

FALSE PREMISES: THE ACCOUNTABILITY FETISH IN EDUCATION

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“She took math and reading workbooks home so her children were always ahead in school. And she insisted on discipline and chores to teach the importance of accountability.”¹

— *The New York Times* on Marian Robinson, Michelle Obama’s mother

“Accountability” has become the mantra of education reform in the United States. During the presidency of George W. Bush, it was also the guiding principle of intergovernmental relations, according to a little-noticed essay in the 2002 *Economic Report of the President*. Setting out his presidency’s approach to federalism, it said that “[t]his Administration seeks to create an institutional framework that will encourage the development of measurable standards to which all providers of public services—Federal and local, public and private—can be held accountable.”²

In federal policy for elementary and secondary education, which is susceptible to management through grants-in-aid to state and local governments, measurable standards became an explicit statutory goal, not to say an obsession. In policy for higher education, measurable standards began to glimmer in the federal government’s eyes as well, but because of the greater legal and organizational variety—and because the bulk of federal aid goes to students as grants and loans rather than

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1. Rachel L. Swarns, *An In-Law, a Mainstay, a White House Resident*, N.Y. TIMES, Jan. 10, 2009, at A1.

2. ECONOMIC REPORT OF THE PRESIDENT 191 (2002) [hereinafter ECONOMIC REPORT].

directly to colleges and universities—federal regulation of higher education is quite problematic politically. The Bush Administration's effort to revise federal regulations on accreditation in higher education stirred a firestorm of opposition and was blocked in Congress.

I. NO CHILD LEFT BEHIND

"Bipartisan education reform will be the cornerstone of my Administration," President Bush said in a position paper sent to Congress only a few days after his inauguration.³ He had campaigned on education reform, repeatedly promising a regime of annual testing, which was the practice in Texas.⁴ As governor, he claimed credit for the improved performance of students there.⁵

This presaged a much deeper federal government intervention in K–12 education, yet President Bush's critique of America's schooling was not new. During the Reagan Administration, *A Nation at Risk*⁶ had raised alarm about the performance of students in the United States as compared with those of other nations. There was also concern over the achievement gap at home between white and minority students. Nor was President Bush's proposed remedy original: Preceded by state governments, the national government had been advocating "accountability" through content standards and testing.⁷

But the national government had been moving only gradually. The Improving America's Schools Act (IASA),⁸ a 1994 renewal of the Elementary and Secondary Education Act of 1965 (ESEA),⁹ nudged rather than compelled the States toward adoption of standards and testing. As the ESEA came up for

3. GEORGE W. BUSH, NO CHILD LEFT BEHIND 2 (2001) [hereinafter BUSH PAPER].

4. See PATRICK J. MCGUINN, NO CHILD LEFT BEHIND AND THE TRANSFORMATION OF FEDERAL EDUCATION POLICY, 1965–2005, at 153–54 (2006).

5. See *id.*

6. NAT'L COMM'N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983).

7. See KEVIN R. KOSAR, FAILING GRADES: THE FEDERAL POLITICS OF EDUCATION STANDARDS (2005).

8. Improving America's Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (codified as amended at 20 U.S.C. §§ 6301–8962 (2006)).

9. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27.

renewal again in 1999, several bills from different political perspectives sought to define a more effective accountability regime, but were never enacted.¹⁰

The advent of the Bush Administration brought several changes, first among them education's greater salience as a political issue. Education had unpredictably shot to the top of the public's concerns in the 2000 election, and President Bush had made education central to his campaign. This was especially noteworthy given that the Republican Party had in the recent past favored a federal retreat from K-12 education. In party postmortems following Senator Bob Dole's loss to President Bill Clinton in 1996, however, then-Governor Bush had argued that this retreat was an error, and that Republicans would benefit from embracing a more compassionate, and hence more activist, conservatism.¹¹ President Bush's election led to a convergence between Republicans and Democrats on a need to deploy federal government power more aggressively vis-à-vis state governments and their local school districts. "Although education is primarily a state and local responsibility, the federal government is partly at fault for tolerating . . . abysmal results," President Bush said. "[A]fter spending billions of dollars on education, we have fallen short in meeting our goals for educational excellence."¹² It was conservative, he suggested, to demand results in return for money.¹³

Yet there was a second face to President Bush's initial position that was kinder, gentler, and more compassionate toward the nation's school establishment than the law that eventually emerged in 2002. Bush's early position, like that taken in the Republicans' ill-fated "Straight A's" bill (Academic Achievement for All Act),¹⁴ favored flexibility for the states with a block grant approach. Under this approach, states would have substantial discretion over spending so long as their academic performance met a standard on which the state governments and

10. See MCGUINN, *supra* note 4, at 137-42.

11. See KOSAR, *supra* note 7, at 185.

12. BUSH PAPER, *supra* note 3, at 1.

13. See *id.* at 2-3.

14. Academic Achievement for All Act (Straight A's Act), H.R. 2300, 106th Cong. (1999).

the federal government jointly agreed.¹⁵ Likewise, President Bush's policy statement promised greater flexibility in the use of federal funds, consolidation of overlapping and duplicative categorical programs, and a radical-sounding "charter option" under which states and districts "would be freed from categorical program requirements in return for submitting a performance agreement to the Secretary of Education and being subject to especially rigorous standards of accountability."¹⁶ The statement promised rewards for "[h]igh performing states that narrow[ed] the achievement gap and improve[d] overall student achievement," as well as one-time bonuses to states that met "accountability requirements" quickly.¹⁷ The *Economic Report* essay on federalism, while asserting that government service providers would be held accountable for meeting measurable standards, said also that these providers would be allowed to find the best way to meet the standards.¹⁸

The law that was eventually enacted, No Child Left Behind (NCLB),¹⁹ contained mostly sanction with little reward except for an increase in authorized funding. It soon elicited angry reactions from governors, state legislatures, and, above all, school teachers.²⁰ The radical-sounding charter proposal turned into an authorization of demonstration projects in seven states and 150 local districts, and has proven to be virtually a dead letter. No state has participated,²¹ and only one locality, Seattle, has.²² The consolidation of categorical programs took place only

15. See Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, in *NO CHILD LEFT BEHIND?: THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 23, 32 (Paul E. Peterson & Martin R. West eds., 2003).

16. BUSH PAPER, *supra* note 3, at 4.

17. *Id.* at 5.

18. ECONOMIC REPORT, *supra* note 2, at 191.

19. No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425. For analyses of the passage of No Child Left Behind, see MCGUINN, *supra* note 4, at 165-95, and Rudalevige, *supra* note 15, at 23-54.

20. Teachers circulated a number of e-mails mocking and satirizing the law. See, e.g., John Taylor, No Dentist Left Behind (2002), <http://www.trelease-on-reading.com/no-dentist.html>.

21. U.S. Dep't of Educ., Awards—State Flexibility Demonstration Program, <http://www.ed.gov/print/programs/stateflex/awards.html> (last visited Apr. 7, 2009).

22. See Press Release, U.S. Dep't of Educ., Seattle's Public School Students Benefit from No Child Left Behind Act's Flexibility (Nov. 6, 2003), available at <http://www.ed.gov/news/pressreleases/2003/11/11062003.html>.

modestly, a frequent outcome for Republican Presidents who have attempted to enact block grants. Meanwhile, NCLB required every school in the country to administer annual tests of reading and math in grades 3 through 8 and to make “adequate yearly progress” toward universal proficiency by 2014.²³ The progress was to be measured not only in the overall student body, but also in “disadvantaged” subgroups defined by income, race, ethnicity, handicapped status, and limited English proficiency.²⁴ Schools that failed to attain their targets were subject to a cascade of sanctions, beginning with permitting students to transfer to better schools in the same district and eventually culminating in “restructuring.”²⁵ This scheme threatened many schools with the prospect of officially declared failure.²⁶

To be sure, elements of federalism (too many elements, in the eyes of many education reformers) remained: NCLB permitted states to design their own standards of proficiency and their own tests. Many had already done so, though they now had to submit their plans for federal approval and suffer consequences—namely a loss of federal money—if they did not respond satisfactorily. NCLB thus created incentives for states to lower standards, making it easier to report that their students were meeting mandated levels of proficiency. Fears of a race to the bottom have not yet been justified; the states’ responses have been more like a “walk to the middle,” albeit one that is slightly downhill. Since 2002, some states have raised their standards, but, to the chagrin of NCLB’s advocates, more have made their tests easier.²⁷ In addition, states have tended to set

23. See FREDERICK M. HESS & MICHAEL J. PETRILLI, *NO CHILD LEFT BEHIND: PRIMER* 31–34 (2006).

24. See *id.* at 35.

25. *Id.* at 42–43.

26. For analyses of the compromises that President Bush made in enacting NCLB, see Frederick M. Hess, *Why LBJ Is Smiling: NCLB and the Bush Legacy in Education*, AM. ENTER. INST. FOR PUB. POLICY RESEARCH, EDUCATION OUTLOOK, Dec. 2008, available at http://www.aei.org/publications/pubID.29057/pub_detail.asp, and Frederick M. Hess & Michael J. Petrilli, *Bush the Hall Monitor: On education-reform legislation, compromise trumped conservatism*, NAT’L REV. ONLINE, Dec. 23, 2008, <http://article.nationalreview.com/?q=YWJhNTRINGU0ZDIkYjZkMTVjNjU2Nzc3MTNlMzg0YzU=>.

27. See Chester E. Finn, Jr., *Dumbing Education Down*, WALL ST. J., Oct. 5, 2007, at A16.

very low standards in elementary grades and then dramatically raise them in junior high school, setting children up for failure.²⁸ NCLB also put off the most significant requirements for achievement gains until 2013–14.²⁹ As the magical date of universal proficiency approaches, NCLB, as presently designed, will further pressure states to lower standards. Thus, a law designed to inform parents and promote accountability instead fosters a smokescreen of proficiency.

Even with loopholes, NCLB was a much more coercive federal policy than anything that preceded it: It is more widely applicable to schools and more penetrating and burdensome in its requirements, especially the disaggregation of the student population into categories of putative disadvantage. Disaggregation was, for some liberals, the most valuable part of the Bush project—“the heart of what NCLB is all about,” according to a Democratic staff member³⁰—and also the most surprising, because the explicit racialization of policy seemed at odds with the conservative Republican critique of affirmative action. For local officials, disaggregation was the part of NCLB most offensive, inconvenient, and ill-conceived,³¹ particularly as it applied to English-language learners and students with disabilities, for whom federal policy prescribed unrealistic standards of annual progress.³²

Perhaps the clearest contrast between President Bush’s twenty-eight-page outline of January 2001 and the more than six hundred pages of law that Congress enacted lay in provisions for improving teacher quality. President Bush’s outline would have given states more flexibility in the use of federal funds “so that they may focus more on improving teacher quality.”³³ President Bush exhorted states to ensure that all children be taught by effective teachers, but this was an expectation, not a command. At the same time, the President’s compassion extended to teachers who were caught in violent classrooms:

28. *See id.*; *see also* JOHN CRONIN ET AL., *THE PROFICIENCY ILLUSION* 6–7 (2007).

29. *See* HESS & PETRILLI, *supra* note 23, at 33–34.

30. MCGUINN, *supra* note 4, at 189.

31. *See id.*

32. *See* Marie C. Scott, *Resegregation, Language, and Educational Opportunity: The Influx of Latino Students into North Carolina Public Schools*, 11 HARV. LATINO L. REV. 123, 146–47 (2008).

33. BUSH PAPER, *supra* note 3, at 5.

“Teachers will be empowered to remove violent or persistently disruptive students from the classroom.”³⁴ Moreover, in a provision designated for action outside of NCLB, “[t]eachers, principals, and school board members acting in their official capacity [were to] be shielded from federal liability arising out of their efforts to maintain discipline in the classroom, so long as they [did] not engage in reckless or criminal misconduct.”³⁵

President Bush had been bipartisan in Texas, and he set out to be bipartisan in securing the enactment of NCLB. He met with leading Democrats several times and assured them that he was open to their views. He seems to have developed particular rapport initially with “Big George,” as the President christened Representative George Miller, a powerful personality who occupied a powerful office as the ranking Democrat on the House Committee on Education and the Workforce.³⁶ With support from Republican Representative John Boehner, the committee chairman, who convened a bipartisan working group outside the normal committee structure, Big George achieved a big victory in the NCLB provisions governing teacher qualification. He had long been concerned with the subject; his proposed amendment to IASA, which failed by a vote of 424 to 1 in 1994, would have required teachers to be certified in the subjects they taught.³⁷ Yet Miller succeeded in adding language to NCLB that required every public school teacher in the country to be “highly qualified” by the end of the 2005–06 school year.³⁸ In general, to be highly qualified, teachers must be licensed or certified by a state, have a bachelor’s degree, and demonstrate a high level of competence in the subjects that they teach.³⁹ This was an enormous expansion of the federal government’s involvement in education policy.

Democrats prevailed with vouchers also—none were authorized—and in regard to the limited provision made for school

34. *Id.* at 6.

35. *Id.* at 13.

36. Nicholas Lemann, *Testing Limits: Can the President’s education crusade survive Beltway politics?*, *NEW YORKER*, July 2, 2001, at 28, 30–31.

37. *Id.* at 30.

38. See HESS & PETRILLI, *supra* note 23, at 20, 63–65.

39. *Id.* at 65.

choice.⁴⁰ President Bush's statement of principles had said that parents, "armed with data, are the best forces of accountability in education. And parents, armed with options and choice, can assure that their children get the best, most effective education possible."⁴¹ The law provided that students in schools that failed to make adequate yearly progress for two years in a row could transfer to another, more successful school within the district. Before long, advocacy groups, including Clint Bolick's Alliance for School Choice, complained that school districts were failing to inform parents of their options.⁴² Parents were mostly ignoring this purported instrument of accountability, perhaps because they lacked data, or because they were indifferent to the data, or because, as a practical matter, they lacked a better alternative school. In the 2006–07 school year, only 45,000 students, less than one percent of the total eligible, used the choice option.⁴³ The several advocacy groups that sought to help parents with lawsuits were handicapped by the law's omission of a private right of action.⁴⁴

It is typically the hope of executive branch reformers to rationalize the laws enacted by a large and diverse Congress, which is prompted both by constituency expectations and personal eccentricities. This was President Bush's hope in 2001 as he deplored the hundreds of programs that Congress had created in devising a "program for every problem."⁴⁵ NCLB, however, conformed to the congressional paradigm. It authorized more than fifty federal education programs, some new and some that already existed. NCLB was rife with special-interest features such as cultural and language education for Alaskan

40. See MCGUINN, *supra* note 4, at 159, 172; Rudalevige, *supra* note 15, at 40.

41. BUSH PAPER, *supra* note 3, at 18.

42. See Martha Derthick, Address at the American Enterprise Institute/Thomas B. Fordham Institute Conference, *From Brown to "Bong Hits": Assessing a Half-Century of Judicial Involvement in Education: Litigation Under No Child Left Behind* 13 (Oct. 15, 2008), available at <http://www.aei.org/event1746>.

43. David J. Hoff, *New Reports Track 'No Child Left Behind' Progress*, EDUC. WEEK, Jan. 21, 2009, at 5. See generally LEAVING NO CHILD BEHIND? OPTIONS FOR KIDS IN FAILING SCHOOLS (Frederick M. Hess & Chester E. Finn, Jr., eds., 2004).

44. See Derthick, *supra* note 42, at 13–14, 22.

45. BUSH PAPER, *supra* note 3, at 1.

Natives and, at the extreme, exchanges with historic whaling and trading partners.⁴⁶

As the Bush presidency ended, NCLB awaited reauthorization. The President had remained strongly committed to the Act and so had his original allies in the Democratic Party, Senator Edward M. Kennedy and Representative Miller.⁴⁷ There was evidence from national tests, which education experts generally treat as more credible than state tests, showing that the achievement gap in reading and math had narrowed, though in part for the wrong reason. Low-achieving pupils, defined as the ten percent with the lowest scores on the National Assessment of Educational Progress, had made big strides in most areas, while high achievers had failed to show any significant improvement.⁴⁸

Even with the encouraging signs of improvement among low achievers, which Administration partisans cited as proof that the Act was fulfilling its purpose, Republican support fell away as loyalty to the President waned and party members saw the negative consequences of what they had helped enact. Support from teachers and school administrators had never existed. The new president of the American Federation of Teachers said in 2008 that the law should be abandoned, as it was “too badly broken to be fixed.”⁴⁹ Invited by the *Washington Post* to offer advice to the incoming president, Diane Ravitch, a leading historian of education and former Assistant Secretary of Education under President George H.W. Bush, told President-elect Obama that he had a chance “to make a historic difference” by abolishing the law, which had “turned our schools into testing factories, narrowed the curriculum to the detriment of everything other than reading and math, and prompted states to claim phony test-score gains.”⁵⁰ *A Nation at Risk*, Ravitch lamented, had been “taken over by the testing and accountability

46. See HESS & PETRILLI, *supra* note 23, at 136–40.

47. MCGUINN, *supra* note 4, at 188–89, 192.

48. See TOM LOVELESS, HIGH-ACHIEVING STUDENTS IN THE ERA OF NCLB 19 (2008), available at http://www.edexcellence.net/doc/20080618_high_achievers.pdf.

49. Sam Dillon, *New Vision for Schools Proposes Broad Role*, N.Y. TIMES, July 14, 2008, at A11.

50. Diane Ravitch et al., *So You Want to Be Education Secretary . . .*, WASH. POST, Jan. 12, 2009, at B2.

posse," rather than remembered as an appeal for sweeping improvement in the quality of American education.⁵¹

II. HIGHER EDUCATION

The Higher Education Act,⁵² originally passed in 1965 and regularly reenacted, was due for reauthorization in 2003. Reauthorization moved slowly at first, without the benefit of executive impetus. During its first term, the Bush Administration was preoccupied with administering No Child Left Behind, which set off political brushfires in states as diverse as Connecticut and Utah.⁵³ Reauthorization of the Higher Education Act was completed only in 2008, after fourteen extensions.

Nevertheless, during its second term, the Bush Administration became deeply involved in higher education when Secretary of Education Margaret Spellings—a self-described hawk on accountability who moved from policy adviser within the White House to department head—set out to carry the accountability campaign to the nation's colleges and universities.⁵⁴

Spellings's vehicle was the Commission on the Future of Higher Education, which she created in the fall of 2005 to lead a nationwide dialogue about pressing issues in higher education.⁵⁵ Here, the political foundation lay in a widespread concern with costs, beginning with high and steadily rising tuition, even in elite institutions with spectacularly large endowments. The concern extended to hundred-dollar textbooks and the interest on student loans, which Democrats charged was enriching lenders while impoverishing students and parents.⁵⁶ Still,

51. Diane Ravitch, *A Nation Still at Risk*, HOOVER DIG., Fall 2008, available at <http://www.hoover.org/publications/digest/30694734.html>.

52. Pub. L. No. 89-329, 79 Stat. 1219 (1965).

53. See Sam Dillon, *Education Law Finds Few Fans in Utah*, N.Y. TIMES, Mar. 6, 2005, at 33; Avi Salzman, *A Fight Over Ideas In Education Suit*, N.Y. TIMES, Aug. 28, 2005, at 5.

54. See Paul Basken et al., *Bush's Legacy in Higher Education: a Matter of Debate*, CHRON. HIGHER EDUC. (Wash, D.C.), Dec. 19, 2008, at A14.

55. See Robert Zemsky, *Lower College Costs and Improved Student Learning: Real Answers Missing from the Spellings Commission Report*, ABOUT CAMPUS, July–Aug. 2007, at 7.

56. See Dale Buss, *Sometimes, It's Not the Tuition. It's the Textbooks*, N.Y. TIMES, Sept. 4, 2005, at 8; Greg Winter, *Closed Loophole Hasn't Cut Subsidies for Student Loans: Payments to Lenders Are as High as Ever*, N.Y. TIMES, Apr. 10, 2005, at 18.

no one in America needs to be trapped in a college not of his choice, as children in urban slums have been trapped in dysfunctional, often violent, schools. Whereas primary and secondary schools have been mostly a public monopoly, the market for higher education is extremely competitive. It has offered an ever-widening array of choice: not just the traditional brick-and-mortar four-year institutions on leafy campuses, but also community colleges, trade and technical schools, and for-profit schools that offer professional training. Online schools, which may be either public or private, have also emerged. Noting that many students are adopting a “cafeteria” approach to post-secondary education, making eclectic choices and frequent transfers even into middle age, the Spellings Commission defined higher education as all public and private education that is available after high school.⁵⁷

Given the overwhelming preoccupation with cost, there was not much evidence to support Spellings’s claim that the college-age population and its parents craved the metrics of student achievement. Privately published guides and websites; institutional reputations; campus visits; feedback from friends, neighbors, and siblings; college websites and videos; and the advice of high school counselors all supply a torrent of unscientific yet helpful information to which formal assessments cannot be expected to add much. Though federal officials might like applicants to choose colleges on the basis of how much learning, statistically rendered, they are able to impart per year attended and tuition dollar expended, applicants are likely to be influenced more by offers of aid, intercollegiate athletics, recreational and dormitory facilities, the quantity and quality of easily available food and drink, the intuition derived from a brief campus visit, and—for the more purposeful and mature applicants—the volume, variety, and dependability of course offerings. Moreover, even students know that how much they learn depends, in the end, on how hard they work.

The Spellings Commission kicked off in Charlotte, highlighting the leadership of former North Carolina Governor Jim Hunt,

57. See SEC’Y OF EDUC.’S COMM’N ON THE FUTURE OF HIGHER EDUC., *A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION*, at xi (2006) [hereinafter *A TEST OF LEADERSHIP*].

whose public career rested on education reform.⁵⁸ The commission was headed by the Secretary's friend from Texas, Charles Miller, an investor who likewise had a long record of involvement in education reform at the state level and had been chairman of the Board of Regents of the University of Texas.⁵⁹

Within a year the Commission produced a report warning of complacency.⁶⁰ It cited a long list of educational failures both in preparing students for college and in teaching them once they arrived.⁶¹ Over the past decade, literacy among college graduates had actually declined. Compounding all other difficulties was "a lack of clear, reliable information about the cost and quality of postsecondary institutions, along with a remarkable absence of accountability mechanisms."⁶²

Trying to stay ahead of the assessment tsunami, many colleges began using standardized achievement tests. On the first anniversary of the Spellings Report—at which point the secretary said, "[W]e haven't even started"⁶³—the Chronicle of Higher Education reported that the American Association of State Colleges and Universities and the National Association of State Universities and Land-Grant Colleges, representing more than 600 member institutions between the two of them, were developing a common system of online data presentation showing such statistics as the projected costs of attendance and standardized test results.⁶⁴ The Spellings Report touted as an example of outcome-based assessments the Collegiate Learning Assessment, which the Rand Corporation had developed to measure critical thinking, problem solving, analytic reasoning, and written communication, and which had been adopted by 230 colleges, including the Texas system and its fifteen member institutions.⁶⁵ The institutions most resistant to standard tests,

58. See Wanda Rushing, *Inequality and Education Reform: formulating a macro-historical sociology perspective*, 4 RACE ETHNICITY & EDUC. 33, 35–36 (2001).

59. Zemsky, *supra* note 55, at 2.

60. *See id.* at 3.

61. *See* A TEST OF LEADERSHIP, *supra* note 57, at x.

62. *Id.*

63. Paul Basken, *A Year Later, Spellings Report Still Makes Ripples*, CHRON. HIGHER EDUC. (Wash. D.C.), Sept. 28, 2007, at A1.

64. *Id.* at A20.

65. *Id.*

predictably, were the most prestigious, which were skeptical of the underlying concept of comparability.⁶⁶

So by 2007 it was fair to say, as Spellings did, that “[w]e’re under way,”⁶⁷ yet the going got rough early that year when she constituted a rulemaking panel to rewrite the federal regulations on college accreditation.⁶⁸ The Department of Education set out its aims in an issue paper prepared for the Secretary’s commission by Vickie Schray, a career official who later emerged as the Department’s leader of the ill-fated attempt at negotiated rulemaking.⁶⁹ Beyond insisting that colleges produce standardized, comparable measures of student performance as a condition of accreditation, Schray sought to transform the entire accrediting system.⁷⁰ Much of the issue paper was embraced by the Commission Report.⁷¹

Most college accreditation in the United States is performed by regional organizations composed of the member colleges operating through voluntary peer review.⁷² Schray dismissed this form as “self-regulation with minimal public input and government interference,” and therefore insufficient to protect the public interest.⁷³ She recommended nationalization and bureaucratization. Rather than have professors and administrators reviewing other professors and administrators, “reviews should be conducted by formally trained and certified inde-

66. *See id.* at A21.

67. *Id.* at A20.

68. *See* Doug Lederman, *Fault Lines on Accreditation*, INSIDE HIGHER ED, Feb. 22, 2007, <http://www.insidehighered.com/news/2007/02/22/accredit>.

69. *Id.*

70. *See* VICKIE SCHRAY, ASSURING QUALITY IN HIGHER EDUCATION: RECOMMENDATIONS FOR IMPROVING ACCREDITATION 4–8 (2006), available at <http://www.ed.gov/about/bdscomm/list/hiedfuture/reports/schray.pdf>.

71. *See* A TEST OF LEADERSHIP, *supra* note 57. As the Bush Administration ended, Schray became the Deputy Assistant Secretary for Higher Education Programs, a position that the Administration had converted from political to career status to accommodate her. Posting of Paul Basken to Chronicle of Higher Education News Blog, *At Education Department, as at Other Agencies, It’s Time for Some to ‘Burrow In,’* <http://chronicle.com/news/article/5528/at-education-department-as-at-other-agencies-its-time-to-burrow-in> (Nov. 20, 2008).

72. SCHRAY, *supra* note 70, at 1–2.

73. *Id.* at 5.

pendent reviewers that are experts in the application of national accreditation standards in the accreditation process."⁷⁴

An underlying objective, hotly contested, was to ease the transfer of credits among institutions with the goal of lowering costs and improving efficiency. Nonprofit institutions, which have predominated in American higher education, are now rivaled by profit-makers. As Schray's report somewhat obliquely put it, "[t]he changing structure and delivery of higher education includes new types of educational institutions and the use of distance learning, which allows institutions to operate on a global scale and holds the potential for improving value and access. . . . These new realities require new solutions to ease the transfer process."⁷⁵ Traditional campus-based colleges, however, wished to remain selective and hence to control admissions and transfers of course credits.

Congress stepped in to protect both the colleges' and its own prerogatives. Both in the Fiscal Year 2008 spending bill for the Department of Education and in the renewal of the Higher Education Act passed in 2008, Congress prohibited the Department of Education from regulating accreditation or accrediting organizations.⁷⁶ In addition, Congress ended the terms of all incumbent members of the Secretary's National Advisory Committee on Institutional Quality and Integrity (NACIQI) as of August 14, 2008 (the date on which the reauthorized Higher Education Act took effect), provided that no new members could be appointed until January 31, 2009⁷⁷ (by which time President Bush and his crusading Secretary of Education would have retired to Texas⁷⁸), enlarged NACIQI from fifteen to eighteen members, and provided that six members each

74. *Id.*

75. *Id.* at 3.

76. See Kelly Field, *A Bill That Took Longer Than a Bachelor's Degree*, CHRON. HIGHER EDUC. (Wash. D.C.), Aug. 8, 2008, at A11; Doug Lederman, *Congressional Timeout for Spellings*, INSIDE HIGHER ED, June 8, 2007, <http://www.insidehighered.com/news/2007/06/08/accredit>.

77. Higher Education Opportunity Act, Pub. L. No. 110-315, § 106, 122 Stat. 3078, 3093 (2008).

78. Bush did in fact go back to Texas, whereas Spellings stayed in Washington promising to remain "a warrior in [the accountability] battle." Alyson Klein, *Spellings' Worldview: There's No Going Back on K-12 Accountability*, EDUC. WEEK, Dec. 10, 2008, at 17.

would be appointed by the House of Representatives, the Senate, and the Secretary of Education (thus putting an end to the Secretary's exclusive right of appointment).⁷⁹ Having been authorized by statute in 1972, NACIQI was not Spellings's creation, but Congress clearly feared that it had become her instrument.⁸⁰ The leader of congressional opposition to the Department was Senator Lamar Alexander, a Republican who had been Secretary of Education under President George H.W. Bush, President of the University of Tennessee, and Governor of Tennessee.⁸¹

It would be wrong, however, to read the rebuke of Spellings as a sign that Congress disapproves of regulating higher education. The message to Spellings was "do as I say," not "do as I do." Proceeding with more than usual slowness, through six years and three Congresses, legislation for higher education during the Bush presidency followed the traditional trajectory of more student aid accompanied by more regulation.

The Higher Education Opportunity Act, which renewed the Higher Education Act in August 2008,⁸² was quintessentially a product of the legislature: 1158 pages long, with roughly seventy new spending programs targeted to narrow constituencies and nearly two hundred new reporting and regulatory requirements. Congress's overriding concern was cost. In 2003, Representative Howard P. McKeon, a California Republican and chairman of the House Committee on Education and the Workforce, proposed withholding federal aid from students at colleges whose tuitions increased faster than consumer prices.⁸³ That perverse plan was abandoned, but the law as enacted requires the Secretary of Education to list each year the higher education institutions, broken into nine categories, with the "biggest percentage increases in tuition and fees and in net

79. § 106, 122 Stat. at 3091.

80. See Basken et al., *supra* note 54, at A14; Doug Lederman, *Key GOP Senator Warns Spellings*, INSIDE HIGHER ED, May 29, 2007, <http://www.insidehighered.com/news/2007/05/29/alexander>.

81. Lederman, *supra* note 80.

82. § 2, 122 Stat. at 3082–83.

83. Terry W. Hartle, *Coming Soon: Lots More Federal Regulations*, TRUSTEESHIP, Nov.–Dec. 2008, at 8, 10.

price" (determined by subtracting aid from charges).⁸⁴ Furthermore, "[c]olleges with the fastest increases will be required to prepare reports that describe why tuition went up and the actions being taken to contain increases."⁸⁵ Higher education officials will be tempted to respond that one way they are trying to contain increases is to lobby Congress to refrain from imposing regulations that inescapably increase the cost of doing business.

Virtually none of the new regulations is in any way instrumental to the advance of learning. The subjects include, among many others, fire safety, missing students, readmission procedures for veterans, services for students with intellectual disabilities, lobbying, foreign gifts, and calculation of net prices.⁸⁶ Some of the most challenging components for colleges to implement will be rules designed to protect the interests of the entertainment industry, which claims that it loses millions of dollars a year through illegal downloading of music and video on college campuses. Colleges are required to offer music and video through subscription-based services "to the extent practicable," and to develop technology to curtail peer-to-peer networks through which students trade copyrighted material.⁸⁷

Congressional zeal for gratuitous regulation of higher education long antedates the Bush Administration and cannot be ascribed to anything that Bush or Spellings said or did. Indeed, in a stunningly disingenuous sentence, the Spellings Commission recommended that state and federal policymakers should work "to relieve the regulatory burden on colleges and universities."⁸⁸ In 2001, as Bush was entering office, the American Council on Education reported that "federal regulation of higher education ha[d] grown exponentially in recent years, sending institutional costs and liability soaring."⁸⁹ Much of the regulation has grown out of laws for civil rights, protection of

84. *Id.*

85. *Id.*

86. § 488, 122 Stat. at 3299, 3301; § 487, 122 Stat. at 3290; §§ 766–769, 122 Stat. at 3365; § 119, 122 Stat. at 3117; § 802, 122 Stat. at 3446; § 453, 122 Stat. at 3265.

87. *Id.* at 3309.

88. A TEST OF LEADERSHIP, *supra* note 56, at 2.

89. Richard M. Freeland & Terry Hartle, *Stemming the Rising Tide of Regulation*, PRESIDENCY, Fall 2001, at 24, 25.

the disabled, and protection of the environment rather than from the Higher Education Act, but that law seems from the start to have produced regulation with a peculiarly quixotic quality. For a time, colleges were required to report to the federal government whenever they changed a trustee—a regulation so preposterous that it very likely was never observed and did in fact die.⁹⁰

CONCLUSION

The United States contains more than 14,000 public school districts and more than 4000 institutions of higher education, together constituting one of the country's major industries.⁹¹ Since 1965, when Congress passed both the Elementary and Secondary Education Act and the Higher Education Act during the Great Society wave of government growth, these institutions have been subject to extensive federal regulation via conditional grants-in-aid for schools, fellowship grants, and subsidized loans for undergraduates in higher education. In general, federal spending has been designed to provide education more equally, with a focus on low-income populations in Title I of ESEA and on financial need in the bulk of collegiate grants and loans.

In primary and secondary education, the Bush Administration, with substantial help from Democrats in Congress, pushed federal policy decisively into a different and deeply problematic realm in which the federal government seeks to sanction public schools for failing to produce well-educated children. The aim is of course laudable, with its emphasis on closing the achievement gap and ending "the soft bigotry of low expectations,"⁹² as the President often said. The trouble, keenly felt by the nation's teachers, is that the performance of school children depends not only on the motivation, effort, and skill of their teachers, but also on a host of social, economic,

90. *Id.* at 26; see also Terry Hartle & Melanie Corrigan, *A Road Map to Federal Compliance*, PRESIDENCY, Spring 2006, at 10–13.

91. NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, 2007, at 117 tbl.83, 385 tbl.255 (2008), available at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2008022>.

92. Adam Clymer, *Bush Seeks to Secure California's Big Prize*, N.Y. TIMES, Mar. 6, 2000, at A16 (quoting President Bush).

cultural, and psychological factors that are beyond the reach of the schools. Above all, performance depends on the family environment of the children. In his classic work on government agencies, James Q. Wilson rightly classifies schools not as “craft organizations,” in which outputs and outcomes are observable and hence subject to management, but as “coping organizations,” in which administrators “cannot tell how much students have learned (except by standardized tests that do not clearly differentiate between what the teacher has imparted and what the student has acquired otherwise).”⁹³ The beguiling temptation, succumbed to by the Bush Administration, is to suppose that schools can be transformed into production organizations without significant cost to their efficacy.

Confident of the same false premise—that the products of a college education are readily measurable and just as readily attributable to actions of the collegiate institution—the Administration carried its accountability campaign into higher education. But there, Congress balked and saved the Administration from itself by the anomalous insertion of a prohibition against regulating accreditation in a statute that otherwise was laden with countless new regulations of Congress’s own devising. Some of the strongest defenders of the status quo in accreditation were conservatives who regretted having voted for NCLB.⁹⁴ Thanks to congressional intervention and the work of Senator Alexander, policy under the Bush Administration was less damaging to the country’s educational institutions than first proposed, yet it was disappointing to conservatives nonetheless.

Arguably, an allegedly conservative Administration should have been less disrespectful of the institutions of federalism, and should have hesitated before adopting a standard of universal proficiency that would brand as failures a sizeable share of the nation’s schools, subjecting them to shame—as if being

93. JAMES Q. WILSON, *BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT* 159, 168 (1989). The Authors are indebted to R. Shep Melnick for reminding them of the pertinence of Wilson’s typology to an understanding of the issue of accountability. See R. Shep Melnick, Address at the American Enterprise Institute/Thomas B. Fordham Institute Conference, *From Brown to “Bong Hits”: Assessing a Half-Century of Judicial Involvement in Education: Taking Remedies Seriously: Judicial Methods for Controlling Bureaucratic Discretion in Public Schools* 9 (Oct. 15, 2008), available at http://www.aei.org/docLib/20081010_Melnick3.15.08.pdf.

94. Editorial, *Running from ‘No Child,’* WASH. POST, Nov. 27, 2007, at A16.

shamed would help the poor performers among them improve. One might have thought also that the Administration would exhibit more confidence in the ability of higher education's consumers to hold colleges accountable by taking advantage of a fiercely competitive market. Above all, one would have hoped for more introspection and curiosity about the effects of the federal government's own actions.

In 1987, President Reagan's Secretary of Education, William Bennett, chastised colleges and universities for tuition increases that far outstripped inflation.⁹⁵ Part of the reason, he said, was federal financial aid to students, which enabled them "blithely to raise their tuition, confident that federal loan subsidies would help cushion the increase."⁹⁶ A study group such as the Spellings Commission, which called for increasing federal aid to students, might be expected to take the trouble to rebut this claim rather than assert that rising costs could be cured by "technology," "productivity improvements," and the national imposition of "performance benchmarks."⁹⁷ Moreover, there persisted an indifference, both within the executive branch and the legislature, to the heavy and steadily-growing burden of federal regulation and the resulting increases in costs at all levels of the education system (as assistant principals and assistant deans multiply in an effort to generate the detailed data and the endless reports that the federal government demands).

Even if the federal government stops short of its most extreme ambitions, as it did in 2008, college administrators respond by acting defensively and putting in place "voluntary" regulations that anticipate what an intrusive government is expected to require. In many of the four-year colleges, faculty members today can attest to growing, time-consuming, and intensely bureaucratic burdens of self-assessment, often linked to review of accreditation.⁹⁸

Finally, in the realm of presidential rhetoric, the Bush presidency was so strenuous and dogmatic in calling schools to ac-

95. William J. Bennett, Op-Ed., *Our Greedy Colleges*, N.Y. TIMES, Feb. 18, 1987, at A31.

96. *Id.*

97. A TEST OF LEADERSHIP, *supra* note 57, at 2.

98. See Doug Lederman, *Whither Accreditation?*, INSIDE HIGHER ED, Jan. 28, 2009, <http://www.insidehighered.com/news/2009/01/28/accredit>.

count that it failed to invite attention to the accountability of others, including the general citizenry, parents, and even schoolchildren. Accountability is indeed an important value and it should be expected of public institutions, but as Marian Robinson rather dramatically demonstrated in the upbringing of a child who went from Chicago's South Side to Princeton, Harvard Law School, and the White House, it has an important place as well when applied to young individuals. Incorporating that thought in presidential rhetoric would not constitute a sufficient federal education policy, but might be the beginning of a prudent and sensible one.