requires food production companies to self-assess their potential safety hazards and identify preventive measures that they will adopt to deal with those risks.[14] Another example is Massachusetts' Uniform Toxic Use Reduction Act, which requires chemical companies to develop plans to reduce the amount of toxic substances they release into the environment.[15] In both of these cases, the plans are reviewed and evaluated by a government regulator.

There are, of course, many potential challenges with this management-based approach. For example, it may be difficult for regulators or private evaluators to determine whether the goals and processes established by the institution will actually benefit society. Since the regulatory regime does not require any specific outcomes, but rather a process to determine outcomes, institutions could "game the system" and create meaningless plans that do not benefit the public. Furthermore, institutions could produce good plans but never implement them.

Good management-based regulation, analysts have argued, must be shaped by the regulator to ensure that the proper goals are being planned for and the plans developed can actually be implemented.[16] Although it has limitations, the small amount of study on this relatively new approach to regulation has found that sectors imposing management-based regulation have seen increases in safety and productivity.[17]

In recent decades, policymakers have debated frequently what type of regulation is most appropriate in a given sector of the economy. In many complex areas, such as higher education, the regulatory scheme involves a mixture of approaches. Command-and-control regulation still predominates, but efforts to adopt performance-based regulation continue to grow. At the same time, there is evidence that more regulatory agencies in the United States and abroad are considering management-based regulation to deal with the complexities of modern economic and social systems.

In order to assess how to improve regulation of higher education, it is essential to consider the strengths and weaknesses of the major policy options. Educational reformers need to take into account what we already know about the available regulatory tools.

II. MANAGEMENT-BASED REGULATION OF HIGHER EDUCATION

More than 7,000 institutions of higher education exist in the United States today.[18] The sector is richly diverse, with everything from large public research

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[14] *Hazard Analysis Critical Control Point*, FOOD & DRUG ADMIN., https://www.fda.gov/food/guidance-regulation-food-and-dietary-supplements/hazard-analysis-critical-control-point-haccp.

[15] Mass. Gen. Laws § 21I (1989).

[16] Coglianese, *supra* note 13.

[17] *See* Lori Snyder Bennear, *Are Management-Based Regulations Effective? Evidence from State Pollution Prevention Programs*, 26 J. POL'Y ANALYSIS & MGMT. 327 (2007).

[18] *Table 105.50. Number of Educational Institutions by Level and Control of Institution: Selected Years, 1980-81 through 2011-12*, NAT'L CTR FOR EDUC. STAT., https://nces.ed.gov/programs/digest/d13/tables/dt13_105.50.asp.

institutions to small religious colleges to for-profit institutions located fully on the web, and much in between. The structures of higher education vary widely, as do the purposes of the institutions.

Recognizing this diversity, government has historically taken a management-based approach to the regulation of higher education, unlike numerous other fields where command-and-control regulation has predominated. Although states have sometimes been more prescriptive of the methods and processes by which institutions (particularly public higher education institutions) must operate, in general higher education institutions have been given the flexibility to set their own goals and to determine the methods by which they will achieve them.

The Higher Education Act of 1965 (HEA), the law that created the current federal system of higher education finance, does not prescribe how institutions should teach, research, or provide service to the community.[19] However, the HEA states that an institution must be "accredited" for its students to be eligible for Pell Grants and student loans under federal programs.

Accreditation is a private system under which regional or national private entities work with individual higher education institutions to review and critique their operations. The higher education institution provides a "self-assessment" that the accreditor then uses as a framework for examining the institution's successes and challenges.

Accreditation has been around for more than a century. Before World War II, accreditation was a fully private initiative that provided a process for institutions to assess themselves, and it also served as a basis upon which institutions would allow students to transfer from one to another. Since the 1950s, accreditation has taken on a second, somewhat conflicting, responsibility of assuring the government of institutional quality control. Private accreditors help the federal government by certifying that institutions are worthy of participation in higher education financial programs.

Under the current accreditation system, seven regional and seven national accreditors work with institutions to assess their programs.[20] Numerous "program accreditors" also certify specific academic programs.[21] For example, the American Bar Association accredits schools of law.

The initial accreditation process for a new institution is especially detailed—some would argue overly burdensome—and can take between five and ten years to complete. After initial accreditation, for most institutions, re-accreditation happens every ten years, providing an opportunity for them to update their goals and methods and to work with a third party to self-evaluate. Supporters argue that the flexibility of the accreditation system allows it to be responsive to the diversity of higher education—the numerous different academic programs at different kinds of

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[19] Higher Education Act of 1965, 20 U.S.C. §§ 1001-1161aa–1.

[20] *Regional Accrediting Organizations 2015-2016*, COUNCIL FOR HIGHER EDUC. ACCREDITATION, https://web.archive.org/web/20160405184946/http://www.chea.org/Directories/regional.asp.

[21] *Id.*

institutions that serve different kinds of students. A "one-size fits all" approach to regulation, they argue, would be destined to fail.[22]

With some meaningful exceptions discussed below, the regulation of higher education is flexible. Unlike with what sometimes happens with management-based regulation in other sectors, institutions are not required to submit their plan to the government regulator, but only to the third party accreditor. They are also not required to implement their plans, and there are no penalties if, for example, at reaccreditation the institution has not implemented the plans it established a decade before. However, if an accreditor finds that the organization has not met the basic requirements of financial stability and academic rigor (this happens rarely), the institution is no longer eligible to participate in federal financial aid programs. For almost every institution, removal of an accreditation would be a death knell, so they work hard to ensure that this does not happen.

This "hands-off" approach has brought increasing complaints over the years. Critics argue that the accreditation system has few teeth—that almost every institution is re-approved, whether they are doing well or poorly. Further, critics assert that the system provides no ability to assess *levels of* institutional success. The re-accreditation answer is a binary "yes or no," which prevents comparison of institutions. As a result, it is difficult for students (and regulators) to determine which institutions provide a quality education and which ones should be avoided. The accreditation system, critics argue, does not push institutions to improve. Since an institution meeting minimum requirements gets the same access to funds as a high-performing one, there are not enough incentives to improve educational outcomes.

To enhance the strength of the regulatory system, Congress amended the HEA in 1992 to require the U.S. Department of Education to approve accreditors.[23] The Education Department must certify that each accrediting agency has the capacity to assess higher education institutions. The amended HEA also gave more direction to accreditors, requiring them to certify that institutions meet "minimum standards" in ten areas, including student achievement and compliance with Title IV. Since the adoption of these requirements, Education Department oversight of accreditors has increased, but many still argue that the system has had little substantive impact and that the regulations have pushed accreditors to become "box checkers," certifying that institutions meet minimum standards in their operations. The system, they argue, does little to help institutions improve student academic outcomes.

Over the past decade, policy makers have increasingly questioned the value of accreditation in the federal financial aid system. A 2006 report by a commission appointed by then Secretary of Education Margaret Spellings argued that accreditors needed to push institutions to focus more on student

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[22] Letter from Molly Corbett Broad, President, Am. Council on Educ., to Sen. Lamar Alexander, Chairman, Sen. Comm. Health, Educ., Labor & Pensions (Apr. 30, 2015), https://www.acenet.edu/Documents/Comments-Alexander-Accreditation.pdf.

[23] Higher Education Act Amendments of 1992, 20 U.S.C. §§ 101-1561.

academic outcomes and that the system should be more transparent and accountable to public concerns.[24]

"Accreditation is the primary barrier to innovation in American higher education," argued Charles Miller, who chaired the commission. While she was the Education Secretary, Spellings tried to change department regulations to require accreditors to measure student learning and other outcomes, but higher education institutions convinced Congress to prohibit the department from adding these requirements.[25] More recently, former Education Secretary Arne Duncan called accrediting agencies "the watchdogs that don't bark," and Senator Marco Rubio (R-FL) has called the system a "cartel."[26]

Critics argue that accreditation serves as a barrier to entry for innovative new educational approaches. For example, federal regulations require that student aid be allocated based on the number of "academic credits" being taken by the student. This system calculates the total number of credits received using the number of hours the student is expected to spend in class. This "seat time" approach does not measure actual student learning, many argue.

New approaches, such as "competency-based" education, would determine student progress based not on the number of hours in class but on the achievement of certain skills. But because they do not fit well into existing federal financial aid regulatory requirements, competency-based approaches have struggled to achieve accreditation and are therefore have been less able to compete for students desirous of financial support.

Higher education today is under attack from people across the political spectrum. American colleges and universities are, according to critics, too expensive, not focused on student success, not helping students progress quickly to graduation, and not preparing students for success in the workplace. Given the significant increase in federal funding and the even greater increase in family contributions to higher education over the past decade, and with overall student debt at $1.2 trillion, it is not surprising that there are increasing demands for greater or different regulation of the sector. But figuring out how to reform will not be easy.

III. PRESIDENT OBAMA'S COLLEGE RATING PROPOSAL

Critics charge that America's main approach to regulating higher education—a management-based accreditation process—has failed to spur

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[24] A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION. A REPORT OF THE COMMISSION APPOINTED BY SECRETARY OF EDUCATION MARGARET SPELLINGS (2006) at 4.

[25] Doug Lederman, *Altering Accreditation—But How?*, AM. COUNCIL TRUSTEES & ALUMNI (Sept. 24, 2007), http://www.goacta.org/news/altering_accreditationbut_how.

[26] *Toward a New Focus on Outcomes in Higher Education*, DEPT. EDUC (July 27, 2015), https://web.archive.org/web/20160413020713/https://www.ed.gov/news/speeches/toward-new-focus-outcomes-higher-education; Tom LoBianco, *Rubio: College 'Cartels' Need Busting in New Economy*, CNN (July 7, 2015), http://www.cnn.com/2015/07/07/politics/rubio-higher-education-overhaul/.

meaningful improvements in the nation's colleges and universities. Could a performance-based approach to higher education regulation be the answer?

The recent fight over the Obama Administration's proposed college rating system has made evident the challenges with moving to a performance-based approach. The performance-based rating system presented serious practical problems that the Administration was simply unable to resolve. When the Obama Administration announced last year it was abandoning its rating system proposal, it essentially conceded that the higher education sector cannot overall be regulated using performance standards.

When he first announced his rating proposal in 2013, President Obama stated that his goal was to create greater transparency and efficiency in the sector. Higher education funding, he argued, should be focused on broadening access, increasing affordability, and improving educational quality. Specifically, he called for reforms to federal higher education financing that would reward colleges that offer low tuition, provide "value" (defined as programs that had high graduation rates), enable graduates to obtain good-paying jobs, and give access to low-income students.

"What we want to do is rate them on who's offering the best value so students and taxpayers get a bigger bang for their buck," the President argued in remarks at the State University of New York at Buffalo. "Colleges that keep their tuition down and are providing high-quality education are the ones that are going to see their taxpayer funding go up. It's time to stop subsidizing schools that are not producing good results."[27]

The President's proposal mirrored performance-based funding proposals that several states, including Tennessee, Ohio, and Indiana, have adopted to allocate a small percentage of funding to their public higher education institutions.[28] The basic idea is that schools that meet established performance goals get greater funding than those that do not.

Although their responses to the President's proposal differed in tone and substance, higher education institutions around the country were vocal and active critics of the proposal, and their critiques mirrored those of performance-based regulation in general. Higher education leaders argued that such a rating system would be impossible to create because higher education is too diverse and has too many goals.[29] Critics asked: how can the "value" of education ever be meaningfully quantified?

"Private, independent college leaders do not believe it is possible to create a single metric that can successfully compare the broad array of American higher education institutions without creating serious unintended

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[27] *Remarks by the President on College Affordability*, THE WHITE HOUSE (Aug. 22, 2013), https://www.whitehouse.gov/the-press-office/2013/08/22/remarks-president-college-affordability-buffalo-ny.

[28] Kysie Miao, *Performance-Based Funding of Higher Education: A Detailed Look at Best Practices in 6 States*, CTR. FOR AM. PROG. (Aug. 7, 2012), https://www.americanprogress.org/article/performance-based-funding-of-higher-education/.

[29] Lederman, et. al., s*upra* note 3.

consequences," argued David Warren, director of the National Association of Independent Colleges and Universities.[30] Any rating system, he argued, would reflect policymakers' choices more than those of individual students.

Although the Obama Administration claimed that the proposal would distinguish among different types of schools, higher education leaders and their lobbyists asserted that such a proposal would further exacerbate the divide between the elite schools—where students from mostly wealthy backgrounds graduate at high rates and secure well-paying employment—from the many universities that provide open access and have lower graduation and employment outcomes.[31]

"It's not fair or reasonable really, to rate institutions on their performance without consideration of the nature of their student body," argued Peter McPherson, president of the Association of Public and Land Grants Universities.[32]

Higher education leaders also questioned the ability of the government to gather and manage accurate data on these complicated factors. "Several of the data points that the Department is likely to include in a rating system, such as retention and graduation rates, default rates and earning data—are flawed," argued Molly Corbett Broad, President of the American Council on Education.[33] "The Department of Education's retention and graduate rates, for example, count as a dropout any student who transfers from one institution to another, regardless of whether they complete their education at another institution," she continued.

Furthermore, according to critics, an exclusive focus on limited metrics, such as earning data, could result in colleges neglecting programs in low-paying occupations such as teaching and nursing.

During the summer of 2015, after more than two years of discussions with higher education institutions, educational advocates and congressional leaders, the Administration pivoted away from the idea of a creating a rating system and then allocating federal funding based on performance according to the ratings.[34] As an alternative, the Administration is putting together a database with "new, easy-to-use tools that will provide students with more data than ever before to compare college costs and outcomes."[35]

Announcing this new plan, and signaling the Administration's retreat from a rating system, Education Deputy Undersecretary Jamienne Studley acknowledged that meaningfully evaluating colleges "through a rating system

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[30] *Id.*

[31] Michael Stratford, *Staking Out Positions*, INSIDE HIGHER ED (Nov. 21, 2013), https://www.insidehighered.com/news/2013/11/21/higher-education-associations-stake-out-positions-ratings-system.

[32] *Id.*

[33] Molly Corbett Broad, *Postsecondary Institution Ratings Response*, AM. COUNCIL ON EDUC. (Jan. 31, 2014), http://docplayer.net/3787060-January-31-2014-dear-mr-reeves.html.

[34] Ellie Bothwell, *Obama 'Scraps' College Rating Plan*, TIMES HIGHER EDUC. (June 25, 2015), https://www.timeshighereducation.com/news/obama-scraps-college-rating-plan.

[35] *Fact Sheet*, *supra* note 1.

is an extremely complex and iterative process that appropriately takes time and thoughtfulness."[36]

The college rating saga has revealed the challenges to reforming the higher education system using performance-based regulation. Even if everyone agrees on general aspirations like accessibility, affordability, and quality, defining those goals concretely and then applying them uniformly to the highly heterogeneous world of higher education creates its own kind of problems.

IV. TOWARD A NEW APPROACH TO REGULATING HIGHER EDUCATION

All along, the Obama Administration's proposed performance-based system of funding for higher education had little chance of being adopted in the current political climate. Congress' 2015 budget threw this point into sharp relief: it specifically prohibited the U.S. Department of Education from collecting the data necessary for the implementation of a performance rating system. Thus, although a performance-based framework is attractive because it would push colleges and universities to focus more on student outcomes, the debate over this system made clear the significant obstacles to its implementation.

The challenges that the Education Department has been unable to overcome are similar to those in other fields. The U.S. Environmental Protection Agency's (EPA) experience implementing the Clean Air Act is instructive.[37] Under the Clean Air Act, the regulator can articulate a relatively clear goal—the reduction of pollution—and a fairly clear way to measure progress toward that goal, namely emissions. Yet, the EPA's air quality and emissions standards have been debated and litigated for over a decade, and to this day there is much disagreement over the proper way to set these standards. And as we saw recently with the Volkswagen emissions scandal, there also can be significant levels of cheating.[38]

Even if higher education institutions, advocates, and regulators could agree on the right goals, defining them and measuring these standards pose large obstacles, as the Obama Administration has found. Pursuing a performance-based path toward regulating higher education would likely result in several years of debate over the standards, followed by decades of litigation once these standards would start to be applied.

Still, even with performance-based regulation being unlikely, the debate over the appropriate means to regulate higher education will continue as Congress considers the reauthorization of the Higher Education Act of 1965 (HEA).[39] So what is the appropriate way to regulate higher education?

Although there is much disagreement over the answer to this question, most policymakers agree that meaningful reform requires changes to the type

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[36] *Id.*

[37] Clean Air Act of 1963, 42 U.S.C. §§ 7401-7675.

[38] Russell Hotten, *Volkswagen: The Scandal Explained*, BBC (Dec. 10, 2015), http://www.bbc.com/news/business-34324772.

[39] Higher Education Act of 1965, 20 U.S.C. §§ 1001-1161aa–1.

of management-based regulation of higher education institutions. In other sectors, the regulator is more deeply involved in framing the self-evaluation process, and in assessing whether institutions have met their self-established goals. A management-based regulatory scheme "with teeth" could create a climate of greater productivity and transparency in higher education.

For instance, an improved management-based approach would facilitate the achievement of certain widely agreed-upon aims. Policymakers, advocates, and higher education leaders agree that the nation's higher education system should be affordable, provide access to a large segment of the population, help students complete their degrees, and support student achievement through quality programs that lead to employment. The difficulties have stemmed from balancing these competing and conflicting goals, defining how to meet them, and determining which, among many alternatives, are the best paths to secure the goals. This is where a management-based approach would be advantageous: it would acknowledge the diversity of educational institutions, while still pushing these institutions to make continuous improvement in the pursuit the goals.

Most policymakers have come to the conclusion that a management-based approach is the only workable one, but almost everyone agrees that there is room for improvement within the current accreditation structure. The current system could lead to reform in two ways: through the establishment of a more robust accreditation system that pushes institutions to be more strategic in meeting the above-stated goals, and through a revised regulatory system—either through accreditation or by other mechanisms—that promotes innovation by allowing institutions to experiment and that enables new higher education initiatives to gain access to federal funding.

Higher education leaders have mostly responded to such ideas by pushing back against "greater regulation" of the sector. They might be wise, though, to take a more active role in shaping the scope and tenor of regulation. Performance standards might not be the right approach, but a more robust, management-based regime with greater agreement on the aspects to be planned and evaluated might assist higher education institutions in fighting a more invasive type of regulation, as well as provide greater clarity on the goals these institutions should pursue.

For example, the reauthorized HEA could require each institution to develop a plan that states its own specific goals for access and outcomes. Institutions would then need to decide, and communicate, their goals for students of color and economically disadvantaged students. Furthermore, institutions would need to set goals for retention and graduation, and explain the processes that they will implement to achieve these goals. Finally, institutions would set their own goals for career placement and success.

Many institutions already take such steps in the reaccreditation process, but a revised HEA could make doing so a requirement. It could also mandate that the institutions publish their goals in a form that is easy to understand, compile, and compare. The reauthorized HEA could establish a center within the Education Department that publishes a short and useful explanation of each institution's plan and a yearly update of its progress.

Higher education leaders might also use their willingness to compromise on "accreditation with teeth" to leverage relief from some of the many onerous regulatory burdens under which they currently operate. Over the past few years, the federal government, through legislation, regulation, and Department of Education practice, has significantly increased oversight of the higher education sector. Federal regulators now require significant reporting on many aspects of higher education practice, particularly in the areas of financial compliance and student safety. In essence, in an effort to improve the performance of the sector, Congress and the Education Department have layered an inflexible, command-and-control regulatory structure on top of the flexible if weak existing management-based structure. This has created a system in which higher education institutions are less than fully accountable for their primary function—education—at the same time that they are highly regulated in many other areas of their operation.

Educational leaders frequently complain that the specific processes that the Department of Education mandates are burdensome, expensive, and not focused on the most important aspects of their institutions. These critiques are comprehensively described in a report issued this summer by the bipartisan Task Force on Federal Regulation of Higher Education.[40] The report concludes that "many rules are unnecessarily voluminous and too often ambiguous, and … the cost of compliance has become unreasonable.[41] Moreover, many regulations are unrelated to education, student safety, or stewardship of federal funds. For example, accreditors must certify that institutions are up-to-date with fire codes, an oversight responsibility that really belongs with local government. Other Education Department rules can be a barrier to college access and innovation in education."

The report outlines numerous areas where federal regulation increases university costs without, according to the task force, increasing productivity. For instance, according to the task force, the Education Department has a 300- page book of guidelines for institutions about the Jeanne Clery Act, the law that requires higher education institutions to report incidents of on- and off-campus crime.[42] This command-and-control regulation has detailed and even contradictory guidelines for what institutions must report, and which too often have the effect of inhibiting the communication of important information and promoting the wasteful use of resources.

The report calls attention to the financial responsibility standards that the Department of Education has implemented to ensure that institutions are financially viable, which often lump colleges with significant resources into the same category as those in financial peril. These standards, the Task Force argues, do not represent best accounting practices, and are both over-

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[40] AM. COUNCIL ON EDUC., *supra* note 4.
[41] *Id*.
[42] 20 U.S. Code § 1092 (2020).

inclusive and under-inclusive in identifying schools that necessitate intervention. Further, the rules for determining financial aid eligibility impose onerous requirements on potential aid recipients and institutions alike; such requirements, the Task Force asserts, are disproportionate to the risks of inaccurately allocating financial aid.

In all, the report provides a critical assessment of the increasing federal regulatory reach, detailing the numerous ways in which higher education institutions spend millions of dollars that could be better used. A reauthorized HEA could streamline these procedures and provide clearer guidance to the Department of Education.

Moreover, a fully thought-out management-based approach, with an emphasis on institutional financial security and student outcomes, would have the benefit of focusing colleges and universities on the most important priorities. At the same time, eliminating some of the many other regulations that are not directed at those two priorities would free up institutional resources that could be refocused on helping students achieve and progress.

V. NEXT STEPS IN IMPROVING HIGHER EDUCATION REGULATION

The need for better regulation of higher education is clear. Critics of command and control decry the wastefulness of box-checking and the many other burdens imposed by prescriptive rules that are too often unrelated to education. But the alternative of a creating an overarching performance-based regulatory rating system has also proven to be infeasible. Reforms are clearly needed, and the best way to do so would be to strengthen the management-based accreditation system.

The Obama Administration recently proposed legislative changes that would move in this direction. In addition, to continue the pressure on the accreditation system, the Department of Education has created a new webpage to provide the public with more information about accrediting bodies and the institutions they supervise.

Although the Department of Education is barred by legislation from requiring accreditors to use specific educational outcomes to evaluate colleges and universities, the Administration has published metrics for each institution (including net tuition price, graduation rate, student loan default rates, post-school earnings) on the department's webpage that describes their accrediting body.[43] This action seeks to pressure accreditors to focus more on these issues in the absence of direct authority. (The Administration also urged Congress to reconsider its ban on agency directed outcomes measures.)

The Administration has also taken steps to promote recent innovations in higher education, announcing that it will allow a small number of colleges and universities to partner with non-traditional educational institutions to

[43] Gail McLarnon, *New Guidance for Accrediting Agencies Will Strengthen Information Sharing and Transparency*, DEPT. EDUC. (Jan. 11, 2017), http://sites.ed.gov/ous/ousblog/.

create academic programs that can qualify for federal financial aid. This experimental initiative seeks to increase enrollments in programs such as short-term certificate programs, computer "boot camps," MOOCs (massively open online courses), and other personalized online educational programs that provide training to students unconnected to a degree.

This new initiative will enable some students to secure Pell grants and federal student loans to participate in these academic programs by involving accredited institutions to partner with those running the programs. In the past, few of these innovative programs have been able to secure accreditation, and therefore students could not access aid. The partnerships allowed under the initiative would enable students to obtain federal aid. As a condition of participation in the initiative, schools would have to have the innovative programs evaluated by an independent (accreditor-like) third party for their effectiveness, and the partnerships would also have to meet jointly established metrics for affordability, student learning, and post-completion job attainment.

The Administration's experimental initiative mirrors recent legislation introduced by Senators Michael Bennett (D-CO) and Marco Rubio (R-FL) that would create a separate procedure for institutions to access federal financial aid.[44] Instead of going through an accreditation process, innovative new institutions that meet certain metrics for student achievement and job placement could participate in federal student aid programs.

In essence, both the Administration and Senators Bennett and Rubio are proposing an alternate, performance-based path for new models of higher education. Instead of trying to change the whole industry, they focus on new entrants into the field and arguing that we should regulate them differently. Performance-based regulation for these new innovators, which are fewer in number and where there is general agreement on what performance measures should be adopted, seems to be a logical approach.

The next steps for improving higher education reform, it seems, will not involve imposing a single regulatory approach on the entire industry. In other words, the solution will not be as simple or easy as getting rid of command and control and replacing it with a uniform performance rating system. Rather, the future of higher education will depend on re-adjusting and strengthening the existing approaches to regulating colleges and universities.

A revitalized and strengthened accreditation system is needed, and such a strengthened management-based system could be combined with a lessening in certain unhelpful command-and-control burdens on institutions of higher learning. And even though the Obama Administration's experience with its proposed college rating system makes clear that an overall performance-based system is not feasible, recent initiatives and legislative proposals suggest that performance evaluation can play a meaningful role in assessing new, targeted innovations.

[44] Higher Education Act of 1965, 20 U.S.C. §§ 1001-1161aa–1.

In the end, just as with other areas of regulation, the federal government needs to look carefully at all the policy tools available for improving access, affordability, and quality in the higher education sector. The path forward requires making smarter decisions about when, where, and how to use the right tools.