

LEGISLATING HIGHER EDUCATION: APPLYING THE LESSONS OF NO CHILD LEFT BEHIND TO POST-SECONDARY EDUCATION REFORMATION PROPOSALS

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INTRODUCTION

On August 22, 2013, President Barack Obama challenged the structure and quality of higher education by proposing an education reform plan which would result in what he called a “shakeup” for colleges and universities.¹ While the plan’s ostensible purpose is to make college a more affordable, better bargain for the middle class, in reality the plan proposes sweeping educational reforms.² The plan mirrors other educa-

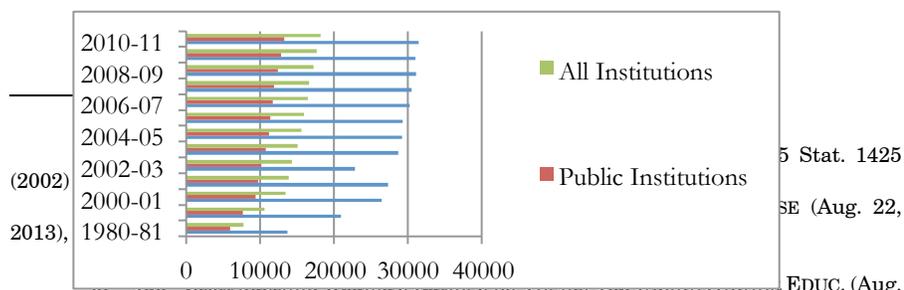
1. Press Release, Remarks by the President on College Affordability, Syracuse NY, WHITE HOUSE (Aug. 22, 2013), *available at* <http://www.whitehouse.gov/the-press-office/2013/08/22/remarks-president-college-affordability-syracuse-ny>.

2. *Id.*

tion legislation³ plans by requiring greater collegiate accountability and efficiency, as well as increased use of technology and innovative teaching methods.⁴ Tuition, policies, and programs will all be ranked by the Department of Education and will be used to determine federal funding for institutions.⁵ In the proposal, students will be held accountable for loan money through required course completion, but the greater burden of performance and improvement rests on colleges and universities.⁶

The suggestion that higher education is in crisis and is in need of reform is by no means a new concept.⁷ Higher education has been increasingly criticized in recent years by reformers from both the public and private arena, with the increasing price of college tuition as one of the main drivers.⁸ Not surprisingly, as state and federal funding for higher education has increased, there has been a corresponding demand for greater accountability on the part of higher education institutions.⁹ Educational reform has become a consumer-driven issue and new legislation, whether for elementary and secondary schools or for colleges and universities, appears to prefer a business model, rather than a more traditional, non-profit model.¹⁰ These recent trends in higher education restructuring are moving higher education from peer accountability to a political and market accountability model, in order to drive tuition rates down and increase access.¹¹

*Table 1: Total Tuition, Room and Board Rates for Undergraduate Tuition in 2010-2011 Dollar Prices.*¹²



5 Stat. 1425
SE (Aug. 22,
EDUC. (Aug.

22, 2013), <http://www.insidehighered.com/news/2013/08/22/president-obama-proposes-link-student-aid-new-ratings-colleges>.

7. Elizabeth Lunday, *Assessing and Forecasting Facilities in Higher Education*, APPA THOUGHT LEADERS SERIES, 3 (2010), available at <http://files.eric.ed.gov/fulltext/ED517059.pdf>.

8. *Id.* at 13 (demonstrating that by 2010, public “college tuition and fees ha[d] risen . . . 440 percent” since 1985).

9. See generally Simon Marginson & Gary Rhoades, *Beyond national states, markets, and systems of higher education: A glonacal agency heuristic*, 43 HIGHER EDUC. 281, 282–83 (2002), available at <http://firgoa.usc.es/drupal/files/hed-2002-marginson-rhoades.pdf> (discussing the link between national higher education systems and market control).

10. See John L. Lahey & Janice C. Griffith, *Recent Trends in Higher Education: Accountability, Efficiency, Technology, and Governance*, 52 J. LEGAL EDUC. 528, 529 (2002).

11. See *id.* at 529-30; Julie Margetta Morgan, *Consumer-Driven Reform of Higher Education: A Critical Look at New Amendments to the Higher Education Act*, 17 J.L. & POL’Y 531, 532 (2009).

12. Nat’l Ctr. for Educ. Statistics, *Tuition costs of colleges and universities*, NCES.ED.GOV, <http://nces.ed.gov/FastFacts/display.asp?id=76> (last visited Nov. 16, 2013).

The introduction of President Obama's plan to make college more affordable is by no means the first time the federal government has addressed the challenge of higher education reform.¹³ In reauthorizing the Higher Education Act (HEA) in 2008, Congress tried to address the problem of access to higher education while simultaneously addressing increasing tuition costs.¹⁴ The newly revised HEA empowered students to make higher education decisions by requiring colleges and universities to provide information about admissions, tuition, and loan costs.¹⁵ The "Better Bargain" plan builds on HEA legislation and incorporates reform concepts introduced by President Obama in 2012; the new plan will reward colleges and students for performance, promote innovations that cut costs and improve educational quality, and help students repay their loan debts.¹⁶

The federal government has always provided financial support for various programs in such a way as to further its public policy goals.¹⁷ When educational reform is on the agenda, political goals become closely tied to federal funding.¹⁸ While using the power of the federal purse to advocate for higher educational quality is an allowable exercise of the congressional spending power¹⁹, there is disagreement between educators, politicians, and special interest groups about how stronger academic outcomes can actually be achieved.²⁰

The revised HEA's attempt to drive down tuition costs was unsuccessful.²¹ The Better Bargain plan is an attempt to achieve cost effectiveness while increasing the quality and access of higher education through accountability measures.²² While President Obama's plan is a step towards educational reform, there appears to be strong similarities between the Better Bargain plan and the 2001 No Child Left Behind Act

13. Morgan, *supra* note 11.

14. *See id.*

15. *See id.* at 533.

16. *Here's the Plan to Make College More Affordable*, *supra* note 4.

17. Morgan, *supra* note 11, at 537.

18. *See id.*

19. *See* U.S. CONST. art. I, § 8, cl. 1.

20. *See* Morgan, *supra* note 11, at 542.

21. Judy Hample, *Tuition Growth, Educational Access and Public Policy*, N.Y. TIMES, http://www.nytimes.com/ref/college/faculty/coll_pres_hample.html (last visited Nov. 16, 2013).

22. Press Release, *FACT SHEET on the President's Plan to Make College More Affordable: A Better Bargain for the Middle Class*, WHITE HOUSE (Aug. 22, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/22/fact-sheet-president-s-plan-make-college-more-affordable-better-bargain-> [hereinafter *A Better Bargain*].

(NCLB)²³ which attempted to reform K-12 education through imposing accountability measures and which was notoriously unsuccessful.²⁴

Both Better Bargain and NCLB are laudable, if optimistic, plans to reform education but are unlikely to be successful because they are rooted in politics rather than in pedagogy. The Better Bargain plan also makes some unfounded assumptions—namely, that the current education model is wasteful and does not prepare students for the work force. The plan does not address the crux of the issue—tuition rates at public institutions are rising rapidly due the extreme state funding cuts at a time when the demand for college placement is greater than ever.²⁵ Funding for public colleges and universities has not kept pace with growth of college enrollment, especially during the recent recessionary period, which has forced public institutions to raise tuition and fees in order to continue to provide services.²⁶

This article addresses the difficulties of imposing accountability measures on higher education by drawing parallels between the Better Bargain plan and NCLB. Part I will review the history of reforms imposed on elementary and secondary education through the use of federal dollars. Part II will discuss the history of federal involvement in higher education, concluding with a discussion of President Obama’s proposal. Part III will analyze the problems experienced under NCLB prior to its recent reform, and discuss how some of those same challenges are likely to play out in higher education if the Better Bargain plan stays in its current form. Part IV will discuss possible solutions to the education accountability problem and suggest compromises which may need to be made so that it truly benefits institutions, students, and families.

FEDERAL EXPANSION INTO ELEMENTARY AND SECONDARY EDUCATION

Prior to 1950, “the federal government played only a limited role in public education,” keeping its contribution to land grants and input into vocational training while steering clear of general education.²⁷ However, in the 1950s the Soviet Union launched the first man-made satellite, triggering the creation of the National Defense Education Act (NDEA),

23. See 20 U.S.C.A § 6311(b) (West 2006).

24. David Hursh, *Exacerbating inequality: the failed promise of the No Child Left Behind Act*, 10 RACE ETHNICITY & EDUC. 295, 295 (2007), available at <http://www.wou.edu/~girodm/foundations/Hursh.pdf>.

25. Paul E. Lingenfelter, *A Critical Juncture for Higher Education in the United States*, GRAPEVINE (Jan. 14, 2010), available at <http://grapevine.illinoisstate.edu/tables/FY10/A%20Critical%20Juncture%20for%20Higher%20Education%20in%20the%20United%20States.pdf>.

26. *Id.*

27. Kenneth Jost, *Revising No Child Left Behind*, 20 CQ RESEARCHER 337, 346 (2010), available at <http://photo.pds.org:5012/cqresearcher/getpdf.php?id=cqresrre2010041600>.

which provided federal funding to the states to teach math, science, and foreign languages in order to achieve defense goals.²⁸ Unlike later federal programs, the NDEA did not contemplate providing training to all students; instead, the NDEA targeted talented students and attempted to improve the quality of their educations.²⁹

The NDEA was followed by the passage of the Elementary and Secondary Education Act (ESEA) in 1965, which was the first broad provision of aid for public schools. Included in the ESEA was one of its best-known components, Title I, which provided specific funding to targeted populations of children living in poverty.³⁰ Title I was designed to provide equality in education for poor and underprivileged students; its main focus was providing funding to the states for remedial math and reading instruction.³¹ After the passage of the ESEA, standardized testing became a part of the American educational experience, as the law required such testing by schools receiving Title I funds.³² However, Title I frequently fell short in closing the gap between poor and wealthy students, and SAT scores sharply declined between 1963 and 1975.³³ Some educators tied this decline to changes in the curriculum; with the rise in the number of non-core subjects taught, such as driver's education and home economics, there was a decline in student enrollment in academic subjects.³⁴

These rapidly dropping academic scores raised concerns that high schools had lowered the achievement bar for students and prompted calls for change.³⁵ One response to these concerns was the creation of the U.S. Department of Education (DOE) in 1979.³⁶ This move was initially met with resistance from the Republican Party, due to concerns about an expanded federal role in education.³⁷ In its initial incarnation, the DOE was focused on federal, state, and local cooperation in order to provide educational equity for individual students, while at the same time observing the importance of local control over the education process.³⁸ However, the publication of *A Nation at Risk: The Imperative for*

28. *Id.* at 347.

29. DIANE RAVITCH, NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN'S GUIDE, 48 (The Brookings Inst. 1995).

30. Jost, *supra* note 26 at 346.

31. *See id.*

32. *See* RAVITCH, *supra* note 29 at 47–48.

33. *Id.* at 48–50.

34. *Id.* at 47.

35. *Id.* at 51.

36. *See* D. T. Stallings, *A Brief History of the United States Department of Education: 1979-2002*, CENTER FOR CHILD & FAMILY POL'Y 1, 4 (2002), https://www.childandfamilypolicy.duke.edu/pdfs/pubpres/BriefHistoryofUS_DOE.pdf.

37. *Id.* at 4–5.

38. *Id.* at 4.

*Educational Reform*³⁹ in 1983 became a powerful motivator for increased government involvement in education reform.⁴⁰ *A Nation at Risk* hypothesized that American schools were not doing enough to prepare students for the global marketplace where the demand for skilled labor was increasing;⁴¹ it decried the “rising tide of mediocrity,”⁴² which the report intimated the then education system was producing.⁴³ In the report, American schools were charged with under-preparing students for the educational challenges ahead; it urged legislators to require more challenging content in schools, raise academic standards, increase the amount of time students spent in class and on homework, and improve teaching quality.⁴⁴ *A Nation at Risk* galvanized the public, drawing interest from a broad range of interested parties; it persuaded several states to begin education reform efforts, and set the stage for greater involvement at the federal level.⁴⁵

By the late 1980s, the concept of federal input into the education reform process was well underway, although what role the federal government should take was still debated.⁴⁶ The national conversation about education began to reach a consensus that greater attention needed to be paid to the academic curriculum and to accurately and uniformly measure its success.⁴⁷ As a response to this educational crisis, candidates running for presidential office began to make education a greater part of their election platforms.⁴⁸ *A Nation at Risk* was influential in beginning the discussion about how to improve American education, and the federal government began developing ideas as to how this could best be achieved.⁴⁹ This increased commitment to K-12 education was demonstrated by the reauthorization of the ESEA in 1986 to include augmented federal support for programs to “benefit economically disadvantaged students.” The federal government began moving away from enacting legislation which focused on compliance with federal regulations and moved towards measuring the academic progress of individual students; this shift signaled a continuously expanding federal involvement in education.⁵⁰ However, this new, improved version of the ESEA

39. NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM* (U.S. Gov't Printing Office 1983), available at http://www.datacenter.spps.org/uploads/sotw_a_nation_at_risk_1983.pdf.

40.. See *id.* at 5.

41. THE NAT'L COMM'N ON EXCELLENCE IN EDUC., *supra* note 39, at 10–12.

42. *Id.* at 9.

43. *Id.*

44. See *id.* at 18–23.

45. Michael Heise, *Goals 2000: Educate America Act: The Federalization and Legalization of Educational Policy*, 63 *FORDHAM L. REV.* 345, 346 (1994).

46. See *id.* at 353–56.

47. See *id.* at 346–47.

48. Stallings, *supra* note 36, at 5.

49. See *id.* at 346–47.

50. Stallings, *supra* note 36, at 6.

required states to develop testing standards and to report their scores, but the standards laid out in the legislation were only loosely enforced.⁵¹ By 1992, only fourteen states had developed the required structure.⁵²

President George H. W. Bush continued the federal incursion into education reform by proposing two education plans during his term in office; legislation was proposed which recommended rewarding high-performing teachers and calling for national standards and assessments, both of which were rejected by Congress.⁵³ Although his legislation was unsuccessful, President Bush did achieve success in gaining the agreement of governors in all fifty states that national standards for education were necessary.⁵⁴ However it quickly became apparent that there would be political challenges to the development of national standards, as well as difficulty in implementing them fairly and uniformly.⁵⁵

President Bill Clinton was more successful in his quest for reform than his predecessor; under his tenure federal involvement in education grew yet again.⁵⁶ To make Title I achieve its promise of extending greater educational benefits to economically disadvantaged students, and to encourage states to develop educational standards, President Clinton persuaded Congress to adopt a philosophy of standards-based reform as a template for change in passing both his Goals 2000⁵⁷ education package and the Improving America's Schools Act (IASA),⁵⁸ which was the reformed, reauthorized ESEA.⁵⁹ Standards-based reform was an educational movement which called for curriculum and assessment endeavors to be tied to objective standards which would be used to measure individual student progress.⁶⁰ Under the new legislation, states would be

51. Andrew Rotherham, *A New Partnership*, 2 EDUC. NEXT 36, 37–38 (Spring 2002), available at http://educationnext.org/files/ednext20021_36.pdf.

52. Judith A. Winston, *Rural Schools in America: Will No Child Be Left Behind? The Elusive Quest for Equal Educational Opportunities*, 82 NEB. L. REV. 190, 204 (2003).

53. Kenneth Jost, *Revising No Child Left Behind*, 20 CQ RESEARCHER 337, 349 (2010), available at <http://photo.pds.org:5012/cqresearcher/getpdf.php?id=cqresrre2010041600>.

54. Ravitch, *supra* note 29, at 57.

55. *Id.* at 57–58 (the goals consisted of agreement regarding: early childhood education; increased high school graduation rates; required demonstrated competency by academic subjects in grade four, eight, and twelve; “first in the world” in math and science; and literacy and skills needed to compete in a global economy).

56. See Heise, *supra* note 45, at 351.

57. Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 128 (1994) (codified at 20 U.S.C.A. § 5801 (West 2013)).

58. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended at 20 U.S.C.A. § 6311(a)(1) (West 2013)).

59. See Heise, *supra* note 45, at 356–60.

60. James E. Ryan, *The Perverse Incentives of the No Child Left Behind Act*, 79 N.Y.U. L. REV. 932, 938 (2004).

required to develop high academic standards that would be implemented uniformly by local districts, and measured using annual state assessments to see if the standards were being met.⁶¹ Standard-based reform was envisioned as leading to improved school quality overall, since every school would have to meet the objective standards, not just schools in wealthy areas.⁶²

This shift to standards-based reform changed the basic structure of Title I.⁶³ Rather than focusing on remedial education, the monies advanced from Title I funding now had to be devoted to developing high academic standards in reading and math, along with development of the accompanying measurement tools.⁶⁴ In addition, the states using Title I funding were now required to track and sanction schools which failed to increase student achievement.⁶⁵ The 1994 version of the ESEA was more successful in its implementation in a way that prior versions were not.⁶⁶ By tightening up the requirements for states, Congress gained compliance from forty-nine states, with only Iowa⁶⁷ objecting based on its commitment to an educational model which valued local control over state or federal input.⁶⁸

The No Child Left Behind Act of 2001 (NCLB), which became law in 2002, built on the IASA, but raised the stakes for states and ratcheted up federal involvement in the education process to an unprecedented level; it was a sweeping change to American educational policy, completely overhauling the ESEA.⁶⁹ Although NCLB's goal was ostensibly equality of education for rich and poor students, the NCLB has been wielded as a tool of educational reform, accompanied by an enlarged federal role in K-12 education.⁷⁰ NCLB was President George W. Bush's first major piece of domestic legislation, and was initially greeted with broad bipartisan support.⁷¹ Under NCLB, states were required to continue to set high academic standards, but additional content areas were added.⁷² In addition, the concept of school accountability was taken to an unprecedented level as districts were now penalized for failing to meet

61. *Id.* at 939.

62. *Id.* at 938.

63. *Id.* at 938; 20 U.S.C.A. § 6311 (West 2013).

64. Ryan, *supra* note 57, at 939.

65. *Id.*; 20 U.S.C.A. § 6311(b)(1)(A)–(C) (West 2013).

66. *See* Winston, *supra* note 50, at 203.

67. *Id.* at 204. Iowa later adopted teaching standards to improve student performance and support local educational goals in 2002. *Id.* at 204 n.68. It also adopted the “Common Core” standards recently required by the Obama administration in order to receive “Race to the Top” grants. Joe Dejka, *State Takes Closer Look at National Education Standards*, OMAHA.COM (Mar. 12, 2013, 1:00 AM), <http://www.omaha.com/article/20130312/NEWS/703129923/1685>.

68. Winston, *supra* note 50, at 204 n.68.

69. *See id.* at 205.

70. *See id.* at 204–05.

71. Jost, *supra* note 51, at 347.

72. *See* Ryan, *supra* note 57, at 940.

goals.⁷³ NCLB attempted to improve education by “closing the achievement gap,”⁷⁴ ensuring equality of education for all children and while it was initially heralded as the answer to the challenges posed by the global marketplace, it placed a heavy performance burden on educators.⁷⁵ However, according to President Bush, the Act, if implemented correctly, would make American schools “flourish.”⁷⁶

As part of its drive to encourage rigorous academic standards, NCLB expanded the required subjects covered by its mandate and upped the stakes—it added science as an additional testing area and required greater accountability from schools by requiring increased performance on tests over time.⁷⁷ No longer focused solely on remedial instruction for disadvantaged students, instead the goal was better measureable outcomes for all students and implementation of policies which might lead to this in exchange for funding.⁷⁸ The stated goals of NCLB were: improved education for disadvantaged students improved teaching quality, better language instruction for English language learners (ELL’s), more innovative programs and informed educational choices for parents.⁷⁹ However, many teachers saw NCLB’s main goals as increasing accountability through testing; in the new system, test scores would be used to measure individual teacher success, and the power of federal funding could be used to force changes in curriculum and in the hiring and retention of teachers.⁸⁰ NCLB held schools accountable for meeting its goals through yearly standardized testing, resulting in statistical measurements which were then publically reported.⁸¹ Schools were tested annually in reading and math and those which failed to make adequate yearly progress (AYP) on those tests were subject to penalties.⁸²

Many of NCLB’s goals were laudable. For example, the law tried to address inequities in the educational system by targeting specific sub-

73. Winston, *supra* note 50, at 205.

74. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C.A. § 6311 (West 2013)) (“An Act To close the achievement gap with accountability, flexibility, and choice, so that no child is left behind.”).

75. Winston, *supra* note 50, at 205.

76. Press Release, Office of the Press Sec’y, President Signs Landmark No Child Left Behind Education Bill (Jan. 8, 2002), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2002/01/20020108-1.html>.

77. Ryan, *supra* note 57, at 939–40.

78. *See id.* at 939.

79. Kimberly A. Murakami, Annotation, *Construction and Application of No Child Left Behind Act*, Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C.A. §§ 6301 *et seq.*), 4 A.L.R. FED. 2d 103 (2005).

80. Gina Austin, note, *Leaving Federalism Behind: How the No Child Left Behind Act Usurps States’ Rights*, 27 T. JEFFERSON L. REV. 337, 340 (2005).

81. Winston, *supra* note 50, at 205.

82. *Id.*; *see also* Ryan, *supra* note 57, at 955–56.

groups for improvement such as economically disadvantaged students, minority and ethnic groups, disabled students, and ELL's.⁸³ NCLB held schools accountable for achievement gaps between white students and other students by requiring schools to report individual test scores by sub-group, rather than measuring test improvement of the school as a whole.⁸⁴ This prevented schools from hiding discrepancies between the test scores of white, affluent students and minority or disadvantaged students.⁸⁵

Unfortunately NCLB was unable to fulfill its early promise. The push for accountability and increased measurement of student success had unanticipated consequences as the role of standardized testing was magnified.⁸⁶ Under NCLB, students were tested at least seven times during their K-12 education,⁸⁷ whereas under prior legislation (the IASA) students were examined only three times during the course of their school careers.⁸⁸ Testing results under NCLB were used to determine whether schools were making AYP, a key determinant of continued school funding.⁸⁹ AYP looked at the number of students in the school performing at a "proficient" level on state tests.⁹⁰ Under NCLB, schools were required to constantly improve the academic performance of their students; schools had to increase their AYP percentage until 100% of students were scoring at the proficiency level by 2014,⁹¹ an impossible goal to meet, especially within a twelve year time period.

As a result of the push for increased accountability, states began creating their own curricula and the corresponding standardized tests; this led to a wide range of standards being created across the country.⁹² In addition to developing their own standards and testing structure, under NCLB, for the first time states were required to administer the National Assessment of Educational Progress (NAEP) reading and math test which had previously been an optional assessment.⁹³ While one of

83. See Timeline, 34 C.F.R. § 200.15(a) (2013); Adequate Yearly Progress in General, 34 C.F.R. § 200.13(b)(7) (2013).

84. Ryan, *supra* note 57, at 944–45.

85. See No Child Left Behind Act of 2001 § 1111(b)(2)(C)(ii), Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C.A. § 6311 (West 2013)).

86. See Thomas F. Risberg, note, *National Standards and Tests: The Worst Solution to America's Educational Problems . . . Except for All the Others*, 79 GEO. WASH. L. REV. 890, 895–05 (2011).

87. Ryan, *supra* note 57, at 938 (NCLB required yearly testing in reading and math in grades three through eight, an additional math and reading exam between grades ten and twelve plus science testing three times between grades three and twelve.).

88. See Improving America's Schools Act of 1994 § 1111(b)(3)(D), Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified as amended at 20 U.S.C.A. § 6311 (West 2013)).

89. Ryan, *supra* note 60, at 940.

90. *Id.*

91. *Id.*

92. *Id.* at 941–42.

93. *Id.* at 943; See also Kevin R. Kosar, *Failing Grades: The Federal Politics of Education Standards 194–95* (2005).

the NCLB's key goals was to raise the achievement levels of all populations, the accountability testing structure, combined with a financial penalty system, actually incentivized some states to lower their education standards in order to boost the number of students achieving the desired "proficient" label.⁹⁴

As part of the quest for proficiency, schools were given benchmarks for success and those which could not meet those benchmarks faced a range of penalties that ran from minimal to extreme.⁹⁵ After two years of failure to make AYP, schools were designated as program improvement schools (PI) and the local school district was required to offer students placement at a non-PI school and to develop a plan to improve the school within two years.⁹⁶ If the school AYP did not improve within the two years, penalties became more severe—options included firing and replacing staff, extending the school year, developing a new curriculum, or reorganizing the school as a charter school with new management and staff.⁹⁷

NCLB was riddled with implementation flaws, almost from its inception. One of the biggest flawed assumptions in the law was that every child could achieve the desired proficiency level.⁹⁸ While NCLB focused on gradual improvement to student proficiency over a twelve year period, the end goal of 100% proficiency was problematic. In addition, rather than looking at individual student improvement, the act required a series of intermediate improvement levels demonstrated by the school as a whole.⁹⁹ Additionally, sub-groups within the schools, such as racial or ethnic groups, ELLs and children receiving special education services were required to meet proficiency targets, without considering the preparation, time, and money which would be needed to truly promote rapid learning in those groups in a relatively short time period.¹⁰⁰ The requirement that all students meet a predetermined improved percentage each year was unrealistic without connection to the school's prior history, to its inputs, and to its previous educational preparation of students. As a result, many schools were unable to meet their targets, leading to

94. Ryan, *supra* note 56, at 947–48.

95. *Id.* at 942–43.

96. Jaqui Guzman & Jennifer Kuhn, *A New System of Support For Low-Performing Schools*, LEGISLATIVE ANALYST'S OFFICE: CALIFORNIA'S NONPARTISAN FISCAL AND POLICY ADVISOR (June 2008), http://www.lao.ca.gov/2008/edu/low_performing_schools/lowperforming_schools_0608.aspx.

97. 20 U.S.C.A. § 6316 (West, Westlaw through P.L. No. 113–47.)

98. See No Child Left Behind Act of 2001 § 1111(b)(2)(G)(iv), Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified as amended at 20 U.S.C.A. § 6311 (2006)).

99. See *id.* at § 1111(b)(2)(I).

100. See *id.* at § 1111(b)(2)(G).

either a failure to make adequate yearly progress¹⁰¹ or to shifting standards so that the scoring system worked to their advantage.¹⁰² Compliance was also challenging for schools; to be eligible for federal funding, schools had to comply with each requirement in the thousand-plus page act, requiring increased administrative tracking and corresponding increased administrative costs.¹⁰³

By 2007, when NCLB was up for reauthorization, many voters were disillusioned by the law,¹⁰⁴ and by 2012, twenty-nine percent of Americans said that the law had made the education system worse, while thirty-eight percent believed it had made no difference at all.¹⁰⁵ While the law was written in response to the problems of its time, and while testing provided insight into how the education process could be improved, the law foundered on unintended consequences which weighed it down—indeed, the law began to be characterized by many as a “race to the bottom.”¹⁰⁶

As President Obama entered office, he was confronted with the responsibility of overhauling the law so that it could achieve its goals.¹⁰⁷ Although a challenging task, President Obama was the first president to have access to the data collected by NCLB which could be used to improve education.¹⁰⁸ In response to the implementation difficulties and flawed outcomes of NCLB, President Obama overhauled the law to replace the 100 percent proficiency goal in reading and math by 2014, with a goal of preparedness for a college or trade for all high school stu-

101. Louis Freedberg, *Federal education law traps schools in spiral of failure*, EDSource: HIGHLIGHTING STRATEGIES FOR STUDENT SUCCESS (Aug. 29, 2013), <http://www.edsource.org/today/2013/federal-law-traps-schools-in-spiral-of-failure/38135#.UiugudKsiSo> (To further demonstrate the difficulties with continually increasing proficiency levels, in 2002, 1200 California schools had PI status. By 2013, the number of PI schools rose to 4,996 and 566 entire schools districts also had PI status. In contrast, in 2002, twenty-one percent of schools had an academic performance index (API) of 800 and above, while by 2013, fifty-one percent had reached that level).

102. John Cronin, Michael Dahlin, Yun Xiang & Donna McCahon, *The Accountability Illusion*, THOMAS B. FORDHAM INST. 23–24 (Feb. 2009), available at <http://www.evsd.org/documents/accountability.pdf>.

103. See No Child Left Behind Act of 2001 § 1111(a).

104. Lowell C. Rose & Alec M. Gallup, *The 38th Annual Phi Delta Kappa/Gallup Poll of the Public's Attitudes Toward the Public Schools*, 88 PHI DELTA KAPPAN 41, 50–52 (Sept. 2006), available at <http://www.larrycuban.files.wordpress.com/2012/10/k0609pol.pdf>.

105. Lydia Saad, *No Child Left Behind Rated More Negatively Than Positively*, GALLUP POLITICS (Aug. 20, 2012), <http://www.gallup.com/poll/156800/no-child-left-behind-rated-negatively-positively.aspx>.

106. *Ending the 'Race to the Bottom'*, N.Y. TIMES (Mar. 11, 2009), available at http://www.nytimes.com/2009/03/12/opinion/12thu1.html?_r=1&.

107. See David Stout, *Obama Outlines Plan for Education Overhaul*, N.Y. TIMES (Mar. 10, 2009), available at <http://www.nytimes.com/2009/03/11/us/politics/11web-educ.html?fta=y>.

108. See *generally No Child Left Behind — Overview*, NEW AMERICAN FOUNDATION: FEDERAL EDUCATION BUDGET PROJECT (July 1, 2013), <http://febp.newamerica.net/background-analysis/no-child-left-behind-overview>.

dents by 2020.¹⁰⁹ In addition, the revised NCLB continued to require annual testing for accountability purposes, but also looked at other measures of success, such as graduation rates.¹¹⁰ However, the revision kept in place key elements of NCLB which had been subjected to criticism—it continued to impose penalties on schools and teachers who are unable to increase test scores.¹¹¹ The impact of NCLB was also limited by President Obama to cover only the worst-performing schools.¹¹² The revision also contemplated the adoption of common curriculum standards currently under discussion at the state level.¹¹³ While the changes to the law sounded reasonable in comparison to 100% proficiency by 2014, the new changes will in fact be equally difficult to achieve, as current high school graduation rates hover at about seventy percent.¹¹⁴

As a result of the difficulties in implementing NCLB, by 2011 the government had plans in place to allow flexibility to the states having difficulty in making AYP.¹¹⁵ By 2012, the government began granting waivers to meeting some of NCLB's requirements, eventually ending in waivers to struggling schools and districts being granted to 41 states and the District of Columbia by the end of 2013.¹¹⁶ These waivers were granted in exchange for commitments by the approved states to implement pre-approved plans which included greater academic rigor and better outcomes for all students.¹¹⁷ In addition, on July 19, 2013, the House passed the Student Success Act,¹¹⁸ which codified many of these changes and allowed for greater flexibility than NCLB.

To encourage continued K-12 education improvement, President Obama also created the Race to the Top (RTT), a \$4.35 billion dollar

109. See *id.*; *Education —Federal Role*, CARMEN GROUP INCORPORATED, <http://www.carmengroup.com/education/federal-role> (last visited Nov. 14, 2013).

110. Nick Anderson, *Obama would scrap 'No Child' standard*, WASH. POST (Feb. 2, 2010), http://articles.washingtonpost.com/2010-02-02/news/36818338_1_ayp-school-accountability-system-achievement-gaps.

111. *Id.*

112. Chad Aldeman, *President Obama's Not-So-Secret School Accountability Plan*, EDUCATIONNEXT (Sept. 3, 2013), <http://educationnext.org/ntshabbat-service-requirements-schedule-options/>.

113. Jost, *supra* note 27.

114. ROBERT MARANTO & MICHAEL Q. MCSHANE, PRESIDENT OBAMA AND EDUCATION REFORM 130 (2012).

115. *President Obama on No Child Left Behind Flexibility* WHITE HOUSE (Sept. 23, 2011), available at <http://www.whitehouse.gov/photos-and-video/video/2011/09/23/president-obama-no-child-left-behind-flexibility#transcript>.

116. Cyndi Waite, *Afternoon Announcements: Pennsylvania Receives No Child Left Behind Act Waiver*, ALLIANCE FOR EXCELLENT EDUCATION (Aug. 21, 2013, 5:07 PM), <http://all4ed.org/afternoon-announcements-pennsylvania-receives-no-child-left-behind-act-waiver/>.

117. U.S. Dep't of Educ., *Elementary and Secondary Education, ESEA Flexibility*, ED.GOV (Nov. 4, 2013), <http://www2.ed.gov/policy/elsec/guid/esea-flexibility/index.html>.

118. Student Success Act, H.R. 3989, 112th Cong. (2nd Sess. 2012).

grant to the states which took the form of a competition based on more rigorous academic standards, updated data collection strategies, increased teacher effectiveness and improved low-performing schools.¹¹⁹ The dispersal of the funding was tied to the states' elimination of barriers which prevent tying student achievement data to teacher evaluations.¹²⁰ Race to the Top pressured states to change their education laws in response to the competition, leading to increased federal influence on the education process at the state and local level.¹²¹ While RTT consisted of one-time funding and was not a perfect approach, it had the desired effect of encouraging the discussion of reform and promoted educational innovation.¹²²

By creating RTT and revising NCLB, the federal government had begun to link continued funding to the adoption of national academic standards, even though the setting of standards has traditionally been within the purview of the states. As of May 2013, twenty-one states and the District of Columbia had been recipients of RTT funds,¹²³ which, in addition to the above requirements, also required states to approve common standards and assessments; This funding linkage led to forty-five states and the District of Columbia adopting common core state standards in math and language arts; the federal government skirted the discussion of whether it could properly require states to use such standards by relying on the common core developed by the National Governors Association and the Council of Chief State School Officers in conjunction with teachers, school administrators and other experts.¹²⁴

FEDERAL INVOLVEMENT IN HIGHER EDUCATION

As we saw in the prior section, federal input into the K-12 education system has increased drastically over the past twenty years, gradually impinging on the traditional role states played in forming education policy.¹²⁵ Federal involvement in higher education has developed on a parallel track, although on a slightly later timeline than at the elemen-

119. Steve Tarlow, *Race to the Top Winners Get \$4.35 Billion for School Reform*, PERSONAL MONEY NETWORK BLOG, (Aug. 24, 2010), <http://personalmoneystore.com/moneyblog/race-to-the-top-winners/>.

120. Shannon K. McGovern, note, *A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy*, 86 N.Y.U. L. REV. 1519, 1528 (2011).

121. *See id.*

122. MARANTO & MCSHANE, *supra* note 110, at 93–96, 109–10.

123. Dan Levin, *Can the Latest Education Reforms Improve Student Achievement?*, CQ PRESS (June 15, 2013), http://library.cqpress.com/cqresearcher/document.php?id=cqr_ht_education_2013#.UmaODZR5NU5.

124. *Id.* (Alaska, Nebraska, Texas, and Virginia have all declined to adopt the common core, while Minnesota adopted only the English language-arts standards.).

125. Neal McCluskey, *K-12 Education Subsidies*, CATO INST. (May 2009), <http://www.downsizinggovernment.org/education/k-12-education-subsidies>.

tary and secondary school level.¹²⁶ In fact, formal higher education predates elementary and secondary education in the U.S., dating back to the establishment of Harvard in 1636.¹²⁷ Initially higher education was available to the privileged few while the poorer students were funneled into trades, but in the 1800s there was a movement to make university education available to the working classes; this eventually led to the creation of more accessible public universities.¹²⁸

The first forms of federal involvement in the higher education system took the form of land grants and funding to create public institutions.¹²⁹ In addition to land grants as a means of promoting higher education, by the early twentieth century, federal support to colleges and universities began to be channeled through financial aid, which benefited targeted populations, and research grants, which targeted goals of increased technology and national defense.¹³⁰

By 1940, almost 50 percent of university students were educated at public institutions.¹³¹

It was with the passage of the GI Bill that the federal government's role in higher education began to expand because the bill, which was intended to defer the impact of GI reentry into society, covered all college costs for veterans returning from World War II.¹³² Almost half of the sixteen million eligible veterans took advantage of the education benefits, which doubled the number of higher education degrees awarded; the number of Americans holding a post-secondary degree jumped from 4.6 in 1945 to 10 percent in 1960.¹³³

The Sputnik launch in 1958 impacted higher education just as it had K–12 education—the National Defense Education Act (NDEA) provided loans for students pursuing degrees in math, science, and education, making college more accessible than ever to lower-income students.¹³⁴ The NDEA was closely followed by the passage of the Higher

126. Chris Edwards & Neal McCluskey, *Higher Education Subsidies*, CATO INST. (May 2009), <http://www.downsizinggovernment.org/education/higher-education-subsidies>.

127. See *History of Harvard University*, HARVARD UNIVERSITY, <http://www.harvard.edu/history>.

128. Robert Kiener, *Future of Public Universities: Can They Compete with New Educational Models?*, 23 CQ RESEARCHER 53, 66–67 (2013), available at <http://ida.lib.uidaho.edu:2357/cqresearcher/getpdf.php?id=cqresrre2013011800>.

129. See *Overview: The Federal Role in Education*, U.S. DEPARTMENT OF EDUC., <http://www2.ed.gov/about/overview/fed/role.html> (last visited Nov. 14, 2013).

130. Morgan, *supra* note 11, at 538–42.

131. Kiener, *supra* note 128, at 67.

132. *Id.*

133. *Id.*; THOMAS D. SNYDER, *120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT* 7–8 (1993), available at <http://nces.ed.gov/pubs93/93442.pdf>.

134. PAMELA EBERT FLATTAU ET AL., *THE NATIONAL DEFENSE EDUCATION ACT OF 1958: SELECTED OUTCOMES*, at II-1 (2006), available at <https://www.ida.org/upload/stpi/pdfs/ida-d-3306.pdf>.

Education Act (HEA) of 1965, which was the first large-scale legislation to provide federal funding to students and universities.¹³⁵ The HEA allowed students to determine which educational institution best fit their needs, and then permitted them to attend that school through federal loans, work-study grants, and fellowships.¹³⁶ Congress increasingly viewed its role in higher-education policy as one dedicated to social equality, and used federal monies to achieve this by making HEA loans usable at all eligible institutions.¹³⁷ In subsequent reauthorizations of the HEA, the commitment to access of higher education continued; Congress has consistently made grants available to lower-income students, and has made them available to increasing numbers of middle-class students.¹³⁸

During the 1980s, public colleges and universities began receiving less funding from the states due to the conservative push for tax reform, which resulted in ever-increasing tuition rates as state dollars dried up.¹³⁹ The public viewpoint of higher education shifted from one where education was seen as worth funding because of the later societal benefits, to a perception that students were benefitting as individuals and should therefore bear more of the cost of their educations.¹⁴⁰ This lessened state funding had a direct impact on rising tuition rates, which soon outpaced the rate of inflation.¹⁴¹ In this same decade, the federal government cut the amount of student aid available through grants (which do not have to be repaid) and shifted to loans.¹⁴² For example, “in 1980, more than half of [federal] financial aid [was] in the form of grants” compared to 2013, where 40 percent of financial aid takes the form of loans.¹⁴³ By 2000, the amount of money loaned to students had more than doubled.¹⁴⁴ Compounding the problem was the increasing number of for-profit colleges and universities, which were also eligible for federal student loan money and which may have contributed to driving up tuition costs.¹⁴⁵

In addition to concerns about rising tuition, was also the concern that the American higher education system was no longer preparing

135. Lawrence E. Gladieux, *Federal Student Aid Policy: A History and an Assessment*, U.S. DEPARTMENT OF EDUC. (Oct. 1995), <http://www2.ed.gov/offices/OPE/PPI/FinPostSecEd/gladieux.html>.

136. *See id.*

137. *Id.*

138. Morgan, *supra* note 11, at 541–42.

139. Kiener, *supra* note 128, at 69.

140. *Id.*

141. *See* C. BOARD, *Trends in College Pricing*, TRENDS IN HIGHER EDUCATION, <http://trends.collegeboard.org/college-pricing/introduction> (last visited Nov. 16, 2013).

142. Gladieux, *supra* note 131.

143. JEFFREY J. SELINGO, *COLLEGE (UN)BOUND: THE FUTURE OF HIGHER EDUCATION AND WHAT IT MEANS FOR STUDENTS* 41 (2013).

144. *Id.*

145. *See id.* at 12–17.

students to compete in a global marketplace.¹⁴⁶ As an increasing number of occupations required a post-secondary degree, the rank of Americans between twenty-five and thirty-four with such degrees slipped from first in 1995 to twelfth in 2012.¹⁴⁷ Federal lawmakers also began to be concerned about the economic impact of students who were less prepared for careers in math and science than to their foreign counterparts.¹⁴⁸

By 2005, state contributions to their public higher education institutions had hit a new low—adjusted for inflation, state spending on higher education was at its lowest rate in twenty-five years.¹⁴⁹ At the same time, increased spending on college administration, rather than on teaching, was contributing to higher tuition bills.¹⁵⁰ When the HEA was reauthorized in 2008, Congress was faced with reconciling its continuing commitment to educational access with rapidly rising costs.¹⁵¹ The timing of the reauthorization, occurring in conjunction with a recessive period in the economy, made affordability a key factor in its revision.¹⁵² These factors led Congress to consider a more consumer-driven approach, which required ever-greater accountability on the part of colleges and universities.¹⁵³

In developing new amendments to the HEA, Congress relied to some extent on the education issues raised by the National Commission on the Future of Higher Education (Commission), written by the Department of Education in 2006.¹⁵⁴ The Commission identified the following as issues for students in seeking higher education: access for minority and disadvantaged students, higher tuition costs, lack of available information about colleges, decreased state subsidies, and student difficulties in navigating the financial aid system.¹⁵⁵ The Commission suggested that accountability measures, such as had been applied to K-12 education, were the best way to solve the issues facing students; it also

146. *See id.* at 10.

147. *See id.* at 18.

148. Linda Darling-Hammond, *President Obama and Education: The Possibility for Dramatic Improvements in Teaching and Learning*, 79 HARV. EDUC. REV., no. 2, 210, 213, (Summer 2009), available at http://www.worldclasseducationillinois.org/assets/images/research_articles/President_Obama_and_Education.pdf.

149. STATE HIGHER EDUC. EXEC. OFFICERS, *State Higher Education Finance* 19 (2013), <http://www.sheeo.org/sites/default/files/publications/SHEF-FY12.pdf>.

150. Benjamin Ginsberg, *Administrators Ate My Tuition*, WASH. MONTHLY, (Sept./Oct. 2011), http://www.washingtonmonthly.com/magazine/septemberoctober_2011/features/administrators_ate_my_tuition031641.php?page=all.

151. Morgan, *supra* note 11, at 532.

152. *Id.* at 533.

153. *Id.* at 543.

154. *Id.* at 547.

155. *Id.* at 548.

proposed that the best way to increase accountability was through making more information available to Congress and to the public.¹⁵⁶

The Commission believed this provision of information would transform higher education to meet the country's needs.¹⁵⁷ This new consumer model kept the decision-making regarding which higher education institution to select with the student,¹⁵⁸ while allowing the federal government to avoid the political hot potato of developing uniform measurement tools to determine learning, a concept which had met with so much debate in K-12 education,¹⁵⁹ and which was likely to encounter even more criticism at the higher education level.¹⁶⁰ This model designated the consumer as the population best suited to making decisions about college choice, once all data was made available¹⁶¹—a hypothesis which may or may not have been true due to the many different ways students determine value in a higher education setting, running the gamut from popularity of sports teams to desirability based on social relationships and geography.¹⁶²

The 2008 reauthorization of the HEA, now called the Higher Education Opportunity Act (HEOA), relied on the recommendations of the Department of Education report,¹⁶³ and continued congressional financial support of higher education,¹⁶⁴ but increased the accountability level of colleges and universities by requiring them to make additional information available to students.¹⁶⁵ This information included information about college tuition, financial aid, total costs (in addition to tuition) at the institution, student aid and institutional spending, and demographics on aid recipients at the college.¹⁶⁶ Included in HEOA was a provision requiring the publication of information about the most expensive institutions in the U.S., as well as those institutions which had

156. *Id.* at 549–50.

157. See MARGRET SPELLINGS, A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S., HIGHER EDUC. 4 (2006), available at <http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/pre-pub-report.pdf>.

158. Morgan, *supra* note 11, at 558, 576.

159. See INST. OF EDUC. SCIENCES, *National Assessment of Educational Progress*, NAT'L CENTER FOR EDUC. STAT., <http://www.nces.ed.gov/nationsreportcard/about/> (last updated Sept. 21, 2012).

160. See Libby A. Nelson, *Tangling Over Accountability*, INSIDE HIGHER ED (Feb. 5, 2013), <http://www.insidehighered.com/news/2013/02/05/heated-discussion-federal-regulations-naicu-panel> [hereinafter *Tangling*] (discussing how “college presidents criticize Congress and the Obama administration” over regulation regarding the HEA).

161. Morgan, *supra* note 11, at 573; See generally Derek Bok, *Universities in the Marketplace: The Commercialization of Higher Education* 7–17 (2003).

162. Robert Morse, *Freshman Students Say Rankings Aren't Key Factor in College Choice*, U.S. NEWS (Jan. 31, 2013), www.usnews.com/education/blogs/college-rankings-blog/2013/01/31/freshmen-students-say-rankings-arent-key-factor-in-college-choice.

163. Morgan, *supra* note 11, at 547–51.

164. *Id.* at 541–42.

165. *Id.* at 553–54.

166. *Id.*

the largest percentage increases in tuition, along with information about which institutions had the lowest tuition and fees.¹⁶⁷ To hold colleges responsible and to drive costs down through public pressure, colleges and universities which were in the top five percent for either tuition or net price were also required to justify those costs to the Secretary of Education, who then had to pass that information on to consumers in a yearly report.¹⁶⁸

To make information easily available to students and to ensure truth in advertising on the part of colleges and universities, HEOA required the creation of accountability measures such as the “Net Price Calculator,” which calculated costs for first-time, full-time students;¹⁶⁹ institutions receiving Title IV funds were required to post the calculator on their websites by 2011.¹⁷⁰ This calculator had to be updated yearly to reflect the most recent tuition and fees so that students were fully informed regarding costs and could make a true comparison between different institutions.¹⁷¹ An existing measurement tool, the “College Navigator,”¹⁷² was also updated to reflect tuition costs (over the past three years), book costs, total costs, use of grants and other financial aid, number of years to graduation, residency, and data regarding student populations based on race and ethnicity.¹⁷³

The HEOA, while aiming at increasing access to higher education and improving higher education overall, relied on the theory that better-informed student consumers would pay less for higher education if more information were available to them.¹⁷⁴ The new law also seemed to be aiming at higher education institutions, pressuring them to reform their programs and offerings to conform to market principles, an idea that had gained traction in recent years.¹⁷⁵ For example, Rep. George Miller (D. Calif.), chairman of the House Education and Labor Committee said, “[w]e are redoubling our commitment to college students and parents by

167. *Id.* at 552–53.

168. *Id.* at 553.

169. Morgan, *supra* note 11, at 553.

170. INST. OF EDUC. SCIENCES, *Net Price Calculator Information Center*, NAT'L CENTER FOR EDUC. STATISTICS, http://nces.ed.gov/ipeds/resource/net_price_calculator.asp (last updated May 29, 2013).

171. Morgan, *supra* note 11, at 553 (stating the “Net price is defined as ‘the average yearly price actually charged to first-time, full-time undergraduate students receiving student aid at an institution of higher education after deducting such aid’”).

172. *Id.* at 553–54 (the bill requires “the Secretary of Education to develop a ‘Multi-Year Tuition Calculator’ that will help parents and students estimate the cost of tuition over an extended period based upon the annual percentage change in tuition over the most recent three years”).

173. *Id.* at 553–54.

174. *Id.* at 557–58.

175. *Id.* at 558–60.

reining in skyrocketing tuition prices and making our whole system of higher education far more consumer-friendly,¹⁷⁶ and Representative Buck McKeon saw the refined legislation as “empower[ing students] to exert influence on the marketplace.”¹⁷⁷ Rather than tying financial aid to attendance at a lower cost for higher value institution, the HEOA instead seemed to favor a market-based solution where student consumers used the information provided to determine which institution best met their educational goals.¹⁷⁸ However, while the provision of information was projected to lower college tuition costs, in fact, it did little to drive the cost of college down.¹⁷⁹

The 2008 reauthorization of the HEOA was solidly backed by federal stimulus funds,¹⁸⁰ and due to the excess money available, the government provided more funding for higher education than ever before.¹⁸¹ As per-student state funding decreased, the federal government has increasingly assured access to higher education through dispersal of financial aid.¹⁸² However, as tuition rates continued to rise, one culprit was increasing administrative costs.¹⁸³ While student-to-faculty ratios have remained relatively stable, since 1975, the administrator-to-student ratio has risen drastically.¹⁸⁴ Faculty ratios tend to rise in proportion to increases in the number of students, while administrative ratios have outpaced that measure.¹⁸⁵ Administrators and staff now outnumber faculty members on campus—an interesting use of funds when we consider the role of higher education is teaching students, rather than managing them.¹⁸⁶ While the number of full-time faculty has dropped so that today 50 percent of faculty members only work part-time, the number of full-time administrators and staff has increased.¹⁸⁷ The salaries of these non-contributing parties has risen as well—since 1995 instructional spending has increased by 128 percent, while administrative spending has increased by 235 percent.¹⁸⁸

176. Doug Lederman, *House, Focusing on Cost, Approves Higher Education Act*, INSIDE HIGHER ED (Feb. 8, 2008), <http://www.insidehighered.com/news/2008/02/08/hea#ixzz2etcAoUSC>.

177. Morgan, *supra* note 11, at 534.

178. *Id.* at 547–48.

179. C. BOARD, *supra* note 141 (In 2009-2010, there was a 9.5 percent increase in tuition at state higher education institutions, although it was followed by smaller increases in subsequent years.).

180. Morgan, *supra* note 11, at 551.

181. C. BOARD, *supra* note 141.

182. *Id.*

183. Ginsberg, *supra* note 150.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. Letter from Thomas K. Lindsay, Dir. of the Ctr. for Higher Educ., to Dan Branch, Chairman, House of the Higher Educ. Comm. (Mar. 20, 2004), *available at*

In 2013, federal intervention in higher education has continued to follow the model of K-12 education reform through the creation of a post-secondary innovation contest, which encouraged colleges and universities to make changes that would boost graduation rates and student outcomes.¹⁸⁹ Colleges which responded quickly to the call for innovation will be eligible to compete for grants from the Fund for the Improvement of Post-Secondary Education,¹⁹⁰ or “First in the World” funding.¹⁹¹ This one-time \$260 million dollar allocation rewards schools that use innovative learning models to enhance teaching and learning.¹⁹²

Under President Obama, there has been increasing support for regulating higher education to serve the dual purposes of access and economic stability while promoting competition between institutions.¹⁹³ The two tools that the federal government seems poised to wield to achieve these goals are accountability and market forces.¹⁹⁴ While traditionally accountability in higher education consisted of accounting for how federal funds were spent, increasingly, accountability has come to mean conformity with federal expectations about how the money should be spent without looking too closely at educational outcomes gained by students.¹⁹⁵ In higher education, students have been put into the driver’s seat as they become consumers of the higher education product.¹⁹⁶ As federal dollars are increasingly supporting higher education, there is a greater call for demonstrating the dollar value of a degree.¹⁹⁷ As higher earnings have consistently been correlated with a college degree, students and their parents in their new roles as consumers increasingly want to see job data from their institutions.¹⁹⁸

The accountability principle in combination with the student consumer model has become increasingly problematic.¹⁹⁹ While Congress and students expect higher education to provide “quality educational opportunities,” such terms are difficult to quantify given the broad

<http://www.legis.state.tx.us/tlodocs/83R/handouts/C2902013032014001/aec38986-b2fb-45a0-a757-65d53ce25fad.PDF>.

189. Morgan, *supra* note 11, at 549–50.

190. See generally Virginia B. Smith et al., *Fund for the Improvement of Postsecondary Education: The Early Years*, THE NAT’L CENTER FOR PUB. POL’Y AND HIGHER EDUC. (June 2002), <http://www.highereducation.org/reports/fipse/FIPSE.pdf>.

191. *A Better Bargain*, *supra* note 22.

192. *Id.*

193. *Id.*

194. See *id.*

195. Morgan, *supra* note 11, at 544.

196. *Id.* at 544 – 545.

197. *Id.* at 545.

198. *Higher Education Pays: But a Lot More for Some Graduates Than for Others*, COLLEGE MEASURES.ORG (Sept. 3, 2013, 2:08 PM), <http://collegemeasures.org/category/Reports.aspx>.

199. Morgan, *supra* note 11, at 546. AT 546.

range of programs available and the difficulty in measuring the “value” students gain as a result of that quality education.²⁰⁰ This is where President Obama’s most recent proposal for higher education steps in—it appears from the plan’s layout that the White House is attempting to define these difficult terms and creating metrics to measure such terms as “quality” and “success.”²⁰¹

As part of his first term, President Obama instituted student loan reform and focused on making college more accessible to disadvantaged or minority students through tax credits and increased Pell grant funding.²⁰² Following his successful run for a second term, President Obama’s focus appears to be shifting toward requiring colleges to provide “good value” in order to keep their federal funding.²⁰³ In the 2012 State of the Union Address, President Obama proposed sweeping changes to the higher education system in the United States, which have now come to fruition in his 2013 proposed Better Bargain plan.²⁰⁴ The 2012 proposal was based on three central tenets: encouraging colleges and universities to lower tuition by rewarding them with additional financial aid, creating an improved education model by rewarding education reform and achievement, and asking Congress to keep higher education accessible through low financial aid interest rates, increased work study funds and educational tax credits.²⁰⁵ All of these principles are now incorporated in additional detail in President Obama’s 2013 plan to make college a more affordable, better bargain for the middle class.²⁰⁶

The Better Bargain Plan

The Better Bargain plan was revealed to the public on August 22, 2013, building upon already existing legislation and requiring greater collegiate accountability and efficiency, as well as increased use of tech-

200. *Id.*

201. See generally *A Better Bargain*, *supra* note 18 (discussing President Obama’s plan to make college more affordable).

202. See *id.*; see also Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. TIMES, Mar. 30, 2010, http://www.nytimes.com/2010/03/31/us/politics/31obama.html?_r=1&.

203. Libby A. Nelson, *The Obama Agenda*, INSIDE HIGHER ED (Sept. 4, 2012), <http://www.insidehighered.com/news/2012/09/04/higher-education-plays-role-democratic-platform> [hereinafter *Obama Agenda*].

204. *President Obama’s State of the Union Address*, N.Y. TIMES, Jan. 24, 2012, <http://www.nytimes.com/2012/01/25/us/politics/state-of-the-union-2012-transcript.html?pagewanted=all%20%28excerpting> (excerpting a portion of the 2012 State of the Union Address). See *A Better Bargain*, *supra* note 18.

205. See *FACT SHEET: President Obama’s Blueprint for Keeping College Affordable and Within Reach for All Americans*, THE WHITE HOUSE (Jan. 27, 2012), <http://www.whitehouse.gov/the-press-office/2012/01/27/fact-sheet-president-obama-s-blueprint-keeping-college-affordable-and-wi> [hereinafter *Blueprint*].

206. See *A Better Bargain*, *supra* note 18.

nology and innovative teaching methods.²⁰⁷ In addition, the Better Bargain plan strengthens existing government tools like the College Calculator, and introduces a ranking system for higher education institutions—tuition, policies and programs will all be ranked by the Department of Education and will be used to determine the extent of federal funding for institutions.²⁰⁸ Connecting college rankings to funding is likely to have a big impact on how higher education does business in the future.²⁰⁹

The federal government currently swings a large hammer when it comes to determining educational policy.²¹⁰ It dedicates over \$150 billion each year to financial aid; in comparison, the states provide less than half that amount of funding—only \$70 billion in state funding to public colleges and universities.²¹¹ While the White House has said that it will not determine college choice for students, it has also stated that tax dollars will be “steered” towards institutions that score high on the ratings scorecard by providing value and performance,²¹² which will certainly determine whether many students will choose to attend universities where federal dollars cannot be used.²¹³ This will give the federal government the opportunity to reform higher education to create its more globally competitive workforce.²¹⁴

The first facet of the White House Better Bargain plan involves rewarding colleges and students for their performance.²¹⁵ This section of the new policy involves the creation of a college ratings system by the Department of Education.²¹⁶ Although the ratings system is in development and will not be available until 2015,²¹⁷ it will likely be based on the College Scorecard, which measures cost of education, graduation rates and time to completion, student loan default rates, the median borrowing rate, monthly loan repayment costs, and student employment after graduation.²¹⁸ The new system will add to those factors: student access,

207. *See id.*

208. *See id.*

209. *See id.*

210. *See generally id.* (comparing the amount of money the federal government spends on financial aid per year, \$150 billion, to the amount of money that state governments spend on financial aid per year, collectively \$70 billion).

211. *Id.*

212. *See A Better Bargain, supra* note 18.

213. *See id.* (discussing that college students who attend higher-ranking colleges might be eligible for “larger Pell Grants and more affordable student loans”).

214. *Blueprint, supra* note 205.

215. *A Better Bargain, supra* note 18.

216. *Id.*

217. *Id.*

218. *See id. See also College Scorecard, THE WHITE HOUSE,* <http://www.whitehouse.gov/issues/education/higher-education/college-score-card> (last visited

cost and outcome measures such as graduation rates, earnings, and whether students go on to earn advanced degrees.²¹⁹ Colleges will be given some time to improve their ratings—although the system is supposed to be complete by 2015, student aid will not be dependent on the institution’s ranking until 2018.²²⁰

The new ratings system is supposed to group colleges according to mission in order to ensure fairness.²²¹ However, the White House is encouraging states to change the way they fund their own colleges and universities and to create their own reward and penalty systems to reward high performing institutions and penalize institutions that do not improve performance.²²² Also, to encourage colleges to serve lower income students, the plan proposes payment of bonuses to the colleges based on the number of Pell grant students they graduate.²²³

In addition to improving higher education through increased information and ratings, the White House is providing additional funding to carry out its vision for change through programs such as Race to the Top: College Affordability and Completion (RTTC).²²⁴ This program is similar to the K-12 version and will reward states which undertake systemic reforms to improve quality, affordability, and efficiency.²²⁵ States that fund their institutions based on success measured by the number of graduating students and who institute value-added programs such as accelerated learning modules and greater collaboration between high schools and higher education institutions will also be eligible for RTTC funding.²²⁶

In addition to state and institutional accountability, the White House plan holds students accountable for making progress towards earning a degree by using financial aid to encourage student graduation rate improvement.²²⁷ This involves overhauling the current system where students receive aid based on credit hour enrollment; under the new plan, students who do not complete a certain percentage of their enrolled courses would not be eligible for future financial aid.²²⁸ The plan also seeks to get more value for Pell dollars by gradually disbursing payments over a period of months, rather than providing the full

Nov. 14, 2013) (the online scorecard allows the website user to search for colleges based on affordability).

219. *A Better Bargain*, *supra* note 18.

220. *Id.*

221. *See id.*

222.. *See id.* (discussing “Race to the Top” funding).

223. *Id.*

224. *Race to the Top: College Affordability and Completion: Fiscal Year 2013 Budget Request*, DEPT. OF EDUC. (2013), <http://www2.ed.gov/about/overview/budget/budget13/justifications/t-rtt.pdf>.

225. *Id.* at T-2 –T-3.

226. *A Better Bargain*, *supra* note 18.

227. *Id.*

228. *See id.*

amount at the beginning of the semester to students who may not complete their coursework.²²⁹

A second major factor in the Better Bargain plan is rooted in the idea that technology has the answers to some of the problems plaguing higher education and driving up costs.²³⁰ The White House believes that investing in technology will allow higher education to drive down costs while preserving quality and has partnered with business and community leaders to get input into how technology can provide better teaching and learning.²³¹ It points to the success of Massive Open Online Courses (MOOC's) as an innovative tool which can serve a large number of students at very little cost.²³²

In addition to using technology to lower costs and to increase delivery, the White House plan also calls for two innovative measures which would reduce the amount of time a student spends in college.²³³ The first is the use of competency-based measures over what it calls "seat time."²³⁴ This proposed learning model would abolish the traditional sixteen week semester and allow students to move on to new courses as soon as they have mastered the basic principles of the class.²³⁵ The second measure calls for prior-learning recognition, where students are awarded credit for skills they have already mastered; this would involve additional pre-college testing along with high school/college collaboration so that students can receive dual credits before enrolling in college.²³⁶

The final piece of the Better Bargain plan secures the federal government's interest in access to higher education for students by keeping lending costs low.²³⁷ While prior repayment plans required the borrower to repay all monies owed to the federal government, the new plan will allow all borrowers who are eligible to pay a percentage of what they earn, rather than the full loan amount.²³⁸ This proposal would cap payments at 10% of each borrower's monthly income.²³⁹ This plan was pre-

229. *Id.*

230. *Id.*

231. *Id.* See also Jeffery R. Young, *A Conversation With Bill Gates About the Future of Higher Education*, THE CHRONICLE OF HIGHER EDUCATION (June 25, 2012), <http://chronicle.com/article/A-Conversation-With-Bill-Gates/132591/> (The Bill and Melinda Gates Foundation has been one such voice, advocating for "flipped" classrooms where students view lectures online and use class time for projects).

232. *A Better Bargain*, *supra* note 18.

233. *Id.*

234. *Id.*

235. *See id.*

236. *Id.*

237. *Id.*

238. *A Better Bargain*, *supra* note 18.

239. *Id.*

viously available to some students—approximately 6% of the total number of present student loan borrowers,²⁴⁰ which worked out to “2.5 million of 37 million federal student loan borrowers are benefitting from” repayment plans tied to their income level.²⁴¹

Continued financing of higher education may be challenging given the current federal financial picture. One challenge is that after implementing the Affordable Care Act (ACA) there may not be much funding left over to implement higher education reform.²⁴² The Obama administration has actually spent slightly less on education than preceding administrations, if we omit the stimulus dollars coming from the American Recovery and Reinvestment Act.²⁴³ Since that money was a one-time investment, it is highly unlikely that spending will continue at the same level. State educational institutions relying on federal funding may have to do more with less.²⁴⁴

As an additional financial challenge, the proposed reforms to higher education are driven, in part, by the \$7 billion shortfall faced by the Pell Grant system.²⁴⁵ As Pell grants serve Obama’s identified high-risk populations (poverty and low-income students), the money will have to come from somewhere or fewer poor students will have access to education.²⁴⁶ Given the financial situation and goal of higher academic achievement, transforming higher education at lower funding levels will require the administration to apply the lessons learned from NCLB to the Better Bargain plan.

LESSONS OF NO CHILD LEFT BEHIND AND THEIR APPLICABILITY TO THE BETTER BARGAIN PLAN

The President’s plan has many factors in common with the No Child Left Behind Act (NCLB).²⁴⁷ Most notably, NCLB required increased accountability, encouraged technology use, and rewarded high performing schools financially, all features of the current Better Bargain plan.²⁴⁸ In fact, the only piece on the higher education reform plan that

240. See *id.* (2.5 Million out of 37 million borrowers currently qualify for the plan. Given the current budget situation, it seems unwise to allow the full 37 million loan recipients access to a 10% repayment plan).

241. *Id.*

242. Michael Q. McShane et al., *What’s Ahead for Education After the 2012 Election*, AM. ENTER. INST. (Dec. 4, 2012), <http://www.aei.org/outlook/education/whats-ahead-for-education-after-the-2012-election/>.

243. *Id.*

244. *Id.*

245. *Id.*

246. See *id.*

247. *UFF Biweekly, President Obama Proposes to Reform Higher Education*, UNITED FAC. OF FLA. (Sept. 12, 2013), <http://uff.ourusf.org/biweekly/Fall2013/Biweekly091213.htm>.

248. See No Child Left Behind Act of 2001 § 1111, 20 USC § 6311 (2006); *A Better Bargain*, *supra* note 22.

differs in principle from K-12 reform is the loan repayment section.²⁴⁹ However, the Better Bargain plan is also susceptible to the same implementation challenges and unanticipated outcomes of NCLB, where schools with high-income, white students were rewarded and schools with low-income, disadvantaged students were penalized.²⁵⁰ This section of the paper will discuss the challenges exposed by NCLB and discuss how the Obama administration can tailor its higher education plan to avoid the same negative outcomes.

One of the problems President Obama may face in implementing his new higher education plan has to do with seeking support. While President Obama has said that he seeks input from educators into the reform process, in actuality, this new plan was developed without such inputs²⁵¹, leading many to question whether the administration sees a lack of competence on the part of higher education to contribute to the new plan, or whether it plans to increasingly rely on the business community for input into reform. However, while there is some value to gaining input from all interested parties, applying a business model to education is problematic.

The Federal Power to “Reform” Higher Education is Limited by State Sovereignty

Congress’ tool for education reform is its Spending Power.²⁵² Congress’ conditional spending power is based on the notion that states are able to contract with the federal government—the state receives funding in exchange for its agreement to abide by federal guidelines.²⁵³ When exercising the spending power, the federal government must comply with four requirements: (1) the legislation must be in pursuit of the general welfare of the United States; (2) the condition must be unambiguous; (3) the money must be related to a federal interest; and (4) the condition cannot conflict with any other constitutional provisions.²⁵⁴ In determining whether the spending power is being used properly, the Supreme Court also considers the persuasive powers of the federal purse, stating that the funds cannot be used so “coercive[ly]” that the pressure to conform becomes compulsory.²⁵⁵ Congress may only use the spending power to serve a federal interest in education, which theoretically limits

249. *A Better Bargain*, *supra* note 22.

250. Hursh, *supra* note 24, at 298.

251. Fain, *supra* note 187.

252. See Eloise Pasachoff, *Conditional Spending After NFIB V. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 580 (2013).

253. *South Dakota v. Dole*, 483 U.S. 203, 206–07 (1987).

254. *Id.* at 207–08.

255. *Id.* at 211.

its ability to use its superior budget size to force states to change their laws.²⁵⁶

As states maintain their sovereign roles regarding education, Congress lacks the power to regulate education on its own; however, in recent years the federal government has made increasing incursions into academic control.²⁵⁷ The U. S. Department of Education at its creation recognized the role that the states played in forming their own education policies, and was barred from exercising “direction, supervision, or control over the curriculum;”²⁵⁸ instead, its role was to encourage state development of quality programs and to ensure educational access for disadvantaged children.²⁵⁹ While today the U.S. Department of Education sees its role “as a kind of ‘emergency response system,’ a means of filling gaps in State and local support for education when critical national needs arise,”²⁶⁰ in fact, the federal government plays a huge role in forming state education policies.²⁶¹

Although the power to develop curriculum and assessment tools rests with the states, both NCLB and the White House Better Bargain plan create conditions under which schools must make changes to both curriculum and assessment in order to qualify for federal funding.²⁶² The federal government currently funds approximately 10.8 percent of K-12 education,²⁶³ and provides funding through grants, work-study funds, and student loans to approximately fifteen million higher education students.²⁶⁴ The real question becomes whether state autonomy can be preserved given the implications for schools, which reject the conditions tied to federal funding. Schools build their budgets around the provision of federal funds;²⁶⁵ attaching new conditions to the money has a trickle-down effect on curriculum and teaching. Federal funds play such a huge role in the overall education budget, that states and higher education institutions are in no position to refuse any funding conditions, no matter how unattractive or counterproductive they may be.

256. *See Id.* at 207.

257. *See, e.g.*, Department of Education Organization Act, Pub. L. No. 96–88, 93 Stat. 668 (1979).

258. *Id.* at § 103(b).

259. *Id.* at § 102.

260. *The Federal Role in Education*, U.S. DEP’T. OF EDUC., <http://www2.ed.gov/about/overview/fed/role.html?src=ln> (last modified Feb. 13, 2012) [hereinafter *The Federal Role in Education*].

261. *See* Pasachoff, *supra* note 252, at 605.

262. *Reforming No Child Left Behind*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/education/k-12/reforming-no-child-left-behind> (last visited Nov. 14, 2013) [hereinafter *Reforming No Child Left Behind*]; *A Better Bargain*, *supra* note 22.

263. *The Federal Role in Education*, *supra* note 260.

264. *Budget Office—U.S. Department of Education*, U.S. DEP’T. OF EDUC., <http://www2.ed.gov/about/overview/budget/index.html?src=ct> (last modified Apr. 10, 2013).

265. *The Federal Role in Education*, *supra* note 260.

Thus, federal funding acts as a lever for policy change. Using the congressional spending power, the NCLB Act, and other acts like it, are enforced against the states, and Congress is given broad discretion to attach conditions to education monies.²⁶⁶

While states are not given a pre-determined federal curriculum, which each state must implement, under NCLB, states were required to improve proficiency in math, language arts, and science.²⁶⁷ This led to curriculum changes in K-12 schools, as those subjects were emphasized; more time was devoted to those academic areas to prepare students for eventual examination.²⁶⁸ While it is unclear which subjects the Better Bargain plan will propose measuring to hold higher education institutions accountable, funding conditions are likely to attach, at the very least, in the areas of math, technology, and science²⁶⁹ as these would help achieve the federal policy goals of increased preparation to compete in a global marketplace²⁷⁰ as the U.S. is currently importing foreign workers to fill demand in these areas.²⁷¹

Accountability, as envisioned by the federal government, may require states to shift their laws to emphasize some academic subjects and minimize others as what happened under NCLB.²⁷² In addition, as discussed above, setting high accountability standards may lessen access for disadvantaged students, unless the statute is narrowly tailored so as not to penalize institutions that serve a large population of disadvan-

266. See *Chas C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 581 (1937); *Dole*, 483 U.S. 203, 210 (1987) (holding that Congress may induce a state legislature to act so long as statehood is not impaired and the loss of the financial reward is not too coercive); Michael D. Barolsky, *High Schools Are Not Highways: How Dole Frees States from the Unconstitutional Coercion of No Child Left Behind*, 76 GEO. WASH. L. REV. 725, 733 (2008).

267. Diane Ravitch & John Chubb, *The Future of No Child Left Behind*, Summer 2009 Vol. 9 No. 3 EDUC. NEXT49, 49–50, <http://educationnext.org/the-future-of-no-child-left-behind/>.

268. *Id.* at 51.

269. *A Strategy for American Innovation: Driving Towards Sustainable Growth and Quality Jobs*, THE WHITE HOUSE (Sept. 2009), (The subjects of math, technology, and science are important to America's economic growth. In the last four decades, federal funding for these subjects has declined, whereas other countries have increased funding in these areas.).

270. *Id.*

271. See Hal Salzman et al., *Guestworkers in the High-Skill U.S. Labor Market*, ECONOMIC POLICY INSTITUTE (April 24, 2013), <http://www.epi.org/publication/bp359-guestworkers-high-skill-labor-market-analysis/> (demonstrating how the United States hires skilled foreign workers in the areas of science, technology, engineering, and mathematics because the its education system cannot produce enough skilled workers in those areas.).

272. See Liz Hollingworth, *Unintended Educational and Social Consequences of the No Child Left Behind Act*, 12 J. GENDER RACE & JUST. 311, 322 (2008-2009) (“[S]chools that are struggling to raise test scores are narrowing the curriculum and abandoning innovative interdisciplinary curricula to focus on math, reading, and science . . .”).

tagged students.²⁷³ Otherwise, institutions such as community colleges, which were established with an open access mission, would either be driven out of business or would have to shift their missions to accept students who had already demonstrated ability to perform well on standardized tests.

Education Reform is a Political Process which May Lead To Inconsistency

While it is relatively simple for everyone to agree that we could do a better job of educating students in the U.S., it is much more difficult to reach concurrence about how to improve the education process and how to measure that achievement. While there is beginning to be bipartisan support for national standards and assessments at the K-12 level as seen by the adoption of the “common core,”²⁷⁴ and while there is some movement towards similar assessments at the university level, parties disagree about how to best develop such tools.²⁷⁵ For example, there may be a broad definition of what words such as “competency” mean, even among educators.²⁷⁶ In addition, deciding how states might be held accountable and what form that accountability might take is also problematic.²⁷⁷ When these conversations take place at the national level and where parties are negotiating in ill-defined areas, the access to and ability to influence congressional leaders may be more important than reliance on data.²⁷⁸

Political parties have always played a role in determining what types of reform are appropriate for education based on policy goals.²⁷⁹ For example, Republicans have traditionally opposed federal involvement in education, which has made them resistant to some reform pro-

273. Emily Suski, *Actually, We are Leaving Children Behind: How Changes to Title I Under the No Child Left Behind Act Have Helped Relieve Public Schools of the Responsibility for Taking Care of Disadvantaged Students' Needs*, 14 GEO. J. ON POVERTY L. & POL'Y 255, 258 (2007).

274. Levin, *supra* note 123.

275. See generally Ravitch & Chubb, *supra* note 265 (Scholars disagree over the National Assessment of Educational Progress, specifically, how to define and measure a student's “proficiency.” One scholar offers a loose definition, which requires students to meet only basic skills, while another suggests that proficiency should mean “college or career ready.”).

276. *Id.*

277. See generally *id.*

278. See generally Lindsey Burke & Jennifer A. Marshall, *Why National Standards Won't Fix American Education: Misalignment of Power and Incentives*, HERITAGE FOUND. (May 21, 2010), <http://www.heritage.org/research/reports/2010/05/why-national-standards-won-t-fix-american-education-misalignment-of-power-and-incentives> (demonstrating how Congress in the past has opposed standardized testing and how in the future, it will similarly resist educational reform.).

279. See generally *Reforming No Child Left Behind*, *supra* note 260.

posals.²⁸⁰ Democrats, on the other hand, generally support more federal involvement in education in order to guarantee access to education by minorities and poor students.²⁸¹ These disagreements tend to result in education bills which are cobbled together to serve the interests of both political parties, and often do not reflect a uniform plan for improvement, but rather bits and pieces which somehow managed to survive the legislative process.²⁸²

It is also important to recognize that requiring accountability puts power in the hands of those calling for it, and highlights the low status teachers' hold in our society²⁸³. The very notion of reform seems based on the perception that schools and administrators require motivation in order to improve the quality of education offered to students, and infers that absent rewards and penalties, students will not succeed.²⁸⁴ The very wording of the Better Bargain plan hints at accounting to a higher authority, which is better able to determine success or failure.²⁸⁵ Accountability also depersonalizes the value a teacher brings to the classroom, since everything depends on the school's overall achievement on the test.²⁸⁶

While different special interest groups may agree on the need for one set of national standards, there is much greater resistance to the idea of a national curriculum, which would be designed by a federal bureaucracy²⁸⁷, especially at the college level. Deciding that some classes or subjects are more important than others²⁸⁸, would likely lead to lobbying at the national level by special interest groups to get additional clas-

280. See generally *Republican Party on Education*, ON THE ISSUES, http://www.ontheissues.org/celeb/Republican_Party_Education.htm (last updated July 10, 2013).

281. See generally Libby A. Nelson, *The Obama Agenda*, INSIDE HIGHER ED (Sept. 4, 2012), <http://www.insidehighered.com/news/2012/09/04/higher-education-plays-role-democratic-platform> (put in the URL and go to the bottom of the page; then keep clicking the next button until you reach articles that are dated Sept. 4 2012; then look for the article titled *The Obama Agenda*).

282. See, e.g., Adam Clymer, *Congress Reaches Compromise on Education Bill*, N.Y. TIMES Dec. 12, 2001, <http://www.nytimes.com/2001/12/12/us/congress-reaches-compromise-on-education-bill.html>.

283. See *Who Is Accountable For Children's Education*, NEWS HOUR (2005), http://newshour-tc.pbs.org/newshour/btp/pdfs/stlouis_accountability_2005.pdf.

284. See generally Emily Richmond, *The Missing Link in School Reform: Student Motivation*, THE ATLANTIC (May 29, 2012, 11:47 AM), <http://www.theatlantic.com/national/archive/2012/05/the-missing-link-in-school-reform-student-motivation/257770/>.

285. See *A Better Bargain*, *supra* note 18.

286. See Ravitch & Chubb, *supra* note 265 (One scholar illustrates how teachers now teach primarily basic skills as opposed to content rich curriculum.).

287. See generally Doug Lederman, *Colleges and the Common Core*, INSIDE HIGHER ED (July 19, 2010), <http://www.insidehighered.com/news/2010/07/19/core>.

288. *Id.*

ses included in their categories of interest. Many different parties in addition to teachers and administrators would be motivated to lobby for their interests; this might include technology platforms, software developers, textbook publishers, and many others who would benefit from having their products adopted.²⁸⁹ Deciding whether a student is competent in an academic area is also rife with possibilities for disagreement.²⁹⁰ The first difficulty arises in deciding the level at which the student is deemed competent,²⁹¹ the second is in how best to test student knowledge and skills.²⁹²

In addition to the above concerns, the decision to revoke or limit the funding of a higher education institution cannot be done in a vacuum. Legislators must take into account that the children of their constituents may attend that school, and the failure to provide funding may result in a lower quality of education or denial of access for students desiring to matriculate at that school. Legislators may be equally vested in preserving funding for their own alma maters. Finally no legislator will want to be on the record as the one whose vote destroyed a college or university in his or her own state.

Standardized Testing Diminishes the Democratic Process

One serious side effect of developing tools for uniform assessment is the lack of input required from interested voters once that tool is completed and implemented.²⁹³ The attempt to legislate what should be learned by students and then hold schools accountable based on those regulations, whether at a local school or at a public university, removes

289. See, e.g., Sarah Garland, *Common Core standards shake up the education business*, HECHINGER REP. (Oct. 15, 2013), http://www.hechingerreport.org/content/common-core-standards-shake-up-the-education-business_13405/ (New Common Core standards have caused textbook publishers to create technology alternatives to textbooks. The adoption of and the use of these new textbook alternatives have attracted new competitors, such as small non-profits and educational technology start-ups, who are eager to create educational products to fit the new Common Core standards.).

290. See Ravitch & Chubb, *supra* note 265; see also *supra* text accompanying note 273.

291. See *supra* text accompanying note 273.

292. See *generally Frequently Asked Questions*, COMMON CORE ST. STANDARDS INITIATIVE, <http://www.corestandards.org/resources/frequently-asked-questions> (last visited Nov. 14, 2013) (States who have adopted the Common Core Standards are working together to develop common assessments to measure the new standards.); see also, Valerie Strauss, *Are school reformers wrecking the Common Core?*, WASHINGTON POST, Oct. 15, 2013, <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/10/15/are-school-reformers-wrecking-the-common-core/> (demonstrating the difficulties associated with Common Core assessments.).

293. LINDA M. MCNEIL, CONTRADICTIONS OF SCHOOL REFORM: EDUCATIONAL COSTS OF STANDARDIZED TESTING 9–11 (Michael W. Apple ed., 2000), available at <http://fathurrahmanbahrinsyah.files.wordpress.com/2010/04/contradictions-of-school-reform1.pdf>.

the possibility of community input.²⁹⁴ Shifting education towards federal standards takes the responsibility for determining the quality of education away from locally elected school boards, and puts it into federal hands.²⁹⁵ It prevents local districts from commenting on or tailoring the curriculum to the needs of their particular communities.²⁹⁶ Setting standards is always elitist because it eliminates the participation of all parties and typically limits input to experts, chosen by those appointed to lead the process.²⁹⁷ If all conversations regarding curriculum and the testing process begin to take place at the federal level, it will become impossible for individually interested parties (such as parents and students) to compete with larger foundations and special interest groups.²⁹⁸ This may not be in the best interest of students, as a community-involved institution may have better buy-in and better outcomes.²⁹⁹

By their very nature, academic standards limit participation in the political process. Once accountability standards have been determined, all conversations regarding the school must then revolve around whether those standards have been met; once the time for discussion has passed (whether you were an invited participant or not) there is no ability to criticize or amend the standards themselves.³⁰⁰ By their very nature, standards of accountability, once implemented, deter creativity in the classroom and prevent teachers from teaching to top students, as all curriculum decisions must be driven by the test.³⁰¹ Adoption of uniform standards also makes it difficult for interested parties to see additional

294. *Id.* at 10.

295. *Id.* at xxiv.

296. See Jay P. Greene, Educ. & Workforce Comm.: Subcomm. on Early Childhood, Elementary, & Secondary Educ., Testimony Before the United States House of Representatives. 1–4 (2011), *available at* http://www.edworkforce.house.gov/uploadedfiles/09.21.11_greene.pdf (Testimony of Jay P. Greene illustrates how California students, who are typically ready to learn algebra in the 8th grade, will be disadvantaged by the Common Core standard which requires that algebra not be introduced until the 9th grade.).

297. *Id.*

298. MCNEIL, *supra* note 287, at 266.

299. See Anne T. Henderson & Karen L. Mapp, A NEW WAVE OF EVIDENCE: THE IMPACT OF SCHOOL, FAMILY AND COMMUNITY CONNECTIONS ON STUDENT ACHIEVEMENT 30–31 (Annual Synthesis ed., 2002), *available at* <http://www.sedl.org/connections/resources/evidence.pdf> (Parent involvement with their child's achievement at home and at school may be one of the strongest arguments for local control as students with engaged parents get higher grades and better standardized test scores.).

300. GREENE, *supra* note 290 (“[N]ationalized approaches lack a mechanism for continual improvement. Given how difficult it is to agree upon them, once we set national standards, curriculum, and assessments, they are nearly impossible to change.”).

301. MCNEIL, *supra* note 287, at 215. (Usually, it is higher academic quality that is negatively impacted by standardization.).

possibilities—to look outside the box for solutions, since we’re all, by virtue of regulation, inside the box.³⁰²

In addition to limiting the democratic process once standards have been developed, there are other faults in federal regulation of higher education. For example, while the new College Scorecard system seems like an innovative tool which will benefit education, the downside of such a tool is that its creation will neither require input from Congress, nor voters, as the Department of Education has been tasked with its development; this puts the allocation of federal dollars to preferred schools firmly in the hands of the administrative branch, and does not allow input into what elements should be incorporated into the College Scorecard, nor does it address how those elements should be weighted.³⁰³

Standards which address only academic issues also have the potential to preempt other valuable learning goals that we may have for education. For example, in K-12 education and in higher education, society has goals for schools which exceed math, science and reading skills.³⁰⁴ We rely on schools to teach students social skills, ethics, citizenship, and a whole host of values.³⁰⁵ At the collegiate level, goals may include development of independence, becoming a valuable member of society, responsibility, and service to the community.³⁰⁶ However, when core academic standards are adopted, these secondary goals necessarily become distanced because of the commitment needed to meet the standards mandated by law.³⁰⁷

Accountability Leads to Discrimination Against Racial and Ethnic Populations

One of the benefits of NCLB was that the law forced schools to track the performance of students based on racial or ethnic characteristics.³⁰⁸ No longer could schools hide the lower performance of disadvantaged groups inside the overall school population.³⁰⁹ However, eleven years after the introduction of NCLB, it was obvious that schools had

302. *Id.* at 248.

303. Lindsey Burke, *Morning Bell: 4 Problems with Federal College Scorecards*, THE FOUNDRY (Aug. 23, 2013, 6:50 AM), <http://blog.heritage.org/2013/08/23/morning-bell-4-problems-with-federal-college-scorecards/>.

304. *See generally* Nina R. Frant, Comment, *The Inadequate Resume of School Education Plans*, 51 HOW. L.J. 819, 819 (2008), (asserting that “[b]eyond the academic preparation of students,” schools need to teach students “trade training, team work, public speaking, professional communication, and time and group management” for them to succeed in today’s labor market.)

305. *See id.* at 836.

306. *See id.* at 833.

307. *See id.* at 836.

308. Daniel J. Losen, *Challenging Racial Disparities: The Promise and Pitfalls of the No Child Left Behind Act’s Race-Conscious Accountability*, 47 HOW. L.J. 243, 260 (2004).

309. *See id.* (noting that before NCLB racial and ethnic reporting “requirements were never enforced in the face of widespread noncompliance.”).

failed to close the achievement gap for these sub-groups.³¹⁰ For example, African-American and Latino students still lagged behind their white and Asian counterparts by 20-30 percentage points on state API tests in California in 2013.³¹¹

While states are invested in the goal of raising proficiency levels of English Language Learners (ELL's), in reality this goal has been difficult to achieve, regardless of legislation and the amount of federal funding available.³¹² One culprit in this dilemma—ELL's are particularly vulnerable to the challenges of standardized testing which has been embraced as the tool of accountability.³¹³ ELL's score consistently low on standardized tests which measure academic achievement and course content knowledge.³¹⁴ For example, in 2011, eighth-grade ELL students scored forty percent lower than their native English speaking counterparts in reading;³¹⁵ this continues a pattern of low scores for ELL's which NCLB did nothing to raise, although accountability through testing was supposed to correct those differentials.³¹⁶

When considering the needs of ELL's, the amount of time a school has to enact improvements becomes key;³¹⁷ for example, we must consider whether it is fair to expect the improvement for this sub-group using the same timeline that is used for more advantaged sub-groups.³¹⁸ One of the goals of NCLB was to move students towards English proficiency as soon as possible, a goal which failed to consider the difficulty in mastering a foreign language in a short time period,³¹⁹ which then led to school failure to make AYP for that sub-group.³²⁰

310. See, e.g., Jeffrey Mongiello, *The Future of the Equal Educational Opportunities Act S 1703(f) After Horne v. Flores: Using No Child Left Behind Proficiency Levels to Define Appropriate Action Towards Meaningful Educational Opportunity*, 14 Harv. Latino L. Rev. 211, 212 (2011).

311. See CALIFORNIA DEPARTMENT OF EDUCATION, 2012-13 ACADEMIC PERFORMANCE INDEX REPORTS 50 (2013), available at <http://www.cde.ca.gov/ta/ac/ap/documents/infoguide13.pdf>.

312. See generally KEIRA GEBBIE BALLANTYNE, ET AL., EDUCATING ENGLISH LANGUAGE LEARNERS: BUILDING TEACHER CAPACITY, available at <http://www.ncele.gwu.edu/files/uploads/3/EducatingELLsBuildingTeacherCapacityVol1.pdf> (last visited Nov. 14, 2013).

313. *Id.* at 7.

314. *See id.* at 8.

315. Nat'l Ctr. for Educ. Statistics, *Table 142. Average National Assessment of Educational Progress (NAEP) Reading Scale Score, by Grade and Selected Student and School Characteristics: Selected Years, 1992 through 2011*, NCES.ED.GOV, http://nces.ed.gov/programs/digest/d12/tables/dt12_142.asp (last updated June 2012).

316. Rosemary C. Salomone, *Educating English Learners: Reconciling Bilingualism and Accountability*, 6 HARV. L. & POL'Y REV. 115, 130 (2012).

317. *See id.* at 129.

318. *See id.* at 130.

319. *Id.* at 129.

320. *See id.* at 130.

In addition to the challenges in improving education for ELL's, under NCLB, more disadvantaged students were enrolled in Title I schools, the very schools which were vulnerable to AYP penalties.³²¹ As the percentage of required "proficient" students increased, the number of schools designated as program improvement (PI) schools increased.³²² For example, in 2002 at the beginning of NCLB, 1,200 California Title I schools were designated as PI schools.³²³ By 2013, the number of California Title I schools with the designated PI label had risen to 4,996 out of 6,135 total Title I schools in the state.³²⁴ As the percentage required to meet AYP rose, the PI designation was applied to entire school districts—566 California districts were PI districts in 2013.³²⁵ This is troubling, as under NCLB, the PI label came to equal a failing school, and those schools were "failing" our most disadvantaged students.³²⁶

The truth is that Title I schools serve a population which needs varied educational supports.³²⁷ Determining that a school is subject to AYP penalties may encourage top teachers to move to other institutions with lower risk in order to keep their jobs.³²⁸ Also, designating a school as a PI school may directly harm students and their parents based on the belief that students in the school are not as intelligent as their non-PI counterparts.³²⁹ Students who come from disadvantaged backgrounds usually have less support and less early childhood preparation than students from more affluent backgrounds.³³⁰ Students with greater socioeconomic challenges tend to test lower on exams as shown by the inverse relationship between the percentage of students receiving free school lunch and standardized test scores.³³¹

The disservice done to disadvantaged students goes beyond the failure to improve test scores. In schools where minority and poor stu-

321. See *No Child Left Behind (NCLB) Requirements for Schools*, GREATSCHOOLS.ORG, <http://www.greatschools.org/definitions/nclb/nclb.html> (last visited Nov. 14, 2013).

322. See generally Cal. Dep't of Educ., *Program Improvement Status Determinations*, <http://www.cde.ca.gov/ta/ac/ay/tidetermine.asp> (last updated Sept. 30, 2013) (giving general requirements for a school to enter PI status in California).

323. Freedberg, *supra* note 101.

324. *Id.*

325. See *id.*

326. See *id.*

327. See generally Melissa Baker & Pattie Johnston, *The Impact of Socioeconomic Status on High Stakes Testing Reexamined*, 27 JOURNAL OF INSTRUCTIONAL PSYCHOLOGY No. 3 193, 194 (2010) (finding "that SES and home life play an important role in a child's learning and education.").

328. See generally *No Child Left Behind (NCLB) Requirements for Schools*, *supra* note 318 (stating that schools that do not meet AYP for six consecutive years are required to restructure by replacing "all or most of the school staff.").

329. See generally *id.* (stating that PI schools have "the goal of all students reaching the proficient level on reading/language arts and mathematics tests...").

330. Baker, *supra* note 200, at 194.

331. *Id.*

dents are located, accountability and testing becomes the core curriculum, rather than learning enrichment.³³² In-class reading and extra assignments all fall by the wayside in the push to prepare for the standardized exam at the end of the year.³³³ This leads to greater inequity in the education process, as wealthier schools are able to provide continued enrichment opportunities that are denied to their poorer counterparts.³³⁴ Test-driven accountability hides inequalities in education, as high test scores in minority schools are taken as representative of a high-achieving school, while learning may in fact be limited to test preparation.³³⁵ This may lead poorer districts to invest their funds in materials and activities that raise scores, rather than in materials and activities that provide long term growth for students.³³⁶ At the college level, this may lead to either curricular changes, or to limiting the enrollment pool.³³⁷ Since Black and Latino sub-groups tend to receive lower scores on standardized tests, any school accepting these populations would be likely to have a lower College Scorecard rating.³³⁸

Beyond the challenges to student sub-groups with racial, ethnic, or socioeconomic barriers to education, lies the challenge of using a standardized test to determine the learning of a special education child.³³⁹ While special education students have a broad range of disabilities, from physical challenges to mental difficulties, under NCLB the special education sub-groups were required to improve their proficiency levels at the same rate as other school sub-groups.³⁴⁰ This change to education for special needs children signaled a shift in how such students were assessed; while it held the school accountable for the increasing progress of special education kids, it was problematic, as special education typically focused on the individual needs of a particular child, rather than on the school's accountability for teaching academic subjects.³⁴¹ The In-

332. Salomone, *supra* note 313, at 142.

333. *See id.*

334. *Id.* at 129.

335. *See generally* Salomone, *supra* note 313, at 142 (stating that “summative standardized assessments leave[] little time for enrichment learning and developing the analytic skills needed for advanced coursework and college.”).

336. *See generally id.*

337. *See id.* at 142 (stating that “summative standardized assessments [leave] little time for enrichment learning and developing the analytic skills needed for advanced coursework and college.”).

338. *See* Salomone, *supra* note 301, at 125.

339. *See generally* Regina R. Umpstead, Commentary, *A Tale of Two Laws: Equal Educational Opportunity in Special Education Policy in the Age of the No Child Left Behind Act and the Individuals with Disabilities Education Act*, 263 ED. LAW REP. 1, 4 (2011) (exploring NCLB's “unreachable promise that all [special education] students must ‘minimally achieve’ the same level of proficiency on a standardized test.”).

340. *Id.* at 4.

341. *Id.* at 14.

dividuals with Disabilities Education Act (IDEA)³⁴² aims at creating high individual academic expectations for students with disabilities.³⁴³ However, the creation of NCLB, which sets minimal testing benchmarks as a measure for success, moves away from the idea of individual needs and towards uniformity.³⁴⁴ The scenarios for many special needs children is this: the focus is on life skills and vocational training to prepare them for life after graduation.³⁴⁵ This is a result that most parents seek and approve.³⁴⁶ However, NCLB mandates a one-size-fits-all model of education, in which all children are college bound.³⁴⁷ It also fails to take into account the learning challenges which individual special needs children may have.³⁴⁸ While a special needs child may be promoted with his or her class, he or she may be continuing to work on what would be remedial skills for others of the same age.³⁴⁹ The undue influence given to standardized testing results may result in ostracism for the child and may limit college access for students with disabilities coming out of high school, in an effort to keep the higher education institution ranked high, which conflicts with the mission of many community colleges which fill the gap for disabled students.³⁵⁰

Applying NCLB-like accountabilities for disadvantaged students in higher education may have a chilling effect on the number of universities willing to accept students who may jeopardize their test scores and thus deprive them of student loan funds.³⁵¹ There is already a competitive market for diverse students who score high on college entry exams.³⁵² The universities who lose that competition may be reluctant to

342. Individuals with Disabilities Educ. Act (IDEA) Act of 1990, Pub. L. No. 111-256, 124 Stat. 2643 (2010) (codified as amended at 20 U.S.C. § 1400 (2011)).

343. *See id.*

344. *See generally* Umpstead, *supra* note 333. (exploring NCLB's "unreachable promise that all [special education] students must 'minimally achieve' the same level of proficiency on a standardized test.>").

345. *See id.*, at 12. This is the model the IDEA Act follows.

346. *See id.*, at 12. High parental involvement under the IDEA act allows drawing this inference.

347. *See id.*, at 1-2.

348. *Id.* at 14

349. *See id.*, at 6-7.

350. *See* Voncella McCleary-Jones, *Students with Learning Disabilities in the Community College: Their Goals, Issues, Challenges and Successes*, UDINI BY PROQUEST, available at <http://udini.proquest.com/view/students-with-learning-disabilities-goid:304834550> (last visited Nov. 14, 2013).

351. *See generally* Marguerite Clarke & Arnold Shore, *The Roles of Testing and Diversity in College Admissions*, NATIONAL BOARD ON EDUCATIONAL TESTING AND PUBLIC POLICY, 51 (2001), <http://www.bc.edu/research/nbetpp/statements/M1N2.pdf> (stating "test score information can be used in a variety of ways in determining how much financial aid to give to students."); Larry Leslie & Gary Johnson, *The Market Model and Higher Education*, 45 JOURNAL OF HIGHER EDUCATION 1, 1 (1974) (stating "the market concept is tied to funding higher education through students.>").

352. *See* Clarke & Shore, *supra* note 351, at 15 (stating that diversity and test scores are focal points for marketing and recruitment).

accept diverse students who cannot demonstrate a level of competence, which is predictive of future success.³⁵³ This competition for dollars, through tried and true accountability measures, may create a category of colleges, which are in essence Title I schools, with fewer opportunities available to students and with the bulk of class time spent on test preparation.

Higher Education is Not a Competitive Free Market

In the ideal free market system, price is influenced by the principles of supply and demand.³⁵⁴ However, a true free market system rests on several fundamental tenets that do not exist in higher education.³⁵⁵ For example, free markets presume that no seller can exert influence over market prices, that identical products are offered by each seller, that products are portable, and that the buyer has full knowledge of alternative products and pricing.³⁵⁶ However, free market models when applied to higher education fail to account for less tangible factors such as family tradition, geographical location (a recognized predictor of which college a student will attend), and the availability of a wide range of options in the area: community colleges, private colleges, private universities, online universities, and public colleges.³⁵⁷ Student “buyers” must also consider the difference between in-state and out-of-state fees;³⁵⁸ other factors such as sports teams, arts programs, and exclusivity play a role in school choice as well.³⁵⁹ Using a free market model also makes assumptions about students, which may not be borne out in practice; for example, it assumes students have the ability to travel between schools, which may not be true.³⁶⁰ Also, given the shift the higher education system is currently experiencing toward non-traditional student models, the free market models fail to take into account that many community college students select institutions based on family needs and full time work schedules.³⁶¹ Such students may be less concerned about whether nearby schools rank low in quality and more concerned about availability of night and weekend classes. The free market model ignores individual student needs and focuses on a one-size-fits-all formula.³⁶²

353. *See id.*

354. Leslie & Johnson, *supra* note 351, at 1.

355. *Id.* at 7–8.

356. *Id.* at 6.

357. *Id.* at 13.

358. *Id.*

359. *See id.* at 13–14.

360. *See* Leslie & Johnson, *supra* note 351, at 13.

361. *See id.*

362. *See id.* at 15.

It is also faulty to assume that colleges are competing based on price; instead colleges compete over qualified students, who are themselves inputs which drive institutional success.³⁶³ Colleges are selling enrollment slots, rather than an educational product.³⁶⁴ However enrollment space is not uniform from institution to institution; it is based on factors such as student qualifications, institutional mission, and faculty quality.³⁶⁵ Further disrupting the vision of higher education as a free market is the fact that many institutions are not completely dependent on tuition revenues; many have the freedom to set their own prices, due to access to different resources such as endowments, operating costs, and state funding.³⁶⁶ Federal financial aid is only one source of revenue.³⁶⁷ Thus, the regulation of higher education in order to achieve an efficiently operating marketplace relies on flawed assumptions.³⁶⁸

There is also some discussion by economists as to whether the existence of federal student loans is itself the cause of inflated tuition rates.³⁶⁹ The very availability of a continuous stream of funding may be influencing the higher education market.³⁷⁰ Experts in market forces suggest that if the federal government is truly invested in lowering tuition rates, it should decrease the amount of student financial aid available, which would then drive down tuition costs.³⁷¹

In discussing his plans for higher education, President Obama is resting his proposal on a human capital theory—that investing in education will result in greater human capital, leading to greater economic advantage in the global marketplace, an assumption that connects education to U.S. economic stability.³⁷² While this seems like a reasonable hypothesis, there is little real data to support it.³⁷³ This hypothesis also fails to consider the difficulties in comparing test scores between nations.³⁷⁴ The other difficulty with the human capital theory lies in its assumption that the value of education is connected to earning capabil-

363. *Id.* at 14.

364. *Id.*

365. *Id.*

366. Leslie & Johnson, *supra* note 351, at 14.

367. *See id.* at 15.

368. *See id.* at 14–18.

369. *See, e.g.,* Lesley J. Turner, *The Incidence of Student Financial Aid: Evidence from the Pell Grant Program*, U. OF MD. ECON. DEPT., (April 29, 2012), http://econweb.umd.edu/~turner/LTurner_FedAid_Apr2012.pdf.

370. *See* Jeffrey Dorfman, *There's No College Tuition Bubble: College Education is Underpriced*, FORBES (Sept. 12, 2013, 7:00 AM), <http://www.forbes.com/sites/jeffreydorfman/2013/09/12/theres-no-college-tuition-bubble-college-education-is-underpriced/>.

371. *See generally id.* (discussing how financial aid from the government is actually increasing tuition rates since schools can charge more because the money is available).

372. Wayne Au, *Obama, Where Art Thou? Hoping for Change in U.S. Education Policy*, 79 HARV. EDUC. REV. 309, 312 (2009).

373. *Id.* at 313.

374. *See id.* at 312–313.

ity—erasing the goal of “life-long learning” and replacing it with one of “life-long earning.”³⁷⁵

NCLB attempted to apply market-like influences to K-12 education by providing choices to parents.³⁷⁶ Under NCLB, parents had the option to exit schools designated as program improvement schools and “transfer their children to better performing schools.”³⁷⁷ This was intended to force schools with diminishing student populations to improve.³⁷⁸ However, it is difficult to determine whether the option of choice influenced overall school improvement.³⁷⁹ Some studies have shown that when parents were provided with adequate information regarding school choice, they selected higher performing schools that increased their child’s standardized test scores,³⁸⁰ but there is minimal data available on this point.

The Better Bargain plan rests on the assumption that students will actually seek out the information contained in the updated College Navigator, and use it to make better education decisions.³⁸¹ It is unclear whether students will do so,³⁸² as the current College Navigator seems to have stalled in its attempts to lower costs through increased information.³⁸³ By refining the College Navigator to include information beyond basic college characteristics, which would allow students to look at the value added by the institution, such as job placement information and assessments of the institution’s academic quality, the White House is attempting to provide a better way for students to make decisions about the value of various higher education programs.³⁸⁴

One item of concern about the use of market forces to create change is the impact that Better Bargain will have on institutional mission—will society continue to see higher education as providing a well-rounded body of knowledge and skills in which the student makes choices about his or her preferred field of study, or will they come to be seen as job preparation factories? As education is increasingly seen as a commodity,

375. See *id.* at 313.

376. Morgan, *supra* note 11, at 565–66.

377. *Id.* at 566.

378. *Id.* at 567.

379. *Id.* at 568–570.

380. *Id.* at 569–70.

381. *A Better Bargain*, *supra* note 22.

382. See Morgan, *supra* note 11, at 577.

383. The current College Navigator website was launched in September 2007. Mary Beth Marklein, *Need to Pick a College? New Websites Can Help*, USA TODAY (September 24, 2007, 10:11 PM), http://usatoday30.usatoday.com/news/education/2007-09-24-college-navigator_N.htm?csp=34. However, tuition has increased since 2007. U.S. Dep’t. of Educ., *Tuition Costs of Colleges and Universities*, NAT’L CTR. FOR EDUC. STAT. (2012) <http://nces.ed.gov/fastfacts/display.asp?id=76>.

384. *A Better Bargain*, *supra* note 22.

we are moving towards a model that is outcome driven, rather than focused on education for its own sake.³⁸⁵ Using such a model may move us towards correct resource allocation by the college, rather than by driving down overall costs; monies may be focused on profitable career tracks, rather than on challenging disciplines that appear to have lower entering salaries.³⁸⁶ Paul Gibbs observes that such a shift may affect both students and faculty.³⁸⁷ The student implications revolve around completing courses, rather than learning, which might then result in less student preparation, lower contact hours, unchallenging assessments, and improper self-assessment.³⁸⁸ Meanwhile, faculty implications include increasingly heavy academic workloads as the institution shifts its focus and funding to job placement, rather than in-depth, rigorous education.³⁸⁹

All of the above issues are implicated by the Better Bargain plan as it shifts funding towards minimal competencies rather than high quality learning. For example, the suggestion that institutions minimize seat time seems less likely to increase teaching time and more likely to shift learning onto the student who will be responsible for achieving minimal competency in an area as measured by a series of multiple choice tests.³⁹⁰ The same challenge is posed by requiring core competencies of students before they can move on to subjects; such models rest on achieving a minimal level of learning, rather than teaching to the highest level.

No Uniformity Means No Accountability

One of the biggest critiques of NCLB was that by leaving the creation of measurement tools up to states, states were given the opportunity to construe the standards to benefit their schools without making any major changes.³⁹¹ The goal that schools had to meet under NCLB was “proficiency,” which was undefined in the act.³⁹² In giving states wide latitude to interpret or determine the meaning of proficiency, the federal government opened the door to inconsistency, and thus disparate measurement results.³⁹³ For example, one study found that a school receiving an 80% proficiency rate in Wisconsin, would receive a 52% proficiency

385. Paul Gibbs, *Higher Education as a Market: a Problem or Solution?*, 26 *STUD. HIGHER EDUC.*, no. 1, 2001, at 85, 87.

386. *See generally id.* (“Here process is incidental and the outcome sought is not an educated person in the classical sense, but an accredited person able to use their educational outcomes (or competencies) to further their economic desires.”)

387. *Id.*

388. *Id.*

389. *Id.*

390. *A Better Bargain*, *supra* note 22.

391. *See Cronin et al.*, *supra* note 102, at 9.

392. *See id.* at 3.

393. *See id.*

rate in Massachusetts and a 19% proficiency rate in California using the same test.³⁹⁴ Not only that, but this feature of NCLB made it difficult to measure different programs offered at different schools on a state-to-state basis.³⁹⁵ It became impossible to make consistent judgments about schools in different states, even when trying to group them for fairness.³⁹⁶

Using Testing to Impose Accountability is a Flawed Model

One of the key difficulties states faced in implementing NCLB was whether or not a standardized test was the most accurate measurement of learning.³⁹⁷ A learning environment that relied on testing as the only model to assess learning created a culture of “teaching to the test,” rather than an educational environment with a rich and diverse range of learning options that were measured in a variety of ways.³⁹⁸

The NCLB was flawed in its execution. Many educators leveled relevant critiques at the law, which punished districts rather than rewarding them.³⁹⁹ While NCLB was well-intentioned, its implementation caused the decline of educational standards in some states.⁴⁰⁰ Since the measurement tool for accountability was increasing test scores and very little else, the temptation for schools to adjust the numerical meaning of a “passing” score was irresistible.⁴⁰¹ For example, some states lowered their standards to reduce the risk of failing to comply with NCLB’s improvement guidelines and others came up with strategies to discourage lower performers, such as special education students, from taking the test at all.⁴⁰²

Testing and accountability come to be one and the same in a federal ranking system.⁴⁰³ In a setting where testing is the driver of success, the core curriculum becomes a test prep class,⁴⁰⁴ rather than the innovative learning space envisioned by the Better Bargain plan. Teachers who would prefer not to teach to the test (those who want to design their own

394. *Id.* at 12.

395. *See id.* at 8.

396. *See id.* at 47.

397. *See* Gershon M. Ratner, *Why the No Child Left Behind Act Needs to Be Restructured to Accomplish Its Goals and How to Do It*, 9 UDC/DCSL L. REV. 1, 16–18 (2007).

398. *Id.* at 16.

399. *See id.* at 34–37.

400. *Id.* at 14.

401. *See id.*

402. *Id.* at 14–15.

403. *See, e.g.,* Ratner, *supra* note 397, at 2 (observing that the NCLB’s accountability system, for one, emphasized applying sanctions for states’ and localities’ failure to raise test scores).

404. *See id.* (arguing that the NCLB drilled students with test preparation and took focus away from improving teaching and learning).

rich curricula and who love teaching) may be diverted into non-core subjects to avoid teaching test prep.⁴⁰⁵ In addition, so long as states design their own testing instruments and their own standards of success (or “proficiency” in the case of NCLB), the system is flawed—it becomes difficult to draw parallels between various state institutions to determine quality.

Accountability measures led to unequal results in the application of NCLB.⁴⁰⁶ In some states, a failing school might meet or exceed the standards of the state next door, where that hypothetical school would be deemed a success.⁴⁰⁷ Whether at a K-12 school or a university, an institution’s qualification for funding should not depend on geographical location. When different states create laws to gain access to federal funds, their different approaches prevent us from seeing whether educational improvement is truly occurring.⁴⁰⁸

As states could vary their standards and approach under NCLB,⁴⁰⁹ difficulties arose based on the different ways in which states determined “[t]he difficulty of the proficiency cut score,” “[t]he proportion of students required to reach the proficiency cut score” (called annual measureable objective), minimum *n* sizes (“[t]he minimum number of students required for a subgroup to be included” as a separate AYP measure), and the application of confidence intervals which are typically used to correct for sampling errors, but which are inappropriately used in testing where nearly the entire school population is tested.⁴¹⁰ These inconsistencies in testing approaches led to outcomes where in one state, a school made AYP and in another it received a failing grade and was destined for program improvement.⁴¹¹

As in NCLB, under the Better Bargain plan, states will have the latitude to develop both their standards for improvement and their measurement tools.⁴¹² While NCLB required 100% improvement or categorization of all students as “proficient” by all states by 2014, in reality, states determined what “proficient” truly meant in terms of math and language skills.⁴¹³ Using Better Bargain, some states will interpret their standards loosely and others will interpret them rigorously, leading to an unequal result—increased funding for some and lost funding for others.⁴¹⁴ In addition, states will have the leeway to determine whether

405. *See id.* at 16–17.

406. Cronin et al., *supra* note 102, at 8.

407. *Id.*

408. *See id.* at 8–9.

409. *Id.* at 7.

410. *Id.* at 15–17.

411. *See* Cronin et al., *supra* note 102, at 8.

412. *See A Better Bargain*, *supra* note 22.

413. Cronin et al., *supra* note 102, at 3.

414. *See id.* at 3–4. (within this study, cut score made a huge difference in whether a school made AYP. In Massachusetts, which has high cut scores and a high annual target, only 1 of 18 elementary schools made AYP. Using the same schools using the Wisconsin cut

smaller racial, ethnic or economically disadvantaged groups must be measured as individual categories.⁴¹⁵ This gives states the freedom to decide whether to lump all students together for a higher overall improvement rating.⁴¹⁶

The ability to measure one higher education institution against another using non-uniform testing measures will be even more challenging than comparing K-12 school districts. Even if the administration is successful in grouping institutions according to mission⁴¹⁷, there will still be a broad range of required courses, teaching styles and learning outcomes, let alone differences in academic qualifications depending on which major a student selects, which will make it difficult to use testing to rank colleges and determine funding eligibility. These testing difficulties may lead to the impression of accountability, rather than the reality of it.⁴¹⁸ Combining increased testing pressure with the corresponding drive to lower costs as currently proposed by the Better Bargain plan⁴¹⁹, will likely create a situation in which colleges will be tempted to change their grading systems and lower their cut scores to improve their reported test scores against their competitors.⁴²⁰

If the Better Bargain plan seeks to eventually impose uniform testing on the states, (which it currently disavows) it may cause some of the same problems faced by NCLB. For example, if the Better Bargain plan were to require a constant rate of improvement as measured by percentage of students enrolled, eventually those targets would become difficult to meet. While initially improvement might be easy to show (especially if the state sets its own opening benchmark), as benchmarks rise it will become more difficult to meet them. If the goal is 100% proficiency or improvement as with NCLB,⁴²¹ eventually we will likely be left with a pool of students who cannot progress or who are becoming more difficult to educate and therefore will be denied access to higher education.

The push for ever-greater achievement in testing may also limit student access to the highest ranked educational institutions. Unlike K-

scores and targets, 17 out of the same 18 schools made AYP. This demonstrates the difficulty in measuring the difference in state outcomes where NCLB is implemented differently).

415. See *A Better Bargain*, *supra* note 22 (discussing that under the Better Bargain plan, states will have the latitude to develop both their standards for improvement and their measurement tools); Cronin, *supra* note 102, at 3 (discussing that under NCLB states have leeway to determine if particular subgroups of minority, low-income, or limited English proficient students should be counted separately).

416. See Cronin, *supra* note 102, at 3.

417. *A Better Bargain*, *supra* note 22.

418. Cronin, *supra* note 102, at 14.

419. See *A Better Bargain*, *supra* note 22.

420. See Cronin, *supra* note 97 (arguing that NCLB created a situation in which K-12 staff was tempted to adjust the numerical meaning of a "passing" score).

421. Cronin et al., *supra* note 102, at 3.

12 education, where school districts must include all students living within their geographical boundaries,⁴²² there are no such restraints on higher education. Higher education institutions typically have the absolute discretion to determine admission requirements⁴²³ (with the exception of community colleges which have a different mission in most states). It may become desirable for these schools to close their enrollment pool to English language learners (ELL's) and other disadvantaged groups. The unpalatable truth is that disadvantaged students do not test well.⁴²⁴ A system which rewards students from prosperous backgrounds who typically do well on standardized tests is relatively low risk for the institution involved.⁴²⁵ The end result of this drive for accountability through testing is that schools that are serious about serving minority and poor students may be penalized for their inability to constantly improve test scores, which would deny them access to federal funds, eventually resulting in a change in mission.⁴²⁶ This may also drive innovative professors away from minority-serving institutions and steer them towards their more stable counterparts. The reduction of an individual student to a number, rather than to a complex personality with a wide range of both needs and talents, is dehumanizing to the student.

A lack of definition in testing will create myriad problems in measuring learning outcomes in higher education.⁴²⁷ For a start, similarities between programs will be difficult to quantify.⁴²⁸ Additionally, while there is likely some general agreement as to what skills constitute a quality education program in the K–12 arena, moving into university education with a broad range of majors, schools can justify different education approaches and goals quite easily.⁴²⁹ There is certainly more than one way to design a quality program—for example, one might rely more on hands-on learning, while the other relies on a flipped class-

422. This is a function of compulsory education requirements. See *Attending a K-12 School in the United States*, HOMELAND SEC., (Feb. 25, 2013), <http://studyinthestates.dhs.gov/2013/02/attending-a-k-12-school-in-the-united-states>.

423. See, e.g., *Higher Education Admission Requirements*, COLO. DEP'T OF HIGHER EDUC., <http://highered.colorado.gov/Academics/Admissions/coursecompletion.html> (last updated Jan. 14, 2008).

424. See Freedberg, *supra* note 101.

425. Wealthy students have additional advantages in standardized testing for college entry, such as the ability to pay for test prep and tutoring. See Thomas G. Mortenson et al., *Family Income and Educational Attainment: 1970 to 2009*, POST SECONDARY EDUC. OPPORTUNITY, Nov. 2010 at 1, available at http://www.postsecondary.org/last12/221_1110pg1_16.pdf. *Id.*

426. See Freedberg, *supra* note 101.

427. Matthew Lynch, *Diverse Conversations: Is Standardized Testing for College a Necessary Evil?*, DIVERSE ISSUES IN HIGHER EDUC. (Sept. 3, 2013), <http://diverseeducation.com/article/55713/>.

428. See *id.*

429. See *id.*

room.⁴³⁰ There could be solid pedagogical reasons for each approach, and reasonable people could disagree as to which is the correct approach when both lead to positive outcomes.⁴³¹

There are additional flaws in using a testing and tuition cost model as the measure of accountability. One such flaw is the failure to take into account the differences between K–12 education, which is mandatory, and higher education, which is not.⁴³² There are no attendance mechanisms available in higher education as we are educating adults who are presumed to be responsible for their own actions.⁴³³ There are no penalties for the failure to show up for class, which colleges could then use to alleviate the problem of unmotivated students.⁴³⁴ While a testing model might be more workable with the captive audience in K–12 education, it seems manifestly unfair to penalize colleges for enrolling students with poor personal management skills and then requiring them to police those students. Such a policy may lead to institutions dropping students who perform poorly in the beginning of the semester in order to avoid poor test performance later on and would penalize students who may need a little time to absorb the main concepts of the class.

The question of when to test is an additional issue created in using assessment to determine success in higher education.⁴³⁵ For example, NCLB required proficiency testing in all grades 3–8, plus one high school grade.⁴³⁶ Thoughtful consideration may lead us to the determination that this type of testing model is flawed, as it closely scrutinized lower grade levels and failed to measure educational quality in the upper grades where improvement and achievement become the most important as students prepare to apply for college. However, the K–12 model is able to look at a student population over a period of years.⁴³⁷

430. See *Teaching Strategies/Methodologies: Advantages, Disadvantages/Cautions, Keys to Success, Teacher & Educational Development*, U. OF N.M. SCH. OF MED. UNDERGRADUATE MED. EDUC., http://som.unm.edu/ume/ted/pdf/ed_dev/gen_teach_strategies.pdf, (last visited Nov. 15, 2013).

431. See *id.*

432. See Michael W. Kirst & Andrea Venezia, *Improving College Readiness and Success for All Students: A Joint Responsibility Between K–12 and Postsecondary Education*, in 12 THE SECRETARY OF EDUCATION'S COMMISSION ON THE FUTURE OF HIGHER EDUCATION 1, available at <http://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/kirst-venezia.pdf>.

433. See Rachel Osman, *Should Class Attendance be Mandatory? Students, Professors Say No*, USA TODAY COLL. (Mar. 25, 2012), <http://www.usatodayeducate.com/staging/index.php/campuslife/should-class-attendance-be-mandatory-students-professors-say-no>.

434. See *id.*

435. See Ou Lydia Liu, *Measuring Learning Outcomes in Higher Education*, R&D CONNECTIONS, Jun. 2009, at 1, 1.

436. Cronin et. al *supra* note 102, at 7.

437. See *id.*

This is less true in higher education, where institutions aim to have students graduate within four years.⁴³⁸ The logical conclusion of this is that students tested in the first and second year of higher education may be successful because of strong K–12 instruction, rather than the instruction they are receiving at university. This limits accurate assessment to the final two years of a student’s matriculation, a very narrow window upon which to base improvement.

Colleges and universities also have a revolving door for enrollment, which makes it difficult to assess improvement with any accuracy.⁴³⁹ The truth is that higher education institutions don’t have a static population.⁴⁴⁰ They graduate students every year, and new ones enroll.⁴⁴¹ There is also a great deal of movement within the enrolled population, as students leave for work and internships, only to return several semesters later.⁴⁴² Students also transfer from one institution to another, and sometimes students leave higher education for a wide variety of reasons having very little to do with the quality of education, such as family commitments, work opportunities, and lack of interest.⁴⁴³ This poses testing challenges, as most schools are working with a varied group of students rather than one group that continues from beginning to end and achieves a degree within a four-year period.⁴⁴⁴ It is also difficult to truly measure the quality and effectiveness of instruction based on the testing results.⁴⁴⁵ For example, testing outcomes are also determined by classroom composition.⁴⁴⁶ There are many contributors to academic achievement and teaching quality is just one.⁴⁴⁷

Innovation is Both a Problem and a Solution

The White House plans to increase innovation in higher education through making statistical data on college performance available publi-

438. See *Highest 4-Year Graduation Rates*, U.S. NEWS & WORLD REP., <http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/highest-grad-rate> (last visited Nov. 15, 2013).

439. See U.S. Dep’t of Educ., *Fast Facts*, NAT’L CTR. FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=98> (last visited Nov. 15, 2013).

440. See *id.*

441. See *id.*

442. Douglas Fehlen, *Tips for Returning to College after Taking Time Off*, EDUC. PORTAL, http://education-portal.com/articles/Tips_for_Returning_to_College_After_Taking_Time_Off.html (last visited Nov. 15, 2013).

443. See Neal A. Raisman, *Why Students are Leaving Your College or University?*, U. BUS. (Jul. 2009), <http://www.universitybusiness.com/article/why-students-are-leaving-your-college-or-university>.

444. See Liu, *supra* note 435.

445. See Richard Rothstein et. al., *Problems with the Use of Student Test Scores to Evaluate Teachers*, ECON. POL’Y INST. (Aug. 27, 2010), <http://www.epi.org/publication/bp278/>.

446. *Id.*

447. See *id.*

cally.⁴⁴⁸ It is doubtful whether this approach will truly increase innovation or whether it will increase the appearance of such innovation. It also plans to offer colleges “regulatory flexibility to innovate,”⁴⁴⁹ (something higher education already has.) However, the idea that innovation, especially using new technologies, could be used to lower costs and increase effectiveness is an attractive proposition.⁴⁵⁰

This transformation of education through technology is already underway.⁴⁵¹ Massive Open Online Courses (MOOC’s) are the harbingers of change as they create an open access portal to students around the world.⁴⁵² As college attendance shifts from traditional student enrollment to a non-traditional model, technology and innovation are poised to become key components to making education accessible to a varied student demographic.⁴⁵³ Higher education has always been drawn to innovation as part of teaching skills to make students marketable.⁴⁵⁴ However, technology generally has had a limited impact on how courses are designed and delivered.⁴⁵⁵ For example, even though many colleges now offer online courses, they are compartmentalized in the same way the brick and mortar course would be.⁴⁵⁶ There is also a stigma attached to attendance at a fully online or less traditional institution, even though that institution may have more freedom to innovate.⁴⁵⁷ Because most traditional institutions are already vested in their models, both K-12 and higher education typically see the new technology as adding value to what already exists, rather than as an opportunity for total innovation.⁴⁵⁸

President Obama’s discussion of competency-based models, as proposed in the Better Bargain plan, is one way to encourage innovation.⁴⁵⁹

448. *A Better Bargain*, *supra* note 22.

449. *Id.*

450. See Robert Mendenhall, *Quality Higher Education Doesn’t Need to Cost so Much*, THE HUFFINGTON POST (May 2, 2012, 2:32 PM), http://www.huffingtonpost.com/dr-robert-mendenhall/quality-higher-education-doesnt-need-to-cost-so-much_b_1471683.html.

451. *A Better Bargain*, *supra* note 22.

452. *Id.*

453. In 2011, 15% of students were traditional undergraduates at four-year institutions; 43% of undergraduates were attending two-year programs, and 40% of students qualified as non-traditional students—part-time students and adults. Andrew P. Kelly & Frederick M. Hess, *Beyond Retrofitting: Innovation in Higher Education*, in HUDSON INSTITUTE INITIATIVE ON FUTURE INNOVATION 1, 6 (2013), available at [http://www.hudson.org/files/documents/Beyond%20Retrofitting-Innovation%20in%20Ed%20\(Kelly-Hess,%20June%202013\).pdf](http://www.hudson.org/files/documents/Beyond%20Retrofitting-Innovation%20in%20Ed%20(Kelly-Hess,%20June%202013).pdf).

454. *Id.* at 2.

455. *Id.* at 3.

456. See *id.* at 3.

457. See *id.* at 10.

458. See Kelly & Hess, *supra* note 453, at 11.

459. See *A Better Bargain*, *supra* note 22.

Currently, student learning is measured by credit hour, which is the amount of time a student spends attending a traditional course.⁴⁶⁰ A competency-based model looks at desired competencies and then provides students with the course materials and assessments to meet those competencies.⁴⁶¹ Another innovation, which is frequently mentioned in connection with lowering costs, is the idea of “unbundling” services so that students only pay for services which they use.⁴⁶² To take unbundling to its logical conclusion, courses would become transferable across institutions and the institutions would become increasingly specialized.⁴⁶³ Courses themselves could be broken down further into smaller units which students could complete.⁴⁶⁴

The Better Bargain proposal to increase innovation also has disadvantages; it would basically take traditional education and put it online.⁴⁶⁵ Online learning necessarily requires less human contact and the ability to meet individually with professors and form mentorships is diminished.⁴⁶⁶ Also, the MOOC model currently is not widely operated for college credit⁴⁶⁷—providing formative feedback in such massive courses would require a lot of human capital, unless grading were limited to multiple choice testing.⁴⁶⁸ The technology required to power innovation may also be costly.⁴⁶⁹ While we embrace today’s technology as a solution to many of the problems in higher education, in reality, colleges would have to invest and reinvest given the rapidity of development.⁴⁷⁰ Also, while technology reduces costs as fewer professors are needed to teach students, it ignores the reality that a key factor in increasing cost of tuition for students has more to do with lower state financial contri-

460. Kelly & Hess, *supra* note 453, at 12.

461. *Id.* at 12–13. Western Governors University uses this model; the average amount of time to earn a bachelor’s degree at Western Governors University is two and one-half years. *Id.*

462. *Id.* at 14.

463. *See id.* at 14–16.

464. *Id.* at 15.

465. *See A Better Bargain*, *supra* note 22 (discussing the President’s plan to change higher education by adding increased access to online education to traditional education).

466. *See* Dhirendra Kumar, *Pros and Cons of Online Education*, N.C. ST. U. (Oct. 2010), <http://www.ies.ncsu.edu/successes/research-and-white-papers/pros-and-cons-of-online-education>.

467. Melissa Korn, *Big MOOC Coursera Moves Closer to Academic Acceptance*, WALL ST. J., Feb. 7, 2013, <http://online.wsj.com/news/articles/SB10001424127887324906004578288341039095024>.

468. *See* Lee Newman et al., *The Opportunities—And Risks—of the MOOC Business Model*, WALL ST. J., Oct. 15, 2013, <http://online.wsj.com/news/articles/SB10001424052702304561004579135363266072976>.

469. *See* Devon Haynie, *U.S. News Data: Online Education Isn’t Always Cheap*, U.S. NEWS AND WORLD REP. (Aug. 28, 2013), <http://www.usnews.com/education/online-education/articles/2013/08/28/us-news-data-online-education-isnt-always-cheap>.

470. *See id.*

butions and exploding administrative costs, than with professor salaries.⁴⁷¹

BETTER BARGAIN REFORM IDEAS

The first thing the administration should do is to determine its goals. This means starting a national conversation on what a “good” school is before assessment begins. As with teaching in the K–12 setting, goals should be designed before changing the current structure. The federal government needs to determine whether it wants to ensure access for all students, whether it wants an overall better education system, whether it wants a more innovative use of technology in teaching or whether it wants tuition rates to drop. While more than one goal can be operative at a time, not all of these goals are mutually compatible. For example if we want better teaching, which most agree can be achieved through smaller class sizes, spending may increase.⁴⁷² Also, the administration needs to consider how accountability will be achieved. While in the case of NCLB this was done through standardized multiple choice testing,⁴⁷³ that model failed to consider the totality of the goals of education.⁴⁷⁴ Increased availability of information seems unlikely to make higher education accountable either. True assessment and eventual accountability can only be achieved by using multiple measures of success, and by using more assessment measures than multiple choice.⁴⁷⁵

True reform involves starting over and looking at cause and effect, rather than making changes to laws that were not effective the first time around.⁴⁷⁶ This means we cannot assume that adding innovative technologies and mandating change to invested institutions (and their equally invested accrediting bodies) in return for funding will achieve the desired goals.⁴⁷⁷ For example, Andrew Kelly and Frederick Hess hypothesize that true change in education will be determined by “disrup-

471. Hadley Malcolm & Sean McMinn, *Sagging State Funding Jacks Up College Tuition*, USA TODAY (Sept. 3, 2013), <http://www.usatoday.com/story/money/personalfinance/2013/09/02/state-funding-declines-raise-tuition/2707837/> (stating that “state funding cuts are the primary driver of tuition inflation in recent years . . .”).

472. *Class Size and Student Achievement: Research Review*, CTR. FOR PUB. EDUC., <http://www.centerforpubliceducation.org/Main-Menu/Organizing-a-school/Class-size-and-student-achievement-At-a-glance/Class-size-and-student-achievement-Research-review.html> (last visited Nov. 15, 2013).

473. Ryan, *supra* note 60, at 973.

474. See Frant, *supra* note 304, at 836.

475. See Cronin et al., *supra* note 102, at 47–48.

476. See Kelly & Hess, *supra* note 455, at 11.

477. See *id.* at 3–4.

tive innovation” as implemented by those outside the traditional academy, rather than by those who are vested in the current model.⁴⁷⁸ They argue that the government needs to be open to funding avant-garde, non-traditional models which are not yet accredited in order to transform higher education, rather than just adding some technological components to the traditional model.⁴⁷⁹

Regardless of agreement on academic standards and assessment, improvement should be measured over time, rather than from year-to-year. Focusing on rates of growth, rather than aiming for a consistently improved, pre-determined test result from year to year, will provide incentive for growth, while still looking at whether the institution is setting and achieving high goals.⁴⁸⁰ Part of this new assessment should look at individual student improvement, rather than at having a critical mass of students achieve a proficiency-like level. A change to the NCLB model would most likely lead to more meaningful outcomes for disadvantaged students and would prevent the imposition of unfair penalties on institutions which serve large populations of such students.⁴⁸¹

Reforming education requires recognition that administrators and professors care about student achievement and its corresponding corollary—in higher education, students are adults, and therefore much of their success rests on them as individuals. The trend towards accountability for both K–12 and higher education often seems based on the assumption that teachers are not doing their best—that teaching staff require either incentives or penalties in order to work hard. It also assumes that students are stymied in their efforts to gain an education and are handed a sub-standard education product. Both of these assumptions are flawed—professors need to be included in the development of any plan which would change curricula and testing while students would also need to be held to greater accountability standards than the gradual payment of Pell grants over the course of a semester.

An unpalatable admission must be made by state and federal education reformers—not everyone in the United States will get the best education possible.⁴⁸² This is a hard pill to swallow since we like to believe that equal access can lead to equal learning opportunity.⁴⁸³ However, we all know that different institutions provide vastly different educational experiences, different opportunities for growth, and different influential alumni networks which may or may not aid students after graduation. In addition, students must qualify for these top educational experiences based on the choices they and their families make in grades

478. *Id.* at 2, 11.

479. *Id.* at 3–4.

480. *See* Ryan, *supra* note 60, at 934.

481. *See id.* at 935.

482. *See* Mortenson et al., *supra* note 427, at 1.

483. *See id.* at 1–2.

9-12.⁴⁸⁴ Learning opportunities are also dependent on student choices: whether to stay at a local community college, whether to have children early which may make it difficult to graduate in four years, whether to go away to a traditional ivy league school, and whether the student wishes to take on student loan debt. All the federal government can really do for students is to provide them with access to higher education of some type.

Discussions on reform also need to begin with whether the traditional college model is actually broken. Student higher education opportunity is in large part based on student preparation in the elementary and secondary education system.⁴⁸⁵ We often say that inputs drive outputs. It may not be possible for higher education to make up for the learning gaps which students have coming out of high school. For example, if a student entering college is required to enroll in remedial mathematics, it is highly unlikely that he or she will ever achieve a math or science degree.⁴⁸⁶

CONCLUSION

While the reform of higher education may be a daunting task, it is not entirely unachievable. If the administration carefully considers the history of federal education reform and closely examines its role in the education process, the desired goals may yet be achieved. As part of the drafting process, the lessons learned from NCLB should be carefully considered, along with the challenges that may arise through applying new accountability standards to a different educational system.

484. See THE EDUCATION RESOURCES INSTITUTE, GETTING READY FOR COLLEGE 2 (2007), available at http://www.asa.org/pdfs/asa_college_planning_docs/asa-cps-get-ready-for-college-en.pdf.

485. See Kirst & Venezia, *supra* note 434, at 1–2.

486. *Hot Topics in Higher Education Reforming Remedial Education*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/research/education/improving-college-completion-reforming-remedial.aspx> (last visited Nov. 15, 2013).