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CONSUMER-DRIVEN REFORM OF HIGHER EDUCATION: A CRITICAL LOOK AT NEW AMENDMENTS TO THE HIGHER EDUCATION ACT

*Julie Margetta Morgan**

I. INTRODUCTION

American higher education is a lot like global warming. Public policy has come to it too late with too little to matter much. Thank God we still have capitalism and evolution to save us.

- *Joe Hagy, retired educator (February 15, 2008)*

In 1978, Walter C. Hobbs set out to survey the burgeoning field of regulatory provisions governing higher education.¹ He set forth a series of questions to be used by scholars to evaluate regulations imposed by the federal government upon higher education: “What are the regulatory agencies seeking to accomplish? Is that legitimate? Is it wise?” and “What are the probable consequences (intended or not) for academe? What is, what can be, and what should be higher education’s response?”² The federal government’s regulatory power over higher education has expanded considerably since those questions were penned,

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¹ See Walter C. Hobbs, *The Theory of Government Regulation, in GOVERNMENT REGULATION OF HIGHER EDUCATION* 1, 5–7 (Walter C. Hobbs ed., 1978).

² *Id.* at 5.

further emphasizing the need to answer them.³ This Article revives Hobbs' inquiries to examine the consumer-information provisions of the amendments to the Higher Education Act, focusing in particular on the goals they seek to accomplish and their potential impact.⁴

As Congress began to seriously approach the reauthorization of the Higher Education Act (HEA) in 2007 and 2008, it faced a policy landscape that had long been defined by the ongoing commitments to broadening access to college and making tuition more affordable, but was significantly altered by some unforeseen obstacles.⁵ One major development was New York Attorney General Andrew Cuomo's 2007 investigation into the relationships between colleges and student loan companies that uncovered the improper use of incentives to attain "preferred lender" status at many institutions.⁶ The investigation received much public attention and resulted in further investigation at the federal level, as well as legislation that cut federal subsidies to lenders.⁷ Later in that same year, the student loan industry took center stage again, as the mortgage crisis that crippled the housing market bled over into a "credit crunch" in student lending.⁸ Major lenders like Nelnet scaled back the types of student loans they offer, and others ceased offering loans altogether, prompting Congress both to provide relief to lenders and increase the scale of its direct lending program.⁹

³ See, e.g., Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2008); Family Educational Rights and Privacy Act, 20 U.S.C. § 1232(g) (2008); 42 U.S.C. § 2000(d) (2008).

⁴ See *infra* Parts II–VIII.

⁵ See Ami Zusman, *Issues Facing Higher Education in the Twenty-first Century*, in *AMERICAN HIGHER EDUCATION IN THE 21ST CENTURY* 109, 109–22 (Philip Altbach, et al., eds., 1999); Kelly Field, *Congress Prepares for Student-Loan Crisis, While Declaring It Unlikely*, *CHRON. HIGHER EDUC.*, Mar. 28, 2008, at A22; Jonathan Glater, *Cuomo Investigates Colleges and Ties to Student Lenders*, *N.Y. TIMES*, Feb. 1, 2007, at B6.

⁶ See Glater, *supra* note 5.

⁷ See College Cost Reduction Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007).

⁸ See Field, *supra* note 5.

⁹ See Paul Basken, *Loan-Rescue Plan Has Hidden Costs, Benefits*, *CHRON.*

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These circumstances made affordability a driving factor in new federal legislation, and also raised concerns about the trustworthiness of our nation's colleges when it comes to safeguarding the financial well-being of students and families.¹⁰ This distrust is reflected in the amendments to the HEA (contained in the Higher Education Opportunity Act) through provisions that regulate the relationship between financial aid officers and loan companies, and also in those that force institutions of higher learning to provide detailed information about the costs and quality of higher education to students and families.¹¹ The reauthorization of the HEA continues to support higher education by providing financial aid to students, but it also reflects a new strategy: changing higher education by empowering consumers.¹²

The amendments to the HEA purport to ease the financial burden of college by decreasing the price of higher education and helping families to plan better to pay for college.¹³ The methods for achieving these goals emphasize providing more and better sources of information about college admissions, cost, financial aid, and the terms of student loans.¹⁴ They include loan information provisions that have been termed a "College Consumer's Bill of Rights,"¹⁵ as well as plans for a net price calculator, tuition watch lists, expanded reporting on institutional characteristics, and incentives to colleges and non-profits to target cost and admissions information to students and families.¹⁶

HIGHER EDUC., June 6, 2008, at A4; Field, *supra* note 5.

¹⁰ See Paul Fain, *Why Colleges Can't Shake the Feds*, CHRON. HIGHER EDUC., July 4, 2008, at A3; H. COMM. ON ED. AND LABOR, 110th CONG., THE COLLEGE OPPORTUNITY AND AFFORDABILITY ACT: *THE COLLEGE CONSUMER'S BILL OF RIGHTS* (Feb. 2008), available at <http://edlabor.house.gov/publications/20080207CCBillOfRights.pdf> [hereinafter *COLLEGE CONSUMER'S BILL OF RIGHTS*].

¹¹ See Higher Education Opportunity Act, Pub. L. No. 110-315, §§ 1001–1042, 122 Stat. 3078, 3478–90 (2008).

¹² See *id.*

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*; *COLLEGE CONSUMER'S BILL OF RIGHTS*, *supra* note 10.

¹⁶ See Higher Education Opportunity Act, Pub. L. No. 110-315, § 111, 122 Stat. 3078, 3098 (2008) (codified as amended at 20 U.S.C. § 1015); College

Representative Buck McKeon described the House of Representative's proposed amendments to the HEA as an effort to capitalize on market principles at work in higher education: "Our principles for reform are based on the idea that by giving good information to consumers, we can empower them to exert influence on the marketplace."¹⁷ The idea that the answer to rising costs and limited affordability for middle- and low-income students is a question of manipulating the higher education market is not a new one.¹⁸ In the past, the federal government has enhanced student choice by providing direct financial aid to students in the hopes that increased choice would promote competition in the higher education market, which would increase efficiency, quality, and affordability.¹⁹ Student aid increases have affected affordability positively in the sense that low-income students are able to attend more costly institutions, but aid increases may have had the unintended negative effect of allowing the price of higher education to rise unchecked.²⁰

The position taken in this Article is not that helping consumers become more informed is inherently bad. Rather, it is the author's contention that this policy and rhetorical shift toward solving problems by "empowering consumers" that has so far succeeded unchallenged, can be dangerous if its consequences are unknown.²¹ Indeed, the responsibility for providing access and affordability is shifted away from the government and institutions, and is instead

Cost Reduction Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2008).

¹⁷ Howard P. McKeon, *Real Progress (Finally) on College Affordability*, INSIDE HIGHER ED, Feb. 7, 2008, <http://www.insidehighered.com/views/2008/02/07/mckeon>; Press Release, H. Comm. on Ed. and Labor, McKeon Statement: Conference Report to H.R. 4137, the "Higher Education Opportunity Act" (July 31, 2008), available at <http://republicans.edlabor.house.gov/PRArticle.aspx?NewsID=691>.

¹⁸ See Larry Leslie & Gary Johnson, *The Market Model and Higher Education*, 45 J. HIGHER EDUC. 1, 1-2 (1974).

¹⁹ See *id.* at 6.

²⁰ See Sandy Baum, *College Education: Who Can Afford It?*, in THE FINANCE OF HIGHER EDUCATION: THEORY, RESEARCH, POLICY AND PRACTICE 39, 39-52 (Michael B. Paulsen & John C. Smart, eds., 2001).

²¹ See *infra* Part VIII.

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placed on students and families.²² Without any indication that greater consumer information will in fact lead to better consumer choices, better access and better affordability, a political rhetoric that glorifies consumer choice at the expense of much-needed focus on assisting families in paying for higher education could hurt students, especially low-income ones.²³

This Article discusses the consumer information sections of the amendments to the HEA as well as their theoretical basis and likelihood of success.²⁴ Section II begins by observing the historical precedents for federal involvement in higher education policy.²⁵ Sections III and IV set the stage for the policy shifts contained in the HEA reauthorization by highlighting the emerging educational policy themes of accountability and consumerism and discussing the key conclusions and recommendations made by Margaret Spellings' 2006 Commission on the Future of Higher Education.²⁶ Section V describes the proposed amendments to the HEA and their intended effects, gleaned from comments by leading policymakers.²⁷ Section VI examines the economic theories that underlie efforts to increase competition in higher education.²⁸ Section VII points to analogous attempts to increase consumer choice in k-12 education and graduate teacher preparation programs, and the results of those efforts.²⁹

II. THE FEDERAL ROLE IN HIGHER EDUCATION POLICY

In order to understand the goals to be fulfilled through the consumer information amendments to the HEA and the context under which they were passed, this section will provide a historical background of the role of Congress in supporting higher

²² See, e.g., Higher Education Opportunity Act, Pub. L. No. 110-315, § 111, 122 Stat. 3078, 3098 (2008) (codified as amended at 20 U.S.C. § 1015).

²³ See *infra* Part VIII.

²⁴ See *infra* Part V.

²⁵ See *infra* Part II.

²⁶ See *infra* Parts III–IV.

²⁷ See *infra* Part V.

²⁸ See *infra* Part VI.

²⁹ See *infra* Part VII.

education.³⁰ It is neither practicable nor necessary to detail every congressional action that has affected higher education. Rather, highlighting the events that have had the most substantial effect on the federal role in postsecondary education is sufficient to show that it evolved incrementally as a response to a variety of circumstances, and any future policies must work within the framework set up more out of necessity than long-term planning.

The responsibility to provide for public education has been traditionally left to the states,³¹ so the federal government has always had what could be considered a secondary role in both k-12 and higher education.³² At its core, the relationship remains one based upon the provision of resources and the expected return of a myriad of benefits to society.³³ From the inception of the system of higher education in America, colleges and universities, both public and private, have received funding from the government, whether it was from the crown, the colony, the state, or the federal government.³⁴ Even from the earliest of days, however, the provision of support has not been purely beneficent; it has served important federal policy goals.³⁵

In the 1800s, while American colleges were still in their infancy, the federal government furthered higher education in its new states by providing its most readily available asset: land.³⁶

³⁰ See *infra* text accompanying notes 31–78.

³¹ U.S. CONST. amend. X.

³² See Lawrence Gladieux & Jacqueline King, *The Federal Government and Higher Education*, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY 151, 152 (Philip Altbach et al. eds., 1999).

³³ See JOHN S. BRUBACHER & WILLIS RUDY, HIGHER EDUCATION IN TRANSITION 219–37 (1997); Robben Fleming, *Who Will Be Regulated, and Why?*, in GOVERNMENT REGULATION OF HIGHER EDUCATION 11, 15 (Walter C. Hobbs ed., 1978).

³⁴ See GEORGE RAINSFORD, CONGRESS AND HIGHER EDUCATION IN THE NINETEENTH CENTURY 3 (1972); JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 12–13 (2004).

³⁵ See Patrick M. Callan, *Reframing Access and Opportunity: Problematic State and Federal Higher Education Policy in the 1990s*, in THE STATES AND PUBLIC HIGHER EDUCATION POLICY 84 (Donald E. Heller ed., 2001); Fleming, *supra* note 33, at 15.

³⁶ BRUBACHER & RUDY, *supra* note 33, at 227.

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Prior to 1862, grants of land were made without significant conditions and for the purpose of inciting interest in the purchase of federally owned land in western territories.³⁷ The Morrill Land Grant Act of 1862 changed that; the Act endowed states with land taken from the public domain for the purpose of establishing and maintaining colleges, with specific conditions: to teach primarily agricultural and mechanical arts, and also to provide military training.³⁸ The Morrill land grants were a response to dissatisfaction with the liberal arts education available in America at the time; legislators recognized that the country's ability to compete with the rest of the world depended upon the development of knowledge in both agricultural and mechanical arenas.³⁹

From the first Morrill Act onward, federal support of higher education has been conditioned in such a way as to not only assist in the spread of higher learning, but also to achieve certain other public policy goals.⁴⁰ For instance, the Morrill Act of 1890 extended funding to land grant colleges on a yearly basis, but it required that institutions receiving funding would not refuse education based upon race.⁴¹ Targeting grants for the development of agricultural and mechanical fields shows the government's intent to shape the course of American higher education so that it might serve the needs of the country and its citizens for economic growth, defense, or social wellbeing.⁴² The condition that institutions admit students of all races, however, indicates a

³⁷ See *id.* Alice Rivlin and George Rainsford indicate that the provision of land in the late 1700's and early 1800's was due to a desire to sell public lands in new territories quickly, rather than to a desire to promote education. The land was granted for the establishment of schools, but evidently the hope was that the schools would help attract settlers to the newly established states. See RAINSFORD, *supra* note 34, at 39–54; ALICE M. RIVLIN, *THE ROLE OF THE FEDERAL GOVERNMENT IN FINANCING HIGHER EDUCATION* 10 (1961).

³⁸ See Morrill Land Grant Act of 1862, 7 U.S.C. § 301 (2008).

³⁹ See BRUBACHER & RUDY, *supra* note 33, at 227.

⁴⁰ See *id.* at 219–37; Callan, *supra* note 35, at 84; Fleming, *supra* note 33, at 15.

⁴¹ See Morrill Land Grant Act of 1890, 7 U.S.C. § 322 (2008). The education need not be provided in an integrated environment in order to comply with this provision. See *id.*

⁴² See Callan, *supra* note 35, at 84.

different kind of goal: the government sought to change its system of higher education so that it reflected attributes essential to a democratic society such as equal opportunity for all citizens.⁴³

The twentieth century brought a more firm commitment by the federal government to the support of higher education.⁴⁴ The patchwork grants and financial support of the 1800s and early 1900s left open the question of whether federal support could be expected to continue and how it would be administered.⁴⁵ The congressional response to this question was shaped in part by circumstance and in part by the vigilant protection of the power of the states to control education, resulting in the establishment of two major channels of support: research grants and student financial aid.⁴⁶ Financing for research projects began in the late 1800s, but a federal commitment to supporting research in a university setting, particularly on issues of national defense, arose out of the military needs of the First and Second World Wars.⁴⁷ Vannevar Bush's *Science: The Endless Frontier* argued successfully for the continuation of funding for scientific research in peacetime; today, many of Bush's suggestions have taken shape in real organizations that fund higher education research, such as the National Institute of Health, the National Science Foundation, and the National Endowment for the Arts, as well as large research grants from federal departments like the Departments of Defense, Agriculture, Energy, and Health and Human Services.⁴⁸

Although targeted research grants satisfied the federal government's need to further national objectives like technological

⁴³ See John Thelin, *Higher Education and the Public Trough*, in PUBLIC FUNDING OF HIGHER EDUCATION 21, 37 (Edward St. John & Michael Parsons eds., 2004).

⁴⁴ See BRUBACHER & RUDY, *supra* note 33, at 219; THELIN, *supra* note 34, at 32–33.

⁴⁵ See Morrill Land Grant Act of 1862, 7 U.S.C. § 301 (2008); Morrill Land Grant Act of 1890, 7 U.S.C. § 322 (2008); Hatch Act of 1887, 7 U.S.C. §§ 361a–361h (2008).

⁴⁶ See THELIN, *supra* note 34, at 23.

⁴⁷ See *id.* at 29.

⁴⁸ See VANNEVAR BUSH, *SCIENCE: THE ENDLESS FRONTIER* (1945); CONSTANCE EWING COOK, *LOBBYING FOR HIGHER EDUCATION* 6–7 (1998); THELIN, *supra* note 34, at 32.

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advancement and national defense, they do not address the “social goals” such as equal access and more equitable distribution of wealth.⁴⁹ President Truman addressed these social goals in 1946 by convening a commission to examine the feasibility of expanding educational opportunities to all eligible students.⁵⁰ The resulting report, *Higher Education for American Democracy*, laid down the rationale and groundwork for expanding access to higher education, but failed to provide any roadmap for how Congress or any other federal branch should facilitate expansion.⁵¹ Colleges and universities would need substantial financial support to accommodate the broad access counseled in the Truman Commission Report, yet it was not clear that this support would come from the federal government.⁵² In order to realize expansion of opportunity in postsecondary education, Congress would have to overcome the same constitutional and political objections it had faced since the 1700s, when President Washington lobbied for the creation of a national university.⁵³

Although Congress balked at the idea of expanding federal support in the 1940s, the political wherewithal to expand educational opportunity surfaced through changing circumstances over the next two decades.⁵⁴ In the mid-1940s, Congress faced the impending return of World War II veterans and pressure to make a smooth transition from a wartime to a peacetime economy.⁵⁵ To delay the entry of servicemen into the workforce and give industry time to recover, legislators created incentives for veterans to take part in postsecondary education.⁵⁶ The Servicemen’s Readjustment

⁴⁹ See Leslie & Johnson, *supra* note 18, at 105–06.

⁵⁰ See PRESIDENT’S COMMISSION ON HIGHER EDUCATION, *HIGHER EDUCATION FOR AMERICAN DEMOCRACY: VOL. I (1947)*; THELIN, *supra* note 34, at 268.

⁵¹ See THELIN, *supra* note 34, at 269.

⁵² See *id.*

⁵³ See U.S. CONST. amend. X; RAINSFORD, *supra* note 34, at 18–20; THELIN, *supra* note 34, at 153–54.

⁵⁴ See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965); BRUBACHER & RUDY, *supra* note 33, at 235.

⁵⁵ See THELIN, *supra* note 34, at 262–63.

⁵⁶ See *id.*

Act (“G.I. Bill”) gave veterans the opportunity to go to college tuition-free for a certain period of time at any federally-approved institution.⁵⁷ The G.I. Bill introduced the concept of national, student-centered support for higher education.⁵⁸ The key feature of such a program was that the funds were portable; that is, the funding traveled with the student to whichever federally-approved college the student chose.⁵⁹ Lawmakers expected the response to the G.I. Bill to be minimal, but in fact, by 1946, more than one million G.I. Bill students were enrolled in institutions of higher education.⁶⁰ The Russian launch of the Sputnik satellite in 1957 lent even more urgency to the cause of supporting higher education, as policymakers moved toward a program that would ensure excellence in American production of knowledge with bills like the National Defense Education Act.⁶¹

The Higher Education Act (HEA) of 1965 was the first comprehensive federal program of financial assistance to colleges and students.⁶² It borrowed from the G.I. Bill to create substantial support for higher education that provided the greatest amount of individual choice for students, while skirting dissension based upon impeding colleges’ and universities’ self-determination.⁶³ The central focus of the 1965 HEA was providing aid to undergraduate students “of exceptional financial need,” in the form of educational opportunity grants, student loans, work-study grants, and fellowships for students who intended to become elementary and secondary school teachers.⁶⁴ Like the G.I. Bill, the

⁵⁷ See Servicemen’s Readjustment Act of 1944, Pub. L. No. 346, 58 Stat. 284 (1944).

⁵⁸ See *id.*

⁵⁹ See Pub. L. No. 346; THELIN, *supra* note 34, at 264.

⁶⁰ See THELIN, *supra* note 34, at 263.

⁶¹ See Pub. L. No. 346; National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958) (codified as amended at 20 U.S.C. §§ 401–602); BRUBACHER & RUDY, *supra* note 33, at 230.

⁶² See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

⁶³ See *id.*; Clark Kerr, *Expanding Access and Changing Missions: The Federal Role in U.S. Higher Education*, 75 EDUC. REC. 27 27–31 (1994).

⁶⁴ See 79 Stat. at 1233.

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HEA ensures that loans are portable and usable at all eligible institutions.⁶⁵ The other provisions of the 1965 HEA included support for developing institutions, funding for infrastructure and training for institutional libraries, as well as various amendments to the National Defense Education Act.⁶⁶ The HEA symbolized a federal commitment to support for higher education beyond those projects that were in the direct interest of the federal government.⁶⁷ It marked the beginning of a legacy of student financial assistance aimed at providing what the Carnegie Commission termed “educational justice;”⁶⁸ it is a federal role that is not mandated by the Constitution, but rather by a commitment to democratic principles of social equality and a recognition that the higher education system could not accommodate widespread growth without financial support.⁶⁹

With the Higher Education Amendments of 1972 and subsequent amendments, Congress reinforced its commitment to providing aid to qualified college students as well as to colleges and universities.⁷⁰ The current version of the HEA contains numerous programs designed to support higher education, including Federal Pell Grants, the TRIO programs, grants to support study of the sciences and engineering, and programs to promote international education.⁷¹ The HEA has shifted its focus on financing higher education from grants to loans over the past forty years; at the same time, it has become more accommodating to middle-income students, rather than solely aiding students “of

⁶⁵ *Id.*

⁶⁶ *See, e.g.*, 79 Stat. at 1224.

⁶⁷ *See* BRUBACHER & RUDY, *supra* note 33, at 236.

⁶⁸ CARNEGIE COMMISSION OF HIGHER EDUCATION, THE PURPOSES AND THE PERFORMANCE OF HIGHER EDUCATION IN THE UNITED STATES: APPROACHING THE YEAR 2000 29–31 (1973).

⁶⁹ *See* 79 Stat. 1219.

⁷⁰ *See* Higher Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972); Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (2008).

⁷¹ *See, e.g.*, 20 U.S.C. §§ 1070(a) (1998), 1022 (2008), 1122 (2008), 1124 (2008); *see also* History of the Federal TRIO Programs, *available at* <http://www.ed.gov/about/offices/list/ope/trio/triohistory.html> (last visited Mar. 17, 2009).

exceptional financial need.”⁷²

This brief history of Congress’ involvement in higher education no doubt leaves out significant pieces of legislation. The major developments detailed above are nonetheless sufficient to illustrate the fact that Congress’ approach to funding higher education has evolved over time by adopting strategies that proved successful in the past.⁷³ Thus, the HEA borrows the idea of providing federal funds with strings attached from the Morrill Act, and it borrows the concept of portable, student-centered funding from the G.I. Bill.⁷⁴

Not only has the development of higher education policy been incremental and isomorphic, but it has also evolved in response to pressing governmental and societal needs. As a result, federal policies have often responded to immediate needs without contemplation of future ramifications. Although higher education researchers such as Martin Trow envision expanding access to higher education from “elite to mass to universal access,”⁷⁵ Congress may not have the ability to provide access for *all* students to *all* levels of higher education.⁷⁶

When Congress undertook the project of reauthorizing the HEA, modern policymakers faced the problem of a legacy that promised access without being able to provide it. Lobbying on behalf of students, universities and non-profit groups cried out for increases in the amount of Pell Grants and other forms of student aid, but these efforts have thus far proved but a drop in the bucket

⁷² See James C. Hearn, *Access to Postsecondary Education: Financing Equity in an Evolving Context*, in *THE FINANCE OF HIGHER EDUCATION: THEORY, RESEARCH, POLICY AND PRACTICE* 439, 444–45 (Michael B. Paulsen & John C. Smart eds., 2001).

⁷³ See *supra* notes 31–72 and accompanying text.

⁷⁴ See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

⁷⁵ See Martin Trow, *Reflections on the Transition from Elite to Mass to Universal Access: Forms and Phases of Higher Education in Modern Societies Since WWII*, in *INTERNATIONAL HANDBOOK OF HIGHER EDUCATION* 243 (James Forest & Philip Altbach eds., 2006).

⁷⁶ See Fritz Machlup, *The Illusion of Universal Higher Education*, in *THE IDEA OF THE MODERN UNIVERSITY* 3 (Sidney Hook, Paul Kurtz, & Miro Todorovich eds., 1974).

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as tuition at some institutions approaches \$50,000 annually.⁷⁷ The consumer-driven reforms included in the HEA are likely an attempt to address the problem of access to higher education without expending extra funds. The increasingly salient social and political themes of accountability and consumerism provide even more support for consumer-driven methods.⁷⁸

III. ACCOUNTABILITY AND CONSUMERISM

The landscape of higher education policy up to the 21st century is one with increasing support for, and regulation of, higher education, particularly in the area of equal access for all students.⁷⁹ Within that basic landscape, accountability and consumerism emerged as policy issues both in the university and public policy contexts. The desire for greater accountability and the increasing tendency to view students as consumers of higher education are both driving forces in the amendments to the HEA.⁸⁰

Accountability is a buzzword in both higher education and k-12 these days, but the trend toward more government oversight of higher education started as far back as the 1960s.⁸¹ According to Jason Lane, the movement toward accountability was born out of public frustration with the student disobedience and protests on campuses during the Vietnam War.⁸² Lane describes the rationale for government oversight in the eyes of the Carnegie Foundation: “since colleges and universities were serving a public good and were supported through public funds, they should be held accountable to the public interest through state governments.”⁸³

Although much of the oversight of higher education has been at

⁷⁷ See Paul Basken, *Pell-Grant Rise is not Enough, Leaders of Black Colleges Tell Spellings*, CHRON. HIGHER EDUC., Sept. 21, 2007, at A17.

⁷⁸ See *supra* Part II.

⁷⁹ See *infra* text accompanying notes 80–104.

⁸⁰ See Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008).

⁸¹ See Jason Lane, *The Spider Web of Oversight: An Analysis of External Oversight of Higher Education*, 78 J. HIGHER EDUC. 615, 618 (2007).

⁸² See *id.* at 617–18.

⁸³ *Id.* at 618.

the state level and focused on public institutions, the federal government participates in its share of oversight over both public and private institutions.⁸⁴ The most basic level of accountability required by the federal government is accounting for the proper use of federal dollars.⁸⁵ In recent years, however, accountability has become more complex; governments now seek to make universities and colleges accountable not only for their spending, but also for the quality of “student outcomes.”⁸⁶ The extension of the scope of inquiry from merely the way in which money is spent to the quality of the outcomes generated by the additional funding reflects the growing tendency to look at students as consumers of a product, and at higher education as a product whose quality can be objectively measured.

Perhaps coincidentally—or perhaps not—the movement toward consumerism arose during the period after the G.I. Bill, particularly in the 1960s.⁸⁷ The rise of consumerism can be traced both to changes in the way students approach higher learning and changes in the way universities undertake the recruitment and retention of students.⁸⁸ According to David Riesman, the traditional, pre-G.I. Bill relationship among professors and students was characterized by faculty hegemony, but the influx of non-traditional veteran students set the stage for change.⁸⁹ These students were older, more focused on vocational preparation, and more willing to question the authority of professors.⁹⁰ Around the same time, student activists changed the relationship between

⁸⁴ See *id.* at 618; see also James Fredericks Volkwein & Shaukat Malik, *State Regulation and Administrative Flexibility at Public Universities*, 38 RES. IN HIGHER EDUC. 17, 17–19 (1997).

⁸⁵ See Robert Berdahl & T.R. McConnell, *Autonomy and Accountability: Who Controls Academe?*, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY 71, 78 (Philip Altbach et al. eds., 1999).

⁸⁶ See Ami Zusman, *Issues Facing Higher Education in the Twenty-First Century*, in AMERICAN HIGHER EDUCATION IN THE TWENTY-FIRST CENTURY 109, 138 (Philip Altbach et al. eds., 1999).

⁸⁷ See generally DAVID RIESMAN, ON HIGHER EDUCATION: THE ACADEMIC ENTERPRISE IN AN ERA OF RISING STUDENT CONSUMERISM (1998).

⁸⁸ See *id.*

⁸⁹ See *id.*

⁹⁰ See *id.*

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students and the administration by leveraging their power as tuition-payers to force universities to live up to ideals of fairness, equality and justice.⁹¹ Together, both veterans and activist students challenged the traditional subordination of students to the academic system.⁹²

Dropping enrollments also put pressure upon colleges to recruit students more effectively. One response to this challenge was to cater to the desires of prospective students in order to entice enrollees.⁹³ Martin Trow deduces another source of consumerist attitudes in the simple fact that the trend toward mass higher education in recent years made the college diploma an obligatory, rather than voluntary, credential, creating more options for students and giving them more choice as to where to attend.⁹⁴ The sum of all these circumstantial forces on higher education created a policy environment in which the relationship between student and college is increasingly thought of as one in which students are entitled to choice and value in the asset for which they are paying (the college degree).

The notion that students need consumer protection measures to improve their relationships with colleges and universities combines both the student-consumer metaphor and increased interest in accountability.⁹⁵ According to Joan Stark, the federal investment in student financial aid in 1965 generated increased attention by lawmakers in abuses perpetrated by colleges against both students and the government.⁹⁶ Partly to protect the federal investment, and partly to protect students, policymakers instituted a “truth in advertising” model of regulation to ensure that students received quality information.

Today, students demand more choice and flexibility from universities, and institutions are willing to acquiesce.⁹⁷ When their

⁹¹ *See id.*

⁹² *See id.*

⁹³ *See generally* RIESMAN, *supra* note 87.

⁹⁴ Martin Trow, *supra* note 75.

⁹⁵ *See* JOAN S. STARK, *THE MANY FACES OF EDUCATIONAL CONSUMERISM* 3 (1977).

⁹⁶ *See id.* at 3, 32.

⁹⁷ *See* RIESMAN, *supra* note 87.

expectations are not met, students and parents do not hesitate to seek recourse outside the university by appealing to the court system. A recent example of this can be found at Wheaton College in Massachusetts, where a parent has filed a lawsuit over the price of attendance at a study abroad program arranged for students by the college.⁹⁸ Courts have reinforced this consumer mentality by inferring a contractual relationship between the student and college, using the academic handbook as the terms of the agreement.⁹⁹

The trends toward increased accountability to the federal government and increasing attention to the student's role as consumer both entail a notion of quality that is often overlooked, but exceedingly problematic. Both legislators and consumers expect colleges and universities to provide quality educational opportunities and "positive" outcomes for students.¹⁰⁰ Yet the field of postsecondary education in the United States is so broad and varied that it is difficult to identify what characteristics define quality.¹⁰¹ In the past, the federal government has sidestepped the issue of quality by requiring states to come up with their own standards of quality.¹⁰² In the new version of the HEA, Congress again skirts the issue of quality by providing consumers with copious information and leaving it up to individuals to make their

⁹⁸ See *Brady v. Wheaton Col.*, No. 0834-CV-133 (Mass. Dist. Ct. filed Feb. 8, 2008), available at http://www.sutherland.com/file_upload/JamesBradyvWheatonCollege.pdf; see also Karin Fischer, *Tuition Lawsuit Puts Study-Abroad Practices in the Spotlight, Again*, CHRON. HIGHER EDUC., Feb. 22, 2008, at A20.

⁹⁹ See *Jamieson v. Vatterott Educ. Ctr., Inc.*, 473 F. Supp. 2d 1153, 1160 (D. Kan. 2007); *Harman v. Sullivan Univ. Sys., Inc.*, No. 03-CV-788-C, 2006 WL 861269, at *1 (W.D. Ky. Mar. 29, 2006).

¹⁰⁰ See Zusman, *supra* note 86, at 121–22.

¹⁰¹ See *id.*

¹⁰² See e.g., Higher Education Act of 1965 § 202(d) (last official version at 20 U.S.C. § 1022(d)(1) (2006), amended by Pub. L. No. 110-315 § 205, 122 Stat. 3078, 3147 (2008)); Higher Education Act of 1965 § 203(d) (last official version at 20 U.S.C. § 1023(d)(1) (2006) (consolidated into current 20 U.S.C.A. § 1022 (2008) by Pub L. No. 110-315 § 201(2), 122 Stat. 3078, 3133 (2008)); U.S. Department of Education, Four Pillars of NCLB, <http://www.ed.gov/nclb/overview/intro/4pillars.html> (last visited Mar. 25, 2009).

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own determinations as to quality.¹⁰³

The trends identified here—accountability, consumerism, and consumer protection—bear directly on the new amendments to the HEA.¹⁰⁴ Although these trends came into being in the 1960s and 1970s, they were never more present than they are today: money is tight, both for governments and families, and value, efficiency, and choice are on the minds of consumers and policy makers.¹⁰⁵ It took the influence of Margaret Spellings' Commission on the Future of Higher Education to translate these buzzwords into a call to action, one that set in motion the key provisions of the HEA amendments.¹⁰⁶

IV. THE SPELLINGS COMMISSION REPORT

In 2006, the Department of Education convened a National Commission on the Future of Higher Education. Often referred to as the Spellings Commission—named for then-Secretary of Education Margaret Spellings¹⁰⁷—the Commission was charged with the task of “developing a comprehensive national strategy for postsecondary education that will meet the needs of America’s diverse population and also address the economic and workforce needs of the country’s future.”¹⁰⁸ One year later, the Commission released a report that was a call to action for education policymakers and higher education leadership and proved to be a harbinger of change in educational policy.¹⁰⁹ The report is marked

¹⁰³ See 20 U.S.C.A. § 1022(d) (2008), Pub. L. No. 110-315 § 205, 122 Stat. 3078, 3147 (2008).

¹⁰⁴ See *id.*

¹⁰⁵ See Zusman, *supra* note 86, at 137–39.

¹⁰⁶ See *infra* Part IV.

¹⁰⁷ A National Dialogue: The Secretary of Education’s Commission on the Future of Higher Education, <http://www.ed.gov/about/bdscomm/list/hiedfuture/index.html> (last visited July 14, 2008).

¹⁰⁸ Press Release, Secretary Spellings Announces New Commission on the Future of Higher Education (Sept. 19, 2005), *available at* <http://www.ed.gov/news/pressreleases/2005/09/09192005.html>.

¹⁰⁹ See U.S. DEPARTMENT OF EDUCATION, A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION (2006) [hereinafter U.S. DEPARTMENT OF EDUCATION, A TEST OF LEADERSHIP].

by its focus on the concepts of accountability, costs, quality, and the role of students as consumers.¹¹⁰

The Spellings Commission report, released in September 2006, was both an analysis of the state of higher education and a series of recommendations for shaping its future.¹¹¹ The report identified the primary challenges for higher education, including gaps in access for minority and low-income students, the increasing cost of college, and the lack of reliable and clear information about how colleges and universities do business.¹¹² The report stated that access to higher education was limited, particularly for low-income Americans and minority groups.¹¹³ The factors that contributed to this limitation were “the complex interplay of inadequate preparation, lack of information about college opportunities, and persistent financial barriers.”¹¹⁴

Compounding these obstacles to access, the report stated, were the rising costs of tuition and the decline of state subsidies.¹¹⁵ The Spellings Commission framed the problem of affordability not simply as a concern for individual students and families, but also as a concern for the government, because consumers pay only a portion of the cost of supporting higher education and the rest is left up to public and private donors.¹¹⁶ The Commission also found that the financial aid system was too complex and therefore inadequate to meet the needs of students.¹¹⁷ Regarding existing measures of accountability, the Commission found that the information collected was primarily centered on the use of financial resources and was therefore insufficient to give

¹¹⁰ See Elizabeth Redden, *Accountability and the Applicant*, INSIDE HIGHER ED, Sept. 26, 2007, <http://www.insidehighered.com/news/2007/09/26/information>.

¹¹¹ See generally U.S. DEPARTMENT OF EDUCATION, A TEST OF LEADERSHIP, *supra* note 109.

¹¹² See *id.* at 7–16.

¹¹³ *Id.* at 8–9.

¹¹⁴ *Id.* at 8.

¹¹⁵ *Id.* at 10–11.

¹¹⁶ See U.S. DEPARTMENT OF EDUCATION, A TEST OF LEADERSHIP, *supra* note 109, at 10–11.

¹¹⁷ *Id.* at 12.

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policymakers and students information about the quality of outcomes which are, in the Commission's mind, the real measure of institutional performance.¹¹⁸

The solution to facing these challenges can be found in the Commission's many recommendations, with an emphasis on accountability.¹¹⁹ The report stated, "Every one of our goals, from improving access and affordability to enhancing quality and innovation, will be more easily achieved if higher education institutions embrace and implement serious accountability measures."¹²⁰ It is apparent from the suggestions made in the report that the Commission envisioned accountability not just as reporting to legislators and other policymakers, but also making information available to the general public.¹²¹ The report called for wide-ranging information-sharing not only with legislators, but also with families and students.¹²² To that end, the Commission advised the creation of sources of easily searchable and comparable "consumer-friendly information" on higher education.¹²³

The appeal of bringing consumers into the accountability equation is not readily discernible from the Spellings Commission report, but one may hazard a guess based purely on logic and past policies. As discussed in the previous section, federal and state governments are interested in accounting not only for money spent, but also for the value added by that money and the effectiveness of its use as measured by student outcomes.¹²⁴ Yet in order to determine that institutions are spending money well or that the cost of an education is justified, federal and state governments must make their expectations clear.¹²⁵ Historically, the federal

¹¹⁸ *See id.* at 14–15.

¹¹⁹ *See id.* at 21–25.

¹²⁰ *Id.* at 21.

¹²¹ *See id.* at 20–21.

¹²² *See id.* at 20–21.

¹²³ *See id.* at 20.

¹²⁴ *See supra* Part III and accompanying text.

¹²⁵ *See* Douglas Bennett, *Assessing Quality in Higher Education*, 87 LIBERAL EDUC. at 3 (2001), available at <http://www.earlham.edu/~pres/documents/pdf/01-02-assessingquality-text.pdf>.

government has shied away from setting education standards or assessing outcomes due to federalism concerns. Even in k-12 education, the federal government skirted the issue of outcomes by allowing states to set up their own testing and curriculum standards.¹²⁶ Although the Spellings Commission identified “student access, retention, learning and success, educational costs . . . and productivity” as “benchmarks of institutional success,” it did not set specific standards to measure adequate learning, access, or costs.¹²⁷ By relying on consumers to regulate the cost and quality of higher education, the federal government can relieve itself of this pressure, as well as avoid the difficulties of implementation and compliance that would arise at both the state and institutional level.

The Spellings Commission report raised the issue of combating rising costs and gaps in enrollment for minorities and low-income students by expanding measures of accountability.¹²⁸ Although a report commissioned by the Department of Education did not necessarily have any bearing on the course of action chosen by Congress, the national attention that the report received likely helped to raise the profile of its policy recommendations.¹²⁹ The following section describes the changes to the HEA made in the 2008 reauthorization,¹³⁰ which reflect Congress’ adaptation of the Spellings Commission’s conclusions about the state of higher education and the most expedient solutions to its problems.¹³¹

¹²⁶ See generally No Child Left Behind Act of 2001, Pub. L. No. 107-110, 115 Stat. 1425 (holding states accountable for improving the academic achievement of students).

¹²⁷ See U.S. DEP’T OF EDUC., A TEST OF LEADERSHIP, *supra* note 109, at 14.

¹²⁸ See *id.* at 18–19.

¹²⁹ See Paul Basken, *A Year Later, Spellings Report Still Makes Ripples*, CHRON. HIGHER EDUC., Sept. 28, 2007, at A1; Kelly Field, *Uncertainty Greets Report on Colleges by U.S. Panel*, CHRON. HIGHER EDUC., Sept. 1, 2006, at A1; *Spellings: Commission Is the Beginning of ‘Long Overdue Reform’*, CHRON. HIGHER EDUC., Oct. 6, 2006, at A23.

¹³⁰ See *infra* Part V and accompanying text.

¹³¹ See *infra* Part V and accompanying text.

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V. NEW AMENDMENTS TO THE HEA

The issues raised by the Spellings Commission report are echoed in the amendments to the HEA that were passed on August 14, 2008.¹³² Although it is clear that the primary method of support for higher education will remain financial, the bill increases accountability to both the federal government and to the public through a series of consumer-oriented protections.¹³³ This section will describe the provisions of the bill and the intended consequences of them, as articulated by legislators themselves.¹³⁴

The reauthorization bill, entitled the Higher Education Opportunity Act, contains several sections that aim to increase the quality or availability of information to students.¹³⁵ Sections 110 and 111 of the Higher Education Opportunity Act amend chapter 28, part C of the existing HEA, entitled “Cost of Higher Education.”¹³⁶ Part C of the Act mandates collection of data in the “Improvements in Market Information and Public Accountability in Higher Education” program, in which the Commissioner of Education Statistics collates information on institutional expenditures, characteristics of student aid recipients, and other subjects.¹³⁷ The new sections would augment efforts toward disseminating information and providing for public accountability by requiring more reporting and publication of information regarding college tuition prices.¹³⁸

Section 110 of the HEA amendments is titled “Improved information concerning the Federal student financial aid website.”¹³⁹ This section generally requires the U.S. Department of

¹³² See Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008) (to be codified as amended in scattered sections of 20 U.S.C.).

¹³³ See, e.g., *id.* §§ 106, 110–15, 120, 488–90, 122 Stat. at 3090–3305.

¹³⁴ See *infra* text accompanying notes 135–85.

¹³⁵ See Higher Education Opportunity Act, Pub. L. No. 110-315 §§ 110–13, 115, 120, 122 Stat. 3078, 3094–117 (2008) (to be codified as amended in scattered sections of 20 U.S.C.).

¹³⁶ See *id.* §§ 110–11, 122 Stat. at 3094–107.

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See *id.* § 110(a), 122 Stat. at 3094–95 (2008).

Education to promote use of the federal student financial aid website (studentaid.ed.gov) by displaying a link to that site from the Department of Education's main website and by continual improvement of the information available on the site and the dissemination of that information.¹⁴⁰ Section 110 also includes requirements to provide additional financial aid information specifically for military members and veterans.¹⁴¹

Section 111 also looks to improve the availability of information to students and parents, but it focuses on financial information.¹⁴² The section requires a variety of lists and calculators that would allow consumers to get estimates of tuition and net cost of attendance. The proliferation of lists required under this section is due to the fact that the legislative compromise combined the proposals from both the House and Senate rather than paring down the number of lists.¹⁴³ As a result, § 111 requires the Secretary of Education to make available through the College Navigator (Department of Education's college search database):

- A list of the top five percent of institutions in each category (four-year public, four-year private non-profit, four-year private for-profit, two-year public, etc.) whose tuition and fees are highest for the most recent year;
- A list of the top five percent of institutions in each category whose net prices are the highest for the most recent year;
- A list of the top five percent of institutions in each category that have had the largest percentage change in tuition and fees over the most recent three years;
- A list of the top five percent of institutions in each category that have had the largest percentage change in net price over the most recent three years;
- A list of the top ten percent of institutions in each

¹⁴⁰ *See id.*

¹⁴¹ *See id.* § 110(b), 122 Stat. at 3095–98.

¹⁴² *See id.* § 111, 122 Stat. at 3097–108.

¹⁴³ *See* Doug Lederman, *Emerging Higher Ed Act Compromise*, INSIDE HIGHER ED, May 13, 2008, <http://www.insidehighered.com/news/2008/05/13/hea>.

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category with the lowest tuition and fees for the most recent year; and

- A list of the ten percent of institutions in each category with the lowest net price for the most recent year.¹⁴⁴

Institutions among the top five percent of increases in tuition and net price in each category must submit an explanation to the Secretary of Education as well as a plan for decreasing costs.¹⁴⁵ These explanations will be made public to consumers through an annual report.¹⁴⁶

The “Net Price Calculator” is another innovation contained in § 111.¹⁴⁷ The Secretary of Education is charged with the task of creating a net price calculator that will help individuals estimate the net price of attendance at a particular institution.¹⁴⁸ Net price is defined as “the average yearly price actually charged to first-time, full-time undergraduate students receiving student aid at an institution of higher education after deducting such aid,”¹⁴⁹ but the Net Price Calculator should take into account the individual student’s need-based and merit-based aid “as much as practicable.”¹⁵⁰ No later than two years after the Secretary develops such a calculator, higher education institutions that receive federal funds for student financial assistance are required to post a Net Price Calculator on their websites.¹⁵¹ The bill also calls for the Secretary of Education to develop a “Multi-Year Tuition Calculator” that will help parents and students estimate the cost of tuition over an extended period based upon the annual percentage change in tuition over the most recent three years.¹⁵²

The final major change contained in § 111 is the “Consumer Information” section, which pertains to the information made

¹⁴⁴ Higher Education Opportunity Act, Pub. L. No. 110-315, § 111, 122 Stat. 3078, 3098 (2008) (to be codified as amended at 20 U.S.C. 1015).

¹⁴⁵ *See id.*

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *See id.*

¹⁵² *See id.*

available to the public through the College Navigator website.¹⁵³ The College Navigator allows users to search for colleges based upon geographical area, majors, level of degree offered, or institution type. Users may then compare institutional characteristics such as student population, tuition and fees, admissions requirements, and other criteria.¹⁵⁴

The HEA amendments essentially codify the data collection and dissemination already in use through the College Navigator.¹⁵⁵ Some of the data required includes: a statement of institutional mission; the number of students enrolled disaggregated by residency, race and ethnicity; degree completion rates; cost of attendance; average amount of grant-based aid awarded to first-time, full-time undergraduates; the average amount of federal student loans provided to undergraduate students; and the percentage of first-time, full-time undergraduates receiving student financial assistance.¹⁵⁶ One new addition to the College Navigator will be the availability of a list of institutions that participate in federal student financial aid programs, including each institution's tuition and fees and net price for the three most recent years, as well as the net price disaggregated by student income.¹⁵⁷

Sections 110 and 111 contain many of the substantive provisions related to the collection and dissemination of information, but there are additional substantive provisions scattered throughout the HEA amendments.¹⁵⁸ Most of these additional provisions are included to provide parents and students

¹⁵³ *See id.*

¹⁵⁴ National Center for Education Statistics, College Navigator, <http://nces.ed.gov/collegenavigator> (last visited Mar. 25, 2009).

¹⁵⁵ *See* Higher Education Opportunity Act, Pub. L. No. 110-315, § 111, 122 Stat. 3078, 3098 (2008) (to be codified as amended at 20 U.S.C. § 1015); College Navigator, *supra* note 154.

¹⁵⁶ *See* Higher Education Opportunity Act § 111.

¹⁵⁷ *See id.* Student income is divided up into categories: \$0–30,000; \$30,001–48,000; \$48,001–75,000; \$75,001–110,000; \$110,000 and more. *See id.*

¹⁵⁸ *See id.* §§ 434, 435, 488–90, 1021, 1022, 122 Stat. at 3247, 3252, 3293–3306, 3483, 3488.

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with more and better information about student loans.¹⁵⁹ For example, § 433 requires lenders to provide borrowers with a disclosure of the name and address of the lender, the principal amount of the loan, the amounts of any fees, the loan interest rate, and a projected monthly payment, as well as several other pieces of information about repayment.¹⁶⁰ Also, § 490 commits the Secretary of Education to the development of a program of early intervention and outreach that would provide students and families with “early information about financial aid and early estimates of such students’ eligibility for financial aid from multiple sources.”¹⁶¹

The sections of the proposed HEA amendments described here represent only a small portion of the entire bill.¹⁶² The other sections cover Department of Education oversight of accreditation agencies, requirements that states maintain their financial support of higher education, better reporting of the price of textbooks required for courses, and of course student financial aid.¹⁶³ That said, the programs highlighted here deserve special attention because they represent a new effort to improve access to higher education through the dissemination of information about costs and quality. While this new emphasis is clear in the text of the bill, it is further buttressed by legislators’ public comments about the bill.¹⁶⁴

Representative Buck McKeon wrote an op-ed piece for *Inside Higher Ed* that decried “hyperinflationary” college prices and increasing taxpayer contributions without adequate accountability.¹⁶⁵ McKeon claimed that the amendments to the HEA would remedy this with “strong consumer-driven disclosure

¹⁵⁹ *See id.*

¹⁶⁰ *See id.* § 433, 122 Stat. at 3247.

¹⁶¹ *Id.* § 490, 122 Stat. at 3305.

¹⁶² *See* Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008) (to be codified as amended in scattered sections of 20 U.S.C.).

¹⁶³ *See generally id.*

¹⁶⁴ *See* H.R. 4137, 110th Cong. (2008); S. 1642, 110th Cong. (as passed by Senate, July 24, 2007); *infra* text accompanying notes 165–78.

¹⁶⁵ Howard P. McKeon, *Real Progress (Finally) on College Affordability*, INSIDE HIGHER ED, Feb. 7, 2008, <http://www.insidehighered.com/views/2008/02/07/mckeon> (last visited Oct. 3, 2008).

and meaningful data comparisons.”¹⁶⁶ Although the availability of data is not a direct panacea for rising costs, McKeon explains that he expects that better information will lead to better decisions, and better decisions will in turn lead to better quality.¹⁶⁷ As a result, according to McKeon, “higher education consumers will finally be given the information they need to start exercising their power in the marketplace.”¹⁶⁸ McKeon’s op-ed piece stresses the idea that Congress is stepping up to the plate to deal with the rising costs of higher education and problems with accountability, but his description of the bill makes it clear that Congress actually expects *consumers* to step up to the plate.¹⁶⁹ Rather than directly regulating cost and quality, based on McKeon’s statements and the text of the bill, Congress appears to be trying to remove itself from the regulation of the industry and instead assume the role of facilitator of better decisions in the marketplace.¹⁷⁰

Buck McKeon’s statements are consistent with those made by Representative Rubén Hinojosa, Chairman of the House Subcommittee on Higher Education. Representative Hinojosa identified the goals of the bill as: closing gaps in access and completion; improving the financial aid system; helping to prepare low-income and first generation students academically, financially, and socially for college; and addressing the rising costs of college.¹⁷¹ Hinojosa identified the high cost of college education as the reason for gaps in access and completion, and the answer to college costs as the provision of public information, as well as accountability and incentives to states.¹⁷²

The Senate Committee on Health, Education, Labor, and Pensions report on the Higher Education Amendments of 2007

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ *Id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See generally* Higher Education Opportunity Act, Pub. L. No. 110-135, 122 Stat. 3078 (2008) (to be codified as amended in scattered sections of 20 U.S.C.); McKeon, *supra* note 165.

¹⁷¹ *See* 154 CONG. REC. H625, H643 (daily ed. Feb. 7, 2008) (statement of Rep. Hinojosa).

¹⁷² *Id.*

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states that the increase in college costs has made it impossible for students and parents to plan and save for college and suggests that increased access to information may remedy this problem.¹⁷³ The report links the inability to afford college without significant borrowing to a decline in access for some students.¹⁷⁴ The report further states, “[t]he committee expects [cost and financial aid information] to help provide students and their parents with a realistic set of expectations about the cost of postsecondary education, as well as introduce some incentives for institutions to control the cost of attendance.”¹⁷⁵ The report clearly shows a desire to achieve better affordability and better access, but there may be another goal here as well.¹⁷⁶ The report further states, “[t]he public availability of this information is expected to support institutions and States that are committed to maintaining access to affordable higher education.”¹⁷⁷ This statement seems to indicate that the committee envisions the use of the data by the public as a way to promote competition among universities in such a way that those providing affordable education will benefit, and those whose prices are inflated or simply not affordable will find ways to cut costs and reduce prices.¹⁷⁸

This summary of the amendments to the HEA made through the Higher Education Opportunity Act shows that several significant provisions of the Act devote public resources toward the development of better systems for the dissemination of higher education information to the public.¹⁷⁹ Much of the information to be collected and distributed has to do with the cost of a college education and the financial support available from the federal government.¹⁸⁰ The other information collected and made public concerns institutional characteristics that might inform a student’s decision of where to attend, data that bears on what might be

¹⁷³ S. REP. NO. 110-231, at 13 (2007).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *See id.*

¹⁷⁷ *Id.*

¹⁷⁸ *See id.*

¹⁷⁹ *See supra* text accompanying notes 132–78.

¹⁸⁰ *See id.*

considered “institutional quality.”¹⁸¹ Comments made by legislators during the process of developing the bill make it clear that they expect the widespread dissemination of information to be a solution to the rising cost of college.¹⁸² What is interesting is that it seems the expected effect of the information is twofold. In one way, it is expected that better information will help families be better able to plan and save for the payment of college tuition.¹⁸³ In another way, though, it seems expected that by accessing good information about cost and quality, parents and students will make better decisions about where to attend, and the aggregation of many good decisions will ultimately drive down the cost of college.¹⁸⁴

The provision of better information may seem like a low-cost strategy with very little risk that has the potential for great reward in terms of cost-reduction and access to higher education. Yet the likelihood of success for such a program is unclear, and even more troubling, its likely effect on access is even less clear. Is it possible that providing information could make access to higher education even more *unequal*? The following section will discuss the potential implications of providing more information to consumers of postsecondary education.¹⁸⁵

VI. THE MARKET FOR HIGHER EDUCATION

The notion that the higher education arena operates as a market is almost too obvious to be stated. A market is any situation in which sellers of a good or service convene with buyers of that good or service, or an area in which “buyers and sellers negotiate the exchange of a well-defined commodity.”¹⁸⁶ However, the specific functioning of the higher education market is what is

¹⁸¹ See Higher Education Opportunity Act, Pub. L. No. 110-315 § 111, 122 Stat. 3078, 3098 (2008) (to be codified as amended at 20 U.S.C. § 1015).

¹⁸² See S. REP. NO. 110-231, at 13; see also 154 CONG. REC. H625, H643 (daily ed. Feb. 7, 2008) (statement of Rep. Hinojosa).

¹⁸³ See S. REP. NO. 110-231, at 13.

¹⁸⁴ See *id.*

¹⁸⁵ See *infra* Part VI.

¹⁸⁶ Leslie & Johnson, *supra* note 18, at 5.

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difficult to describe.¹⁸⁷

In a perfectly competitive free market, the price of the services being sold would be determined between buyer and seller according to the laws of supply and demand.¹⁸⁸ The fundamental conditions of a free market are that: no single competitor in the market is large enough to influence price; the products being sold by each seller are identical; there are no barriers to entry to, or exit from, the market; and, all participants in the market possess perfect knowledge of alternatives, prices and other relevant data.¹⁸⁹ Although no market is perfectly competitive, the ideal of the perfectly competitive market can be used in a predictive context for real-world situations.¹⁹⁰

Leslie and Johnson argue that higher education policymakers make decisions using a perfectly competitive model, with the assumption that their decisions will optimize efficiency and reduce costs.¹⁹¹ Nevertheless, the market for higher education is far from this ideal.¹⁹² The market tends to be distinct and different depending on geographical area, and the product being sold—an enrollment space—is qualitatively different from college to college and therefore of unequal desirability to different students.¹⁹³ Leslie and Johnson further point out that although colleges and universities compete against one another, they do not compete over price; rather, they set their own prices and compete for students by adjusting the perceived quality of their product.¹⁹⁴

Under these circumstances of imperfect competition, policymakers nevertheless see incomplete or insufficient information as the source of the failure of a competitive market model.¹⁹⁵ Some of the intended consequences of increasing market

¹⁸⁷ *See id.*

¹⁸⁸ *See id.*

¹⁸⁹ *See id.* at 6.

¹⁹⁰ *See id.* at 8.

¹⁹¹ *Id.* at 9.

¹⁹² *See id.* at 13–14.

¹⁹³ *Id.* at 14.

¹⁹⁴ *See id.*

¹⁹⁵ *See* David Dill, *Through Deming's Eyes: A Cross-National Analysis of Quality Assurance Policies in Higher Education*, 1 QUALITY IN HIGHER EDUC.

competitiveness are better “value for money” and spurring more innovation; others are better efficiency and quality.¹⁹⁶ Public policy interventions into the market to create better competition tend to affect either: 1) the conduct of consumers and suppliers; 2) the structure of the market, including number and size of suppliers; or 3) the legal conditions under which the market operates.¹⁹⁷ The public policy tools available to the government correspond to these three stages of intervention: regulation of price and quantity, as well as provision of information, may affect how conduct, taxes, subsidies and quasi-markets are used to modify market structure; legal adjustments such as anti-trust provisions or changing intellectual property rights can be used to alter the basic market conditions.¹⁹⁸

Leslie and Johnson describe the federal government’s interest in interfering in the higher education market as far back as the 1970’s.¹⁹⁹ They support their claim with evidence from position papers and policy statements from government officials,²⁰⁰ including the following quote from a Department of Health, Education and Welfare document: “The fundamental premise of this paper is that a freer play of market forces will best achieve Federal objectives in post-secondary education Accordingly, this paper describes what we should do to give individuals the general power of choice in the education market place”²⁰¹ It is evident that Congress’ early endeavors into increasing the power of student choice centered on ensuring that federal funding was largely in the form of aid to students, rather than institutions.²⁰²

Dill, Naidoo and Jamieson show that the reliance on market

95, 98 (1995).

¹⁹⁶ David Dill, *Higher Education Markets and Public Policy*, 10 HIGHER EDUC. POL’Y 167, 172 (1997). See Leslie & Johnson, *supra* note 18, at 1–2.

¹⁹⁷ See Dill, *supra* note 196.

¹⁹⁸ See *id.* at 172–76.

¹⁹⁹ See generally, Leslie & Johnson, *supra* note 18.

²⁰⁰ See *id.* at 1 n.1.

²⁰¹ See *id.* at 2.

²⁰² See *id.* at 2; Brian Pusser & Dudley Doane, *Public Purpose and Private Enterprise: The Contemporary Organization of Postsecondary Education*, CHANGE: MAG. HIGHER LEARNING, Sept.–Oct. 2001, at 18, 21.

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forces to cure the ills of higher education is happening all over the world.²⁰³ Although countries like the United Kingdom are deregulating to a more American model of higher education, researchers are cautioning against inflated expectations.²⁰⁴ In particular, the United States' intention to assist competition by providing better information to students and parents about financing and quality may be misguided.²⁰⁵ The causal chain that carries better information to changing college prices and quality entails a long list of assumptions: that accurate measures can be created and disseminated, that students and parents will use this information in decision making, and that institutions will react to students' enrollment decisions in a positive way.²⁰⁶

It is easy to see from the research available on the marketplace for higher education that it is difficult to predict how the market operates. It is likely that legislators envision the market for higher education as something approaching a competitive market, and that they see imperfect information as the barrier to more perfect competition. Although in theory better information could lead to better choices and thus more competition among higher education institutions, this will not happen unless the assumptions mentioned in the previous paragraph prove to be true. Each of these assumptions must be researched in order to ascertain whether the amendments to the HEA contained in the Higher Education Opportunity Act will achieve the goal of creating better competition in higher education that will, in turn, reduce costs and increase quality.

²⁰³ See Dill, *supra* note 196, at 177; Dill, *supra* note 195, at 99; Rajani Naidoo & Ian Jamieson, *Empowering Participants or Corroding Learning? Towards a Research Agenda on the Impact of Student Consumerism in Higher Education*, 20 J. EDUC. POL'Y 267, 267–81 (2005).

²⁰⁴ See Naidoo & Jamieson, *supra* note 203.

²⁰⁵ See Dill, *supra* note 196, at 180–83; Leslie & Johnson, *supra* note 186, at 13–14.

²⁰⁶ See Dill, *supra* note 196, at 180–83; Leslie & Johnson, *supra* note 186, at 13–14.

VII. OPEN-MARKET PRECEDENTS IN EDUCATION

The recent attempts to marketize higher education have precedent in both k-12 education policy and in the regulations governing teacher preparation programs.²⁰⁷ Scholars who documented the rhetoric surrounding the move toward “deregulation” closely followed the changing approaches to reform in each of these areas.²⁰⁸ This section will describe the changes in both teacher preparation policy and the reforms to k-12 education, as well as the research on both the process of reform and its effects.

A. Teacher Preparation Programs

During the 1990s, the federal government took a role in increasing accountability and quality in teacher preparation programs through the Goals 2000: Educate America Act of 1996, the 1994 reauthorization of the Elementary and Secondary Education Act (ESEA), and the 1998 amendments to the HEA.²⁰⁹ The idea of inspiring a culture of public accountability in teacher preparation was ushered into the public policy arena by several public interest groups and a few key legislators.²¹⁰

Lora Cohen-Vogel and Hyland Hunt examined the way that policy regarding teacher preparation took shape by observing the contributions of advocates and politicians.²¹¹ Their analysis creates a dichotomy among policy advocates, distinguishing those who advocated for the “professionalization” of teacher preparation

²⁰⁷ See *infra* text accompanying notes 209–72.

²⁰⁸ See *infra* text accompanying notes 209–72.

²⁰⁹ See Goals 2000: Educate America Act, Pub. L. 103-227, 108 Stat. 125 (1994) (codified in scattered sections of 20 U.S.C.); Improving America’s Schools Act of 1994, 20 U.S.C. §§ 6301-6304 (2008); Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (1998) (codified in scattered sections of 20 U.S.C.).

²¹⁰ See Lora Cohen-Vogel & Hyland Hunt, *Governing Quality in Teacher Education: Deconstructing Federal Text and Talk*, 114 AM. J. EDUC. 137, 137–38 (2007).

²¹¹ See *id.*

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through better licensing standards, and those who supported the deregulation of teaching, emphasizing knowledge of subject matter content over pedagogical concerns.²¹² The teacher preparation legislation is more or less a compromise between these two points of view; it is “deregulation” because it does not set federal standards of quality, but it “professionalizes” by forcing states to maintain licensing standards and publicize the quality of its programs.²¹³

The Goals 2000 Act codified as a national goal access to teacher’s education programs that allow teachers to “acquire the knowledge and skills needed to instruct and prepare all American students for the next century.”²¹⁴ The 1994 reauthorization of the ESEA followed through on this goal by providing support to teacher education program through additional funding.²¹⁵ Congress’ next step into the field of teacher preparation was the most intrusive; the 1998 Higher Education Act Amendments require reporting both by states and individual institutions that amounts to accountability to both the legislature and the general public.²¹⁶

The 1998 amendments offer grants to states and institutions to improve the quality of teacher education programs.²¹⁷ The statutes do not clearly define standards of quality, but rather call upon states and institutions to prepare teachers who are “highly competent in their academic content areas in which [they] plan to teach.”²¹⁸ They also emphasize state-level certification

²¹² *Id.*

²¹³ See Goals 2000: Educate America Act; Improving America’s Schools Act of 1994 §§ 6301–04; Higher Education Amendments of 1998.

²¹⁴ See Goals 2000: Educate America Act,

²¹⁵ See Improving America’s Schools Act of 1994 §§ 6301–04.

²¹⁶ See Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581, 1759 (1998) (codified in scattered sections of 20 U.S.C.).

²¹⁷ See Higher Education Amendments of 1998, 112 Stat. at 1623.

²¹⁸ See, e.g., Higher Education Act of 1965, § 202(d) (last official version at 20 U.S.C. § 1022(d)(1) (2006)) (amended by Pub. L. No. 110-314 § 205, 122 Stat. 3078, 3147 (2008); Higher Education Act of 1965 § 203(d) (last official version at 20 U.S.C. § 1023(d)(1) (2006) (consolidated into current 20 U.S.C.A. § 1022 (2008) by Pub. L. No. 110-315 § 201(2), 122 Stat. 3078, 3133) (2008)).

requirements, clinical experience, and professional development.²¹⁹ The provisions offering grants are immediately followed by requirements of accountability.²²⁰ To that end, Congress requires both states and institutions to submit report cards on the quality of teacher preparation.²²¹

Although states and individual institutions are required to submit “report cards” to the Department of Education, so far only the institutional report cards must be made readily available to the general public.²²² The only portion of state report cards that is required by law to be widely publicized is the percentage of teacher candidates who passed the state assessments, disaggregated and ranked by the students’ preparation program.²²³ The other state report card components, including a description of teacher licensing or certification requirements, the standards a teacher-candidate must meet to pass certification or licensing requirements, and the alignment of the certification or licensing program with the state’s standards for students must be reported to the Secretary of Education.²²⁴

The institutional report cards must include the percentage of the teacher preparation program’s students who passed the institution’s resident state licensing or certification exam within three years of completing the teacher preparation program, and a comparison of its pass rate with the average pass rates of other programs in the state.²²⁵ It also must provide a general description of the teacher preparation program, including the number of students enrolled, the hours of practicum experience required and the faculty-student ratio in the practicum experience, as well as a statement as to whether the program is accredited. The institutions also must publicize whether or not they have been designated as

²¹⁹ See generally Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (codified in scattered sections of 20 U.S.C.).

²²⁰ See Higher Education Amendments of 1998, 112 Stat. at 1759 (reauthorizing the Higher Education Act of 1965, omitted 2009).

²²¹ See *id.*

²²² See *id.*

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See *id.*

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“low-performing” according to standards set by the states in accordance with another provision of the HEA.²²⁶

The amendments to the HEA substantially changed the way that teacher preparation programs are accountable to both the federal government and the general public.²²⁷ Now, one can search the Internet and find the institutional report cards of a wide array of teacher preparation programs.²²⁸ The Secretary of Education’s Annual Report on Teacher Quality documents the gains in quality in teacher preparation programs, but it does not differentiate among the potential causes of these gains.²²⁹ Neither that report nor any scholarly research shows whether public information about the quality of teacher preparation programs is used by applicants and whether it has had an effect on their decisions as to where to apply.²³⁰

B. No Child Left Behind

The No Child Left Behind Act (NCLB)—a comprehensive education reform undertaken in 2001—has received much attention from the public and from education policymakers and practitioners. The Act is a mammoth piece of legislation that reauthorizes federal programs promoting primary and secondary education found in the Elementary and Secondary Education Act.²³¹ The revolutionary elements of NCLB are measures of accountability and free choice that force states to evaluate the educational preparation of their students, and give parents more options for choosing where their children will be educated.²³²

The U.S. Department of Education states that No Child Left Behind is based upon four “pillars”: stronger accountability, more

²²⁶ *See id.*

²²⁷ *See id.*

²²⁸ *Id.*

²²⁹ *See generally* U.S. DEPARTMENT OF EDUCATION, THE SECRETARY’S FIFTH ANNUAL REPORT ON TEACHER QUALITY: A HIGHLY QUALIFIED TEACHER IN EVERY CLASSROOM (2006).

²³⁰ *Id.*

²³¹ *See* No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301–6304 (2008).

²³² *See id.*

freedom for states and communities, proven education methods, and more choice for parents.²³³ Stronger accountability is achieved by requiring states to develop standards for academic content areas and use standardized tests to gauge how learning measures up to these standards.²³⁴ Accountability is also furthered by creating state and district “report cards” that are not only made public, but also used to enforce penalties on under-performing districts.²³⁵ Freedom for states and communities is encouraged by allowing states to redirect federal funds from one program to another.²³⁶

The Act purports to promote “proven education methods” by requiring that states implement programs and assessment methods that are proven through “scientifically based research.”²³⁷ The final pillar, more choice for parents, is supported by allowing parents of children in low-performing schools to transfer their children to better performing schools in the district or to public charter schools.²³⁸ Some parents in low-performing districts are also eligible for supplemental educational services.²³⁹ In all, the measures supporting the four pillars of NCLB encourage accountability to the state and federal governments, accountability to the public through the provision of information, and greater school choice for parents.²⁴⁰

These measures of accountability and choice are part of the theme underlying the Act that public education may be improved by decentralized accountability coupled with competition.²⁴¹ It

²³³ U.S. Department of Education, Four Pillars of NCLB, <http://www.ed.gov/nclb/overview/intro/4pillars.html> (last visited July 14, 2008).

²³⁴ See No Child Left Behind Act of 2001, Pub. L. No. 107–110, § 1111 (2001).

²³⁵ See U.S. Department of Education, *supra* note 233.

²³⁶ See *id.*

²³⁷ See 20 U.S.C. § 6314.

²³⁸ See 20 U.S.C. § 6316(b).

²³⁹ See 20 U.S.C. § 6316(e).

²⁴⁰ See 20 U.S.C. §§ 6314, 6316(b), 6316(e); U.S. Department of Education, *supra* note 233.

²⁴¹ See 20 U.S.C. §§ 6301–04; Andrew Rudalevige, *No Child Left Behind: Forging a Congressional Compromise*, in *NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY* 23, 24 (Paul Peterson & Martin West, eds., 2003).

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may seem odd to think of public schools, school districts, and states as competitors, but in fact they do compete.²⁴² Public schools do not necessarily have a monopoly on their district; they compete with public charter schools and private schools for students.²⁴³ Students are not the only resource in short supply; districts and states also compete for money in the form of government grants or higher property taxes.²⁴⁴

The stated purpose of NCLB is “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education”²⁴⁵ How was it decided that increasing choice and accountability would meet this goal? The “checks and balances” of the legislative and executive branches and the adversarial two-party system at work in Congress do not lend themselves to creating policy based upon a unified ideology.²⁴⁶ Rather, the ideology evident in NCLB is the product of legislative compromise.²⁴⁷ In the years leading up to its enactment, Republicans and Democrats differed markedly in terms of their approaches to education reform.²⁴⁸ Andrew Rotherham of the Progressive Policy Institute described the heart of these differences as “the left’s habitual demand for more spending and the right’s incessant campaign to shrink Washington’s role in education.”²⁴⁹

²⁴² Dennis Epple & Richard E. Romano, *Competition Between Private and Public Schools, Vouchers, and Peer-Group Effects*, 88 AM. ECON. REV. 33–34 (1998); George M. Holmes et al., *Does School Choice Increase School Quality?*, 2 (Nat’l Bureau of Econ. Research, Working Paper No. 9683, 2003).

²⁴³ See Epple & Romano, *supra* note 242, at 33; Holmes et al., *supra* note 242, at 2.

²⁴⁴ See Holmes et al., *supra* note 242, at 1.

²⁴⁵ 20 U.S.C. § 6301.

²⁴⁶ See generally David Epstein & Sharyn O’Halloran, *Divided Government and the Design of Administrative Procedures: A Formal Model and Empirical Test*, 58 J. POL. 373 (1996).

²⁴⁷ See Rudalevige, *supra* note 241.

²⁴⁸ See ELIZABETH H. DEBRAY, *POLITICS, IDEOLOGY, AND EDUCATION: FEDERAL POLICY DURING THE CLINTON AND BUSH ADMINISTRATIONS* 27–37 (2006).

²⁴⁹ ANDREW ROTHERHAM, PROGRESSIVE POLICY INSTITUTE, *TOWARD PERFORMANCE-BASED FEDERAL EDUCATION FUNDING* (1999), <http://www.ppionline.org/documents/ESEA.pdf>.

In the 106th Congress, House Republicans introduced Academic Achievement for All (The Straight A's Act). This Act would provide unprecedented freedom for states by giving them the option to distribute federal education funds across programs as they saw fit; in exchange for flexibility, the states would have to meet higher accountability standards.²⁵⁰ Meanwhile, Democratic Representative George Miller was advocating better accountability by forcing states to use the disaggregated student data they collect as a basis for accountability frameworks; similar accountability proposals were made in the Senate.²⁵¹ No Child Left Behind reflects a compromise between these disparate points of view; the Act increases accountability, but limits the federal role by forcing states to set their own standards and placing some of the burden of monitoring school progress on the public.²⁵² It is out of this spirit of compromise, rather than any indication of feasibility, that Congress came to rely upon open market forces as a major factor in education reform.²⁵³

After seven years of No Child Left Behind, researchers have only just begun to gauge the effectiveness of its provisions.²⁵⁴ The effects of No Child Left Behind may be instructive for evaluating the future of the higher education policies that rely on market competition and which are the focus of this review. The majority of the existing research has been on how academic achievement has been affected by state accountability requirements.²⁵⁵ This

²⁵⁰ H.R. 2300, 106th Cong. (1st Sess. 1999).

²⁵¹ See DEBRAY, *supra* note 248, at 47–48.

²⁵² See No Child Left Behind Act of 2001, 20 U.S.C. § 6301 (2001).

²⁵³ See DEBRAY, *supra* note 248, at 92–110.

²⁵⁴ See, e.g., Justine S. Hastings & Jeffrey M. Weinstein, *Information, School Choice, and Academic Achievement: Evidence from Two Experiments*, 2–3 (Nat'l Bureau of Econ. Research, Working Paper No. 13623, 2007).

²⁵⁵ See, e.g., Julian R. Betts & Anne Danenberg, *The Effects of Accountability in California*, in NO CHILD LEFT BEHIND? THE POLITICS AND PRACTICE OF SCHOOL ACCOUNTABILITY 197 (Paul Peterson & Martin West, eds., 2003); Martin Carnoy & Susanna Loeb, *Does External Accountability Affect Student Outcomes? A Cross-State Analysis*, 24 EDUC. EVALUATION & POL'Y ANALYSIS 305, 305–06 (2002); Eric Hanushek & Margaret Raymond, *Does School Accountability Lead to Improved Student Performance*, 24 J. OF POL'Y ANALYSIS & MGMT. 297, 297–99 (2005) [hereinafter Hanushek &

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particular area of NCLB does not really rely on market competition, so it is not all that instructive.²⁵⁶ Researchers have found that some state accountability plans have had positive effects on student achievement, and others have not; but only Figlio and Rouse give any indication that the improvement is related to market competition.²⁵⁷ Their study posited that the motivation to improve academic achievement at low-performing schools in Florida was stigma attached with the label of “failing” or “low-performing.”²⁵⁸

A few studies have examined the impact of the increased choice provided by NCLB on student achievement.²⁵⁹ Jeffrey Weinstein and Justine Hastings estimate the impact of school choice provisions and publicizing school performance measures in the Charlotte-Mecklenburg School District.²⁶⁰ That district employed a school choice plan that allowed all parents to choose their top three choices.²⁶¹ After evaluating the schools for NCLB performance criteria, however, the Charlotte-Mecklenburg district notified parents of students at poorly performing schools and allowed them to resubmit their choice forms.²⁶² Hastings and Weinstein compared the choices of parents at low-performing schools before and after notification.²⁶³ They found that 16% of these parents chose a different school for their child, and they

Raymond, *Improved Student Performance*]; Eric Hanushek & Margaret Raymond, *The Effect of School Accountability Systems on the Level and Distribution of Student Achievement*, 2 J. EUR. ECON. ASS'N 406, 407–09 (2004) [hereinafter Hanushek & Raymond, *Student Achievement*].

²⁵⁶ See 20 U.S.C. § 6311.

²⁵⁷ See David N. Figlio & Cecilia Elena Rouse, *Do Accountability and Voucher Threats Improve Low-Performing Schools?*, J. PUB. ECON., Jan. 2006, at 239, 253–54; Carnoy & Loeb, *supra* note 255, at 311–19; Hanushek & Raymond, *Improved Student Performance*, *supra* note 255, at 297, 309–14; Hanushek & Raymond, *Student Achievement*, *supra* note 255, at 406, 411–14.

²⁵⁸ Figlio & Rouse, *supra* note 257, at 253–54.

²⁵⁹ See Hastings & Weinstein, *supra* note 254.

²⁶⁰ See *id.* at 3.

²⁶¹ See *id.*

²⁶² See *id.*

²⁶³ See *id.*

chose schools that were, on average, higher performing.²⁶⁴ Furthermore, the study found that students who were admitted to higher-performing schools than their original school did significantly better on achievement tests.²⁶⁵

This and similar studies indicate that NCLB notification and choice requirements can have a positive effect on the achievement of students who exercise their choice, but they do not address the question of whether parental choice can have a positive effect on overall school quality.²⁶⁶ Caroline Hoxby acknowledges that, in theory, school choice can increase competitiveness among schools, rewarding those that have higher achievement per dollar spent.²⁶⁷ Hoxby points out that school choice has long existed in American public schools, because people choose residential areas based upon local school districts.²⁶⁸ Charles Tiebout's model of local public expenditures states that the choices made by residents influence the quality and amount of public goods offered by the local government.²⁶⁹ Hoxby attempts to ascertain the effects of Tiebout choice in order to shed light on the potential effects of school reforms that promote choice.²⁷⁰ She concludes that Tiebout choice appears to raise the productivity of public school districts by increasing student achievement while also lowering spending.²⁷¹ Although not conclusive on this issue, Hoxby's study indicates that it is possible that school reforms that increase school choice could be effective in increasing quality and efficiency.²⁷²

Without evidence that school choice increases the overall

²⁶⁴ See *id.* at 4.

²⁶⁵ See Hastings & Weinstein, *supra* note 254, at 5.

²⁶⁶ See, e.g., Justine Hastings, Thomas Kane & Douglas Staiger, *Preferences and Heterogenous Treatment Effects in a Public School Choice Lottery* 20–23 (Nat'l Bureau of Econ. Research, Working Paper No. 12145, 2005); Hastings & Weinstein, *supra* note 254, at 24–25.

²⁶⁷ Caroline Hoxby, *Does Competition Among Public Schools Benefit Students and Taxpayers?*, AM. ECON. REV., Dec. 2000, at 1209.

²⁶⁸ See *id.*

²⁶⁹ See *id.*

²⁷⁰ See *id.* at 1209–10.

²⁷¹ See *id.* at 1236–37.

²⁷² See *id.* at 1209–10, 1236–37.

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quality of public schooling, or that teacher preparation regulations increase the overall quality of preparation programs, these examples of the use of open market principles in federal education policy do not give any indication as to whether the promotion of market competition will benefit higher education.²⁷³ Still, these examples indicate that Congress has embraced the philosophy that competition is good for education, and it is likely that it will continue to produce policies that will rely upon the consumer's awareness of the quality of educational options available.²⁷⁴

VIII. IMPLICATIONS

The preceding sections have shown that the new amendments to the HEA mark a departure from Congress' traditional reliance on student financial aid to widen access to higher education.²⁷⁵ Although student financial aid and direct funding to higher education institutions remain central to the HEA, the new amendments contain a variety of measures aimed at increasing access to information about college, particularly about the costs associated with attendance and the financial aid available to students and families.²⁷⁶ These measures serve a multitude of government objectives. Chief among those are these three. First, Congress intends to help families gain access to college by making them more aware of its costs (tuition price and net cost), so that they can plan and save better to pay for college tuition, and also apply to institutions that offer better financial aid packages.²⁷⁷

²⁷³ See, e.g., Figlio & Rouse, *supra* note 257; Hanushek & Raymond, *supra* note 257; Hastings, Kane, & Staiger, *supra* note 266; Hastings & Weinstein, *supra* note 254; Hoxby, *supra* note 267; U.S. DEPARTMENT OF EDUCATION, *supra* note 229.

²⁷⁴ See Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581, 1759 (codified in scattered sections of 20 U.S.C.) (reauthorizing the Higher Education Act of 1965, omitted 2009); No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-04, 6311-16 (2008).

²⁷⁵ See *supra* Parts II-VII.

²⁷⁶ See, e.g., Higher Education Opportunity Act of 2008, Pub. L. No. 110-315 §§ 110-15, 120, 488-490, 122 Stat. 3078, 3094-111, 3117, 3293-308 (2008) (to be codified as amended in scattered sections of 20 U.S.C.).

²⁷⁷ See *id.*; S. REP. NO. 110-231, at 13 (2007); 154 CONG. REC. H643 (daily

Second, policymakers seem to believe that if they provide information to consumers, consumers will be able to make better decisions that will ultimately drive the cost of higher education down by influencing price setting in a competitive market.²⁷⁸ Third, the more expansive information collection and dissemination included in the amendments to the HEA will be available to policymakers as well as consumers; legislators will be able to use the detailed cost and affordability data to make higher education institutions accountable to Congress as well as the general public.

Each of these goals is riddled with inherent inconsistencies and ambiguities. The first goal of increasing access by clearing up students' and parents' uncertainties about the cost of higher education and its net price after discounting financial aid is problematic for at least one major reason: no matter how useful the information is, it is worthless if parents and students do not access it and fully understand it. Studies of parents' and students' access to information about cost and financial aid are sparse and limited in scope, but they indicate that parents and students most often rely upon guidance counselors and publications from specific colleges or universities for information.²⁷⁹ Also, these studies show that higher income families and those in which a parent has attended

ed. Feb 7, 2008) (statement of Rep. Hinojosa).

²⁷⁸ See Higher Education Opportunity Act of 2008 §§ 110–115, 120, 488–490, 122 Stat. at 3094–111, 3117, 3293–308; S. REP. NO. 110-231, at 13; 154 CONG. REC. H643 (daily ed. Feb 7, 2008) (statement of Rep. Hinojosa); Howard P. McKeon, *Real Progress (Finally) on College Affordability*, INSIDE HIGHER ED, Feb. 7, 2008, <http://www.insidehighered.com/views/2008/02/07/mckeon>.

²⁷⁹ See, e.g., LAURA HORN, XIANGLEI CHEN & CHRIS CHAPMAN, U.S. DEPARTMENT OF EDUCATION, GETTING READY TO PAY FOR COLLEGE: WHAT STUDENTS AND THEIR PARENTS KNOW ABOUT THE COST OF COLLEGE TUITION AND WHAT THEY ARE DOING TO FIND OUT 17–23 (2003); LOUIS G. TORNATZKY, RICHARD CUTLER, & JONGHO LEE, COLLEGE KNOWLEDGE: WHAT LATINO PARENTS NEED TO KNOW AND WHY THEY DON'T KNOW IT 11–12 (2002); Alberto F. Cabrera & Steven M. La Nasa, *On the Path to College: Three Critical Tasks Facing America's Disadvantaged*, 42 RES. HIGHER EDUC. 119, 138 (2001); Patricia M. McDonough & Shannon Calderone, *The Meaning of Money: Perceptual Differences Between College Counselors and Low-Income Families About College Costs and Financial Aid*, 49 AM. BEHAV. SCIENTIST 1703, 1704–05 (2006).

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college are more likely to seek out multiple sources of information on colleges, whereas lower income or first-generation families seek only information from “local” sources such as a teacher or guidance counselor.²⁸⁰

It is unlikely that a large group of college-bound students currently seek information from the Department of Education, and it is also unclear whether students and families actually use the information in the way that Congress anticipated.²⁸¹ A student from Brooklyn Friends School in New York said of the U.S. Department of Education’s College Navigator website, “It gives you exactly what you’re looking for, but that might not be what you’re looking for if you don’t know what you’re looking for.”²⁸² In order for the cost and financial aid information on the College Navigator site to be useful, a student or parent must use it to look up costs at a college, estimate the student’s likelihood to receive financial assistance in attending that college, and then either decide to apply to a more affordable college or university, or start a more effective plan to save for the cost of attendance.²⁸³ Of course, the estimated net costs and financial aid packages predicted using net cost calculators could prove to be inaccurate based upon family circumstances such as additional children in college or existing assets; this would make it impracticable to change one’s saving strategy based on the federal government’s prediction.²⁸⁴ Moreover, existing research indicates that families are more likely to access this information during the last few years of high school,

²⁸⁰ *See id.*

²⁸¹ *See id.* *See also* HORN, CHEN & CHAPMAN, *supra* note 279, at 22–32; Eric Grodsky & Melanie Jones, *Real and Imagined Barriers to College Entry: Perceptions of Cost*, 36 SOC. SCI. RES. 745, 754–60 (2007).

²⁸² Samantha Stainburn, *The College Info Fest*, N.Y. TIMES, Jan. 6, 2008, § 7, at 4 (quoting Ryan Ladoceur).

²⁸³ *See Report of the Committee on Health, Education, Labor and Pensions on S. 1642*, S. REP. NO. 110-231, at 13 (2007); 154 CONG. REC. H643 (daily ed. Feb. 7, 2008) (statement of Rep. Ruben Hinojosa); Howard P. McKeon, *Real Progress (Finally) on College Affordability*, INSIDE HIGHER ED, Feb. 7, 2008, <http://www.insidehighered.com/views/2008/02/07/mckeon>.

²⁸⁴ *See Higher Education Opportunity Act of 2008*, Pub. L. No. 110-315 § 111, 122 Stat. 3078, 3098 (2008) (to be codified as amended at 20 U.S.C. § 1015).

at which point it would be too late to accrue any significant savings to pay for college.²⁸⁵

The second congressional goal of curbing rising tuition prices by helping consumers make better decisions is equally problematic. The circumstances that must come to pass in order to achieve an effect on the price of tuition are complicated. Not only must consumers consult and understand the information distributed by the federal government, but they must also use it to make “good” decisions about where to apply and attend.²⁸⁶ A “good” decision presumably is based on more than merely the sticker price or net price of attendance. Rather, better decisions about where to attend would involve some measure of quality, weighed against the price of attendance;²⁸⁷ that is, which institution gives the best value for the dollar?

Although Congress intends to produce plenty of information about cost, as discussed in previous sections, its work to improve information on quality is lacking.²⁸⁸ The College Navigator hosts a variety of data about college characteristics from graduation rates to enrollment statistics and majors, and the amendments add to that measures of quality such as student-faculty ratio and average SAT and ACT scores.²⁸⁹ Yet they do not include other relevant measures, such as job placement rates of graduates, average income of graduates, or measures of the quality of academic

²⁸⁵ See, e.g., HORN, CHEN & CHAPMAN, *supra* note 279, at 22–23; TORNATZKY, CUTLER & LEE, *supra* note 279, at 11–12; Cabrera & La Nasa, *supra* note 279, at 138; Grodsky & Jones, *supra* note 281, at 754–60; McDonough & Calderone, *supra* note 279, 1704–05.

²⁸⁶ See, e.g., HORN, CHEN & CHAPMAN, *supra* note 279, at 22–23; TORNATZKY, CUTLER & LEE, *supra* note 279, at 11–12; Cabrera & La Nasa, *supra* note 279, at 138; Grodsky & Jones, *supra* note 281, at 754–60; McDonough & Calderone, *supra* note 279, 1704–05.

²⁸⁷ See Charles Manski, *Adolescent Econometricians: How Do Youth Infer the Returns to Schooling?*, in *STUDIES IN SUPPLY AND DEMAND IN HIGHER EDUCATION* 43, 55 (Charles Clotfetter & Michael Rothschild, eds., 1990).

²⁸⁸ See *supra* Part III.

²⁸⁹ See Higher Education Opportunity Act, Pub. L. No. 110-315 §§ 106, 110–15, 120, 488–90, 122 Stat. 3078, 3094–111, 3117, 3293–308 (2008) (to be codified as amended in scattered sections of 20 U.S.C.); College Navigator Home Page, <http://nces.ed.gov/collegenavigator> (last visited Feb. 12, 2009).

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programs.²⁹⁰ And while independent ranking organizations such as U.S. News and World Report attempt to provide consumers with measures of quality, their methods have been criticized for serious flaws.²⁹¹ If Congress balks at the idea of dictating measures to assess quality in higher education, and other sources of information about quality are insufficient, consumers are left with inadequate means to make better-informed financial decisions about where to attend because they lack the resources to accurately ascertain the quality-cost tradeoffs that are inherent in choosing an affordable college.

The third and final goal of promoting the use of cost and financial aid information is the internal use of such data by policymakers to evaluate the efficacy of federal programs to reduce educational costs.²⁹² Extensive data on tuition prices and the net cost of higher education may be helpful for serving this purpose, but fulfilling this goal may compromise others. It seems unlikely that the information a policymaker might need to determine whether colleges and universities are using federal dollars efficiently is the same that a consumer would need to select an appropriate college.

IX. CONCLUSION

Walter Hobbs' evaluation criteria for federal higher education policy served as the starting point for this discussion of the

²⁹⁰ See Higher Education Opportunity Act §§ 106, 110–15, 120, 488–90, 122 Stat. at 3078, 3094–111, 3117, 3293–308; College Navigator Home Page, <http://nces.ed.gov/collegenavigator> (last visited Feb. 12, 2009).

²⁹¹ See Ronald C. Ehrenberg, *Method or Madness? Inside the U.S. News & World Report College Rankings*, J. C. ADMISSION, Fall 2005, at 29–35; Don Hossler, *The Problem with College Rankings*, ABOUT CAMPUS, Mar./Apr. 2000, at 20–24; Best Colleges – US News and World Report, <http://colleges.usnews.rankingsandreviews.com/college>. Research has shown that the U.S. News and World Report rankings are heavily based upon institutional reputation rather than academic outcomes, and critics have pointed out that colleges and universities may manipulate their rankings further by modifying acceptance rates, admissions rates, and other factors. *See id.*

²⁹² *See supra* Part V.

consumer information provisions of the HEA.²⁹³ Hobbs stated that one must uncover the goals of a particular government regulation and evaluate whether those goals are legitimate and wise. Further, one must determine the probable consequences of such federal action.²⁹⁴ The Higher Education Opportunity Act amended the HEA by increasing the amount of information available to the public regarding higher education, particularly in terms of the sticker price and net price of higher education, as well as available financial aid.²⁹⁵ It is clear from both the evolution of federal higher education policy and the contents of the bill itself that the goals Congress seeks to accomplish are many, including greater access to higher education, alleviation of pressure to provide financial assistance (by both reducing tuition prices and helping families save and better plan to pay), and accountability for the use of federal funds.²⁹⁶

It seems that these goals are all, to some extent, legitimate and wise, owing to their relationship to the democratic aims of social equality and wealth distribution.²⁹⁷ However, the consequences of supplying more cost and financial aid information to the public are entirely unclear.²⁹⁸ Neither the limited theoretical understanding of the operation of market principles in higher education nor the examples of market-based reform in k-12 and teacher preparation programs can predict whether better information will lead to better decision-making by students and parents.²⁹⁹ Congress cannot predict whether students and parents will use greater access to cost and financial aid information at all; moreover, it cannot predict whether they will use such information to plan and save more effectively, or to make better choices about where to apply.³⁰⁰

²⁹³ See *supra* Part I.

²⁹⁴ See Hobbs, *supra* note 1, at 5.

²⁹⁵ See Higher Education Opportunity Act §§ 110–13, 115, 120, 122 Stat. at 3094–112, 3117.

²⁹⁶ See *supra* Parts II–V.

²⁹⁷ See Leslie & Johnson, *supra* note 18, at 4–5.

²⁹⁸ See *supra* Parts VI–VIII.

²⁹⁹ See *supra* Parts VI–VII.

³⁰⁰ See, e.g., HORN, CHEN & CHAPMAN, *supra* note 279, at 22–23; TORNATZKY, CUTLER & LEE, *supra* note 279, at 11–12; Cabrera & La Nasa,

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Also, there is no evidence to indicate whether the aggregate of individual decisions to attend lower-cost higher-quality institutions will actually result in changes in college tuition prices.³⁰¹

Obviously, it is unclear whether the consumer information provisions of the Higher Education Opportunity Act will achieve their intended goals. What is even more troubling, however, is the prospect that they may have unintended negative consequences. Social science research indicates that the new amendments to the HEA may serve to benefit only those people who are equipped to interpret the information that the federal government provides—namely, high-income families and those families in which a parent has attended college.³⁰² Congress purports to close the gaps in access that plague American higher education with this new legislation, but it may in fact only serve to widen the gap by giving some groups access to “inside” information on institutions that offer high-quality education at more affordable prices.³⁰³

In order to fully understand the value and consequences of the information provisions in the Higher Education Opportunity Act, patterns in parents’ and students’ use of cost and financial aid information must be investigated. At this point, there is no evidence to suggest that the information provisions contained in the Higher Education Opportunity Act will be either helpful or harmful.³⁰⁴ As the U.S. Department of Education struggles to comply with the informational mandates set forth by Congress, it is important to develop research and data that will answer the uncertainties identified in this Article: Who accesses cost and financial aid information supplied by the U.S. Department of Education? How do they use it? Do the choices made by college

supra note 271, at 138; Grodsky & Jones, *supra* note 281, at 754–60; McDonough & Calderone, *supra* note 279, at 1704–05.

³⁰¹ See *supra* Part VI.

³⁰² See, e.g., HORN, CHEN & CHAPMAN, *supra* note 279, at 22–23; TORNATZKY, CUTLER & LEE, *supra* note 279, at 11–12; Cabrera & La Nasa, *supra* note 279, at 138.

³⁰³ See S. REP. NO. 110-231, at 13 (2007); 154 CONG. REC. H625, H643 (daily ed. Feb. 7, 2008) (statement of Rep. Hinojosa); Howard P. McKeon, *supra* note 238.

³⁰⁴ See *supra* text accompanying notes 297–303.

consumers affect the price of services offered by colleges? Do consumers' choices affect the quality of services offered? A clearer picture of how and whether financial information about college access is used can inform the process of HEA implementation, and it can also shape future legislation that seeks to enhance college access.