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GOING BACK TO THE DRAWING BOARD: RE-ENTRENCHING THE HIGHER EDUCATION ACT TO RESTORE ITS HISTORICAL POLICY OF ACCESS

*Twinette L. Johnson**

INTRODUCTION

IMAGINE that Congress repealed Title IV of the Higher Education Act (“HEA” or “the Act”)¹ during the Act’s next reauthorization. Title IV is the provision of the Act which provides financial aid.² Its various forms include grants, loans, and work study.³ Title IV provides the pathway for many students to attend a post-secondary institution, particularly those who are socially and economically underrepresented. It provides the funding that many students need to attend post-secondary institutions from trade schools (also known as career schools) to colleges to graduate schools to professional schools. So, what if Congress were to repeal that portion of the Act thereby defunding those trade schools, colleges, graduate schools, and professional schools (including law schools)?

There would be outrage at least from that portion of the population who subscribes to the idea that government should provide a path to post-secondary education through federal financial aid funding. Even those who do not ideologically support this type of government provision would still feel a sense of outrage over this when considering their practical and personal needs regarding higher education.⁴ It is, thus, difficult to imagine that Americans would stand for

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1. Higher Education Act of 1965, 20 U.S.C. § 1001 (2012).

2. Higher Education Act of 1965, tit. IV, 20 U.S.C. § 1001 (2012).

3. *Id.*

4. Staffan Kumlin, *The Welfare State: Values, Policy Preferences, and Performance Evaluations*, in THE OXFORD HANDBOOK OF POLITICAL BEHAVIOR 362, 363 (Russell J. Dalton & Hans-Dieter Klingemann eds., 2007) (“[W]hereas a majority of Americans were ideologically

the complete deprivation of something that, for many, has become essential to achieving a portion of the American dream—the ability of Americans to use education to become productive and contributing members of society.⁵ Congress is very aware of how the voting public may view this and, thus, is unlikely to directly propose such an action.⁶

Nevertheless, it is happening. In my opinion, the federal financial aid that citizens have come to expect is being taken away. It is not occurring in an absolute way that would signal alarm and outrage, but in a way that confuses citizens regarding the issues and diverts their attention from the slow chipping at institutions that are entrenched and, thus, expected in our society. Congress seems bent on hiding education amongst a myriad of other issues. In doing so, it has taken broad higher education access off the main stage and relegated it behind fashionable issues (such as fiscal resources and government expansion) which are made to seem unrelated to the realization of the benefits which flow from receiving post-secondary education.

The HEA, from its inception to its passage and through many of its reauthorizations, has entrenched in American society this expectation that its citizens should be able to earn a credential past high school that will enable them to support themselves and their families.⁷ This is proven by the Act's endurance, over eight reauthorizations (from 1968-2008 at the writing of this article) and the maintenance of, across a diverse pool of stakeholders, the fundamental policy behind the Act—to provide widespread post-secondary education access particularly to those who have been historically stymied in their higher education pursuits.⁸

Access to post-secondary education is not a fundamental right,⁹ but statutes such as the HEA fill in gaps left by the Constitution in providing access to rights

suspicious of public welfare and government spending, only a minority tended to be dissatisfied with how public schemes perform in practice.”).

5. Tito Boeri, Axel Borsch-Supan & Guido Tabellini, *Would You Like to Shrink the Welfare State? A Survey of European Citizens*, 16 *ECON. POL'Y* 7, 39 (2001) (focusing on general equilibrium calculations such that a question about general policy issues will typically consider society-wide implications, but a question about individual choices elicits a more individualized response). For instance, asking a citizen whether he believes the government should provide financial aid may illicit a different response than a question to that same man as to whether he would like his child to receive government help in attending college if he or she were not able to afford it.

6. See Paul Pierson, *The New Politics of the Welfare State*, 48 *WORLD POL.* 143, 156, 177 (1996) (stating that “[t]he unpopularity of retrenchment makes major cutbacks unlikely except ... [in times] of budgetary crisis, and radical restructuring is unlikely even then” because while the framing of the crisis as a fiscal matter may open the door to welfare reform, it requires a consensus with the opposition that is difficult to achieve).

7. Lyndon Johnson, Remarks on Signing the Higher Education Act of 1965 (Nov. 8, 1965), available at <http://www.txstate.edu/commonexperience/pastsitearchives/2008-2009/lbjresources/higheredact.html>.

8. See ANGELICA CERVANTES ET AL., TG RESEARCH & ANALYTICAL SERV., OPENING THE DOORS TO HIGHER EDUCATION: PERSPECTIVES ON THE HIGHER EDUCATION ACT 40 YEARS LATER 18 (2005), available at http://www.tgslc.org/pdf/hea_history.pdf.

9. See generally *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (discussing education rights in the context of the Texas school finance system). For a discussion of

not guaranteed by it.¹⁰ These enactments represent a “statutory constitutionalism ... that [has grown] out of ... social movement demands that government create affirmative programs to regulate private as well as public institutions and behaviors.”¹¹ They thus are distinguished from ordinary statutes and elevated to “super” statutes as society comes to expect and rely on the rights provided by them.

A study of the events leading to the enactment of the HEA and its various reauthorizations evidences the evolution of the Act to super status and, thus, demonstrates its entrenchment of societal expectations with regard to widespread post-secondary education access. Such entrenchment begins with credit claiming legislation.¹² That is, legislation sponsored by politicians seeking to expand social benefits in response to a problem and take credit for solving that problem.¹³ While recognizing various political impetuses for proposing such welfare legislation, this article views the resultant expansion of the welfare state as entrenchment of societal demand through legislation. This goes beyond a simple credit claiming opportunity for politicians and actually represents the product of rights-claiming advocacy from the citizens. Put differently, politicians may act to receive the credit but it is the citizenry who pressures (through various methods of advocacy and potential exercise of voting power) politicians to provide something they expect and deem essential. The citizens thus claim the right through their direct or indirect influence on politicians.¹⁴ Beyond the initial impetus for the legislation’s creation and the policy undergirding it, the legislation evolves and proliferates through constant debate and assessment over time as the statute is expanded and narrowed to meet its purpose of extending the right to the citizenry.¹⁵

The HEA’s long existence evidences this expansion, constant debate, and assessment. The Act, at its inception and through many of its reauthorizations, created new access programs such as the TRIO programs that sought to prepare socially and economically disadvantaged high school students for the rigors of college.¹⁶ The Act also expanded funding through grants.¹⁷ In contemplating the

the *San Antonio* case, see Richard Schragger, *San Antonio v. Rodriguez and the Legal Geography of School Finance Reform*, in *CIVIL RIGHTS STORIES* 85, 96-97 (Myriam E. Gilles & Risa L. Goluboff eds., 2008), available at <http://ssrn.com/abstract=1590405>.

10. See WILLIAM N. ESKRIDGE & JOHN FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 6 (2010) (stating that “the constitutional pervasiveness depends upon statutes to fill in huge holes in our governance structure and norms” and calling this process transformative instead of mere gap filling).

11. *Id.* at 121. See also Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *YALE L.J.* 1665, 1670 (2002).

12. Pierson, *supra* note 6, at 144-45 (“[E]xpanding social benefits [is] ... a process of political credit claiming” which, in times of economic prosperity, is a favored political activity in that it contributes to “the popularity of reform-minded politicians.”).

13. *Id.*

14. See *id.*

15. ESKRIDGE & FERREJOHN, *supra* note 10, at 9.

16. Edward J. McElroy & Maria Armesto, *TRIO and Upward Bound: History, Programs, and Issues—Past, Present, and Future*, 67 *J. NEGRO EDUC.* 373, 373 (1998). See generally *Federal TRIO Home Page*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ope/trio/index.html>

Act, President Lyndon Johnson learned that students would go to college if they had the money but also if they were not saddled with debt upon graduating.¹⁸ Thus, in the early days of the Act's reauthorization, there was not only expansive grant creation and maintenance, but also response to a burgeoning societal expectation that government would sponsor programs to ensure widespread post-secondary education access.¹⁹

The later reauthorizations, however, reveal a shift in how the access policy behind the Act was carried out. By the late 1970s and early 1980s, the reauthorizations took on a different focus with regard to federal financial aid. The country's spending on financial aid had grown tremendously²⁰ and the nation was no longer experiencing an economic boom.²¹ This shift is not entirely surprising as scholars note that rights-claiming reforms occur in times of economic prosperity, but those same programs are eyed with suspicion during times of austerity.²² In the later reauthorizations, grant creation and funding slowed down. The Act's last reauthorization in 2008 was filled with reporting requirements focused mainly on accountability and protection of federal funds. This last reauthorization signaled the latest attempt to retrench the historical policy of access behind the Act. It showed a clear switch from the rights-claiming legislation at the Act's inception and its earlier reauthorizations to a blaming culture²³ of legislating. This blaming legislation replaced creation of new pathways to post-secondary access with adherence to accountability standards that obscure the true purpose of the Act.²⁴

The increased need for protection is warranted. More accountability, particularly for those institutions eligible to receive Title IV funds, is necessary. The ever-changing higher education landscape and the corporatization and arguable commodification of higher education all suggest that protection of

(last modified Apr. 23, 2014) (describing TRIO as a collection of “[f]ederal outreach and student services programs designed to identify and provide services for individuals from disadvantaged backgrounds” including those who are “low-income ..., first-generation college students, and ... [disabled]”).

17. CHARMAINE MERCER, CONG. RESEARCH SERV., FED. PELL GRANT PROGRAM OF THE HIGHER EDUCATION ACT: BACKGROUND AND REAUTHORIZATION I (2008), available at http://www.tennessee.edu/govrelations/docs/Pell_grant.pdf.

18. Lyndon B. Johnson, Special Message to the Congress: “Toward Full Educational Opportunity” (Jan. 12, 1965), available at <http://www.presidency.ucsb.edu/ws/?pid=27448>.

19. Lawrence E. Gladieux, *Federal Student Aid Policy: A History and an Assessment*, <http://www2.ed.gov/offices/OPE/PPI/FinPostSecEd/gladieux.html#f1> (last visited Nov. 17, 2013).

20. *Id.*

21. PHILIP ABBOTT, THE CHALLENGE OF THE AMERICAN PRESIDENCY 238 (2d ed. 2011); *Slaying the Dragon of Debt: 1980-82 Early 1980s Recession*, UNIV. OF CAL. BERKELEY, <http://bancroft.berkeley.edu/ROHO/projects/debt/1980srecession.html> (last visited Apr. 4, 2014).

22. See Pierson, *supra* note 6, at 144-45. See, e.g., ESKRIDGE & FERREJOHN, *supra* note 10, at 177 & 200 (discussing how the Social Security “safety net” was so entrenched in America’s statutory constitution that it survived numerous arguments that would eliminate or reduce it).

23. Pierson, *supra* note 6, at 145.

24. See Nathalie Giger, *Is Social Policy Retrenchment Unpopular? How Welfare Reforms Affect Gov’t Popularity*, 28 EUR. SOC. REV. 691, 691 (2011) (describing retrenchment in the context of her empirical research on whether retrenchment sways public opinion of the government).

federal financial aid funds is critical if access programming is to be maintained. This article does not suggest that protection of those funds is an unworthy goal of the HEA. Higher education must certainly stay in step with economic shifts.

But, the Act must also keep up with cultural shifts and how those shifts impact the population's education needs. The need for post-secondary education has grown exponentially since the HEA was enacted in 1965—spurred by a modern workforce economy that places a premium on credentialed job candidates.²⁵ That growth has, in some ways, grossly stimulated and changed the higher education landscape as citizens seek opportunities to attain those credentials. Thus, the next reauthorization of the HEA cannot fall into the blame accountability scheme of retrenchment.²⁶ To the contrary, the historical policy behind the HEA must be reset or re-entrenched.

This article posits that given the current concerns with the post-secondary education system in meeting the demands of today's workforce,²⁷ the next reauthorization of the HEA should reset or re-entrench the historical access policy behind the HEA. This legislation must reflect that while the post-secondary education needs of citizens have changed, the need to constantly assess and determine pathways to higher education has not. Thus, the historical access policy behind the Act is not focused only on protecting those access programs already in place (existing federal financial aid funding), but is also concentrated on creating and implementing new programs to meet the needs of students today just as it did in 1965 and throughout the early activist days of the HEA's enactment and subsequent reauthorization. That is the true nature of an entrenched super statute—adaptable over time in responding to new crises while still adhering to its undergirding policy.²⁸

This article, therefore, seeks to explore the entrenchment of the HEA and its historical policy to propose that Congress return the HEA to its roots and enact reauthorizing legislation that will set the course for re-entrenching HEA policy. This re-entrenching will properly set the focus of the Act on widespread higher education access by creating and implementing new pathways (funding and otherwise) to that access. To that end, Part I discusses how the HEA became entrenched in American culture and society. The goal here is to set a foundation for understanding the historical view of the United States toward government funded higher education. Part II discusses the retrenchment of the Act by exploring presidential and congressional fiscal policy goals with regard to post-

25. See Marilyn S. Thompson et al., *Understanding Differences in Postsecondary Educational Attainment: A Comparison of Predictive Measures for Black and White Students*, 75 J. NEGRO EDUC. 546, 546 (2006); EDWARD P. ST. JOHN, REFINANCING THE COLLEGE DREAM 1 (2003).

26. Retrenchment is characterized as either cutting social programs or impacting the funding associated with social programs. Giger, *supra* note 24, at 691-92. See also Pierson, *supra* note 6, at 157 (during retrenchment, there are dramatic changes in benefit and eligibility rules that signal qualitative reform of a particular program).

27. See Thompson et al., *supra* note 25, at 546 (citing Anthony. P. Carnevale & Donna. M. Desrochers, *Preparing Students for the Knowledge Economy: What School Counselors Need to Know*, 6 PROF'L SCH. COUNSELING 228, tbl.3 (2003)).

28. See William N. Eskridge & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1271 (2001).

secondary education in the context of all HEA reauthorizations to understand the shift towards retrenchment that has taken place in HEA reauthorizing legislation. Discussing this history in Parts I and II will simultaneously prove the retrenchment of the historical access policy behind the HEA and the importance of defining access in a way that balances maintaining existing pathways to higher education with the need for creating new ones. Part III discusses the changing higher education landscape. The goal here is to validate the need for protecting federal funds, but to also highlight how that need for protection has overshadowed the historical policy of widespread post-secondary access. Part IV advances that in the next HEA reauthorization, Congress should begin the re-entrenchment of the Act by returning its primary focus to creation and implementation of new access programming and suggesting methods by which it might accomplish this goal.

I. THE ENTRENCHMENT OF THE HIGHER EDUCATION ACT

If we would prevent the growth of class distinctions and would constantly refresh our leadership with the ideals of our people, we must draw constantly from the general mass. The full opportunity for every boy and girl to rise through the selective processes of education can alone secure to us this leadership.²⁹

Entrenchment is potentially controversial as it involves legislators' attempts to, through statutory enactment, stay the hand of future legislative actors, thus giving a statute "super" status.³⁰ But this is just one interpretation of statutory entrenchment and, given the importance of the rights the entrenched statute provides, not necessarily the worst way in which to view such statutes.³¹ The true impact of entrenchment is not just that it can potentially preempt future legislators from legislating in the area, but that it is both the act and result of establishing and promoting a desired societal norm.³² Legislators act, in essence, to give the statute super status such that the norm or policy supporting the statute is "entrenched" so deeply in society's expected "rights,"³³ those rights seem fundamental although they are not granted in the Constitution.³⁴ Eskridge and

29. President Herbert Hoover, Inaugural Address (Mar. 24, 1929), available at <http://www.hoover.archives.gov/info/inauguralspeech.html>.

30. Posner & Vermeule, *supra* note 11, at 1667 (stating that "an entrenching statute is like a mini-constitution in its self-conscious effort to control the voting practices or policy choices of future majorities").

31. *Id.* at 1666 (describing entrenchment as "a promiscuous word in the academic literature" and thereby suggests that there are alternate ways of defining and using the term).

32. Eskridge & Ferejohn, *supra* note 28, at 1230 ("The key to super-statuedom is acceptance in the public culture.").

33. ESKRIDGE & FEREJOHN, *supra* note 10, at 121 (noting that "statutory constitutionalism often grows out of social movement demands that government create affirmative programs to regulate private as well as public institutions [such as education] and behaviors").

34. *Id.* at 8-9. See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 26 YALE L.J. 710 (1917) (declaring that a right, as opposed to a privilege, is one's affirmative claim against another).

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Ferejohn provide a “rough model” for how statutes evolve to super status thus entrenching societal expectations:

[An important problem exists in society] and after careful deliberation, Congress enacts a statute [to address the problem]

↓

Statute is implemented by judges and/or agencies, with feedback from Congress

↓

Normative conflict, where one institution seeks to narrow the statute in a major way
Legislature bows to pressure to create special-interest exceptions
Court narrowly construes the statute
Agency is captured by the regulated group or a special interest

↓

Public debate about the attempted narrowing
Critical outrage seeking to engage the public
Institutional opposition
Statutory narrowing may become an election issue

↓

Responsive to the normative debate, the government reaffirms or modifies the core principle of the statute

↓

More crises, especially as the statute is adapted to ever newer circumstances³⁵

This model also provides the appropriate framework for understanding that a statute’s entrenchment is not meant to stay the legislature’s hand³⁶ on the matter

35. Eskridge & Ferejohn, *supra* note 28, at 1270-71. *See also* ESKRIDGE & FEREJOHN, *supra* note 10, at 173 (recognizing President Franklin Roosevelt’s desire to use the Social Security program as more than a remedy for a current ill, but to establish it as a program that would “endure for decades” and in doing so “enter into the fabric of people’s lives ... form[ing] the basis of their retirement plans”). Eskridge and Ferejohn chart the Social Security Act’s entrenchment as follows:

Social Security Act of 1935 responds to both the immediate and long-term problem of old-age destitution; survives Supreme Court review and 1939 amendments

↓

Administrative implementation of new norm, with positive feedback from media, experts, public

↓

Republic Congress tries to trim back social security coverage; President Truman defies Republicans and triumphs in 1948 election

↓

Congress reaffirms social security norm and expands coverage, 1950 amendments

↓

Social security survives GOP control of presidency and Congress, 1953-55, program flourishes and expands, 1950s

↓

Social security is entrenched

ESKRIDGE & FEREJOHN, *supra* note 10, at 187 fig.4 (Entrenchment of the social security norm).

(even if that may be the effect from time to time). It instead proves that the statute's subject matter is engrained in society and thus deserves "super" status because it represents a more complicated journey—one born out of a culturally identified problem that threatens an established or desired tradition, cultivated by normative justification debate through legislative, administrative, and judicial action and sustained through continued societal expectations.³⁷ Therefore, a super statute does not simply stay the legislature's hand. On the contrary, a statute that is "super" because of its entrenched status *guides* the legislature's hand as to whether it should be stayed or moved in ensuring that future proposed statutory enactments stay in step with society's expectations regarding the right the statute grants.

A. *Maintaining the Traditions: Acknowledging and Remediating the Historical Lack of Access*

The HEA was enacted in 1965³⁸ and came about during the Great Society efforts of President Lyndon B. Johnson.³⁹ Sweeping and often touted as revolutionary in its scope,⁴⁰ the Act sought to bridge the economic gap for citizens stuck in a revolving cycle and hereditary legacy of poverty by providing the means to pursue higher education.⁴¹ The Act, once passed, represented a bipartisan compromise that recognized that all citizens should have the opportunity to gain access to higher education.⁴²

The HEA was certainly not the first attempt at recognizing the importance of widespread post-secondary access to education.⁴³ Statutes like the HEA come about after attempts by legislators (with some motivation by the public), financial

36. Posner & Vermeule, *supra* note 11, at 1667.

37. See Eskridge & Ferejohn, *supra* note 28, at 1270-71. See also Posner & Vermeule, *supra* note 11, at 1666 (stating that in the "appropriate circumstances," entrenchment is "normatively attractive"); *id.* at 1680 (stating that such statutes demonstrate that an appeal always lies from traditional practices to higher norms).

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

39. ROBERT DALLEK, *FLAWED GIANT 79* (1998) (stating social reforms included the Civil Rights Act, Housing Act, Voting Rights Act, what is known today as Medicare and Medicaid, Equal Employment Opportunity Act and the Elementary and Secondary Education Act).

40. See Fred M. Hechinger, *Johnson Tells How Much and Where*, N.Y. TIMES, Feb. 11, 1968, at E9 (stating that both political parties' attempts to provide broad federal aid had been unsuccessful for forty years).

41. Erica R. Dines, *The Higher Education Act of 1965*, THE THIN TWEED LINE (Mar. 17, 2012, 5:19 PM), <http://www.humanstudy.org/students/2012-04-dines-e.html>.

42. See generally Posner & Vermeule, *supra* note 11, at 1671 ("Entrenchment smooths interactions among political actors within the government by enabling them to make commitments to each other.").

43. Hechinger, *supra* note 40 (highlighting failed attempts and subsequent compromises by Presidents Eisenhower and Kennedy in providing broad financial aid). Both Eisenhower and Kennedy had to settle for the National Defense Education Act (1958) and the National Education Facilities Act (1963), respectively. Susan B. Hannah, Midwest Political Sci. Ass'n Annual Meeting Presentation: Finding the Balance: A Political Analysis of the 2008 Reauthorization of the Higher Education Act 4 (Apr. 1, 2010), available at http://opus.ipfw.edu/polsci_facpres/57.

exigencies, political maneuvering, or a combination thereof, to memorialize certain practices or traditions that exist in society and that citizens desire to protect.⁴⁴ Tradition can thus create a presumption that such practices granted by the statute be entrenched.⁴⁵ The HEA, thus, emerged from a societal expectation regarding access to higher education, but also responded to a long history of attempts to provide broadened higher education access while balancing equality with redistribution concerns.⁴⁶

After the Revolutionary War, the Northwest Territories Act of 1787 granted land to new states on the condition that the states establish “institutions of higher education.”⁴⁷ These institutions would provide an education geared toward the practical interests of the time—agriculture and mechanics.⁴⁸ However, these land grant institutions did not provide access to all people in that they did not address the specific education needs of all colonial settlers and inhabitants.⁴⁹ Occurring 75 and 103 years after the Northwest Territories Act respectively, the Morrill Acts of the mid- and late 1800s were an answer to the concerns regarding widespread access. As such, with the first Morrill Act of 1862,⁵⁰ the federal government continued using land grants to expand the reach of higher education to farmers.⁵¹ The second Morrill Act of 1890⁵² recognized that while the land grants and Morrill Act of 1862 sought to expand access to higher education, African Americans (those previously free and newly emancipated after the Civil War) were still not beneficiaries to this increased access provided by land grant institutions.⁵³ Under this second act, states had to demonstrate that existing colleges did not use race or color in determining admission.⁵⁴ If they could not, they had to designate a separate land grant college for African Americans.⁵⁵

44. For a discussion of reasons for entrenchment, see Posner & Vermeule, *supra* note 11, at 1670-73.

45. *See id.*

46. Hannah, *supra* note 43, at 4 (noting that “old debates about redistribution from state to church, public to private, rich to poor stalled Congressional action” regarding higher education and broad financial aid); ESKRIDGE & FERRELL, *supra* note 10, at 173 (in promulgating the Social Security Act, Roosevelt positioned it as an insurance program instead of a handout program, where payments out of the program were based on what individuals put into the program).

47. Scott Key, *Economics as Education: The Establishment of American Land Grant Universities*, 67 J. HIGHER EDUC. 196, 197 (1996); CERVANTES ET AL., *supra* note 8, at 5.

48. Key, *supra* note 47, at 197; CERVANTES ET AL., *supra* note 8, at 5 (stating that these schools did not offer practical training in agriculture for the many potential students who intended to return home to farm and desired an education that would address these particular education needs).

49. *See* Key, *supra* note 47, at 197.

50. Act of July 2, 1862, ch. 130, 12 Stat. 503 (current version at 7 U.S.C. § 310 (2012)).

51. CERVANTES ET AL., *supra* note 8, at 6. *Cf.* Key, *supra* note 47, at 198, 211 (noting that while some historians claim the Morrill Acts was an education reform tool, others believe that the focus was more economical than educational citing the representative Justin Morrill’s emphasis on the benefits that agriculture would bring to the land, the society and commerce).

52. Act of August 30, 1890, ch. 841, 26 Stat. 417 (current version at 7 U.S.C. § 322 (2012)).

53. CERVANTES ET AL., *supra* note 8, at 6.

54. ASS’N OF PUB. AND LAND-GRANT UNIVS., THE LAND-GRANT TRADITION 4 (2012), available at <http://www.aplu.org/document.doc?id=780>.

55. *Id.*

Thus, the second Morrill Act operated “to primarily fund ‘separate but equal’ land grant institutions for African-Americans.”⁵⁶

This legislative activity, in the early stages of this country’s development, indicates several things: first, that higher education was desirable amongst citizens and viewed as an opportunity for economic and class advancement; second, that an educated citizenry would ultimately lead to a better and stronger country overall; and third, that government support or sponsorship of education was the best way to ensure that all citizens would have these educational opportunities. In fact, at its inception, higher education was meant to provide meaningful education to a wider swath than what would be able to accomplish it without government intervention.⁵⁷ Even though institutions of higher learning in America, such as Harvard, Yale, and William and Mary predated the Revolutionary War, these schools were reserved for a certain segment of the population and, thus, were not welcoming to all who desired higher education.⁵⁸ Just as is currently the case, socio-economic and racial factors were impediments to higher education.⁵⁹ With broadened access as the goal, programs and initiatives were devised to close the gaps created by those factors.

Following the educational legislative acts of the nineteenth century were early twentieth century statutory enactments, such as the Smith-Hughes Act,⁶⁰ which provided federal student aid for vocational training.⁶¹ Not only was there recognition that institutions of higher learning were necessary to give citizens the opportunity to earn a living, but also that making higher education attainable through government funding (accomplished through land grants early on) was in many ways the necessary conduit by which higher education attainment on a widespread basis would occur.⁶²

The Great Depression of the 1930s and the economic devastation it wrought would put the necessity of far-reaching education opportunities beyond high school into sharp focus. During the 1930s, when the Horatio Alger self-made bootstrap pulling rhetoric found little application, the government recognized that

56. CERVANTES ET AL., *supra* note 8, at 6. The United States Supreme Court in *Sweatt v. Painter*, 339 U.S. 629, 635-36 (1950), and *McLaurin v. Oklahoma State Regents for Higher Education*, 339 U.S. 637, 642 (1950), would declare separate but equal higher education schemes in Texas and Oklahoma, respectively, unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. Later, the Supreme Court, in *Brown v. Board of Education*, 347 U.S. 483 (1954), would declare separate public educational facilities as “inherently unequal.” These cases paved the way for many African Americans to gain admission to post-secondary schools where they were previously denied. For a discussion of the desegregation Supreme Court cases of the 1950s, see JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974*, at 386-89 (1996).

57. Key, *supra* note 47, at 198.

58. CERVANTES ET AL., *supra* note 8, at 5-6.

59. *See id.*

60. Smith-Hughes Vocational Education Act, 39 Stat. 929 (1917). *See also* Emily Badger, *Despite Bad Marks, For-Profit Colleges Still Passing*, PAC. STANDARD (Dec. 2, 2011, 1:58 PM), <http://www.psmag.com/education/despite-bad-marks-for-profit-colleges-still-passing-38103/>.

61. Smith-Hughes Vocational Education Act, 39 Stat. at 929.

62. *See generally* Key, *supra* note 47, at 198.

if the country were to regain its footing, the public would need assistance.⁶³ Although opponents thought otherwise, these welfare reforms were not designed as merely handout or subsistence programs.⁶⁴ The long bread lines, astronomical unemployment rates, increasing number of homeless people, and other visible signs, highlighted existing societal problems requiring government attention.⁶⁵ The programs and statutes seeking to ameliorate these ills in their design were not just an opportunity for politicians to gain popularity in addressing the ills, but also recognition that the mechanisms which enable citizens to work and flourish over time could break down and remain in that broken down state without government intervention. The devastation of the economic depression proved that certain things must be provided to the population, and the provision of those things cannot be left to the calm or turbulence of the market.⁶⁶ As with most economic cataclysms, the Great Depression and the economic hardship it wrought seemed to bring to the forefront the dearth of opportunities for citizens to simply subsist during difficult times and to improve their position during stable times. While that era was marked with welfare policies set to reverse and protect from the ravages of poverty, it also seemed to cement the idea that citizens and, through them, the country would need long-term government subsidy programs in place to address the needs of those who could not pull themselves up by their bootstraps or had no bootstraps from which to pull.⁶⁷ The claim to such assistance, through government programs, has entrenched within society's expectations.

By the 1940s and through the 1950s, the federal government instituted new programs in higher education access programming. These programs did not involve land grants but saw the government directly funding students' higher education needs.⁶⁸ The switch made federal financial aid portable, at least for certain types of higher education and, thus, certain students were eligible to

63. See John Hardman, *The Great Depression and The New Deal*, STANFORD UNIV., http://www.stanford.edu/class/e297c/poverty_prejudice/soc_sec/hgreat.htm (last updated July, 26, 1999).

64. See ESKRIDGE & FERREJOHN, *supra* note 10, at 173 (describing the social security program as something beyond "welfare to the dole").

65. See *id.* at 179. For a discussion of the conditions that Americans faced during the Great Depression, see Hardman, *supra* note 63.

66. ST. JOHN, *supra* note 25, at 77 (stating that market forces are touted as an equalizing force in providing higher education access, but access, particularly when it can have the effect of racial equalization, cannot be left exclusively to market forces). See also Osamudia R. James, *Predatory Ed: The Conflict Between the Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45, 68 n.141 (2011) (explaining that "[m]arket failure" means a failure of market mechanisms to correct for flaws like ... unequally distributed power, thus diminishing or eliminating the likelihood that the market will produce optimal outcomes for all ..."). For a discussion regarding the impact on society when market values are introduced, see generally MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* (2012).

67. Jay Wesley Richards, *The Economy Hits Home: Poverty*, THE HERITAGE FOUND., <http://www.heritage.org/research/reports/2010/06/the-economy-hits-home-poverty> (last visited Mar. 30, 2014).

68. ST. JOHN, *supra* note 25, at 77.

receive it.⁶⁹ But, these programs did not always create the widespread access. For instance, while the Servicemen's Readjustment Act⁷⁰ (known as the GI Bill) provided service men and women with the opportunity to further their education and the National Defense Education Act⁷¹ provided low-interest loans and debt cancellation for students, there were still access problems for certain groups—namely African Americans due to universities' discriminatory admission policies.⁷² In addition, many African Americans were underprepared for college due to poor performing primary and secondary schools.⁷³

During the 1950s, the country found itself in an era of economic prosperity, but the reach of that prosperity was limited.⁷⁴ By the 1960s, the materialism of the '50s had waned and the public wanted to return to achieving greater equality and social justice for all.⁷⁵ Former statutory reforms included new programs that would remove impediments in gaining admission to existing institutions and creating and maintaining the financial means by which students could afford higher education once they gained admission. However, disparities remained, indicating clearly that the tradition of government sponsored access to higher education in America was not adequately working to fulfill its mission. Too many segments of the population were falling through the cracks of these statutory reforms. Segregated elementary and secondary schools often operated with fewer funds and thus led to inadequate resources.⁷⁶ Many of these students were either not prepared for post-secondary work or were guided to a post-secondary track that was deemed suitable for them because it emphasized trade and skill training over a liberal arts education.⁷⁷ The separate but equal approach to higher education was not working. Schools were separate. Education was separate. But, they were rarely equal.⁷⁸ The result was that too many citizens, mostly those from disadvantaged backgrounds, were not gaining access to post-secondary education and were thus permanently foreclosed from jobs and careers that would assist in lifting them out of poverty. The legislation of the past, aimed at ameliorating practices that would restrict educational attainment and provide programs that would ensure, it seemed to be reserved for some and not directed

69. CERVANTES ET AL., *supra* note 8, at 10-11. A hallmark of these programs was that they sought to use the market to expand access by making funds portable. In that way, students could attract colleges with their financial aid dollars. Julie Margetta Morgan, *Consumer-Driven Reform of Higher Education: A Critical Look at New Amendments to the Higher Education Act*, 17 J.L. & POL'Y 531, 540 (2009). However, there were still access problems for diverse students, even with this portability.

70. Servicemen's Readjustment Act of 1944, Pub. L. No. 346, ch. 268 (1944).

71. National Defense Education Act of 1958, Pub. L. No. 85-864 (1958).

72. CERVANTES ET AL., *supra* note 8, at 10-11.

73. *Id.*

74. *See* DALLEK, *supra* note 39, at 83.

75. *Id.*

76. *Education and Civil Rights*, HISTORY LEARNING SITE, http://www.historylearningsite.co.uk/civil_rights_education.htm (last visited Mar. 30, 2014).

77. *Id.*

78. *Id.*

to all citizens who sought post-secondary education.⁷⁹ This was not lost on the citizenry and there were ample critics and movements devoted to exposing and toppling the institutional divide of the time which created and reinforced poverty.⁸⁰ Civil rights leaders as well as groups dedicated to the reversal of the status quo social and economic isolation fought for the empowerment of minorities across many social spheres.⁸¹ It was out of this conduct and atmosphere that the HEA came to be. Posner and Vermeule point out that appeal always lies in “jettisoning normatively unappealing traditions” for “higher norms.”⁸² As a whole, the activist legislation of the 1960s, including the HEA, would take significant steps in addressing these unappealing traditions of inequality in education and would stand as the preeminent type of higher education reform.

B. Claiming the Traditions: “Swinging Open the Most Important Door”

If it can be said that the previous higher education statutory enactments created fissures in the quest for broader post-secondary education access, then some would argue that the HEA, in President Johnson’s own words, swung open the “door to education”—“the most important door that [would] ever open.”⁸³ “By the 1960s, there was a general sentiment that college should become a birthright for Americans, much as high school had become a birthright in the 1920s.”⁸⁴ To create this “birthright” of access to higher education, there would have to be a massive revamping of the higher education system including a provision of funds to accomplish the revamping.⁸⁵ Johnson recognized the crises the country faced at the Act’s inception. Issues with race relations, poverty, and the growing chasm between those who would have access to post-secondary education and those who would not because of those societal issues proliferated.⁸⁶

79. See generally Hannah, *supra* note 43 (providing a description of earlier higher education access legislation that preceded the HEA).

80. DALLEK, *supra* note 39, at 222 (recalling the study and approval that went into crafting Johnson’s 1965 remarks at Howard University regarding the systemic oppression of blacks and the necessity of programs aimed at not just opening gates but providing the means to walk through them).

81. *Id.*

82. Posner & Vermeule, *supra* note 11, at 1679-80 (explaining legislative initiatives that have achieved this counter-traditional institutional arrangements also include Reconstruction, New Deal, and Great Society era legislation).

83. President Lyndon B. Johnson, Remarks at Southwest Texas State College upon signing the Higher Education Act of 1965 (Nov. 8, 1965), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=27356&st=johnson&st1=higher+education#axzz1wmJ4GCOU>.

84. CERVANTES ET AL., *supra* note 8, at 18.

85. President Lyndon B. Johnson, Annual Message to the Congress on the State of the Union (Jan. 8, 1964), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=26787>. See also Barbara Jordan, Remarks, Susan B. Anthony Annual Banquet, 5 TEX. J. WOMEN & L. 245, 246 (1996).

86. DALLEK, *supra* note 39, at 60.

Johnson's efforts were not only an answer to the poverty epidemic amongst the county's underprivileged citizens, but also an answer to an increasingly vocal populace concerned with matters of inequality.⁸⁷ This populace would expect and demand a federal government that would acknowledge hidden and obvious systemic inequality and rethink the government's traditional method of intervention in these matters.⁸⁸ The populace wanted the government to respond to the crisis, but not to take a crisis approach in responding as had been done with legislative acts in the past. Johnson's approach then, with regard to higher education, would have to be more than just advancing a parochial legislative act. He would have to put forth an entrenching and enduring guide for providing post-secondary access that would lift the population out of poverty and keep them uplifted out of poverty.⁸⁹ Certainly, the crisis in poverty and race relations set the scene for Johnson to claim credit (which he did) for spearheading legislation that would assist in ameliorating those ills.⁹⁰ But, the legislation that occurred was the result of the populace drawing intense attention to those ills—including the lack of financial resources for certain students to attend college and the unrealized promise of *Brown* seen through the continued systemic inequality in the schools preparing students for college. Through protests, court cases, demonstrations, and various activist strategies,⁹¹ the citizens would set the stage for entrenching access to higher education amongst those "rights" not codified in the Constitution and beyond the reach of market forces.

The HEA stated simply, in its preamble, that it exists to "strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education."⁹² Although, it did not boast lofty purpose in its preamble words,⁹³ the contents of the Act itself would contain eight titles,⁹⁴ including Title IV—Student Assistance—which

87. For a discussion of the rights' advocacy that occurred in the 1960s, see PATTERSON, *supra* note 56, at 637-77.

88. *See id.* at 641.

89. *See* ESKRIDGE & FEREJOHN, *supra* note 10, at 173 (describing Roosevelt's goal of instituting social security as a program that would "endure for decades" and enter the "fabric of people's lives").

90. *Id.* at 221.

91. For a discussion of the rights' advocacy that occurred in the 1960s, see PATTERSON, *supra* note 56, at 637-77.

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

93. *See* ESKRIDGE & FEREJOHN, *supra* note 10, at 171 (providing a description of similar purpose regarding the Social Security Act of 1935).

94. The Act contained seven titles: Title I-Community Service and Continuing Education Programs (to assist "in the solution of community problems such as housing, poverty, government, recreation, employment, [etc.]"); Title II-College Library Assistance and Library Training and Research (authorized basic grants for college library books, special grants for colleges with special needs, librarian training and a small amount for the cataloguing service of the Library of Congress); Title III-Strengthening Developing Institutions (to assist colleges which have the desire to contribute to substantially to higher education, but who lack the resources to do so); Title IV-Student Assistance ("to provide, through institutions of higher education, educational opportunity grants to assist in making available the benefits of higher education to qualified high school graduates of exceptional financial need, who" would be unable to attend college otherwise);

would be a critical piece to the Act in terms of it fulfilling its mission of widespread access.⁹⁵

Johnson saw education as more than just decreasing poverty; he also saw it as a benefit to the country by ensuring a steady source of talented and educated human resources needed for economic prosperity.⁹⁶ Thus, to Johnson, lack of access to higher education not only reflected a loss for the students, but also a loss of human capital for the country.⁹⁷ This is an important acknowledgement in the context of entrenched legislation in super statute form. Johnson's purview seems to have *grown up* many of the attempts to ameliorate these issues in the past. Even though the country could certainly be described as being in crisis, Johnson seems to have moved from an approach that would just fix or band aid the latest civic crisis.⁹⁸ The HEA seemed like an education reform approach that would instead recognize that such crises are often symptoms of underlying and systemic societal ills that require continued redress over time. It can be said that the HEA, then, at its inception was expected to, if not devised to be, that legislation that would again and again reinforce the power of education to set the country on the path to addressing systemic inequities amongst its citizens.

The Act would encapsulate earlier higher education enactments thereby setting the stage for the entrenchment of a new normal through statutory codification. The Act expanded existing loan programs such as the National Defense Student Loan Program (known today as the Perkins Loan) which was originally part of the National Defense Education Act of 1958.⁹⁹ It also made low interest loans available to all students, regardless of credit history, as long as they met the need criteria.¹⁰⁰ Students would continue to earn money towards education expenses through work study programs already in existence.¹⁰¹ Recognizing financial assistance as only one piece of the puzzle, the HEA also authorized federal partnerships with state and local education agencies to continue and add to programs, such as the TRIO programs, to prepare disadvantaged youth for and encourage them to attend college.¹⁰²

Title V-Teacher Programs (to improve the quality of teacher education mainly through fellowships for graduate study); Title VI-Financial Assistance for the Improvement of Undergraduate Instruction ("to improve the quality of classroom instruction in selected subject areas [mainly technology] in institutions of higher education"); Title VII-Amendments to the Higher Education Facilities of 1963 (provided funding for the construction of educational facilities, under urgent circumstances); and Title VIII-General Provisions. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1219, 1224, 1229, 1232, 1254, 1261, 1266, 1269 (1965). See also CERVANTES ET AL., *supra* note 8, at 20 (explaining that under Title III, aid was distributed mainly to African American institutions in the south and also established faculty and student exchange programs between developing and more established schools to promote learning among educators).

95. CERVANTES ET AL., *supra* note 8, at 18, 20.

96. *Id.* at 17.

97. *Id.*

98. Fred M. Hechinger, *88th Congress*, N.Y. TIMES, Oct. 11, 1964, at E11 [hereinafter Hechinger, *88th Congress*].

99. CERVANTES ET AL., *supra* note 8, at 27.

100. *Id.* at 24-26.

101. *Id.* at 26-27.

102. McElroy & Armesto, *supra* note 16, at 1216.

C. *Entrenching the Access: Keeping the Door Open and Making It Accessible Over Time*

According to Eskridge's and Ferejohn's super statute model, the presumption that traditional practices should be entrenched in a statute is rebuttable by normative debate.¹⁰³ This debate is the "process by which ... the polity evaluates and chooses among policy options, implements those choices, and then reconsiders them in light of experience."¹⁰⁴ The normative debate, then, which includes reasons for and against the enactment, is what eventually entrenches the statute by codifying the acknowledgement and maintenance of the desired right which served as the impetus for the statute's enactment in the first place.¹⁰⁵

With regard to the HEA, this debate began as the Act was contemplated and later materialized. Although Johnson took over the presidency in midterm after President John F. Kennedy's assassination, he saw his reform efforts more as a continuation or renewing of reforms instituted under President Roosevelt's New Deal policies.¹⁰⁶ But, Johnson faced obstacles in enacting these reforms, particularly in the higher education sector. Republicans favored tax credits to help families pay for tuition costs.¹⁰⁷ Democrats feared that such an approach would not aid poor families who were not financially able to make the tuition payments that would ultimately entitle them to the tax credits.¹⁰⁸ Democrats favored more institutional aid.¹⁰⁹

Three years after its enactment, the HEA was reauthorized for the first time in 1968.¹¹⁰ The HEA had achieved, at least according to a cursory look at the numbers, its primary goal of broadened access. At the time, the *New York Times* reported that higher education had expanded from 2.6 million students enrolled in 1955 to 7 million in 1968.¹¹¹ Johnson faced increasing costs in realizing the goals of his reforms and much prodding from stakeholders regarding increased aid for higher education.¹¹² University presidents lobbied Congress for an increase in aid citing increased expenditures due to increased enrollments.¹¹³ They argued that without new funding sources, there would be serious deterioration to higher education.¹¹⁴

103. Eskridge & Ferejohn, *supra* note 28, at 1270-71.

104. ESKRIDGE & FEREJOHN, *supra* note 10, at 27.

105. *See id.*

106. PATTERSON, *supra* note 56, at 534.

107. *See* Fred M. Hechinger, *For Equality of Opportunity*, N.Y. TIMES, Dec. 15, 1968, at E9.

108. *See id.*

109. *See* ST. JOHN, *supra* note 66, at 77.

110. CERVANTES ET AL., *supra* note 8, at 31.

111. Fred M. Hechinger, *Urgent Plea for More Federal Aid*, N.Y. TIMES, June 30, 1968, at E9.

112. *Id.*

113. Fred M. Hechinger, *University Heads Unite in Appeal for More U.S. Aid*, N.Y. TIMES, June 24, 1968, at 1, 41.

114. *Id.*

The policy influencing the continuation and escalation of the Vietnam War set a difficult backdrop for welfare reform.¹¹⁵ The cost of the war and the sweeping financial promises of the HEA proved incompatible.¹¹⁶ Even so, Johnson would not abandon the reforms.¹¹⁷ Johnson was committed to a long-term strategy of federal aid to higher education.¹¹⁸ But, he faced a Congress that sought to adjust these reforms in light of the economic crisis.¹¹⁹ This normative debate played out in the political wrangling associated with the HEA reauthorizations and is evident in their content.

The 1968 reauthorization expanded access by increasing the number of federally funded precollege encouragement programs.¹²⁰ Under this reauthorization, “the administration also took steps to increase private lending in the Guaranteed Student Loan program.”¹²¹

The 1972, 1976, and 1978 reauthorizations similarly expanded access but also continued to respond to the government’s growing financial aid cost. The 1972 reauthorization provided additional resources for grant aid for students thereby reducing the need for loans for the neediest students.¹²² The goal here was to make grant programs the core of the financial aid package so that the neediest students would be less dependent on loans in pursuing higher education.¹²³ The 1972 reauthorization marked an increase in federal spending toward “removing impediments” to higher education and, thus, showed the government’s commitment in that area.¹²⁴

During 1976 reauthorization, the trend in government spending toward broadened access continued.¹²⁵ There was some grant expansion under this reauthorization so that less needy students would also be eligible to receive it.¹²⁶

The 1978 reauthorization focused on the middle class. This reauthorization produced the Middle Income Student Assistance Act.¹²⁷ There was a perception

115. Hechinger, *88th Congress*, *supra* note 98, at E11.

116. Fred M. Hechinger, *A Nervous Year for Educators*, N.Y. TIMES, Jan. 12, 1968, at 49-50 (noting that unrealized higher education promises has “given currency to protest rather than plodding reform” and the dialogue associated with the 1965 enactment has been replaced by confrontation).

117. PATTERSON, *supra* note 106, at 639.

118. Fred M. Hechinger, *Johnson Tells How Much and Where*, N.Y. TIMES, Feb. 11, 1968, at E9.

119. For a discussion of the fiscal and political hurdles Johnson faced in continuing the reforms, see DALLEK, *supra* note 39, at 399-405. For a discussion of how politicians attempt to retrench welfare reform in times of economic crisis, see Pierson, *supra* note 6, at 144-45.

120. CERVANTES ET AL., *supra* note 8, at 24.

121. *Id.* at 31.

122. *Id.* at 33.

123. *See id.* at 34-35. There were some problems with these initiatives. Some grants were subject to appropriations and thus could possibly be underfunded in future years. *Id.* Also, maximum grant amounts were limited to half the cost of attendance which could lead a student to rely on loans. *Id.*

124. *See id.* at 35.

125. *Id.*

126. *Id.*

127. *Id.* at 36.

among the middle class that they were being “squeezed out” of federal financial aid programs.¹²⁸ A compromise was reached and President Jimmy Carter, who supported these access expanding financial programs, wanted to protect them, “even if it meant extending ... to the middle-income class.”¹²⁹ The result was an extension of the loan program to students who did not have low incomes and an even greater federal financial aid budget.¹³⁰

II. THE RETRENCHMENT OF THE HEA

[Education reform is] “hard and involves continual reformulation, it’s about planting a tree and letting it go without pulling it every six months to see how it’s coming along.”¹³¹

While the above quote seems to carry two contradictory sentiments, it actually captures the difficulty of adhering to a legislative act’s historical policy while simultaneously engaging in and responding to the normative debate that is required as new crises arise and societal expectations change. The later HEA reauthorizations would highlight the conflicting goals of widespread higher education access and fiscal thriftiness thereby reshaping the policy direction of the HEA from rights-claiming legislation to blame accountability legislation endemic of welfare reform retrenchment during economic crises.¹³²

A. *Shifting the Focus of Access: Reordering the Priorities from Widespread Higher Education Provision to Fiscal Accountability*

Throughout all of its reauthorizations, the HEA has maintained a program of creating access and has used the reauthorizations as opportunities to expand access, but the access focus shifted in the later years of the Act. President Reagan recognized that the federal government should play a role in helping needy students attend college, but felt that the cost of education should rest primarily with the family.¹³³ The reauthorizations occurring during his presidency were clear reminders of that fiscal policy. Additionally, the sluggish pace of the reauthorizations signaled an overall focus shift with regard to congressional cohesiveness and compromise regarding government higher education access policy.¹³⁴ While reauthorizations should occur within six years,¹³⁵ the rate of reauthorization in the early days of the Act’s existence

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 32 (quoting Harold Howe, U.S. Commissioner of Education during the Johnson Administration, on implementing education policy, June 12, 1968).

132. See Pierson, *supra* note 6, at 144-45.

133. CERVANTES ET AL., *supra* note 8, at 38.

134. See Posner & Vermeule, *supra* note 11, at 1671.

135. Anna Gould, *Reauthorizing the Higher Education Act: A Chat with Terry Hartle*, EDUCAUSE REV., May/June 2009, at 60, 61, <http://www.educause.edu/EDUCAUSE+Review/EDUCAUSEReviewMagazineVolume44/ReauthorizingtheHigherEducatio/171783>.

suggests a proactive approach on the part of lawmakers in upholding the Act's underlying policy. Lawmakers seemed able to reach consensus through compromise on how the Act would operate in fulfilling its mission of broadened access. The later reauthorizations, beginning in 1980 and occurring just at the six-year mark in 1986, 1992 and 1998, signaled a different approach and suggest that members of Congress, at that time, were beginning to drift apart in their ideology regarding widespread higher education access.

While the 1980 and 1986 reauthorizations "furthered the expansionist trend"¹³⁶ of federal student aid programs that had been the case in the early days of the Act's reauthorizations, they took a different approach to access in doing so. Congress instituted a needs test for all borrowers—completely reversing the 1976 reauthorization.¹³⁷ The compromise for this restriction in borrowing was to increase borrowing limitations.¹³⁸ Students at all academic levels could now borrow more money as a result of increasing annual loan limits and aggregate borrowing caps.¹³⁹ This compromise may have preserved the policy regarding higher education access by ensuring that students had the ability to reach funds for college, but the policy behind who would bear the ultimate cost for the access shifted as the government sought to reduce its financial stake. Previously, the federal government assumed that role and in fact earlier lawmakers considered this the only way to ensure students would have access to higher education.¹⁴⁰ By increasing loan amounts and thus borrowing among students and parents, the Act solidly shifted that burden from the federal government and back on to students and their families.¹⁴¹ Federal financial aid was being transformed from a need-based grant system to one dominated by student and parent loans.¹⁴²

In 1992, the Act was once again reauthorized. Seeing the full impact of the earlier reauthorizations and the resultant increase in student borrowing, the federal government was still faced with budgetary concerns regarding the financial aid program.¹⁴³ Grants were not keeping pace with the cost of college education thereby making students increasingly dependent on loans.¹⁴⁴ The pressure to rein in spending in this area, as more students defaulted on student loans, was great.¹⁴⁵ Addressing these concerns would be difficult during these times. For instance, politicians, wanted to be seen as supportive of higher education reform, but also favored cuts to federal spending.¹⁴⁶ Thus, budget considerations were a significant part of the negotiations leading up to the 1992

136. CERVANTES ET AL., *supra* note 8, at 37.

137. *Id.* at 38.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. See NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., LOSING GROUND: A NATIONAL STATUS REPORT ON THE AFFORDABILITY OF AMERICAN HIGHER EDUCATION 4 (2002), http://www.highereducation.org/reports/losing_ground/ar2.shtml [hereinafter LOSING GROUND].

143. See CERVANTES ET AL., *supra* note 8, at 39.

144. *Id.*; LOSING GROUND, *supra* note 142, at 5.

145. See CERVANTES ET AL., *supra* note 8, at 39.

146. *Id.*

reauthorization.¹⁴⁷ The shift towards a loan based system of financial aid continued to take hold as a perpetually fully funded grant program and full scale direct lending were abandoned.¹⁴⁸ This loss of a financial aid entitlement aspect signaled more than a shift towards a loan based system. Beyond that, it signaled a political shift away from consensus on higher education and towards an obfuscation of issues that would pave the way for education legislation aimed more at blaming and accountability as opposed to increased higher education access.

After the 1992 reauthorization, lawmakers considered, once again, providing education tax credits. These tax credits were historically a Republican-backed initiative,¹⁴⁹ but this time, “Democratic President Bill Clinton proposed an education tax credit that would allow first- and second-year students to subtract a portion of their education costs from their tax bills.”¹⁵⁰ President Clinton’s proposal met with opposition from all sides. Not surprisingly, his party did not support the bill as Democrats were historically against education tax credits.¹⁵¹ Republicans thought the program too costly and college leaders believed the program would offer no incentive to attend college since those who it would benefit (the middle class) would attend college anyway.¹⁵² After considerable negotiation and compromise, President Clinton was able to offer his tax credit program, which became known as the Taxpayer’s Relief Act of 1997.¹⁵³ This Act “represent[ed] one of the largest single offers of federal aid to higher education ... estimated at \$40 billion over five years.”¹⁵⁴ In keeping with the HEA policy, this initiative was touted as a necessary step in making higher education more affordable and thus more accessible.¹⁵⁵ However, low-income students, who in many instances did not pay enough taxes or pay any taxes at all, would not benefit from the program.¹⁵⁶ These types of programs were endemic of the later reauthorizations. While they operated to provide increased access through financial aid programs, the design of the programs did not facilitate

147. *Id.*

148. *Id.* The Pell grant program would receive increased authorization maximums, but without the entitlement aspect as part of it, the Pell grant was susceptible to being underfunded in a given year and thus could not be relied upon to assist the neediest students as it had done in the past. *Id.* In addition, under this reauthorization, the unsubsidized student loan was born. *Id.* Middle-income students who did not meet the need requirements for subsidized loans were now eligible for the unsubsidized loans. *Id.* These loans operated in the same way as the subsidized loans except that students did not have the benefit of the in school interest subsidies. *Id.*

149. Hechinger, *88th Congress*, *supra* note 98.

150. CERVANTES ET AL., *supra* note 8, at 41.

151. *Id.*

152. *Id.*

153. *Id.* The Tax Payer Relief Act included the Hope Scholarship, which provided a tax credit for 100% of the first \$1000 of tuition and fees and 50% for the second \$1000. *Id.* It also provided tax benefits for the second year of college under a Lifetime Learning Tax Credit. *Id.* As a concession to Republicans, the Act also included tax deductions for interest paid on student loans during the first sixty months of repayment. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

access among those students most susceptible to being denied it. The later initiatives were thus not in the spirit of the 1965 HEA or its later reauthorizations, which sought to equalize educational opportunities by reaching down and pulling up, with a financial hand, those who would not otherwise be able to afford a college education.¹⁵⁷ These initiatives, while receiving bargained-for bipartisan support, still seemed politically driven as they often benefited one group of potential students and not those most in need of assistance.¹⁵⁸

In 1998, the Act was reauthorized again.¹⁵⁹ The federal government's "adherence to fiscal discipline" meant that there would be no new initiatives or ground-breaking reforms under the HEA during this reauthorization.¹⁶⁰ The amendments under this reauthorization made hundreds of relatively minor changes to aid programs already in place.¹⁶¹ The reauthorization did greatly increase the maximum Pell Grant, but actual funding for that program would not reach those maximums.¹⁶² In addition, this authorization reduced interest rates on student loans and allowed borrowers to lock in interest rates on consolidated loans.¹⁶³

In the earlier days of the Acts existence, there seemed to be an urgency of purpose behind the Act—to provide opportunities now for those who had been previously denied opportunities and who would be willing to take advantage of them. This was born out not just in the legislative innovations of the time, but also in the approach taken with regard to maintaining the Act so that it remained fit for its purpose. For instance, the 1965 HEA was reauthorized in 1968 to strengthen the program by providing high school students with the opportunity to be successful in post-secondary institutions through TRIO programs.¹⁶⁴ The lawmakers did not wait the statutorily proscribed six years for reauthorization, but acted with the urgency the matter called for. Lawmakers again took up the Act in 1972 when it learned that income level was still a primary factor in decisions to enter college and addressed that impediment to access by expanding grant aid to students so that the most needy could depend on grant money and less on student loans.¹⁶⁵ The 1976 and 1978 reauthorizations expanded financial aid to less needy students, but that was described as a necessary compromise to protect access for the neediest students.¹⁶⁶ After the 1980s and '90s, access remained the key phrase in the higher education sector, but sluggish attention to the Act (reauthorizations occurred at the six-year mark for extension after the

157. *Id.*

158. *Id.* The Tax Payer Relief Act mainly benefitted middle- and upper-income families and not needy students. *Id.*

159. *Id.* at 42.

160. *Id.* at 41.

161. *Id.*

162. *Id.* at 41-42.

163. *Id.* at 42.

164. *Id.* at 32.

165. *Id.* at 34.

166. *Id.* at 35-36.

1980 reauthorization) and the increased focus on protecting funds took the focus off creating new pathways to access.

*B. Retrenching the Historical Access Policy Behind the Act: Blame
Accountability and Protectionist Policies Under the HEA*

Although slated to take place in 2003,¹⁶⁷ the next reauthorization of the HEA did not take place until 2008.¹⁶⁸ After an unprecedented 14 extensions and over four years of delay, President George W. Bush signed into law the Higher Education Opportunity Act (“HEOA”) of 2008.¹⁶⁹ As expected, the HEOA, in its reauthorization of the HEA, focused mainly on the rising cost of postsecondary education.¹⁷⁰ The HEOA required that college affordability and transparency lists be published by the Department of Education (“DOE”).¹⁷¹ These lists would include the top 5% of institutions with the highest tuition and fees, the largest increase in tuition and fees, the highest net price, and the largest percentage of increase in net price.¹⁷² Institutions with such increases would be required to provide the DOE with reasons for the increase and indicate steps taken to reduce costs.¹⁷³

The HEOA also required that the DOE publish annual state by state information concerning trends in higher education spending and tuition fees and financial aid at state institutions.¹⁷⁴ In addition, the act required that schools receiving Title IV financial aid funds publish consumer information such as statistics on applications, admission, enrollment, standardized test scores, racial and ethnic groups, degrees awarded, degree completion time, faculty, cost of attendance, and many other categories.¹⁷⁵

This act also established due process procedures for institutions adversely affected by accreditors.¹⁷⁶ It addressed accreditors’ respect for institutions’

167. *Id.* at 42. Although the next reauthorization after 1998 was set for 2004, there would be no reauthorization of the HEA for the next 10 years. The country experienced catastrophic events in the years between the 1998 and 2008 reauthorizations. The 9/11 attacks as well as the devastation along the Gulf due to Hurricane Katrina took the focus from the education bills that circulated over the years. *Id.* In addition, spending on programs involving these events also cast a pall on education spending and kept the need for disciplined federal spending at the forefront of higher education reform. *Id.*

168. AM. COUNCIL ON EDUC., ACE ANALYSIS OF HIGHER EDUCATION ACT REAUTHORIZATION 1 (2008), <http://cra20.humansci.msstate.edu/ACE%20Analysis%20of%20Higher%20Education%20Act%20Reauthorization%20-%20Campus%20Safety,%20Timely%20Warning,%20and%20Fire%20Safety%20Issues.pdf> [hereinafter ACE ANALYSIS OF HEAR].

169. Martha Derthick & Joshua M. Dunn, *False Premises: The Accountability Fetish in Education*, 32 HARV. J.L. & PUB. POL’Y 1015, 1024 (2009); CERVANTES ET AL., *supra* note 8, at 42.

170. ACE ANALYSIS OF HEAR, *supra* note 168, at 1.

171. *Id.*

172. *Id.*

173. *Id.* at 2.

174. *Id.* at 1.

175. *Id.* at 2. In all, the HEOA required that the DOE post on the College Navigator website for each of these institutions 27 categories of information. *Id.*

176. *Id.*

mission and their transparency and symmetry regarding their standards, procedures and policies in evaluating distance education.¹⁷⁷ The act required accreditors that verify that a student registered for the distance course was also the same student who completed and received credit for the course.¹⁷⁸

The act also restructured the National Committee on Institutional Quality and Integrity, which advises the DOE.¹⁷⁹ Under the HEOA, the number of committee members increased and the members would be appointed by the DOE Secretary and members of Congress from both parties.¹⁸⁰ Lastly, under accreditation, the HEOA defined diploma mills for the first time and directed the DOE to maintain information and resources to assist students, families, and employers in identifying and avoiding them.¹⁸¹

The HEOA contained a number of provisions which addressed student financial aid. The act increased the authorized maximum amounts under the Pell Grant Program and allowed students to receive the grant year-round to reduce the time it takes to complete degree programs.¹⁸² The act also contained a number of provisions to assist veterans and their families with post-secondary education.¹⁸³ The act allowed for parent loan deferment, called for an easier financial aid application process, permitted dual enrollment in both college and secondary schools, and granted flexibility in considering Title IV eligibility for students with cognitive disabilities in terms of receiving grant and work-study funds.¹⁸⁴

The act also required that all institutions participating in Title IV programs publish prominently on their websites a code of conduct covering a wide range of proscribed items with respect to student aid.¹⁸⁵ This portion of the Act required disclosures regarding direct loans, the Federal Family Education Loan Program, and guaranty agencies.¹⁸⁶ The HEOA also expanded and revised existing programs for teacher professional development under Title II of the HEA.¹⁸⁷ These programs required institutions receiving Title IV financial aid funds and operating teacher preparation programs to create quantifiable goals for increasing

177. *Id.*

178. *Id.* at 3. This provision is representative of the many provisions under the HEOA, which required many reporting and policing activities but provided little guidance beyond delegation to the DOE as to how this information would be collected and how certain activities would be policed.

179. *Id.*

180. *Id.* In the past, the DOE Secretary appointed all members. *Id.*

181. *Id.* On some levels, the accreditation provisions seemed to recognize the importance of allowing institutions enough autonomy to develop programs to meet particular students' needs. However, the inclusion of these provisions show a battle between those lawmakers who support and oppose for-profit post-secondary institutions—the institutions most accused of committing the acts the provisions sought to protect against.

182. *Id.* at 3-4.

183. *Id.* at 4.

184. *Id.*

185. *Id.* at 6. Proscribed conduct included gifts from private lenders in connection with their loan activities, revenue sharing and co-branding of loans. *Id.* at 7.

186. *Id.* at 7.

187. *Id.* at 8.

the number of “high need” teachers and to report passing rates for state licensing and certification for graduates from those programs.¹⁸⁸

The act also included provisions regarding international education, authorized studies on topics such as diversity, endowments, federal regulation of higher education and its impact on the cost of higher education, private education loan criteria, and student aid recipient information.¹⁸⁹ The HEOA reauthorized the HEA for six years through September 30, 2014.¹⁹⁰

Although sweeping and seemingly promulgated to protect students and tax payers, the 2008 reauthorization did not restore the proper focus to access. It fell short of addressing those concerns fully in the context of implementing and maintaining programs toward access to higher education. Critics of the reauthorization point out just that. Sarah A. Flanagan, an executive at the National Association of Independent Colleges and Universities, argues that the HEA reauthorizations historically have focused more on access to college and not on Congress’ ideas as to how colleges should be better run.¹⁹¹ This is not surprising considering the lag time between this and the last reauthorization.¹⁹² The inability of congressional members to reach consensus and the resultant blame accountability legislation are endemic of economic downturns. These situations mark the exact point at which statutes become retrenched. Politicians shift from credit claiming to blaming and in the process reduce rights that citizens advocated for. Citizens allow this because politicians have in essence obfuscated the issue.¹⁹³ Politicians understand that the public (which advocated for the right in the first place) would not allow them to completely abrogate the right. They thus devise an alternative basis upon which to reduce or limit the right. That political discourse is designed to play upon the public’s fear of losing the right altogether due to increased spending. Politicians thus have the perfect climate in which to push blame accountability schemes with fund protection as the main focus because they have essentially convinced the public that fiscal thriftiness is more important than expanding the right created by the statute.¹⁹⁴

III. THE CHANGING HIGHER EDUCATION LANDSCAPE

[A]s our numbers increase and as our life expands with science and invention, we must discover more and more leaders for every walk of life. We can not hope to

188. *Id.* Among other things, this provision of the HEOA was meant to develop closer alignment with “the post-No Child Left Behind K-12 classroom.” *Id.*

189. *Id.* at 9.

190. Gould, *supra* note 135.

191. Doug Lederman, *HEA: A Huge, Exacting Accountability Bill*, INSIDE HIGHER ED (Aug. 8, 2008), <http://www.insidehighered.com/news/2008/08/01/hea>.

192. *See generally* ESKRIDGE & FEREJOHN, *supra* note 10, at 207-08 (describing the need for broad consensus when changing fundamental rights).

193. Pierson, *supra* note 6, at 147; Alexander Cuenca, Ph.D., Lecture at Saint Louis University during an “Education and Culture” course (Oct. 1, 2013) (on file with author).

194. *See, e.g.*, ESKRIDGE & FEREJOHN, *supra* note 10, at 197-205 (providing a discussion of how Social Security reformers attempted to limit the old age benefit while still maintaining political viability).

succeed in directing this increasingly complex civilization unless we can draw all the talent of leadership from the whole people.¹⁹⁵

“Postsecondary degrees and certificates have become critical even for workers in the lower and middle tiers of the labor market.”¹⁹⁶ Workers who seek to earn a living wage doing skilled labor and entry level jobs are increasingly required to hold post-secondary credentials to qualify for jobs.¹⁹⁷ The average earnings of 30 to 59 year olds who had completed high school decreased by 15.8% from 1979 to 1999.¹⁹⁸ However, earnings for those holding bachelor or graduate degrees increased by 9% and 30%, respectively, over the same time period.¹⁹⁹

In March of 2007, the U.S. Department of Labor, Employment Training Administration and the Office of Policy Development and Research published an occasional paper in which “barriers to success” of “adult learners in higher education” were discussed.²⁰⁰ The report characterized the workplace as one in which a premium is placed on an educated workforce due to “[t]he transformation of the world economy over the past several decades.”²⁰¹ Thus, workers are seeking training in increasing numbers as they attempt to better equip themselves to enter today’s workforce.²⁰² Many of these workers make up a niche market consisting of potential students who, because of age, geographic location, academic credentials, desired occupation, financial means, work and family obligations, etc. would not be typical candidates for traditional post-secondary institutions.²⁰³ The higher education sector has become bloated with for-profit institutions focused on serving that market.²⁰⁴ While there are good for-profit school actors, the vast majority of reports and studies and increasing investigations and law suits paint the sector differently. When considering the

195. President Herbert Hoover, Inaugural Address (Mar. 24, 1929), *available at* <http://www.hoover.archives.gov/info/inauguralspeech.html>.

196. ELAINE L. CHAO ET AL., U.S. DEP’T OF LABOR, ADULT LEARNERS IN HIGHER EDUCATION, BARRIERS TO SUCCESS AND STRATEGIES TO IMPROVE RESULTS 4 (Mar. 2007), *available at* http://wdr.doleta.gov/research/FullText_Documents/Adult%20Learners%20in%20Higher%20Education%20-%20Barriers%20to%20Success%20and%20Strategies%20to%20Improve%20Results.pdf.

197. Thompson et al., *supra* note 25, at 546.

198. *Id.*

199. *Id.* (citing Carnevale & Desrochers, *supra* note 27, at tbl.3).

200. CHAO ET AL., *supra* note 196, at 3.

201. *Id.*

202. Joe Nocera, *How to Improve On an [F]*, N.Y. TIMES MAG., Sept. 18, 2011, at MM64 (arguing that the very need for credentialed workers at all levels puts this country in desperate need of institutions which can train people and, therefore, American higher education “desperately” needs the for-profit sector to succeed). *But cf.* James, *supra* note 66, at 84-87 (arguing that such arguments ignore how the for-profit scheme further entrenches societal structures that produce poorly educated students).

203. S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 112TH CONG., 1 FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 2 (Comm. Print 2012) [hereinafter FOR PROFIT HIGHER EDUCATION].

204. *Id.* at 3.

mounting costs of federal financial aid over the years and the growth of this sector (which is eligible to receive those funds), Congress' and the DOE's stance on protecting federal financial aid funds is not surprising.

For-profit schools have existed in this country for decades and, in most cases, included start up institutions which offered training for local industries while traditional schools taught a classical curriculum.²⁰⁵ For instance, the 1917 Smith-Hughes Act provided federal student aid for vocational training, but limited the funds to schools under public supervision and control.²⁰⁶ This perhaps shows an early discomfort by the federal government in supporting any model that associated profit with education. However, after a successful lobby by the for-profit higher education industry,²⁰⁷ the 1972 HEA reauthorization allowed students attending for-profit schools access to Title IV financial aid funds.²⁰⁸ While there were many years in which for-profit schools existed prior to the HEA, allowing those schools to access financial aid funds shows that even in a period of activist legislation in creating and maintaining widespread access, there was still a recognition that money alone could not be the catapult by which citizens would overcome their hurdles to gaining post-secondary education.²⁰⁹ The emergence of for-profit schools thus illustrates that while Title IV funds pave the way for students to afford college, they still do not adequately address gaining admission to college and the needs of nontraditional students who tend not to fit within the traditional school model.²¹⁰

The proliferation of for-profit schools in the higher education sector has garnered the attention of various stakeholders from the President of the United States to members of Congress to civil rights advocates and taxpaying consumers. Several criticisms have gained prominence regarding for-profit schools. One, in particular, is that for-profit colleges use high pressure recruiting techniques to persuade an already vulnerable population to enroll in their schools.²¹¹ A Senate oversight committee released internal training documents from several for-profit colleges which detailed high pressure tactics focused on “‘pain’ and ‘fear’ to attract low-income students ... struggling with adverse personal and financial circumstances.”²¹²

205. Badger, *supra* note 60.

206. *Id.*; C.M. Arthur, *Vocational Education*, 13 CONG. DIG. 199, 199 (1934).

207. Badger, *supra* note 60.

208. James, *supra* note 66, at 49.

209. These students included those with poor academic credentials and working class adults needing flexible schedules to obtain skills for better paying jobs. Robin Wilson, *For-Profit Colleges Change Higher Education's Landscape*, CHRON. HIGHER EDUC. (Feb. 7, 2010), <http://chronicle.com/article/For-Profit-Colleges-Change/64012>. See also Walter Hamilton, *For-Profit Colleges Face a Difficult Test; Accused of Recruiting Students with False Promises, the Industry Is Fighting a Federal Crackdown that Could Force It to Retrench*, L.A. TIMES, Feb. 6, 2011, at B1, available at <http://articles.latimes.com/2011/feb/06/business/la-fi-for-profit-colleges-20110206>.

210. Wilson, *supra* note 209.

211. Hamilton, *supra* note 209.

212. See Chris Kirkham, *For-Profit College Recruiters Taught to Use 'Pain,' 'Fear,' Internal Documents Show*, HUFFPOST BUS. (updated May 25, 2011, 7:30 PM ET),

Another criticism is that students pay exorbitant tuition rates to attend these for-profit colleges and cannot find gainful employment in their chosen field once they graduate.²¹³ While this argument can easily emanate from students enrolled in traditional public and private colleges, the difference here is that these students are heavily recruited with numerous advertisements, promises of affordable tuition rates, and placements in dream jobs with salaries comparable to what they spent on the degree.²¹⁴ At some two-year for-profit colleges, tuition is more than double the tuition at a state school.²¹⁵ Thus, students are encouraged to take out loans to pay for school with the hope that these promises will materialize. When these promises do not materialize, students are faced with repaying loan debt without the high income they were promised. Reports indicate that a disproportionate number of graduates from for-profit colleges default on their student loans.²¹⁶ According to a statement made by Education Secretary Arne Duncan, the loan default rate for students graduating from a for-profit institution rose from 11% to 11.6% while public and private institutions' loan default rates rose from 5.9% to 6% and 3.7% to 4%, respectively.²¹⁷

These circumstances lead to federal financial aid funds abuse. For-profit schools have been repeatedly accused of falsifying documents, fraudulently qualifying students for admission and thus receipt of federal funds, and engaging in deceptive and questionable marketing practices.²¹⁸ Consumer complaints of

http://www.huffingtonpost.com/2011/02/08/for-profit-college-recruiters-documents_n_820337.html (detailing one for-profit school in use of a "Pain Funnel and Pain Puzzle" used to convince prospective students to sign up for their classes). Questions such as "What has not having a college education cost you?" "What are you willing to change now?" and "Have you given up trying to deal with the problem?" are set out in the internal training documents. *Id.* For-profit colleges also promote this high pressured recruiting by tying recruiters' compensation to how many people they contact and how many people they eventually enroll. Tamar Lewin, *U.S. Education Dept. Delays Rules on For-Profit Colleges*, N.Y. TIMES, June 16, 2010, at A17.

213. Lewin, *supra* note 212.

214. Wilson, *supra* note 209. *But cf.* Joel F. Murray, *Professional Dishonesty*, 15 J. CONSUMER & COM. L. 97, 99 (2012) (summarizing *Wall Street Journal* reports on traditional law schools' misrepresentation of post-graduation employment statistics).

215. Hamilton, *supra* note 209. "Tuition is nearly five times as high at two-year for-profit colleges as at state schools. At four-year for-profit colleges, half of graduates leave school with at least \$31,000 in student loans. [Studies show] that's nearly four times that of their public-university counterparts." *Id.*

216. *Id.*

217. Press Release, U.S. Dep't of Educ., Student Loan Default Rates Increase (Sept. 13, 2010), *available at* <http://www.ed.gov/news/press-releases/student-loan-default-rates-increase-0>. "For-profit students borrow heavily, receiving 24% of government-guaranteed student loans while accounting for only 12% of U.S. college students." Hamilton, *supra* note 209. Many graduates report that they cannot find jobs in their chosen fields and subsequently cannot earn enough to repay their debt. *Id.*

218. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948-T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGING FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES (Aug. 4, 2010), *available at* <http://www.gao.gov/new.items/d10948t.pdf> [hereinafter GAO, FOR-PROFIT COLLEGES].

misconduct prompted investigations of for-profit schools.²¹⁹ In an August 2010 investigative report, the Government Accountability Office (“GAO”) conducted an undercover investigation of 15 for-profit colleges and found that these colleges encouraged fraud and engaged in deceptive and questionable marketing practices.²²⁰ The GAO found, among other things, that undercover applicants were encouraged to falsify federal aid forms to qualify for federal funds.²²¹ Stories of students who have been taken advantage of by for-profit schools abound. While success stories exist, they are too few.

The vulnerable nature of the typical for-profit recruits makes them very susceptible to “misrepresentations “due to their lack of insight about higher education.”²²² Similarly, their lack of knowledge regarding the higher education system makes them prime targets for the unscrupulous tactics employed by workers whose pay is often tied to their ability to recruit.²²³ These students not only lack the background to make informed decisions regarding their education, they also lack the background to know when they have fallen prey to an unscrupulous actor and what their potential recourse is in those situations.²²⁴

While the DOE has promulgated regulations which seem to respond to these claims and criticisms, it notes that the for-profit school sector serves an underrepresented population among those seeking to receive a post-secondary education and provides career opportunities and growth for this population that would not otherwise be available.²²⁵ But, reports about the sector indicate that it has not served this population well. The for-profit higher education sector has an

219. Linda Doell, *For Profit College Misconduct Complaints Under Investigation*, DAILYFINANCE (updated Nov. 29, 2010, 3:40 PM), <http://www.walletpop.com/2010/11/29/for-profit-college-misconduct-complaints-under-investigation>.

220. GAO, FOR-PROFIT COLLEGES, *supra* note 218, at 7.

221. *Id.* at 7-8. Even though the DOE requires that students report the amount of money they have in a savings account, in several different instances, college representatives encouraged undercover applicants not to report the amount in their savings accounts. *Id.* In one instance, a representative stated that it was not the government’s business how much the applicant had in the bank. *Id.* at 7. When an undercover applicant inquired as to what would occur in the case of a default on student loans, an admissions representative told the applicant that student loans were unlike car payments in that no one would “come after” the applicant for failing to pay it back. *Id.* at ii. The GAO has been publicly derided for its findings and reissued its report in November 2010 to clarify some of them. *Id.* at cover. It did not, however, change its findings under its initial report. *Id.* But see Jean Norris, *GAO Bias Evident in Report on For-Profit College Industry*, THE HILL (Jan. 14, 2011, 5:21 PM), <http://thehill.com/blogs/congress-blog/education/137995-gao-bias-evident-in-report-on-for-profit-college-industry> (determining that the GAO miscondacted its study).

222. Aaron N. Taylor, “Your Results May Vary”: *Protecting Students and Taxpayers Through Tighter Regulations of Proprietary School Representations*, 62 ADMIN. L. REV. 729, 761 (2010).

223. *Id.*

224. *Id.*

225. Elaine Korry & Liz Willen, *For-Profits Gaining Ground, But Changes Loom*, HECHINGER REP. (June 15, 2010), http://hechingerreport.org/content/for-profits-gaining-ground-but-changes-looming_3059/. In urging the sector to rid itself of “the bad actors,” Arne Duncan, the Secretary of the Department of Education, acknowledged that “[a]mong the for-profits, phenomenal players are out there making a huge difference in helping people take the next step in the economic ladder.” *Id.*

inherently misplaced focus on earning profit.²²⁶ Even though good for-profit actors may exist, the industry overall has created a perversion of higher education.²²⁷ This is especially true regarding its delivery to those who are socially and economically disadvantaged—those most vulnerable to not having access to higher education in the first place.²²⁸ This is in stark contrast to the policy goals articulated and promoted in the early days of the HEA.

What's more troubling is that the federal government seems to have relegated these students largely to the for-profit sector.²²⁹ Leaving the higher education provision for a group that has been historically underserved to a profit driven sector ignores systemic inequalities.²³⁰ Commodifying and reducing the education provision to a question of money desensitizes the public to those inequalities and sets up the perfect landscape for politicians to curtail and limit these rights.²³¹ Roosevelt recognized this potential with his New Deal policies and thus sought to avoid establishing social security as a market-driven program.²³² Johnson recognized it as well when he promoted making available “free” money for the neediest students in providing higher education access.²³³ These enactments validated the need for increased access and the need to systematize enduring programs that would achieve those goals. A purely market or financial approach paves the way for retrenchment of these systems and programs because such an approach breaks the link between the “rights” provided and the societal value that formed the basis for their entrenchment in the first place.

In October of 2010, the DOE promulgated a new set of rules seeking to regulate those schools which receive federal funds through financial aid programs under Title IV.²³⁴ While the regulations pertain to all institutions of higher learning receiving Title IV funds (for-profit and traditional not-for-profit schools), they are seemingly meant to impact for-profit schools by tying their adherence to these regulations with eligibility to receive Title IV funds.²³⁵

226. James, *supra* note 66, at 67-68 (arguing that for-profit models undermine the public good of higher education, while its failures destabilize its delivery).

227. *See id.* at 88. *See also* Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 S. CAL. INTERDISC. L.J. 505, 506-07 (2009).

228. *Id.*

229. FOR PROFIT HIGHER EDUCATION, *supra* note 203, at 2.

230. *See* SANDEL, *supra* note 66, at 8-9.

231. Pierson, *supra* note 6, at 147.

232. ESKRIDGE & FEREJOHN, *supra* note 10, at 173.

233. CERVANTES ET AL., *supra* note 8, at 22.

234. Program Integrity Issues, 75 Fed. Reg. 66,832, 66,832-33 (Oct. 29, 2010) (to be codified at 34 C.F.R. pt. 600, 602, 603, 668, 682, 685, 686, 690, 691).

235. *Id.* The regulations included:

Revising the definitions and provisions that describe the activities that constitute substantial misrepresentation by an institution of the nature of its educational programs, its financial charges, or the employability of its graduates;

While the regulations address some of the most egregious practices in the for-profit sector, and seemingly operate to rid the sector of bad actors,²³⁶ they miss an important point. They do not recognize that the obstacles faced by today's socially or economically disadvantaged student in attending traditional schools may still be present. Regulation guided solely by protection of funds will not eradicate the problems that pervade the higher education landscape. Legislation, regulation and program implementation that also supports good education actors in the traditional and for-profit sectors is what is needed here.²³⁷ When President Johnson initiated his higher education task force in 1964, the task force was charged with discovering the role the federal government should play in creating access to higher education.²³⁸ The study revealed that the ability to finance college was an impediment to higher education.²³⁹ President Johnson, therefore, focused his attention on developing a system of financial aid which would remove that impediment.²⁴⁰ Certainly, this long history of legislation in this vein has opened many doors that would have been otherwise closed. These doors must certainly be kept open by legislation and regulation that would protect

Removing the "safe harbor" provisions related to incentive compensation for any person or entity engaged in any student recruitment or admission activity, including making decisions regarding the award of title IV, HEA program assistance;

Clarifying what is required for an institution of higher education, a [for-profit] institution of higher education, and a postsecondary vocational institution to be considered legally authorized by the State[.]

Id.

236. Although that is arguable given the considerable due process opportunities schools have regarding their right to be a Title IV institution. New regulations do not automatically strip institutions of their right to qualify or become compliant under the HEA. See 20 U.S.C. § 1094(c)(3)(A) (2006). In fact, the HEA states that the determination of noncompliance will be preceded by significant investigation and a hearing. 20 U.S.C. § 1094(c)(3)(B)(i). Additionally, an institution found not to be in compliance will be given an opportunity to become compliant. *Id.*

237. In 2013, in an attempt to perhaps promote good actors, President Obama's administration unveiled a higher education rating system. Ellen McCulloch-Lovell, *College-Rating Systems: One Size Cannot Fit All*, CHRON. HIGHER EDUC., Feb. 28, 2014, at 21, available at <http://chronicle.com/article/College-Rating-Systems-One/144917/>. The purpose of the system is to "measure college performance ... so students and families have the information to select schools that provide the best value." *Id.* This rating system would tie schools eligibility to receive federal financial aid to the scores they receive based on the their students employability. *College Ratings and Paying for Performance*, U.S. DEP'T OF EDUC., <http://www.ed.gov/college-affordability/college-ratings-and-paying-performance> (last visited Apr. 2, 2014). The proposal has been met with mixed reactions. Some support the move as a way to differentiate good schools from bad ones in terms of providing an education that has value. Nick Anderson, *LSU Chief Cheers Federal College Ratings Plan*, WASH. POST (Feb. 21, 2014), http://www.washingtonpost.com/local/education/lsu-chief-cheers-federal-college-ratings-plan/2014/02/21/f3d9bdca-9b1f-11e3-975d-107dfef7b668_story.html. Others decry the proposal's inability to capture the diversity among institutions and programs and the lack of reliable data upon which to rate schools. McCulloch-Lovell, *supra*; Thomas A. Kazee, *College Scorecards and the Liberal Arts*, HUFFINGTON POST (Mar. 5, 2014), http://www.huffingtonpost.com/thomas-a-kazee/college-scorecards-and-th_b_4903782.html.

238. CERVANTES ET AL., *supra* note 8, at 17.

239. *Id.* at 18.

240. *Id.*

federal financial aid funding ability. But today, there are new doors and they remain closed even with wide ranging financial aid access and multiple types of higher education opportunities. The poor, disadvantaged, and minority—the underserved—are still falling through the cracks. Congress must prominently factor that into their legislating and regulating actions.

Congress should revise its stance to include access program creation in addition to fund protection. The higher education access policy has been buried beneath a policy of fiscal austerity. This is not its rightful place. Higher education access policy belongs ahead of fiscal austerity at most and alongside it at least as Congress creates and maintains new access programs to support those struggling to gain a post-secondary education. But, without a shift back to the proper focus, this divide between fund protection and new access programming will continue to grow and the effect will be to further loosen and eventually fully retrench the original access policy behind the Act.

IV. GOING BACK TO THE DRAWING BOARD

“The Great Society” is not a safe harbor, a resting place, a final objective, a finished work. It is a challenge constantly renewed, beckoning us toward a destiny where the meaning of our lives matches the marvelous products of our labor.²⁴¹

Reauthorization of the HEA should occur, at most, in six year intervals.²⁴² This gives lawmakers and other stakeholders an opportunity to test existing provisions and devise and promote necessary new ones. In the next reauthorization, Congress will undoubtedly focus on controlling financial aid spending, but hopefully Congress will also focus on creating new programs and implements to address the Nation’s higher education concerns. Concern about the proliferation of the for-profit sector and its impact on higher education has almost reached a fever pitch. This situation has also exposed a gape that politicians, long seeking to curtail higher education spending, have readily stepped into. These politicians have labeled higher education spending as a crisis and have used this label to appeal to the public’s concern on fiscal matters as it proposes and promotes legislation that would speak directly to that concern. This is not the approach that will result in broadened access programming.

Like President Johnson did in the ‘60s, Congress should initiate a study of what is currently impeding access to higher education, particularly amongst the underserved. The study should go beyond a GAO investigative sting on for-profit schools and attempt to gain a full understanding of barriers to education among the population most susceptible to for-profit school recruitment. President G.W. Bush’s 2008 reauthorization allowed for such studies, but those allowances were broad and unfunded.²⁴³ Congress should take a deeper look and

241. Jordan, *supra* note 85, at 246 (recounting LBJ’s “Great Society” Speech at the University of Michigan on May 22, 1964).

242. Gould, *supra* note 135, at 61. At the writing of this article, the HEA is due for a reauthorization later in 2014. *Id.*

243. *See generally* Gould, *supra* note 135; ACE ANALYSIS OF HEAR, *supra* note 168.

stress the seriousness of its actions by putting forth a clear and direct charge and providing the necessary resources to see the charge through. This will not only help in resetting the policy goals of the HEA toward broad access, but will provide the stakeholders, specifically the DOE, with concrete guidance as to the specific policies it should uphold in administering the Act.

In the '60s, the HEA reauthorizations included programs that prepared high school students for college. While these programs continue to operate, they clearly do not reach everyone and may not reach some early enough. Congress should use its resources to conjure up new ways to institute national programs to get students interested in and informed about college.

For instance, under the HEA, Congress could initiate and provide funding for increased programming in career counseling at the elementary school level. According to the American School Counselor Association, "The elementary years are a time when students begin to develop their academic self-concept and their feelings of competence and confidence as learners."²⁴⁴ Under the Elementary and Secondary Education Act,²⁴⁵ research and implementation grants are available with preference given to those schools which show a particular need for counseling.²⁴⁶ However, many of the grants awarded are geared toward mental health, behavioral and social development.²⁴⁷ This is certainly an appropriate goal for elementary school counseling programs, but it misses an opportunity to firmly plant a seed regarding higher education at a time when "students are beginning to develop attitudes toward school."²⁴⁸ Even though elementary school counselors may already provide career guidance in addition to academic, social and behavioral guidance, a federal HEA initiative would allow these counselors additional resources in becoming versed in the best practices and techniques for programming and counseling students about higher education choices. A federal grant program, housed under the HEA, would send a message to the DOE, as well as the public that Congress is committed to increasing access through new and innovative programs that not only help pay for a post-secondary degree but that also expose students to its possibility. In addition, this type of program, at the elementary level, would serve as a complement to existing programs like TRIO that students are not introduced to until high school.²⁴⁹

244. *Why Elementary School Counselors*, AM. SCH. COUNS. ASS'N, <http://www.schoolcounselor.org/school-counselors-members/careers-roles/why-elementary-school-counselors> (last visited Apr. 1, 2014).

245. Elementary and Secondary Act of 1964, 20 U.S.C. § 241 (2010).

246. *Elementary and Secondary School Counseling Programs*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/elseccounseling/index.html> (last modified Nov. 3, 2011).

247. *See FY 2013 Awards: Elementary and Secondary School Counseling Programs*, U.S. DEP'T OF EDUC., <http://www2.ed.gov/programs/elseccounseling/fy2013awards.html> (last modified Aug. 15, 2013) (listing and describing the 2013 grant recipients' proposed programs).

248. *Id.*

249. *See* McElroy & Armesto, *supra* note 16, at 379 (stating that greater compensatory education programs during the "elementary school years" would essentially take the burden off of TRIO programs in exposing disadvantaged students and preparing them for post-secondary education). *See generally* Omari Scott Simmons, *Lost in Transition: The Implications of Social Capital for Higher Education Access*, 87 NOTRE DAME L. REV. 205 (2011) (thoroughly discussing

There must also be initiatives for the people who exist right now in the workforce—those who have matriculated through high school and who still need to earn a living wage.²⁵⁰ Innovative and wide-reaching programs are needed in this area. Relegating this population solely to the for-profit sector has proven disastrous. Congress should create financial incentives for traditional schools to reach this population by offering a wider range of desirable programs that respect their varying life demands. This could decrease the demand for, and thus the need for, oversight of the for-profit school sector (which tends to offer these flexible life schedules) as more traditional schools could offer these programs.

Congress should assemble a new task force and charge it specifically with determining what impediments there are to students accessing higher education today. Certainly, paying for education and ensuring that upon attaining a degree, one is not crippled with debt is a critical aspect of access, but there are other aspects which could act as impediments to access (e.g., not possessing the necessary admission credentials and matriculation skills). Congress must set the path for exposing and eradicating the impediments of today and the specific ways they manifest and prevent access.²⁵¹

The higher education system, as it currently exists, needs an overhaul. Racked with a growing financial aid debt, Congress has redefined and grounded its higher education access goals in terms of protecting funds. With the ever-changing economy, growing workforce, and need for appropriate education, the real work of higher education reform must begin, and it can do so with the next reauthorization of the HEA. Congress can reset the policy associated with the HEA in a way that will better guide not only the DOE, but also citizens in terms of where this country's focus is for the future of higher education and, thus, the prosperity of the Nation.

CONCLUSION

Education reform is never easy. It takes hard work. Today, it means reimagining, reformulating and re-actualizing the means by which widespread higher education access is to occur. Money is an important part of that process, but understanding what drives access and the role government should play in ensuring that access is also important. Congress must critically examine the trend toward commodification of education services for its potential impact today and in the coming years regarding higher education access. Congress must also respond, not with a crisis approach, but with a long-term view of positioning access to higher education as a “right” that is essential to a functioning society.

the positive connection between high school career counseling and college access as well as suggestions for legislative initiatives that would strengthen that connection).

250. CHAO ET AL., *supra* note 196, at 2.

251. For a discussion of the Spellings Report—the result of a 2005 Commission on the Future of Higher Education created by then Education Secretary Margaret Spellings, see Derthick & Dunn, *supra* note 169, at 1024-31. The politics of the day dictated “a widespread concern with costs” and Secretary Spellings, a self-described accountability hawk, “set out to carry the accountability campaign” by leading a nationwide dialogue about pressing in higher education. *Id.* at 1024.

If it continues on this path of mainly protecting funds and not creating new pathways for meaningful access for all citizens, it risks unequally redistributing true opportunity thus unseating education as the great equalizer.