[UC Irvine Law Review](https://scholarship.law.uci.edu/ucilr)

Volume 11
Issue 1 *Student Debt*

Article 5

11-2020

The Forgotten Stewards of Higher Education Quality

Matthew A. Bruckner

The Forgotten Stewards of Higher Education Quality

Matthew Adam Bruckner*

A "triad" of regulators is supposed to ensure that student loan borrowers are not harmed by low-value institutions of higher education, including exploitative profiteers operating fly-by-night or predatory institutions of higher education. The triad has failed. Millions of students have borrowed billions of federal student loan dollars that they won't ever repay, causing borrowers to suffer needless economic harm and psychological anguish. But these harms were, are, and remain mostly preventable. This Article appears to be the first law review article to consider the states' role in policing institutional quality and ensuring that student borrowers are not preyed upon by low-value institutions of higher education. It suggests concrete steps states could take, such as adopting a state version of financial responsibility scores, the gainful employment rule, or a cohort default rate metric, to avoid being characterized as the forgotten stewards of higher education quality.

---

* Associate Professor of Law, Howard University School of Law. This Article was inspired by Tariq Habash of the Student Borrower Protection Center. It benefitted from the comments received in connection with presentations at the "Consumer Protection in the Age of the Student Debt Crisis" symposium at UC Irvine School of Law and to the 2020 AALS Annual Meeting's student loan discussion group. I would like to thank Christopher Bradley, Yan Cao, Seth Frotman, Tariq Habash, Michael Itzkowitz, Angela Perry, Carla Reyes, Aníbal Rosario Lebrón, and Ramsi Woodcock for their comments, ideas, and suggestions. Research assistance was provided by Eri Aguilar, Victoria Capatosto, Elizabeth Gabaud, Paul Lisbon, and Zoe Nwabunka. As always, this Article would not have been possible without my wife's support. (Thanks Morgan!) Research support was provided by Howard University School of Law.

INTRODUCTION

On January 18, 2019, a receiver was appointed to oversee the colleges operated by Dream Center Education Holdings (Dream Center), including various colleges run under the Art Institute, Argosy, and South University brands.[1] Dream Center's receivership followed the mysterious disappearance of millions of dollars earmarked for student borrowers.[2] By mid-March, most Dream Center institutions had closed, compelling students to transfer to other institutions to complete their degree or to drop out entirely.[3]

Obviously, Dream Center's closure took a substantial toll on its students.[4] For students who intended to continue their studies, they were forced to find another

1. Ashley A. Smith, *Nonprofit Dream Center Institutions Placed in Receivership*, INSIDE HIGHER ED (Jan. 21, 2019), https://www.insidehighered.com/news/2019/01/21/nonprofit-dream-center-institutions-placed-receivership [https://perma.cc/Y255-WYA8].

2. Ben Unglesbee, *Judge Orders End to Dream Center's Ill-fated Receivership*, EDUC. DIVE (Apr. 30, 2019), https://www.educationdive.com/news/judge-orders-end-to-dream-centers-ill-fated-receivership/553731/ [https://perma.cc/292L-RXHK].

3. *See id.*

4. Chris Quintana, *A College Closed, Leaving Thousands Without a Degree. How to Keep It from Happening to You*, USA TODAY (Mar. 26, 2019, 6:00 AM), https://www.usatoday.com/story/news/education/2019/03/26/how-to-choose-a-college-argosy-university-college-closing/3211480002/ [https://perma.cc/2PG9-L297] (relating one student's "chaotic and emotional" experience of one Argosy branch closing, and how the school's closure "inflamed a chronic medical condition"); *see also* Matthew Adam Bruckner, *Higher Ed "Do Not Resuscitate" Orders*, 106 KY. L.J. 223, 264 n.261 (2018)

school willing to accept them and give them credit for their previous studies. But transferring students often lose most of their credits.[5] And if an institution of higher education (IHE) suddenly closes, as Dream Center did, students may find it even more difficult to transfer.[6] For example, Dream Center inadvertently destroyed some student records in the process of vacating the school's previous office space.[7] In addition, such students often need to physically move to another city, potentially on short notice.[8] On top of it all, sudden changes are often stressful for people.

Of course, some students will be unable or unwilling to transfer to a new institution after their school closes.[9] These students may drop out entirely.[10] Ostensibly, these students are entitled to discharge their federal student-loan debt.[11] But the U.S. Department of Education (ED or the Department) has failed to promptly "discharge federal student loans of eligible students impacted by [all recent IHE] closures."[12] This uncertainty must only compound the stress experienced by students at closed schools.

[hereinafter Bruckner, *DNRs*] ("Moreover, it remains disruptive to a student's education, even if the now-closed school implements a so-called 'teach out' plan.").

5. A 2017 Government Accountability Office report found that "students who transferred from private for-profit schools to public schools . . . lost an estimated 94 percent of their credits." U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-574, HIGHER EDUCATION: STUDENTS NEED MORE INFORMATION TO HELP REDUCE CHALLENGES IN TRANSFERRING COLLEGE CREDITS 15 (2017), https://www.gao.gov/assets/690/686530.pdf [https://perma.cc/3U7Y-5A3Q].

6. *See* Rachel Leingang, *Argosy University Is Withholding Financial Aid. Students Can't Pay Their Bills.*, USA TODAY (Feb. 8, 2019, 6:58 PM), https://www.usatoday.com/story/news/education/2019/02/08/argosy-university-financial-aid-closing-receivership-accreditation/2817950002/ [https://perma.cc/T3RF-LFSF].

7. Statement Regarding the Destruction of Education Training Files at Argosy University, Atlanta Campus at 2–3, Digit. Media Sols., LLC v. S. Univ. of Ohio, LLC, No. 1:19-cv-145, 2019 WL 1958510 (N.D. Ohio May 2, 2019) (acknowledging that "the training records for (we believe) thirty three clinical psychology students" were destroyed and that "likely the only way to replace this material" is via a "cumbersome and unpleasant" process (for the students)).

8. *See* Unglesbee, *supra* note 2.

9. For example, Mount Ida College students were offered automatic admission to the University of Massachusetts Dartmouth, but with the schools approximately seventy miles apart, transferring from Mount Ida to Dartmouth was too much for some students. *See generally* Scott Jaschik, *Another Small College Closing: Mount Ida, After Trying for a Merger, Will Shut Down*, INSIDE HIGHER ED (Apr. 9, 2018), https://www.insidehighered.com/news/2018/04/09/mount-ida-after-trying-merger-will-shut-down [https://perma.cc/2E2L-UG3E] ("On social media, many current students said they felt betrayed by the college's announcement -- and that the option of enrolling at the University of Massachusetts at Dartmouth was not viable for them. Depending on where in the Boston area Mount Ida students live, the drive to Dartmouth is 70-85 miles. One student wrote on Facebook, 'Are you kidding me? . . . This is absolutely ridiculous. I chose Mount Ida because it was relatively close to my home and near Boston. Dartmouth is two hours away and doesn't even have my major!'").

10. *See* Unglesbee, *supra* note 2.

11. *See Has Your School Closed? Here's What to Do*, FED. STUDENT AID, https://studentaid.gov/announcements-events/closed-school [https://perma.cc/YB6Z-PZU6] (last visited Sept. 23, 2020). And private student loan debt does not enjoy similar treatment.

12. Margaret Mattes, *Lawsuit Calls on Department of Education to Provide Relief to Students Whose Schools Closed*, STUDENT LOAN BORROWER ASSISTANCE (Dec. 3, 2018), https://www.studentloanborrowerassistance.org/lawsuit-calls-on-department-of-education-to-provide-relief-to-students-whose-school-closed/ [https://perma.cc/2ZYT-QTSP].

Dream Center's failure is just one of many high-profile failures that has caused serious harm to its student population.[13] Mount Ida College, Corinthian Colleges, ITT Tech, DeVry, and Education Corporation of America all "collapsed," which affected tens of thousands of students.[14] This "wave of institutional closures" should force policymakers to consider how to protect students from suffering similar harms at the hands of other institutions.[15] Moreover, students may be harmed in many other ways by IHEs.[16] Although state governments are only one leg of the regulatory triad intended to ensure that IHEs provide a high-quality education to (and a good value for) students, they are currently best positioned to take action to protect students.[17] Neither ED nor accrediting agencies seem to be up to the task or willing to perform their obligations. As such, this Article considers what states can do on their own.

This Article proceeds as follows. Part I expands upon this introduction by explaining the harms wrought on students by our student loan system and low-value IHEs. It argues that, under our current higher education funding regime, students

13. Even students who attended a Dream Center institution that didn't close, such as students at the Western State College of Law at Argosy University, suffered from the collapse of the wider Dream Center enterprise. For example, these students never received their financial aid for the spring 2019 semester. Leingang, *supra* note 6 (explaining that as a result, "[s]tudents from campuses across the country described missing rent payments, not being able to afford gas and food, not being able to afford daycare for their children").

14. "In 2014, Corinthian Colleges collapsed despite being in good standing with the Accrediting Council for Independent Colleges and Schools (ACICS). A few years after that, ITT Tech followed suit, and then Education Corporation of America and its 70 campuses." CLARE MCCANN & AMY LAITINEN, THE BERMUDA TRIAD: WHERE ACCOUNTABILITY GOES TO DIE 13 (2019) (citing Andrew Kreighbaum, *Collapse of For-Profit Chain Long in the Making*, INSIDE HIGHER ED (Dec. 6, 2018)), https://www.insidehighered.com/news/2018/12/06/closure-education-corporation-america-raises-questions-about-oversight-and-support [https://perma.cc/E7LB-GVTM]), https://www.newamerica.org/education-policy/reports/bermuda-triad/ [https://perma.cc/SLZ5-9CZ6]; *see also* Yan Cao, *How Betsy DeVos Got Schooled by the Education Corporation of America*, CENTURY FOUND. (Dec. 14, 2018), https://tcf.org/content/commentary/betsy-devos-got-schooled-education-corporation-america/ [https://perma.cc/Q5VZ-27TR] ("Last week, Education Corporation of America (ECA), a for-profit college conglomerate that has operated chains like Virginia College, Brightwood, and Golf Academy, hastily announced the sudden closure of campuses nationwide. Estimates suggest that nearly 20,000 students across the United States will be impacted."); Matthew Bruckner, *Enron & ITT Tech*, PRAWFSBLAWG (Sept. 8, 2016), https://prawfsblawg.blogs.com/prawfsblawg/2016/09/enron-itt-tech.html [https://perma.cc/H8Q3-LXPP]; Matthew Bruckner, *Who's Looking Out for the Students?*, CREDIT SLIPS (Jan. 20, 2015, 8:49 PM), https://www.creditslips.org/creditslips/2015/01/whos-looking-out-for-the-students.html [https://perma.cc/2UY6-ZMRP].

15. DAVID A. TANDBERG, ELLIE M. BRUECKER & DUSTIN D. WEEDEN, STATE HIGHER EDUC. EXEC. OFFICERS ASS'N, IMPROVING STATE AUTHORIZATION: THE STATE ROLE IN ENSURING QUALITY AND CONSUMER PROTECTION IN HIGHER EDUCATION 4 (2019), https://sheeo.org/wp-content/uploads/2019/07/SHEEO_StateAuth.pdf [https://perma.cc/PP88-CLCM] ("A renewed level of interest in and scrutiny of public accountability of higher education has recently been fueled by a wave of institutional closures . . . .").

16. *See infra* Part I.

17. "While much of the attention has focused on the role of accreditors and the federal government, the central actors in the higher education public accountability space are the states." TANDBERG ET AL., *supra* note 15, at 4.

are harmed when they pay for an education that does not increase their earning power sufficiently to pay off their student loan debt. Part II discusses the existing regulatory framework, including why neither ED nor accreditors seem capable of ensuring that students receive an economic return on their higher education expenditures,[18] or even simply protecting all students from exploitation.

Finally, Part III looks at a range of options that interested states could adopt to prevent IHEs from exploiting state residents. These options are based on programs that ED has previously used and include the gainful employment rule and a cohort default rate metric to ensure that students get a financial[19] return on their higher education expenditures. And it also includes better information gathering tools to create financial responsibility scores for colleges to better anticipate (and hopefully prevent) college collapses and the concomitant student harm. This part also considers how states could encourage IHEs to report data and comply with state regulation, including limiting state authorization or accessing additional funding. A conclusion follows.

I. STUDENT HARM

"[A]s more students have had to borrow, and borrow more, to even attempt a degree or credential program, some are ending up even worse off than before they started, with thousands of dollars of debt and little or no increased earnings power to pay it off."[20]

Whether or not a student attends an IHE that closes precipitously, students are hurt when they borrow heavily to attend an institution that does not sufficiently boost their earning power to repay their educational debt.[21] And alumni of hundreds

18. The author believes that higher education is a quasi-public good justifying larger public investment and is not simply a private good. Increasingly, however, elected officials appear to disagree, and individuals have been asked to shoulder a larger portion of the cost of higher education. It is within this latter paradigm that this Article was written.

19. While there are surely other important returns to students (and society) from investments in higher education, there must also be some point at which we, collectively, are willing to describe an IHE as acting in its own best interests instead of the best interests of its students. In my opinion, such schools should not be permitted to operate. At a minimum, such schools should not be supported with taxpayer funds.

20. NEHA DALAL, BETH STEIN & JESSICA THOMPSON, THE INST. FOR COLL. ACCESS & SUCCESS, OF METRICS AND MARKETS: MEASURING POST-COLLEGE EMPLOYMENT SUCCESS 4 (2018), https://ticas.org/files/pub_files/of_metrics_markets.pdf [https://perma.cc/UX9Z-SU5C].

21. *See* Patrick F. Linehan, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 GEO. L.J. 753, 754 (2001) (describing the plight of several students defrauded by predatory colleges that offered no-value "educations" and claiming that these stories are "typical of many individuals, often of low socioeconomic and educational status, who attempt to improve their labor skills by enrolling in vocational training schools"); *see also* Michael Itzkowitz, *Price-to-Earnings Premium: A New Way of Measuring Return on Investment in Higher Ed*, THIRD WAY (Apr. 1, 2020), https://www.thirdway.org/report/price-to-earnings-premium-a-new-way-of-measuring-return-on-investment-in-higher-ed [https://perma.cc/9R2X-2HZL] (discussing interest from some Congresspersons in developing "policies that would protect students from poor-performing colleges and programs"); TRESSIE MCMILLAN COTTOM, LOWER ED: THE TROUBLING RISE OF FOR-PROFIT COLLEGES IN THE NEW ECONOMY 67 (THE NEW PRESS 2017) ("As it turns out, there is such a thing

of colleges leave school making "well below the average earnings of a worker with only a high school diploma."[22] In some cases, alumni fare poorly because the schools are outright frauds.[23] Among others, ITT Tech and its executives were credibly accused of fraud by the Securities and Exchange Commission (SEC) and the Consumer Financial Protection Bureau (CFPB) at the time it closed in 2016.[24]

Even when a school is not defrauding students outright, students may attend well-meaning but low-value institutions that fail to adequately prepare students for the job market.[25] At these IHEs, students may not learn important skills. For example, many students show no "significant improvement in critical thinking, complex reasoning, and written communication skills after four years of college coursework."[26] Several commentators have suggested that "[a] significant chunk of our higher-education system, perhaps as much as thirty or forty percent, does not graduate students into jobs with high enough salaries to justify the cost of providing the education."[27] And some schools may simply lack the resources, ability, or interest to adequate support all of their students.[28]

---

as 'bad' education. It is an educational option that, by design, cannot increase students' odds of beating the circumstances of their birth.").

22. MCCANN & LAITINEN, *supra* note 14, at 5; *see also* Michael Itzkowitz, *Higher Ed's Broken Bridge to the Middle Class*, THIRD WAY (Sept. 25, 2019), https://www.thirdway.org/report/higher-eds-broken-bridge-to-the-middle-class [https://perma.cc/XEL2-LDB3] ("When measuring post-enrollment earnings six years after enrollment, there are 257—or 6.5% of all institutions with earnings data available—where over four-fifths of the student body fails to earn as much as the average high school graduate. And there are a whopping 2,075 institutions (52% of all institutions) where over half of students who enroll are earning less than a high school graduate six years later.").

23. *See* Linehan, *supra* note 21, at 759 (discussing various misrepresentations that proprietary schools may make to students, including "students' prospects for employment upon graduation," and the reasons why those schools make such misrepresentations).

24. *See* Yan Cao & Tariq Habash, *College Complaints Unmasked*, CENTURY FOUND. (Nov. 8, 2017), https://tcf.org/content/report/college-complaints-unmasked/ [https://perma.cc/VRW5-QT4W] ("By the time ITT closed in September 2016, it was under investigation by multiple state attorneys general offices; the Securities and Exchange Commission, which oversees Wall Street, had charged its executives with fraud; and the Consumer Financial Protection Bureau (CFPB) had uncovered 'secret shopper' evidence showing that ITT recruiters regularly lied to potential students.").

25. *See* MCCANN & LAITINEN, *supra* note 14, at 5 ("[T]he U.S. also hosts thousands of poor- and under-performing colleges, where millions of students are paying—and often borrowing—a lot."); *see also* Linehan, *supra* note 21, at 759; Preston Cooper, *Taxpayers Fund College Degrees that Don't Pay Off*, FORBES (Jan. 21, 2020, 2:30 AM), https://www.forbes.com/sites/prestoncooper2/2020/01/21/taxpayers-fund-college-degrees-that-dont-pay-off/ [https://perma.cc/3JN7-MDND].

26. ANDREW P. KELLY & DANIEL K. LAUTZENHEISER, TAKING CHARGE: A STATE-LEVEL AGENDA FOR HIGHER EDUCATION REFORM 2 (2013), https://www.aei.org/wp-content/uploads/2013/07/-taking-charge_103835525600.pdf [https://perma.cc/ZK3Z-G523].

27. Cooper, *supra* note 25; *see* MELANIE DELGADO, CHILD.'S ADVOC. INST., FAILING U 2 (2018) ("[F]or-profit colleges of all sizes are over-promising and under-delivering when it comes to the quality of their academic programs and offerings, as well as the ability of their graduates to cash in on lucrative careers."); DALAL ET AL., *supra* note 20.

28. *See generally* MCMILLAN COTTOM, *supra* note 21 (discussing the financialization of the for-profit higher education sector and suggesting that, at some IHEs, maximizing enrollment to satisfy shareholder demands is more important than providing "good" educations for students).

Students who borrow money but never graduate are particularly likely to be harmed by that borrowing.[29] Unfortunately, these harms disproportionately befall minority student loan borrowers.[30] Even for students who graduate, default rates on student loan debts are much higher for minority borrowers than for white borrowers.[31] Twelve years after first taking out a student loan, forty-nine percent of Black borrowers (including twenty-three percent of bachelor's degree attainers) have defaulted on their loans and thirty-six percent of Hispanic borrowers (including fourteen percent of bachelor's degree attainers) have defaulted on their loans, whereas only twenty-one percent of white borrowers (including just six percent of bachelor's degree attainers) have defaulted.[32]

For some, higher education offers a pathway to the middle class.[33] But students who attend exploitative or low-quality IHEs[34] are harmed twice over. First, they waste their time.[35] Second, they waste their money.[36] And a lot of borrowed

29. *See* Katherine Porter, *College Lessons: The Financial Risks of Dropping Out*, *in* BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS 85–100 (Katherine Porter ed., 2012) (explaining that incurring educational debt without earning a degree can lead to bankruptcy). *See generally* KELLY & LAUTZENHEISER, *supra* note 26, at 1 ("Across two and four-year institutions, just half of students who start a degree finish it within six years.").

30. *See* KELLY & LAUTZENHEISER, *supra* note 26, at 1; Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CTR. FOR AM. PROGRESS (Oct. 16, 2007, 9:00 AM) [hereinafter Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*], https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-show-student-loan-crisis-african-american-borrowers/ [https://perma.cc/D4NP-B5R6]; *see also* Ben Miller, *The Continued Student Loan Crisis for Black Borrowers*, CTR. FOR AM. PROGRESS (Dec. 2, 2019, 5:00 AM) [hereinafter Miller, *The Continued Student Loan Crisis for Black Borrowers*], https://www.americanprogress.org/issues/education-postsecondary/reports/2019/12/02/477929/continued-student-loan-crisis-black-borrowers/ [https://perma.cc/FX88-5TJK]; Dalié Jiménez & Jonathan D. Glater, *Student Debt Is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.–C.L. L. REV. 131 (2020).

31. Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, *supra* note 30; Miller, *The Continued Student Loan Crisis for Black Borrowers*, *supra* note 30; Jiménez & Glater *supra* note 30.

32. Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, *supra* note 30.

33. *See* Kate Sablosky Elengold, *The Investment Imperative*, 57 HOUS. L. REV. 1, 3–4 (2019) ("One major aim of higher education legislation has been to increase access to bolster individual and societal advancement."); *see also* THEA GARON, ANDREW DUNN, KATY GOLVALA & ERIC WILSON, FIN. HEALTH NETWORK, U.S. FINANCIAL HEALTH PULSE: 2018 BASELINE SURVEY RESULTS 38 (2018), https://s3.amazonaws.com/cfsi-innovation-files-2018/wp-content/uploads/2019/05/07151007/FHN-Pulse_Baseline_SurveyResults-web.pdf [https://perma.cc/53J5-CLU2] (noting the correlation between financial health and educational attainment).

34. Or who attend high-quality IHEs but receive a low-value education.

35. "Thousands of students, many of them veterans, invested substantial amounts of time and money into pursuing degrees they never received; many of those students were left with enormous amounts of student loan debt, which cannot be discharged in bankruptcy." *See* DELGADO, *supra* note 27, at 1.

36. KRISTIN BLAGG & KELIA WASHINGTON, URB. INST., WHICH DOLLARS GET MEASURED? ASSESSING EARNINGS METRICS USING DATA FROM CONNECTICUT 1 (2020), https://www.urban.org/sites/default/files/publication/101637/which_dollars_get_measured_0_4.pdf [https://perma.cc/RM5N-HK5Q] ("Similarly, when prospective students are considering where to

money is being wasted.[37] Federal and state governments have engaged in a decades-long effort to increase enrollment at IHEs by making available large sums of money for students to borrow.[38] Student aid, in the form of state and federal loans and grants, and, more recently, "free college" programs in various states, costs the federal and state governments more than $150 billion per year.[39] By many estimates, total student indebtedness now exceeds $1.6 trillion.[40] Even more troubling, student indebtedness is growing fast.[41]

Moreover, a generation of heavily indebted students may be a problem for America as a whole, not just for the indebted students. Increasingly, people have begun to liken the student loan crisis to the subprime mortgage crisis.[42] Students

---

invest their eligible financial aid, their own money, and their time, they are also calculating whether the return on their investment will be greater than the monetary and nonmonetary costs.").

37. Most of the money that students use to pay for their education is borrowed. *See* Cooper, *supra* note 25 (arguing that low-quality schools should not have access to taxpayer-supported loans and grants); *cf.* BETH AKERS, MANHATTAN INST., RISK SHARING: HOW TO HOLD COLLEGES ACCOUNTABLE FOR THE EDUCATION THEY PROVIDE 4 (2019), https://media4.manhattan-institute.org/sites/default/files/Risk-Sharing-How-to%20Hold-Colleges-Accountable-BA.pdf [https://perma.cc/9M9E-NBT5] ("The federal government is the single largest purchaser of postsecondary education services in the United States.").

38. *See* Bruckner, *DNRs*, *supra* note 4, at 250–51 ("Federal efforts to promote college access through Title IV have not been cheap. The federal government indirectly provides an enormous amount of money to IHEs, including more than $76 billion in 2013, representing a slight majority of all student aid. Federal student aid takes a variety of forms, including well-known programs such as Pell Grants, Perkins, Grad (PLUS), and Stafford Loans. Total student loan indebtedness now tops one trillion dollars, almost all of it backed by federal government guarantees."); *see also* Christopher J. Ryan, Jr., *Paying for Law School: Law Student Loan Indebtedness and Career Choices*, U. ILL. L. REV. (forthcoming 2021) ("The current outstanding student loan debt is roughly $1.64 trillion dollars and continues to grow every year.") (citing Chris Arnold, *Student Loans a Lot like the Mortgage Debacle, Says Watchdog*, NPR (Dec. 9, 2019, 4:37 PM), https://www.npr.org/2019/12/09/785527874/student-loans-a-lot-like-the-subprime-mortgage-debacle-watchdog-says [https://perma.cc/JX8J-3RHY] and Anya Kamanetz, *Democratic Presidential Contenders Propose Free College and Student Loan Forgiveness*, NPR (June 27, 2019, 10:41 AM), https://www.npr.org/2019/06/27/736342686/democratic-presidential-contenders-propose-free-college-and-student-loan-forgive [https://perma.cc/963F-PSWJ]); Elengold, *supra* note 33, at 4.

39. *See* Bruckner, *DNRs*, *supra* note 4, at 250.

40. *See* Ed Flynn, *Game of Loans: Is Student Debt Forgiveness Coming*?, 38 AM. BANKR. INST. J. 12 (2019) (noting that "[t]he St. Louis Federal Reserve, which gets information from lenders, reports that total student loan debt was $1.61 trillion as of June 30, 2019").

41. Abigail Hess, *Here's How Much the Average Student Loan Borrower Owes when They Graduate*, CNBC MAKE IT (Feb. 15, 2018, 9:30 AM), https://www.cnbc.com/2018/02/15/heres-how-much-the-average-student-loan-borrower-owes-when-they-graduate.html [https://perma.cc/4TCJ-RVXC] ("When they graduate, the average student loan borrower has $37,172 in student loans, a $20,000 increase from 13 years ago."); *see also* Ryan, Jr., *supra* note 38, at 4 n.9 (quoting Matthew P. Diehr, *The Looming Threat Posed to Student Loan Lenders and Servicers by State-Level Actors in an Era of Federal Regulatory Remission*, 65 FED. LAW. 43, 43 (2018)).

42. Amir Shachmurove, David M. Gettings, Stephen C. Piepgrass, Timothy St. George & Alan Wingfield, *Federal Inaction and State Activity: Student Loan Edition*, LAW360 (Aug. 1, 2018, 1:12 PM), https://www.law360.com/articles/1066268/federal-inaction-and-state-activity-student-loan-edition [https://perma.cc/CJ97-N8RK] ("By 2017, student loan data shows patterns that are similar to what occurred prior to the subprime mortgage crisis."); Prentiss Cox, Judith L. Fox & Stacey Tutt, *Forgotten*

are borrowing heavily and struggling to repay their debt. Many cannot. These students either end up in default or in some sort of loan forgiveness program.[43] "More than one million students default on almost $20 billion worth of federal student loans each year."[44] Many more are substantially past due on their payments.[45] "As of August 2018, 11 million of the roughly 44.2 million borrowers are in a state of default or delinquency."[46] "When discussing student loan debt, it is easy to fixate on the aggregate impact of the burdens this debt places on tax payers, the economy, and borrowers alike, such as the depressive effects that [student] loan debt has on marriage, homeownership, and entrepreneurship."[47]

While return on investment and student indebtedness are not the only measures of whether an IHE is a low-value or low-quality institution (let alone exploitative), these issues are hard to ignore because of our extant higher education financing system.[48] For so long as most students are effectively required to debt-fund their educations,[49] students' return on investment will remain an important criteria on which to judge whether IHEs are providing a service on which the federal and state governments should offer their imprimatur.[50] Focusing on

---

Borrowers: Protecting Private Student Loan Borrowers Through State Law, 11 U.C. IRVINE L. REV. 43 (2020) (comparing the student loan crisis to the mortgage foreclosure crisis).

43. Ryan, Jr., *supra* note 38, at 4 n.9; Joy Wiltermuth, *A Record One-Quarter of $450 Billion of Student Loans Are Being Repaid on Income-Based Repayment Plans, DBRS*, MARKETWATCH (Feb. 24, 2020, 11:08 AM), https://marketwatch.com/story/a-record-one-quarter-of-450-billion-of-student-loans-are-being-repaid-on-income-based-repayment-plans-dbrs-2020-02-22 [https://perma.cc/6GMH-VWRN] ("Income-based repayment plans were being used on 24.7% of $452 billion worth of student loans with U.S. government backing during the fourth-quarter of 2019, up from 21.8% a year earlier . . . .").

44. Matthew Bruckner, Brook Gotberg, Dalié Jiménez & Chrystin Ondersma, *A No-Contest Discharge for Uncollectible Student Loans*, 91 U. COLO. L. REV. 183, 189 (2020) [hereinafter Bruckner et al., *No-Contest*].

45. Shachmurove et al., *supra* note 42 ("In fact, per one of the most exhaustive recent studies, almost 40 percent of student loan borrowers are either in default or more than 90 days past due on their payments as of October 2017. The DOE, for its part, has reported that more than 8 million federal student loan borrowers are in default and have not made a payment in at least a year and another three million direct loan borrowers—those with debt from the largest federal student loan program—are delinquent on their loans and have not made a payment in more than 30 days in 2017.").

46. Ryan, Jr., *supra* note 38, at 4 n.9; Zack Friedman, *Student Loan Debt Statistics in 2018: A $1.5 Trillion Crisis*, FORBES (June 13, 2018, 8:32 AM), https://www.forbes.com/sites/zackfriedman/2018/06/13/student-loan-debt-statistics-2018 [https://perma.cc/4ULR-LB7D].

47. Ryan, Jr., *supra* note 38, at 2 (discussing law school-related student loan debt).

48. *See* Itzkowitz, *supra* note 22 (noting that students cannot easily comparison shop for high "value" IHEs and discussing students' need "to easily assess how long it will take to recoup their educational investment—or to compare those timelines across schools or programs").

49. *See* Hess, *supra* note 41; Elengold, *supra* note 33, at 47–48 (discussing how the "investment imperative risks overpromising students certain financial outcomes from seeking a college certification or degree, encouraging overconfidence in the ability to repay education debt" and causing a "student debt cascade"); Ryan, Jr., *supra* note 38, at 4.

50. Alternative methods of financing higher education and arguments that higher education is a public good are outside the scope of this Article. For more about whether we should conceive of higher education as a public good, see Gareth Williams, *Higher Education: Public Good or Private Commodity?*, 14 LONDON REV. EDUC. 131 (2016).

student outcomes can also allow state higher education regulators to become more actively involved with troubled institutions sooner. Too often, state attorneys general are the ones who first step in but only after there has already "been substantial harm to students and to taxpayers."[51]

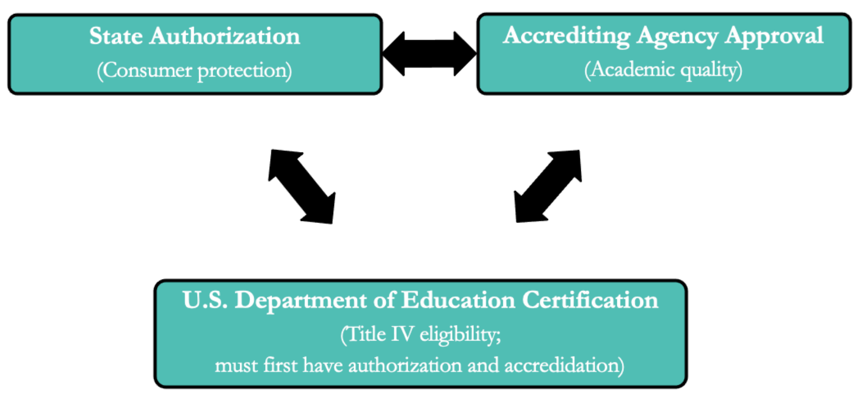
The next part explores the existing regulatory framework, including a succinct explanation of the role of each regulator. It also explains why the existing regulatory framework does not provide adequate oversight of IHEs.

II. THE EXISTING REGULATORY FRAMEWORK IS INADEQUATE

"[F]ar too many schools maintain their institutional accreditation even while defrauding and misleading students, providing poor quality education, or closing without recourse for students."[52]

The question that motivates this Article is as follows: How can we create the necessary "accountability . . . to ensure students are not left to bear unaffordable debt," particularly student loan debt incurred while attending low-value or exploitative IHEs?[53] One place to begin our inquiry is with the entities responsible for ensuring IHEs provide affordable high-quality educations rather than prey on vulnerable students. These entities are known as the "program integrity triad."[54] The triad—our existing higher education regulatory apparatus—is composed of ED, accrediting agencies, and states.[55] Figure 1 highlights the interplay between members of the triad.[56]

Figure 1: Program Integrity Triad



51. DELGADO, *supra* note 27, at 2.

52. Ted Mitchell, *Strengthening Accreditation to Protect Students*, U.S. DEP'T EDUC.: HOMEROOM (Mar. 29, 2016), https://blog.ed.gov/2016/03/strengthening-accreditation-to-protect-students/ [https://perma.cc/L4JR-LN25].

53. MCCANN & LAITINEN, *supra* note 14, at 35; *cf.* TANDBERG ET AL., *supra* note 15, at 4.

54. MCCANN & LAITINEN, *supra* note 14, at 8. This Article is not going to address ex post enforcement through litigation, including tort, contract, or consumer law theories of recovery.

55. *Id.* at 5–6.

56. Figure 1 copied from MCCANN & LAITINEN, *supra* note 14, at 6.

"This distributed approach to higher education accountability is designed to keep governmental intrusion in higher education to a minimum and maintain a proper division of powers between the states, the institutions and the federal government."[57]

The triad needs to be reinvigorated. This regulatory framework predates the introduction and growth of federal aid programs, which have changed institutional behavior as entities chase this massive infusion of federal money.[58] And it "provides little or no assurance that schools are educating students efficiently and effectively."[59] Perhaps as a result, McCann & Laitinen describe our current framework as the "'Bermuda triad,' with the mysterious disappearance of rigorous oversight of colleges that are known by all actors to be problems."[60] In some ways, the triad appears to have parallels to bank regulation prior to the 2008 financial crisis. Both regulatory schemes attempted to create a collaborative state-federal partnership, and both resulted in a regulatory lacuna, with no single entity having the authority and interest in adequately overseeing its charges.

The roles of each member of the triad are discussed in the three sections that follow, including why they are not able to effectively police institutional quality.

A. The U.S. Department of Education

ED is the most prominent member of the triad.[61] ED "certifies institutions to be eligible for taxpayer-financed financial aid and oversees their administration of those funds."[62] Put differently, ED supplies a large percentage of all the funding received by American IHEs. In addition, ED also regulates which accrediting agencies "bear responsibility for the academic quality of the colleges they

57. THOMAS HARNISCH, BARMAK NASSIRIAN, AMBER SADDLER & ART COLEMAN, EDUC. COMM'N STATES, ENHANCING STATE AUTHORIZATION: THE NEED FOR ACTION BY STATES AS STEWARDS OF HIGHER EDUCATION PERFORMANCE 2 (2016), http://www.ecs.org/wp-content/uploads/ECS_FundingReports_HarnischNassirianSaddlerColeman_F.pdf [https://perma.cc/G97F-S2XF].

58. *Id.* at 9 ("In sum, the original decision to rely on the regulatory framework that pre-dated the introduction and growth of federal aid programs did not anticipate how the massive infusion of federal money would change the behavior of both regulators and regulated entities as the breadth of institutions and providers of higher education expanded."); TANDBERG ET AL., *supra* note 15, at 7 ("[R]apid growth in the number of proprietary institutions in the 1980s resulted in a greater need for state oversight and more applications for state authorizers, but the rigor of these processes remained fractured across different states.").

59. MCCANN & LAITINEN, *supra* note 14, at 6; Linehan, *supra* note 21 ("[E]xisting state law, either through public or private enforcement, does not provide proprietary schools with adequate incentives to implement honest, non-predatory marketing techniques, nor does it provide victimized students with adequate remedies when schools do employ these dishonest, predatory techniques.").

60. *Id.* at 7.

61. *Id.* at 5–6 ("[A]ccrediting agencies are approved by the Education Department to bear responsibility for the academic quality of the colleges they accredit; the states are tasked with consumer protection; and the federal government, via the U.S. Department of Education, certifies institutions to be eligible for taxpayer-financed financial aid and oversees their administration of those funds. The Department also decides which accreditors meet federal standards.").

62. *Id.*

accredit."[63] And it has also dictated certain requirements for state authorization of Title IV-eligible IHEs.[64]

Given its control over the purse strings, ED could be "the strongest regulator in the triad," with the ability to ensure that "baseline consumer protection exists for all students."[65] And many have pushed ED to assume a more robust role by, for example, "serv[ing] as the convener and the facilitator for a sustained conversation" on how states could strengthen their "authorization standards and improv[e] the[ir] administrative and organizational processes."[66] But the Department's current leadership has not shown itself willing to step up in these ways.

While many criticized ED even before the start of the Trump administration, "[b]eginning in 2016, a new mood dampened the federal bureaucracy's regulatory pace."[67] At this point, many believe that ED basically "abdicated its responsibility" to students and taxpayers by "back-tracking on what few protections do exist in the program integrity triad."[68] For example, ED repealed the Obama-era gainful employment rule,[69] undefining the term "without replacing it with some new meaning."[70] ED has also been criticized for failing to properly oversee accrediting agencies.[71] Secretary DeVos has also been held in contempt of court by a federal

63. *Id.* at 6 ("The Department also decides which accreditors meet federal standards."); *see also* LINDSEY M. BURKE & STUART M. BUTLER, HERITAGE FOUND., ACCREDITATION: REMOVING THE BARRIER TO HIGHER EDUCATION REFORM 6 (2012), https://www.heritage.org/education/report/accreditation-removing-the-barrier-higher-education-reform [https://perma.cc/MKY8-MV3K] ("In order to be recognized as an approved accreditor, a prospective accrediting agency must complete a grueling review process overseen by DOE and the National Advisory Committee.").

64. TANDBERG ET AL., *supra* note 15, at 8.

65. MCCANN & LAITINEN, *supra* note 14, at 27. ED is only the strongest if you consider the market to be national. But, particularly since ED has stepped back its enforcement, state agencies are the strongest regulator in the triad in some states.

66. HARNISCH ET AL., *supra* note 57 at 10.

67. Shachmurove et al., *supra* note 42 (explaining that ED, led by Secretary DeVos has "displayed decreased enthusiasm for regulation and litigation," as has the CFPB under both of its Trump-appointed directors); MCCANN & LAITINEN, *supra* note 14, at 8 ("[C]hange is desperately needed.").

68. MCCANN & LAITINEN, *supra* note 14, at 8.

69. For a discussion of the gainful employment rule, see *infra* Section III.A.1.

70. *See* Corey Turner, *Teachers Union Lawsuit Claims DeVos 'Capriciously' Repealed Borrower Protections*, NPR (Jan. 22, 2020, 7:01 AM), https://www.npr.org/2020/01/22/798128256/teachers-union-lawsuit-claims-devos-capriciously-repealed-borrower-protections [https://perma.cc/9E8D-T9JN] ("'They just undefined the term,' says James Kvaal, who helped design the original rule as deputy undersecretary in the Obama Education Department. 'Gainful employment had meaning, and [DeVos] took it out. And I just — I've never seen that before. I've never seen an agency take a term that was in the regulations and just undefine it . . . .'"); Complaint for Declaratory and Injunctive Relief at 96–97, Am. Fed'n of Teachers v. DeVos, No. 5:20-cv-00455 (N.D. Cal. Jan. 22, 2020) (asserting that ED acted "arbitrarily, capriciously, and not in accordance with law" when it repealed the gainful employment rule).

71. MCCANN & LAITINEN, *supra* note 14, at 14 (arguing that ED "does not have adequate controls" over the decision to recognize accreditors, and that ED's oversight of accreditors once they're recognized "is not adequate to ensure agencies consistently and effectively carry out their responsibilities"); *id.* at 15 (asserting that ED "has virtually no ability to police which accreditors are permitted to serve as gatekeepers to billions in federal dollars").

judge "for failing to stop collecting loans from former students of a now-defunct chain of for-profit colleges."[72]

ED's failure as a regulator of institutional quality seems primarily political in nature. Thus, with a new administration, ED might play a more prominent role in protecting students. And it should. The federal government has "a stake in . . . improv[ing] institutional accountability and consumer protection."[73] While states can play an important role, ED's involvement may be critical to moving the ball forward because this effort "would require significant resources and an upfront investment of time and effort" to generate the necessarily "collaborative national effort."[74] Until there is a leadership change at ED, however, students will have to look elsewhere for an entity willing to protect their interests.

B. Accrediting Agencies

Accreditors are the second leg of the regulatory triad for IHEs and, traditionally, have been considered the primary IHE-quality regulator.[75] Technically, accreditation is voluntary and there are many IHEs that are unaccredited. Unaccredited entities tend to be either new institutions that are not yet accredited, institutions that have lost their accreditation and are on their way to closing down, or institutions that do not intend to participate in the Title IV programs. However, almost all traditional two- and four-year colleges and universities are accredited by a regional or national accrediting agency.[76] This is because accreditation is required of IHEs that wish to participate in the federal student loan and grant programs under Title IV of the Higher Education Act (HEA).[77] Thus, accreditation is effectively mandatory for most traditional two- and four-year colleges and universities.[78]

72. Elissa Nadworny & Anya Kamanetz, *DeVos Held in Contempt of Court for Enforcing Loans on Defrauded College Students*, NPR (Oct. 25, 2019, 10:29 AM), https://www.npr.org/2019/10/25/773334681/devos-held-in-contempt-of-court-ed-department-fined-100-000-in-student-loan-case [https://perma.cc/WPE8-3SX4].

73. HARNISCH ET AL., *supra* note 57, at 10.

74. *Id.*

75. "[A]ccreditors served as the primary gatekeepers – and scapegoats – in evaluating institutions of higher education." TANDBERG ET AL., *supra* note 15, at 7; *see also* MCCANN & LAITINEN, *supra* note 14, at 5; BURKE & BUTLER, *supra* note 63, at 5 ("[B]ecause the institution is accredited, students can be confident that the university is operated professionally and that the courses they take will be of an appropriate standard."). *But see* DELGADO, *supra* note 27, at 10 (arguing that "[a]ccreditation is not a sufficient substitute for rigorous state oversight").

76. BURKE & BUTLER, *supra* note 63, at 7 ("Most traditional four-year colleges and universities are . . . accredited by one of the six regional accrediting agencies. By contrast, most for-profit and technical schools are accredited by national accrediting agencies.").

77. *See* BURKE & BUTLER, *supra* note 63, at 5.

78. *See id.* "Once a voluntary decision on the part of universities, accreditation is now a *de facto* requirement for institutions to be eligible even to open their doors or for their students to receive federal aid." *Id.* at 8; *see* 1 JAMES A. RAPP, EDUCATION LAW § 3.08[4][a] (2020) ("[A]s a practical matter, accreditation has become a necessity for post-secondary institutions for several fundamental reasons."); *see also* Matthew Adam Bruckner, *Bankrupting Higher Education*, 91 AM. BANKR. L.J. 697, 698 (2017)

The primary role of accreditors in the triad is to ensure that the "institution meets certain standards of quality."[79] This role is mandated by federal law, which requires accrediting bodies to "develop standards in areas that tend to indicate school success, such as graduation and placement rates, loan default rates, curricula and faculty, student support services, facilities and equipment, program length, and recruiting and admissions practices."[80] Notably, this seemingly requires accreditors to consider both inputs (e.g., facilities) and outputs (e.g., graduation rates).

Despite accreditors' role as the academic quality-regulator,[81] some believe that accreditors "lack effective oversight practices . . . ."[82] These criticisms often center on the nature of an accreditor's review, which "largely measure 'quality' in terms of inputs . . . [which are] dubious measures of an institution's capacity."[83] A rigorous review of an IHE's quality requires a focus on student outcomes, not "faculty credentials, facilities, and even the number of books in the library," especially for reauthorization.[84]

Unfortunately, accrediting agencies are unlikely to adequately protect students by serving as a capable steward of higher education quality. As a group, accrediting agencies are primarily "interested in institutional improvement and inclined against institutional sanctioning."[85] Yet they have been conscripted into "a high-stakes role

---

[hereinafter Bruckner, *Bankrupting Higher Education*] (referring to the loss of Title IV funds as "an effective death sentence" for IHEs).

79. *See supra* text accompanying note 65; *see also* Mary Watson Smith & Joshua C. Hall, *Keeping College Pricey: The Bootlegger and Baptist Story of Higher Education Accreditation*, 44 OKLA. CITY U. L. REV. 33 (2019); RAPP, *supra* note 78, § 3.08[1] ("Accreditation involves a determination by an accrediting agency that an educational institution meets certain established standards.").

80. Linehan, *supra* note 21, at 783.

81. *See* Pro. Massage Training Ctr., Inc. v. Accreditation All. of Career Schs. & Colls., No. 1-12-cv-911, 2014 WL 201879, at *1 (E.D. Va. Jan. 17, 2014) (describing accreditation as the "process which vets the schools and designates those which are accredited as having exceeded a certain threshold of quality and competency"), *aff'd in part and rev'd in part*, 781 F.3d 161 (4th Cir. 2015).

82. MCCANN & LAITINEN, *supra* note 14, at 14–15 (claiming that "inadequate accreditors' standards are a challenge for overseeing academic quality and that accreditors lack effective oversight practices for academic quality" and that "accreditors have fallen short of their responsibilities"); BURKE & BUTLER, *supra* note 63, at 8 ("Even though it is a *de facto* requirement for colleges, accreditation does not guarantee academic quality."); RAPP, *supra* note 78, § 3.08[1] ("[A]ccreditation . . . is subject to some deserved criticism."); DELGADO, *supra* note 27, at 6 ("[E]ven though regional accreditors tend to have more stringent standards and more diversity of membership, they, like national accreditors, tend to lack effective review of consumer protection issues.").

83. Smith & Hall, *supra* note 79, at 41, 43; *see also* AKERS, *supra* note 37, at 4 ("The current system of oversight for colleges in the U.S. is implicitly based on the notion that the quality of education can and should be measured by examining the 'inputs' rather than the 'outputs.'").

84. Andrew P. Kelly, *At Last! Promising Higher Ed Ideas from Washington*, AM. ENTER. INST. (Nov. 1, 2013), https://www.aei.org/articles/at-last-promising-higher-ed-ideas-from-washington/ [https://perma.cc/3LR8-DA9Y].

85. MCCANN & LAITINEN, *supra* note 14, at 11, 15 (explaining that accreditors "withdrew accreditation for only about 1 percent of accredited schools, despite there being more than 1,500 accredited colleges with graduation rates below 40 percent."); *see also* RAPP, *supra* note 78, § 3.08[3] ("Accreditation is a voluntary, generally nongovernmental system, peer review process for recognizing educational institutions for a level of performance, integrity, and quality that entitles them to the confidence of the educational community and the public they serve.").

as . . . gatekeepers to more than $120 billion in federal dollars annually, most of which is borrowed by—and must be repaid by—students."[86] This is a function accrediting agencies are ill-suited to fulfill.[87]

Because of accreditors' predilection toward institutional improvement and against sanctions, "schools failing to meet accreditors' standards could easily go a decade before they lose accreditation."[88] The high-stakes nature of an institution losing accreditation makes accreditors "reluctant to use that bludgeon."[89] Without more graduated penalties, such as enrollment limitations, accreditors will always be slow to withdraw accreditation from even the most troubling institutions. For example, when Corinthian Colleges collapsed in 2014, it was in good standing with its accreditor, the Accrediting Council for Independent Colleges and Schools.[90] Corinthian remained fully accredited despite not having the financial wherewithal to withstand even a short interruption to its cash flow and despite investigations by ED and multiple attorneys general for, among other things, defrauding students by publishing misleading job placement rates.[91] Yet both ED and states have continued to rely on accreditors as the stewards of higher education quality.

C. States

Providing an education for residents is a core function of state and local governments.[92] No surprise then that states are the third member of the triad and

86. MCCANN & LAITINEN, *supra* note 14, at 11; Smith & Hall, *supra* note 79, at 34 (arguing that in short, they are the "gatekeepers of these federal monies."); *see also* Kelly, *supra* note 84 (explaining that the federal government provides "access to more than $150 billion in student financial aid" each year but largely allows "third-party accreditation agencies that are closely allied with existing higher education institutions" to decide which entities are eligible to receive these funds).

87. MCCANN & LAITINEN, *supra* note 14, at 13 (arguing that this role is a strange fit for them because "accreditors do not see themselves as regulators."); Linehan, *supra* note 21, at 780 ("[T]he U.S. Senate reported in 1991, '[a]ccrediting agencies reject the idea that it is their responsibility to see that Title IV funds are administered properly at their schools.'") (citing S. REP. NO. 102-58, at 17–18 (1991)). Even worse, some suggest "that the current system of higher education accreditation acts as a cartel aimed at keeping the price of a college education high, with few incentives for anything beyond minimum quality standards." BURKE & BUTLER, *supra* note 63, at 8 ("With regard to colleges and universities, accreditation has become, first and foremost, a barrier to entry."); *see also* Zachary Maggio, State Policy and For-Profit Higher Education: A Comparative Case Study of Two States 174 (2018) (Ph.D. dissertation, New York University) (arguing that some accreditors "engage in a tacit kind of 'quid pro quo' approach that errs on the side of 'rubber-stamping' applications that come before it" because the accreditor "is not well empowered to engage in rigorous oversight of for-profit institutions").

88. MCCANN & LAITINEN, *supra* note 14, at 16.

89. *Id.*

90. *Id.* at 13.

91. *Corinthian Colleges Student Loan Relief Eligibility*, OFF. ATT'Y GEN. FOR D.C., https://oag.dc.gov/corinthian-colleges-student-loan-relief [https://perma.cc/QJH4-VSDD] (last visited Sept. 23, 2020); *Information for Former Corinthian Colleges Students*, ST. CAL. DEP'T JUST.: XAVIER BECERRA ATT'Y GEN., https://oag.ca.gov/corinthian [https://perma.cc/YD9Z-YZLA] (Oct. 24, 2018).

92. RAPP, *supra* note 78, § 3.08[2] ("[T]he Supreme Court has stated that education is one of the most important functions of state and local governments, and is, perhaps, at the very apex of the

"have played a role in the oversight of public colleges within their borders since the[ir] formation."[93] Thus, tradition dictates that states are primarily responsible for authorizing and overseeing both public and private IHEs.[94] In addition, ED has "established minimum expectations for what qualifies as a college's authorization by a state."[95]

States' traditional role in the triad has been to "assure the legitimacy and integrity of institutions of higher education"[96] and to protect students from fraud and abuse.[97] States' consumer protection role has a clear overlap with the role of accreditors, but they have approached the role differently. Traditionally, states have tried to protect students by creating "tuition recovery funds," arranging to preserve student records when IHEs close and ensuring that IHEs have "basic operational safeguards."[98]

Most states require that the IHE be authorized[99] by a state agency before they can operate.[100] State regulatory agencies, such as California's Bureau for Private

---

functions of a state.") (citing Brown v. Bd. of Educ., 347 U.S. 483 (1954) and Wisconsin v. Yoder, 406 U.S. 205 (1972)); *see also* Matthew A. Bruckner, *Special Purpose Municipal Entities and Bankruptcy: The Case of Public Colleges*, 36 EMORY BANKR. DEVS. J. 341, 365 (2020) (discussing a state's obligation to educate its residents).

93. MCCANN AND LAITINEN, *supra* note 14, at 19; TANDBERG ET AL., *supra* note 15, at 5 ("The state's preeminent role in higher education is appropriate because, under the reserved powers clause of the Tenth Amendment to the U.S. Constitution, the provision of education is a responsibility of the states."); George Gollin, Emily Lawrence & Alan Contreras, *Complexities in Legislative Suppression of Diploma Mills*, 21 STAN. L. & POL'Y REV. 1, 11 (2010) ("The state authorization requirement is in 34 C.F.R. § 600.4(a)(1), (3). These in turn are rooted in 20 U.S.C. § 1001(a)(2), which says that an educational institution must be 'legally authorized within each state to provide a program of education beyond secondary education.'"); RAPP, *supra* note 78, § 3.08[2] ("By tradition and law, education is a state function.").

94. Maggio, *supra* note 87, at 3 ("[S]tate governments have a long-standing mandate of primary authority and responsibility for higher education . . . ."); Linehan, *supra* note 21, at 785 ("[T]he federalism concern that education policy be controlled at the state and local level."); BRUCE N. CHALOUX, STATE OVERSIGHT OF THE PRIVATE AND PROPRIETARY SECTOR 4 (1985) ("[S]tates traditionally have been legally responsible for authorizing educational activity within state boundaries.").

95. TANDBERG ET AL., *supra* note 15, at 8.

96. HARNISCH ET AL., *supra* note 57, at 2.

97. Maggio, *supra* note 87, at 21; TANDBERG ET AL., *supra* note 15, at 4.

98. HARNISCH ET AL., *supra* note 57, at 11.

99. Some states use the term "authorization" to refer to "degree-granting activities and licensure to nondegree-granting activities, although these distinctions are not universal." CHALOUX, *supra* note 94, at 7–8.

100. It is the license from a state to an institution of higher education that "serves as the fundamental formative act in the creation of postsecondary institutions and as the primary gatekeeper." HARNISCH ET AL., *supra* note 57, at 3; RAPP, *supra* note 78, § 3.08[3][a] ("Licensure generally refers to the mechanism through which states grant individuals or, in some circumstances, organizations, the authority to practice a restricted profession, such as operating an educational institution."); *see, e.g.*, KY. REV. STAT. ANN. § 165A.330(l) (West 2018) ("No person shall conduct, operate, maintain, or establish a proprietary school . . . unless he holds a valid current license from the commission."); MINN. STAT. ANN. § 141.25(1) (West 2019) ("A private career school must not maintain, advertise, solicit for, administer, or conduct any program in Minnesota without first obtaining a license from the office.").

Postsecondary Education, are the primary state-based IHE regulators.[101] States authorize IHEs in a variety of ways, either via a state charter, by exempting IHEs from the state authorization requirement (e.g., a religious exemption), or via "authorization from the state for nonpublic institutions."[102] Some states embrace their role in the triad with zeal.[103] Others are more lax.[104] For example, Reagan National University—an accredited IHE that appeared to have no students, no faculty, and no classrooms—operated out of South Dakota, which was described as "the ideal place for Reagan" because "[t]he state has among the laxest rules for colleges in the country."[105]

In recent years, states have allowed other members of the triad to drive the regulatory process, ceding "their role in the triad entirely to accreditors for the purposes of federal student aid eligibility under the HEA, permitting institutions to consider themselves authorized if they had obtained accreditation."[106] For example, South Dakota authorizes any college that is accredited—"they don't independently hold universities accountable."[107] States have also deferred to the federal government, allowing their responsibilities to police institutional quality to be "subsumed in the nebulous architecture of the triad, which, in its ill-defined division of responsibilities, may induce each actor to assume that critical functions are someone else's responsibility."[108] Finally, states have also deferred to each other

101. "States provide oversight in many ways, including through higher education regulatory agencies, as well as through indirect means such as consumer protection and commerce laws." Aaron N. Taylor, *Your Results May Vary: Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations*, 62 ADMIN. L. REV. 729, 768 (2010); *see also About the Enforcement Section*, BUREAU FOR PRIV. POSTSECONDARY EDUC., https://www.bppe.ca.gov/enforcement/about.shtml [https://perma.cc/NJA2-2JYQ] (last visited Sept. 23, 2020); TANDBERG ET AL., *supra* note 15, at 4 ("The foundational function of the state is the approval of an entity to establish itself as a postsecondary institution. Most often referred to as state authorization, it is the first formal act in the legal operation of an institution and often serves as the foundation upon which other quality assurance functions are built (like accreditation).").

102. HARNISCH ET AL., *supra* note 57, at 3; *see also* MCCANN & LAITINEN, *supra* note 14, at 19 ("State authorization and oversight requirements also vary considerably from state to state.").

103. HARNISCH ET AL., *supra* note 57, at 3 ("Some states have proven to be active and thorough in fulfilling this responsibility, while others have taken a passive approach with few requirements demanded of institutions."); TANDBERG ET AL., *supra* note 15, at 7 ("[R]apid growth in the number of proprietary institutions in the 1980s resulted in a greater need for state oversight and more applications for state authorizers, but the rigor of these processes remained fractured across different states.").

104. *Id.*

105. Chris Quintana & Shelly Conlon, *This College Was Accredited by a DeVos-Sanctioned Group. We Couldn't Find Evidence of Students or Faculty.*, USA TODAY (Feb. 16, 2020, 5:31 PM), https://www.usatoday.com/story/news/education/2020/02/15/college-accreditation-department-education-betsy-devos-south-dakota-sioux-falls/4746906002/ [https://perma.cc/6LC4-MKSG].

106. MCCANN & LAITINEN, *supra* note 14, at 19; S. COMM. ON HEALTH, EDUC., LAB. & PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 10 (2012) ("[M]any States have taken a passive or minimal role in approving institutions, reviewing and addressing complaints from students and the public, and ensuring that colleges are in compliance with State consumer protection laws.").

107. Quintana & Conlon, *supra* note 105.

108. HARNISCH ET AL., *supra* note 57, at 4; *see also* DAVID A. TANDBERG & REBECCA R. MARTIN, QUALITY ASSURANCE AND IMPROVEMENT IN HIGHER EDUCATION: THE ROLE OF THE

through their participation in reciprocity agreements.[109] Unfortunately, in recent years, states have become "the least consistent of the members of the program integrity triad."[110]

In the past, "states had to take full responsibility for the legitimacy, conduct and impact of institutions they authorized."[111] States were more active participants, in part, because "[s]tate authorization was the only public validation entities received before claiming collegiate status."[112] And states could take a more active role once more.[113] For example, Tandberg, Bruecker, and Weeden wrote that states should "reconsider and reconceptualize how they develop and implement a state authorization process aimed at meeting the needs of its students as well as the strategic goals of the state. This is particularly true given the proliferation of new providers, distance education, alternative credentials, and new technologies."[114]

States should pay attention to the "variety of general outcomes measures—retention and graduation rates, placement and earnings data for program graduates, loan default or repayment rates, to name a few examples—[that]

STATES 6 (2019) ("States play a fundamental role in higher education, protecting both the investment of state dollars and their citizens as their consumers. Despite their central responsibility in this regard, states have struggled with how they might help ensure that students are receiving a quality educational experience.").

109. *See About NC-SARA*, NC-SARA, https://www.nc-sara.org/about-nc-sara [https://perma.cc/F3MU-W5JU] (last visited Sept. 23, 2020).

110. MCCANN & LAITINEN, *supra* note 14, at 22. Senator Harkin helped produce a report for the Senate Health, Education, Labor and Pensions Committee, which found that "[s]tate oversight of for-profit education companies has eroded over time due to a variety of factors, including State budget cuts and the influence of the for-profit college industry with State policymakers. The U.S. Department of Education had never defined minimum requirements for State authorization, and many States have taken a passive or minimal role in approving institutions, reviewing and addressing complaints from students and the public, and ensuring that colleges are in compliance with State consumer protection laws." S. COMM. ON HEALTH, EDUC., LAB. & PENSIONS, *supra* note 106, at 8.

111. HARNISCH ET AL., *supra* note 57, at 4. *But see* TANDBERG ET AL., *supra* note 15, at 7 ("Prior to the modern era, state higher education regulation had relatively little impact on postsecondary institutions. Private institutions were largely seen as accountable because of their religious or charitable affiliations.").

112. HARNISCH ET AL., *supra* note 57, at 4.

113. Linehan, *supra* note 21, at 785 ("Despite the expansive statutory regulatory scope of federal oversight programs, the non-federal arms of the 'triad' fail to adequately play their part as gatekeepers to Title IV funds."); *see* TANDBERG & MARTIN, *supra* note 108.

114. TANDBERG ET AL., *supra* note 15, at 4. To do so, NC-SARA may need to "be strengthened to facilitate the provision of quality online educational opportunities across state lines while supporting robust oversight structures to ensure consumer protection" because NC-SARA currently limits states' authority over out-of-state distance education providers. Letter from Debbie Cochrane, Exec. Vice President, The Inst. for Coll. Access & Success, Clare McCann, Deputy Dir. for Fed. Pol'y, New Am. Higher Educ. Program, Bob Shireman, Senior Fellow, Century Found., Robyn Smith, Of Couns., Nat'l Consumer L. Ctr. & Carrie Wofford, President, Veterans Educ. Success, to Lori Williams, President, Nat'l Council for State Authorization Reciprocity Agreements (Apr. 28, 2020), https://ticas.org/wp-content/uploads/2020/04/Comments-to-NC-SARA-Board-for-May-2020-Meeting.pdf [https://perma.cc/B5N4-ZG9C]; *see* also Lindsay McKenzie, *The Odd State Out*, INSIDE HIGHER ED (Feb. 28, 2018), https://www.insidehighered.com/digital-learning/article/2018/02/28/california-holds-out-state-reciprocity-agreement-online [https://perma.cc/XF9T-RH4B].

could serve as early warning signs of an institution failing to serve its students well."[115] States are better situated than accreditors to police institutional quality because state oversight "devolves decision-making power to leaders who are well-equipped to recognize the specific needs of their local economies and employers"[116] because "state officials are politically accountable."[117] "[I]f the states took seriously their role of authorizing institutions of higher education and ensuring educational quality, state licensure could become an independent and meaningful mark of quality for consumers, employers, and other graduate institutions."[118] This would also make states, rather than accrediting agencies, the gatekeepers of federal funds.[119]

The following part considers the tools available to triad members to police higher education institutional quality, with an eye toward considering which of these tools could be appropriated by state regulators interested in ensuring the "operational legitimacy of institutions."[120]

---

115. ANDREW P. KELLY, KEVIN J. JAMES & ROONEY COLUMBUS, INPUTS, OUTCOMES, QUALITY ASSURANCE: A CLOSER LOOK AT STATE OVERSIGHT OF HIGHER EDUCATION 13 (2015). *But see* TANDBERG & MARTIN, *supra* note 108, at 6 ("Definitions of quality in higher education are varied and contested, while measuring quality may be an even more difficult task"). California is currently the only state that could police out-of-state online schools in this way because every other state is a member of NC-SARA, and participants in NC-SARA have agreed not to impose additional "requirements on institutions from other SARA states." *About NC-SARA*, *supra* note 109 ("As of April 2020, 49 states, the District of Columbia, Puerto Rico and the U.S. Virgin Islands are members of SARA. Over 2,100 colleges and universities participate in SARA.")

116. KELLY, *supra* note 84. *But see* Linehan, *supra* note 21, at 782 ("While the states have relatively little to lose from student loan default resulting from proprietary schools' predatory practices, the federal government's monetary interest in the Title IV program may drive more effective regulation of proprietary school marketing and recruitment.").

117. Smith & Hall, *supra* note 79, at 64 ("[V]oters' demand for higher quality and lower cost higher education could incentivize state officials to increase the supply by developing outcome-based methods of assessing an institution's performance and by encouraging low-cost and innovative new educational programs. Because they are not publicly accountable—elected by traditional universities institutionally opposed to innovation—the accreditors have no incentive to pursue such reforms."); *see* MCCANN & LAITINEN, *supra* note 14, at 23.

118. *See* Smith & Hall, *supra* note 79, at 62; HARNISCH ET AL., *supra* note 57, at 11 ("[S]tate authorization should not be completely outsourced to accrediting agencies and the federal government. Such a complete delegation of authority would essentially render state authorization meaningless and non-additive.").

119. Smith & Hall, *supra* note 79, at 62; *see also* Maggio, *supra* note 87, at 3 ("[S]tate governments are arguably in the strongest position to enact effective regulation of the for-profit institutions operating within their borders."). *But see* TANDBERG & MARTIN, *supra* note 108, at 8 (pointing out that some states lack an "operating definition of quality").

120. Instead of relying on accreditors to do this work, which both the federal government and the states have increasingly done. HARNISCH ET AL., *supra* note 57, at 7.

III. STATES AS STEWARDS OF HIGHER EDUCATION QUALITY

A. Solutions States Could Adopt

Most commentators that have considered how to strengthen the triad have focused on either accreditors or ED.[121] But this Article is intended to focus on how states could provide greater consumer protections for in-state students.[122] For too long, states have deferred to other members of the triad instead of taking "the lead in developing potential reforms or new regulatory mechanisms."[123] Some states have "the capacity and appetite for greater institutional oversight responsibility held by some actors within the state quality assurance ecosystem."[124] This Article is for those state higher education regulators that are eager to do more. This part presents a variety of regulatory solutions that states could adopt to better regulate in-state institutions and out-of-state schools with brick-and-mortar campuses.[125]

It does so by drawing on various methods previously used by ED to police institutional quality and prevent students from being exploited.[126] Two options—the gainful employment rule and cohort default rate metric—are directly related to improving student outcomes. The other—the financial responsibility scores—is about alerting students to possible school closures so that they may make informed decisions about which institution to attend (or whether to transfer). States could replicate and improve upon these methods. Each will be addressed in turn.

1. "Gainful Employment" Rule

In 2014, ED produced the "gainful employment rule—a regulation that holds career training programs accountable if loan payments represent too large a share

121. *See, e.g.*, Linehan, *supra* note 21, at 754 ("This Note argues that the U.S. Department of Education is the superior entity to police proprietary schools."); TANDBERG ET AL., *supra* note 15. *But see, e.g.*, HARNISCH ET AL., *supra* note 57; MCCANN & LAITINEN, *supra* note 14.

122. This is not, by far, the only article to consider the State's role in consumer protection, but it does appear to be the first law review article on the topic. Excellent coverage of this topic has been provided by KELLY ET AL., *supra* note 115; TERESA E. TAYLOR, ART COLEMAN, BETHANY LITTLE & AMBER SADDLER, EDUCATIONCOUNSEL, GETTING OUR HOUSE IN ORDER: CLARIFYING THE ROLE OF THE STATES IN HIGHER EDUCATION QUALITY ASSURANCE (2016), http://educationcounsel.com/?publication=getting-house-order-clarifying-role-state-higher-education-quality-assurance [https://perma.cc/A3MM-7T3W]; MCCANN & LAITINEN, *supra* note 14, at 22–25; HARNISCH ET AL., *supra* note 57, at 6 ("The base of scholarly literature on the state authorization function remains scant with two recent exceptions."); TANDBERG ET AL., *supra* note 15, at 4 ("Given the state's interest in quality education and consumer protection, to what extent is its authorization process advancing those goals, and what can be done to improve the authorization process to better advance those goals?"); TANDBERG & MARTIN, *supra* note 108.

123. Maggio, *supra* note 87, at 2.

124. HARNISCH ET AL., *supra* note 57, at 9.

125. NC-SARA limits the ability of every state besides California to impose additional regulatory requirements on out-of-state IHEs that operate entirely online. *See About NC-SARA*, *supra* note 109.

126. Concerns about the exploitation of students underlies a lot of policies, including some aspects of bankruptcy policy. *See, e.g.*, Bruckner, *Bankrupting Higher Education*, *supra* note 78; Bruckner, *DNRs*, *supra* note 4.

of income for students who received federal aid and finished the program of study."[127] The regulations were meant to "distinguish programs that provide affordable training that leads to well-paying jobs from programs that leave students with poor earnings prospects and high amounts of debt."[128] A program "passed" the gainful employment test if it could satisfy two debt-to-earnings ratios: graduates had to be able to repay their education debt by spending eight percent or less of their annual income or twenty percent or less of their discretionary income.[129] The rule was also intended to force IHEs to disclose information to prospective students about "what the typical graduate earns, how much debt graduates have, and what share of graduates find employment in their field" to allow consumers to make more informed decisions.[130] Accordingly, a state version of the gainful employment rule could be a useful tool to protect students from programs that require them to incur thousands of dollars of debt and provide little or no increased earning power.

The federal gainful employment regulations had an immediate effect, and a comparable state rule might have similar results. Approximately sixty percent of the programs that were on track to lose access to Title IV funding because of unacceptable student debt-to-earnings ratios "shut down even before the rule would have terminated their financial aid."[131] Nevertheless, the Trump administration repealed the gainful employment rule, effective July 2020.[132] The Trump

127. BEN MILLER, CTR. FOR AM. PROGRESS, GRADUATE SCHOOL DEBT 9 (2020), https://www.americanprogress.org/issues/education-postsecondary/reports/2020/01/13/479220/graduate-school-debt/ [https://perma.cc/4KC9-J8WK] ("That regulation defined a long-standing statutory requirement that certain programs and types of institutions had to show they provided training leading to gainful employment in a recognized occupation."); *see also Gainful Employment Information*, FED. STUDENT AID, https://studentaid.gov/data-center/school/ge [https://perma.cc/Z4BC-USZQ] (last visited Sept. 23, 2020) ("Generally, in order to be eligible for funding under the Higher Education Act Title IV student assistance programs, an educational program must lead to a degree at a nonprofit or public institution or it must prepare students for 'gainful employment in a recognized occupation.'").

128. DELGADO, *supra* note 27, at 7.

129. 34 C.F.R. § 668.403 (2015); *see also Gainful Employment Information*, *supra* note 127; THE INST. FOR COLL. ACCESS & SUCCESS, WHAT TO KNOW ABOUT THE GAINFUL EMPLOYMENT RULE (2019), https://ticas.org/wp-content/uploads/2019/08/what_to_know_about_GE_fact-sheet-1.pdf [https://perma.cc/V6V2-L7TH] ("The GE rule was based on a simple idea: typical graduates need to earn enough to afford to repay their loans. The rule required any program where typical graduates' debts exceed both 8 percent of their total income and 20 percent of discretionary income to improve or lose access to federal financial aid."); Miller, *supra* note 127, at 9 (Conversely, "[i]f a program fails to stay under the prescribed debt-to-income ratio defined in the gainful employment regulation for multiple years, the program loses access to federal aid.").

130. THE INST. FOR COLL. ACCESS & SUCCESS, *supra* note 129.

131. MILLER, *supra* note 127, at 10.

132. *Department of Education Repeals Gainful Employment Regulations*, AM. COUNCIL ON EDUC. (July 1, 2019), https://www.acenet.edu/News-Room/Pages/Department-of-Education-Repeals-Gainful-Employment-Regulations.aspx [https://perma.cc/4YAL-QW53]; MCCANN & LAITINEN, *supra* note 14, at 31.

administration suggested that disclosure—via the College Scorecard—better serves the needs of students than the gainful employment rule.[133]

A subsequent administration may reinstate the federal gainful employment rule regulations and the "data-matching agreement with the Social Security Administration that permitted the use of administrative data to calculate post-college earnings for such programs."[134] In addition, Congress could mandate such information sharing, which would make it more difficult for a future administration to undo.

But states should consider implementing their own version of the gainful employment rule anyway.[135] Hundreds of thousands of students attend or have attended programs that would not satisfy the federal gainful employment rule.[136] These students hold billions in debt that the gainful employment rule suggests that they will struggle to repay.[137] Importantly, "[s]tudents of color account for more than half of the undergraduate enrollment at for-profit colleges, and they are disproportionately impacted by the high-cost, low-quality programs identified and addressed by the [gainful employment rule]."[138] In other words, the gainful employment rule—like student loan debt more generally—is a racial justice issue.

Ostensibly, ED remains committed to transparency and has therefore made available a significant amount of information about student outcomes vis-à-vis the College Scorecard.[139] States could use this data to begin to create their own gainful employment-like rule. For example, the Texas Public Policy Foundation (TPPF) created a tool based on College Scorecard data that allows students (or regulators) to examine which schools produce graduates with high debt burdens relative to their

133. *See Department of Education Repeals Gainful Employment Regulations*, *supra* note 132 ("In announcing the decision to formally repeal the gainful employment regulations, Secretary of Education Betsy DeVos referred to changes to add more information to the federal College Scorecard, saying, 'All schools should be clear and transparent about their outcomes and all students should have a full range of information available. We're committed to making that happen.'").

134. MCCANN & LAITINEN, *supra* note 14, at 31.

135. *See* BLAGG & WASHINGTON, *supra* note 36, at 1 ("Using longitudinal datasets, some states now provide their own estimates [of what students earn after college] by institution and program.").

136. THE INST. FOR COLL. ACCESS & SUCCESS, *supra* note 129 ("More than 350,000 students have completed programs at schools that failed to meet the guidelines established by the GE Rule.").

137. *Id.* ("These students hold nearly $7.5 billion in student debt they are unlikely to be able to repay.").

138. *Id.*

139. *See Find the Right Fit*, U.S. DEP'T EDUC.: COLL. SCORECARD, https://collegescorecard.ed.gov/ [https://perma.cc/X6WP-83XL] (last visited Sept. 23, 2020); *see also Department of Education Repeals Gainful Employment Regulations*, *supra* note 132. There are, however, substantial limitations with these data. *See Why the College Scorecard Should Complement – Not Replace – the Gainful Employment Standards*, INST. FOR COLL. ACCESS & SUCCESS (Feb. 26, 2020), https://ticas.org/accountability/gainful-employment/why-the-college-scorecard-should-complement-not-replace-the-gainful-employment-standards/ [https://perma.cc/2DC7-QQLZ] (discussing limitations with the College Scorecard data).

earnings.[140] "According to TPPF's analysis, just 73% of students at public colleges are enrolled in a passing program, along with 62% of those at private nonprofit schools. (At for-profits, the proportion is sixty-three percent.)"[141]

It is possible, however, that ED would stop sharing this information if states began to use it to calculate their own version of the gainful employment rule because ED has shown itself to be hostile to this sort of outcomes-based metric. In addition, the data is (mostly) not program-level data and therefore is not as fine-grained as it could be.[142] Moreover, the data is only available for less than one quarter of all college programs and only for graduates one year after they complete their education.[143] Therefore, states should use their own data instead of getting this information from the Treasury Department.[144] Since the early 2000s, states have begun to collect substantially more data about postsecondary students.[145] For example, Tennessee now collects "measures of student progress and completion, including credit hour accumulation, transfer, graduation rates, and number of degrees conferred."[146] And this data is both differentiated by institution type and broken down into subpopulations of students, "including adult students,

140. Andrew Gillen, *College Earnings and Debt*, TEX. PUB. POL'Y FOUND., https://www.texaspolicy.com/college-earnings-and-debt/ [https://perma.cc/E548-7ZQM] (last visited Sept. 23, 2020); *see also* Cooper, *supra* note 25.

141. Cooper, *supra* note 25.

142. *See* Michael Itzkowitz, *Overpromised, Underdelivered: The Limitations of the Department of Education's Transparency Efforts*, REALCLEAREDUCATION (Sept. 25, 2019), https://www.realcleareducation.com/articles/2019/09/25/overpromised_underdelivered_the_limitations_of_the_department_of_educations_transparency_efforts__110358.html [https://perma.cc/LJC7-8C5Q] (discussing limitations with the data provided by ED).

143. *Id.* ("[T]he Department released as part of this effort so far are underwhelming, to say the least. Out of the 194,575 higher education programs across the United States, only 42,430 (22%) have information available on the median loan debt of graduates. Furthermore, the data that was released hides the outcomes of certain types of programs more than others.").

144. All states collect information on quarterly earnings for many (but not all) in-state workers. *See* JULIE M. WHITTAKER & KATELIN P. ISAACS, CONG. RSCH. SERV., RL33362, UNEMPLOYMENT INSURANCE: PROGRAMS AND BENEFITS 6 (2019), https://fas.org/sgp/crs/misc/RL33362.pdf [https://perma.cc/HZT2-44BS]; *see also* BLAGG & WASHINGTON, *supra* note 36, at 3 (noting that some states have earnings data, but that data—typically from unemployment insurance programs—only covers people who work for an in-state employer, thus excluding various categories of people including the self-employed and people who leave the state); KELLY ET AL., *supra* note 115, at 3 (arguing that gainful employment-like measurement requires "connecting wage information from unemployment insurance databases to postsecondary-enrollment information"); KELLY & LAUTZENHEISER, *supra* note 26, at 7 ("Similarly, states should take steps to link data on postsecondary experience with earnings and employment information. Some institutions already try to measure employment and earnings using graduate surveys, but these are expensive to conduct and often suffer from low response rates. Linking administrative data from postsecondary and wage records is likely to be more informative and less expensive in the long run (despite start-up costs). With these data systems in hand, states would ideally be able to connect average earnings to both institutions and degree programs."); CHRISTINA WHITFIELD, JOHN ARMSTRONG & DUSTIN WEEDEN, STATE HIGHER EDUC. EXEC. OFFICERS ASS'N, STRONG FOUNDATIONS 2018: THE STATE OF STATE POSTSECONDARY DATA SYSTEMS (2019).

145. *See, e.g.*, JOHN ARMSTRONG & KATIE ZABACK, ASSESSING AND IMPROVING STATE POSTSECONDARY DATA SYSTEMS 4 (2016).

146. *Id.* at 9.

low-income students, and community college students."[147] Even more recently, states have begun to link together students' postsecondary and workforce records.[148]

For now, there are substantial gaps in individual states' data records because, for example, the "data they hold is highly concentrated in the public sectors."[149] Approximately two-thirds of states do not currently collect any information from private nonprofit IHEs and even fewer collect information from for-profit IHEs.[150] And in the eighteen states that do collect information from private IHEs, "coverage of independent institutions is often limited to those that participate in financial aid programs or to institutions that volunteer to submit data to the state postsecondary agency."[151] But this is a choice that states are making. States can and should demand the data they need as a condition of the school's reauthorization.[152]

Another important gap in state data records exists because workforce data is typically drawn from state unemployment insurance records, which exclude various categories of people, including those employed out of state.[153] States can address this gap by sharing data amongst themselves, thereby gaining a more accurate picture of post-college earnings.[154] And states have been doing just this. Whether

147. *Id.* at 5.

148. WHITFIELD ET AL., *supra* note 144, at 16 ("Fifty-one agencies in 46 states link or plan to link postsecondary and workforce data (nine agencies in nine states plan to link)."); ARMSTRONG & ZABACK, *supra* note 145, at 7 ("[C]onnections between students' postsecondary and workforce records have also expanded."); *see also* KELLY & LAUTZENHEISER, *supra* note 26, at 7 (providing examples from Florida, Texas, Tennessee, Virginia, and Colorado, and describing these states as "leading the way in linking unemployment insurance and postsecondary records and reporting those data").

149. WHITFIELD ET AL., *supra* note 144, at 8. Another important gap is in state workforce records, which typically come from state unemployment insurance records. *See supra* note 144. These records only cover people who work for an in-state employer, excluding various categories of people including the self-employed, people who leave the state, people who work for the federal government and others. *See* BLAGG & WASHINGTON, *supra* note 36, at 4.

150. WHITFIELD ET AL., *supra* note 144, at 8 ("Roughly one-third of respondents indicated they collect information from institutions in other sectors: 18 agencies collected information from independent (private, nonprofit) institutions, 12 from proprietary (private, for-profit) institutions, and three from tribal institutions."); ARMSTRONG & ZABACK, *supra* note 145, at 1 ("Only 18 states surveyed by State Higher Education Executive Officers (SHEEO) collected information from private, not-for-profit institutions.").

151. ARMSTRONG & ZABACK, *supra* note 145, at 7–8.

152. For example, California has taken its first steps toward creating a state-level, gainful-employment rule in California Assembly Bill 1340, which "would require an institution subject to the act to collect and retain for each graduate completing a program at that institution on or after January 1, 2020, individual identifying information, the program the graduate was enrolled in, and specified student loan debt information." Assemb. B. 1340, 2019-2020 Assemb., Reg. Sess. (Cal. 2019).

153. *See Department of Education Repeals Gainful Employment Regulations*, *supra* note 132; ARMSTRONG & ZABACK, *supra* note 145, at 2 ("Often, unemployment insurance records are used to determine wage outcomes of graduates."); *see also supra* text accompanying note 149 (noting other limitations with this data).

154. "Colorado, Michigan, Texas, and Wisconsin have partnered with the LEHD program at the US Census Bureau to develop nationwide earnings data for students who leave postsecondary institutions." BLAGG & WASHINGTON, *supra* note 36, at 9 (noting that using only one state's data may

by entering into memoranda of understanding between state agencies or developing data sharing agreements, more than half of the states now share these types of data with each other.[155] There are regional data sharing arrangements as well. For example, Hawaii, Idaho, Oregon, and Washington share data with each other through the Western Interstate Commission for Higher Education's Multistate Longitudinal Data Exchange to better understand outcomes for students who cross state lines.[156] While multistate information-sharing agreements are more administratively cumbersome (and expensive) than using the Treasury Department's data, it creates the potential for an end run of a recalcitrant federal government.[157]

2. *Cohort Default Rates*

As noted above, more than one million student loan borrowers default on their federal student loans each year.[158] These defaults occur despite an exceedingly generous definition of default.[159] The Cohort Default Rate (CDR) is a consumer protection measure designed to shield students from extremely low-quality IHEs and stop the flow of tax dollars to these institutions.[160] IHEs are ineligible to receive federal financial aid if they have three consecutive default rates that exceed thirty percent.[161] The CDR is the only financial outcome-based metric used by ED to assess institutional quality.[162]

---

bias earnings data downwards because "students who move out of state may be more likely to earn more than those who do not move"); ARMSTRONG & ZABACK, *supra* note 145, at 2 ("[M]ore cross-state collaboration could improve the quality of reporting on student workforce outcomes.").

While there are some privacy-focused concerns with this approach, states appear to be comfortable with what they can and cannot share. *See* ARMSTRONG & ZABACK, *supra* note 145, at 11 ("Addressing privacy related to education data is particularly challenging because there is significant variation in privacy laws across both sectors and states.").

155. Slightly more than half the states reportedly "house data from various government agencies in a central warehouse." ARMSTRONG & ZABACK, *supra* note 145, at 5.

156. *Id.* at 6.

157. *See* BLAGG & WASHINGTON, *supra* note 36, at 4 (noting that some "states are partnering with nearby states to follow residents when they move or take jobs in a neighboring state").

158. *See supra* text accompanying notes 38–40.

159. *See infra* text accompanying note 164.

160. *See* Michael Itzkowitz, *Why the Cohort Default Rate Is Insufficient*, THIRD WAY (Nov. 7, 2017), https://www.thirdway.org/report/why-the-cohort-default-rate-is-insufficient [https://perma.cc/F8GR-R3UW] (discussing how the CDR was intended to protect students from "low-performing providers" and "bad actors"); *see also* MCCANN & LAITINEN, *supra* note 14, at 27 (explaining that the CDR "was designed to penalize colleges where a disproportionate share of borrowers default on their loans").

161. Or a single year with a CDR of greater than 40%. *See* Itzkowitz, *supra* note 147 (citing 34 C.F.R. § 668.206 (2011)); *see also* MCCANN & LAITINEN, *supra* note 14, at 27. The FY 2017 national cohort default rate was 9.7%. *Official Cohort Default Rates for Schools*, FED. STUDENT AID, https://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html [https://perma.cc/G77A-PDGQ] (Aug. 27, 2020).

162. AKERS, *supra* note 37, at 5 ("The only current financial outcome used to assess the quality of institutions that are eligible for federal aid is the cohort default rate.").

Unfortunately, the CDR metric is broken. ED's ability to identify and remove IHEs from Title IV eligibility using the CDR metric has been diminished by an outdated definition of default.[163] While many borrowers are seriously behind on their payments, a student loan is not technically in default until it has gone between 270 and 360 days in nonrepayment.[164] In many cases, borrowers can make no payments on their student loan debt and still not be in default.[165] As a result, while only slightly more than half of all student loan debt is in active repayment, the official student loan default rate is merely 11.5%.[166] To put this number in context, even with such a generous definition, the official "student loan default rate is higher than the default rate for auto loans,"[167] and exceeds the rate of delinquent mortgages "during the peak of the housing crisis in 2010."[168]

Simply put, the definition of "default" does not appropriately account for students who are in forbearance, have a deferment, or use an income-driven repayment plan.[169] While these programs and grace periods are valuable, excluding them from the definition of default allows IHEs to remain eligible for Title IV even though most of their students would—objectively—be considered to struggle with their educational debts.[170] For example, at almost 500 institutions "less than

163. *See* 34 C.F.R. § 682.200(b) (2001), which defines default as:

The failure of a borrower and endorser, if any, or joint borrowers on a PLUS or Consolidation loan, to make an installment payment when due, or to meet other terms of the promissory note, the Act, or regulations as applicable, if the Secretary or guaranty agency finds it reasonable to conclude that the borrower and endorser, if any, no longer intend to honor the obligation to repay, provided that this failure persists for—

(1) 270 days for a loan repayable in monthly installments; or

(2) 330 days for a loan repayable in less frequent installments.

Cf. Cohort Default Rates, FINAID, https://www.finaid.org/loans/cohortdefaultrates.phtml [https://perma.cc/2KA7-EHS2] (last visited Sept. 23, 2020); MCCANN & LAITINEN, *supra* note 14, at 29 ("[I]ts utility in identifying poor-performing schools and removing them from the federal aid program has continued to decline."); Itzkowitz, *supra* note 160 (claiming that "[t]he implementation of the initial CDR law was extremely effective, leading to a significant decline in defaults across the country" and "a significant number of fly-by-night institutions failed the CDR test, lost access to federal funding, and closed down . . . [which is] exactly what the CDR is supposed to do").

164. 34 C.F.R. § 682.200(b) (2001); *see also* Bruckner et al., *No-Contest*, *supra* note 44, at 189 n.25; Itzkowitz, *supra* note 160 (defining default as a borrower's inability "to make a single payment on their loans within the past 360 days").

165. *See* Itzkowitz, *supra* note 160 (discussing $0 income-driven repayment (IDR) plans).

166. *See* Flynn, *supra* note 40. While "the reported default rate for federally managed loans is 11.5 percent . . . , the true default rate is actually more than 17 percent." *Id.* at 3. These figures do not include private student loans, which have higher repayment rates than federal student loans. The rest is in some form of grace period, such as forbearance or deferment, an income-driven repayment plan, or in default. *See id.*

167. Bruckner et al., *No-Contest*, *supra* note 44, at 189 n.25 (citing Ben Miller, *Who Are Student Loan Defaulters?*, CTR. FOR AM. PROGRESS (Dec. 14, 2017, 12:01 AM), https://www.americanprogress.org/issues/education-postsecondary/reports/2017/12/14/444011/student-loan-defaulters/ [https://perma.cc/GA3E-TK7H]).

168. Itzkowitz, *supra* note 160.

169. *See id.*

170. MCCANN & LAITINEN, *supra* note 14, at 30 (claiming that "[c]olleges that left the majority of their students struggling to repay, though not defaulting, were able to skirt accountability" and reporting that "[l]ast year alone, $25.4 billion in federal loans were in deferment due to economic

one-quarter of their students had successfully begun to pay down their loans within three years of leaving school and beginning repayment."[171] Some have even accused IHEs of manipulating their repayment statistics to avoid a failing CDR score.[172]

Thus, it appears that the definition of default needs to be amended if the CDR metric is to be useful for protecting students from IHEs with poor outcomes.[173] Any metric that faults only ten IHEs a year—like the CDR—even though there are three times as many IHEs (thirty-two) "where less than one in 10 students were able to pay down $1 of their loan principal within three years of leaving" is a flawed metric.[174] There may not be political will at the federal level for this redefinition exercise,[175] but there's no reason why states could not adopt their own CDR rules for use in their own (re)authorization decisions. They could, for example, use loan repayment rates measuring "the percentage of borrowers who succeed in lowering their loan balance over a given period of time."[176] States "should also institute program-level accountability based on graduates' debt relative to their incomes, even at nonprofit and public degree-granting institutions."[177]

Unfortunately, if the definition of "default" was amended at the state level, it may make it harder for states to obtain the data they need because ED won't simply be able to share what they have. However, ED does have (and currently shares) data

hardship" and "even though these students are struggling financially, they do not count negatively against an institution's CDR").

171. Itzkowitz, *supra* note 160 (discussing data from 2014–2015).

172. AKERS, *supra* note 37, at 5 ("While the cohort default rate is designed to capture the ability of graduates to repay their debts, it falls short because colleges manipulate repayment statistics by encouraging students to enroll in programs that postpone repayment. Student borrowers can use a variety of tactics to avoid having their loan enter default while still failing to make any progress in paying down their balance."); Itzkowitz, *supra* note 160 (claiming that some IHEs use "unscrupulous . . . default prevention strategies" to avoid failing the CDR metric and that ED is aware that its metric is "susceptible to gaming behavior").

173. *See* MILLER, *supra* note 127, at 12 ("Rather than capping debt based on the earnings of completers, graduate programs could instead be held accountable if many students are unable to repay their debts or are heavily reliant on options such as IDR, which sets payments at a share of income."); Robert Kelchen, *How Well Do Default Rates Reflect Student Loan Repayment?*, BROOKINGS (Sept. 30, 2015), https://www.brookings.edu/blog/brown-center-chalkboard/2015/09/30/how-well-do-default-rates-reflect-student-loan-repayment/ [https://perma.cc/HA86-FTLM] ("All of these complications make cohort default rates a weak metric of whether students are actually paying back their loans.").

Another flaw with the CDR metric, not otherwise addressed in this Article, is that the CDR data is old data. For example, "[t]he FY 2017 official cohort default rates were delivered to both domestic and foreign schools on September 28, 2020." *Official Cohort Default Rates for Schools*, *supra* note 161.

174. *See* Itzkowitz, *supra* note 160.

175. MCCANN & LAITINEN, *supra* note 14, at 30 ("House Republican and Democratic bills introduced this year both sought to incorporate a measure of delinquency to the existing default rate . . . .").

176. AKERS, *supra* note 37, at 5 ("The advantage of this metric is that it reveals when borrowers don't make progress in paying down their loans because they are eligible for programs that postpone payments without causing their loan to be reported as delinquent.").

177. MCCANN & LAITINEN, *supra* note 14, at 35; *see also* Itzkowitz, *supra* note 21 (discussing a value-added measure of higher education quality).

on repayment rates via the College Scorecard.[178] It is not clear, though, whether ED would continue to share this data if states were using it to calculate their own CDR rates. This would be a substantial impediment to state implementation of a revised CDR-like metric because most of this data is only collected by student loan servicers.[179]

3. Financial Responsibility Rules

Through its Office of Federal Student Aid (FSA), ED measures the financial health of IHEs using its financial responsibility score.[180] "Colleges are scored on a scale from -1.0 to 3.0."[181] IHEs need a score a 1.0 or better to participate in any Title IV programs,[182] though an IHE is subject to heightened scrutiny if it scores between 1.0 and 1.4.[183] In academic year 2016–17, more than ten percent of IHEs either received a failing score or were subject to additional oversight.[184]

There are three problems with the current financial responsibility metric. First, these scores are not a particularly useful way to analyze an IHE's current financial health because they rely on old data.[185] The scores are based on IHE's audited

---

178. ED shares data on the percent of undergraduate students reducing their original principal balance over a three-year, backwards-looking period. *See Download the Data*, U.S. DEP'T EDUC.: COLL. SCORECARD, https://collegescorecard.ed.gov/data/ [https://perma.cc/ALN2-YDV4] (June 1, 2020). This data is limited by ED decision to suppress this information at schools with cohorts of fewer than thirty students because of accuracy concerns. *See* TECHNICAL DOCUMENTATION: COLLEGE SCORECARD INSTITUTION-LEVEL DATA 24 (2020), https://collegescorecard.ed.gov/assets/FullDataDocumentation.pdf [https://perma.cc/K2BE-9YVQ] ("Data are also suppressed for institutions with fewer than 30 students, where the outcome of a single student could dramatically change the rate.").

179. However, states could use their authority to license student loan servicers to impose data collection obligations on them. *E.g.*, H.B. 10, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (imposing a wide range of obligations on student loan servicers before they can operate in Virginia); *cf. infra* text accompanying notes 231–33.

180. MCCANN & LAITINEN, *supra* note 14, at 30; Robert Kelchen, *Which Colleges Failed the Latest Financial Responsibility Test?*, ROBERT KELCHEN (Apr. 15, 2019), https://robertkelchen.com/2019/04/15/which-colleges-failed-the-latest-financial-responsibility-test/ [https://perma.cc/876X-6R59].

181. Kelchen, *supra* note 173; *see also Financial Responsibility Composite Scores*, FED. STUDENT AID, https://studentaid.gov/data-center/school/composite-scores [https://perma.cc/DJU8-2YHK] (last visited Sept. 23, 2020).

182. 34 C.F.R. § 668.15(a) (2000); *Financial Responsibility Composite Scores*, *supra* note 181; *see also* 2 FED. STUDENT AID, U.S. DEP'T OF EDUC., FEDERAL STUDENT AID HANDBOOK: 2019–2020, at 89 (2020) [hereinafter FSA HANDBOOK], https://ifap.ed.gov/sites/default/files/attachments/2020-01/1920FSAHbkVol2Ch4.pdf [https://perma.cc/ZNY8-URDZ] ("To participate in the FSA programs, a school must demonstrate that it is financially responsible.").

183. Kelchen, *supra* note 180; *Financial Responsibility Composite Scores*, *supra* note 181 ("The overall relative financial health of institutions [falls] along a scale from negative 1.0 to positive 3.0. A score greater than or equal to 1.5 indicates the institution is considered financially responsible.").

184. Kelchen, *supra* note 180.

185. *Id.* ("The data are already three years old, which is an eternity for a college on the brink of collapse (but perhaps not awful for a cash-strapped nonprofit college with a strong will to live on)."); FSA HANDBOOK, *supra* note 182, at 89 ("[S]chools are required to submit financial information to the Department every year. A school must provide this financial information in the form of an audited

financial statements, which aren't due until six to nine months after the school's fiscal year ends.[186] Thus, an IHE that encounters a significant financial shock early in its fiscal year might not share that information with FSA for more than eighteen months. At that point, it is often far too late regulators to act. For example, almost as soon as ED announced that it would delay providing Title IV funds to Corinthian Colleges for a mere three weeks, the for-profit chain of colleges announced it would sell or close its campuses and operations.[187] Without current data, it's no wonder that the FSA "has failed to keep up with the scale and scope of problems in higher education around the country."[188]

But the FSA processes could be improved.[189] First, the federal government (or states if the federal government won't act) could require more current information.[190] For example, IHEs could be required to promptly report "steep declines in enrollment and tuition revenues (which can be an indicator of financial problems)."[191] Additionally, IHEs could be required to report if they fail to pay a

---

financial statement as part of a combined submission that also includes the school's compliance audit. For-profit schools have six months from the end of the schools' fiscal year to provide the combined submission; other schools have nine months.").

186. FSA HANDBOOK, *supra* note 182. But at least this data is considered by ED. States do not universally require IHEs to annually submit audited financial statements. TANDBERG ET AL., *supra* note 15, at 21 ("For existing institutions and those seeking renewal, authorizers ought to require the annual submission of audited financial statements and any additional financial information they need to measure the financial viability of the institutions and to ensure they are operating in accordance with relevant laws and regulations.").

187. Jose Luis Magana, *School Daze: Students at Troubled Corinthian Colleges Say They're in the Dark*, NBC NEWS (Aug. 28, 2014, 9:54 PM), https://www.nbcnews.com/news/education/school-daze-students-troubled-corinthian-colleges-say-theyre-dark-n190456 [https://perma.cc/78M2-2FCY] ("In early July, Corinthian announced it would be selling or closing its 107 campuses and online operations. The announcement came after the Department of Education withheld Corinthian's Pell grants and loan funds for 21 days, claiming the company was taking too long with a request for detailed records of their students' performance.").

188. MCCANN & LAITINEN, *supra* note 14, at 30.

189. *Id.* at 31 ("FSA's processes have proven wholly inadequate to respond to—or better yet, prevent—the abuse of federal dollars and prevalence of poor performing colleges in the system."); Rick Seltzer, *Regulating College Closures*, INSIDE HIGHER ED (Jan. 23, 2019) [hereinafter Seltzer, *Regulating*], https://www.insidehighered.com/news/2019/01/23/massachusetts-regulators-propose-efforts-protect-students-unexpected-college [https://perma.cc/QTM4-FU5E] ("[E]xisting metrics that could mark stressed institutions, like the federal government's Financial Responsibility Composite Score, have failed to identify problems with colleges and universities in the years leading up to their closure and have sometimes flagged colleges with considerable resources.").

190. Rick Seltzer, *What to Know About Lists of Financially Challenged Colleges*, INSIDE HIGHER ED (Nov. 19, 2019) [hereinafter Seltzer, *Lists*], https://www.insidehighered.com/news/2019/11/01/publishing-colleges-financial-information-has-long-history-and-raises-larger-set [https://perma.cc/A97E-28QV] ("More recently, the idea of publishing financial evaluations became a hot topic at the state level. After Mount Ida College suddenly collapsed in 2018 . . . officials in Massachusetts started looking into new state requirements designed to prevent colleges from closing without warning students. . . . At the beginning of this year, Massachusetts regulators moved to screen all private nonprofit colleges' finances and warn students one and a half years before their colleges were at risk of closing.").

191. Robert Kelchen & Kenneth Megan, *Another University Is Imploding. The Federal Government Must Do More*, ROLL CALL (Mar. 11, 2019, 5:04 AM), https://

debt when it is due (or even if it anticipates not paying a debt when it becomes due).[192] Similarly, IHEs could be forced to promptly disclose actual or anticipated lawsuits involving a material sum.[193] Regulators might have differing views as to exactly which information to require, but "[i]t turns out this is not rocket science."[194] "Those who know what to look for probably already have a good idea of the colleges and universities that are in financial trouble. It's often institutions that are starting to spend more than they collect."[195]

In other words, regulators need to collect a broader array of data related to an IHE's potential financial distress and to collect that data in a more timely fashion.[196] IHEs, like public companies, could be required to timely report any significant news likely to affect their financial future.[197] Like IHEs, public companies are required to file annual financial reports (known as 10-Ks).[198] But public companies are also required to file quarterly updates (10-Q reports) and to provide extremely prompt updates upon the happening of certain significant events (8-Ks).[199] Unlike with disclosures by public companies, disclosures by IHEs need not be made public but could be provided only to regulators. These changes to the financial responsibility

---

www.rollcall.com/2019/03/11/another-university-is-imploding-the-federal-government-must-do-more/ [https://perma.cc/WS5E-UP3F] (calling on the federal government to collect such information "quarterly, improving timeliness and providing regulators with better information on institutions with deteriorating financial health"); *see also* Seltzer, *Lists*, *supra* note 190 (highlighting another important piece of information: when an IHE's net expenses are expected to exceed its net assets); Seltzer, *Regulating*, *supra* note 189 ("Working group documents[, which are located at https://www.insidehighered.com/sites/default/server_files/media/03e_THESIS%20Deck.pdf [https://perma.cc/6UZQ-RXA8],] indicate that 24 percent of private nonprofit four-year institutions in the state experienced enrollment decreases of 10 percent or more between 2011 and 2016.").

192. Both of these are salient to the Secretary of Education's determination of whether an IHE is financially responsible. *See* 34 C.F.R. § 668.15(b) (2000) ("In general, the Secretary considers an institution to be financially responsible only if it . . . (4) Is current in its debt payments. The institution is not considered current in its debt payments if—(i) The institution is in violation of any existing loan agreement at its fiscal year end, as disclosed in a note to its audited financial statement; or (ii) the institution fails to make a payment in accordance with existing debt obligations for more than 120 days, and at least one creditor has filed suit to recover those funds.").

193. *Id.*

194. Seltzer, *Lists*, *supra* note 190.

195. *Id.*

196. "[U]pdates should be made speedily and narrowly." MCCANN & LAITINEN, *supra* note 14, at 34; *see also* WORKING GRP., MASS. DEP'T OF HIGHER EDUC., FINAL REPORT & RECOMMENDATIONS, TRANSITIONS IN HIGHER EDUCATION: SAFEGUARDING THE INTERESTS OF STUDENTS (THESIS) 7 (2019) [hereinafter WORKING GROUP documents], https://www.insidehighered.com/sites/default/server_files/media/THESIS%20Working%20Group%20Final%20Report.pdf [https://perma.cc/X2GN-MTF8] (noting the need "to significantly improve on the timeliness of awareness of growing risk at specific" IHEs).

197. "Colleges should be required to report in a timely manner when they experience significant financial risks." MCCANN & LAITINEN, *supra* note 14, at 34.

198. *Exchange Act Reporting and Registration*, U.S. SEC. & EXCH. COMM'N, https://www.sec.gov/smallbusiness/goingpublic/exchangeactreporting [https://perma.cc/Q9F6-4NUL] (Oct. 24, 2018); FSA HANDBOOK, *supra* note 182.

199. *Exchange Act Reporting and Registration*, *supra* note 198.

rules could help by informing regulators when an event occurs that creates a "significant risk of closure or other liabilities owed to the federal government."[200]

Second, FSA is also an (overly) cautious regulator. There are various reasons for this caution, including that "FSA has been underfunded" and understaffed.[201] Nor has the FSA been "empowered to take more, stronger, and swifter action when it finds concerning indicators."[202] "Oversight of colleges is not among FSA's stated goals in the law."[203] As a result, "FSA typically acts out of an overabundance of caution, waiting until problems are too far along before taking serious action. And lengthy due process requirements for colleges make it difficult for FSA to take action early, subjecting students to harm for a longer period of time."[204] Thus, a state regulator empowered to act on concerning financial responsibility scores might be an effective strategy for protecting students.

In response to Mount Ida's precipitous collapse in 2018, the Massachusetts Board of Higher Education convened its Working Group in early 2019.[205] This Working Group determined that the "existing regulators . . . and existing metrics [were] insufficient to provide early enough warning or action."[206] In response, it proposed to "screen all private nonprofit colleges' finances and warn students one and a half years before their colleges were at risk of closing."[207] The goal is to define a threshold at which an IHE's financial condition creates a "meaningful risk of interruption" for students, triggering the need to notify students and prepare a contingency plan for the institution.[208] And the information used to calculate a risk score is based exclusively on "existing, publicly reported data and requires no further information from colleges."[209]

200. MCCANN & LAITINEN, *supra* note 14, at 34.

201. *Id.* at 32.

202. *Id.*

203. *Id.*

204. *Id.* at 31.

205. *See* Seltzer, *Lists*, *supra* note 190.

206. WORKING GROUP documents, *supra* note 196, at 1.

207. Seltzer, *Lists*, *supra* note 190; KASIA LUNDY, HAVEN LADD & ALI HUBERLIE, ERNST & YOUNG-PARTHENON, TRANSITIONS IN HIGHER EDUCATION (2018), https://www.mass.edu/strategic/documents/EY-Parthenon%20Transitions%20in%20Higher%20Ed.pdf [https://perma.cc/BW2R-3TFT] (describing the Teachout Viability Metric as a method for assessing whether an institution has sufficient financial resources to teach out current students through to graduation on its own campus).

208. "The proposed plan centers on a clear goal – to ensure that any college that reaches a defined threshold where its financial condition puts current and recently admitted students at meaningful risk of interruption in their educations must prepare necessary contingency plans and must inform the students and other stakeholders when that risk becomes sufficiently imminent." WORKING GROUP documents, *supra* note 196, at 1; *see also* Seltzer, *Regulating*, *supra* note 189.

209. WORKING GROUP documents, *supra* note 196, at 2. While many of these data are available publicly, most of them have never been combined to create a metric that takes into account financial information, enrollment information, and a host of other factors. *Id.* This is not meant to undermine my earlier claim that updated information would be better information. Rather, I mean to suggest only that we need not wait for better information before acting.

Finally, a related problem is that colleges experiencing significant financial risks are not forced to protect taxpayers by, among other things, having sufficiently large letters of credit on file.[210] Letters of credit are rarely required and usually too small "to cover the entirety of the closed-school discharge liabilities" even when they are in place.[211] Less than one in ten closed institutions with more than "$1 million in closed-school discharge liabilities" had a letter of credit on file.[212] Better disclosures could help ensure that more IHEs have appropriately large letters of credit to protect taxpayers when other measures are insufficient.[213]

B. Mechanisms to Improve Institutional Quality

There are several mechanisms by which states could protect students from low-value or exploitative IHEs. One is through their power to authorize businesses operating in their state (whether with a brick-and-mortar or a virtual presence).[214] State authorization has traditionally been used as a stick to punish bad actors. But instead of authorization being a binary option (an entity is authorized and can operate, or it does not and cannot), a broader array of authorizations could be offered. For instance, authorization may be subject to various restrictions, restrictions akin to endorsements on an individual's driver license. Just like a person needs to satisfy different requirements to be licensed to drive a motorcycle rather than a car, IHEs might apply for various endorsements if they want to expand operations to a new location, accept significantly more students, or similar changes.

Other mechanisms to compel IHEs to protect students include the use of tuition-assistance grants for students and performance-based funding for public IHEs. These mechanisms can serve as a carrot to go along with the stick of threatening to terminate an IHE's authorization or deny it an endorsement. By

---

210. *Cf.* KELLY ET AL., *supra* note 115, at 11 (discussing the surety bond requirement that most higher education boards require but noting that they tend to be small, $500,000 at the high end and only $10,000 at the low end); AKERS, *supra* note 37 (suggesting that risk-sharing payments might be used to protect taxpayers).

211. MCCANN & LAITINEN, *supra* note 14, at 34 (reporting that of the "62 institutions that closed between 1987 and 2016 and had over $1 million in closed-school discharge liabilities—just six institutions had letters of credit on file, and only one had a letter of credit large enough to cover the entirety of the closed-school discharge liabilities").

212. *Id.*

213. Maggio, *supra* note 87, at 172 ("[T]he total amount of the fund and the amounts awarded to students on an annual basis are minimal considering the size of the state's enrollment.").

214. KELLY ET AL., *supra* note 115, at 2 ("Authorization in a state is typically required if an institution is deemed to have a 'physical presence' in the state—a definition that hinges on certain types of activities, such as advertising to students, employing faculty, or providing on-the-ground services."); *see also* CHALOUX, *supra* note 94, at 8 ("States use a variety of approaches in licensing and authorizing institutions to operate and grant degrees in their jurisdictions."); HARNISCH ET AL., *supra* note 57, at 5 ("Authorization is usually required if an institution has a 'physical presence' in the state, a definition that can be triggered based on a range of activities, such as employing faculty or advertising to students."). *But cf.* *NC-SARA*, *supra* note 125 (noting that NC-SARA substantially limits states' ability to impose additional regulations on entities that do not have a physical presence in the state (e.g., operate entirely online)).

offering additional funds only to IHEs that meet certain performance-based criteria, states can push IHEs to improve student outcomes.[215]

1. State Authorization

States have well-established authority to regulate IHEs.[216] State authorization is both required by federal law and prudent as a matter of public policy.[217] States can leverage an IHE's need for state authorization to protect students at two stages: when they first authorize an IHE and when the IHE needs to renew its authorization.[218] "The establishment—and continuous approval process—places tremendous responsibility on the state to assure that new and existing institutions are capable of meeting their educational missions and are operating in the best interests of their students and the state."[219] This places state policymakers in a powerful position to protect students by shaping the higher education marketplace.[220]

a. Initial Authorization

States' approaches to setting initial authorization requirements vary. Some states have required only that an IHE be properly incorporated or accredited to be authorized to operate.[221] Obviously, this provides very little protection for students and does not represent a state's embrace of its "powerful position."[222] By contrast, other states use "a comprehensive authorization and renewal process that evaluates

215. "The report acknowledges that some colleges and universities could resist the process proposed. It suggests making them ineligible for state student financial aid if they do not agree to the plan, a considerable penalty in a state with meaningful grants for state residents who enroll at private colleges." Seltzer, *Regulating*, *supra* note 189; *see also* WORKING GROUP documents, *supra* note 196 (discussing the tethering of active monitoring to continued access to state financial aid and that "[i]t is fair and appropriate for Massachusetts to place such strings upon publicly financed aid provided to schools").

216. HARNISCH ET AL., *supra* note 57, at 7 ("[The] few court cases related to the state's power to authorize institutions . . . [provide] enough case law to establish a clear state authority to authorize colleges and universities within its borders.").

217. 34 C.F.R. § 600.2 (2011); Linehan, *supra* note 21, at 783 ("Under the present system, federal law requires states to designate one or more administrative bodies to furnish school licensing information, to notify the Department upon revocation of a school's operating license, and notify the Department when it has 'credible evidence' that a school has committed fraud in the administration of federal student loans or has otherwise violated federal loan eligibility rules.").

218. HARNISCH ET AL., *supra* note 57, at 11 ("Clearly, the state authorization process should be most comprehensive for entities seeking institutional status for the first time. This, as has been pointed out, is the stage where few other quality assurance or regulatory mechanisms have reviewed the entity, where little by way of data or track record tends to be available, and where the state must single-handedly make a determination of legitimacy. But even the most robust upfront vetting process must be paired with a regime of continuing, and appropriate, oversight to ensure that institutional performance does satisfy the states' baseline requirements.").

219. TANDBERG ET AL., *supra* note 15, at 5.

220. KELLY & LAUTZENHEISER, *supra* note 26, at 2.

221. *See* HARNISCH ET AL., *supra* note 57, at 5 ("For some states, simple incorporation has been deemed sufficient to declare an institution as legitimate."); *supra* text accompanying note 94.

222. KELLY & LAUTZENHEISER, *supra* note 26, at 2.

a wide array of inputs and outcomes."[223] The latter approach is the only one that can protect students.

In particular, states are the only entity that regulates unaccredited institutions that do not receive Title IV funding, such as coding bootcamps.[224] These state-authorized, unaccredited institutions "represent an often-overlooked but important segment of American higher education."[225] It is important that states closely examine these institutions and "ensure that [students] are receiving a quality education, as protections offered by accreditation and federal oversight [such as they are] are unavailable."[226]

Before initially authorizing their operations, states are well positioned to evaluate whether IHEs are likely to provide students with a good-value education. At this point, of course, state regulators are likely limited to evaluating the IHE's plans for educating students and the resources it intends to devote to the endeavor. For example, states can assess "whether an entity has the expected internal resources to deliver educational services—the classroom and course-inventories, the number of faculty, and the general material and human resources necessary to perform as a school."[227] And states already collect "lots of information about inputs," such as professors' CVs, "student-faculty ratios," school "floor plans, site plans, blueprints, or square footage of facilities," evidence of "appropriate equipment for students and instructors," and information "related to content and academic programs."[228]

---

223. HARNISCH ET AL., *supra* note 57, at 5.

224. *See, e.g.*, Jeremy Bauer-Wolf, *Running Without State Approval, Lambda School Shows Challenge of Regulating New Entities*, EDUC. DIVE (Jan. 22, 2020), https://www.educationdive.com/news/running-without-state-approval-lambda-school-shows-challenge-of-regulating/570906/ [https://perma.cc/SY8J-N5QN] (discussing coding bootcamp, the Lambda School, which "has not been approved as an educational entity in [California]," is not accredited, and does not accept Title IV funds); TANDBERG ET AL., *supra* note 15, at 20 ("[N]ew providers of alternative credentials . . . do not seek accreditation or access to federal student financial aid and therefore operate outside of the traditional regulatory triad. These entities operate boot camps, badging services, and the like, and are often for-profit entities that should require regulation and authorization in order to ensure some level of quality and consumer protection.").

225. HARNISCH ET AL., *supra* note 57, at 12 ("The growth and dominance of Title IV participating postsecondary institutions has so dominated current thinking about state authorization that policymakers often assume a rapid progression through state authorization to accreditation and federal certification. A large number of credential-granting institutions, however, choose to operate with nothing more than state authorization, and a number of these may even access public subsidies through other agencies. State authorization serves as the only mechanism of establishing legitimacy and assuring quality for such institutions."); *see also* Bauer-Wolf, *supra* note 224 (highlighting a regulatory disconnection in California between the California Attorney General office and "the government agency that authorizes private institutions there, the Bureau for Private Postsecondary Education (BPPE)").

226. HARNISCH ET AL., *supra* note 57, at 12.

227. *Id.* at 5.

228. KELLY ET AL., *supra* note 115, at 7–8; *see also* Marilyn C. Kameen & Manuel J. Justiz, *Using Assessment in Higher Education to Improve Success for Minority Students*, 66 PEABODY J. EDUC. 46, 49 (1988) ("Until recently, 'input' measures such as mean Scholastic Aptitude Test (SAT) scores of entering students, number of books in the library, and percentage of faculty with terminal degrees, were used to measure institutional quality. Little has been said, however, about the ability of the institution to

States might systemize which information they collect[229] and ensure that authorization decisions are taken seriously by, for example, adequately funding the office that authorizes new IHEs.[230]

b. Renewed Authorization

States generally required IHEs to renew their authorization ever year or two.[231] Although they are limited to focusing on proposed inputs at the initial authorization stage, at the authorization renewal stage, states should base their decisions on actual student outcomes.[232] States should mandate that all IHEs provide them with data about "graduation rates, completions, student licensure/certification success rates, job placement rates, and loan repayment and default rates, among other metrics."[233] With this information, states could produce their own versions of CDRs, financial responsibility scores, and gainful employment rule to decide whether an IHE is providing a good value to its students.[234] Collecting and using information about student outcomes is important for deciding whether an IHE should be allowed to continue operating.[235] Unfortunately, this is not always the case.[236] For example, in

---

influence student learning and development. To focus on 'results' and ask questions about 'output' requires far more serious and systematic approaches to defining and assessing learning outcomes.").

229. HARNISCH ET AL., *supra* note 57, at 11 (arguing that states should "enable the creation of a common matrix of 'institutional vital signs,' a set of quantitative metrics that would allow regulators to focus their limited resources on institutions that pose the greatest risk to students and other stakeholders. Items such as default rates, graduation rates, recorded consumer complaints, and certain financial indicators could quickly direct more expansive and more comprehensive oversight to venues where that might be needed more urgently.").

230. *Cf.* Maggio, *supra* note 87, at 171 (reviewing one accreditor's records—ASBPPE—showed that the accreditor "is exceedingly generous in approving new licensure and program approval requests" with no recorded rejections during the period of time studied).

231. KELLY ET AL., *supra* note 115, at 11 ("[R]enewals [are] generally required every one to two years."); TANDBERG ET AL., *supra* note 15, at 13 ("Seven states do not require regular reauthorization or exempt some types of institutions from regular reauthorization. The frequency with which institutions must renew their authorization varies by state, and it also varies within a state based on the type of institution. Typically, in-state institutions are authorized for longer time periods, while out-of-state institutions are required to renew their authorization more frequently. Most reauthorization approvals hinge on maintenance of accreditation and fiscal viability; fewer states assess student outcomes during the renewal process.").

232. States can help ensure institutional capacity by collecting data, information, and assurances. TANDBERG ET AL., *supra* note 15, at 5; TANDBERG & MARTIN, *supra* note 108, at 15 ("The need to collect and address student learning outcomes was a topic of great interest and discussion at both convenings.").

233. TANDBERG ET AL., *supra* note 15, at 19; TANDBERG & MARTIN, *supra* note 108, at 14.

234. For an alternative measure of how to evaluate whether IHEs are providing a good value for students, see Itzkowitz, *supra* note 21.

235. "The establishment—and continuous approval process—places tremendous responsibility on the state to assure that new and existing institutions are capable of meeting their educational missions and are operating in the best interests of their students and the state." TANDBERG ET AL., *supra* note 15, at 5; *see also* TANDBERG & MARTIN, *supra* note 108.

236. KELLY ET AL., *supra* note 115 (highlighting the variety of approaches across states and institution types).

Arizona, "there is little cost to entry and few rules to play by."[237] And Arizona "doesn't require [IHEs] to account for particular outcomes in order to participate."[238]

Only about half of state IHEs supervisors even require institutions "to report some measure of student outcomes."[239] But even in states that require such reporting, there is some evidence to suggest that this information is not used rigorously to decide whether to renew an IHE's authorization to operate.[240] Nevertheless, a survey of state higher education stakeholders suggested they may have an appetite to require "institutions to submit assessable learning outcomes and descriptions of how the proposed program will meet those outcomes in meaningful ways [so that] during follow-up reviews of approved programs, states and systems might require institutions to provide evidence of the programs' success in accomplishing the approved student learning outcomes."[241] States must act to protect students because if they do not, many times no one else will.

Some states actively work to protect students in these ways. In Florida, Ohio, and Oregon, state education officials are using student outcome data to evaluate IHEs. Florida Commission for Independent Education, for example, requires an improvement plan from unaccredited institutions whose placement rate falls below sixty percent, with potential for license revocation should the institution's placement rate not improve.[242] Similarly, the "Oregon Department of Education's Private Career School office may put a program on probation should its completion or placement rate drop below fifty percent."[243] Ohio's annual authorization renewals, for example, include on-site inspections and a review of the institution's student outcomes, such as graduation and job placement rates.[244]

---

237. Maggio, *supra* note 87, at 148.

238. *Id.*

239. KELLY ET AL., *supra* note 115, at 11 ("44 of the 70 state boards require institutions to report some measure of student outcomes."); *see* TANDBERG ET AL., *supra* note 15, at 13 ("Thirty-six of the 70 state authorizing agencies do not require any measure of student outcomes to be reported in the reauthorization process"); *id.* at 19 ("States may want to consider making participation in the state postsecondary student unit record data system a part of the authorization process. Requiring institutions that are seeking authorization or renewal to develop agreements for regular submissions to the state postsecondary data system would ensure the collection of consistent data elements and outcomes measures for all institutions. Moreover, states could match the student-level data with other state data . . . .").

240. Maggio, *supra* note 87, at 5 (discussing the impact of both "student financial aid and direct institutional aid" but not disaggregating the two); TANDBERG ET AL., *supra* note 15, at 10 ("Institutions are not asked to provide any indicators of student success (graduation/completion rates, student loan default rates, job placement rates).").

241. TANDBERG & MARTIN, *supra* note 108, at 16.

242. FLA. ADMIN. CODE ANN. r. 6E-2.004(10)(c) (2013) ("A nonaccredited institution holding provisional or annual licensure shall report its placement rate as defined by the Commission with each license review. If the placement rate falls below 60%, the Commission shall place the institution on a placement improvement plan . . . . If the progress report does not show improvement as accepted by the Commission, the Commission shall take actions up to and including revocation of license.").

243. KELLY ET AL., *supra* note 115, at 12.

244. TANDBERG ET AL., *supra* note 15, at 11.

Unfortunately, the required reporting varies substantially among states.[245] Most pertinent to this Article—which suggests that states should adopt CDR metrics, gainful employment rule, and financial responsibility scores—only twenty-eight (of seventy) state boards require IHEs to report on "job-placement rates," only three "require wage data," and only four require CDRs.[246] In other words, "[d]espite the rising concern over delinquency and default rates and debt-to-income ratios, few states are considering the return on investment for students when reauthorizing institutions to operate in their state."[247]

States have an important role to play in protecting students. States should not cede their obligations to protect students to other members of the triad.[248] Instead, states should invest in strengthening "the processes by which they carry out their authorization functions."[249] "A central focus of the authorization process ought to be quality assurance and improvement."[250] Admittedly, it will require difficult political choices for state leaders to provide additional funding for this work, particularly during the pandemic.

c. Endorsements on State Authorization

State authorization need not be an all-or-nothing proposition. Instead, states could prod IHEs to provide better value to their students by embracing the idea of tiered authorizations. An initial authorization could allow a new IHE to engage in fairly limited operations. States might restrict the size and scope of an IHE's operations until the IHE has a demonstrated track record of producing good student outcomes.[251] At that point, the state might authorize the IHE to increase enrollment, offer new majors, open a branch campus, or expand in other ways.

Some IHEs effectively police themselves along the lines that I have suggested. For example, Long Island University (LIU) recently decided to freeze new enrollment in several of its degree programs, while allowing existing students to

---

245. And sometimes it varies within a state, depending on which type of college is seeking reauthorization. *See* Maggio, *supra* note 87, at 104–06 (discussing license renewals in New Jersey).

246. KELLY ET AL., *supra* note 115, at 12 ("43 boards require graduation rates, 28 require job-placement rates, 10 require retention rates, 4 require licensure exam passage rates, 4 require cohort-default rates, and 3 require wage data.").

247. TANDBERG ET AL., *supra* note 15, at 13. *But see* TANDBERG & MARTIN, *supra* note 108, at 16 ("[C]lose to 80 percent of survey respondents reported using quality assurance metrics in program approval. However, program approval is often viewed as a bureaucratic compliance exercise with little connection to other quality assurance efforts.").

248. *See* TANDBERG ET AL., *supra* note 15, at 6.

249. *Id.*; *see also* TANDBERG & MARTIN, *supra* note 108, at 4 ("Making these processes substantive and focused on quality assurance is challenging but necessary.").

250. TANDBERG ET AL., *supra* note 15, at 19.

251. *But see* Jeremy Bauer-Wolf, *A New State Bill Could Challenge Key Interstate Distance Learning Pact*, EDUC. DIVE (Mar. 4, 2020), https://www.educationdive.com/news/a-new-state-bill-could-challenge-key-interstate-distance-learning-pact/573513/ [https://perma.cc/ST3B-9W59] (reporting on limitations states face in regulating IHEs that provide distance education because of NC-SARA participation).

complete their degrees.[252] LIU's vice president for academic affairs suggested that the criteria for selecting which programs to discontinue was based on whether the programs were "competitive, relevant and of the highest quality for our students."[253] Instead of relying on IHEs to self-police, state regulators could restrict IHEs from offering programs that aren't of the "highest quality."[254]

2. Financial Incentives for Better Student Outcomes

In addition to the threat of declining an IHE's authorization to operate in state, a state could also use the carrot of making additional funds available. These funds could be made available directly to students at eligible institutions or be given directly to the institutions themselves. This section discusses two such options: tuition assistance grants (TAGs) or performance-based funding. Historically, TAG funding has only been available to nonprofit IHEs and performance-based funding has only been available to public IHEs. Thus, the primary mechanism for regulating for-profit IHEs will continue to be authorization.[255]

a. Tuition Assistance Grants

States already provide substantial funding directly to students attending certain IHEs. For example, "[i]n 2010–2011, nine percent of total student grant aid came from state governments."[256] These TAGs are given to students at certain, usually nonprofit, IHEs. Research has shown that this aid has "a weak but measurable impact on the enrollments and finances of private institutions across the United States."[257]

If states were so inclined, TAGs might "become a highly effective lever" to ensure that IHEs are meeting certain minimum expectations for student

252. *See* Elizabeth Redden, *Putting Liberal Arts Programs on Ice*, INSIDE HIGHER ED (Feb. 25, 2020), https://www.insidehighered.com/news/2020/02/25/long-island-university-freezes-enrollments-many-liberal-arts-programs [https://perma.cc/QC53-W38S] (discussing Long Island University's decision to discontinue offering certain majors "in art history, earth system science, French, Italian, music performance, Spanish, geography and geology").

253. *See id.*

254. *See id.*

255. However, states could also levy "penalties for an assortment of violations." TANDBERG ET AL., *supra* note 15, at 21. While also a stick, penalties are not an all-or-nothing proposition like authorization has historically been.

256. Maggio, *supra* note 87, at 22.

257. *Id.* at 5.

outcomes.[258] States could and should tie the availability of TAGs to whether the student attends a high-performing IHE.[259]

Unfortunately, it generally doesn't seem that states are using TAGs to improve student outcomes because they are not tying continued access to TAGs to those outcomes.[260] Kelly, James, & Columbus found "few states actually renew authorizations on the basis of [student] outcomes" despite a substantial majority of states collecting student outcome data.[261] For example, New Jersey "has one of the nation's most generous TAG programs, covering both nonprofit and for-profit colleges," but IHEs in New Jersey "are not required to engage in any reporting on outcomes in order to justify their continued eligibility to receive the funding."[262] And other states, such as Arizona, don't offer any sort of "statewide financial aid program," making this tool unavailable to them.[263]

b. Performance-Based Funding

While TAG funds flow directly to students, policymakers could also funnel money directly to high-value IHEs. And most states do already use some version of performance-based funding for public IHEs, in which money flows directly to the IHEs based on achieving certain student outcome benchmarks.[264] Common benchmarks "include retention and graduation rates, job placement, graduation

---

258. *Id.* at 125 ("TAG grant frees them from reliance on federal standards [and] it also serves as a mechanism for the state to ensure that for-profit institutions adhere to certain minimal standards. Should the state ever wish to begin enforcing stricter standards or to enact new accountability mechanisms, the availability of the TAG grant would become a highly effective lever with which to coerce the cooperation of the for-profit sector."); *id.* at 22 (explaining that TAGs "requir[e] institutions participating in state grant programs to meet certain loan default rate standards").

259. It is possible, however, that the cost of higher education is not salient to students for any number of reasons. In that case, tying a student's eligibility for a TAG to whether that student attends a high-quality IHE might mean that students who attend low-quality IHEs would be worse off because they'll both receive a less useful degree and they'll pay more for that degree. *Cf.* Jonathan D. Glater, *Law School, Debt, and Discrimination*, 68 J. LEGAL EDUC. 548 (2019) (discussing various circumstances where the least advantaged students would pay more for law school).

260. KELLY ET AL., *supra* note 115, at 12 (describing the use of outcomes in state higher education decision-making as "extremely rare").

261. *Id.* at 12. *But see* KELLY & LAUTZENHEISER, *supra* note 26, at 6 (claiming that few states systemically collect useful student outcome data).

262. Maggio, *supra* note 87, at 121.

263. *Id.* at 207.

264. David A. Tandberg & Nicholas W. Hillman, *State Higher Education Performance Funding: Data, Outcomes, and Policy Implications*, 39 J. EDUC. FIN. 222, 223 (2014) ("State performance funding programs are incentive systems that link institution funding levels to performance outcomes."); ARMSTRONG & ZABACK, *supra* note 145, at 9 (reporting that twenty-six state higher education agencies "indicated their states use a performance formula to allocate funds to postsecondary institutions"); MCCANN & LAITINEN, *supra* note 14, at 19; Alicia C. Dowd, *From Access to Outcome Equity: Revitalizing the Democratic Mission of the Community College*, 586 ANNALS AM. ACAD. POL. & SOC. SCI. 92, 109–10 (2003) ("Most state legislatures have embraced the practice of linking tax-dollar support for public colleges to performance, even though a large share of public-college officials remain convinced that doing so is a bad idea."). *But see* KELLY & LAUTZENHEISER, *supra* note 26, at 4 ("[Nineteen] states were experimenting with some form of outcomes-based funding.").

credits and time to degree, licensure test scores, workforce training and development, and two- to four-year transfers."[265] Funding levels vary between two and ten percent of an IHEs funding.[266]

Historically, performance-based funding has been both limited to public IHEs and of questionable efficacy to improve institutional quality. Some researchers have found that incentives have either been insufficiently large or poorly tailored toward improving student outcomes to create "a significant relationship between performance funding and improved institutional performance."[267] For example, the most frequently cited outcome that legislators claim to want when they embrace performance funding is to improve degree completion rates.[268] The efficacy of performance funding is unclear. Some find the "introduction of performance funding does not have a statistically significant impact on the total number of baccalaureate degrees produced within the performance funding states."[269] But other researchers have found that, "although the monetary incentives have not been large, campus administrators have responded to them."[270] And one study from Ohio "found that Ohio's performance funding reduced median time to degree for in-state bachelor's students from 4.7 years to 4.3 years and led to a thirteen percent increase in bachelor's degrees for at-risk students."[271]

Even if initial experiments with performance-based funding haven't been as effective as we might like, that does not mean that the idea should be abandoned. Research suggests that states have been insufficiently patient with IHEs and that it is not until the program is up and running for a long time that "performance funding has a positive and significant impact on the number of degrees produced."[272] "Outcomes-based funding is not a new idea in higher education, but early efforts

265. Dowd, *supra* note 264, at 109; Tandberg & Hillman, *supra* note 264, at 223 (explaining that outcomes include: "student retention, graduation rates, student scores on licensure exams, job placement rates, faculty productivity, and campus diversity."); Taylor, *supra* note 101, at 750 ("[I]nstitutions have had to provide evidence of successful outcomes, particularly as they relate to student learning.").

266. Tandberg & Hillman, *supra* note 264, at 224 ("Some states reserve up to 10% of an institution's funding as performance funding; others reserve as little as 2%. In most cases performance funding serves as a bonus. However, a few states take performance funding further and embed it into their base funding formula."). *But see* KELLY & LAUTZENHEISER, *supra* note 26, at 4 ("Tennessee has the country's boldest performance-based funding system—a 2010 law set up a system whereby 80–100 percent of the higher education budget is based on remedial course completion, retention rates, and degree completion. Tennessee's system pays a premium for completions by adult students and those receiving Pell Grants. The performance criteria are weighted to reflect the different sectors—two-year and open-access campuses are not held to the same standards as research universities.").

267. Tandberg & Hillman, *supra* note 264, at 223; *see also* Maggio, *supra* note 87, at 27 ("[P]erformance-based funding initiatives were rapidly proliferating but were not resulting in desired impact or improvement.").

268. Tandberg & Hillman, *supra* note 264, at 229 ("Increasing total baccalaureate degree completions is the most frequently cited goal . . . .").

269. *Id.* at 236.

270. Dowd, *supra* note 264, at 109.

271. KELLY & LAUTZENHEISER, *supra* note 26, at 4.

272. Tandberg & Hillman, *supra* note 264, at 239.

were typically timid: states would either link a very small percentage (too small to inspire meaningful change) of an institution's budget to student outcomes or create a pot of money that institutions could win as a bonus on top of their base funding."[273] Finally, too many funding policies are enrollment driven. They encourage IHEs "to bring students in the front door but provide less incentive to make sure they progress all the way through—or actually learn anything in the process."[274]

CONCLUSION

Higher education offers students opportunities for both economic and intellectual advancement. While both are important, this Article has focused primarily on economic advancement because value-added measures of institutional effectiveness can be both contested and contentious.[275] In addition, the American higher education funding system—which is predicated on individuals debt-funding their own educations—encourages research to focus on economic growth. Even if a student receives an excellent education while in school, if that student cannot repay their educational debt, they will suffer hardship.

This Article has considered three ways that states could serve as stewards of higher educational quality and ensure that students receive a positive return on their economic investments. States can and should ensure that students attend high-quality IHEs by refusing to reauthorize IHEs that fail new, state-based CDR metrics and gainful employment rules, or that fail to demonstrate that they have the financial wherewithal to stay open for a student's entire time in college. Without state authorization, IHEs will lose access to Title IV funds, forcing many low-value IHEs to improve or close. Generally speaking, this ought to protect students. Only by vigorously protecting students by policing institutional quality will states fulfill their role as a member of the program integrity triad.

273. KELLY & LAUTZENHEISER, *supra* note 26, at 3.

274. *Id.*

275. DOUGLAS N. HARRIS, VALUE-ADDED MEASURES IN EDUCATION: WHAT EVERY EDUCATOR NEEDS TO KNOW (2011); *see also* Itzkowitz, *supra* note 21 ("[T]here's still minimal consensus on how to accurately gauge the value that students get from attending a specific higher education institution or program.").