



11 Ways the Federal Government Is Making It More Difficult to Access Career Pathways

Michael Brickman

October 2024

Key Points

- The federal higher education and workforce systems live in mortal fear of a single dollar being wasted by those outside their reach, but when insiders waste billions of dollars year after year, concerns are muted at best.
- Although often well-intentioned, supporters of the education and workforce regulatory state have created a system that seems almost purposely designed to kill innovation and opportunity.
- We must abandon our obsession with trying to bubble wrap learners in “protective” regulations and instead embrace a flexible structure that allows *anyone* to serve learners, with additional funds flowing to only those who succeed in doing so.

America is becoming worse at connecting workers with jobs—in part because it is unnecessarily difficult to offer and access education and training that could prepare students for a career. Two decades ago, there were just over three million open jobs, and it took, on average, fewer than 20 days to fill an open position;¹ today, the number of open jobs has more than doubled, and it takes more than 50 days to fill each of those positions.²

It is also becoming more difficult for students to receive the education they need to get these jobs. A year’s college tuition, for instance, cost less than \$5,000 (in 2023 dollars) 60 years ago, a figure that had more than tripled by 2023.³ During the 2021–22 school year, US educational institutions spent a whopping \$1.6 trillion, representing 7 percent of the nation’s gross domestic product.⁴

Unfortunately, while spending on education and workforce development programs continues to increase, a steady stream of regulatory and sub-regulatory barriers enacted at the federal level are making it harder to achieve one of these programs’ primary objectives: connecting people with good jobs.

Although often well-intentioned, supporters of the education and workforce regulatory state have created a system that seems almost purposely designed to kill innovation. It is a system with high walls that prevent not only entrance but also exit. An entrepreneur with a creative idea to better serve learners will find it almost impossible to qualify for and receive meaningful funding directly and will likely encounter more barriers to receiving indirect support (such as by operating as a vendor to an eligible provider) compared to just a short time ago.

Inversely, a provider that has been failing learners for decades will be almost impossible to remove from funding eligibility, particularly if it is a nonprofit or public entity. And increasingly, when learners fail within these walls, they are bailed out with ever-greater taxpayer subsidies, such as the current administration’s recent loan-forgiveness efforts costing several hundred billion dollars, which only serve to further bolster the approved providers’ failure.

Meanwhile, sentries roam the walls, stamping out any new and innovative ideas within and eliminating

anything that attempts to gain entry (or even lob assistance over the walls to those inside). This dynamic has been worsening for decades but has been exacerbated by regulations (currently proposed and enacted) from the Biden-Harris administration.

The current system lives in mortal fear that an outsider will waste a single dollar of taxpayer funds in their efforts to solve these problems, but when insiders waste billions of dollars year after year, concerns are muted at best. To effectively serve learners, we must abandon our obsession with trying to bubble wrap them in “protective” regulations and instead embrace a flexible structure that allows anyone to serve learners, with additional funds flowing to only those who succeed.

Why Are Regulations Making It More Difficult to Serve Learners?

The specific barriers that government regulators have erected between their stated goals and realistic pathways to achieve them vary by program but can be roughly broken into two categories.

Barriers to Entry. Regulations make it exceedingly difficult to become a provider of education and training. The ostensible purpose of this red tape is to protect students and taxpayers from bad outcomes. For example, for a higher education provider to access Title IV funds under the Higher Education Act (HEA), it must gain approval from three separate parties: the US Department of Education, a federally recognized accreditor, and its state. This is hard to do, as evidenced by the overwhelming 98 percent of American college students who attend an institution that is more than 20 years old.⁵

In fact, the University of Austin (UATX) may be the only new institution of its kind created in decades. To grant it state authorization, a process that took over 10 months, the state of Texas had to dust off mammoth rulebooks that hadn’t been used, much less revised, in generations. Indeed, the chapter of the Texas state code governing state authorization is some 80,000 words long, and, according to Michael Shires, UATX’s chief of staff, it had been 60 to 70 years since Texas had authorized an institution of its kind.⁶

Unfortunately, this experience is not unique to the Lone Star State. According to data collected by the Postsecondary Commission, a rare upstart postsecondary

accrediting body, only 135 new four-year institutions have been created nationwide in the past two decades.⁷ This may sound like a lot, but the majority of these “new” schools are either new campuses of existing university systems or small boutique schools, such as career-focused or religious schools: 59 have enrollment under 100, and only 18 have more than 1,000 students enrolled at any one time.

And even this overstates the case. Many of these institutions, for instance, are not actually new but simply had previously lacked accreditation. Others, like Ashford University, the largest school started in the past two decades, opted to merge with existing university systems. Similarly, Trident University International, a for-profit institution of about 4,500 undergraduate students, is now part of a larger system of institutions but still operates semi-independently, meaning it could be the largest new college or university created since at least 2002.

Workforce programs are similarly burdened under the Workforce Innovation and Opportunity Act (WIOA). Being added to a state’s eligible training provider list isn’t so difficult, but actually receiving funding requires navigating an excruciating labyrinth of state, federal, and local laws, regulations, procedures, and just plain made-up provincial customs.

Barriers to Exit. On the other side of things, there is significant infrastructure in place to hold existing institutions accountable, but most of it never sees active duty. This is primarily because once a program is approved, it is exceedingly difficult to revoke its status. Under the HEA, almost nothing can be done to punish bad outcomes among approved providers except for, in recent years, for-profit colleges, which serve a small and shrinking subset of the student population. Even this limited accountability mostly punishes them for taking on lower-income students looking to enter modest-paying occupations. Meanwhile, the nonprofit and public institutions that serve about 90 percent of students receive only ever-growing subsidies with almost no accountability.

Despite existing in the name of accountability and oversight, so-called consumer protections almost never trigger the shutdown of an institution that is still successfully attracting enough students to stay afloat financially, regardless of student outcomes. Indeed, only a tiny fraction of accreditor actions seem to be in line

with one of their primary reasons for existing: disciplining institutions that produce inadequate student outcomes.⁸

Community colleges receive more than \$18 billion in federal aid per year, but fewer than half their students will graduate within six years.⁹ Even this may overstate their rate of success, as many community college programs, though often affordable, actually leave their students worse off. Without controlling for completion rates, a remarkable 43 percent of these associate degrees still yield a negative return on investment.¹⁰

Unfortunately, workforce training programs funded by WIOA, the US Department of Labor's major funding stream aimed at workforce development, also fail far more often than they succeed. A mere 38.6 percent of adults who undergo WIOA-funded training end up in a job related to the program that they completed.¹¹

When this system of barriers fails to help either learners or taxpayers, supporters of the education and workforce regulatory state often resort to supporting the fleecing of taxpayers for potentially trillions of dollars in loan forgiveness while the system that led us here continues to operate as before.

A State of Perpetual Crisis

Since new entrants cannot force innovation and poor performers are rarely removed from the system, rule of law seldom prevails in this walled garden. All this is not to say that actors are not sometimes removed from the system. The problem is that the process for doing so tends to more often resemble a mob hit than a thoughtful and impartial accountability apparatus.

This typically involves jumping from crisis to crisis, often of the manufactured variety, attacking “bad actors.” These “crises” are the engine that drives and justifies the ever-growing thicket of regulations and sub-regulatory enforcement actions that only further protect incumbents and prohibit new entrants. Policy-makers layer on new requirements or simply replicate the “transparency,” “accountability,” “safety,” or “consumer protection” requirements that made old programs ineffective.

Rather than inviting new models and providers in, supporters of the status quo aggressively keep them out, slamming the door shut on each new challenger until the seal is virtually airtight. This ratcheting up

of regulations over time follows a familiar pattern, in which a real or imagined “bad actor” is made into a scapegoat to justify further government action.¹² Here is how it usually transpires:

1. The federal government identifies a target in the private sector.
2. Government officials or activists raise “concerns” about that target. Leading questions are asked of the Government Accountability Office or other perceived “neutral observers” to validate these views.
3. The target suffers from greater regulatory scrutiny or merely the anticipation of such scrutiny (in the form of reduced investment, lost partnerships, or bad press).
4. The government may take regulatory action to make it harder for the target (and its peers) to operate.
5. Regardless of the particulars, the result is often a self-fulfilling prophecy that hampers innovation, harms students, kills jobs, and wastes taxpayers’ resources.

How Recent Actions Are Making a Broken System Even More Sclerotic

Those involved in education and workforce policy and programs can likely point to numerous examples of this pattern playing out, but it is worth outlining some recent and particularly troubling examples.

Apprenticeships. WIOA provides \$3.6 billion annually for workforce training.¹³ However, WIOA’s overall funds go to a variety of programs, many of which are not particularly effective. Of the more than 220,000 workers who received “training services” under WIOA, for instance, fewer than 10 percent received training linked to a specific job.¹⁴ Even further, nearly 50,000 of these workers have been enrolled in WIOA’s supposedly short-term training for more than two years.

Much of this stems from the burdensome process of obtaining funds. Providers must be on approved state lists, convince local workforce boards (one at a time) to actually fund them, and finally report hundreds of data points for each worker served.

I have personally spoken with workforce boards that admit to having no relationship with the largest employers in their region and, after serving very few workers, spending leftover money on furniture and travel

junkets. To make things worse, the government must pay intermediaries to help regulated parties understand and navigate its regulations. A batch of new regulations proposed by the Biden administration throws up even more hurdles, making it harder for employers and intermediaries support more apprentices.¹⁵

How the Government Is Hurting Those It Says It Wants to Help. In short, outside of a generally union-managed pipeline of apprentices in the trades and some other exceptions, most of the talk about apprenticeships is mere talk. Apprenticeships are extremely difficult to break into and almost impossible to scale due to the qualification and reporting requirements coupled with local control of small pots of funds. The aforementioned proposed regulations certainly won't help anything in this regard.

Current Status. The Department of Labor has proposed revisions to the regulations governing the national apprenticeship system that would narrow the scope of apprenticeship programs, revise the state governance process, and more clearly delineate approved pipelines to programs.¹⁶ A final rule is expected by the end of the calendar year.¹⁷

What We Can Do About It. We should oppose these new barriers and work to reauthorize WIOA to give states more authority to manage local workforce boards and ensure that those willing to hire and provide high-quality training at scale can also receive funding at scale.

College Accreditation (and the Creation of New Accreditors in Particular). In 2019, the Department of Education, led by Secretary Betsy DeVos, loosened requirements for becoming a college accreditor to break the regional monopoly that existed before and overcome the incentives that made it difficult for accreditors to meaningfully sanction the institutions they regulate. As a result, several new organizations are seeking federal recognition and intend to explore new innovative models to hold colleges accountable for results.

How the Government Is Hurting Those It Says It Wants to Help. Unfortunately, these new actors are perceived threats to the current administration's appointed

gatekeepers. The department is currently considering regulations that would make starting new accreditors much more difficult and has been quick to attempt to curtail states that have looked to break out of the accreditation monopoly.¹⁸

Current Status. The department plans to release a proposed rule in late 2024, which will likely include provisions making it more difficult for institutions to run online college programs and serve students in multiple states.¹⁹ It is also considering changes to accreditation that would once again make it more difficult to start a new accreditor or switch accreditation. When Florida passed legislation requiring its state schools to switch accreditors each accreditation cycle, the department threatened the state, insinuating it had no right to tell its public universities what to do.²⁰

What We Can Do About It. The proposed regulations should mostly be opposed, although some technical fixes may be harmless. States should promote accreditor freedom as Florida and North Carolina have done, and reformers should support the several new accreditors being formed in the wake of the DeVos regulations.²¹

Online Program Management Organizations and Other "Third-Party Service Providers" to Colleges and Universities. When online education began to really take off in the early 2010s, many traditional institutions lacked the capacity or interest (or both) necessary to make such programs successful. Online program management organizations (OPMs) offered them the opportunity to focus on academic content without having to become technology providers themselves. This arrangement risked running afoul of a federal prohibition on institutions paying "any commission, bonus, or other incentive payment" tied to "securing enrollments or financial aid," but the Obama administration made it clear that OPMs could provide recruitment services as long as they were part of a larger bundle.²²

How the Government Is Hurting Those It Says It Wants to Help. The Biden administration is attempting to disrupt a compromise that has worked well for years and contributed to the rise of online and competency-based education that has been vital to countless students,

especially adult learners. The Department of Education published a letter that dramatically expanded the definition of what might be considered a third-party servicer subject to the department's regulations.²³ This would include not only OPMs but also entities supporting "any other aspect" of the administration of federal financial aid or the statutory or regulatory requirements associated with it. In other words, literally anyone doing business with a college or university could be regulated.

Current Status. The administration received significant backlash for its efforts, including from many public and nonprofit universities that benefit from the services OPMs provide. The department has "clarified" things several times and generally backtracked, but the risk remains. Meanwhile, some states and accreditors may take up this ideological fight against capitalism in higher education. This summer, the department announced a mid-2025 date for the release of a proposed rule on third-party servicers, but it may act before the end of the calendar year on incentive compensation.²⁴ Much of the damage has already been done, though: The best-known OPM recently announced it was undergoing Chapter 11 restructuring, but the company's leadership has expressed optimism, and it appears they have come out the other side with an ability to move forward.²⁵

What We Can Do About It. Rather than allowing regulators who misunderstand how the private sector works to misinterpret the law to the detriment of student accessibility and affordability, Congress should codify the Obama-era compromise and allow the private sector to continue to help colleges meet student needs.²⁶

Gainful Employment. The words "gainful employment" originated from the HEA differentiating traditional colleges from for-profit colleges (and some community college programs), the latter of which must "prepare students for gainful employment in a recognized occupation" to be eligible to receive federal aid.²⁷

How the Government Is Hurting Those It Says It Wants to Help. As the Obama administration attempted previously, the Biden administration is seeking to transform this simple phrase into a complex formula involving students' postgraduation debt and earnings. Poor performance could result in a loss of financial-aid

eligibility—a death penalty for almost any college or university.

Current Status. The department released a final rule on the topic last year—and the regulations have gone into effect—but the deadline for institutions to report their metrics has been repeatedly delayed, most recently to January 15, 2025.²⁸ (Ironically, this delay is partly collateral damage from the department's own ineptitude rolling out the new Free Application for Federal Student Aid application.) While lawsuits have been filed, the department still plans to proceed with shutting down programs that fail the gainful employment standard in 2026. The outcome of the 2024 election will likely impact whether that happens.

What We Can Do About It. Replace sector-based accountability with a reauthorized HEA that requires colleges and universities to cosign their students' loans while granting flexibility for them to determine the financing that is offered to students. The problem of fields of study that consistently do not provide a positive return on investment can be solved by reducing degree inflation and lowering barriers to state occupational licensing.

The 150 Percent or "Bare Minimum" Rule. In yet another regulation aimed at postsecondary programs designed to prepare students for careers, in 2023, the Department of Education published a rule that would limit the length of "gainful employment" (mostly for-profit) programs to no more than the number of hours required for state licensure.²⁹ For decades, the department has said that programs can be 150 percent of the length a state requires, but now are changing course and attempting to enact what is being called the "Bare Minimum Rule." While proponents of other regulations targeting proprietary colleges may at least have a reasonable-sounding justification other than simply attacking this sector, this particular regulation is hard to justify for any reason except to close such programs or make them less competitive than their nonprofit and public counterparts.

How the Government Is Hurting Those It Says It Wants to Help. While states are often overzealous in their occupational licensing requirements, these requirements are well understood to represent the minimum training

necessary to work safely in a certain occupation. For many occupations, however, students need training beyond what their state requires to equip them to provide the services the market demands. In trades, cosmetology, massage therapy, and many other fields, specialized skills may be required, and such additional training may change over time with variations in consumer desire. The government has decided to pinch pennies on these particular programs, which often have direct paths to in-demand jobs. Conversely, it is doing nothing to limit access to funding for programs at elite universities, which can offer programs that cost many times more and have a lifetime return on investment of as low as *negative* \$1 million.³⁰ A further likely outcome of this regulation is that some states will simply increase the barriers to licensure in order to qualify their state's students for federal financial aid, placing an even greater burden on workers. While states should be creating flexible licensure regimes that allow students to get licensed based on competency, this federal policy could force them to double down on licensure tied to hours.

Current Status. The department released a final rule on the topic in 2023, but schools in Texas offering massage therapy and other programs sued and won a preliminary injunction, which has halted the rule.³¹ The judge noted that the change by the department “represents a sea-change from thirty years of established practice” and agreed that the rule “reflects a dearth of justification for the department’s pivot on the 150 percent Rule.”

What We Can Do About It. Ideally, Congress would clarify these issues and move away from time-based regimes altogether, but short of that, the Department of Education should revert to its prior regulations, which allow students in career-focused training programs to get the training they need to succeed in those careers. Anything less than that seems like an obvious attempt to undermine congressional intent. They could go even further to provide broader flexibility and a looser tie to state occupational licensing requirements so that federal regulations are not making it more difficult for states to license occupations based on a measure of competency rather than seat time.

The 90/10 Rule. The “90/10 Rule,” enacted by Congress in the 1990s, requires for-profit colleges and universities

(but not others) to get at least 10 percent of their revenue from nonfederal sources, capping the amount of federal funding they can receive at 90 percent. This expectation is defensible, though there is probably no good justification for applying it to only one sector. However, there has always been some gray area in terms of what counts on the “90 percent federal” side versus the “10 percent nonfederal” side of the ledger. For instance, Congress recently changed the law to say that federal aid from non-Department of Education programs—such as those for veterans—must count on the federal side.

How the Government Is Hurting Those It Says It Wants to Help. The Biden administration is now using this recent legislation to enact regulations that further tighten the screws on for-profit colleges and universities. For example, it is limiting how colleges’ own aid programs can count in the 90/10 calculation. These programs are designed to make college more affordable for students, but this new treatment could result in less ability to offer aid to those who need it. In addition, the Department of Education is using its enforcement power to go after colleges and universities accused of wrongly classifying their funding, and activists are encouraging them to do more of this.³²

Current Status. The department released a final rule on the topic last year, and the regulations have gone into effect.³³ The department has also issued sub-regulatory guidelines meant to “interpret” the regulations it had just enacted, but even those seem to be designed to head off any possible flexibilities.³⁴

What We Can Do About It. Changes would require a new rulemaking effort under a new administration. However, a new Republican administration could quickly change its stance on enforcement and its issuance of sub-regulatory guidance, which can have significant implications for on-the-ground flexibility. A broader congressional fix on accountability would probably also make this provision unnecessary.

The National Council for State Authorization Reciprocity Agreements (NC-SARA) and State Authorization. To receive federal aid, colleges and universities must be authorized by the Department of Education, a federally recognized accreditor, and their state. As online

learning and branch campuses far from universities' home bases proliferated, the Obama administration took the confusing step of requiring institutions to be authorized in *each* state where they had students. Sometimes a student's location was difficult to know and could change if a student carried a laptop over state lines. As a result, every state except California joined an NC-SARA, a compact designed to ease these burdens through reciprocity. Now the federal government wants to undermine this state-led effort to cope with the initial federal overreach.

How the Government Is Hurting Those It Says It Wants to Help. At the urging of a few vocal activists, the Biden administration is seeking to sever this lifeline and impose the California model on the entire nation.³⁵ Specifically, the administration wants to permit states to enforce their own statewide regulations on any online colleges that their residents attend.

Current Status. Rulemaking has commenced, but a proposed rule is not expected until November 2024, and early plans have already received significant pushback due to the likely chaos they would cause.³⁶ Thus, we are unlikely to see a final rule before Inauguration Day in 2025.

What We Can Do About It. Such misguided plans, which are far outside the mainstream of even the higher education establishment, should be rejected outright. So too should the proposal to reinstate burdensome regulations that force online learning providers to assign make-work to students.³⁷

Short-Term Pell. Many jobs could be done with less training, and there is a bipartisan consensus that more jobs should drop college degree requirements.³⁸ The key to making skills-based hiring work is a proliferation of short-term training and credentials that job postings signal for. Short-term Pell promises to permit billions of dollars in annual federal student aid to be used to fund such programs. During the Obama administration, a promising pilot program called Educational Quality Through Innovative Partnerships (EQUIP) failed because it required short-term training providers to meet all the requirements of traditional comprehensive universities (including accreditation) *and then* meet the requirements of an additional quality assurance entity.

How the Government Is Hurting Those It Says It Wants to Help. Disappointingly, the proposals with the greatest momentum create enormous barriers that mirror the ineffective EQUIP experiment.

Current Status. There are currently two legislative proposals aimed at bringing about short-term Pell: the Jumpstart Our Business Startups (JOBS) Act and the Bipartisan Workforce Pell Act (BWPA).³⁹ The JOBS Act was slated to be considered by the Senate last year but has been indefinitely postponed. Attempts to bring the BWPA to the House floor have thus far been unsuccessful.

What We Can Do About It. Half measures such as the current short-term Pell proposals may seem like progress to some, but they will merely lock in the burdensome regulatory regime that has caused so many other programs to fail. Worker- and employer-aligned advocates should stop promoting them until Congress can muster the votes for more meaningful reforms. In the meantime, other efforts such as skills-based hiring in the public and private sectors should be supported alongside the growing state movement to remove barriers such as college-degree requirements and protectionist occupational licensing.⁴⁰

Nonprofit Conversion and Acquisition of For-Profit Institutions by Public Institutions. A natural consequence of the effort to sanction *only* for-profit universities is that many of them will attempt to stop being for-profit. Institutions like Grand Canyon University have spent years attempting to convert and have faced (likely politically motivated) retribution from multiple government agencies in the process.⁴¹ The University of Phoenix is similarly looking to drop its for-profit status via acquisition by the state of Idaho, a common-sense approach that would give the state significant new in-house capabilities.⁴² However, the university is already facing scrutiny from the usual suspects on Capitol Hill and some in-state concerns due in part to fears that federal regulators could come calling even after the deal goes through.⁴³

How the Government Is Hurting Those It Says It Wants to Help. Legislators in Idaho have raised concerns, some of which are specific to Idaho politics, but this and similar

acquisitions have faced scrutiny from some of the activists who ought to be the happiest about a public institution absorbing private-sector capabilities.

Current Status. Most of the former for-profit college industry has either successfully converted or closed. Although there are still nearly 800,000 students enrolled in for-profit institutions, this figure decreased by more than 50 percent over the past decade and continues to drop rapidly.⁴⁴

What We Can Do About It. There is no reason that the Department of Education should have a greater say about tax status than the IRS or states. Any such supposed authority should be promptly revoked. So too should accountability mechanisms at the department, which are based on tax status. If accountability is instead based on student outcomes, these compounding problems of the department's own making will disappear.

Textbooks. The Biden administration is currently pushing to roll back an Obama-era policy that allowed higher education institutions to provide students with course materials at below-market rates by lumping their cost in with tuition and fees.⁴⁵ According to the Association of American Publishers, the cost of textbooks and other materials has declined by 57 percent over the past decade, thanks to the proliferation of more affordable digital tools and innovative strategies by colleges and universities to make these resources more affordable.⁴⁶ Now the federal government wants to intervene, but it has a much greater chance of making the problem worse than it has of contributing to continued gains.

How the Government Is Hurting Those It Says It Wants to Help. The new policy's ostensible purpose is to cut down on "automatic fees" by preventing colleges from bundling textbooks into the overall price charged to students. Under current practice, students still have the opportunity to shop around, but these practices provide a default option that is usually more affordable than the alternative, because colleges can benefit from economies of scale and pass savings on to students. But the proposed changes would likely prove fatal to the progress that has been made in recent years. The reality is that many students, especially those with financial challenges, would

simply go without required materials, to the detriment of their own education.

Current Status. As of yet, no federal rulemaking has been proposed to implement these changes. The department's most recent regulatory forecast suggests an open-ended date for a proposed "cash management" regulation (which is likely the package of regulations that would contain these changes), meaning a final regulation would almost certainly not come during this presidential term.⁴⁷

What We Can Do About It. Free-market solutions have worked to improve affordability for textbooks and other materials (an issue that was recently considered a crisis). More federal regulations would only reverse these improvements and should be opposed.

Independent Contractors. One of the best ways to break into a field for which you have competence but lack formal qualifications is to start your own business or contract out your services. However, a rule released by the Department of Labor earlier this year will make this more difficult.⁴⁸

How the Government Is Hurting Those It Says It Wants to Help. The independent contractor rule would overturn a Trump-era regulation that expanded the definition of "independent contractor," which allowed employers greater flexibility in terms of what counts as a contractor.⁴⁹ Many fear that employers will abuse this flexibility to deny benefits or higher wages to what are essentially full-time workers. This concern is reasonable, and such practices should be avoided. However, the proposal does not necessarily give employers certainty on fair rules and instead moves the line but leaves it fuzzy, which will likely discourage some employers from using contractors at all (which is likely the point). This makes it more difficult for Americans to become entrepreneurs, earn extra income with a side gig, or simply have the freedom to chart their own workforce path.

Current Status. The Department of Labor released a final rule on the issue in March 2024.⁵⁰ Business groups, including the US Chamber of Commerce, are suing to stop it. In their view, "Under the new test, businesses and employers—especially small businesses—will face

confusion and uncertainty when trying to determine whether they have properly classified their workers.”⁵¹

What We Can Do About It. The new regulations should be opposed, and groups representing workers and employers should continue to aggressively defend their right to set up fair workplace arrangements without interference from the federal government. Meanwhile, workers being treated unfairly by employers can and should institute the most effective form of accountability: finding work elsewhere.

Looking Forward

Proponents of the freedom to provide and choose from a number of high-quality career pathways must fight back more forcefully against attempts to limit this freedom. This starts with overturning the notion that the barrier to receiving funds to provide education and training should be remarkably high, especially while the standard for being removed from such programs is virtually nonexistent.

In some ways, this is happening already. After many thought that the likely illegal Saving on a Valuable Education (SAVE) plan would quietly take effect, 18 states decided to fight back and, so far, have won several injunctions against it.⁵²

Meanwhile, attempts to go after for-profit colleges through borrower defense (i.e., forgiving loans if students are “harmed”) and gainful employment (i.e., revoking access to federal student aid if students are unsuccessful in careers after graduation) are also being aggressively challenged in courts.⁵³ These and other challenges stand a better chance at succeeding with the Supreme Court’s recent ruling ending the *Chevron* doctrine in *Loper Bright Enterprises v. Raimondo*.

A similar pattern holds for the Biden administration’s attempts to regulate OPMs and potentially much of the broader “edtech” sector. As detailed above, early proposals to do so have received significant pushback, even from some of the administration’s traditional allies.⁵⁴

But that does not mean supporters of a more innovative and accountable education and workforce system should rest on their laurels. More bad ideas are

in the pipeline already. Take the National Association of Colleges and Employers (NACE), which represents “17,000 college career services professionals” and their partners.⁵⁵ Their marquee policy initiative would ban unpaid internships. NACE might have good reasons for preferring paid internships, but the thoughtlessness with which such a group would attempt to forcibly deny opportunities to young people in the name of helping them, without considering the blindingly obvious likely outcomes, is cause for serious concern.

At the state and federal levels, transformative change away from these types of approaches is needed. If an education or training provider is given a fair opportunity to make its graduates better off and fails, its access to funding should be promptly severed. But many for-profit, nonprofit, and public providers have been consistently failing for decades without consequence, while promising models and countless invisible entrepreneurs are kept from entering the market by a nearly impenetrable wall of regulations.

The damage done to programs providing career pathways is sometimes indistinguishable from sabotage. The adage commonly referred to as Hanlon’s razor warns against attributing to malice that which can be adequately explained by incompetence.⁵⁶ In the case of recent education and workforce policies, the proposed or enacted changes are often so misguided as to make one wonder whether they are truly the result of good intentions and poor execution or special-interest-driven harm packaged in press materials designed to score political points by seeming helpful.

Taken together, they call for fundamentally different approaches from those of the parties they are meant to regulate. Rather than being taken at face value and negotiated in good faith, the targets of these regulations should at least consider the possibility that these policies come from a model of how the world works so fundamentally broken that it cannot be reasoned with—or so corrupted by special interests that it should be viewed as an open attack by anyone attempting to do good work by educating the next generation. In short, more affordable and accessible paths to good jobs are possible and certainly worth pursuing, but they will be difficult to bring about without a fight.

About the Author

Michael Brickman is an adjunct fellow at the American Enterprise Institute, where he focuses on higher education and cutting-edge innovation in education reform. He concurrently develops state policy at the Cicero Institute and advises companies, nonprofits, and investors on the innovations that are changing the way we work and learn.

Notes

1. US Bureau of Labor Statistics, Job Openings and Labor Turnover Archived News Releases, <https://www.bls.gov/bls/news-release/jolts.htm>; and DHI Group, 2017-08 DHI Hiring Indicators Final, August 2017, <https://www.dice.com/indicators>.
2. Society for Human Resource Management, *Talent Access Report*, 2022, <https://www.shrm.org/content/dam/en/shrm/research/benchmarking/Talent%20Access%20Report-TOTAL.pdf>.
3. US Department of Education, Institute of Education Sciences, National Center for Education Statistics, “Table 330.10. Average Undergraduate Tuition, Fees, Room, and Board Rates Charged for Full-Time Students in Degree-Granting Postsecondary Institutions, by Level and Control of Institution: Selected Academic Years, 1963–64 Through 2022–23,” https://nces.ed.gov/programs/digest/d23/tables/dt23_330.10.asp.
4. US Department of Education, Institute of Education Sciences, National Center for Education Statistics, “Table 106.10. Expenditures of Educational Institutions Related to the Gross Domestic Product, by Level of Institution: Selected School Years, 1929–30 Through 2021–22,” https://nces.ed.gov/programs/digest/d22/tables/dt22_106.10.asp.
5. Yazmin Guzman and Stig Leschly, *An Analysis of the Age of Colleges and New College Accreditation in US Higher Education*, Postsecondary Commission, June 2022, <https://postsecondarycommission.org/wp-content/uploads/2023/07/Report-on-New-College-Format-070822-PSC-updated-72423.pdf>.
6. 3 Tex. Educ. Code § 61.001 (1971); and Preston Cooper, “A New Hope for Higher Education,” *Education Next*, <https://www.educationnext.org/new-hope-for-higher-education-regulatory-red-tape-university-austin>.
7. Guzman and Leschly, *An Analysis of the Age of Colleges and New College Accreditation in US Higher Education*.
8. Stig Leschly and Yazmin Guzman, *Oversight of Academic Quality and Student Outcomes by Accreditors of US Higher Education: Evidence from the Database of Accredited Postsecondary Institutions and Programs*, Harvard Business School and College101, Spring 2022, <https://college101.org/wp-content/uploads/2022/06/College101-Accreditor-College-Quality-Report-FINAL-062822.pdf>.
9. National Student Clearinghouse Research Center, “Completing College: National and State Reports,” November 30, 2023, <https://nscresearchcenter.org/completing-college>.
10. Preston Cooper, “Does College Pay Off? A Comprehensive Return on Investment Analysis,” Foundation for Research on Equal Opportunity, May 8, 2024, <https://freopp.org/whitepapers/does-college-pay-off-a-comprehensive-return-on-investment-analysis>.
11. US Department of Labor, “WIOA Adult Performance Report,” December 18, 2023, <https://www.dol.gov/sites/dolgov/files/ETA/Performance/pdfs/PY2022/PY%202022%20WIOA%20National%20Performance%20Summary.pdf>.
12. Michael Brickman, “The Federal Government Is Abusing Its Power to Target Private-Sector Education Providers,” *The Hill*, April 27, 2024, <https://thehill.com/opinion/education/4623909-the-federal-government-is-abusing-its-power-to-target-private-sector-education-providers>.
13. US Department of Labor, *FY 2024 Department of Labor Budget in Brief*, 2024, <https://www.dol.gov/sites/dolgov/files/general/budget/2024/FY2024BIB.pdf>.
14. John Pallasch, “Written Testimony of John Pallasch, One Workforce Solutions,” testimony before the House Committee on Education and the Workforce, Subcommittee on Higher Education and Workforce Development, May 11, 2023, https://edworkforce.house.gov/uploadedfiles/5.11.23_pallasch_testimony_hewd_hearing_on_workforce_skills_development.pdf.
15. Ryan Craig, “Seeking a Meeker DC Clique,” *Achieve Partners*, 2024, <https://mailchi.mp/gapletter/seeking-a-meeker-dc-clique-2612669>.
16. US Department of Labor, “National Apprenticeship System Enhancements,” *Federal Register* 89, no. 11 (January 17, 2024): 3118–298, <https://www.federalregister.gov/documents/2024/01/17/2023-27851/national-apprenticeship-system-enhancements>.
17. US Department of Labor, “National Apprenticeship System Enhancements.”
18. Defense of Freedom Institute, “DFI-Led Coalition of Former Education Department Officials Calls on the Biden Administration to End Its ‘Politically Motivated Harassment’ of Florida’s Governor, Legislature,” press release, December 14, 2022, <https://dfipolicy.org/press-release-dfi-led-coalition-of-former-education-department-officials-calls-on-the-biden-administration-to-end-its-politically-motivated-harassment-of-floridas-governor>.
19. Recognition of Accrediting Agency or Association, 20 U.S.C. § 1099b (2018).

20. Defense of Freedom Institute, “DFI-Led Coalition of Former Education Department Officials Calls on the Biden Administration to End Its ‘Politically Motivated Harassment’ of Florida’s Governor, Legislature.”
21. Michael Brickman, “The State of Federal Accreditation Regulations and Guidance,” Defense of Freedom Institute, March 7, 2023, <https://www.aei.org/research-products/report/the-state-of-federal-accreditation-regulations-and-guidance>; and Michael Brickman, “The Future of University Accreditation,” American Enterprise Institute, June 12, 2024, <https://www.aei.org/events/the-future-of-university-accreditation>.
22. Program Participation Agreements, 20 U.S.C. § 1094 (2010).
23. US Department of Education, Federal Student Aid, “(GEN-23-03) Requirements and Responsibilities for Third-Party Servicers and Institutions,” May 16, 2023, <https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-02-15/requirements-and-responsibilities-third-party-servicers-and-institutions-updated-may-16-2023>.
24. Michael Brickman, “Checking In on the Biden Administration’s Higher Education Regulatory Agenda,” AEIdeas, July 11, 2024, <https://www.aei.org/education/checking-in-on-the-biden-administrations-higher-education-regulatory-agenda>.
25. 2U, “2U Successfully Completes Financial Restructuring to Drive Innovation and Growth,” press release, September 13, 2024, <https://2u.com/newsroom/2u-successfully-completes-transaction>; and Joshua Kim, “3 Questions for 2U CEO Paul Lalljie,” *Inside Higher Ed*, July 29, 2024, <https://www.insidehighered.com/opinion/blogs/learning-innovation/2024/07/29/three-questions-2us-ceo-paul-lalljie>.
26. Michael Brickman, “The Biden Administration’s Misguided Attempt to Undermine College and University Partnerships,” American Enterprise Institute, November 1, 2023, <https://www.aei.org/research-products/report/the-biden-administrations-misguided-attempt-to-undermine-college-and-university-partnerships>.
27. Higher Education Act of 1965, Pub. L. No. 89–329.
28. US Department of Education, “Financial Transparency and Gainful Employment,” *Federal Register* 88, no. 184 (October 10, 2023): 7004–193, <https://www.federalregister.gov/documents/2023/10/10/2023-20385/financial-value-transparency-and-gainful-employment>; and Katherine Knot, “Education Department Delays Gainful Reporting Requirements Again,” *Inside Higher Ed*, September 16, 2024, <https://www.insidehighered.com/news/quick-takes/2024/09/16/us-once-again-delays-gainful-reporting-requirements>.
29. US Department of Education, “Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit (ATB),” *Federal Register* 88, no. 209 (October 31, 2023): 74568–710, <https://www.federalregister.gov/d/2023-22785>.
30. Foundation for Research on Equal Opportunity, “Is Grad School Worth It?,” <https://freopp.org/roi-graduate>.
31. *360 Degrees Education et al. vs. US Department of Education et al.*, 4:24-cv-00508 (N.D. Tex.) (2024).
32. Katherine Knot, “In Bid to Deter Misconduct, U.S. Releases New Data on Financial Aid Enforcement,” *Inside Higher Ed*, August 26, 2024, <https://www.insidehighered.com/news/government/student-aid-policy/2024/08/26/new-data-show-how-us-cracks-down-colleges-misconduct>.
33. US Department of Education, “Financial Transparency and Gainful Employment.” <https://www.thompsoncoburn.com/insights/blogs/regucation/post/2023-05-03/90-10-rule-compliance-strategies-and-considerations-for-proprietary-institutions-of-higher-education>.
35. US Department of Education, Office of Postsecondary Education, “Issue Paper 2: State Authorization,” March 4–7, 2024, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/session-3-issue-paper-state-authorization-v3.pdf>.
36. US Department of Education, “Negotiated Rulemaking Committee; Public Hearing,” *Federal Register* 88, no. 128 (July 6, 2023): 43069–70, <https://www.govinfo.gov/content/pkg/FR-2023-07-06/pdf/2023-14329.pdf>; and Robert Anderson, “Memorandum: Impact of Proposed Regulations on the Existence of SARA,” February 14, 2024, <https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/impact-of-proposed-regulations-on-the-existence-of-sara-submitted-by-robert-anderson.pdf>.
37. Lauren Coffey, “Colleges Balk at Federal Plan to Require Attendance Taking in Online Courses,” *Inside Higher Ed*, August 7, 2024, <https://www.insidehighered.com/news/tech-innovation/teaching-learning/2024/08/07/new-concern-attendance-taking-proposal-online>.
38. Cicero Institute, “Degree Requirements,” April 2024, <https://ciceroinstitute.org/degree-requirements>.
39. Jumpstart Our Business Startups Act of 2023, S. 161, 118th Cong., 1st Sess. (2023); and Bipartisan Workforce Pell Act, H.R. 6585, 118th Cong., 1st Sess. (2023).
40. Stacey Guber, *Public Sector Degree Requirements*, Cicero Institute, December 2022, <https://ciceroinstitute.org/issues/public-sector-degree-requirements>.
41. Katherine Knott, “Grand Canyon University Lambastes Federal Agencies in ‘Unusual’ Public Statement,” *Inside Higher Ed*, October 6, 2023, <https://www.insidehighered.com/news/government/student-aid-policy/2023/10/06/grand-canyon-university-airs-grievances-against-us>.
42. University of Idaho, “University of Phoenix Affiliation FAQ,” March 26, 2024, <https://www.uidaho.edu/president/university-of-phoenix-affiliation>.
43. Josh Moody, “Scrutiny Mounts over Idaho-Phoenix Deal,” *Inside Higher Ed*, March 11, 2024, <https://www.insidehighered.com/news/business/mergers-collaboration/2024/03/11/new-obstacles-threaten-idaho-phoenix-deal>.

44. US Department of Education, Institute of Education Sciences, National Center for Education Statistics, “Undergraduate Enrollment,” May 2023, <https://nces.ed.gov/programs/coe/indicator/cha/undergrad-enrollment>.
45. Katherine Knott, “Biden Administration Looks to Clamp Down on Inclusive Access,” *Inside Higher Ed*, January 29, 2024, <https://www.insidehighered.com/news/government/2024/01/29/biden-admin-looks-clamp-down-inclusive-access>.
46. Association of American Publishers, “Student Watch Reports a 57% Decline in Student Spending on Course Materials over a Decade,” June 8, 2023, <https://publishers.org/news/student-watch-reports-a-57-decline-in-student-spending-on-course-materials-over-a-decade>.
47. Brickman, “Checking In on the Biden Administration’s Higher Education Regulatory Agenda.”
48. US Department of Labor, “US Department of Labor Announces Final Rule on Classifying Workers as Employees or Independent Contractors Under the Fair Labor Standards Act,” press release, January 9, 2024, <https://www.dol.gov/newsroom/releases/whd/whd20240109-1>.
49. US Department of Labor, “Independent Contractor Status Under the Fair Labor Standards Act,” *Federal Register* 86, no. 4 (January 7, 2021): 1168–248, <https://www.federalregister.gov/documents/2021/01/07/2020-29274/independent-contractor-status-under-the-fair-labor-standards-act>.
50. US Department of Labor, “Employee or Independent Contractor Classification Under the Fair Labor Standards Act,” *Federal Register* 89, no. 7 (January 10, 2024): 1638–743, <https://www.federalregister.gov/documents/2024/01/10/2024-00067/employee-or-independent-contractor-classification-under-the-fair-labor-standards-act>.
51. Marc Freeman, “U.S. Chamber Challenges DOL’s Independent Contractor Rule That Creates Uncertainty, Employee Bias,” US Chamber of Commerce, January 12, 2024, <https://www.uschamber.com/workforce/independent-contractors/departments-of-labor-new-independent-contractor-rule-creates-uncertainty-employee-bias>.
52. Michael Brickman, “SAVE Loan Forgiveness Has Been Halted . . . for Now,” AEIdeas, June 25, 2024, <https://www.aei.org/education/save-loan-forgiveness-has-been-halted-for-now>.
53. Michael Brickman, “Biden Doubles Down on ‘Accountability’ That Could Wipe Out Career Pathways,” AEIdeas, May 22, 2022, <https://www.aei.org/education/biden-doubles-down-on-accountability-that-could-wipe-out-career-pathways>.
54. Brickman, “The Biden Administration’s Misguided Attempt to Undermine College and University Partnerships”; and Ted Mitchell, letter to Miguel Cardona, March 29, 2023, https://www.acenet.edu/Documents/Comments_ED_Third_Party_Servicers_032923.pdf.
55. National Association of Colleges and Employers, “What Is NACE? About Our Association,” <https://www.nacweb.org/about-us>.
56. Jeremy Buist, “Hanlon’s Razor,” Decision Lab, <https://thedecisionlab.com/reference-guide/philosophy/hanlons-razor>.

© 2024 by the American Enterprise Institute for Public Policy Research. All rights reserved.

The American Enterprise Institute (AEI) is a nonpartisan, nonprofit, 501(c)(3) educational organization and does not take institutional positions on any issues. The views expressed here are those of the author(s).