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Collaborative Accreditation: Securing the Future of Historically Black Colleges

Jamie L. Wershbale*

INTRODUCTION

America’s educational system continuously evolves, striving to meet the nation’s ever changing socio-economic needs. Higher education produces a more dynamic society, and enhances the nation’s domestic economy and political posture in the global arena. Skilled and educated individuals, often products of postsecondary education, provide valuable human capital for American industries and are responsible for moving the nation forward economically, politically, and socially. To maintain and improve the quality of higher education in America, public funding is crucial for undergraduate postsecondary students and institutions alike. However, this crucial public funding is contingent upon an institution’s accreditation status.¹

The recently amended Higher Education Act of 1965 (“HEA” or “Act”)² reaffirms accreditation as a prerequisite for postsecondary student and institutional federal financial aid; non-accredited institutions of higher learning and the students enrolled at those institutions are ineligible for federal funds disbursed under the HEA.³ Federal statutes establish general accreditation guidelines that are delineated further in administrative regulations; however, private national and regional accrediting agencies carry out institutional

¹ Accreditation is a voluntary, generally nongovernmental system, peer review process for recognizing educational institutions for a level of performance, integrity, and quality that entitles them to the confidence of the educational community and the public they serve. Accredited means the ‘status of public recognition that a nationally recognized accrediting agency grants to an educational program that meets the agency’s established requirements.’ Stated otherwise, accreditation has been ‘defined as the formal expression by a private body of an authoritative opinion concerning the acceptability, under objective quality standards fairly applied, of the services rendered by a particular institutional provider.’” 1-3 Educ. Law § 3.08 (Bender 2009).
² The Higher Education Act (“HEA”) was amended in 2008 by the Higher Education Opportunity Act (“HEOA”). As the HEOA in substance amends the HEA, references to the HEA shall include the HEOA amendments currently in effect. The HEOA will be referenced as such where appropriate.
accreditation. Accrediting bodies are responsible for evaluating institutions of higher learning, ultimately determining whether or not an institution is in compliance with the agency’s own standards for accreditation.

The link between accreditation and federal financial assistance is potentially problematic for smaller institutions because such institutions often lack the financial resources and infrastructure necessary to achieve or maintain full-accreditation status. These accreditation problems are further amplified in the context of historically black colleges and universities ("HBCUs"). This class of institutions has unique concerns that the existing accreditation process and standards fail to contemplate fully. The accreditation problem for HBCUs is circular — by catering to underserved minorities and low-income students, HBCUs often lack the educational and financial resources necessary to satisfy accreditation standards based on the archetype of predominately-white institutions ("PWIs") and flagship universities; but without the accreditation required for federal funding, HBCUs are unable to develop resources and infrastructure. Federal funds designed to enable structural improvement and provide for student tuition are contingent upon an institution’s accreditation status.

This paper explains the American higher education accreditation system under the HEA, as amended in August 2008, and its application to and impact on undergraduate HBCUs. It argues for additional specific amendments to accreditation requirements under the HEA, designed to better serve HBCUs in the long run. The proposal mandates collaboration between accrediting agencies and HBCUs in order to produce accreditation standards in line with legislative funding goals, which would promote HBCUs and encourage long-term financial independence and increased student achievement. Collaborative accreditation would take into account necessary structural rehabilitation, remedial education needs, and financial concerns, and would be implemented for a relatively short period of time. Collaborative standards would: (1) require incremental structural and resource development goals based on each institution’s mission and needs, (2) consider progress toward reaching stated long-term sustainable objectives, and (3) include a limited cause of action to ensure good faith during the collaborative process.

Accreditation encompasses many specific, yet varied, elements of postsecondary education. The prominent problematic areas collaborative accreditation would address include deteriorating infrastructures, lack of financial controls, insufficient technology, and dwindling endowments. Collaborative accreditation would also focus on facets such as curricula, student achievement, post-graduation job placements, and faculty and administrative capabilities.

The purpose of these amendments would not be to create a so-called double standard or to lower accreditation standards, but rather to enable
HBCUs to remedy potential accreditation problems while continuing to educate the high-risk and underserved students matriculating to these unique institutions. Financially dependent postsecondary institutions, such as HBCUs, subsist in large part on federal funds, which are contingent on institutional accreditation; federal funds provide aid for institutional development and infrastructure, as well as providing financial aid for individual students. Collaborative accreditation would enable HBCUs to effectively utilize these necessary federal funds while minimizing the risk of losing accreditation.

Part I of this paper discusses the broad functions of higher education in contemporary American society and the recently amended HEA. Part II briefly reviews the historic and modern-day purposes and functions of HBCUs. Part III explains the fundamentals of postsecondary accreditation. Part IV discusses the interplay between accrediting agencies and HBCUs. Part V discusses a proposed statutory solution to HBCUs’ unique accreditation problems, in light of the current state of the law, and judicial remedies available under the HEA. It should be noted that while this paper focuses specifically on HBCUs, standards similar to those proposed may be appropriate for each ascertainable class of minority-serving institution enumerated in the HEA.4

I. AMERICAN HIGHER EDUCATION

A. Functions of Education in the United States

Education in the United States is based on the general premise of universal education, including compulsory publicly-financed primary and secondary education.5 Universal education develops an informed citizenry, the underpinning of the American democratic process.6 It has been “long recognized that ‘education... is the very foundation of good citizenship.’”7 In contemporary American society, education has developed the role of equally promoting economic stability and prosperity.8 The state of the global economy has “escalate[d] competition for economic and political power[,]”9 and as such this nation demands a skilled workforce.9 Congress has declared “education is

4. In addition to HBCUs, the ascertainable classes of minority-serving institutions include Hispanic-serving institutions, tribal colleges and universities, Alaska native-serving institutions, native Hawaiian-serving institutions, predominately-black institutions, Asian American and Native American Pacific Islander-serving institutions, and Native American-serving nontribal institutions. 20 U.S.C. § 1067q (2008).
6. Id.
9. Id.
fundamental to the development of individual citizens and the progress of the Nation[,]”¹⁰ and that “the Nation’s economic, political, and social security require a well-educated citizenry.”¹¹ In modern society, higher education plays a pivotal role in preparing Americans for competition in both the domestic and global economies.¹² Recognizing the importance of excellent education to continued American prosperity, the federal government has enacted statutes aimed at improving and developing postsecondary education across the nation.

**B. The Higher Education Act of 1965**

1. **Purposes of the Higher Education Act**

   First enacted on November 8, 1965 as part of President Lyndon Baines Johnson’s “Great Society” initiatives,¹³ the HEA promotes higher education across the United States. It is comprised of statutes providing guidelines to the United States Department of Education (“Department of Education” or “Department”) such that the Department may promulgate administrative regulations for the maintenance and improvement of institutions of higher learning. The HEA also articulates programs which provide postsecondary financial aid for students and institutions. Since its 1965 enactment, Congress has amended the HEA numerous times.¹⁴

   Throughout the years, the general purpose of the HEA—combating urbanization problems through strength in higher education—has endured.¹⁵ However, both the text and its implementation have evolved in an attempt to satisfy the developing needs of postsecondary institutions, and America as a whole. In 1965, President Johnson sought to develop American society by promoting higher education. Congress aspired to “put [] President [Johnson]’s words into action by fostering innovation and encouraging and enabling institutions of higher education to respond to the demands of the communities they serve.”¹⁶ The Act’s legislative history illustrates Congress’ underlying concerns and the need for the Act. Congressional reports explain “[t]he character of modern knowledge and industry and the development of knowledge and of the community dictate that adult life will be characterized by ever sharper requirements of occupational, social, and cultural competence, [and] by deeper problems for the individual of obsolescence and

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12. JACKSON, supra note 5.
disorientation.\textsuperscript{17}

When Congress reenacted the HEA in 1998, more than thirty years after the HEA's first passage, the legislature reiterated the same concerns relevant to the Act in the 1960s. One legislative report states, "[t]he fundamental purpose of the [HEA] Amendments of 1998 is to reaffirm America's commitment to maintaining its higher education system as the best in the world."\textsuperscript{18} To that end, Congress focused on affordability of higher education, simplification of the student aid system, improving academic quality, and expanding accessibility to higher education for all Americans.\textsuperscript{19} These Congressional focal points developed into guidelines for the maintenance and furtherance of excellence in national higher education.\textsuperscript{20}

The HEA underwent Congressional reauthorization and amendment again in 2008, in an act called the Higher Education Opportunity Act of 2008 ("HEOA").\textsuperscript{21} The HEOA retains the Act's original goals, but overhauls and amends the HEA in key areas in order to provide students even greater access to higher education opportunities.\textsuperscript{22} The majority of the HEOA amendments became effective immediately upon enactment on August 18, 2008.\textsuperscript{23}

2. Statutory Constructs of the Higher Education Act

The 1998 form of the HEA had nine titles; after amendment by the HEOA there are now eleven titles.\textsuperscript{24} The titles relevant to the discussion in this paper

\begin{itemize}
    \item \textsuperscript{17} Id.
    \item \textsuperscript{18} H.R. REP. No. 105-481, at 95 (1998), as reprinted in 1998 WL 186665.
    \item \textsuperscript{19} Id.
    \item \textsuperscript{20} See id.
    \item \textsuperscript{22} In an August 18, 2008 press release, U.S. Representative George Miller, the Chairman of the House Education and Labor Committee, stated "with this bill [HEOA] signed into law, [Congress] ha[s] taken the next critical steps towards restoring the promise of our nation's higher education programs: To help all students gain access to a world-class college education. . . . This law will help every student in this country get their fair shot at a college degree, and reclaim their piece of the American Dream." Chairman Miller Statement on Signing of the Higher Education Opportunity Act, http://www.house.gov/apps/list/speech/edlabordem/BushHEOA081408.html (last visited Dec. 18, 2008).
    \item \textsuperscript{23} See Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3083, § 3 ("Except as otherwise provided in this Act or the amendments made by this Act, this Act and the amendments made by this Act shall take effect on the date of enactment of this Act."); Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3083, § 101(b) ("The amendments made by this section shall take effect on July 1, 2010.").
are: Title I, which includes definitions and general provisions of the Act; 25 Title III, which addresses so-called “minority-serving institutions,” such as HBCUs, and focuses on equalization of opportunity at institutions catering to large percentages of minority and low-income students; 26 and Title IV, which includes requirements and directives related to federal student financial aid, as well as federal assistance to the states and postsecondary institutions. 27

Under the HEA, an “institution of higher education” is an educational institution, in any state, that (1) admits high school graduates or individuals who have achieved an equivalency certificate, (2) has state authorization to provide postsecondary education, (3) awards baccalaureate degrees or administers a two-year program applicable towards a baccalaureate degree, (4) is public or non-profit entity, and (5) is accredited or pre-accredited by an agency or association recognized by the Secretary of the U.S. Department of Education (“Secretary of Education” or “Secretary”). 28 For specific purposes related to Title IV federal financing, an institution of higher education may also include postsecondary vocational and proprietary institutions. 29

II. HISTORICALLY BLACK COLLEGES AND UNIVERSITIES

A. HBCUs Defined

As Congress has already determined, one sure way to promote the


stability and mission of HBCUs is through the HEA. HBCUs are specifically provided for under Title IIIIB of the HEA. Under the HEA, HBCUs are also referred to as “part B” institutions. The statutory language of Title IIIIB of the HEA, known as the “HBCU Aid Act,” presently encompasses provisions promoting HBCUs. When Title III was initially enacted in 1965 it was entitled “Strengthening Developing Institutions.” The Act did not make specific reference to predominately black or minority postsecondary institutions. Rather, Title III was explicitly enacted to benefit institutions “which[, for financial and other reasons[,] [were] struggling for survival and [were] isolated from the main currents of academic life.”

It was not until 1986, when Title III was subsequently amended, that Congress acknowledged HBCUs as a defined class of institutions, recognizing these institutions’ collective contribution to the “effort to attain equal opportunity through postsecondary education for Black [sic], low-income, and educationally disadvantaged Americans.” This class of institutions became known as part B institutions when Title IIIIB was added to the HEA. Part B institutions are defined as colleges or universities with historically black student populations established prior to 1964, with the principle mission of providing postsecondary educational opportunities to black Americans. To be eligible for federal financial aid, Part B institutions, like all postsecondary institutions, must be accredited by a federally recognized accrediting agency. Unfortunately, even as a defined class, HBCUs still struggle with accreditation standards that do not address their particular nature and needs.

Currently there are 103 accredited HBCU part B institutions throughout the United States, including forty public four-year institutions, fifty private four-year institutions, eleven public two-year institutions, and two private two-year institutions. The vast majority of these HBCUs are in the southern United States within the jurisdiction of a single regional accrediting agency.

34. Id.
35. The 1986 Amendments created “part B” institutions, synonymous with HBCUs, under newly created Title III.B of the HEA.
37. Id.
38. See id.
39. See infra, Part IV for a discussion of HBCUs and accreditation challenges.
41. The Southern Association of Colleges and Schools is the regional accrediting agency in
B. HBCUs and Diversity in Modern America

There were strong de jure and social policies of racial exclusion in antebellum America. As a result, "white" institutions of higher learning denied admission to black students, with only rare exception. To combat these exclusionary policies, the first "black" institution of higher learning was founded in the North in 1837, twenty-eight years before the Thirteenth Amendment abolished slavery in the United States. However, after emancipation, despite the increasing number of educated blacks in postbellum America, racial exclusion policies persisted. Initially, in the South, black students were limited to rudimentary "Negro education," and in the North, students were subjected to pervasive institutionalized racism and discrimination. As a result, additional minority-serving institutions, known today as HBCUs, were quickly established to provide black Americans postsecondary educational opportunities. Historically, these predominately black colleges and universities faced widespread discrimination, even at the hands of state and federal governments.

Many in modern society argue that institutionalized racism and governmental discrimination are no longer legitimate concerns. Citing the decrease in institutionalized and governmental racism, opponents of HBCUs question whether HBCUs are even necessary, claiming diversity initiatives at the South; there are eighty-two HBCUs in the eleven states that comprise this region. 42. WILLIAM A. SMITH, PHILIP G. ALTBACH, & KOFI LOMOTÉY, THE RACIAL CRISIS IN AMERICAN HIGHER EDUCATION: CONTINUING CHALLENGES FOR THE TWENTY-FIRST CENTURY 5 (State University of New York Press, Albany 2002).

43. See id. at 4. In a rare exception to the antebellum policy of racial exclusion, in 1835 Oberlin College began accepting black students. In the 1840s and 1850s black students comprised four to five percent of the college's total student enrollment.

44. See U.S. CONST. amend. XII, § 1 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). Cheyney University of Pennsylvania is commonly referred to as the first HBCU, although the level of education provided would be considered secondary. JACKSON, supra note 5, at 48-49. In 1854, Lincoln University was founded, also in Pennsylvania, and was the first HBCU established specifically to provide collegiate level instruction. Id.

45. SMITH ET AL., supra note 42, at 6.

46. JACKSON, supra note 5, at 108. Of the HBCUs still in existence, nearly seventy-five percent were founded between 1865 and 1899, and predominately in the South. Id.


48. Julianne Malveaux, Black Colleges Are As Vital Today As Ever, USA TODAY, Aug. 24, 2007, at 13A. ("[As president of a HBCU,] I often hear the question, 'Does a post-integration America really need HBCUs?'"). America's Black Colleges and Universities: Models of Excellence and Challenges for the Future: Hearing before the House Education and Labor Committee, 110th Cong. 17 (2008) (testimony, President of Johnson C. Smith University Dr. Dorothy Cowser Yancy) ("HBCUs exist in 21st Century America in a virtual higher education vacuum – viewed by some, including some African Americans, as a relic of America's segregated past and having no real place or role in America's presumably diverse higher education community.").
PWIs are incompatible with the continued existence of HBCUs.\(^{49}\)

However, proponents of HBCUs argue that disbanding HBCUs would create a detrimental void in the national postsecondary educational system.\(^{50}\) Substantial social and political benefits are derived from HBCUs, demonstrated through concrete successes – graduating the majority of all black judges, doctors, and Ph.D.s – as opposed to the relatively abstract \textit{diversity in the classroom} arguments HBCU detractors advance.\(^{51}\) Statistical and anecdotal evidence complied by Congress, the White House, scholars, and educators indicates that, \textit{yes}, the need for HBCUs in America remains strong.\(^{52}\) HBCUs represent only three percent of all American institutions of higher learning,\(^{53}\) yet fourteen percent of all black postsecondary students are enrolled in HBCUs, and nearly a quarter of all black students earning baccalaureate degrees are graduates of HBCUs.\(^{54}\) President George W. Bush’s White House Initiative on HBCUs\(^{55}\) called these institutions a “national resource” and “a source of accomplishment and great pride for the African American community as well as the entire Nation. . . . HBCUs offer all students, regardless of race, an opportunity to develop their skills and talents.”\(^{56}\) HBCUs persist as “engines of social mobility for minority students,”\(^{57}\) playing “a crucial role in filling the

\(\text{\footnotesize 49. }\) See Malveaux, \textit{supra} note 48.


\(\text{\footnotesize 51. }\) See B. Seymour, \textit{I’m Confused: How Can the Federal Government Promote Diversity in Higher Education Yet Continue to Strengthen Historically Black Colleges?}, 12 WASH & LEE J. CIVIL RTS. & SOC. JUST. 287, 302 (2006) (“Although HBCUs are relatively small institutions, have few resources[,] and serve a high number of disadvantaged students, they have performed remarkably throughout their existence. By the early 1990s [HBCUs] had educated almost 40% of America’s black college graduates. In addition, eighty percent of black federal judges, eighty five percent of all black doctors, seventy five percent of all black Ph.D.s, fifty percent of black engineers, and forty six percent of all black business professionals received their undergraduate training at HBCUs. Moreover, historically black health-profession schools have trained an estimated forty percent of black physicians, seventy five percent of black veterinarians, fifty percent of black pharmacists, and forty percent of the nation’s black dentists.”).

\(\text{\footnotesize 52. }\) See infra Part II.B.

\(\text{\footnotesize 53. }\) There are 4084 institutions of higher education in the United States. White House Initiative on Historically Black Colleges and Universities, \textit{supra} note 40.

\(\text{\footnotesize 54. }\) Id.

\(\text{\footnotesize 55. }\) Since 1980, each American president has signed an Executive Order establishing an initiative aimed at strengthening HBCUs.

\(\text{\footnotesize 56. }\) White House Initiative on Historically Black Colleges and Universities, \textit{supra} note 40.

higher education gap . . . and . . . the economic [lifetime earnings] gap."58 Closing these gaps advances diversity on a broader scale.59 Congress has determined that HBCUs "play[] a prominent role in American history and have an unparalleled record of fostering the development of African American youth by recognizing their potential, enhancing their academic and technical skills, and honing their social and political skills through higher education[.]."60

Opponents contend that promoting HBCUs substantially diminishes diversity initiatives at PWIs. This argument fails to consider, however, that "attaining diversity in the abstract is susceptible to making only a minimalistic impact that does alarmingly little to promote harmony between the races or address contemporary racism."61 The claim is also refuted by the evidence. Statistics illustrate that both promoting HBCUs and actively encouraging diversity at PWIs are not mutually exclusive propositions, either practically or theoretically.62 HBCUs are not a dominating force on a national scale; while many black students attend HBCUs, these institutions comprise only a small portion of all colleges and universities, and enroll less than twenty percent of matriculating black students.63 Taken together, the percentage of black students enrolling at HBCUs, and the anecdotal and empirical evidence of successful student achievement, confirm there is both a clear place in postsecondary education for this unique type of institution, and that HBCUs do not impair diversity initiatives at PWIs. HBCUs offer black students, as well as other minority and white students, an environment unlike the educational atmosphere typical at PWIs.

HBCUs are not an obstacle to diversity, but rather they are institutions that possess a "unique sensibility to the special needs of young African

58. America’s Black Colleges and Universities: Models of Excellence and Challenges for the Future, supra note 48, at 15-18 (internal quotations omitted). The lifetime earnings gap is a statistical showing that on average, black Americans earn less money over a lifetime than white Americans of the same educational level. Id. It is estimated that the average baccalaureate U.S. citizen will earn $2.1 million dollars over a lifetime, while a baccalaureate black American is estimated to earn substantially less, averaging only $1.7 million dollars in a lifetime. Id. The median annual earnings of full-time college-educated workers indicates in 2006 that a white individual holding a baccalaureate degree earned $44,700, compared to a black individual earning $38,600. National Center for Education Statistics, Median annual earnings of full-time, full-year wage and salary workers ages 25-34, by highest level of educational attainment and race/ethnicity: 2006, http://nces.ed.gov/pubs2008/nativetrends/tables/table_7_3.asp (last visited Dec. 18, 2008).

59. See id.


62. Cole, supra note 57, at 60 ("As the country’s demographics change, many HBCUs are also becoming more diverse[,]”).

63. Nationwide, HBCUs comprise three percent of all institutions of higher learning, and HBCUs matriculate fourteen percent of all black students in a given academic year. See White House Initiative on Historically Black Colleges and Universities, supra note 53.
American minds." For black students, "[i]t has been established that there is a symbiotic relationship between faculty of color and students of color. . . . [M]any prospective students of color will not attend institutions or enroll in departments that are too white and have no faculty or advisors of color to support them." Promotion of HBCUs is based on the elemental concept that "[s]tudents do best at institutions that mirror themselves, their culture, and their interests." It is self-evident that when a minority student is in an educational environment where he or she is exposed to minority role models and feels comfortable, that student has a greater probability of successful academic achievement. Offering students a comfortable environment is not, and should not be confused with, deferring to students' arguably discriminatory preferences; rather, it is about bolstering academic achievement, which is paramount.

Congressional recognition of HBCUs as a distinct class of institutions also confirms that there is a continuing need to provide postsecondary learning environments for underserved minorities. One scholar has explained the practical need for HBCUs stating:

To the extent that inner-city children are able to overcome the inadequacies of urban schools, black colleges may be one of the best environments in which to make the transition from the isolation of the inner-cities to careers in a larger society. . . . [Presumptively, the] vast majority of black children are being educated in poor, isolated and hyper-segregated communities. The residents of these communities often dress differently, speak a dialect other than Anglo-American English and have different cultural norms. . . . Black colleges have trained generations of African-American leaders who emerged from similar backgrounds. These institutions [HBCUs] are a precious and irreplaceable asset which should not be sacrificed to promote a superficial form of desegregation which measures success solely by the percentage of black students enrolled in white colleges. This will never substitute for true educational parity.

65. FRANK W. HALE, JR., WHAT MAKES RACIAL DIVERSITY WORK IN HIGHER EDUCATION 17 (Stylus Publishing, LLC 2004).
66. Id. at 18.
67. See id. at 18-19. For instance, Mark A. McGlone, an alumni of Howard University in Washington DC, states he chose a HBCU for his undergraduate education because "[n]ot too long ago there was a moment in history where African-Americans were not allowed to attend a college or a university. Through hard work and perseverance [HBCUs] were founded, which allowed young Blacks the opportunity to participate in higher education. . . . I wanted to attend an HBCU because I felt like it gave me a sense of belonging and achievement."
68. Ware, supra note 50, at 677-678; see also Jerome Wright, A Struggle to Survive – 21st century challenge for historically black colleges, MEMPHIS COMMERCIAL APPEAL, Aug. 20, 2006, 2006 WLNR 14477205 (West) ("The reality is that most of our high schools are still segregated. We have to provide a connection. HBCUs provide a cultural connection that's
Further, HBCUs promote higher education by continuing to reach out to underserved populations and communities through the admittance and “education [of] students who would not otherwise be selected by the state for a college education [at a public institution].”\(^69\) Potentially, “[a]ctively integrating universities may otherwise disadvantage black college-bound students by denying some of them the opportunity to attend college at all.”\(^70\) HBCUs provide “as many points of access to higher education for African-American students as possible.”\(^71\)

The operation of HBCUs also provides national economic gains, generating value-added benefits, employment, and consumer spending.\(^72\) While HBCUs, on the whole, do not have a substantial fiscal impact on the localized metropolitan areas in which they operate, their aggregate nationwide economic impact is significant.\(^73\) Based on 2001 statistics, “in terms of output (revenues), the nation’s HBCUs would rank 232nd on the [2006 Fortune Magazine] Forbes Fortune 500 list of the United States’ largest companies” and “the rolled-up employment impact of the nation’s HBCUs [in 2001] exceeds the 177,000 jobs at the Bank of America in 2006, which [wa]s the nation’s 23rd largest private employer.”\(^74\) Further, HBCUs substantially contribute to the nation’s workforce, conferring approximately a quarter of all baccalaureate degrees earned by blacks.\(^75\) Ultimately, the viability of HBCUs in modern American society is vital to future domestic social and economic success.

\(^69\) Kujovish, supra note 50, at 18 (“[For example,] [i]n Mississippi, the state’s black public colleges enrolled many students whose low standardized test scores would not qualify them for admission to the white institutions.”).

\(^70\) James A. Washburn, Beyond Brown: Evaluating Equality in Higher Education, 43 DUKE L.J. 1115, 1152 (1994) (“Such an effect [disadvantaged black students due to greater integration] would result from the current disparity in admissions standards between historically white and historically black schools and could lead to a diminution in the educational opportunities for blacks. Predominantly black public universities tend to have lower admissions standards than predominantly white public universities. . . . [B]lack students [. . .], on average, [] tend to score lower on standardized entrance examinations.”).


\(^73\) Id. (“Because most HBCUs are located in large- to medium-sized metropolitan areas that have very diverse economic bases, their economic impacts typically constituted a small share of total economic activity in their respective regional economies. There were some exceptions, however. For example, the 2147 jobs that owe their existence to Tuskegee University accounted for 24 percent of total employment in its regional economy. Similarly, Fort Valley State University and Grambling State University accounted for 14 percent and 10 percent of the jobs in their regional economies, respectively.”).

\(^74\) Id.

\(^75\) Id.
Today, HBCUs face different financial and administrative challenges than when these institutions were first formed. These challenges include eroding infrastructures, financial insolvency, insufficient technology, increasing costs of enrollment, and decreasing endowments. Arguably, these difficulties establish grounds for discontinuing HBCU funding. However, HBCUs have a place in modern society. Despite financial and infrastructure problems, HBCUs achieve substantial academic successes, promote black political leadership and advocacy, and provide national and local economic growth. The benefits derived from HBCUs outweigh the costs of increasing support for these institutions.

III. UNDERSTANDING ACCREDITATION

A discussion of the accreditation process and hierarchy is essential to understanding the relationship between HBCUs and accreditation.

Each state maintains a degree of control over postsecondary institutions within its borders, but, as a general rule, "institutions of higher education are permitted to operate with considerable independence and autonomy." This high degree of institutional self-determination generally results in wide variation in the character and quality of higher education across the nation. As such, accrediting bodies developed in order to provide a "reliable authority as to the quality of education or training" offered by institutions of higher learning. In context, accreditation may be defined as "a voluntary, non-governmental peer review process by the higher education community." Today, accrediting agencies play a "critical role . . . in higher education. They are "a vital component in assuring the quality of the programs supported by the Federal Government [sic]." Accréditing agencies also wield significant power, acting as "gatekeepers" to federal funding for higher education, derived from the interrelation of accrediting agencies with state and federal governments. Under the HEA, if an institution is not accredited, then

77. Id. ("As a consequence [of independence and autonomy], American educational institutions can vary widely in the character and quality of their programs.").
81. Id.
82. See 59 F.R. 22250, 22250 (1994) ("The provisions of the HEA create a "framework for a shared responsibility among accrediting agencies, States, and the Federal government to ensure that the 'gate' to Title IV, HEA programs is opened only to those institutions that provide students with quality education or training worth the time, energy, and money they invest in it. The three 'gatekeepers' sharing this responsibility have traditionally been referred to as 'the triad.'").
neither the institution nor its students are eligible for Title IV programs.83

A. Accrediting Agencies Defined

In the United States, accreditation of postsecondary institutions is decentralized. Regional and national accrediting agencies, recognized by the Secretary of Education ("Secretary"), carry out accreditation.84 These accrediting agencies are organized and operate based on general standards Congress and the Secretary establish.85 The Secretary must "recognize" an accrediting agency before the agency’s member institutions can gain eligibility for financial assistance under the HEA.86 The recognition process ensures each accrediting agency is a "reliable authority" on the quality of education its accredited member programs and institutions provide.87 The Secretary may only recognize agencies that exist for the sole purpose of issuing institutional accreditations for the purpose of enabling its members to be eligible for federal aid under the HEA.88

In function, accrediting agencies are independent organizations that develop evaluation criteria and conduct peer evaluations of voluntary fee-paying member institutions.89 Some accreditation agencies have a broad focus, accrediting degree-granting institutions in a particular region.90 Other agencies accredit specific degree-granting programs nationwide.91 Others provide accreditation specifically for purposes of Title IV under the HEA,92 and still others are responsible for specialized accreditation in a particular field of study.93 While there are many accrediting agencies, the six regional agencies that accredit baccalaureate-granting institutions of higher learning across the United States “dominate accreditation” and are most relevant to this paper.94

85. Id.
87. 34 C.F.R. § 602.1(a) (2008).
90. E.g. The Southern Association of College and Schools accredits degree-granting institutions in the “southern states” region of the United States.
91. E.g. The Accreditation Council for Pharmacy Education accredits professional pharmacy degree programs granting a degree of Doctor of Pharmacy.
92. E.g. The Accrediting Council for Continuing Education and Training accredits postsecondary non-collegiate vocational programs offering occupational Associate degrees for Title IV purposes.
93. E.g. The American Bar Association accredits law programs and free-standing law schools nationwide.
94. Michael W. Prairie & Lori A. Chamerlain, Due Process in the Accreditation Context, 21
Each of these six accrediting bodies has a specific region of the country in which the agency has jurisdiction; the Southern Association of College and Schools Commission on Colleges ("SACS") is the agency responsible for postsecondary accreditation in the southern United States, where the majority of HBCUs are located. The system is not duplicative and does not provide for multiple accreditations. If an institution loses its accreditation it has no immediate option of alternative accreditation. In accreditation disputes, institutions have little recourse beyond the appeal procedure provided for in the HEA, which is internal to the accrediting agency involved in the dispute; federal courts provide only limited judicial review.

B. Functions and Structure of Accrediting Agencies

One of the primary functions of a federally recognized accrediting agency, under the structure of the HEA, is to verify whether a postsecondary institution or program is satisfying established educational quality standards. Each agency establishes these quality standards based on its own promulgated criteria "reflecting the qualities of a sound educational program" the HEA provides only a vague framework for accrediting agencies to develop accreditation standards. Accrediting agencies also assist postsecondary
institutions in the development of institutional "self-improvement" goals, increasing faculty involvement in institutional evaluation and planning, and in establishing certification or licensure criteria.

Further, under the HEA, accrediting agencies provide a vehicle for institutions of higher learning to maintain financial viability through receipt of federal funds. Accreditation is not a requirement for operation as an institution of higher learning, but it is a requirement for most federal assistance programs. For an institution and its students to be eligible for federal funding under the HEA, the institution must be accredited, or preaccredited, by an accrediting agency recognized by the Secretary of Education. Institutional financial assistance and Title IV student "Federal Pell Grants" are paid directly to an accredited institution.

Federal law requires individual agencies to consistently apply and enforce the agency's own promulgated accreditation standards. These standards are related to student achievement in light of the institution's mission, and may include aspects of an institution's job placement rates, curricula, faculty, facilities, equipment, fiscal and administrative capacity, student support services, recruiting and admissions practices, academic calendars and catalogs, publications, grading, advertising, program length, objectives of the degrees and credentials offered, student complaint records, and compliance with program responsibilities under Title IV of the HEA. Accrediting agencies

102. The development of "self-improvement" goals is distinct from "collaborative accreditation" because these goals are aspiratory, as opposed to accreditation standards with which an institution must comply; these goals are neither government mandated, nor is progress towards the achievement of these goals considered in accreditation decisions.


104. See 59 C.F.R. § 22250 (1994) ("In order to approve a postsecondary education institution to participate in the student financial assistance programs authorized under Title IV of the HEA (referred to as 'Title IV, HEA programs') and many other Federal programs, the Secretary must determine, in part, that the institution satisfies the statutory definition of an 'institution of higher education' [which includes an accreditation requirement].").

105. 20 U.S.C. § 1058(b)(1)(D) (2008) ("[T]he term 'eligible institution' means-- (1) an institution of higher education-- (D) which is accredited by a nationally recognized accrediting agency or association determined by the Secretary [of Education] to be reliable authority as to the quality of training offered or which is, according to such an agency or association, making reasonable progress toward accreditation[.]"); §§ 1070, 1070a(a)(1) ("For each fiscal year . . . the Secretary shall pay to each eligible institution such sums as may be necessary to pay to each eligible student . . . for each academic year during which that student is in attendance at an institution of higher education, as an undergraduate, a Federal Pell Grant in the amount for which that student is eligible. . . .").

106. See 20 U.S.C. § 1070(a)(5) (2008); §§ 1070 1001, 1002 (2008); § 1070a(a)(1) (2008) ("For each fiscal year . . . the Secretary shall pay to each eligible institution such sums as may be necessary to pay to each eligible student . . . for each academic year during which that student is in attendance at an institution of higher education, as an undergraduate, a Federal Pell Grant in the amount for which that student is eligible. . . .").


must also evaluate particular criteria, such as an institution’s ability to maintain clear educational objectives consistent with the institution’s mission, the institution’s success in achieving said objectives, and an institution’s ability to maintain degree requirements conforming to commonly accepted, yet largely undefined, educational quality standards.  

Accrediting agencies conduct on-site reviews of each member institution, and provide each institution with a detailed written report of the institution’s compliance, or lack thereof, with agency standards and the institution’s performance in the context of student achievement. Member institutions are also required to prepare self-studies for later agency evaluation. Further, the accrediting agencies themselves are required to conduct systematic and comprehensive reviews of the agency’s own standards of accreditation to ensure the standards are adequately assessing the quality of education provided by postsecondary institutions at-large.

Further, agencies also monitor accredited member institutions for compliance during periods of accreditation, as well as periodically reevaluate accreditation decisions at self-established intervals. If at any time an institution becomes noncompliant, the agency must immediately initiate adverse action and require the noncompliant institution to come into compliance within a specified time period, generally between twelve and twenty-four months. If the institution fails to come into compliance it will either be sanctioned or lose its accreditation status and HEA federal funding.

C. Contesting Adverse Accreditation Action

The HEA does not create a private right of action for postsecondary institutions to enforce the Act’s provisions. Therefore, postsecondary institutions must seek alternate avenues of redress to contest perceived wrongs in accreditation disputes, such as loss of accreditation for failure to comply with promulgated standards. These avenues of redress are limited and the standard

110. Id. The agency must allow the institution an opportunity to respond in writing to the on-site report. Id.
111. Id.
112. 34 C.F.R. § 602.21 (2008).
114. 34 C.F.R. § 602.20 (2008). The maximum time to come into compliance, two years, is granted to institutions of higher education which grant baccalaureate degrees. Id.
115. See, e.g., Hiwassee Coll., Inc. v. S. Ass’n of Coll. & Sch., Inc., 531 F.3d 1333, 1334-35 (11th Cir. 2008) (citing McCulloch v. PNC Bank Inc., 298 F.3d 1217, 1224 (11th Cir. 2002)); Thomas M. Cooley Law Sch. v. ABA, 459 F.3d 705, 711 (6th Cir. 2006); Slovinec v. DePaul Univ., 222 F. Supp. 2d 1058, 1060 (N.D. Ill. 2002). But see Auburn Univ. v. S. Ass’n of Coll. & Sch., Inc., 489 F. Supp. 2d 1362, 1379 (N.D. Ga. 2002) (determining that 20 U.S.C. § 1099(f) may be “susceptible [to] an interpretation that the HEA would allow such a suit,” but never reaching the issue and finding no private right of action on grounds other than the “denial, withdrawal, or termination of accreditation”).
of review favors accrediting agencies. Essentially, both the agency appeal and the federal litigation consider whether the accreditation standards were arbitrarily applied, but do not consider the validity or appropriateness of the actual standards.

Each regional agency is required to have an internal appeals procedure that comports with the HEA’s statutory due process provisions, although disciplined institutions retain discretion to appeal an adverse accreditation decision. In the SACS region, the disciplined institution bears the burden of proof. To overcome an adverse accreditation determination, under SACS procedure, an institution must establish that the agency’s decision was arbitrary, or that the agency failed to follow internal procedures such that the failure was significant to the decision. If an institution is unable to establish one of these two articulated grounds, then the adverse accreditation decision will be affirmed.

If the institution loses the internal agency appeal, it is not able to assert rights under the Fifth and Fourteenth Amendment in federal court because due process protections only apply when the offending entity is governmental—either a federal or state actor, respectively. The courts have explicitly concluded accrediting agencies are private entities or, at best, authoritative quasi-public entities. While constitutional restrictions potentially bind

116. 20 U.S.C. § 1099b(6) (2008). The courts have determined that even though “due process” is written into the provisions of the HEA—to the extent an institution facing adverse action is entitled to notice, a right to be heard, and legal counsel—these statutory rights do not translate into constitutional protections. The HEOA amendments make the due process provisions stronger by explicitly addressing issues of conflict of interest, adding greater notification and hearing provisions, and expanding the rights of institutions to appeal lesser adverse actions that do not result in removal from membership; it is unlikely courts will interpret these changes to equate with constitutional protections.


118. Other regional accrediting agencies have similar procedures and requirements as SACS. See e.g., MSACS Middle States Commission on Higher Education Procedure for Appeals from Adverse Accrediting Actions, http://www.mschec.org/documents/P7.4-MSCHE-Appeals-031908.doc (last visited Dec. 21, 2008). All agencies will be expected to amended internal appellate procedures to comport with the requirements set forth in the recent HEOA amendments, if not already completed. See e.g., NEASC Policy and Procedure for the Appeal of Adverse Action Affecting Institutional Accreditation or Candidate for Accreditation Status http://www.neasc.org/policies/procedure_for_appeal/ (last visited Dec. 21, 2008) (noting the Board of Trustees approved new rules conforming with the HEOA amendments on Dec. 3, 2008).


120. Id.


122. Thomas M. Cooley Law Sch. v. ABA, 459 F.3d 705, 711-12 (6th Cir. 2006); (citations omitted) (defining quasi-public entities as private entities “exercising significant authority in areas of public concern such as accreditation and professional licensing”).
postsecondary institutions as governmental actors, accrediting agencies are private actors exempt from the Fifth and Fourteenth Amendments’ constitutional safeguards.

Although the courts hold there is no right of private action provided by the HEA, and that constitutional due process is inapplicable in the context of accreditation disputes, institutions of higher education may seek redress via “adequate judicial review” and federal common law due process. The judiciary developed common law due process to accommodate the legal void resulting from classification of accrediting agencies and other similar organizations as quasi-public non-governmental actors.

Federal common law due process ensures quasi-public entities “employ fair procedures when making decisions affecting their members.” Judicial review is limited to considering if the decision was “arbitrary and unreasonable” and whether “substantial evidence” supports the decision. The arbitrary and unreasonable standard basically is a question of whether an accrediting agency maintains fair and impartial internal rules and procedures, and whether the accrediting agency followed those rules and procedures in the accreditation dispute at bar.

Under federal common law due process, the courts give deference to an accrediting agency’s decision unless there is some violation of fundamental fairness in the agency’s internal operating procedures. Where educational information is in conflict or there is a substantive question regarding higher education, the court will defer to the agency’s factual evaluation and educational expertise.

123. Broadly, constitutional due process expresses the concept of fundamental fairness; constitutional due process encompasses both procedural and substantive “due process” rights and is only invoked when the government or a governmental actor is involved. See 16B AM. JUR. 2D Constitutional Law §§ 892, 896 (2008).

124. Cooley, 459 F.3d at 711 (6th Cir. 2006). Common law due process is a creature of the judiciary, encompassing only procedural concerns, and only to the extent that a decision is arbitrary or capricious. See 16B AM. JUR. 2D Constitutional Law §§ 892, 896 (2008).

125. See Cooley, 459 F.3d at 711-712 (“"[Q]uasi-public’ professional organizations and accrediting agencies . . . have a common law duty to employ fair procedures when making decisions affecting their members. . . Courts developed the right to common law due process as a check on [private] organizations that exercise significant authority in areas of public concern such as accreditation and professional licensing.").

126. Id. (citations omitted).


128. Id. (citing Wilfred Acad. of Hair & Beauty Culture v. S. Ass’n of Coll. & Sch., 957 F.2d 210, 214 (5th Cir. 1992)).


IV. POSTSECONDARY ACCREDITATION: CHALLENGES TO HBCUs

HBCUs lack financial resources, such as endowments, sufficient to satisfy institutional financial needs, particularly given the recent American economic decline. Endowments are crucial to the financial stability of postsecondary institutions because they "represent necessary shelter against the winds of change in higher education." Fewer than five HBCUS [sic] have endowments that exceed $500,000 and only one that exceeds $1 million. The combined sum total of HBCU endowments nationwide is less than one-tenth of the Harvard University endowment alone. These small endowments are due in part to racial lifetime earning gaps—because of this gap, HBCU alumni often have decreased earning capacity and therefore fewer financial resources with which to sustain their alma maters. Potentially, insubstantial endowments and other financial strains lead to inadequate libraries, outdated technology, and subpar scientific laboratory equipment.

Another significant challenge—perhaps the most significant argument opponents advance in favor of dismantling HBCUs—is the so-called "brain drain" phenomenon. Because HBCUs lack necessary infrastructure and competitive faculty salaries, they "often lose the battle with PWIs for the best and brightest black students and faculty." Physical and structural disparities, such as those noted, are also often why HBCUs are subject to adverse accreditation action.

"Many . . . HBCUs have been sanctioned by SACS and other regional accrediting agencies, and continue to operate in a fiscally ‘at-risk’ posture that threatens their continued existence and viability." A substantial majority of

131. Matthew Bigg, U.S. Recession Hits Black Colleges Hard, REUTERS, Feb. 16, 2009, http://uk.reuters.com/article/marketsNewsUS/idUKN1340502020090216 (last visited February 17, 2009) ("Black colleges in the United States are reeling from the impact of a recession that has hit their funding and are struggling to retain poor and middle income students. The big government economic stimulus package President Barack Obama is expected to sign on Tuesday could provide some relief in a downturn that is hurting dozens of small, private universities set up for African Americans that lack big endowments and rely on tuition fees.").


133. Id.

134. Seymore, supra note 51, at 299. The sum total of all 103 accredited HBCUs’ endowments is less than $2 billion dollars, while Harvard University alone has an endowment of approximately $35 billion dollars. Cole, supra note 57, at 60.

135. Id.

136. Seymore, supra note 51, at 299.

137. Id. at 300.


139. Seymore, supra note 51, at 300.

140. Id. at 299-300.

141. America’s Black Colleges and Universities: Models of Excellence and Challenges for
HBCUs are located in the southern United States, within the jurisdiction of the regional accrediting agency SACS. HBCUs comprise a relatively small percentage of the total institutions of higher learning within the SACS region — approximately ten percent. However, between the years 1996 and 2005, HBCUs represented twenty-five percent of all postsecondary institutions in the SACS region facing accreditation sanctions.

For example, on June 26, 2008, SACS took negative accreditation action against three HBCUs on the grounds of fiscal concerns. Florida Memorial University in Miami, Florida was placed on "Warning" for twelve months, Paul Quinn College in Dallas, Texas was denied reaffirmation of accreditation status and continued on "Probation" for twelve months, and Dillard

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142. Kujovich, supra note 50, at 37-38 ("The first black colleges were Cheyney and Lincoln Colleges in Pennsylvania and Wilberforce College in Ohio. Nearly 100 additional black public and private institutions were founded in the latter half of the nineteenth century and the early years of the twentieth. Most of them were established in the seventeen southern and border states that contained nearly all of the freed slaves, who constituted the overwhelming majority of black Americans. The creation of black colleges was prompted by the success of the earliest efforts to provide emancipated slaves with a basic education.").

143. See White House Initiative on Historically Black Colleges and Universities, supra note 40; see Prairie, et al., supra, note 94.


145. Charles Dervarics, "Federalizing Accreditation:" Standards May Include Student Outcomes, but Should the Government of Accrediting Agencies Implement the Change?, DIVERSE ISSUES IN HIGHER EDUCATION, July 26, 2007, at 6(1).

146. A warning is "[t]he less serious of the two sanctions, Warning is usually, but not necessarily, levied in the earlier stages of institutional review and often, but not necessarily, precedes Probation. It cannot, however, succeed Probation. An institution may be placed on Warning or Probation for noncompliance with any of the Core Requirements or significant noncompliance with the Comprehensive Standards. Additionally, an institution may be placed on Warning for failure to make timely and significant progress toward correcting the deficiencies that led to the finding of noncompliance with any of the Principles of Accreditation. An institution may also be placed on Warning for failure to comply with Commission policies and procedures, including failure to provide requested information in a timely manner. The maximum total time during one monitoring period that an institution may be on Warning is two years." Commission on Colleges Southern Association of Colleges and Schools, Sanctions, Denial of Reaffirmation, and Removal from Membership Policy Statement, http://www.sacsccoc.org/pdf/081705/sanction%20policy.pdf (last visited Dec. 18, 2008).

147. Florida Memorial University was placed on Warning for failure to comply with the Core Requirements of Financial Resources, Financial Stability, and Control of Finances, articulated under the SACS Principles of Accreditation. Commission on Colleges, Southern Association of Colleges and Schools, Actions Taken by the Commission on Colleges on June 25, 2009, http://www.sacsccoc.org/pdf/09cractjune.pdf (last visited Oct. 11, 2009).

148. Probation is a "[f]ailure to correct deficiencies or failure to make satisfactory progress toward compliance with the Principles of Accreditation, whether or not the institution is already
University in New Orleans, Louisiana was placed on Probation for twelve months. On December 8, 2008, SACS took adverse action against three additional HBCUs. South Carolina State University in Orangeburg, South Carolina, was placed on Warning for twelve months, Alabama A&M University in Normal, Alabama, was placed on Probation for twelve months, and Texas Southern University in Houston, Texas was continued on Probation for six months. On June 25, 2009, Tougaloo College in Tougaloo, Mississippi was placed on Warning for twelve months, Concordia College in

on Warning, may result in the institution being placed on Probation. An institution may be placed on Probation for the same reasons as discussed above regarding Warning if the Commission deems noncompliance with the Principles to be serious enough to merit invoking Probation whether or not the institution is or has been on Warning. Probation is a more serious sanction than Warning and is usually, but not necessarily, invoked as the last step before an institution is removed from membership. Probation may be imposed upon initial institutional review, depending on the judgment of the Commission of the seriousness of noncompliance or in the case of repeated violations recognized by the Commission over a period of time. An institution must be placed on Probation when it is continued in membership for Good Cause beyond the maximum two-year monitoring period. Commission on Colleges Southern Association of Colleges and Schools, Sanctions, Denial of Reaffirmation, and Removal from Membership Policy Statement, http://www.sacscoc.org/pdf/081705/sanction%20policy.pdf (last visited Dec. 18, 2008).

149. Paul Quinn was continued on Probation for failure to comply with the Core Requirements of Institutional Effectiveness, Financial Resources, Quality Enhancement Plan, Board/Administration Distinction, Qualified Administrative/Academic Officers, Institutional Effectiveness, Terminal Degrees of Faculty, Qualified Staff, Financial Stability, Control of Finances, Student Achievement, and Title IV Program Responsibilities. Commission on Colleges, Southern Association of Colleges and Schools, Actions Taken by the Commission on Colleges on June 26, 2008, http://www.sacscoc.org/pdf/08cractjune.pdf (last visited Dec. 18, 2008).

150. Dillard University was placed on Probation for failure to comply with the Core Requirement of Control of Finances. Id. At the June 25, 2009 meeting, Dillard University was removed from Probation. Commission on Colleges, Southern Association of Colleges and Schools, Actions taken by the SACS COC Board of Trustees, June 25, 2009, http://www.sacscoc.org/2009%20June%20Actions%20and%20Disclosure%20Statements/09cract%20june.pdf (last visited Oct. 11, 2009).

151. South Carolina State University was placed on Warning for failure to comply with the Core Requirements of Governing Board, Board/Administrative Distinction, Control of Intercollegiate Athletics, Fund-Raising Activities, and Responsibility for Curriculum. Commission on Colleges, Southern Association of Colleges and Schools, Actions Taken by the Commission on Colleges on June 26, 2008, http://www.sacscoc.org/pdf/08cractjune.pdf (last visited Dec. 18, 2008).

152. Alabama A&M University was placed on Probation for failure to comply with Core Requirements of Financial Resources, Financial Stability, Financial Aid Audits, and Control of Finances. Id.


154. Tougaloo College was placed on Warning for twelve months for failure to comply with Core Requirements of Financial Resources, Qualified Staff, Financial Stability, Control of
Selma, Alabama was placed on Probation for twelve months, and Paul Quinn College—placed on Probation in 2008—was removed from membership.

Adverse accreditation actions and sanctions, such as those against Alabama A&M University, Concordia College, Dillard University, Florida Memorial University, Paul Quinn College, South Carolina State University, Texas Southern University, and Tougaloo College, place individual HBCUs in precarious positions. Sanctions are particularly troubling if the institution is likely to fail to come into compliance with agency requirements in a timely manner. While adverse action against an institution does not automatically result in a loss of accreditation, if an institution is unable to comply within the specified twelve to twenty-four month time period, it will almost certainly lose its accreditation. Paul Quinn College is a clear and current example of the consequences an institution faces when it is unable to comply with agency standards—in this case, SACS’ standards—within the time allotted by the agency. Despite substantial progress—reducing the number of noncompliance issues from twenty-three to three in the twelve-month Probation period—“it wasn’t enough to avoid having SACS revoke [Paul Quinn College’s] accreditation.”

Losing accreditation causes serious problems to which HBCUs are particularly vulnerable. For one, when an institution of higher learning loses its accreditation, its students are no longer eligible for federal financial aid under Title IV of the HEA. At HBCUs, an overwhelming number of students are dependent on Title IV funding for tuition because they are from low-income families, and HBCUs, as smaller institutions with limited endowments, are dependent on those tuition funds to operate.

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155. Concordia College was placed on Probation for failure to comply with Core Requirements of Governing Board, Institutional Effectiveness, Faculty, Financial Resources, CEO/Evaluation Selection, External Influence, Board Dismissal, Administrative Staff Evaluations, Institutional Effectiveness, Academic Program Coordination, College-Level Competencies, Faculty Competence, Learning/Information Resources, Financial Stability, Control of Finances, Control of Sponsored Research/External Funds, and Title IV Program Responsibilities. Id.

156. Id. On August 27, 2009, a federal district court issued a preliminary injunction reinstating Paul Quinn College’s accreditation, on Probation, to protect the rights and interests of both SACS and the college during the legal proceedings; the preliminary injunction remains in effect pending further order of the court. Southern Association of College and Schools, News Release, August 27, 2009, Updated Notification to the Public Regarding the Revised Accreditation Status of Paul Quinn College, http://www.sacscoc.org/pdf/announcements/UPDATED%20PQC%20Announcement.pdf (last visited Oct. 11, 2009).

157. See 34 C.F.R. § 602.20 (stating the compliance period ranges from twelve to twenty-four months based on the length of the programs offered by the institution).


159. See Cole, supra note 57, at 60 ("Many students who attend HBCUs come from low-
funding cease, [] institutional death is imminent.”

Despite the dire consequences of losing accreditation, appealing adverse agency decisions is often arduous or unfeasible for HBCUs. The cost of appealing an accrediting agency’s decision, through the statutory and judicial due process channels, is often an insurmountable financial hurdle. There is also a practical burden of litigating with limited funds while simultaneously operating a struggling school.

As indicated, Paul Quinn College, the oldest HBCU in Texas, was removed from SACS membership in June 2009, losing its accreditation; the college lost an appeal to SACS and filed a federal lawsuit. As a result, Paul Quinn’s operational difficulties have worsened. Aside from the costs of litigation, a number of students elected not to enroll at the college, notwithstanding a legal decree temporarily enjoining SACS from revoking the college’s accreditation. While the college is still operational, the fall semester began a month late and with a third of the enrollment of last fall. At the start of the semester the college received donations, totaling one million dollars, from the Meadows Foundation, a private Texas philanthropic organization, and the Texas Legislative Black Caucus. However, given a mounting legal battle in income families. . . . And cash-strapped schools can find themselves scrambling to help out.”); Julianne Malveaux, Black Colleges Are As Vital Today As Ever, USA TODAY, Aug. 24, 2007, at 13A (“[A] whopping 78% of HBCU students have [federal] loans. At Bennet [College], 98% of [the] students receive some form of financial aid.”); Tracie Powell, In Not So Good Company: Another HBCU Loses its Accreditation, but with New Leadership Barber-Scotia College is Meeting its Challenges Head-On, BLACK ISSUES IN HIGHER EDUCATION, Aug. 26, 2004, 2004 WLNR 11628826 (West) (“About [ninety] percent of Barber-Scotia [College]’s students depend on some sort of financial assistance for tuition.”).

160. See Seymour, supra note 51, at 300. Accord HBCU Capital Financing Program Advisory Board Meeting Minutes (Nov. 30, 2007) (Mr. Watson: “[O]nce [an institution] lose[s] Title IV eligibility — . . . No matter how large [a HBCU’s] endowment may be, it’s only — at some point [the] institution is going to have to close, close its doors.”); see also Kamille D. Whittaker, A Lesson Before Rising, ATLANTA TRIBUNE: THE MAGAZINE, Sept. 1, 2007 at 18, available at 2007 WLNR 19194051 (stating Texas College, a HBCU in Tyler, Texas, is the only institution in SACS history “that has managed to escape the fate of revoked accreditation”); Jody Callahan, LeMoyne told to ‘clean up their act’ – But school’s revenues have exceeded expenses for 2 years, MEMPHIS COMMERCIAL APPEAL, Oct. 31, 2005 at A1, available at 2005 WLNR 17639343 (“Financial struggles are not uncommon among the nation’s more than 100 historically black schools. According to the Chronicle of Higher Education, 12 HBCUs have closed in the past 25 years.”).

161. See, e.g., Powell, supra note 159 (“It probably would have cost [Barber-Scotia College] a minimum of $50,000 to wage an appeal — $15,000 just to file [with SACS], plus attorney’s fees. . . . For a small, limited-resource college like Barber-Scotia, it just didn’t make economic sense.”) (quoting President of Barber-Scotia College Dr. Gloria Bromwell-Tinubu (internal quotations omitted)).

federal court, it is unlikely the funds will be dedicated for educational purposes and financial stabilization of the institution. The combination of resource-consuming litigation, dwindling financial resources, and decreased student enrollment may be fatal to the continued existence of Paul Quinn College.

HBCUs’ success or failure is contingent on the funding provided to each of these institutions, in the form of both institutional grants and federal financial aid for students. HBCUs need federal assistance to “continue [to] expand their educational mission and enhance their significant role in American higher education.”¹⁶³ For a HBCU to receive federal funding, like all institutions of higher learning, it must be accredited by a nationally recognized accrediting agency or association.¹⁶⁴ Yet, as already discussed, some HBCUs may be dangerously close to losing accreditation due to infrastructure and financial deficiencies.¹⁶⁵ The structure of the HEA and the resultant accreditation guidelines fail to sufficiently accommodate the unique, historically-based needs of HBCUs, and as such, statutory changes should be made.¹⁶⁶

V. STRENGTHENING HBCUS THROUGH COLLABORATIVE ACCREDITATION

Structural improvements and stable endowments play a critical role in the success or failure of a HBCU. Appreciating the significance of infrastructure and financial resources to HBCUs, lawmakers included provisions in the HEOA amendments to advance significant funding for capital improvements and assistance for building institutional endowments. However, such federal funds are only available to accredited institutions. Unfortunately, HBCUs struggling with unique financial and infrastructure concerns can lose accreditation status because they cannot comply with financial and infrastructure standards. Therefore, in order to achieve the HEA’s ultimate legislative goal for HBCUs—financial independence and self-sufficiency—accreditation standards must do more to support and aid HBCUs.

The HEA should be amended to include a collaborative accreditation system for HBCUs. Collaborative accreditation standards would require

¹⁶⁵. See Seymore, supra note 51, at 299.
¹⁶⁶. See Crystal L. Keels, Investing in HBCU Leadership: Southern Education Foundation Creates Three-Year Initiative to Facilitate HBCU Accreditation, BLACK ISSUES IN HIGHER EDUCATION, Sept. 9, 2004 (“[T]he size of most HBCUs poses the same problems that other small schools face, but note[] that cultural and historical factors also play a part in the struggle some HBCUs experience with accreditation.”). There are also modern social issues, stemming from past racial discrimination, such as disparities in educational competencies — “Fewer African-American students than whites receive adequate preparation for college in general . . . . [For example,] [o]nly 12 percent of African-Americans take pre-calculus, compared with 25 percent of white students.” Margaret Loftus, Untapped Potential, ASEE PRISM, Oct. 1, 2008, 2008 WLNR 20708945 (West).
institutions and accrediting agencies alike to face head-on the disparate needs of HBCUs and PWI flagship institutions. A collaborative system, in place for only as long as necessary, or for a fixed term, would create a safe harbor period for successful structural and financial growth, expansion of educational resources, and building of endowments. Rather than a one-size-fits-all model, collaborative institution-specific accreditation standards, aligned with federal funding, would best serve legislative goals and utilize accrediting agencies to their fullest potential. These standards would encompass the range of postsecondary educational issues, but would focus on problem areas, such as deteriorating infrastructures, lack of financial controls, insufficient technology, and dwindling endowments. Collaborative accreditation would also focus on student achievement, considering elements such as curricula, post-graduation job placements, and faculty and administrative capabilities. To ensure good faith during the collaborative process, collaborative accreditation would also carve out a limited cause of action for HBCUs.

A. Why Decentralized Accreditation Remains Appropriate for Collaborative Accreditation

Today, the HEA’s general decentralized structure of accreditation remains in place. 167 Changing the structural framework of accreditation is, for practical reasons alone, an unappealing and inexpedient option. As an extensive accreditation system is already in place, structural changes would create significant logistical and financial problems. More significantly, the decentralized structure of accreditation under the HEA was specifically developed to maintain a degree of local control over education. 168 Further, the function and structure of accreditation lends itself to the collaborative accreditation proposal because agencies must review their own policies from time to time, and there is already a degree of flexibility in the establishment of institutional accreditation standards because there is no set of explicit nationwide standards. The HEA also requires agencies to communicate with member institutions on planning and improvement goals. Finally, due to the wide-ranging needs and types of American postsecondary institutions, a centralized accreditation system would be ill-equipped to accommodate and adequately evaluate all of the institutions and programs of higher learning available to students. 169

168. See Auburn Univ. v. S. Ass'n of Colleges & Schs., Inc., 489 F. Supp. 2d 1362, 1368 (N.D. Ga. 2002) (“The continued reliance on a ‘private’ system to regulate the accreditation of institutions again appears to have its origins in congressional desire to maintain local control over education and to avoid the development of federal standards for educational policy.” (citing 20 U.S.C. § 3403(a))).
169. See Judith Eaton, Institutions, Accreditors, and the Federal Government: Redefining their “Appropriate Relationship,” CHANGE, September 1, 2007 (“[A] major effort has been under
In the context of HBCUs, decentralized accreditation weighs in favor of adequate promotion of these institutions because there are significant distinctions between small HBCUs and large flagship PWIs. So-called "flagship" postsecondary institutions receive the highest amount of financial funding, and initiate and develop a wide array of state-of-the-art, advanced, or specialized curricular programming. HBCUs are smaller institutions focused on catering to underserved, high-risk, and low-income students and do not have the same resources as flagship universities. As a result, HBCUs "simply ha[ve] different needs and priorities than a traditional four-year flagship research institution." These differing needs do not necessarily call for federal mandates to immediately equalize resources, nor does the divergence in needs demand cohesive federal oversight. Rather, variance in the needs of HBCUs and flagship PWIs calls for an introspective analysis through joint efforts of higher learning institutions and regional accrediting agencies.

Ultimately, accreditation appropriately remains both regionalized and in the hands of educational professionals. The current decentralized postsecondary accreditation structure, with its six regional accrediting agencies and numerous other program and field specific agencies, is the best framework for future development and promotion of all American institutions of higher education. Regional agencies have the ability to cater not only to a smaller, localized set of member institutions, but to cater to the specific cultural needs of each region of the country. Collaborative accreditation lends itself to a decentralized system, and the current decentralized system lends itself to collaborative accreditation.

B. 2008 HEOA Amendments

1. Accreditation Language

When the HEA was revised and reenacted in 2008, Congress moved toward a standard similar to the one this paper proposes, but the amendments do not go far enough to support and nurture HBCUs. The HEA’s provisions addressing agency recognition were altered to allow agencies to use “different
standards for different institutions” where student achievement, based on the institutional mission, is concerned. Unfortunately, the HEOA does not bring this premise to its logical conclusion. The language is neither mandatory nor binding on accrediting agencies; the agencies are not required to actually implement the “different standards” provision. Without further amendment to require implementation, it is unlikely that the benefits Congress sought to derive from the “different standards” language will materialize. The amended “different standards” statutory language of the HEOA is permissive and directly addresses only student achievement. The focus on institutional mission alone overlooks the other elements which impact an institution’s mission and contribute to student achievement. Student achievement is paramount, but it must be put into context; the HEOA amendment fails to address institutional financial and infrastructure needs in relation to student needs and accreditation concerns.

Many noncompliance violations HBCUs encounter are based on finances and infrastructure, not student achievement. Permitting accrediting agencies greater latitude when addressing student achievement is one of collaborative accreditation’s greatest strengths, particularly regarding institutions like HBCUs where remedial coursework is often a necessity, however, collaborative accreditation seeks to account for all aspects of an institution that contribute to academic success.

The HEOA also altered the language relating to agency enforcement of accreditation standards, requiring application and enforcement to “respect the stated mission of the institution of higher education, including religious missions, and [ ] ensure that the courses . . . are of sufficient quality to achieve . . . the stated objective for which the courses or programs are offered[.]” Congressional recognition that agencies should “respect” an institution’s mission when applying and enforcing accreditation standards generally

173. 20 U.S.C. § 1099b(a)(5) (2008). The pre-amendment language of the HEA read: “the standards for accreditation of the agency or association assess the institution’s—(A) success with respect to student achievement in relation to the institution’s mission[,]” § 1099b(a)(5)(A) (1998). The HEOA alters the language to read, “the standards for accreditation of the agency or association assess the institution’s—(A) success with respect to student achievement in relation to the institution’s mission, which may include different standards for different institutions or programs, as established by the institution[,]” § 1099b(a)(5)(A) (2008) (emphasis added).

174. 20 U.S.C. § 1099b(a)(4)(A) (2008) (emphasis added). Pre-amendment language read: “such agency or association consistently applies and enforces standards that ensure that the courses or programs of instruction, training, or study offered by the institution of higher education, including distance education courses or programs, are of sufficient quality to achieve, for the duration of the accreditation period, the stated objective for which the courses or the programs are offered[,]” § 1099b(a)(4)(A) (1998). The HEOA alters the language to read: “such agency or association consistently applies and enforces standards that respect the stated mission of the institution of higher education, including religious missions, and that ensure that the courses or programs of instruction, training, or study offered by the institution of higher education, including distance education or correspondence courses or programs, are of sufficient quality to achieve, for the duration of the accreditation period, the stated objective for which the courses or the programs are offered[,]” § 1099b(a)(4)(A) (2008) (emphasis added).
supports this paper's proposed amendment—collaborative accreditation—but does little to foster self-sufficiency of HBCUs or actually change the way accrediting agencies function relative to member institutions.

Overall, the HEOA amendments grant broad power to accrediting agencies to develop and enforce accreditation standards but do not demand specific focus on institutional missions and concerns. The standards are therefore insufficient both to address the unique issues HBCUs encounter, and to achieve the legislative purpose of financial independence of these institutions. This practical difficulty is exemplified by considering the substantial progress Paul Quinn College made while on Probation, reducing the number of noncompliance issues from twenty-three to three, yet still losing accreditation despite swift and significant movement toward compliance with accreditation standards. If collaborative accreditation standards had been in place, Paul Quinn College would have been able to work with SACS under a government-mandated policy of incremental improvements, to develop the institution and maintain adequate operations, rather than expending much-needed financial resources on agency appeals and litigation.

2. Endowments and Infrastructure Funding

Despite significant amendment to the HEA in 2008, Congressional findings in Title III remain untouched. The title's purpose is still to aid minority-serving postsecondary institutions in problem solving, stabilizing management and financial operations, and to encourage financial independence. Congress observed that HBCUs require “financial assistance to establish or strengthen the physical plants, financial management, academic resources, and endowments.” This assistance is crucial because endowments and infrastructure “enhance . . . institutions and facilitate a decrease in reliance on governmental financial support.” However, regional agencies are presently imposing on HBCUs accreditation standards premised on financially independent flagship universities. In contrast, collaborative accreditation would allow accrediting agencies and HBCUs to align funding with focused development goals, making full use of federal aid.

Under the HEOA, Congress created a new defined class of institutions—"predominately black institutions" ("PBIs")—which are distinct from, but similar to HBCUs. PBIs are encompassed within Title IIIA, which provides

178. Id.
179. 20 U.S.C. § 1059e (2008). PBIs are defined as institutions of higher education with an enrollment of more than 1000 undergraduate students who are "not less than [forty] percent Black American students[,]" at least fifty percent of enrollment are "needy undergraduate students[,]" and "has an average educational and general expenditure that is low, per full-time equivalent undergraduate student, in comparison with the [national] average[.]"] Id.
grants "to improve the academic quality, institutional management, and fiscal stability of eligible [minority-serving] institutions, in order to increase their self-sufficiency and strengthen their capacity to make a substantial contribution to the higher education resources of the Nation." Under this title, "special consideration" may be given where an eligible institution has a below-average endowment or library resources. PBIs are not entitled to part B funding, but these institutions are permitted to apply for grants and fund-matching endowment monies similar to those offered to HBCUs under part B. Creation of PBIs under the HEOA, while not directly linked to the survival of HBCUs, further emphasizes Congressional recognition of the need to support and nurture minority-serving institutions in the modern era.

"Endowment challenge grants" provide a clear example of Congressionally contemplated financial strains on minority-serving institutions. These grants enable the Secretary of Education to issue matching-funds grants to Title III part A and part B institutions for the specific purpose of augmenting and developing institutional endowments; matching-funds must be equal to one-half of the grant award and be deposited in the institution's endowment fund. The HEOA not only retained this program, but doubled both the minimum and maximum grant award amount.

Further, investment funds allocated to HBCUs and PBIs, primarily HBCUs, may be used by institutions with a priority for "[p]urchase, rental, or lease of scientific or laboratory equipment[,]... [c]onstruction, maintenance, renovation, and improvement in classroom, library, laboratory, and other instructional facilities[,]... [a]cademic instruction[,]... [p]urchase of library books[,]... [s]tablishing or enhancing a program of teacher education." Grants may also be used, up to twenty percent with matching funds, to establish or increase an institution's endowment. Grant applications require an institution to develop and establish a comprehensive plan aiming for academic quality and institutional self-sufficiency; the plan must include measurable objectives illustrating the effectiveness of the plan. HBCUs will be required to develop institutional self-improvement plans to receive the grant monies earmarked for HBCU infrastructure and educational resource development. Collaborative accreditation would dovetail with these provisions as these plans are likely to be similar to or incorporated into any collaborative accreditation

181. 20 U.S.C. §§ 1062, 1067q (2008) (matching funds in an amount not less than $100,000 and up to $1,000,000).
182. "Part A" institutions are non-HBCU minority-serving institutions within the Title III "strengthening institutions" provisions of the HEA.
185 §1067q (2008).
187. Id.
standards. The achievement goals stated in these self-improvement plans, if consistent with accreditation requirements, would enable HBCUs to follow through with planned improvements efficiently and on practical timetables. Additionally, the HBCU capital financing program provides an avenue for institutions to borrow federally insured funds generated through the issuance of bonds.\(^{188}\)

However, given the United States' present recessionary economy, the challenges many HBCUs face are substantially amplified and, particularly in light of accreditation problems, the money the HEA provides may be insufficient. The HEOA amendments, although enacted as recently as August 2008, do not take into account the present economic decline, nor do the amendments fully contemplate the increased problems of HBCUs in a depressed economy. For instance, despite the 2008 amendments, in early 2009, Spelman College in Atlanta, Georgia, the top ranked HBCU in America,\(^{189}\) announced "it would reduce its operating budget by $4.8 million, including the elimination of [twelve] vacant and [twenty three] existing positions, because of a three percent drop in enrollment and a decrease in endowment earnings."\(^{190}\)

To further supplement HBCUs, as part of President Barack Obama's 2009 "stimulus package," are appropriations for additional dollars, beyond those funds accounted in the HEA, for HBCUs to develop infrastructure and technology.\(^{191}\)

The purpose of all of these available funds and grants, under both the HEA and the stimulus package, is to establish financial stability and put HBCUs on the path to financial independence. Unfortunately, given the rigid framework of accreditation and sanction, the funds may, ultimately, be provided in vain, at least where HBCUs in precarious financial situations are concerned. Collaborative accreditation would key to the available grants and federal funds, and would measure the efficiency in which individual HBCUs utilize funding opportunities. Percentage growth of endowments or construction of needed facilities would be appropriate areas to include in accreditation standards at institutions struggling with dwindling endowments or dilapidated infrastructure. Given the federal efforts to make financial resources


\(^{190}\) Bigg, supra note 131. Reduced enrollment has a significant impact on HBCUs, like Spelman College, because the substantial majority of operating funds come from annual tuition, not endowment funds. Id.

\(^{191}\) Id. ("As it stands, the $787,000,000,000 stimulus bill includes money to make an 'incredible difference' to HBCUs....It would include more than $800,000,000 for infrastructure projects on HBCU campuses and $500,000,000 over 2 years for improvements in technology as well as increased federal grants for students from low-income families," said Lezli Baskerville, President of the National Association for Equal Opportunity in Higher Education.).
available to HBCUs, it follows that accreditation standards regional agencies impose on member HBCUs should align with focused development goals, not accreditation standards based on financially independent flagship universities.

C. Proposed Amendments: Collaborative Accreditation

Congress has recognized that minority-serving postsecondary institutions, particularly HBCUs, are struggling. In response, it appropriated funds under the HEOA to correct the financial and infrastructure difficulties plaguing many of these institutions. However, if accreditation is lost during the period of increased financial assistance, then Title IV federal aid intended to promote and build the institution will cease, as will funding for enrolled students. It is important to align accreditation requirements with funding for institutions receiving structural grants, matching funds programs, and student tuition aid money.

Collaborative accreditation would mandate accrediting agencies and constituent HBCUs to design individualized standards jointly. It would target incremental structural and resource development, based on each institution’s mission and needs. A collaborative system would require timelines for developing infrastructure and financial stability, for marshalling financial and administrative resources, and would focus on the needs of minority students, many of whom are insufficiently prepared, although not unable, to succeed in postsecondary academics. It would enable HBCUs to take full advantage of available federal funding, without jeopardizing accreditation status, or prematurely expending scarce resources on costly appeals and legal battles.

In September 2009, SACS issued a public statement regarding college and university accreditation. It indicated that the agency recognizes the particular concerns applicable to HBCUs, and possibly that the agency is amenable to some form of collaborative accreditation, but the statement falls short of calling for or implementing a collaborative system. SACS states, “[t]he process of accreditation is designed to provide a systematic and systemic evaluation of an institution resulting in sustainable improvement over time and yielding effective student learning.” The statement continues, indicating institutional self-study is a vital component of accreditation, and with SACS urging its member institutions to “develop further plans and to initiate additional activities of a cooperative nature to ensure a student’s success,” with an eye toward vocational and technical training. The statement cites studies which establish that many students enrolled in the primary and secondary educational system are “from low socioeconomic families and minority backgrounds, [and]"


193. Id.
are academically and socially underprepared." While a start in the collaborative direction, SACS' statement is too weak to bring about the necessary changes to HBCU accreditation, nor does it apply outside of SACS' jurisdiction. Without requiring, through HEA amendment and revision, that each regional accrediting agency work closely with its HBCU members to develop incremental improvement plans and mandating greater collaborative efforts between these institutions and agencies, such statements pay mere lip service to the idea of collaborative accreditation by failing to provide institutions with clear standards or an avenue of redress.

1. Aligning Accreditation Standards with Federal Funds

SACS is the primary accrediting agency for HBCUs. This phenomenon is plainly due to demographics—a high concentration of black Americans were living in the Southern states in the years immediately following emancipation and, as a result, HBCUs formed in the South. SACS has not always had a strong relationship with its member institutions, and in the past the agency's procedures raised due process concerns. There have even been allegations SACS is more rigorous in enforcing standards against HBCUs. However, in recent years there has been a shift in SACS policy. The relations between HBCUs and SACS have improved, with the institutions collectively coming together with SACS to discuss concerns specific to southern HBCUs. The HEA should not only permit such action, but require it.

To supplement the recent changes to the HEA, and to complement the infrastructure and matching-fund endowment grants, the statutory accreditation guidelines imposed on accrediting agencies should require each regional agency to jointly develop standards tailored to the individualized institutional mission and cultural needs of each HBCU. The HEA, and the regulations the Department of Education promulgates under authority of the Act, should

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194. Id.
195. Accrediting agencies are under governmental mandate to consistently apply and enforce promulgated educational quality standards, and are required to base accreditation decisions on the agency's published standards. 34 C.F.R. § 602.18 (2008).
196. White House Initiative on Historically Black Colleges and Universities, supra note 40.
197. See e.g., St. Andrews Presbyterian Coll. v. S. Ass'n of Colleges & Sch., Inc., 2007 U.S. Dist. LEXIS 87953, *10 (M.D.N.C. Nov. 29, 2007) ("SACS' accreditation procedures have previously raised common law due process concerns. For example, the Department of Education has recommended that SACS 'address the Department's concerns pertaining to the time it affords an institution to comply with requests for information and documents, the administrative record, cost of appeal, etc., to demonstrate that the procedures it uses throughout the accrediting process satisfy due process.'").
198. ADC: In Danger?, ATLANTA TRIBUNE, Nov. 1, 2005, 2005 WLNR 22483407 (West) ("Some have made the argument that SACS is more rigorous on African-American colleges and universities." However, SACS countered, stating "'[i]t's not just an HBCU issue; a lot of faith-based institutions are going through [accreditation problems] too... The standards to which they (HBCUs) are held is no different than any other institution, including community colleges.'").
199. Dervarics, supra note 145, at 6(1).
mandate that member HBCUs and regional accrediting agencies collaboratively develop institution-specific accreditation standards that align with federal infrastructure and endowment funds. HBCUs’ accreditation standards should be designed “to accommodate variation in purpose and character” for each individual institution.\(^{200}\) Agency recognition criteria should require each agency to consult with individual constituent HBCUs in order to develop short-term individualized collaborative standards for infrastructure and resource development and student achievement. These individualized accreditation standards should align with the new grant and endowment provisions of the HEOA.

Financial resource management and infrastructure fortification are areas in which collaborative accreditation would be particularly beneficial to directing federal funding to HBCUs’ unique needs. For instance, if institutions are compelled to inexpediently divert student resources to curing non-compliance issues, perhaps inadequately, or there is litigation over accreditation concerns on these bases, it is a misuse of funds and time. It is also more difficult for students to achieve in the classroom when the physical structures are lacking.\(^{201}\) Collaborative accreditation would ameliorate this problem in two ways.

First, it would enable institutions to prioritize needs and accomplish goals related to finance and infrastructure on a more realistic timeline than is provided under current accreditation policies. Rather than merely assigning a demerit for failure to develop adequate infrastructure, collaborative timelines would allow each institution to obtain and implement infrastructure and

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200. Parsons Coll. v. N. Cent. Ass’n of Coll., 271 F. Supp. 65, 73 (N.D. Ill. 1967). When a college alleged nebulous accreditation standards under the original provisions of the HEA of 1965, a federal court determined “[t]he [accrediting] Association was entitled to make a conscious choice in favor of flexible standards to accommodate variation in purpose and character among its constituent institutions, and to avoid forcing all into a rigid and uniform mold.” Id. Now, strict requirements exist, mandating agencies to articulate and publish standards; the current HEA also includes a due process provision. The Parsons College court’s rationale favoring flexibility in fashioning accreditation standards proves valid here. However, this paper proposes a joint effort, rather than unilateral flexibility reserved to the accrediting agency.

201. Cynthia Uline, Megan Tschannen-Moran, The walls speak: The Interplay of Quality Facilities, School Climate, and Student Achievement, Journal of Educational Administration, Vol. 46, No. 1, pp.55-78 (2008), http://www.emeraldinsight.com/Insight/ViewContentServlet?Filename=Published/EmeraldFullTexArticle/Articles/0740460104.html (last visited Oct. 28, 2009) (“A growing body of research provides evidence of a link between school building quality and student achievement. It may be that dilapidated, crowded, or uncomfortable school buildings lead to low morale and reduced effort on the part of teachers and students alike, to reduced community engagement with a school and even to less positive forms of school leadership. Our results revealed that when learning is taking place in inadequate facilities, there tends not to be as clear a focus on academics, and the learning environment is less likely to be perceived as orderly and serious. Where school buildings are shabby and inadequate, there is less likely to be the kind of community engagement that supports teaching and learning. Teacher attitudes and behaviors are related as well, as teachers are less likely to show enthusiasm for their jobs and to go the extra mile with students to support their learning when they teach in buildings they judge to be of poor quality.”).
technology based on realistic, targeted achievement goals. These short-term structural accreditation standards would be based on meeting specific goals with specific funds, such as complete rehabilitation of a particular structure or equipping a set number of science laboratories with state-of-the-art instruments.

Second, collaborative accreditation would aid HBCUs in their mission to educate underserved and high-risk minority students by taking into consideration the actual needs of the student population at each institution. Where classes are required to bring particular students to the necessary level of academic preparedness required by sound educational practices, institutions should not be penalized for students failing to achieve; rather, achievement should be measured incrementally in terms of improvement. It is the duty of the educational system to teach students to achieve, when necessary, in addition to demanding excellence. HBCUs should not be penalized under accreditation standards for providing remedial curriculum necessary to develop and prepare high-risk students for later postsecondary educational challenges—many minority and low-income students are educationally disadvantaged during their years of primary and secondary education. For instance, Paul Quinn College, while fighting to preserve SACS membership, was also fighting for increased student retention, due to the high-risk students it matriculates. The college has implemented a new policy for the 2009 academic year which will allow “[s]ome first-year students [to] take all of their classes on a credit/no-credit basis, with no letter grades. . . . [T]he credit-only policy is to help students get ‘acclimated to college without the pressure of grades.’”

Accrediting agencies and standards should encourage such policies, when tied to long-term student achievement, where there is a proven need at a particular institution. Collaborative accreditation keeps with this goal by giving HBCUs a legitimate opportunity to teach achievement as needed.

202. Corbett, supra note 61, at 197 (“[B]ecause of the lack of quality in many public primary and secondary schools in urban areas, many African-American college students are plagued by deficient preparation for post-secondary education.... Since they have not been adequately trained at the elementary and secondary level, black students regularly enter college without the study habits and basic skill sets needed to effectively handle the increased rigor and complexity of college level course work.”); Ware, supra note 50, at 677-78 (“[S]tates would be better served by taking actions to increase the pool of minority college students....College is the continuation of a long-term educational process, where it is difficult to remedy problems that have developed at earlier stages. The focus should be on elementary and high schools in urban areas, where the vast majority of black students attend school, and where the quality of educational services is most lacking. The economic disparities between urban and suburban school districts are at the heart of the nation’s failure to educate minority children.”). To some extent this issue may be remedied under the HEOA amendment to section 1099b(a)(5)(A) regarding student achievement.

2. The Importance of Collaborative Standards and Timelines

A collaborative accreditation system would make each individual HBCU responsible for initially drafting proposed standards and timelines. These drafts would surpass, in specificity and depth, the self-study requirements that accrediting agencies such as SACS currently impose. This principle would serve two purposes. First, it would force each institution to identify institutional problems with precision and to contemplate realistic avenues to achieve financial stability and independence. Second, by making efficient use of resources, also it would prevent an undue burden on the accrediting agencies. After each constituent HBCU drafts its proposal, the institution would collaborate with its accrediting agency to refine and clarify the standards, and to ensure that educational excellence is not compromised. Collaboration would serve as a check on the institution’s proposed standards and structural development timelines, and would encourage open discourse and exchange of ideas to promote the best possible route to financial independence for each individual member HBCU.

Further, timelines aligned with accreditation concerns and federal funding would enable each institution to combat its individual financial concerns, while efficiently expending resources—logic dictates that the current twelve or twenty four month time periods allotted to correct numerous complex noncompliance issues are too short to cure all problems, and make prioritization difficult. Working alongside SACS, or another jurisdictionally competent accrediting agency, to establish clear accreditation goals to be met incrementally, will enable each HBCU to cure noncompliance issues and solve financial and administrative problems without compromising student achievement.

Finally, the standards and timelines should focus not only on student achievement, but on developing the financial and educational resources that affect achievement. Specifically, they should reflect prioritized concerns, including percentage growth of the institutional endowment, increased asset development, degree of fiscal stability, number or type of facilities constructed or rehabilitated, degrees and licensure held by faculty, student retention rates, and post-graduation job placements.

Accreditation must be structured to meet individual deficiencies within each institution such that the accreditation process will not hinder HBCUs, but support and assist them as the HEA and the HEOA amendments envision. Each HBCU should be given the opportunity to develop a program of quality enhancement that caters to its needs, rather than seeking to fit PWI archetype-based accreditation standards. The focus should be on individualized incremental and ascertainable goals, aligned with federal funding, that create

204. See, e.g., Keegan, supra note 158.
modern infrastructure and institutional financial independence without sacrificing educational quality.

3. Private Cause of Action for Enforcement Collaborative Accreditation Standards

To ensure the full cooperation and good faith of accrediting agencies in the collaborative process, the proposed amendment should not only require collaborative accreditation, but carve out a limited cause of action which expressly permits a HBCU covered by collaborative accreditation standards to bring suit against its regional accrediting agency on specific grounds. Absent this cause of action, there is the potential for bad faith in collaborative negotiations or a stalemate between the institution and agency. The option for a HBCU to bring suit against its accrediting agency also would balance power between the two bodies; the agency occupies a superior bargaining position because, while an institution’s membership is voluntary, membership is required for accreditation.

The cause of action would only be viable if an institution could establish that its accreditation agency failed to collaborate in good faith and within the statutory time frame for development of collaborative standards. The statutory cause of action would also require that the status quo be maintained throughout the pendency of collaborative negotiation and any subsequent litigation stemming from negotiations. In other words, there would be no change to an institution’s accreditation status for the duration of the litigation.

To prevent institutions from abusing the statutory right, the amendment would require that the prosecuting institution pay costs and attorney’s fees if a claim is brought in bad faith, as determined by the court. The private right of action, reserved to HBCUs and constrained to the collaborative process, would be further confined to equitable remedies. Federal courts would be limited to the imposition of preventative mandatory injunctive orders enforceable only through coercive civil contempt. This restricted scope would prevent either institutions or accrediting agencies from using the threat of litigation as leverage, and would limit the outlay of financial resources required to enforce the cause of action.

HBCUs would be safeguarded in the collaborative process through a statutory mandate that accrediting agencies follow statutory “due process” as defined by the HEA, and through a limited private cause of action to ensure good faith. An equitable private right of action would enable institutions to enforce the Act’s actual collaborative provisions to the extent granted by Congress, while federal common law due process would continue to function as a check on the significant power accrediting agencies wield against institutions of higher learning. The sum of collaborative accreditation standards and legal safeguards would serve as a solid foundation for HBCUs to improve
infrastructure, develop resources, and continue to provide excellence in education, without endangering institutional accreditation status on the path to financial independence.

4. Counterarguments and Opposition to Collaborative Accreditation

Potentially, there exist counterarguments or opposition to collaborative accreditation.

Some members of society view HCBUs as a reminder of the racist ideologies that encouraged blatant discrimination against black Americans, or consider HBCUs a throwback to segregation era practices. Opponents of HBCUs argue these institutions are inescapably burdened by the remnants of an inherently unequal dual system of higher education. However, empirical and anecdotal evidence demonstrate the continuing positive role HBCUs play in American cultural, political and economic life.

One might argue that collaborative accreditation lowers standards, or is detrimental to the value of a student’s education at a HBCU. Those fears, however, miss the point. Collaborative accreditation does not lower standards. Rather, it encourages accrediting agencies and institutions to develop effective plans for improvement of problem areas at individual schools. The standards would be, as they currently are, based on sound educational practices, but would simply avoid the mistake of comparing HBCUs’ needs to the needs of flagship universities.

Opponents of HBCUs or collaborative accreditation may also suggest that so-called failing schools should not be responsible for drafting their own standards, which may be analogous to the fox guarding the henhouse. However, this proposal does not provide HBCUs with unilateral control over accreditation, nor does it state each and every HBCU that has or is facing accreditation noncompliance should forever retain accreditation regardless of the quality of the institution. Instead, collaborative accreditation seeks to attain, and maintain, academic excellence at HBCUs while remedying problems of financial dependence and inadequate infrastructure. It is true, some institutions encounter noncompliance with accreditation standards based on student complaints or curriculum concerns, and such institutions may not ultimately be qualified to grant baccalaureate degrees; but a substantial number of HBCU noncompliance issues are based on problems with financial resources and internal financial controls. Collaborative accreditation does not allow “failing schools” to set their own standards, but creates a unique approach to remedying primarily non-academic problems germane to achievement.

205. See Seymore, supra note 51, at 299.
206. Id.
207. See Part II.B.
208. See, e.g., supra, Part IV.
Opponents might suggest that collaborative accreditation—and maintaining HBCUs in general—perpetuates the vestiges of de jure segregation. This proposal, however, does not approach the “separate but more equal” result condemned in *United States v. Fordice.*[^209] *Fordice* stands for the proposition that discriminatory state educational policies traceable to a former system of de jure segregation are unconstitutional, but holds there is no violation of equal protection where a state reforms such discriminatory policies to “the extent practicable and [in a manner] consistent with sound educational practices.”[^210] Collaborative accreditation, rather than fortify the vestiges of segregation, seeks to cure them in a manner in keeping with sound educational practice. Further, collaborative accreditation would not be implemented through state actors, but private agencies. It is an initiative designed to mitigate the effects of past discrimination.

Indeed, collaborative accreditation would function as a soft form of affirmative action, following the general guidelines set forth in *Grutter v. Bollinger,* recognizing that HBCUs promote the compelling government interest of providing postsecondary education to low-income and underserved American minority students. In *Grutter,* the Court endorsed the view “that student body diversity is a compelling state interest that can justify the use of race in university admissions.”[^211] Thus, the Court effectively sanctioned educational affirmative action, assuming an appropriate, limited, and narrowly tailored policy.[^212] In the case of collaborative accreditation, however, the requirements of *Grutter* are likely more strict than necessary because the proposal would only collaterally promote HBCUs and would avoid setting any race-related or admission standards.

A broadly mandated collaborative accreditation system for HBCUs would be an evenhanded and unburdensome means of taking remedial action against past discrimination arising out of segregation, in furtherance of a compelling government interest.[^213] The proposed collaborative approach would aim to

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[^210]: Id. at 729. *Fordice* does not explicitly mandate disbanding HBCUs, nor does it hold these institutions to be clearly unconstitutional under an equal protection analysis. See also Luti, *supra* note 32, at 477.


[^212]: Id. at 341-42 (“Narrow tailoring, therefore, requires that a race-conscious admissions program not unduly harm members of any racial group...[and] race-conscious admissions policies must be limited in time.”). In the context of postsecondary affirmative action admissions policies, “narrow tailoring” of a race-conscious policy is not equivalent to a policy that excludes any and all racial considerations. Id. at 339 (“Narrow tailoring does not require exhaustion of every conceivable race-neutral alternative. Nor does [narrow tailoring] require a university to choose between maintaining a reputation for excellence or fulfilling a commitment to provide educational opportunities to members of all racial groups. Narrow tailoring does, however, require serious, good faith consideration of workable race-neutral alternatives that will achieve the diversity the university seeks.” (internal citations omitted)).

[^213]: See *c.f. Grutter,* 539 U.S. at 332, 341 (2003) (“When race-based action is necessary to
achieve national academic, social, political, and economic successes through affirmative steps designed to increase widespread diversity and promote equal opportunity for all students, both during and subsequent to their postsecondary education.

VI. CONCLUSION

In the era of globalized economies, America will continue to demand increasing numbers of skilled, educated citizens. Excellent higher education will be the vehicle through which the United States remains competitive. Therefore, particularly in light of the recent economic downturn, the widespread development and promotion of all avenues of available postsecondary education should become an immediate national goal.

HBCUs are unique institutions facing unique challenges, and they require unique methods of support. Collaborative accreditation, and a limited private cause of action tailored to that system, would fortify HBCUs nationwide. It would allow HBCUs promptly and systematically to enhance infrastructure and achieve financial independence without jeopardizing accreditation or sacrificing educational quality during the capital improvement stage. When HBCUs can focus on achieving specific, articulable goals for structural improvement and student achievement—and not on the immediate burden of complex financial and infrastructure problems—they will be able to more successfully achieve their institutional mission: providing education and skills to high-risk and underserved minority students, while supplying substantial social, political, and economical benefits to the nation as a whole.

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further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied....To be narrowly tailored, a race-conscious admissions program must not "unduly burden individuals who are not members of the favored racial and ethnic groups." (citations omitted)).