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**PROMISSORY EDUCATION:
REFORMING THE FEDERAL STUDENT LOAN COUNSELING PROCESS TO PROMOTE INFORMED
ACCESS AND TO REDUCE STUDENT DEBT BURDENS**

AMANDA HARMON COOLEY*

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“When kids do graduate, the most daunting challenge can be the cost of college. . . . Higher education can’t be a luxury – it is an economic imperative that every family in America should be able to afford.”¹

I. INTRODUCTION

Student loan debt now totals more than one trillion dollars.² This exceeds both credit card debt and auto loan debt in the United States.³ However, in obtaining financial assistance, most postsecondary students do not contemplate the long-term implications of the legal obligations that they accept as conditions to obtain student loan funds.⁴ Instead, many students merely sign

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¹ See President Barack Obama, Remarks by the President in State of the Union Address (Jan. 24, 2012) (transcript available at <http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address>).

² See Josh Mitchell & Maya Jackson-Randall, *Student-Loan Debt Tops \$1 Trillion*, WALL ST. J. (Mar. 22, 2012, 12:46 PM), <http://online.wsj.com/article/SB10001424052702303812904577295930047604846.html>.

³ See Andrew Martin & Andrew W. Lehren, *A Generation Hobbled by College Debt*, N.Y. TIMES, May 31, 2012, at A1; Daniel de Vise, *Student Loans Surpass Auto, Credit Card Debt*, WASH. POST (Mar. 6, 2012, 10:54 AM), http://www.washingtonpost.com/blogs/college-inc/post/student-loans-surpass-auto-credit-card-debt/2012/03/06/gIQARFQnuR_blog.html.

⁴ See Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 11, 54 (2011) (providing that “students may not pay attention to loan terms until they begin repayment years after signing master promissory notes to cover their college costs”).

their Master Promissory Notes with an electronic click⁵ and without reviewing the ten pages of small text that outlines all of the attendant legal responsibilities.⁶ This one-time, thirty-minute process will allow most students the opportunity to borrow additional loans for a ten-year period.⁷ Although in most forms of financial lending individuals with meager savings and modest incomes would not be permitted to borrow significant sums of money,⁸ this has become a commonplace practice in higher education.⁹ Typically, this is the first substantial debt that young people incur.¹⁰ Yet, ironically, these loan agreements take place at a time when most student borrowers have the least financial knowledge and experience.¹¹

In an attempt to address the mass failure to realize the requirements attached to signing promissory notes and entering into binding loan contracts, the federal government has attempted to reform some of the problems related to student loans and debt burdens.¹² These reforms have included the federal takeover of the federal student loan market by eliminating the use of private commercial banks as intermediaries in the student loan process;¹³ the revamping of the Income-Based Repayment plan;¹⁴ and the creation of the Pay As You Earn plan.¹⁵ Unfortunately, these

⁵ See *What to Expect, Master Promissory Note*, U.S. DEP'T OF EDUC. STUDENTLOANS.GOV, <https://studentloans.gov/myDirectLoan/whatToExpect.action?page=mpn> (last visited Jan. 23, 2013) (providing that the entire Master Promissory Note process “takes approximately 30 minutes to complete” and will require an electronic signature).

⁶ See, e.g., Federal Direct PLUS Loan Application and Master Promissory Note, *available at* <http://www.direct.ed.gov/pubs/plusmpn.pdf> (last visited Jan. 23, 2013).

⁷ See *Frequently Asked Questions, Master Promissory Note*, U.S. DEP'T OF EDUC. STUDENTLOANS.GOV, <https://studentloans.gov/myDirectLoan/faqs.action> (last visited Jan. 23, 2013) (describing the availability of the use of the master promissory note for additional loans up to a ten-year period).

⁸ See Tamar Lewin, *Student-Loan Borrowers Average \$26,500 in Debt*, N.Y. TIMES, Oct. 18, 2012, at A22; Mark Kantrowitz, *Who Graduates College with Six-Figure Student Loan Debt?*, Aug. 1, 2012, *available at* <http://www.finaid.org/educators/20120801sixfiguredebt.pdf> (finding that 0.2% of undergraduate students and 6.4% of graduate students graduate with six-figure student loans).

⁹ See ALAN MICHAEL COLLINGE, *THE STUDENT LOAN SCAM: THE MOST OPPRESSIVE DEBT IN U.S. HISTORY AND HOW WE CAN FIGHT BACK* 4 (2009) (providing that about two-thirds of all college students acquire student loans).

¹⁰ See Jon Marcus, *Student Loan Debt And Financial Literacy: Lack Of Safeguards Driving Student Loan Debt*, HUFFINGTON POST (Oct. 22, 2012, 11:45 AM), http://www.huffingtonpost.com/2012/10/22/student-loan-debt-and-fin_n_2001104.html?ref=topbar (discussing the lack of awareness of the legal obligations attached to student loans due to an absence of past borrowing among students).

¹¹ See Eboni S. Nelson, *Young Consumer Protection in the “Millennial” Age*, 2011 UTAH L. REV. 369, 377-78 (2011) (discussing multiple studies that have examined the general lack of financial experience and knowledge of young consumers).

¹² See, e.g., David M. Hersznehorn & Tamar Lewin, *Student Loan Overhaul Approved by Congress*, N.Y. TIMES, Mar. 26, 2010, at A16 (“Ending one of the fiercest lobbying fights in Washington, Congress voted Thursday to force commercial banks out of the federal student loan market, cutting off billions of dollars in profits in a sweeping restructuring of financial-aid programs and redirecting most of the money to new education initiatives.”).

¹³ See Health Care and Education Reconciliation Act of 2010, 20 U.S.C. § 1087f (2012) (eliminating the bank-based Federal Family Education Loan program).

¹⁴ See *id.* § 1098e (amending the Income Based Repayment plan to provide for reduced payments and shorter forgiveness periods for any loans made to a new borrower on or after July 1, 2014).

¹⁵ See Presidential Memorandum: Improving Repayment Options for Federal Student Loan Borrowers, 77 Fed. Reg. 35,241 (June 7, 2012) (detailing the acceleration of the effective date of the reduced payment and shorter forgiveness period provisions of the Income-Based Repayment plan through the Pay As You Earn plan); William D. Ford Federal Direct Loan Program Announcement of Early Implementation Date, 77 Fed. Reg. 72,960 (Dec. 7,

reforms have done little to stem the tide of rising student loan debt, which rarely is dischargeable in bankruptcy.¹⁶ Indeed, in order to discharge student loan debt, the debtor must demonstrate a showing of undue hardship;¹⁷ in some courts, a much more severe standard of a certainty of hopelessness is required.¹⁸

Given these extreme circumstances and the potentiality for a crisis atmosphere these circumstances engender,¹⁹ the current status of student loan debt undeniably showcases the newest front in the battle for access to higher education.²⁰ As costs continue to rise rapidly to attend institutions,²¹ students will find it more difficult to pursue education, resulting in harm to individuals' civic²² and economic lives²³ with an impact similar to the effects of not receiving an

2012) (to be codified at 34 C.F.R. pt. 685) (announcing the effective date of the Pay As You Earn repayment plan as December 21, 2012).

¹⁶ See Terrence L. Michael & Janie M. Phelps, “Judges?! - We Don’t Need No Stinking Judges!!!”: *The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH L. REV. 73, 74 (2005) (discussing the extreme difficulty attached to attempting to discharge student loan debts in bankruptcy).

¹⁷ See Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 478-81 (2005) (discussing the strict standard of undue hardship in student loan bankruptcy cases).

¹⁸ See *In re King*, 368 B.R. 358, 368-69 (D. Vt. 2007) (discussing the split between bankruptcy courts as to whether a showing of a certainty of hopelessness is required in order to show the undue hardship that is necessary for the discharge of student loans); Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 222 (2012) (discussing the bankruptcy court decisions that have utilized the certainty of hopelessness standard). See also Richard Fossey, “The Certainty of Hopelessness: Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?”, 26 J.L. & EDUC. 29, 31 (1997) (arguing that the “‘undue hardship’ clause in the Bankruptcy Code should be interpreted in such a way that overburdened individuals can discharge their debts in bankruptcy without the necessity of showing ‘the certainty of hopelessness’ in their long-term economic future”).

¹⁹ Compare William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. ECON. & POL’Y 485, 487 (2010) (“The problem [of outstanding United States student loan debt] is reaching a tipping point particularly in the aftermath of the most recent recession, as many students financed expensive educations under the assumption that the post-graduation jobs and average salaries advertised by schools and school ranking magazines would be available to them.”) and Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 503 (1999) (“Since enactment of the Guaranteed Student Loan Program in 1965, the looming crisis of America’s cumulative student debt has been the subject of significant commentary in the national press.”) with Rick Newman, *Maybe All That Student Debt Is a Good Thing*, US NEWS & WORLD REP. (Oct. 1, 2012), <http://www.usnews.com/news/blogs/rick-newman/2012/10/01/maybe-all-that-student-debt-is-a-good-thing> (“But the hand-wringing over excessive student debt might be, well, excessive.”).

²⁰ See Cathleen D. Zick & W. Keith Bryant, *A Review of the Economics of Family Time Use*, 1998 UTAH L. REV. 293 (1998) (identifying student loan programs as “public efforts aimed at increasing access to higher education”).

²¹ See Michelle Jamrisko & Ilan Kolet, *Cost of College Degree in U.S. Soars 12 Fold: Chart of the Day*, BLOOMBERG (Aug. 15, 2012, 5:00 AM), <http://www.bloomberg.com/news/2012-08-15/cost-of-college-degree-in-u-s-soars-12-fold-chart-of-the-day.html> (“[C]ollege tuition and fees have surged 1,120 percent since records began in 1978, four times faster than the increase in the consumer price index. Medical expenses have climbed 601 percent, while the price of food has increased 244 percent over the same period.”).

²² See Richard J. Coley & Andrew Sum, *Fault Lines in Our Democracy: Civic Knowledge, Voting Behavior, and Civic Engagement in the United States*, EDUC. TESTING SERVS., 14 (Apr. 2012), http://www.ets.org/s/research/19386/rsc/pdf/18719_fault_lines_report.pdf (providing, in support of the finding of a strong relationship between educational attainment and civic participation, that “the [voting] rate for high school dropouts (39 percent) was less than half the rate for those with advanced degrees (83 percent). For individuals who obtained at least some postsecondary education, the rates exceeded two-thirds.”).

adequate K-12 education.²⁴ Further, the student loan problem does not just harm the individual student borrower. The country’s democratic governance,²⁵ class diversity,²⁶ economic growth,²⁷ and public health²⁸ can be hobbled by a less educated population or a population encumbered by overwhelming educational debt levels. Given these potential harms that accompany the rising costs of postsecondary education and the growing debt loads of students, it has become imperative to implement legal and policy initiatives that promote access without diminishing the quality of higher education or turning students’ investments in their futures into unsustainable burdens.

This Article advocates for one such measure through the next reauthorization of the Higher Education Act.²⁹ Specifically, it argues for several changes to the statutory provisions of the Act, as well as the related administrative regulation, regarding the counseling that is attached to the disbursement of student loans for all institutions whose students receive Title IV aid.³⁰ These reforms are necessary given the ineffectiveness of the present loan counseling requirements.³¹ To remedy this deficiency, this Article calls for a revised statutory and regulatory process that would reflect the complexity and gravity of taking on the substantial legal obligations tied to the acquisition of student loan monies.³² These proposed changes would

²³ See, e.g., Jen Mishory & Rory O’Sullivan, *Denied? The Impact of Student Debt on the Ability to Buy a House*, YOUNG INVINCIBLES, 3 (2012), <http://younginvincibles.org/wp-content/uploads/2012/08/Denied-The-Impact-of-Student-Debt-on-the-Ability-to-Buy-a-House-8.14.12.pdf> (“The average single student debtor is likely ineligible for the typical home mortgage due to their debt-to-income ratio.”).

²⁴ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 63 (1973) (Brennan, J., dissenting) (arguing that “education [in the context of K-12 education] is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association guaranteed by the First Amendment.”); Kirk Stark & Jonathan Zasloff, *Tiebout and Tax Revolts: Did Serrano Really Cause Proposition 13?*, 50 UCLA L. REV. 801, 830 (2003) (identifying the high correlation between education and income).

²⁵ See Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 73 (1997) (identifying individuals with less education as an underrepresented group in democratic participation).

²⁶ See Benjamin A. Templin, *Social Security Reform: Should the Retirement Age Be Increased?*, 89 OR. L. REV. 1179, 1202 (2011) (identifying the less educated as being more at risk to live at or below the poverty level).

²⁷ See, e.g., Joel F. Handler, *Women, Families, Work, and Poverty: A Cloudy Future*, 6 UCLA WOMEN’S L.J. 375, 391 (1996) (linking a lack of education with “continued levels of unemployment”).

²⁸ See, e.g., Barbara A. Noah, *A Prescription for Racial Equality in Medicine*, 40 CONN. L. REV. 675, 684 n. 29 (2008) (linking disparities in health care delivery with lack of education).

²⁹ The next reauthorization of the Higher Education Act will likely occur in the next several years. See Libby A. Nelson, *Higher Ed in the Next Congress*, INSIDE HIGHER ED (Oct. 10, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/10/10/higher-ed-congressional-election> (“[M]embers [of Congress] will probably at least begin considering a reauthorization of the Higher Education Act, the massive law that governs federal student aid, although few in Washington expect a full reauthorization in the next two years.”).

³⁰ For the statutory loan counseling provisions under the current version of the Higher Education Act, see 20 U.S.C. § 1092(b), (l) (2012). For the current related regulatory provisions, see Counseling Borrowers Regulation, 34 C.F.R. § 685.304 (2010).

³¹ See Deanne Loonin, *Finding a Way Out: Improving the Assistance Network for Financially Distressed Student Loan Borrowers*, STUDENT LOAN BORROWER ASSISTANCE PROJECT, 9 (Dec. 2007), <http://www.studentloanborrowerassistance.org/blogs/wp-content/www.studentloanborrowerassistance.org/uploads/File/REPORTDec07.pdf> (“[T]he existing counseling requirements for federal loans are ineffective, simply one of many hoops students jump through to get their student aid checks.”).

³² See *infra* text accompanying notes ___.

mandate more robust entrance and exit counseling program requirements; specifically, they would require that each form of counseling be conducted in-person and with personalized information for each student. Further, the proposed amendments would require personalized interim counseling prior to the disbursement of every allocation of student loan funds. Finally, the proposed changes would ensure that institutions of higher education not impose additional costs on students for these enhanced counseling processes. Altering the statute and regulation in these ways would be a substantial improvement over the extant pro forma systems that meet the current requirements of the Higher Education Act and its implementing regulation.

This call for amendment is a moderate proposal.³³ However, if adopted, it would instill a measure of informed access into the student loan process, unlike other suggested proposals that would limit access to higher education.³⁴ Also, the changes called for in this Article attempt to address the problems of student loan debt *prior* to when, rather than after, these debts have been incurred. This type of approach to help to ease the student debt crisis on the front end of the acquisition of student loans has been relatively neglected in academic and policy realms.³⁵ Finally, this proposal focuses on increased accountability on the part of all of the stakeholders in the student loan process—for the government, the institutions of higher education, and the student borrowers themselves.³⁶

Overall, the goal of this argument for statutory and regulatory reform is the provision of informed access to higher education. Consequently, the notion of access serves as the guiding framework for the entirety of this Article. In support of this framework, Part Two of the Article provides the historical backdrop for the growth of educational access since the founding of the country, alongside an evaluation of the challenges and barriers to expanding opportunities in higher education.³⁷ This part of the Article particularly emphasizes the way legislation, supplemented by judicial action and social movements, has often been the primary catalyst in increasing educational access. Part Three discusses the present challenges students face in terms of gaining access to higher education given the rapid escalation of university and college costs over the last thirty years and the concomitant rise in student debt loads.³⁸ Part Four provides a

³³ See Edward B. Foley, *The Where and When of Voting*, 6 ELECTION L.J. 270, 270 (2007) (reviewing JOHN C. FORTIER, *ABSENTEE AND EARLY VOTING* (2006)) (identifying how “moderate proposals” can be advanced “in an effort to persuade policymakers regardless of their partisan or ideological disposition”).

³⁴ See, e.g., BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* 179-81 (2012) (arguing for a cap on federal student loans for law students on either an individual or institutional basis, but acknowledging the possibility that this could have the effect of limiting access to legal education for non-rich students).

³⁵ To date, the vast majority of scholarship that has focused on the problems related to student loan debts has advocated for changes to the bankruptcy law regarding the near impossibility to discharge these debts after they have been incurred, for changes involving student loan forgiveness, or for changes to repayment plans. See, e.g., Fossey, *supra* note __, at 31 (arguing for a relaxation of the draconian standards attached to attempts to discharge student loan debt in bankruptcy); Arthur Ryman, *Contract Obligation: A Discussion of Morality, Bankruptcy, and Student Debt*, 42 DRAKE L. REV. 205, 223 (1993) (urging Congress to “address forgiveness of [student] loans”); Eryk J. Wachnik, *The Student Debt Crisis: The Impact of the Obama Administration’s “Pay As You Earn” Plan on Millions of Current & Former Students*, 24 LOY. CONSUMER L. REV. 442, 451-453 (2012) (discussing the problems with the modified Income-Based Repayment plan for federal student loans).

³⁶ See *infra* text accompanying notes __.

³⁷ See *infra* text accompanying notes __.

³⁸ See *infra* text accompanying notes __.

discussion of the current loan counseling statutory and regulatory provisions.³⁹ Subsequently, it argues for the enhancement of these legal requirements in order to advance informed access and to reduce student debt burdens, thereby motivating a potential de-escalation of the costs of postsecondary education.⁴⁰ Finally, the conclusion addresses the democratic and civic importance of having broad access to higher education for individuals from diverse backgrounds, as such opportunities provide both benefits to individual students and to the greater social polity.⁴¹ This type of informed access can be achieved through the adoption of the Article’s statutory and regulatory reforms, which focus on the prescriptive and preventive side of the student loan debt issue.

II. A SHORT HISTORY OF THE EXPANSION OF ACCESS TO HIGHER EDUCATION

Access to higher education has undergone an expansive transformation since the founding times of the country.⁴² The first governmental acts that promoted higher education as a means for opportunity included the Northwest Ordinance,⁴³ which was enacted by the Confederation Congress in 1787,⁴⁴ and the 1862 Morrill Land Grant Act,⁴⁵ which allocated federal land grants to the states to establish institutions of higher education.⁴⁶ These federal legislative acts were supplemented by the states, which extended their support to postsecondary

³⁹ See *infra* text accompanying notes __.

⁴⁰ See *infra* text accompanying notes __.

⁴¹ See *infra* text accompanying notes __.

⁴² See JOHN THELIN, *A HISTORY OF AMERICAN HIGHER EDUCATION* 346-50 (2004) (discussing the historical expansion of educational opportunities in the United States).

⁴³ See Northwest Ordinance of 1787, § 14, art. III, *The Organic Laws of the United States of America*, reprinted in 1 U.S.C. at LVII (Office of the Law Revision Counsel of the House of Representatives ed., 2006) (“Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”).

⁴⁴ See generally Louis J. Sirico, Jr., *The Supreme Court and the Constitutional Convention*, 27 J.L. & POL. 63, 82-83 (2011) (providing a history of the Northwest Ordinance); Matt Festa, *Property and Republicanism in the Northwest Ordinance*, ARIZ. ST. L.J. (forthcoming) (same). Education was also a priority in the First Congress. See David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789-1791*, 61 U. CHI. L. REV. 775, 799 (1994) (“The second spending suggestion was Washington’s startling invitation to Congress in his first State of the Union message to ‘promo[te] science and literature’ either ‘by affording aids to seminaries of learning already established’ or ‘by the institution of a national university.’”).

⁴⁵ See Morrill Act, ch. 130, 12 Stat. 504 (1862) (codified at 7 U.S.C. § 304 (2006)) (providing federal land grants to states for “the endowment, support, and maintenance of at least one college . . . in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life”).

⁴⁶ See HAROLD M. HYMAN, *AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS, AND THE 1944 G.I. BILL* 36 (2008) (discussing how the Northwest Ordinance and the Morrill Act established the United States as “the first nation in the world . . . systematically to commit its resources for the support of higher education”). States were given a substantial amount of control with respect to how the Morrill Act grants could be used and which types of educational institutions could benefit from them. See William Zumeta, *State Policy and Private Higher Education*, in *THE FINANCE OF HIGHER EDUCATION: THEORY, RESEARCH, POLICY, AND PRACTICE* 374-75 (Michael B. Paulsen & John C. Smart eds., 2001) (discussing the discretion that states received with the land grants, in that the only limitation was the institutional establishment of practical programs, like agriculture, mechanics, and military tactics, in addition to the classical college curriculum).

schools through the adoption of constitutional provisions⁴⁷ and the chartering of public universities.⁴⁸ However, these early educative efforts were focused primarily on the exclusive provision of educational opportunities to affluent, white men.⁴⁹

Access to higher education became a reality for an increasingly diverse group of students from a variety of socioeconomic backgrounds when the G.I. Bill⁵⁰ was signed by President Franklin Roosevelt in 1944.⁵¹ The G.I. Bill had a transformative effect on higher education in the United States,⁵² with over two million veterans attending college after World War II and approximately five million veterans acquiring vocational trade skills.⁵³ Specifically, the G.I. Bill provided veterans, who had served at least ninety days of active duty, with \$500 for tuition and monetary stipends for college, graduate school, or vocational training.⁵⁴ Veterans could use their G.I. Bill educational benefits at any public or private, accredited college or university,⁵⁵ as well as at other for-profit or proprietary institutions of higher education.⁵⁶

⁴⁷ See, e.g., N.C. CONST. of 1776, § XLI, available at <http://docsouth.unc.edu/unc/uncbk1017/uncbk1017.html> (“That a school or schools shall be established by the Legislature for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more Universities.”). Many of these constitutional provisions were exact adoptions of the language within the Northwest Ordinance of 1787. See, e.g., MICH. CONST. art. 8, § 1 (“Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.”).

⁴⁸ The first public university, The University of North Carolina, was chartered on December 11, 1789, by the state legislature. See I KEMP P. BATTLE, HISTORY OF THE UNIVERSITY OF NORTH CAROLINA 6 (1907) (quoting the charter: “[I]n all well regulated governments, it is the indispensable duty of every legislature to consult the happiness of a rising generation, and endeavor to fit them for an honorable discharge of the social duties of life, by paying the strictest attention to their education, and that, a University, supported by permanent funds and well endowed, would have the most direct tendency to answer the above purpose.”).

⁴⁹ See Lani Guinier, *Admissions Rituals As Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 127-28 (2003) (discussing how “higher education was originally a province reserved for wealthy white men”).

⁵⁰ See Servicemen’s Readjustment Act, Pub. L. No. 78-346, 58 Stat. 284 (1944).

⁵¹ See EDWARD HUMES, OVER HERE: HOW THE G.I. BILL TRANSFORMED THE AMERICAN DREAM 5 (2006) (discussing how the G.I. Bill allowed for the transformation of “[c]ollege . . . from an elite bastion to a middle-class entitlement”); Franklin Roosevelt’s *Statement on Signing the G.I. Bill* (June 22, 1944), available at <http://docs.fdrlibrary.marist.edu/odgist.html> (“[The G.I. Bill] provide[s] the special benefits which are due to the [men and women] of our armed forces -- for they ‘have been compelled to make greater economic sacrifice and every other kind of sacrifice than the rest of us, and are entitled to definite action to help take care of their special problems.’”).

⁵² See Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CAL. L. REV. 967, 973 (2008) (“In total, the G.I. Bill’s education and training provisions completely reoriented the tenor of higher education in the United States.”).

⁵³ See Lizette Alvarez, *Combat to College*, N.Y. TIMES (Oct. 30, 2008), at EdLife 24 (discussing the wide-ranging impact of the G.I. Bill for World War II veterans).

⁵⁴ Servicemen’s Readjustment Act of 1944, § 400, 58 Stat. at 288, 290.

⁵⁵ See Katherine Kiemle Buckley & Bridgid Cleary, *The Restoration and Modernization of Education Benefits Under the Post-9/11 Veterans Assistance Act of 2008*, 2 VETERANS L. REV. 185, 190-91 (2010) (describing the G.I. Bill’s “open-ended right” provisions regarding students’ choices of institutions of higher education).

⁵⁶ See ARTHUR M. COHEN & CARRIE B. KISER, THE SHAPING OF AMERICAN HIGHER EDUCATION: EMERGENCE AND GROWTH OF THE CONTEMPORARY SYSTEM 456 (2009) (discussing how the G.I. Bill allowed students benefits to attend for-profit vocational schools of higher education).

Like with earlier land grants,⁵⁷ the federal government in the G.I. Bill program limited its oversight of higher education by granting significant autonomy to the beneficiary students.⁵⁸ This discretion regarding the students' choices of postsecondary institution allowed for increased access for these new populations of students to a much larger selection of schools.⁵⁹ This breadth of choice was opposed by many leaders of prestigious schools, who feared that their "elite" institutions would be overrun by "non-elite" students and who favored the former exclusivity of higher education.⁶⁰ However, in actuality, the majority of veterans who participated in the initial G.I. Bill educational benefits program attended proprietary schools.⁶¹

While the statutory intent of the G.I. Bill was one of limited government, it actually marked a sea change in the relationship between the federal government and these colleges and universities. Although the G.I. Bill attempted to conform to the previous federal pattern of limited oversight for higher education,⁶² the introduction of such substantial federal funds for postsecondary education inevitably led to increased federal control over this area.⁶³ "By initiating the first big surge in demand for higher education and helping to insure that the enterprise became too big and important for government to ignore for long, [the G.I. Bill] marked the beginning of the end of the era of true independence from government for much of the private sector."⁶⁴

Despite the G.I. Bill's successes in its expansive extension of access to higher education to veterans from lower socioeconomic backgrounds,⁶⁵ which ultimately created a "post-World War II middle class,"⁶⁶ increased governmental intervention became necessary to truly open

⁵⁷ See *supra* note __.

⁵⁸ See MARTIN TROW, *TWENTIETH-CENTURY HIGHER EDUCATION: ELITE TO MASS TO UNIVERSAL* 201 (Michael Burrage ed., 2010) (discussing how the G.I. Bill was an example of "the sharp separation of financial support from academic influence—that marked earlier federal policy").

⁵⁹ See MILTON GREENBURG, *THE GI BILL: THE LAW THAT CHANGED AMERICA* 107 (1997) ("The GI Bill was rooted in the idea that the individual recipient of a benefit, not the government, could decide how and where to use it.").

⁶⁰ See, e.g., NICHOLAS LEMANN, *THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY* 59 (1999) (discussing then-Harvard University President James Bryant Conant's opposition to the G.I. Bill's "free, universally redeemable ticket to higher education, which [he] believed was already overpopulated").

⁶¹ See GARY A. BERG, *LESSONS FROM THE EDGE: FOR-PROFIT AND NONTRADITIONAL HIGHER EDUCATION IN AMERICA* 41 (2005) ("Proprietary schools served more students on the G.I. Bill than any other institutional type."). In some instances, these proprietary institutions defrauded students of tuition funds while not providing the promised education. See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 *HARV. L. REV.* 1229, 1239-40 (2003) ("Veterans initially faced unscrupulous practices by proprietary schools that promised programs that they did not deliver or otherwise engaged in fraudulent schemes.").

⁶² See Zumeta, *supra* note __, at 376 (deeming the G.I. Bill "a deliberate choice by the federal government to stay out of the details of the operations of higher education").

⁶³ See Judith Areen, *Governing Board Accountability: Competition, Regulation, and Accreditation*, 36 *J.C. & U.L.* 691, 726 (2010) (discussing the G.I. Bill and increased federal oversight for higher education).

⁶⁴ *Id.*

⁶⁵ See William E. Nelson, *The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy*, 25 *HOFSTRA L. REV.* 1, 19 (1996) (noting that the G.I. Bill "uplifted millions of those poor to a new middle-class status"); William M. Wiecek, "America in the Post-War Years: Transition and Transformation," 50 *SYRACUSE L. REV.* 1203, 1211 (2000) (describing how the G.I. Bill "underwrote . . . the rise into the comfortable middle class of countless families and individuals who might otherwise have spent their lives struggling to make ends meet").

⁶⁶ Thomas Earl Geu, *Chaos, Complexity, and Coevolution: The Web of Law, Management Theory, and Law Related Services at the Millennium*, 65 *TENN. L. REV.* 925, 943 (1998).

these doors for people of color, for women, and for individuals with disabilities.⁶⁷ Despite the notion that the G.I. Bill was “race- and gender-neutral in [its] design,”⁶⁸ the actual choices in educational opportunity for non-white or non-male veterans were much more circumscribed.⁶⁹ Consequently, further congressional action was required in order to facilitate increased access to greater populations of Americans.

Beginning twenty years after the enactment of the G.I. Bill into law, other federal legislation began to expand educational opportunities to greater groups of people and cemented the federal government’s active involvement in educational policy.⁷⁰ This legislation included the Civil Rights Act of 1964,⁷¹ which, in Title VI, prohibits discrimination based on “race, color, or national origin” by programs that receive “federal financial assistance,”⁷² like colleges and universities. Building upon many of the premises of the Civil Rights Act, Congress also passed the Elementary and Secondary Education Act of 1965,⁷³ which intended “to improve the educational opportunities of poor students and to obligate those districts receiving Title I funds to comply with various federal non-discrimination statutes,”⁷⁴ thereby acting as a pipeline for the broadening of opportunities in postsecondary education. Subsequently, the Higher Education Act⁷⁵ was enacted “to strengthen the educational resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education.”⁷⁶ Title IX of the Education Amendments of 1972⁷⁷ generally prohibited gender-discrimination in institutions of higher education.⁷⁸ Increased access for persons with disabilities was extended by the passages

⁶⁷ See Guinier, *supra* note __, at 127-28 (noting that “legal challenges, social movements, and a participatory conception of individual rights helped pressure these institutions of higher education to open their doors—albeit only a crack—to those [non-white, non-male, non-rich students] who had been shut out.”).

⁶⁸ John A. Powell, *Post-Racialism or Targeted Universalism?*, 86 DENV. U. L. REV. 785, 794 (2009).

⁶⁹ See IRA KATZNELSON, *WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD HISTORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA* 129 (2005) (noting that the educational choices of black veterans under the G.I. Bill were limited as “[e]ven outside the South, black access to primarily white colleges and universities remained limited”); SUZANNE METTLER, *SOLIDERS TO CITIZENS: THE G.I. BILL AND THE MAKING OF THE GREATEST GENERATION* 149 (2005) (discussing how female veterans were not provided with the informational counseling under the G.I. Bill that was routinely provided to male veterans).

⁷⁰ See, e.g., *Education and Title VI*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/about/offices/list/ocr/docs/hq43e4.html> (discussing how the Department of Education’s Office for Civil Rights enforces Title VI of the Civil Rights Act of 1964 in all educational institutions that receive federal funds); Julia Hanna, *The Elementary and Secondary Education Act (ESEA): 40 Years Later*, ED. MAG. (Summer 2005), http://www.gse.harvard.edu/news/2005/0819_esea.html (noting that since the passage of the ESEA, “the government’s involvement in education policy has come to seem a given”).

⁷¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000a-2000h (2006)).

⁷² Civil Rights Act of 1964, 42 U.S.C. § 2000d (2006).

⁷³ Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (codified in scattered sections in 20 U.S.C.).

⁷⁴ Derek W. Black, *The Congressional Failure to Enforce Equal Protection Through the Elementary and Secondary Education Act*, 90 B.U. L. REV. 313, 314 (2010).

⁷⁵ Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified in scattered sections of 20 U.S.C.).

⁷⁶ *Id.* at 1219.

⁷⁷ Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (1972) (codified in 20 U.S.C. §§ 1681-1688 (2006)).

⁷⁸ See Allan Ides, *The Curious Case of the Virginia Military Institute: An Essay on the Judicial Function*, 50 WASH. & LEE L. REV. 35, 46 (1993) (discussing the institutional exceptions to Title IX).

of the Rehabilitation Act of 1973,⁷⁹ which prohibited discrimination based on disability by institutions of higher education in Section 504;⁸⁰ the Individuals with Disabilities Education Act of 1975,⁸¹ which provided for the comprehensive education of children with disabilities and facilitated college attendance by students with disabilities;⁸² and the Americans with Disabilities Act of 1990,⁸³ which “extend[ed] the protections of Section 504 [of the Rehabilitation Act of 1973] to a much broader segment of society.”⁸⁴

Despite the passage of this extensive legislation, increased access to higher education has not been automatic. Legislative efforts for increased diversity of the student bodies of institutions of higher education often required supplementation by the courts and increased advocacy for equal opportunity. Court decisions prior to⁸⁵ and considerably after⁸⁶ much of this legislation, affirmative action programs,⁸⁷ social movements,⁸⁸ and the acts of courageous individuals⁸⁹ formed the basis for the desegregation of college and university campuses,⁹⁰ as well as the

⁷⁹ Rehabilitation Act of 1973, Pub. L. No. 93–112, § 504, 87 Stat. 355 (codified at 29 U.S.C. § 794 (2006)).

⁸⁰ See 29 U.S.C. § 794 (2006).

⁸¹ Individuals with Disabilities Education Act, Pub. L. No. 91-320, 84 Stat. 175-188 (codified at 20 U.S.C. §§ 1400-1482).

⁸² See Laura Rothstein, *Higher Education and Disability Discrimination: A Fifty Year Retrospective*, 36 J.C. & U.L. 843, 847 (2010) (discussing the purpose and effect of the Individuals with Disabilities Education Act).

⁸³ Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified in scattered sections of 42 U.S.C.).

⁸⁴ Laura Rothstein, *Disability Law and Higher Education: A Road Map for Where We’ve Been and Where We May Be Heading*, 63 MD. L. REV. 122, 133 (2004).

⁸⁵ See *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (“[I]n the field of public education the doctrine of ‘separate but equal’ has no place [as] separate educational facilities are inherently unequal.”); *Sweatt v. Painter*, 339 U.S. 629, 634-35 (1950) (holding that an African-American student must be admitted to the University of Texas law school as “legal education equivalent to that offered by the State to students of other races . . . [was] not available to him in a separate law school as offered by the State”); *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 642 (1950) (holding that an African-American student, “having been admitted to a state-supported graduate school [at the University of Oklahoma], must receive the same treatment at the hands of the state as students of other races”); *Sipuel v. Bd. of Regents*, 332 U.S. 631, 633 (1948) (finding that the State of Oklahoma must provide an African-American student with legal education “in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group”).

⁸⁶ See *United States v. Fordice*, 505 U.S. 717, 729 (1992) (holding that Mississippi did not fulfill its affirmative obligation to dismantle its prior de jure segregation system in higher education by the adoption and implementation of race neutral policies to govern colleges and universities); *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973), *modified*, 480 F.2d 1159 (D.C. Cir. 1973) (requiring desegregation in higher education and serving as the impetus for extensive changes in the admissions policies of colleges and universities).

⁸⁷ See Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1776 (2004) (discussing how affirmative action was essential to ending “the period of massive resistance . . . passive resistance and deliberate foot-dragging” to higher education desegregation).

⁸⁸ See Jack Greenberg, *Report on Roma Education Today: From Slavery to Segregation and Beyond*, 110 COLUM. L. REV. 919, 980 (2010) (“It took from 1936 to 1963—a period that included the civil rights movement—until every Southern state enrolled at least one black student at a white institution of higher learning.”).

⁸⁹ See Charles W. Eagles, *THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS* (2009) (discussing James Meredith’s quest to become the first African-American student at the University of Mississippi).

⁹⁰ See Michael A. Olivas, *Brown and the Desegregative Ideal: Location, Race, and College Attendance Policies*, 90 CORNELL L. REV. 391, 392-96 (2005) (discussing the series of court decisions that provided desegregation remedies for institutions of higher education).

foundation for the achievement of more equity in higher education for women⁹¹ and for students with disabilities.⁹² In more recent years, higher educational institutions have attempted to improve access in terms of sexual orientation⁹³ and citizenship status.⁹⁴ All of these progressions, alongside the administration of Title IV programs that provide more than \$150 billion annually “in new federal aid to approximately fourteen million post-secondary students and their families,”⁹⁵ demonstrate the dynamic changes that have taken place with respect to increased access for all students in institutions of higher education.⁹⁶

To sum, the movement in higher education towards greater access of opportunity for students has evolved slowly. Significantly, the catalysts for this expansive change have not typically been individual institutional initiatives.⁹⁷ Instead, the origin for increased educational access has predominantly been federal legislation with supplemental auxiliary support.⁹⁸ This pattern remains the same for the problem of growing student loan debt burdens. Consequently, colleges and universities will need more than a federal nudge to provide informed access.⁹⁹ What must be required is a statutory and regulatory mandate to provide enhanced student loan counseling in order to educate students about college costs, attendant debt issues, and the

⁹¹ See BARBARA MILLER SOLOMON, *IN THE COMPANY OF EDUCATED WOMEN: A HISTORY OF WOMEN AND HIGHER EDUCATION IN AMERICA* xviii (1986) (discussing how governmental efforts and public advocacy, over centuries, increased women’s access to institutions of higher education).

⁹² See generally Rothstein, *supra* note __, at 844 (providing a comprehensive discussion of the expansion of rights for individuals with disabilities from 1960 to 2010). See also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-33, *HIGHER EDUCATION AND DISABILITY: EDUCATION NEEDS A COORDINATED APPROACH TO IMPROVE ITS ASSISTANCE TO SCHOOLS IN SUPPORTING STUDENTS* 8 (2009) (“In 2008, students with disabilities represented an estimated 11 percent of all postsecondary students.”).

⁹³ See, e.g., Eric Hoover, *Elmhurst College Will Ask Applicants About Sexual Orientation*, CHRON. HIGHER EDUC. (Aug. 23, 2011, 10:49 PM), <http://chronicle.com/blogs/headcount/elmhurst-college-will-ask-applicants-about-sexual-orientation/28553> (discussing the first postsecondary “institution to include a question about sexual orientation and gender identity on its undergraduate admissions application” as a means to increase diversity).

⁹⁴ See Jennifer M. Chacón, *Race As A Diagnostic Tool: Latinas/os and Higher Education in California, Post-209*, 96 CAL. L. REV. 1215, 1247 (2008) (“Over the past decade, questions over the right of undocumented students to access public higher education have been a battleground in the larger political and cultural struggle over immigration.”).

⁹⁵ Ass’n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 435 (D.C. Cir. 2012).

⁹⁶ Although efforts to increase access in higher education have improved, reforms are still needed in order to attain true equity of opportunity. See Michele S. Moses, *Race, Affirmative Action, and Equality of Educational Opportunity in A So-Called “Post-Racial” America*, 20 KAN. J.L. & PUB. POL’Y 413, 423 (2011) (discussing how the pervasive inequalities in K-12 education signify that “meaningful access to higher education often is not realistic for Black students and other underrepresented students of color”); Leslie Miller-Bernal, *Coeducation: An Uneven Progression*, in *GOING COED: WOMEN’S EXPERIENCES IN FORMERLY MEN’S COLLEGES AND UNIVERSITIES, 1950-2000* 1, 14 (Leslie Miller-Bernal & Susan L. Poulson eds., 2004) (stating that coeducation is not the equivalent of equal education and discussing research that demonstrates continued disadvantages for women in colleges and universities); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-33, *HIGHER EDUCATION AND DISABILITY*, *supra* note __, at 20-25 (discussing the challenges that postsecondary schools still face in supporting students with disabilities); Todd A. DeMitchell & Suzanne Eckes, *Sexual Orientation and the College Campus*, 254 EDUC. L. REP. 19, 20 (2010) (discussing the discrimination faced by LGBT students on college campuses).

⁹⁷ See *supra* text accompanying note __.

⁹⁸ See *supra* text accompanying note __.

⁹⁹ See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 143 (2009) (discussing various “federal nudges” that could assist in dealing with the problems related to the accumulation of higher education student loans).

potential impacts of both factors on future finances.¹⁰⁰ This legislative initiative will help to ensure the continued dynamism of access to achieve higher education in the United States.

III. PRESENT CHALLENGES TO ACCESS: RISING COSTS AND STUDENT LOAN DEBT LEVELS

The challenges that most students face today in higher education are not de jure barriers to access based on demographic factors.¹⁰¹ Instead, challenges to access now primarily come in the form of continual cost increases and prohibitively high debt loads. These dual burdens have become absolute bars (or significant impediments) to admission for many students.¹⁰² Colleges and universities have not been able to reign in these increases and have done relatively little to curb overall student loan debt levels.¹⁰³ Further, although federal student loans constitute the bulk of all student lending,¹⁰⁴ the current statutory and regulatory requirements governing these loans do not adequately address these challenges to access. Consequently, federal governmental reforms to the direct federal student loan program are necessary in order to start to ameliorate the harms of rising postsecondary education costs and student loan debt levels.

Despite institutional myopia,¹⁰⁵ increasing costs have become systemic to higher education.¹⁰⁶ Over the last twenty-five years, college tuition and fees have risen exponentially, surging 1,120 percent, at roughly four times the rate of the increase in the consumer price index¹⁰⁷ and three times the rate of overall inflation.¹⁰⁸ “The cost of tuition alone has soared from 23% of median annual earnings in 2001 to 38% in 2010.”¹⁰⁹

Tuition and fees are only one part of the overall cost of college and university attendance. In 2012-2013, the average total annual cost of attendance for a public, two-year commuter school student was \$15,584; for a public, four-year, in-state, on-campus student was \$22,261; for a public, four-year, out-of-state, on-campus student was \$35,312; and for a private, non-profit,

¹⁰⁰ See *infra* text accompanying notes __.

¹⁰¹ This is not to say, however, that universal access to higher education has been achieved. See Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and for-Profit Higher Education*, 38 J.C. & U.L. 45, 100 (2011) (“[G]aps in college and university access remain significant for low-income Americans and ethnic and racial minorities, even after controlling for college and university preparation.”).

¹⁰² See Peter Coy, *Student Loans: Debt for Life*, BLOOMBERG BUSINESSWEEK (Sept. 18, 2012), <http://www.businessweek.com/articles/2012-09-06/student-loans-debt-for-life#p1> (discussing how “[t]he poor, who need the boost that a college education can provide, are suffering the most” from the high costs of attendance of a traditional four-year college); *Tuition Costs Hurting Students, Colleges*, MARKETPLACE (Apr. 1, 2009), available at <http://www.marketplace.org/topics/life/tuition-costs-hurting-students-colleges> (“Tuition has increased so much that even high-income families have to stretch.”).

¹⁰³ See *infra* text accompanying notes __.

¹⁰⁴ See *infra* text accompanying notes __.

¹⁰⁵ See Sara Hebel, *Board Members Say College Costs Too Much, but Not at Their Institution*, CHRON. HIGHER EDUC. (Dec. 13, 2012), <http://chronicle.com/article/Board-Members-Say-College/136291/> (“Most members of college boards believe that higher education costs too much, but a majority also say their own institutions’ prices aren’t the problem”).

¹⁰⁶ See *Trends in College Spending 1999-2009*, DELTA COST PROJECT, 18 (2011), http://www.deltacostproject.org/resources/pdf/Trends2011_Final_090711.pdf (finding that both public and private, non-profit four-year institutions significantly increased tuition and fees in response to the Great Recession).

¹⁰⁷ Jamrisko & Kolet, *supra* note __.

¹⁰⁸ *The College-Cost Calamity*, ECONOMIST (Aug. 4, 2012), <http://www.economist.com/node/21559936>.

¹⁰⁹ See *id.*

four-year, on-campus student was \$43,289.¹¹⁰ These average annual costs reflect the undergraduate student budgets created by college and university financial aid offices, which “form the basis for determining the total cost of attendance, [and] which can affect the financial aid for which students are eligible.”¹¹¹ Based on the most recent report from the National Center for Education Statistics, which collects and analyzes educational data as part of the United States Department of Education, the average total annual cost in 2007-2008 for a full-time graduate degree program was \$34,600 for a master’s degree program; \$39,700 for a doctoral degree program; and \$46,500 for a first professional degree program.¹¹² More specifically, for the 2010-2011 academic year, the average total annual cost to attend a public law school as an in-state student was almost \$40,000; the cost to attend a public law school as an out-of-state student was over \$52,000; and the cost to attend a private law school was a little over \$58,000.¹¹³ In 2010-2011, the average four-year costs of attendance of private and public medical schools were \$263,964 and \$187,393 respectively.¹¹⁴

The costs of higher education have increased for a variety of reasons.¹¹⁵ Many of these costs have resulted from external factors related to the funding of colleges and universities. Significantly, the macro-economic impact of the latest financial crisis and resulting Great Recession on the United States’ economy has had a substantial effect on postsecondary educational cost increases.¹¹⁶ Indeed, the financial crisis and recession eroded both state and private funding streams, causing many institutions to raise tuition and fees.¹¹⁷

¹¹⁰ See *Trends in College Pricing 2012*, COLLEGEBOARD, 11 (2012), http://trends.collegeboard.org/sites/default/files/college-pricing-2012-full-report_0.pdf (providing the data on these average annual total costs). Average net prices are lower than these amounts. See *id.* at 19-21.

¹¹¹ *Id.* at 11.

¹¹² See *The Condition of Education, Price of Graduate and First-Professional Attendance (2011)*, NAT’L CTR. FOR EDUC. STATISTICS (2012), http://nces.ed.gov/programs/coe/indicator_gsn.asp.

¹¹³ See *Law Students: What’s Your Average Cost of Law School?*, ACCESS GRP., <http://www.accessgroup.org/paying-for-school/how-much-will-it-cost/law-students-whats-your-average-cost-of-law-school/> (last visited Jan. 27, 2013).

¹¹⁴ See Carolyn Krupa, *Medical Students Still Burdened by High Debt Loads*, AM. MED. NEWS (Aug. 27, 2012), <http://www.ama-assn.org/amednews/2012/08/27/prsb0827.htm>.

¹¹⁵ See generally RONALD EHRENBERG, TUITION RISING: WHY COLLEGE COSTS SO MUCH (2000) (citing multiple reasons for the increases in the costs of higher education, including endowment and development policies, program rankings, admissions and financial aid policies, research costs, faculty salaries, tenure processes, administrative costs, benefits, deferred maintenance, capital campaigns, physical space requirements, internal transfer prices, enrollment management, information technology, libraries, transportation costs, infrastructure, athletics programs, and dining and housing costs).

¹¹⁶ See Kim Clark, *The Great Recession’s Toll on Higher Education*, U.S. NEWS & WORLD REP. (Sep. 10, 2010), <http://www.usnews.com/education/articles/2010/09/10/the-great-recessions-toll-on-higher-education> (outlining the “devastating effect” the Great Recession has had on higher education). See also TRENDS IN COLLEGE PRICING, *supra* note __, at 13-15 (discussing the impact of the Great Recession on colleges and universities).

¹¹⁷ See Andrew Martin, *Building a Showcase Campus, Using an I.O.U.*, N.Y. TIMES, Dec. 14, 2012, at A1 (discussing decreases in traditional sources of revenue like state appropriations and private sources of revenue like cash, pledged gifts, and investments).

This latest downturn in the economy has not been the sole external factor that has resulted in increasing costs for college and university attendance.¹¹⁸ Throughout the last fifteen years, both public and private non-profit schools of higher education have received fewer direct allocations of federal, state, and local appropriations.¹¹⁹ Accreditation processes and expectations have also led to increased prices in higher education.¹²⁰ Finally, external review in the form of the national publishing rankings process and the resulting actions to attract increased student enrollments have caused these costs to escalate.¹²¹ Each of these various types of external factors has had an impact on the increased costs of higher learning.

In addition to external pressures, internal, institutional forces have resulted in increasing costs for student attendance. These internal constraints often result from an unattainable attempt to be all things to all people;¹²² they have generated “the equivalent of an arms race of spending to improve . . . absolute quality and . . . relative stature.”¹²³ These internal factors include both instructional and non-instructional line items. Faculty retention and recruitment have driven up costs, as instructional spending consistently constitutes the most substantial item of total expenditures for schools, with faculty costs of salaries and benefits being the largest share of that expenditure.¹²⁴ However, due to a national trend of hiring more non-tenured and part-time faculty members,¹²⁵ who typically receive lower salaries than tenure-track and tenured professors

¹¹⁸ See, e.g., Frances R. Hill, *University Endowments: A (Surprisingly) Elusive Concept*, 44 NEW ENG. L. REV. 581, 582 (2010) (noting that the Great Recession only provided additional cost requirements for institutions of higher education).

¹¹⁹ See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-179, POSTSECONDARY EDUCATION: FINANCIAL TRENDS IN PUBLIC AND PRIVATE NONPROFIT INSTITUTIONS 13 (2012) [hereinafter POSTSECONDARY EDUCATION: FINANCIAL TRENDS] (finding that most schools of higher education have seen “decreases in state and local appropriations” since 1999). See also James, *supra* note __, at 100 (citing losses in state and federal financial support as the primary reason for increasing costs of higher education); Josh Mitchell, *New Course in College Costs*, WALL ST. J. (June 10, 2012, 8:17 PM), <http://online.wsj.com/article/SB10001424052702303296604577454862437127618.html> (citing cuts in state funding as one reason for rising costs in higher education).

¹²⁰ See Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL'Y 67, 79-80 (2010) (arguing that accreditation processes have contributed to increased costs in the law school segment of higher education).

¹²¹ See Howard, *supra* note __, at 497 (arguing that the costs of higher education have increased in an attempt to garner higher rankings and to attract increased student enrollments).

¹²² See Hugo F. Sonnenschein, *In Memoriam: Edward H. Levi (1912-2000)*, 67 U. CHI. L. REV. 967, 968 (2000) (quoting former Attorney General and noted American academic Edward H. Levi as stating, “‘A university which claims to be all things to all people, or as many different things as different groups wish it to be, is deceitful or foolish or both.’”).

¹²³ EHRENBERG, *supra* note __, at 277.

¹²⁴ See POSTSECONDARY EDUCATION: FINANCIAL TRENDS, *supra* note __, at 17 (finding that “[f]rom 1999-2009, spending on instructional activities varied and faculty costs remained the largest share).

¹²⁵ See *id.* at 21 (citing the increase of hiring of nontenured track professors at a rate of “31 to 34 percent at public schools and 37 to 39 percent at private nonprofit schools” as a means, in part, to “address[] budget constraints”).

and who receive fewer or no benefits,¹²⁶ instructional spending is by no means the sole internal factor increasing costs on college campuses.¹²⁷

Non-instructional spending has increased significantly for both public and private non-profit schools.¹²⁸ The hiring of non-instructional staff, mostly at the executive managerial level, has spurred increased expenditures in higher education.¹²⁹ The compensation and benefits packages for these top personnel can be large expenditures,¹³⁰ thereby increasing costs for students.¹³¹ The nationwide ratio of two full-time administrators to every one tenured or tenure-track faculty members evidences this problem of administrative bloat.¹³² Further, these growing numbers of administrators have created “bureaucratic entropy,” in which executives and governing boards have consolidated “control over institutional priorities.”¹³³ The result of this consolidation is an increase in costs, with research finding that these “decisions accounted for a \$2 increase in cost for every \$1 increase caused by external factors.”¹³⁴

Another internal cost factor involves the rapid expansion of student services, like housing and dining facilities, due to “competition among schools to meet student and parent expectations.”¹³⁵ Multiple colleges and universities have spent tremendous amounts of money, acquiring significant debt in the process, in order to provide lavish physical facilities, like “student unions with movie theaters and wine bars; workout facilities with climbing walls and ‘lazy rivers’; and dormitories with single rooms and private baths.”¹³⁶ Capital and maintenance costs are not limited to discretionary spending to attract potential students either; these costs also

¹²⁶ See *id.* (providing that the reduced payment and benefits to nontenured and part-time faculty members “result in cost savings for schools”).

¹²⁷ *Not What it Used To Be*, ECONOMIST (Dec. 1, 2012), <http://www.economist.com/news/united-states/21567373-american-universities-represent-declining-value-money-their-students-not-what-it> (last visited Jan 27, 2013) (“[E]xpenditures on instruction have risen more slowly than in any other category of spending.”).

¹²⁸ See POSTSECONDARY EDUCATION: FINANCIAL TRENDS, *supra* note __, at 22.

¹²⁹ See *id.* at 25 (“From the 2003-2004 through 2009-2010 school years, noninstructional staff increased at public and private nonprofit schools by 10 and 9 percent, respectively. Most of the increase reflected growth in executive managerial staff that provide institutional support, which increased 14 percent at public schools and 21 percent at private nonprofit schools.”).

¹³⁰ See, e.g., Jack Stripling, *Pay and Perks Creep Up for Private-College Presidents: Some of the Highest Paid Get Cash to Cover Taxes, Too*, CHRON. HIGHER EDUC. (Dec. 9, 2012), <http://chronicle.com/article/PayPerks-Creep-Up-for/136187/> (providing that, “[i]n 2010, 36 private-college presidents earned more than \$1-million” and that many top administrators were beneficiaries of “grossing up,” the provision of cash to pay taxes on benefits).

¹³¹ See, e.g., Carly Q. Romalino, *Salaries of NJ Community College Presidents Scrutinized by State*, GLOUCESTER COUNTY TIMES (May 31, 2012, 4:00 AM), http://www.nj.com/gloucester-county/index.ssf/2012/05/salaries_of_nj_community_colle.html (discussing concerns regarding whether executive compensation at community colleges “is consistent with the basic principal of affordability”).

¹³² See Jenny Rogers, *Administrative Bloat: How Much is Enough?*, CHRON. HIGHER EDUC. (Nov. 1, 2012), <http://chronicle.com/article/Administrative-Bloat-How-Much/135500/>.

¹³³ Robert E. Martin, *College Costs Too Much Because Faculty Lack Power*, CHRON. HIGHER EDUC. (Aug. 5, 2012), <http://chronicle.com/article/College-Costs-Too-Much-Because/133357/> (claiming that the costs of higher education have increased based on this “bureaucratic entropy”).

¹³⁴ Rogers, *supra* note __.

¹³⁵ POSTSECONDARY EDUCATION: FINANCIAL TRENDS, *supra* note __, at 23.

¹³⁶ Martin, *supra* note __, at A1.

include deferred maintenance and “general deterioration of usable space.”¹³⁷ Finally, spending for athletics programs,¹³⁸ including athletic personnel,¹³⁹ and for technology¹⁴⁰ also have resulted in increased costs in higher education.

Given the decline in incomes at all income distribution levels over the past decade,¹⁴¹ as well as the financial losses that accompanied the Great Recession,¹⁴² these rising college costs have made it more difficult to access higher education for many students and their families.¹⁴³ These declines in access have been across the board, from community colleges¹⁴⁴ to four-year institutions.¹⁴⁵ Further, the rapid escalation of costs in higher education has had a disproportionate impact in terms of access on diverse populations¹⁴⁶ and on the lowest income families. In 2011, in order for one child to attend a four-year, public or private non-profit college, low-income families had to pay or borrow a monetary amount of 72 percent of their family income, compared to the financing of 27 percent by middle-class families and only 14 percent for high-income families.¹⁴⁷ As a result, “the increasing costs and lack of access to means of financing it have reduced both equity in participation and created an underinvestment in higher education by the families without resources.”¹⁴⁸

¹³⁷ Rita Kirshstein & Jane Wellman, *Technology and the Broken Higher Education Cost Model: Insights from the Delta Cost Project*, EDUCAUSE (Sept. 5, 2012), <http://www.educause.edu/ero/article/technology-and-broken-higher-education-cost-model-insights-delta-cost-project>.

¹³⁸ See Donald E. Shelton, *Equally Bad Is Not Good: Allowing Title IX “Compliance” by the Elimination of Men’s Collegiate Sports*, 34 U. MICH. J.L. REFORM 253, 261 (2001) (discussing the high costs of athletics programs in higher education); Steve Berkowitz et al., *How Student Fees Boost College Sports Amid Rising Budgets*, USA TODAY (Sept. 21, 2010, 12:27 PM), http://usatoday30.usatoday.com/sports/college/2010-09-21-student-fees-boost-college-sports_N.htm (“Students were charged more than \$795 million to support sports programs at 222 Division I public schools during the 2008-09 school year”).

¹³⁹ See, e.g., Kristi Dosh, *Schools Pay Out \$31 Million to Fired Coaches*, ESPN (Dec. 6, 2012, 12:59 PM), http://espn.go.com/blog/playbook/dollars/post/_/id/2520/schools-pay-out-31-million-to-fired-coaches (“Athletic departments whose teams play football in the Football Bowl Subdivision have committed more than \$31 million to head coaches in recent weeks. The largesse didn’t go to the coaches who will lead their teams on the sidelines next season. No, this spending free-for-all covered parting gifts for their coaches to hit the road.”).

¹⁴⁰ See Macchiarola & Abraham, *supra* note __, at 93 (citing increased spending on technology as a cause for increased costs in law schools).

¹⁴¹ See TRENDS IN COLLEGE PRICING, *supra* note __, at 9 (discussing these losses as a significant issue related to college prices).

¹⁴² See Arne Duncan, *Through the Schoolhouse Gate: The Changing Role of Education in the 21st Century*, 24 NOTRE DAME J.L. ETHICS & PUB. POL’Y 293, 306 (2010) (“In contrast to much of the twentieth century, when the U.S. economy and household wealth steadily grew, the first decade of the twenty-first century has already been called a ‘lost decade’ for the American workforce.”).

¹⁴³ See TRENDS IN COLLEGE PRICING, *supra* note __, at 9 (“[F]amilies have not been able to plan for the fluctuations in the value of the assets they have saved to pay for college. Rising tuition levels cause even more problems because of the economic environment in which they are occurring.”).

¹⁴⁴ See *id.* at 18 (finding that state funding limitations and tuition constraints have threatened access to community colleges).

¹⁴⁵ See Mamie Lynch et al., *Priced Out: How the Wrong Financial-Aid Policies Hurt Low-Income Students*, EDUCATION TRUST, 1 (2011), <http://www.baruch.cuny.edu/news/documents/PricedOut.pdf> (discussing how the escalating costs of college education have served as barriers to access).

¹⁴⁶ See *Economy Hurting Diversity*, ABA J., Mar. 2010, at 68 (“[D]iverse populations often are most affected by rising tuition costs and heavy debt loads.”).

¹⁴⁷ See Lynch et al., *supra* note __, at 2.

¹⁴⁸ Henry M. Levin, *The Economics of Education*, 4 ALB. GOV’T L. REV. 394, 422 (2011).

There have been some attempts to attack the rising costs of higher education and the concomitant barriers to access these costs engender. These efforts primarily have taken the form of protests¹⁴⁹ and lawsuits.¹⁵⁰ Despite their intended goals, these protests have been largely unsuccessful in their attempts to drive down college costs.¹⁵¹ Likewise, although there have been a few instances of court-ordered recoveries for retroactive fee increases on a breach of implied contract theory,¹⁵² lawsuits have not led to widespread eliminations of tuition and fee increases.¹⁵³ Consequently, for the most part, neither of these avenues has resulted in any significant solutions to the price tag problem of college and university attendance.

In light of these costs increases and faced with these potential barriers to access, a significant majority of postsecondary students have had to obtain student loans, taking on debt to finance the acquisition of degrees.¹⁵⁴ Most students agree to these debt obligations expecting an economic return on their investments.¹⁵⁵ However, excessive debts and inability to repay those debts have resulted in acute harms to individual students, their families, and society at large.¹⁵⁶

¹⁴⁹ See, e.g., Alisha Azevedo, *Hacker Group Breaches Thousands of University Records to Protest Higher Education*, CHRON. HIGHER EDUC. (Oct. 3, 2012, 4:23 PM), <http://chronicle.com/blogs/wiredcampus/hacker-group-breaches-thousands-of-university-records-to-protest-higher-education/40348> (“A team of hackers claims to have broken into more than 120,000 computer accounts at dozens of universities to protest what it sees as the high cost and low quality of higher education.”); *As UC Berkeley Investigates Police Brutality Against Students Protesting Fee Hikes, a Report from Inside the Takeover of Wheeler Hall*, DEMOCRACY NOW (Nov. 24, 2009), http://www.democracynow.org/2009/11/24/as_uc_berkeley_investigates_police_brutality (discussing the 2009 protest of the University of California Board of Regents decision to raise tuition by 32 percent).

¹⁵⁰ See, e.g., Josh Keller, *U. of California Must Refund \$38-Million in Fees to Students, Judge Rules*, CHRON. HIGHER EDUC. (Mar. 12, 2010), <http://chronicle.com/article/article-content/64667/> (discussing the order in the *Luquetta v. Regents of the University of California* case, in which the court found a breach of implied contract by the University when it raised fees above what was provided for in the publicly available official fee guide after class members accepted admission).

¹⁵¹ See Azevedo, *supra* note __ (describing the overall impact of the hacking of university websites in protest of the high costs of education as “minor”); *Regents Agree to Increase UC Tuition, Despite Protests*, LA JOLLA LIGHT (Nov. 19, 2009), <http://www.lajollalight.com/2009/11/19/regents-agree-to-increase-uc-tuition-despite-protests/> (discussing the approval of a 32 percent tuition and fee increase “[d]espite raucous student protests”).

¹⁵² See, e.g., *Kashmiri v. Regents of Univ. of Cal.*, 67 Cal. Rptr. 3d 635, 665 (Cal. Ct. App. 2007) (holding that the University of California “breached its contracts with the students . . . when it raised the educational fees for these terms after the students had received bills for these terms charging them a set fee to be paid by a particular date”); Keller, *supra* note __.

¹⁵³ See, e.g., Larry Gordon, *UC Plan Sees Tuition Rising Up to 16% Annually Over Four Years*, L.A. TIMES (Sept. 15, 2011), <http://articles.latimes.com/2011/sep/15/local/la-me-0915-uc-plan-20110915>.

¹⁵⁴ See *Trends in Student Aid 2012*, COLLEGEBOARD, 9 (2012), <http://trends.collegeboard.org/sites/default/files/student-aid-2012-full-report.pdf> (“Student loans make it possible for many students who could not otherwise pay for college to gain the postsecondary experience they need to improve their life prospects. Just as most small business start-ups would be impossible to launch without loans that can be repaid out of future earnings, many students would be unable to invest in themselves without debt financing.”).

¹⁵⁵ *Student Debt and the Class of 2011*, INST. FOR COLL. ACCESS & SUCCESS: THE PROJECT ON STUDENT DEBT, 2 (Oct. 2012), <http://projectonstudentdebt.org/files/pub/classof2011.pdf> (discussing the research that “continues to show strong economic returns on investments in college degrees”).

¹⁵⁶ See *Trends in Student Aid 2012*, *supra* note __, at 9 (“Although postsecondary education has a higher success rate in terms of future earnings than small businesses, excessive debt and barriers to managing that debt create major difficulties for many students.”).

Ultimately, the collective acquisition of such substantial student loan debts will limit access to higher education, with a disparate impact on low-income and first-generation students.¹⁵⁷

Approximately “two-thirds (66%) of college seniors who graduated in 2011 had student loan debt, with an average of \$26,600 for those with loans.”¹⁵⁸ This data is even more staggering for graduates of four-year, for-profit institutions of higher education, in that approximately 96% of those students have student loan debt at a borrowing rate of about 45% more than graduates of non-profit institutions.¹⁵⁹ With respect to advanced degrees, over 55% of all graduate-degree recipients in 2012 had student loan debt, at an average of \$43,500.¹⁶⁰ In 2011, 88.5% of all medical school graduates had educational debt, with an average debt of over \$183,000.¹⁶¹ For 2011 law school graduates, the average debt burden was over \$75,700 for public law schools and almost \$125,000 for private law schools.¹⁶² Collectively, “36.2% of law school graduates and 49% of medical school graduates graduated with six-figure debt.”¹⁶³

Federal student loans constitute the substantial bulk of all student lending.¹⁶⁴ These federal loans composed approximately 93% of all student lending in 2010-2011 and 2011-2012.¹⁶⁵ In 2011-2012, the total amount of federal student loans disbursed was approximately \$105 billion.¹⁶⁶ Federal student loans cumulatively “account[] for about 86% of the roughly \$1 trillion in student loans outstanding as of June 2012.”¹⁶⁷ Consequently, any reform to the general student loan debt issue must involve the process for the allocation of federal student loan money.

Given the substantial federal debt loan volume, it is unsurprising that the United States has recently attempted to implement a series of changes to improve the outcomes of its lending program and to ensure continued access to higher education. The most dramatic change to higher

¹⁵⁷ See *Policy Matters: Student Debt Burden*, AM. ASS’N OF STATE COLLS. AND UNIVS., 1 (2006), <http://aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/StudentDebtBurden.pdf> (“The trend of heavy debt burdens threatens to limit access to higher education, particularly for low-income and first-generation students, who tend to carry the heaviest debt burden.”). See also Bradley J. B. Toben & Carolyn P. Osolinik, *Nonprofit Student Lenders and Risk Retention: How the Dodd-Frank Act Threatens Students’ Access to Higher Education and the Viability of Nonprofit Student Lenders*, 64 BAYLOR L. REV. 158, 159 (2012) (“Lower- and middle-income students, including large numbers of Latino and African-American students, face an increasingly challenging environment in which to find funding to cover the costs of postsecondary education.”).

¹⁵⁸ STUDENT DEBT AND THE CLASS OF 2011, *supra* note __, at 2.

¹⁵⁹ See *id.* at 13 (discussing student debt at for-profit colleges).

¹⁶⁰ See Annamaria Andriotis, *Grad School: Higher Degrees of Debt*, WALL ST. J. (May 16, 2012), <http://online.wsj.com/article/SB70001424052702304192704577406652556893064.html>.

¹⁶¹ See Krupa, *supra* note __ (providing the average debt levels for both osteopathic and allopathic medical students).

¹⁶² See Debra Cassens Weiss, *Average Debt of Private Law School Grads is \$125K; It’s Highest at These Five Schools*, ABA J. (Mar. 28, 2012, 4:29 AM), http://www.abajournal.com/news/article/average_debt_load_of_private_law_grads_is_125k_these_five_schools_lead_to_m.

¹⁶³ Kantrowitz, *supra* note __, at 1.

¹⁶⁴ See Josh Mitchell, *Federal Student Lending Swells*, WALL ST. J., Nov. 28, 2012, at A1.

¹⁶⁵ See *Trends in Student Aid 2012*, *supra* note __ at 17 Figure 6.

¹⁶⁶ See *id.* (providing that \$113.4 billion in student loans were disbursed in 2011-2012, with \$8.1 billion of that amount being non-federal loans, which include private loans, loans to students from states, and loans from institutions).

¹⁶⁷ Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587, 590 (2012).

educational financing took place in 2010 with the federal government retaking responsibility of the federal student loan market, eliminating private commercial banks as subsidized intermediaries in the federal lending process.¹⁶⁸ Through this action, the United States government eliminated the Federal Family Education Loan program,¹⁶⁹ thereby establishing the William D. Ford Federal Direct Loan Program as the sole source of all new federal student loan funds.¹⁷⁰ This restructuring of the federal loan market was accomplished via the Student Aid and Fiscal Responsibility Act, which was included as a rider on the enacted Health Care and Education Reconciliation Act of 2010.¹⁷¹ By eliminating the student loan-related government subsidies given to financial institutions, the federal government is projected to save \$68 billion over eleven years, which will be used to expand Pell grants.¹⁷²

In addition to addressing the process for the issuance of new federal student loans, the Obama Administration also has modified how existing and future student loans can be repaid. Student loan repayment plans were part of the reforms that were incorporated into law by the Reconciliation Act of 2010.¹⁷³ Specifically, the Act modified the statutory Income-Based Repayment Plan to change the cap on monthly student loan payments from 15% to 10% of discretionary income.¹⁷⁴ It also amended the forgiveness period from 25 years to 20 years of repayment.¹⁷⁵ These changes were to become effective for “any loan made to a new borrower on and after July 1, 2014.”¹⁷⁶ Unsatisfied with the lag, the President announced the “Pay As You Earn” student loan repayment plan in October 2011, which would make the benefits outlined in

¹⁶⁸ See David M. Herszenhorn & Tamar Lewin, *Student Loan Overhaul Approved by Congress*, N.Y. TIMES, Mar. 26, 2010, at A16 (discussing the federal student loan direct lending overhaul). The bill was signed into law on March 30, 2010. See *President Obama Signs Historic Health Care and Education Legislation*, THE WHITE HOUSE (Mar. 30, 2010), <http://www.whitehouse.gov/the-press-office/president-obama-signs-historic-health-care-and-education-legislation>.

¹⁶⁹ See Nick Anderson & Alec MacGillis, *Obama’s Student Loan Plan Moving Forward with Health Bill*, WASH. POST (Mar. 18, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/18/AR2010031802289.html> (“The student loan measure would end . . . [the Federal Family Education Loan] program begun in 1965 that relies on banks and other financial institutions to lend students money for college while the government assumes virtually all the default risk.”).

¹⁷⁰ See *Student Loans Better for Students and Taxpayers*, PERFORMANCE.GOV, <http://goals.performance.gov/videos-and-feature-stories/student-loans-better-students-and-taxpayers> (last visited Jan. 30, 2013) (providing the Obama Administration’s perspective on the positive implications of the Student Aid and Fiscal Responsibility Act).

¹⁷¹ See Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, 1074 (codified as amended at 20 U.S.C. § 1071(d)(1) (2012)) (terminating the authority to make or insure new loans under the Federal Family Education Loan Program after June 30, 2010).

¹⁷² See *The Health Care and Education Reconciliation Act*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/education/higher-education/making-college-affordable> (last visited Jan. 30, 2013); Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. TIMES (Mar. 31, 2010), <http://www.nytimes.com/2010/03/31/us/politics/31obama.html> (“The new law will eliminate fees paid to private banks to act as intermediaries in providing loans to college students and use much of the nearly \$68 billion in savings over 11 years to expand Pell grants and make it easier for students to repay outstanding loans after graduating.”). But see Tom Robinson, *SAFRA One Year Later*, UNIV. BUS. (June 1, 2011, 12:00 AM), <http://www.universitybusiness.com/article/safra-one-year-later> (contesting the claimed \$68 billion savings).

¹⁷³ See Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029, 1081 (codified as amended at 20 U.S.C. § 1098e(e) (2012)) (modifying the statutory income-based repayment plan).

¹⁷⁴ See *id.* § 1098e(e)(1).

¹⁷⁵ See *id.* § 1098e(e)(2).

¹⁷⁶ See *id.* § 1098e(e).

the Reconciliation Act Income-Based Repayment Plan amendments available to certain borrowers prior to July 2014.¹⁷⁷ The Pay as You Earn plan began on December 21, 2012.¹⁷⁸

Although guided by good intentions,¹⁷⁹ these federal statutory and regulatory changes have some potentially negative aspects. Given the uncertainties tied to the statutory changes to the Income-Based Repayment Plan and the executively-mandated Pay As You Earn Plan, it is possible that the impact of these plans will be de minimis for lower-income borrowers, a population that arguably is in need of the most assistance.¹⁸⁰ Further, it has been argued that these changes will only further desensitize students to high tuition and fees.¹⁸¹ Another potential problem tied to these new plans is the likelihood of a substantially increased amount of interest that will be paid throughout the lifetime of the repayment plan.¹⁸² This is especially problematic given that most student loan borrowers who opt for the Income-Based Repayment plan “will repay their student loans in full.”¹⁸³ The possible tax consequences tied to the loan forgiveness also illustrate the negative aspects of these reformed plans, in that corresponding statutory changes were not made to the Internal Revenue Code at the time of the changes to the Income-Based Repayment plan in the Reconciliation Act. Without these amendments, the forgiven loan amount could be treated as income, resulting in a substantial tax burden for that year.¹⁸⁴ Finally, these changes only make the loan repayment process even more complex for student loan borrowers, most of whom have relatively little financial experience or savvy.¹⁸⁵

¹⁷⁷ See *FACT SHEET: “Help Americans Manage Student Loan Debt,”* THE WHITE HOUSE (Oct. 25, 2011), http://www.whitehouse.gov/the-press-office/2011/10/25/fact-sheet-help-americans-manage-student-loan-debt?utm_source=wh.gov&utm_medium=shorturl&utm_campaign=shorturl (discussing President Obama’s announcement regarding the “Pay as You Earn” proposal).

¹⁷⁸ See *Education Department Launches ‘Pay As You Earn’ Student Loan Repayment Plan*, U.S. DEP’T OF EDUC. (Dec. 21, 2012), <http://www.ed.gov/news/press-releases/education-department-launches-pay-you-earn-student-loan-repayment-plan> (announcing the availability of the Pay As You Earn plan).

¹⁷⁹ See Megan Slack, *How President Obama is Helping Lower Monthly Student Loan Payments*, THE WHITE HOUSE (Oct. 26, 2011, 11:11 AM), <http://www.whitehouse.gov/blog/2011/10/26/how-president-obama-helping-lower-monthly-student-loan-payments> (discussing the executive branch’s desire to help student loan borrowers as the motivation for the Pay As You Earn Plan).

¹⁸⁰ See, e.g., Jason Delisle & Alex Holt, *Safety Net or Windfall?: Examining Changes to Income-Based Repayment for Federal Student Loans*, NEW AM. FOUND., ii, (Oct. 2012), http://edmoney.newamerica.net/sites/newamerica.net/files/policydocs/NAF_Income_Based_Repayment.pdf (asserting that the statutory changes to the Income-Based Repayment plan and the Pay As You Earn plan will result in minimal new benefits for lower-income borrowers).

¹⁸¹ See Libby A. Nelson, *An Underused Lifeline*, INSIDE HIGHER ED (Oct. 23, 2012, 3:00 AM), <http://www.insidehighered.com/news/2012/10/23/despite-student-debt-concern-income-based-repayment-lags> (“[T]he expansion could encourage graduate schools to charge more, knowing students’ payments will be manageable no matter how much they borrow.”).

¹⁸² See Slack, *supra* note __. (“Although lower monthly payments may be better for some borrowers, lower payments may also mean you make payments for longer and the longer it takes to pay your loans, the more interest you pay compared to the standard repayment plan.”).

¹⁸³ See *Examples of Borrowers Eligible for Income-Based Repayment (IBR) and the Current Tax Consequences for Those Receiving Loan Forgiveness*, INST. FOR COLL. ACCESS & SUCCESS, PROJECT ON STUDENT DEBT, http://www.projectonstudentdebt.org/files/pub/IBR_forgiveness_ex.pdf (last visited Feb. 1, 2013).

¹⁸⁴ See Ron Lieber, *For Student Borrowers, Relief Now May Mean a Big Tax Bill Later*, N.Y. TIMES, Dec. 15, 2012, at B1.

¹⁸⁵ For example, the Pay As You Earn plan is now one of seven repayment plans for federal student loans. See *Repayment Plans*, FEDERAL STUDENT AID, available at <http://studentaid.ed.gov/repay-loans/understand/plans> (last

Consequently, these recent federal attempts to reform the student loan industry are not sufficient to fully address the problems attached to the growing debt load of American students.¹⁸⁶ These governmental changes do not provide the complete assistance that students need, especially as they are focused on payment plans after loan debts have been incurred.¹⁸⁷ Further, the federal government has not satisfied its obligations to provide complete information to student borrowers about the availability and implications of these alternate repayment plans, which was readily admitted in a June 2012 presidential memorandum.¹⁸⁸ The lack of information about repayment options is representative of the lack of information that is currently present at all stages of the student loan process, and it is a deficiency that needs to be remedied.¹⁸⁹ The loan counseling process would be an appropriate place to start to cure the problems of growing student loan debts and their impact on access to higher education.

IV. REFORMING THE FEDERAL STUDENT LOAN COUNSELING PROCESS TO PROMOTE INFORMED ACCESS AND TO REDUCE STUDENT DEBT BURDENS

Rather than limiting access¹⁹⁰ or addressing the problem only after student loans have been incurred,¹⁹¹ more needs to be done to help students have informed access and not leverage their entire future financial livelihoods by acquiring such significant student loan debts.¹⁹² There

visited Jan. 30, 2013) (providing a chart of the seven possible repayment plans and advising students to “[w]ork with your loan servicer to choose a federal student loan repayment plan that’s best for you”).

¹⁸⁶ See, e.g., Matt Leichter, *Income-Based Repayment: Lifeline for Law Graduates, Certain Loser for Government*, LAW.COM (Oct. 11, 2012),

http://www.americanlawyer.com/PubArticleALD.jsp?id=1202574613758&IncomeBased_Repayment_Lifeline_for_Law_Graduates_Certain_Loser_for_Government&slreturn=20130102100548 (discussing how the Income-Based Repayment plan would result in additional interest payments for college graduates and characterizing the plan as “a bureaucratic, protracted Chapter 13 bankruptcy repayment plan that coincidentally allows the Department of Education to conceal the effective default rate on large federal student loans [for professional students]”).

¹⁸⁷ See Michael Stratford, *Obama’s ‘Pay as You Earn’ Plan for Student Borrowers Becomes Official*, CHRON.

HIGHER EDUC. (Nov. 1, 2012), <http://chronicle.com/article/Obamas-Pay-as-You-Earn-Plan/135504/?key=Sj1xc1VrZSZAYCkYm5GYj9RO3VjMEJxMHdBaS1wbltWFA==> (discussing how “Pay as You Earn” is a plan to help student loan debtors after the debts have been incurred).

¹⁸⁸ See Presidential Memorandum: Improving Repayment Options, *supra* note __, 77 Fed. Reg. at 35,241 (“[T]oo few borrowers are aware of the options available to them to help manage their student loan debt, including reducing their monthly payment through [Income-Based Repayment]. Additionally, too many borrowers have had difficulties navigating and completing the IBR application process once they have started it.”).

¹⁸⁹ See Ron Lieber, *Clearing Up Some Confusion About the New Federal Student Loan Rules*, N.Y. TIMES, Oct. 27, 2011, at B7 (providing that any change regarding student loans “almost inevitably leads to enormous confusion” and describing student loan borrowers as “befuddled” regarding the recent federal governmental reforms to student loan repayment plans).

¹⁹⁰ See *supra* note __.

¹⁹¹ See *supra* text accompanying note __.

¹⁹² See Jon Marcus, *Student Loan Debt And Financial Literacy: Lack Of Safeguards Driving Student Loan Debt*, HUFFINGTON POST (Oct. 22, 2012, 11:45 AM), http://www.huffingtonpost.com/2012/10/22/student-loan-debt-and-fin_n_2001104.html?ref=topbar (“[S]ome college and university financial-aid departments don’t publicize their office hours or contact information, use technical language students don’t understand, provide materials only in English while serving more and more non-native-English speakers, are open only during the days when increasing numbers of students are taking night classes, and put their least experienced employees on the front lines to try to answer student questions.”).

are many approaches to confronting this situation,¹⁹³ and certainly there is no panacea for the debt problem.¹⁹⁴ However, given the gravity of the situation, innovative measures are needed that can help ameliorate the student loan debt issue. One such measure would be the enhancement of the statutory requirements of the Higher Education Act, along with the regulation promulgated pursuant to its authority, regarding the counseling that is attached to the acquisition of federal student loans.¹⁹⁵ This proposed statutory change addresses what media and scholarly attention on the student debt crisis has largely ignored: the way students are educated about student loans before taking on excessive debts.¹⁹⁶ Further, although a moderate proposal, these changes are readily achievable and would serve the existing interests of students, the federal government, and institutions of higher education without directly limiting access.¹⁹⁷ Instead, these amendments would allow for increased access to colleges and universities.

¹⁹³ See, e.g., Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 475 (2012) (characterizing changes to aspects of the federal student loan repayment process as the “first tier of relief for a student-loan debtor”); Kamille Wolff Dean, *Student Loans, Politics, and the Occupy Movement: Financial Aid Rebellion and Reform*, 46 J. MARSHALL L. REV. 105, 162-63 (2012) (advocating for the increased regulation of student loan lenders as one measure of student loan reform); Lonnie Golden, *Becoming Too Small to Bail? Prospects for Workers in the 2011 Economy and 112th Congress*, 87 IND. L.J. 11, 30 (2012) (touting the passage of the Student Aid and Fiscal Responsibility Act as an important reform for access to higher education); Karen Kornbluh & Rachel Homer, *The New Family Values Agenda: Renewing Our Social Contract*, 4 HARV. L. & POL’Y REV. 73, 83 (2010) (arguing that the Obama Administration’s reforms of student loans were implemented to grow relative educational attainment, in the hope that these reforms would also lead to increases in economic competitiveness); Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 143 (1996) (arguing for more leniency in the interpretation of the undue hardship standard in bankruptcy for the discharge of student loans); Comment, Laura Miller, *The Option That Is Not an Option: The Invalidity of the Partial Discharge Option for the Student Loan Debtor*, 39 WAKE FOREST L. REV. 1053, 1075-76 (2004) (arguing for either the elimination of the undue hardship standard in bankruptcy for student loans or a declaration that all student loans are not dischargeable in bankruptcy).

¹⁹⁴ See Jill Riepenhoff & Mike Wagner, *Investigation: Federal Student Loans Become Constant Burden*, COLUMBUS DISPATCH (Dec. 16, 2012, 8:26 AM), <http://www.dispatch.com/content/stories/local/2012/12/16/constant.html> (noting that the calls for the discharge of student loans in bankruptcy, if heeded, would not result in a panacea for the debt problem).

¹⁹⁵ See *infra* text accompanying notes __.

¹⁹⁶ See, e.g., Robert B. Milligan, *Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U.C. DAVIS L. REV. 221 (2000) (discussing only exit counseling in relationship to student loans); Schumpeter, *The Latest Bubble?*, ECONOMIST (Apr. 13, 2011), http://www.economist.com/blogs/schumpeter/2011/04/higher_education (predicting disastrous results for the bursting of the higher education bubble, but not addressing the need for education prior to the acquisition of student loan debts).

¹⁹⁷ See Presidential Memorandum: Improving Repayment Options, *supra* note __, 77 Fed. Reg. at 35,241 (articulating a desire to improve student access to information about student loans); Equal Justice Works, *Some Colleges Help Students Avoid, Handle Debt*, U.S. NEWS & WORLD REP. (Nov. 14, 2012), <http://www.usnews.com/education/blogs/student-loan-ranger/2012/11/14/some-colleges-help-students-avoid-handle-debt> (describing various ways that some institutions of higher education are assisting students in avoiding or lowering debt levels); Pardo & Lacey, *supra* note __, at 439 (positing that “thoughtful credit counseling” could have resulted in lower amounts of student loan monies being acquired by individual students who now seek discharge of those debts in bankruptcy).

Under the current version of the Higher Education Act, two types of counseling are required concerning federal student loans—exit counseling and entrance counseling.¹⁹⁸ Exit counseling was added to the Higher Education Act in 1986, and its plain language solely required that institutions make simple exit counseling available to borrowers.¹⁹⁹ More detailed information was added to this provision via the Higher Education Amendments of 1992, but this statutory addition still only required the exit counseling to be made available for student borrowers.²⁰⁰ In the Higher Education Amendments of 1998, a provision was added that allowed institutions of higher education to utilize electronic means to deliver personalized exit counseling.²⁰¹ It was only in the last reauthorization of the Higher Education Act, the Higher Education Opportunity Act of 2008, that exit counseling became statutorily mandated for student borrowers.²⁰² This statutory amendment also substantially increased the amount of information

¹⁹⁸ See Higher Education Act of 1965, 20 U.S.C. § 1092(b), (l) (2012) (requiring institutions to provide entrance counseling for first-time student borrowers and exit counseling). Throughout this section, the full text of each statutory change has been included within the footnotes to illustrate the progression of these counseling requirements and to demonstrate Congress’s past willingness to amend the statutes governing these processes.

¹⁹⁹ See Higher Education Act of 1965, Pub. L. No. 99-498, § 485, 100 Stat. 1268 (codified as amended at 20 U.S.C. § 1092(b) (2012)) (emphasis added) (“Each eligible institution *shall*, through financial aid officers or otherwise, *make available* counseling to borrowers (individually or in groups) of loans which are made, insured, or guaranteed under part B of this title prior to the completion of the course of study for which the borrower enrolled at the institution or at the time of departure from such institution. The counseling required by this subsection shall include—”(1) general information with respect to the average indebtedness of students who have loans under part B or part E; and “(2) the average anticipated monthly repayments, a review of the repayment options available, together with such debt and management strategies as the institution determines are designed to facilitate the repayment of such indebtedness. In the case of a borrower who leaves an institution without the prior knowledge of the institution, the institution shall attempt to provide the information to the student in writing.”).

²⁰⁰ See Higher Education Act of 1965, Pub. L. No. 102-325, § 485, 106 Stat. 448 (codified as amended at 20 U.S.C. § 1092 (2012)) (emphasis added) ((b)“Each eligible institution *shall*, through financial aid officers or otherwise, *make available* counseling to borrowers (individually or in groups) of loans which are made, insured, or guaranteed under part B (other than loans made pursuant to section 428B) of this title or made under parts D or E of this title prior to the completion of the course of study for which the borrower enrolled at the institution or at the time of departure from such institution. The counseling required by this subsection shall include—”(i) the average anticipated monthly repayments, a review of the repayment options available, and such debt and management strategies as the institution determines are designed to facilitate the repayment of such indebtedness; and “(ii) the terms and conditions under which the student may obtain partial cancellation or defer repayment of the principal and interest pursuant to sections 428(b), 464(c)(2), and 465. “(B) In the case of borrower who leaves an institution without the prior knowledge of the institution, the institution shall attempt to provide the information described in subparagraph (A) to the student in writing. “(2)(A) Each eligible institution shall require that the borrower of a loan made under parts B, D, or E submit to the institution, during the exit interview required by this subsection—”(i) the borrower’s expected permanent address after leaving the institution (regardless of the reason for leaving); “(ii) the name and address of the borrower’s expected employer after leaving the institution; “(iii) the address of the borrower’s next of kin; and “(iv) any corrections in the institution’s records relating the borrower’s name, address, social security number, references, and driver’s license number. “(B) The institution shall, within 60 days after the interview, forward any corrected or completed information received from the borrower to the guaranty agency indicated on the borrower’s student aid records.”).

²⁰¹ See Higher Education Act of 1965, Pub. L. No. 105-244, § 485, 112 Stat. 1581 (codified as amended at 20 U.S.C. § 1092 (2012)) (“(C) Nothing in this subsection shall be construed to prohibit an institution of higher education from utilizing electronic means to provide personalized exit counseling.”).

²⁰² See Higher Education Opportunity Act, Pub. L. No. 110-315, § 485, 122 Stat 3078 (codified as amended at 20 U.S.C. § 1092 (2012)) (emphasis added) (“(b)(1)(A) Each eligible institution *shall*, through financial aid offices or

that is to be conveyed during the exit counseling process.²⁰³ Statutorily required entrance counseling prior to the first disbursement of student loan monies (and not prior to the signing of the master promissory note for the student loan) was only added as an amendment to the Higher Education Act via the Higher Education Opportunity Act of 2008.²⁰⁴ Prior to these

otherwise, *provide* counseling to borrowers of loans that are made, insured, or guaranteed under part B (other than loans made pursuant to section 428C or loans under section 428B made on behalf of a student) or made under part D (other than Federal Direct Consolidation Loans or Federal Direct PLUS Loans made on behalf of a student) or made under part E of this title prior to the completion of the course of study for which the borrower enrolled at the institution or at the time of departure from such institution. The counseling required by this subsection shall include—(i) information on the repayment plans available, including a description of the different features of each plan and sample information showing the average anticipated monthly payments, and the difference in interest paid and total payments, under each plan; (ii) debt management strategies that are designed to facilitate the repayment of such indebtedness; (iii) an explanation that the borrower has the options to prepay each loan, pay each loan on a shorter schedule, and change repayment plans; (iv) for any loan forgiveness or cancellation provision of this title, a general description of the terms and conditions under which the borrower may obtain full or partial forgiveness or cancellation of the principal and interest, and a copy of the information provided by the Secretary under section 485(d); (v) for any forbearance provision of this title, a general description of the terms and conditions under which the borrower may defer repayment of principal or interest or be granted forbearance, and a copy of the information provided by the Secretary under section 485(d); (vi) the consequences of defaulting on a loan, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation; (vii) information on the effects of using a consolidation loan under section 428C or a Federal Direct Consolidation Loan to discharge the borrower’s loans under parts B, D, and E, including at a minimum—(I) the effects of consolidation on total interest to be paid, fees to be paid, and length of repayment; (II) the effects of consolidation on a borrower’s underlying loan benefits, including grace periods, loan forgiveness, cancellation, and deferment opportunities; (III) the option of the borrower to prepay the loan or to change repayment plans; and (IV) that borrower benefit programs may vary among different lenders; (viii) a general description of the types of tax benefits that may be available to borrowers; and (ix) a notice to borrowers about the availability of the National Student Loan Data System and how the system can be used by a borrower to obtain information on the status of the borrower’s loans.’”.

²⁰³ *See id.*

²⁰⁴ *See id.* (“(1) ENTRANCE COUNSELING FOR BORROWERS.—(1) DISCLOSURE REQUIRED PRIOR TO DISBURSEMENT.—(A) IN GENERAL.—Each eligible institution shall, at or prior to the time of a disbursement to a first-time borrower of a loan made, insured, or guaranteed under part B (other than a loan made pursuant to section 428C or a loan made on behalf of a student pursuant to section 428B) or made under part D (other than a Federal Direct Consolidation Loan or a Federal Direct PLUS loan made on behalf of a student), ensure that the borrower receives comprehensive information on the terms and conditions of the loan and of the responsibilities the borrower has with respect to such loan in accordance with subparagraph (B). Such information—(i) shall be provided in a simple and understandable manner; and (ii) may be provided—(I) during an entrance counseling session conducted in person; (II) on a separate written form provided to the borrower that the borrower signs and returns to the institution; or (III) online, with the borrower acknowledging receipt of the information. (B) USE OF INTERACTIVE PROGRAMS.—The Secretary shall encourage institutions to carry out the requirements of subparagraph (A) through the use of interactive programs that test the borrower’s understanding of the terms and conditions of the borrower’s loans under part B or D, using simple and understandable language and clear formatting. (2) INFORMATION TO BE PROVIDED.—The information to be provided to the borrower under paragraph (1)(A) shall include the following: (A) To the extent practicable, the effect of accepting the loan to be disbursed on the eligibility of the borrower for other forms of student financial assistance. (B) An explanation of the use of the master promissory note. (C) Information on how interest accrues and is capitalized during periods when the interest is not paid by either the borrower or the Secretary. (D) In the case of a loan made under section 428B or 428H, a Federal Direct PLUS Loan, or a Federal Direct Unsubsidized Stafford Loan, the option of the borrower to pay the interest while the borrower is in school. (E) The definition of half-time enrollment at the institution, during regular terms and summer school, if applicable, and the consequences of not maintaining half-time enrollment. (F) An explanation of the importance of contacting the appropriate offices at the institution of higher education if the

statutory requirements, in December 1994, the Department of Education promulgated final regulations regarding both required initial and exit counseling.²⁰⁵ There are currently no requirements, either statutory or regulatory, for interim counseling prior to the disbursement of each allocation of student loan money.²⁰⁶

Under the current authorizing statute and the Department of Education regulation, entrance and exit counseling may be conducted in person or electronically.²⁰⁷ The vast majority of this counseling is conducted online,²⁰⁸ and it does not necessarily provide individualized information for the student borrower, as that is not required by law.²⁰⁹ For both entrance and exit counseling, a significant amount of information is required to be conveyed to the student loan borrower under the relevant statute.²¹⁰ Although the statutory provision for entrance counseling mandates that the loan information “shall be provided in a simple and understandable manner,”²¹¹ it subsequently requires that eleven distinct items be provided to the borrower

borrower withdraws prior to completing the borrower’s program of study so that the institution can provide exit counseling, including information regarding the borrower’s repayment options and loan consolidation. ‘(G) Sample monthly repayment amounts based on—(i) a range of levels of indebtedness of—(I) borrowers of loans under section 428 or 428H; and (II) as appropriate, graduate borrowers of loans under section 428, 428B, or 428H; or (ii) the average cumulative indebtedness of other borrowers in the same program as the borrower at the same institution. ‘(H) The obligation of the borrower to repay the full amount of the loan, regardless of whether the borrower completes or does not complete the program in which the borrower is enrolled within the regular time for program completion. ‘(I) The likely consequences of default on the loan, including adverse credit reports, delinquent debt collection procedures under Federal law, and litigation. ‘(J) Information on the National Student Loan Data System and how the borrower can access the borrower’s records. ‘(K) The name of and contact information for the individual the borrower may contact if the borrower has any questions about the borrower’s rights and responsibilities or the terms and conditions of the loan.’”).

²⁰⁵ See Counseling Borrowers Regulation, 34 C.F.R. § 685.304 (2010).

²⁰⁶ See 20 U.S.C. § 1092 (2012) (featuring no provision on interim counseling); Counseling Borrowers Regulation, 34 C.F.R. § 685.304 (2010) (same).

²⁰⁷ See 20 U.S.C. § 1092(b)(1)(C) (2012) (“Nothing in this subsection shall be construed to prohibit an institution of higher education from utilizing electronic means to provide personalized exit counseling.”); 20 U.S.C. § 1092(l)(1)(A)(ii) (2012) (“Such information [‘on the terms and conditions of the loan and of the responsibilities the borrower has with respect to such loan’] may be provided-- (I) during an entrance counseling session conducted [sic] in person; (II) on a separate written form provided to the borrower that the borrower signs and returns to the institution; or (III) online, with the borrower acknowledging receipt of the information.”). See also Counseling Borrowers Regulation, 34 C.F.R. § 685.304(a)(3) (2010) (providing that entrance counseling may be provided in person, on a written form acknowledged in writing by the borrower, or online); *id.* § 685.304(b)(2) (requiring that exit counseling be in person, by audiovisual presentation, or by interactive electronic means).

²⁰⁸ See *Exit and Entrance Counseling*, FINAID.ORG, <http://www.finaid.org/loans/loancounseling.phtml> (last visited Feb. 3, 2013) (“Many colleges favor the use of web-based loan counseling.”).

²⁰⁹ See 34 C.F.R. § 685.304(a)(6)(v) (2010) (providing that in entrance counseling the student borrower must be informed of sample monthly repayment amounts based on “a range of student levels of indebtedness” or “[t]he average indebtedness of other borrowers in the same programs at the same school”); 34 C.F.R. § 685.304(b)(4)(i) (2010) (emphasis added) (providing that exit counseling must “inform the student borrower of the average anticipated monthly repayment amount based on the student borrower’s indebtedness *or* on the average indebtedness of student borrowers . . . for attendance at the same school or in the same program of study at the same school”).

²¹⁰ See 20 U.S.C. § 1092 (2012).

²¹¹ 20 U.S.C. § 1092(l)(1)(A)(i) (2012).

during entrance counseling.²¹² Under the Higher Education Opportunity Act, nine distinct items are required for exit counseling.²¹³

In accordance with the statutory and regulatory provisions regarding counseling borrowers, entrance and exit counseling may be completed via the Department of Education's Federal Student Aid website.²¹⁴ However, each of these counseling processes, in their current forms, appears to be essentially a pro forma exercise. For example, according to the website, entrance counseling takes "20-30 minutes to complete."²¹⁵ The exit counseling process "takes approximately 30 minutes to complete."²¹⁶ In actuality, though, these processes can be completed in significantly less time--perhaps in as short a time as five minutes.²¹⁷ Given the tens (if not hundreds) of thousands of dollars that may be ultimately obtained in student loans, these short allotments of time do not seem to indicate a serious effort at providing students with the necessary information to fully understand the significance of the legal responsibilities attached to the acquisition of student loans.²¹⁸

Additionally, the inclusion of interactive quizzes as part of the entrance and exit counseling on the Department of Education's website does not provide any meaningful education for the student borrower.²¹⁹ First, most online systems, like that on the governmental website, have no actual means to verify that the individual student borrower actually completes the process; the Department of Education's online counseling only requires the provision of the student loan pin and other identifying information.²²⁰ Further, the system, at least in the past,²²¹

²¹² See 20 U.S.C. § 1092(l)(1)(B)(2) (2012). For the text of these current statutory provisions, see *supra* note __. The loan counseling regulation expands these statutory requirements to include twelve pieces of information. See 34 C.F.R. § 685.304(a)(6)(i-xii) (2010).

²¹³ See 20 U.S.C. § 1092(b)(1)(A) (2012). For the text of these current statutory provision, see *supra* note __. The loan counseling regulation expands these statutory requirements to include thirteen pieces of information. See 34 C.F.R. § 685.304(b)(4)(i-xiii) (2010).

²¹⁴ See STUDENTLOANS.GOV, <https://studentloans.gov/myDirectLoan/index.action?bypassSigninButton=true> (last visited Feb. 3, 2013) (providing links to both entrance and exit counseling).

²¹⁵ *Entrance Counseling, What You Need*, STUDENTLOANS.GOV, <https://studentloans.gov/myDirectLoan/whatYouNeed.action?page=entrance> (last visited Feb. 3, 2013).

²¹⁶ *National Student Loan Data System (NSLDS) for Students, Exit Counseling*, STUDENTLOANS.GOV http://www.nsls.ed.gov/nsls_SA/SaEcTour.do?page=SaEcIntro2 (last visited Feb. 3, 2013).

²¹⁷ See *Student Loan Entrance Counseling is a Joke*, YOBUCKO: YOUR PERSONAL FIN. GUIDE (May 10, 2012), <http://yobucko.com/education/student-loan-entrance-counseling-is-a-joke> (providing that it took an individual five minutes to retake the student loan entrance counseling process that he or she completed "prior to taking out approximately \$120,000 in student loans").

²¹⁸ See, e.g., Jhanay Davis, *Entrance Loan Counseling: You're Joking, Right?*, ATLANTA TRIB. (Aug. 29, 2011), available at http://atlantatribune.typepad.com/the_life_and_times_of_and/2011/08/entrance-loan-counseling-youre-joking-right.html ("This 20-30 minute interactive quiz is supposed to give information about things like the Master Promissory Note (MPN), borrower's rights, forbearance and default. While this concept sounds great in theory, the results are not that great in reality. It is only required of first-time borrowers, usually freshman students. Recent high school graduates are consumed by reflecting on high school, enjoying the summer before college and imagining the fun that college will bring. These 20-30 minutes do not compare to the other events in their memory banks.").

²¹⁹ See, e.g., *National Student Loan Data System (NSLDS) for Students, Exit Counseling, Basics*, STUDENTLOANS.GOV, http://www.nsls.ed.gov/nsls_SA/SaEcTour.do?page=SaEcIntro2 (last visited Feb. 3, 2013) ("There will be a series of short quizzes that you will be required to complete before continuing through the session.").

²²⁰ Although the Department of Education's website warns that "[u]se of another person's PIN constitutes fraud" and directs users to "[u]se only your own PIN," *Entrance Counseling, What You Need*, *supra* note __, such a

has featured an interactive quiz that does not provide a level of rigor to facilitate the student borrower’s complete understanding of the nature of the financial agreement.²²² The ease of completion of these interactive exercises without greater holistic understanding reduces the impact of the possible positive “train-and-test model” for agreement to the student loan process.²²³

Consequently, despite the extensive amount of provisions within the authorizing statute and regulation, the current, required student loan counseling process has not been effective in actually educating students as to the full extent of the legal responsibilities that they are taking on when acquiring student loan debts.²²⁴ The process has become so ineffective that, in at least one major study of approximately 13,000 present and former students,²²⁵ over forty percent of the federal student loan borrower respondents replied “that they had not received loan counseling.”²²⁶ The inefficacy of the counseling process is acutely problematic, given that if the process were more effective and more informative, it could help to ensure continued access to higher education and to curb excessive student loan debts.²²⁷

prescription contemplates the completion of the counseling by someone other than the student loan borrower. *See also Direct Loan Entrance Counseling*, MAPPING YOUR FUTURE, <http://mappingyourfuture.org/oslc/counseling/index.cfm?act=Start&Step=2#gettingstarted> (emphasis in original) (last visited Feb. 3, 2013) (providing the following instruction as part of online entrance counseling that satisfies the federal requirements for student loan counseling: “**PARENTS:** Please don’t complete the counseling session on behalf of your son or daughter, as this federal requirement helps the student understand the rights and responsibilities of borrowing a student loan.”).

²²¹ *See* Ian Ayres, *Regulating Opt-Out: An Economic Theory of Altering Rules*, 121 YALE L.J. 2032, 2080 n. 135 (2012) (citing to a website that provides the “questions and answers for the online entrance counseling test offered by the U.S. Department of Education,” which claimed that “[s]tudents can pass merely by answering ‘all of the above’ or ‘true’ to all of the questions.”). *Accord Student Loan Entrance Counseling is a Joke*, *supra* note __ (describing the answer key of the federally mandated student loan entrance counseling quiz as follows: “For every True/False question, *the answer is TRUE*. For every multiple choice questions [sic], *the answer is ALL OF THE ABOVE*”).

²²² *See* Ayres, *supra* note __, at 2080 (describing “the standard online test offered by the U.S. Department of Education [as] extraordinarily easy, containing simple true/false and multiple-choice questions that largely restate the informative text presented to the borrower.”).

²²³ *See id.* (using student loan counseling quizzes as an ineffective example of the “train-and-test model,” in a taxonomy of contract theory models that minimize harm to a contracting party, given their ease of completion).

²²⁴ *See* Loonin, *supra* note __, at 9 (discussing the ineffectiveness of the existing counseling requirements for federal student loans).

²²⁵ *See* Healey Whitsett & Rory O’Sullivan, *Lost Without a Map: A Survey about Students’ Experiences Navigating the Financial Aid Process*, NERA ECONOMIC CONSULTING, 2 (Oct. 11, 2012), http://www.nera.com/nera-files/PUB_Student_Loan_Borrowers_1012.pdf (providing information about the nature of the study).

²²⁶ *See id.* at 15 (“Despite the fact that the federal government mandates entrance and exit counseling, over 40 percent of respondents with federal loans told us that they had not received loan counseling . . . There are several explanations for this statistic. First, colleges may not be adequately complying with the legal requirement to provide counseling. Second, lax standards may allow schools to offer poor quality programs, which students do not recognize as counseling. Third, borrowers may not remember that they received counseling resulting from poor quality or students simply forgetting. It will require further research to fully understand this feedback, though the responses strongly suggest the loan counseling system is not working for students.”).

²²⁷ *See id.* at 16-17 (discussing how many student loan borrowers wished that the student loan counseling process had been more informative for their specific situations and how that could have resulted in lower amounts of loans).

Therefore, given the importance of maintaining access to higher education and the current deficiencies of the law governing the acquisition of federal student loans, a significant and serious legislative effort is needed to enhance the counseling requirements attached to the federal student loan process.²²⁸ Specifically, 20 U.S.C. § 1092, the statute regarding the provision of institutional and financial assistance information to student borrowers, as well as the coordinating administrative regulation on counseling borrowers, should be amended in order to accomplish the twin goals of providing informed access to higher education and of helping to reduce student loan debt burdens.²²⁹ These proposed amendments involve 1) the nature of delivery of the entrance and exit counseling, 2) the addition of interim counseling, and 3) a prohibition on the charging of any fee associated with these enhancements. Although relatively modest in scope,²³⁰ these changes to the current legal provisions regarding student loan counseling would provide vitally needed education to student loan borrowers—a stated goal of the federal government²³¹ and the core mission of public and private nonprofit institutions of higher education.²³²

The first necessary amendments to the statutory and regulatory framework of the student loan counseling process would require institutions to provide only in-person entrance and exit counseling to students.²³³ Within these in-person entrance and exit counseling sessions, the dissemination of specific, personalized information regarding students’ debt and repayment obligations should be mandated, rather than just allowing the provision of information based on the averages of other students in the same program or at the same school.²³⁴ The second form of necessary amendments to the statutory and regulatory framework of the student loan counseling process would involve the addition of a requirement that institutions provide in-person, personalized, interim counseling to student loan borrowers, prior to each disbursement of student

²²⁸ See, e.g., Jonathan D. Glater, *supra* note __, at 72 (providing a general discussion about how “legislative and regulatory responses” to certain issues regarding student loans “have not gone far enough in facilitating access to higher education”).

²²⁹ See 20 U.S.C. § 1092 (2012); Counseling Borrowers Regulation, 34 C.F.R. § 685.304 (2010).

²³⁰ This portion of the normative section of the Article is intentionally brief and narrow to reinforce the relative ease with which these statutory and regulatory amendments could be effectuated.

²³¹ See *Education: Knowledge and Skills for the Jobs of the Future*, THE WHITE HOUSE, <http://www.whitehouse.gov/issues/education/higher-education> (last visited Feb. 3, 2013) (“In the vein of transparency and accountability, the President tasked his Administration with giving students and families new tools and relevant information that will help them make sound financial decisions in pursuing their higher education goals.”).

²³² See Tim Hatcher, *Shanghaiing America’s Best Thinking: Musings on University Corporatization, Chinese Partnerships, and Embracing Critical Theory*, 39 MCGEORGE L. REV. 763, 764 (2008) (“Today’s public university evolved from merging of the ideals of private land grants, European universities, and colonial colleges whose mission was to educate the population for life in a democratic society.”); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 964 (2001) (discussing the “widely shared belief that the primary mission of colleges and universities is to educate those students who are likely to become the leaders of society in an increasingly diverse world”).

²³³ This requirement would be live, in-person counseling for traditional brick and mortar schools and synchronous, in-person counseling for those students who attend only online programs at traditional colleges and universities or students who attend entirely online institutions of higher education.

²³⁴ See *supra* note __.

aid.²³⁵ Finally, in order to block institutions from attempting to increase costs when implementing these enhanced student loan counseling processes that are designed to ease student loan debt burdens, a statutory change to the program participation agreement statute would be necessary, which would bar the assessment of any fee or charge to students for student loan counseling.²³⁶

By requiring institutions to have in-person entrance and exit loan counseling which students must attend as a condition of obtaining student loan monies, as well as interim, personalized counseling prior to each disbursement, the beneficiaries of taxpayer-supported federal student loan money would have more skin in the game.²³⁷ This would result in more transparency for the institution and more financial literacy for the student,²³⁸ as well as in greater societal benefits.²³⁹ In effect, it would provide a significant improvement to the status quo of the student loan counseling that is now required. The current allowances for non-synchronous, online, non-personalized student loan counseling do not sufficiently present the importance of the obligations that accompany the acquisition and repayment of student debt.²⁴⁰ Quite simply, the statutory encouragement to facilitate the counseling process through interactive electronic means is self-defeating given how paltry the current interactive aspects measure the understanding of the borrowers of the substantial amount of complicated information that is required to be conveyed.²⁴¹

Conversely, the enhancement of the statutory and regulatory framework in these ways would provide several distinct measures of informed access, thereby educating students that the option of taking the full amount of available student loan monies may not be the wisest investment for their futures. Further, this proposal would result in increased accountability on the part of all of the stakeholders in the process. It would require an actual commitment to addressing the problem of student debt burdens by the federal government.²⁴² It would require that institutions, which garner a significant amount of their revenue from tuition and fees that are

²³⁵ Currently, there are no statutory or regulatory provisions for interim student loan counseling. *See supra* text accompanying note ____.

²³⁶ This could be accomplished through an addition to the statutory prohibition on institutions charging students fees “for processing or handling any application, form, or data required to determine the student’s eligibility for [financial] assistance.” 20 U.S.C. § 1094(a)(2) (2012).

²³⁷ *See* Iman Anabtawi & Steven L. Schwarcz, *Regulating Systemic Risk: Towards an Analytical Framework*, 86 NOTRE DAME L. REV. 1349, 1385-86 (2011) (characterizing “skin in the game” as “sharing at least some portion of the risk of loss associated with their actions”).

²³⁸ *See* Omari Scott Simmons, *Lost in Transition: The Implications of Social Capital for Higher Education Access*, 87 NOTRE DAME L. REV. 205, 208 (2011) (arguing that increased financial literacy counseling can help to overcome social capital deficits).

²³⁹ *See* Toben & Osolinik, *supra* note __, at 164 (discussing how the benefits of post-secondary education to society are equally significant to these benefits for the individual students)

²⁴⁰ *See supra* text accompanying note ____.

²⁴¹ *See* 20 U.S.C. § 1092(1)(1)(B) (2012) (“The Secretary shall encourage institutions to carry out the requirements of subparagraph (A) through the use of interactive programs that test the borrower’s understanding of the terms and conditions of the borrower’s loans under part B or C of this subchapter, using simple and understandable language and clear formatting.”); *supra* text accompanying notes __ (detailing the extensive amount of information that is required to be conveyed during entrance and exit counseling).

²⁴² *See, e.g., Education: Knowledge and Skills for the Jobs of the Future*, *supra* note __ (outlining the Obama Administration’s intentions to provide increased transparency to students in higher education).

subsidized primarily by federal student loans,²⁴³ provide increased education for their student borrowers about the legal responsibilities attached to the acquisition of student loan monies. Finally, it would require students to take a more active role in the student loan process, thereby reinforcing the personal accountability aspect of agreement to this type of financial lending.²⁴⁴

Overall, these changes would provide informed access to colleges and universities for the vast majority of students who require federal student loans funds for attendance. The current lack of understanding of the gravity of the obligations tied to the acquisition of student loans, and the problems that have resulted due to increasing debt loads, must be considered the newest battleground in terms of access.²⁴⁵ The proposed federal statutory and regulatory changes in this section constitute relatively modest, but significant, measures to aid in the de-escalation and amelioration of this current climate of crisis.²⁴⁶

V. CONCLUSION

Despite significant advances in access to higher education, this progress in colleges and universities is now being threatened.²⁴⁷ The status quo of increased costs and growing student debt loads is not a sustainable model for American higher education.²⁴⁸ The stagnation (and decline) of wage growth over the last thirty years,²⁴⁹ coupled with the higher rate of

²⁴³ See POSTSECONDARY EDUCATION: FINANCIAL TRENDS, *supra* note __, at 9, 12 (finding that from 1999 to 2009, colleges and universities’ “revenues from tuition and fees increased significantly” and that “[r]evenues from all federal loans increased at both public and private nonprofit schools, by 134 and 138 percent respectively”); Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. TIMES, July 30, 2012, at A12 (providing that federal student loan monies compose the “bulk of the for-profit colleges’ revenue, more than 80 percent in most cases”).

²⁴⁴ Personal financial accountability underlies much of legal and political theory regarding the acquisition of debt and whether or not that debt can be dischargeable in bankruptcy. See, e.g., H.R. REP. NO. 109-31, pt. 1, at 2 (2005), *reprinted in* 2005 U.S.C.C.A.N. 88, 89 (providing that the “proposed reforms” that ultimately were included in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 “respond to many of the factors contributing to the increase in consumer bankruptcy filings, such as lack of personal financial accountability, the proliferation of serial filings, and the absence of effective oversight to eliminate abuse in the system.”).

²⁴⁵ TRENDS IN COLLEGE PRICING, *supra* note __, at 20 (“If institutions do not have the basic capacity to offer courses or provide necessary services, maintaining access without resources proves to be a false promise.”).

²⁴⁶ See, e.g., Jon Marcus, *Why is College Enrollment Dropping?*, TIME (May 31, 2012), <http://www.time.com/time/nation/article/0,8599,2116059,00.html> (discussing the “ominous signs that overall college enrollment is starting to drop” due to high costs and increasing debt obligations).

²⁴⁷ See *supra* text accompanying notes __.

²⁴⁸ See Goldie Blumenstyk, *One-Third of Colleges Are on Financially “Unsustainable” Path, Bain Study Finds*, CHRON. HIGHER EDUC. (July 23, 2012), <http://chronicle.com/article/One-Third-of-Colleges-Are-on/133095/> (“[O]ne-third of the [1,700 public and private nonprofit institutions of higher education analyzed by Bain from 2005 to 2010] have been on an ‘unsustainable financial path’ in recent years, and an additional 28 percent are ‘at risk of slipping into an unsustainable condition.’”); Elizabeth Dexheimer, *Overdue Student Loans Reach ‘Unsustainable’ 15%*, FAIR ISAAC SAYS, BLOOMBERG (Jan. 29, 2013, 3:19 PM), <http://www.bloomberg.com/news/2013-01-29/overdue-student-loans-reach-unsustainable-15-fair-isaac-says.html> (quoting chief analytics officer of Fair Isaac as stating “‘When wage growth is slow and jobs are not as plentiful as they once were, it is impossible for individuals to continue taking out ever-larger student loans without greatly increasing the risk of default.’”).

²⁴⁹ See Timothy M. Kaine, *Economic Policy After A Lost Decade-From Over-Spending to Innovation*, 45 U. RICH. L. REV. 1037, 1045 (2011) (“[M]uch of the reduction in traditional household savings rates was clearly driven by years of stagnant wages for middle-class families who faced rising costs for significant expenditures such as housing,

unemployment that followed the Great Recession,²⁵⁰ has only exacerbated these problems. However, maintaining, if not increasing, higher educational attainment is key to both the individual successes of citizens²⁵¹ and the economic growth of the country.²⁵² Consequently, it has become imperative to find innovative measures to attempt to avoid the eventuality of a student loan-induced financial crisis.²⁵³

The statutory and regulatory amendments proposed in this Article offer a moderate proposal to the existing law that governs the provision of information to students as part of the student loan process.²⁵⁴ These changes are fully within the congressional scope of authority,²⁵⁵ and they could be easily achieved through the next reauthorization of the Higher Education Act.²⁵⁶ They would not provide external constraints on access to higher education, and they

health care, and education.”); Lawrence Mishel & Heidi Shierholz, *The Sad But True Story of Wages in America*, ECON. POLICY INST., (Mar. 15, 2011),

http://www.epi.org/publication/the_sad_but_true_story_of_wages_in_america/ (“Recent debates about whether public- or private-sector workers earn more have obscured a larger truth: all workers have suffered from decades of stagnating wages despite large gains in productivity.”).

²⁵⁰ See generally MICHAEL REICH, CENTER ON WAGE AND EMPLOYMENT DYNAMICS, HIGH UNEMPLOYMENT AFTER THE GREAT RECESSION: WHY? WHAT CAN WE DO? (June 2010), available at <http://www.irl.berkeley.edu/cwed/wp/2010-01.pdf> (discussing the high rates of long-term and very-long-term unemployment after the Great Recession).

²⁵¹ See Anthony P. Carnevale, Tamara Jayasundera, & Ban Cheah, *The College Advantage: Weathering the Economic Storm*, GEORGETOWN PUB. POLICY INST., 35,

<http://www9.georgetown.edu/grad/gppi/hpi/cew/pdfs/CollegeAdvantage.FullReport.081512.pdf> (“At a time when college education is under attack from budget cuts and the increasing cost of college education is raising the question of whether postsecondary education is worth the money, these findings provide a compelling reason to say, yes. In jobs at every skill level and in many different occupations, the better-educated applicant has the edge.”).

²⁵² See Michael Greenstone & Adam Looney, *Economix: The Uncomfortable Truth About American Wages*, N.Y. TIMES (Oct. 22, 2012, 1:00 PM), <http://economix.blogs.nytimes.com/2012/10/22/the-uncomfortable-truth-about-american-wages/> (“Among the most robust findings in economics is that education reduces unemployment and increases earnings. But even with the remarkable capacity for education to produce growth, the rate of educational attainment in the United States has slowed . . . Strengthening our K-12 education system and increasing college-completion rates are, therefore, imperative to improving living standards for future generations.”).

²⁵³ See Halah Touryalai, *More Evidence on The Student Debt Crisis: Average Grad’s Loan Jumps to \$27,000*, FORBES (Jan. 29, 2013, 3:22 PM), <http://www.forbes.com/sites/halahtouryalai/2013/01/29/more-evidence-on-the-student-debt-crisis-average-grads-loan-jumps-to-27000/> (“Predicting the next financial crisis isn’t easy but there’s growing evidence that student loans will be involved in the next one.”).

²⁵⁴ See *supra* text accompanying notes __.

²⁵⁵ See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)) (“Incident to this [spending] power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power ‘to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.’”).

²⁵⁶ The Higher Education Act is slated for reauthorization in 2013, per the five-year reauthorization schedule. See, e.g., Sara Lipka, *Quest for Good Graduation Data Will Be Key to Next Higher Education Act*, CHRON. HIGHER EDUC. (Nov. 15, 2012), <http://chronicle.com/article/Quest-for-Good-Graduation-Data/135816/> (discussing congressional preparation for the next reauthorization of the Higher Education Act in 2013). But see *Spotlight Issue: Higher Education Accreditation*, NEW AM. FOUND.,

http://pnpi.newamerica.net/spotlight/higher_education_accreditation (last visited Feb. 4, 2013) (“Any changes to federal law and accreditation are most likely to be made during the next reauthorization of the Higher Education Act. Although that Act is scheduled to be reauthorized in 2013, almost all federal education statutes are now many years behind schedule for reauthorization.”).

would only require institutions to comply with their missions: to educate students about their current and future lives.²⁵⁷ In sum, these proposed amendments are attainable and would be beneficial to all of the stakeholders in the student loan process.

Admittedly, there may be resistance to the implementation of these statutory and regulatory proposals by some factions of these stakeholders. Students may not want an extra time burden attached to the acquisition of federal student loans.²⁵⁸ Some institutions of higher education might claim that they do not have the resources to conduct the training.²⁵⁹ Some legislators who desire smaller government may resist any attempt at increased federal regulation of higher education.²⁶⁰ However, given that students and colleges and universities are the beneficiaries of the allocation of these Title IV student loan funds,²⁶¹ and that the federal government is the steward of those funds, this resistance should not impede the necessary legal changes that are advocated for in this Article. Indeed, historically, the federal legislature has often had to mandate that institutions of higher education move forward to increase access even

²⁵⁷ See Steven Bahls, *Time to Teach Financial Literacy*, INSIDE HIGHER ED (June 13, 2011, 3:00 AM), http://www.insidehighered.com/views/2011/06/13/essay_on_responsibility_of_colleges_to_teach_financial_literacy (“All liberal arts colleges — but especially those colleges enrolling classes with more first-generation college students than ever before — have an obligation to ask how we can continue to improve the experience of gaining financial literacy and those outcomes for our students.”).

²⁵⁸ See, e.g., Davis, *supra* note __ (“Personally, I just wanted everything to be over with for my financial aid so I breezed through the [online entrance counseling] quiz because I knew my financial aid office really just cared about the MPN.”). *But see* Whitsett & O’Sullivan, *supra* note __, at 16 (discussing how a portion of student loan borrower respondents in their study “said they would prefer in-person counseling over online counseling”).

²⁵⁹ See, e.g., Jennifer Epstein, *Resistance on Debt Proposal*, INSIDE HIGHER ED (Jan. 26, 2010, 3:00 AM), <http://www.insidehighered.com/news/2010/01/26/employment> (discussing the massive resistance by all sectors of higher education to the Department of Education’s proposed gainful employment regulations). *But see Financial Aid Money Awareness Program*, SYRACUSE UNIV., http://www.syr.edu/financialaid/financialliteracy/money_awareness_program.html (discussing the Money Awareness Program, a program initiated by Syracuse University that attempts to identify students who may be acquiring too much debt and to assist them in finding ways to reduce those debt burdens).

²⁶⁰ For example, Senator Daniel Akaka and Representative Sheila Jackson Lee each introduced bills in the 112th Congress, entitled the College LIFE Act, as legislative efforts to require broader financial literacy training that could impact the loan counseling process. See College LIFE Act, S. 1260, 112th Cong. (2011); College LIFE Act, H.R. 2535, 112th Cong. (2011). However, neither bill made it out of committee. See *S. 1260 (112th): College LIFE Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/s1260> (noting the status of the bill as “died (Referred to Committee)”); *H.R. 2535 (112th): College LIFE Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bills/112/hr2535> (same). Still, there is continued interest by some legislators in reforming the student loan counseling process. For example, Senator Dick Durbin has expressed interest in colleges that have taken the initiative to provide more than the basic loan counseling required by the statute. See Kate Thayer, *Durbin Touts ECC’s Required Loan Counseling Program*, CHICAGO TRIB., http://articles.chicagotribune.com/2013-01-14/news/ct-tl-elgin-ecc-durbin-loans-20130114_1_private-loans-student-loans-student-debt (Jan. 14, 2013) (“She recalled one student who at first thought \$18,000 in loans would be needed to take classes at ECC, but after working on a budget with a counselor ‘he left the office with \$800’ in loans.”).

²⁶¹ The possible recalcitrance of institutions of higher education to these changes could also be overcome by self-interest. By offering these enhanced student loan counseling sessions, the institutions would further insulate themselves against possible claims for fraud, breach of contract, or malpractice from students claiming they had too little information about their programs and costs. See, e.g., Note, Sonia Gioseffi, *Corporate Accountability: Achieving Internal Self-Governance Through Sustainability Reports*, 13 CORNELL J.L. & PUB. POL’Y 503, 504 (2004) (“To operate efficiently, to maintain a positive public image, and to avoid civil and criminal liability, companies need to understand and respond to pressure for greater transparency.”).

when institutions and individual students have resisted this progress.²⁶² In this case, the statutory foundation for this federal mandate already exists;²⁶³ these student loan counseling requirements just need to be made pedagogically effective to provide that informed access.

²⁶² *See supra* text accompanying notes __.

²⁶³ *See* 20 U.S.C. § 1092 (2012).