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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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\(^2\) Id. at 5.
further emphasizing the need to answer them. 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.

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. 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. 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. 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. 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.

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4 See infra Parts II–VIII.
6 See Glater, supra note 5.
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.\(^\text{10}\) 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.\(^\text{11}\) 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.\(^\text{12}\)

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.\(^\text{13}\) 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.\(^\text{14}\) They include loan information provisions that have been termed a “College Consumer’s Bill of Rights,”\(^\text{15}\) 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.\(^\text{16}\)


\(^\text{12}\) See id.

\(^\text{13}\) See id.

\(^\text{14}\) See id.

\(^\text{15}\) See id.; \textit{COLLEGE CONSUMER’S BILL OF RIGHTS, supra} note 10.

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.” 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. 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. 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.

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. Indeed, the responsibility for providing access and affordability is shifted away from the government and institutions, and is instead


19 See id. at 6.


21 See infra Part VIII.
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placed on students and families. \textsuperscript{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.\textsuperscript{23}

This Article discusses the consumer information sections of the amendments to the HEA as well as their theoretical basis and likelihood of success.\textsuperscript{24} Section II begins by observing the historical precedents for federal involvement in higher education policy.\textsuperscript{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.\textsuperscript{26} Section V describes the proposed amendments to the HEA and their intended effects, gleaned from comments by leading policymakers.\textsuperscript{27} Section VI examines the economic theories that underlie efforts to increase competition in higher education.\textsuperscript{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.\textsuperscript{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

\textsuperscript{23} See infra Part VIII.
\textsuperscript{24} See infra Part V.
\textsuperscript{25} See infra Part II.
\textsuperscript{26} See infra Parts III–IV.
\textsuperscript{27} See infra Part V.
\textsuperscript{28} See infra Part VI.
\textsuperscript{29} See infra Part VII.
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, so the federal government has always had what could be considered a secondary role in both k-12 and higher education. At its core, the relationship remains one based upon the provision of resources and the expected return of a myriad of benefits to society. 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. Even from the earliest of days, however, the provision of support has not been purely beneficent; it has served important federal policy goals.

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.

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30 See infra text accompanying notes 31–78.
31 U.S. CONST. amend. X.
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.
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. 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. 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.

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. 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. 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. 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).
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.\textsuperscript{43}

The twentieth century brought a more firm commitment by the federal government to the support of higher education.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{47} Vannevar Bush’s \textit{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.\textsuperscript{48}

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


\textsuperscript{44} See Brubacher & Rudy, \textit{supra} note 33, at 219; Thelin, \textit{supra} note 34, at 32–33.


\textsuperscript{46} See Thelin, \textit{supra} note 34, at 23.

\textsuperscript{47} See id. at 29.

\textsuperscript{48} See Vannevar Bush, \textit{Science: The Endless Frontier} (1945); Constance Ewing Cook, \textit{Lobbying for Higher Education} 6–7 (1998); Thelin, \textit{supra} note 34, at 32.
advancement and national defense, they do not address the “social goals” such as equal access and more equitable distribution of wealth.\footnote{See Leslie & Johnson, supra note 18, at 105–06.} President Truman addressed these social goals in 1946 by convening a commission to examine the feasibility of expanding educational opportunities to all eligible students.\footnote{See President’s Commission on Higher Education, Higher Education for American Democracy: Vol. I (1947); Thelin, supra note 34, at 268.} 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.\footnote{See Thelin, supra note 34, at 269.} 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.\footnote{See id.} 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.\footnote{See U.S. Const. amend. X; Rainsford, supra note 34, at 18–20; Thelin, supra note 34, at 153–54.}

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.\footnote{See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965); Brubacher & Rudy, supra note 33, at 235.} 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.\footnote{See Thelin, supra note 34, at 262–63.} 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.\footnote{See id.} The Servicemen’s Readjustment
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.\textsuperscript{57} The G.I. Bill introduced the concept of national, student-centered support for higher education.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{61}

The Higher Education Act (HEA) of 1965 was the first comprehensive federal program of financial assistance to colleges and students.\textsuperscript{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.\textsuperscript{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.\textsuperscript{64} Like the G.I. Bill, the


\textsuperscript{58} See id.

\textsuperscript{59} See Pub. L. No. 346; THELIN, supra note 34, at 264.

\textsuperscript{60} See THELIN, supra note 34, at 263.


\textsuperscript{64} See 79 Stat. at 1233.
HEA ensures that loans are portable and usable at all eligible institutions. 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. The HEA symbolized a federal commitment to support for higher education beyond those projects that were in the direct interest of the federal government. It marked the beginning of a legacy of student financial assistance aimed at providing what the Carnegie Commission termed “educational justice,” 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.

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. 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. 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

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65 Id.
66 See, e.g., 79 Stat. at 1224.
67 See BRUBACHER & RUDY, supra note 33, at 236.
69 See 79 Stat. 1219.
exceptional financial need.”

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. 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.

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,” Congress may not have the ability to provide access for all students to all levels of higher education.

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.

73 See supra notes 31–72 and accompanying text.
as tuition at some institutions approaches $50,000 annually. 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.

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. 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.

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. 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. 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.”

Although much of the oversight of higher education has been at

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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.
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.\textsuperscript{84} The most basic level of accountability required by the federal government is accounting for the proper use of federal dollars.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{89} These students were older, more focused on vocational preparation, and more willing to question the authority of professors.\textsuperscript{90} Around the same time, student activists changed the relationship between

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


\textsuperscript{88} See id.

\textsuperscript{89} See id.

\textsuperscript{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

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\(^ {91}\) See id.

\(^ {92}\) See id.

\(^ {93}\) See generally RIESMAN, supra note 87.

\(^ {94}\) Martin Trow, supra note 75.


\(^ {96}\) 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

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

104 See id.
105 See Zusman, supra note 86, at 137–39.
106 See infra Part IV.
by its focus on the concepts of accountability, costs, quality, and the role of students as consumers.\textsuperscript{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.\textsuperscript{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.\textsuperscript{112} The report stated that access to higher education was limited, particularly for low-income Americans and minority groups.\textsuperscript{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.”\textsuperscript{114}

Compounding these obstacles to access, the report stated, were the rising costs of tuition and the decline of state subsidies.\textsuperscript{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.\textsuperscript{116} The Commission also found that the financial aid system was too complex and therefore inadequate to meet the needs of students.\textsuperscript{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

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\textsuperscript{111} See generally U.S. DEPARTMENT OF EDUCATION, A TEST OF LEADERSHIP, supra note 109.

\textsuperscript{112} See id. at 7–16.

\textsuperscript{113} Id. at 8–9.

\textsuperscript{114} Id. at 8.

\textsuperscript{115} Id. at 10–11.

\textsuperscript{116} See U.S. DEPARTMENT OF EDUCATION, A TEST OF LEADERSHIP, supra note 109, at 10–11.

\textsuperscript{117} Id. at 12.
\end{footnotesize}
policymakers and students information about the quality of outcomes which are, in the Commission’s mind, the real measure of institutional performance.\textsuperscript{118}

The solution to facing these challenges can be found in the Commission’s many recommendations, with an emphasis on accountability.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{121} The report called for wide-ranging information-sharing not only with legislators, but also with families and students.\textsuperscript{122} To that end, the Commission advised the creation of sources of easily searchable and comparable “consumer-friendly information” on higher education.\textsuperscript{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.\textsuperscript{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.\textsuperscript{125} Historically, the federal

\begin{thebibliography}{125}
\bibitem{118} See \textit{id.} at 14–15.
\bibitem{119} See \textit{id.} at 21–25.
\bibitem{120} \textit{Id.} at 21.
\bibitem{121} See \textit{id.} at 20–21.
\bibitem{122} See \textit{id.} at 20–21.
\bibitem{123} See \textit{id.} at 20.
\bibitem{124} See supra Part III and accompanying text.
\end{thebibliography}
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. 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. 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. 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. The following section describes the changes to the HEA made in the 2008 reauthorization, which reflect Congress’ adaptation of the Spellings Commission’s conclusions about the state of higher education and the most expedient solutions to its problems.

128 See id. at 18–19.
130 See infra Part V and accompanying text.
131 See infra Part V and accompanying text.
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. 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. This section will describe the provisions of the bill and the intended consequences of them, as articulated by legislators themselves.

The reauthorization bill, entitled the Higher Education Opportunity Act, contains several sections that aim to increase the quality or availability of information to students. Sections 110 and 111 of the Higher Education Opportunity Act amend chapter 28, part C of the existing HEA, entitled “Cost of Higher Education.” 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. 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.

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

134 See infra text accompanying notes 135–85.
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. Section 110 also includes requirements to provide additional financial aid information specifically for military members and veterans.

Section 111 also looks to improve the availability of information to students and parents, but it focuses on financial information. 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. 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

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140 See id.
141 See id. § 110(b), 122 Stat. at 3095–98.
142 See id. § 111, 122 Stat. at 3097–108.
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.\(^\text{144}\)

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.\(^\text{145}\) These explanations will be made public to consumers through an annual report.\(^\text{146}\)

The “Net Price Calculator” is another innovation contained in § 111.\(^\text{147}\) 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.\(^\text{148}\) 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,”\(^\text{149}\) but the Net Price Calculator should take into account the individual student’s need-based and merit-based aid “as much as practicable.”\(^\text{150}\) 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.\(^\text{151}\) 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.\(^\text{152}\)

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

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\(^{145}\) 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. 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.

The HEA amendments essentially codify the data collection and dissemination already in use through the College Navigator. 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. 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.

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. Most of these additional provisions are included to provide parents and students

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153 See id.
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.
with more and better information about student loans.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{161}

The sections of the proposed HEA amendments described here represent only a small portion of the entire bill.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{165} McKeon claimed that the amendments to the HEA would remedy this with “strong consumer-driven disclosure

\textsuperscript{159} See id.
\textsuperscript{160} See id. § 433, 122 Stat. at 3247.
\textsuperscript{161} Id. § 490, 122 Stat. at 3305.
\textsuperscript{163} See generally id.
\textsuperscript{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.
and meaningful data comparisons.”  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. 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.” 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. 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.

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. 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.


166 Id.
167 See id.
168 Id.
169 See id.
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.\textsuperscript{173} The report links the inability to afford college without significant borrowing to a decline in access for some students.\textsuperscript{174} The report further states, “\textquote{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.”\textsuperscript{175} The report clearly shows a desire to achieve better affordability and better access, but there may be another goal here as well.\textsuperscript{176} The report further states, “\textquote{t}he public availability of this information is expected to support institutions and States that are committed to maintaining access to affordable higher education.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{174} Id.
\textsuperscript{175} Id.
\textsuperscript{176} See id.
\textsuperscript{177} Id.
\textsuperscript{178} See id.
\textsuperscript{179} See supra text accompanying notes 132–78.
\textsuperscript{180} See id.
considered “institutional quality.”  

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. 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. 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.

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.

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.” However, the specific functioning of the higher education market is what is

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184 See id.

185 See infra Part VI.

186 Leslie & Johnson, supra note 18, at 5.
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...difficult to describe.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{191} Nevertheless, the market for higher education is far from this ideal.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{195} Some of the intended consequences of increasing market

\begin{itemize}
\item \textsuperscript{187} See id.
\item \textsuperscript{188} See id.
\item \textsuperscript{189} See id. at 6.
\item \textsuperscript{190} See id. at 8.
\item \textsuperscript{191} Id. at 9.
\item \textsuperscript{192} See id. at 13–14.
\item \textsuperscript{193} Id. at 14.
\item \textsuperscript{194} See id.
\item \textsuperscript{195} See David Dill, \textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{198}

Leslie and Johnson describe the federal government’s interest in interfering in the higher education market as far back as the 1970’s.\textsuperscript{199} They support their claim with evidence from position papers and policy statements from government officials,\textsuperscript{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 . . . .”\textsuperscript{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.\textsuperscript{202}

Dill, Naidoo and Jamieson show that the reliance on market

\textsuperscript{95, 98 (1995).}


\textsuperscript{197} See Dill, supra note 196.

\textsuperscript{198} See id. at 172–76.

\textsuperscript{199} See generally, Leslie & Johnson, supra note 18.

\textsuperscript{200} See id. at 1 n.1.

\textsuperscript{201} See id. at 2.

forces to cure the ills of higher education is happening all over the world.\footnote{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).} Although countries like the United Kingdom are deregulating to a more American model of higher education, researchers are cautioning against inflated expectations.\footnote{204 See Naidoo & Jamieson, supra note 203.} In particular, the United States’ intention to assist competition by providing better information to students and parents about financing and quality may be misguided.\footnote{205 See Dill, supra note 196, at 180–83; Leslie & Johnson, supra note 186, at 13–14.} 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.\footnote{206 See Dill, supra note 196, at 180–83; Leslie & Johnson, supra note 186, at 13–14.}

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.
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.\textsuperscript{207} Scholars who documented the rhetoric surrounding the move toward “deregulation” closely followed the changing approaches to reform in each of these areas.\textsuperscript{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.

\textit{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{211} Their analysis creates a dichotomy among policy advocates, distinguishing those who advocated for the “professionalization” of teacher preparation.

\textsuperscript{207} See infra text accompanying notes 209–72.
\textsuperscript{208} See infra text accompanying notes 209–72.
\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{214} The 1994 reauthorization of the
ESEA followed through on this goal by providing support to
teacher education program through additional funding.\textsuperscript{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.\textsuperscript{216}

The 1998 amendments offer grants to states and institutions to
improve the quality of teacher education programs.\textsuperscript{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.”\textsuperscript{218} They also emphasize state-level certification

\textsuperscript{212} \textit{Id.}

\textsuperscript{213} \textit{See} Goals 2000: Educate America Act; Improving America’s Schools

\textsuperscript{214} \textit{See} Goals 2000: Educate America Act,

\textsuperscript{215} \textit{See} Improving America’s Schools Act of 1994 §§ 6301–04.

\textsuperscript{216} \textit{See} Higher Education Amendments of 1998, Pub. L. No. 105-244, 112

\textsuperscript{217} \textit{See} Higher Education Amendments of 1998, 112 Stat. at 1623.

\textsuperscript{218} \textit{See, e.g.}, Higher Education Act of 1965, § 202(d) (last official version
Stat. 3078, 3147 (2008); Higher Education Act of 1965 § 203(d) (last official
requirements, clinical experience, and professional development.\textsuperscript{219} The provisions offering grants are immediately followed by requirements of accountability.\textsuperscript{220} To that end, Congress requires both states and institutions to submit report cards on the quality of teacher preparation.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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


\textsuperscript{221} See id.

\textsuperscript{222} See id.

\textsuperscript{223} See id.

\textsuperscript{224} See id.

\textsuperscript{225} See id.
“low-performing” according to standards set by the states in accordance with another provision of the HEA.\textsuperscript{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.\textsuperscript{227} Now, one can search the Internet and find the institutional report cards of a wide array of teacher preparation programs.\textsuperscript{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.\textsuperscript{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.\textsuperscript{230}

\textbf{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.\textsuperscript{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.\textsuperscript{232}

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

\begin{itemize}
\item \textsuperscript{226} \textit{See id.}
\item \textsuperscript{227} \textit{See id.}
\item \textsuperscript{228} \textit{Id.}
\item \textsuperscript{229} \textit{See generally U.S. Department of Education, The Secretary’s Fifth Annual Report on Teacher Quality: A Highly Qualified Teacher in Every Classroom} (2006).
\item \textsuperscript{230} \textit{Id.}
\item \textsuperscript{232} \textit{See id.}
\end{itemize}
freedom for states and communities, proven education methods, and more choice for parents.\textsuperscript{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.\textsuperscript{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.\textsuperscript{235} Freedom for states and communities is encouraged by allowing states to redirect federal funds from one program to another.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{238} Some parents in low-performing districts are also eligible for supplemental educational services.\textsuperscript{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.\textsuperscript{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.\textsuperscript{241} It

\textsuperscript{235} See U.S. Department of Education, supra note 233.
\textsuperscript{236} See id.
\textsuperscript{237} See 20 U.S.C. § 6314.
\textsuperscript{238} See 20 U.S.C. § 6316(b).
\textsuperscript{239} See 20 U.S.C. § 6316(e).
\textsuperscript{240} See 20 U.S.C. §§ 6314, 6316(b), 6316(e); U.S. Department of Education, supra note 233.
may seem odd to think of public schools, school districts, and states as competitors, but in fact they do compete. Public schools do not necessarily have a monopoly on their district; they compete with public charter schools and private schools for students. 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. The stated purpose of NCLB is “to ensure that all children have a fair, equal, and significant opportunity to obtain a high-quality education . . . ” 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. Rather, the ideology evident in NCLB is the product of legislative compromise. In the years leading up to its enactment, Republicans and Democrats differed markedly in terms of their approaches to education reform. 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.”


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


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. 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. 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. 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.

After seven years of No Child Left Behind, researchers have only just begun to gauge the effectiveness of its provisions. 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. This

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251 See DEBRAY, supra note 248, at 47–48.
253 See DEBRAY, supra note 248, at 92–110.
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].


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.\textsuperscript{264} Furthermore, the study found that students who were admitted to higher-performing schools than their original school did significantly better on achievement tests.\textsuperscript{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.\textsuperscript{266} Caroline Hoxby acknowledges that, in theory, school choice can increase competitiveness among schools, rewarding those that have higher achievement per dollar spent.\textsuperscript{267} Hoxby points out that school choice has long existed in American public schools, because people choose residential areas based upon local school districts.\textsuperscript{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.\textsuperscript{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.\textsuperscript{270} She concludes that Tiebout choice appears to raise the productivity of public school districts by increasing student achievement while also lowering spending.\textsuperscript{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.\textsuperscript{272}

Without evidence that school choice increases the overall

\begin{footnotesize}
\begin{enumerate}
\item See id. at 4.
\item See Hastings & Weinstein, supra note 254, at 5.
\item Caroline Hoxby, Does Competition Among Public Schools Benefit Students and Taxpayers?, AM. ECON. REV., Dec. 2000, at 1209.
\item See id.
\item See id.
\item See id. at 1209–10.
\item See id. at 1236–37.
\item See id. at 1209–10, 1236–37.
\end{enumerate}
\end{footnotesize}
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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. 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.

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. 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. 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.

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.


275 See supra Parts II–VII.


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.\textsuperscript{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.\textsuperscript{279} Also, these studies show that higher income families and those in which a parent has attended


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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.  

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. 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.” 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. 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. 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).


at which point it would be too late to accrue any significant savings to pay for college.\textsuperscript{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.\textsuperscript{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;\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{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.


\textsuperscript{288} See supra Part III.

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programs. 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. 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. 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

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292 See supra Part V.
consumer information provisions of the HEA.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{297} However, the consequences of supplying more cost and financial aid information to the public are entirely unclear.\textsuperscript{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.\textsuperscript{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.\textsuperscript{300}

\textsuperscript{293} See supra Part I.
\textsuperscript{294} See Hobbs, supra note 1, at 5.
\textsuperscript{296} See supra Parts II–V.
\textsuperscript{297} See Leslie & Johnson, supra note 18, at 4–5.
\textsuperscript{298} See supra Parts VI–VIII.
\textsuperscript{299} See supra Parts VI–VII.
\textsuperscript{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,
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{301} See supra Part VI.

\textsuperscript{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.


\textsuperscript{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.