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## Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education

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# PREDATORY ED: THE CONFLICT BETWEEN PUBLIC GOOD AND FOR-PROFIT HIGHER EDUCATION

OSAMUDIA R. JAMES\*

INTRODUCTION .....	46
I. THE BIG BUSINESS OF HIGHER EDUCATION.....	47
A. The For-Profit Business Model .....	47
B. A Niche Market .....	53
II. PREDATORY EDUCATION .....	54
A. The Public Failure .....	55
i. Merging Public and Private—A Trend.....	55
ii. The Public Good of Higher Education .....	57
B. PredEd .....	64
i. For-Profits and the Public Good.....	65
ii. Market Failure and Predatory Education.....	67
III. REGULATION AND REMEDIES .....	82
A. The Perils of For-Profit.....	83
B. The Futility of Regulation .....	87
i. Rules, Rules, Rules.....	88
ii. Regulatory Bodies .....	93
C. The Problem Is In the Premises.....	96
IV. CONCLUSION .....	101

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## INTRODUCTION

In October of 2009, two employees from for-profit University of Phoenix visited a homeless shelter in Cleveland to recruit students for enrollment.<sup>1</sup> Men like Benson Rollins, an unemployed, recovering alcoholic and high school dropout who had been homeless for ten months, received repeated phone calls and emails urging him to register for classes.<sup>2</sup> Not to be outdone by the University of Phoenix, administrators at for-profit Chancellor's School of Professional Studies invited managers of Cleveland social service agencies to a lunch to discuss "new plans to recruit the economically disadvantaged and at-risk groups" through "on-site recruitment at local transitional housing, halfway houses, and other human service facilities."<sup>3</sup> Do these two vignettes illustrate savvy and much-needed business entrees into untapped markets or predatory behavior at the expense of the vulnerable?

As in housing, healthcare, and even public financing, the reception of the for-profit motive in higher education has been mixed. Supporters celebrate the movement as promising, citing rapid growth in the industry as affirmation of the good the institutions provide in responding to a niche student market neglected by nonprofit institutions (NPIs). Detractors, however, critique the movement as ultimately incompatible with notions of public good and certain to produce casualties in the race to maximize profit. Investigations have revealed that for-profit education has, indeed, produced casualties, and that those casualties are disproportionately borne by the disadvantaged: first-generation, minority, poor and working class, and veteran students. Recruiters from the University of Phoenix, for example, were not likely to explain to Benson Rollins that graduates of for-profit institutions of higher education (FPIs) bear a disproportionate number of student loan defaults; that FPIs have gained a reputation for fraud and abuse in recruiting and business practices; and that recruitment officers at the schools are trained to target and prey upon the vulnerabilities of students who consider their institutions.

The argument I make against FPIs is both practical and normative. Regulation of the for-profit sector is ultimately futile because higher education is difficult to define or measure, and legal recourse for a poorly delivered education is often inadequate. Normatively, for-profit higher education is the latest in a troubling trend of introducing market dynamics and private interests into areas that should be shaped by a commitment to public ideals and collective responsibility.

Part I explores the for-profit business model and the niche market the

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1. See Daniel Golden, *The Homeless at College*, BLOOMBERG BUS. WK., April 30, 2010, at 64.

2. *Id.*

3. *Id.*

industry targets. Part II establishes higher education as a public good essential to promoting democracy and societal equality, and characterizes for-profit higher education as the latest merge of private interest and public good. In this merge, the for-profit motive undermines the public good of higher education, and in pursuit of the federal monies to which low-income students have access, FPIs capitalize on information asymmetries and valuation problems in the sector. This strategy results in predatory education—negative educational experiences, rent-seeking behavior, fraud, deception, and the absence of legal remedies—at the expense of the public and the marginalized student population for-profits purport to help. Part III explores whether this market failure can be directly attributed to the for-profit motive, assesses the law’s current response to predatory education, and notes the futility of regulation in the area. The article concludes that the “problem is in the premises,” an issue that most of the literature on for-profit higher education has ignored. Accordingly, although the for-profit sector might be able to educate students in a few limited areas, federal loan monies are better spent to support programs administered through the nonprofit sector where at least the absence of the for-profit motive eliminates an incentive to exploit vulnerable students in pursuit of investor wealth.

#### THE BIG BUSINESS OF HIGHER EDUCATION

*“Not being comparable to a light-industry (having no product, in the strict sense), nor to a store (having no sales-list of items for disposal), a university is apt to confound the accounts. Profit and loss, cost and return on capital are not easily calculable; indeed, there is something inappropriate in making the calculations.”<sup>4</sup>*

FPIs employ a business model that maximizes profits through operating efficiencies and the receipt of federal student loans funds, all while purporting to educate a niche student market.

##### A. The For-Profit Business Model

To call an institution for-profit or nonprofit<sup>5</sup> incorrectly implies that the latter does not seek to maximize revenue. To the contrary, NPIs often

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4. MICHAEL OAKESHOTT, WHAT IS HISTORY? AND OTHER ESSAYS 373, 386 (Luke O’Sullivan ed., 2004).

5. The term “nonprofit institution” includes both public and private nonprofit entities. It is obvious that public and private nonprofit colleges and universities have different cost structures and internal constraints that dictate their behavior. Moreover, substantial literature suggests that the very benefit of the private nonprofit sector is its ability to be more responsive than the public sector to those they serve because of the possibility of tailoring for particular patronage and the absence of bureaucratic unwieldiness. Nevertheless, to the extent that both public

aggressively pursue revenue, through “research contracts and grants, . . . [and] royalty streams from licensing of intellectual property.”<sup>6</sup> And, just as FPIs exist to realize a profit, NPIs also work with “excess of revenues over expenditures . . . .”<sup>7</sup> Although many of the terms and labels used to describe the finance and governance of NPIs differ from those used to describe the finance and governance of FPIs, the terms apply to conceptually similar activities. For example, “donors” in the nonprofit context might be considered analogous to “investors” in the for-profit context, and “endowment” in the former context might be analogized to “private investment capital” in the latter.<sup>8</sup> Moreover, with NPIs increasingly entering for-profit ventures that operate parallel to their educational missions, the distinction between public and private in higher education is blurring. The most significant factor, therefore, distinguishing FPIs from NPIs is the nondistribution constraint.<sup>9</sup> NPIs are limited by the prohibition on the distribution of net revenues through organizational shares. Any net revenue must be reinvested in the institution. In contrast, FPIs are not so constrained.

Although records detailing the origins of for-profit higher education are scarce, proprietary schools existed among the American colonies, where

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and private NPIs operate under a nondistribution constraint, to the extent that federal legislation treats FPIs differently vis-à-vis public and private NPIs, and to the extent that much of the literature examining the advantages and disadvantages of for-profit education compares the sector to the public and private nonprofit sector, this article uses the term “nonprofit” to encompass both public and private nonprofit institutions of higher education.

6. WILLIAM G. TIERNEY & GUILBERT C. HENTSCHE, *NEW PLAYERS, DIFFERENT GAME: UNDERSTANDING THE RISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES* 66 (2007).

7. RICHARD RUCH, *HIGHER ED, INC.: THE RISE OF THE FOR-PROFIT UNIVERSITY* 90 (2001). Harvard University, for example, generates a “profit” of over hundreds of millions of dollars each year, while smaller, more modest NPIs can generate profits of several thousand to several hundred dollars a year. *Id.*

8. TIERNEY & HENTSCHE, *supra* note 6, at 67.

9. Henry Hansmann first explained the “nondistribution constraint” as follows:

A nonprofit organization is, in essence, an organization that is barred from distributing its net earnings, if any, to individuals who exercise control over it, such as members, officers, directors, or trustees . . . . It should be noted that a nonprofit organization is not barred from earning a profit . . . . It is only the distribution of the profits that is prohibited. Net earnings, if any, must be retained and devoted in their entirety to financing further production of the services that the organization was formed to provide . . . . I shall call [this prohibition on the distribution of profits] the “nondistribution constraint.”

*See* Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835, 838 (1980). *See also* RUCH, *supra* note 7, at 91.

sole proprietors, usually trained as clergy, ran private schools for teaching and tutoring.<sup>10</sup> Well into the nineteenth-century, basic skills in teaching, medicine, law, and accounting were taught at proprietary institutions, although the institutions were rarely degree-granting.<sup>11</sup> Moreover, commercial schools offering training in new technologies like the typewriter and stenographic machines proliferated at the turn of the century.<sup>12</sup> These independent proprietary schools originally received no public funding.<sup>13</sup> Eventually, political and cultural movements favoring public vocational training curtailed the growth of proprietary education, resulting in policy recommendations like the 1910 Flexner report, a study which curtailed for-profit medical education programs and led to further calls for regulation and oversight of the proprietary sector.<sup>14</sup> With the rise of the comprehensive research university, nonprofit education—both public and private—dominated higher education until the Higher Education Act (HEA) of 1972 made students of for-profit education institutions eligible for participation in the federal financial aid program.<sup>15</sup>

Fueled by both technology and organizational practices that enable the provision of education at lower cost, as well as by the increasing size of the college-age population,<sup>16</sup> enrollment at FPIs has grown faster than the rest of higher education, averaging an increase of nine percent per year over the last thirty years.<sup>17</sup> By for-profit, I mean those post-secondary educational institutions that explicitly pursue profit from the educational services they provide. These range from independent for-profit vocational programs, to online education, to the for-profit colleges and universities that currently dominate the field. Although NPIs today do engage in for-profit ventures, I exclude in my scope NPIs that pursue profit through activities other than academic instruction.

Today, FPIs educate about 1.4 million students,<sup>18</sup> or seven percent of the nineteen million students who enroll at degree-granting institutions each

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10. See RUCH, *supra* note 7, at 91.

11. See EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES 5 (David W. Breneman et al. eds., 2006).

12. See *id.*

13. See RUCH, *supra* note 7, at 54.

14. See EARNINGS FROM LEARNING, *supra* note 11, at 5.

15. See *id.* at 5–6.

16. See *id.* at 6.

17. Jennifer Gonzalez, *Federal Proposal Could Jeopardize For-Profit Programs, Especially Bachelor's Degrees*, CHRON. HIGHER EDUC. (May 17, 2010), <http://chronicle.com/article/Federal-Proposal-on-Student/65604>.

18. *Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices: Hearing on For-Profit Schools: The Student Recruitment Experience Before the S. Comm. on Health, Educ., Labor and Pensions*, 111th Cong. 1 (2010) [hereinafter *Undercover Testing*] (statement

year,<sup>19</sup> the majority of whom complete two-year (or less) certification programs.<sup>20</sup> Although prohibited from awarding liberal arts degrees,<sup>21</sup> program offerings at FPIs include B.A., M.A., and Ph.D programs in areas ranging from the culinary arts to psychology and teacher education.<sup>22</sup>

Publicly traded companies must show consistent growth to maintain their stock prices and satisfy investors, and the publicly traded FPIs have been no exception. The number of publicly traded degree-granting providers of higher education grew steadily throughout the 1990s,<sup>23</sup> and in 2010, the for-profit sector brought in \$29.2 billion in revenue, compared to just \$9 billion in 2000.<sup>24</sup> Between 2000 and 2003, the largest eight FPIs had the highest-performing stocks of any industry on the S&P stock index, rising an incredible 460% during the period, as compared to a twenty-four percent *loss* for the S&P 500 index.<sup>25</sup> As of July 2010, the fourteen largest publicly traded FPIs were worth more than \$26 billion, with rapid growth a hallmark of their stocks.<sup>26</sup>

Because FPIs do not receive state support, virtually all income received by the institutions is derived from student tuition. Although cheaper than most private NPIs,<sup>27</sup> tuition at FPIs is generally more expensive than that of public colleges and universities, including community colleges.<sup>28</sup> The Government Accountability Office (GAO) has found that in fourteen of

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of Gregory D. Kutz, Managing Director Forensics Audits and Special Investigations, United States Government Accountability Office).

19. Gonzalez, *supra* note 17.

20. EARNINGS FROM LEARNING, *supra* note 11, at 7.

21. Some scholars suggest that advocacy among FPIs for a single definition of “postsecondary education” in the Higher Education Act, which would allow only a small percentage of FPIs to compete for competitive institutional grants, is really about the right to offer liberal arts degrees, rather than access to the additional funding. See TIERNEY & HENTSCHKE, *supra* note 6, at 163.

22. See TIERNEY & HENTSCHKE, *supra* note 6, at 56; see also EARNINGS FROM LEARNING, *supra* note 11, at 8–9.

23. EARNINGS FROM LEARNING, *supra* note 11, at 145.

24. Golden, *supra* note 1.

25. Melanie Hirsch, *What's In a Name? The Definition of an Institution of Higher Education and its Effect on For-Profit Postsecondary Schools*, 9 N.Y.U. J. LEGIS. & PUB. POL'Y 817, 822 (2005).

26. *Id.*

27. See TIERNEY, & HENTSCHKE, *supra* note 6, at 20. In 2010–11, in-state and out-of-state tuition at public four-year colleges and universities averaged \$7,605 and \$19,595, respectively, while tuition at private four-year NPIs averaged \$27,293. COLLEGEBOARD ADVOCACY & POLICY CTR., *Trends in College Pricing* 3 (2010), available at [http://trends.collegeboard.org/downloads/archives/CP\\_2010.pdf](http://trends.collegeboard.org/downloads/archives/CP_2010.pdf) (last visited Nov. 29, 2011).

28. See RUCH, *supra* note 7, at 85–86. In 2010–11, community colleges had an average annual tuition of \$2,713, compared to \$13,935 at FPIs. *Trends In College Pricing*, *supra* note 27, at 3.

fifteen FPIs researched, tuition was more expensive at the FPI than at the closest public college or university, regardless of degree.<sup>29</sup> For-profit tuition was more expensive than nearby private nonprofit colleges and universities in four out of fifteen cases.<sup>30</sup> Similarly, certificates awarded at the FPIs were often significantly more expensive than those offered at nearby public colleges and universities.<sup>31</sup>

When grant aid is considered, however, the unmet financial needs of low-income students at FPIs can be higher than that of low-income students at even private NPIs, which use institutional grants to defray costs, and spend three and a half times more on each student than FPIs do.<sup>32</sup> There are also several instances of for-profit tuition approaching the tuition of elite private nonprofit universities. ITT Technical Institute charges \$40,000 for a two-year associate's degree in computers and electronics; Le Cordon Bleu College of Culinary Arts charges \$41,000 for a 21-month program.<sup>33</sup>

To meet the high cost of tuition, students incur significant amounts of debt. Borrowers who earned bachelor's degrees from FPIs in 2007–2008 had a median debt of \$32,653—significantly higher than the \$22,375 and \$17,700 debt loads incurred by graduates of four year private and public nonprofit colleges and universities, respectively.<sup>34</sup> Low-income attendees in particular depend significantly on federal grants and loans to enroll.<sup>35</sup> Driven by the increased enrollment of low-income students eligible for Pell Grant awards at proprietary schools, federal aid to students at for-profit colleges and universities jumped from \$4.6 billion in 2000 to \$26.5 billion in 2009, with publicly traded FPIs deriving on average seventy-five percent of their revenue from the federal funds.<sup>36</sup> Career Education Corporation, for example, reported \$1.84 billion in revenue in 2009, with approximately

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29. See *Undercover Testing*, *supra* note 18, at 16.

30. *Id.*

31. For example, a certificate in computer-aided drafting cost \$13,945 at a FPI, but only \$520 at a nearby public college. See *id.* at 17.

32. At four-year FPIs, low-income students must finance almost \$25,000 a year, with only a twenty-two percent chance of graduation. In contrast, four-year, private, nonprofit, low-income students must finance \$16,600 a year, with a graduation rate that is almost three times higher. See MAMIE LYNCH, JENNIFER ENGLE & JOSÉ L. CRUZ, EDUC. TRUST, SUBPRIME OPPORTUNITY: THE UNFULFILLED PROMISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES 3 (2010) [hereinafter EDUC. TRUST], available at [http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime\\_report\\_1.pdf](http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime_report_1.pdf) (last visited Nov. 29, 2011).

33. See Peter S. Goodman, *The New Poor - In Hard Times, Lured Into Trade School and Debt*, N.Y. TIMES, Mar. 13, 2010, at A1.

34. See Golden, *supra* note 1.

35. See TIERNEY & HENTSCHKE, *supra* note 6, at 171.

36. See Golden, *supra* note 1.



eighty percent of that revenue coming from federal loans and grants.<sup>37</sup> Apollo Group, parent company to University of Phoenix, derived eighty-six percent of its revenue from federal funds in fiscal year 2009, more than double the percent of revenue that the average private, nonprofit college or university obtains from the same source.<sup>38</sup> In 2010, University of Phoenix made history, becoming the first college in the history of the United States to take in more than \$1 billion worth of Pell Grant disbursements in a single academic year.<sup>39</sup> Despite educating less than ten percent of students, FPIs received close to twenty-five percent of Pell Grant and federal student loan dollars in 2008,<sup>40</sup> and the Department of Education estimates that by the end of the 2011–2012 school year, students at for-profit schools will receive more than \$10 billion in Pell grants.<sup>41</sup>

The for-profit motive in higher education is premised on market economics principles. The standard market model envisions a competitive world of buyers and sellers, all of whom are said to “share equally all relevant information (or ignorance) about the key factors determining product quality and prices in the market.”<sup>42</sup> Socially, the collective interests of buyers and sellers ensure the sale of products that consumers want to purchase. Competition between sellers in the market incentivizes sellers to use efficient production methods and management practices to pass savings on to customers.

Private markets fully embrace the for-profit motive, while assuming that risk of reputation damage will prevent exploitation by the sellers, and that customers will refuse to knowingly buy an inferior product. Ultimately, those sellers who provide the best product at the most reasonable price will become successful, and those that produce inferior, unreasonably priced products will be less patronized and pushed out of the market. Indeed, in accordance with the typical market narrative, FPIs maximize profit, in part, through low overhead and wage scales,<sup>43</sup> the absence of faculty tenure, streamlined pre-packaged curriculums, and low physical plant costs.<sup>44</sup>

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37. See Goodman, *supra* note 33.

38. *Id.*

39. See Ben Miller, *U of Phoenix Makes History*, THE QUICK & THE ED (July 10, 2010), <http://www.quickanded.com/2010/07/phoenix-makes-history.html> (last visited Nov. 29, 2011).

40. Kelly Field & Jeffrey Brainard, *Government Vastly Undercounts Defaults*, CHRON. HIGHER EDUC., July 16, 2010, at A1.

41. See Goodman, *supra* note 33, at A1.

42. ELLIOTT SCLAR, *YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* 6–7 (2000).

43. See EARNINGS FROM LEARNING, *supra* note 11, at 11.

44. See RUCH, *supra* note 7, at 85–88, 119–20.

### B.A Niche Market

Minority, low-income, and first-generation students choose for-profit post-secondary education at disproportionate rates.<sup>45</sup> For-profit students also tend to be those “whose prior education experiences [were] unsuccessful or unrewarding,” and who found traditional NPIs too large, impersonal, and insistent on classes perceived by the students to be unnecessary.<sup>46</sup> For-profit students are also more likely to have been under-prepared for their academic experience at traditional institutions, resulting in poor performance while there.<sup>47</sup> In response to this sense of alienation, FPIs provide lock-step curriculums tailored specifically to student career objectives.<sup>48</sup> FPIs also cater to adult learners. Only sixteen percent of college and university students in 2004 fit the traditional full-time, living on-campus, profile.<sup>49</sup> In 2006, of the nation’s fourteen million undergraduate students, more than forty percent attended two-year colleges, almost one-third were older than twenty-four years old, and forty percent were enrolled part-time.<sup>50</sup>

FPIs have also attracted veterans, who use G.I. Bill benefits to attend. In 2007, nineteen percent of students who used the G.I. Bill education benefits chose FPIs, compared to only six percent of all college and university students who chose the same.<sup>51</sup> In contrast, only six percent of G.I. Bill students attended private NPIs compared to twenty percent of all college and university students who choose the schools.<sup>52</sup> Because for-profit colleges and universities are more expensive than community colleges, and sometimes more expensive than even private colleges and universities, the choice is not necessarily driven by cost. Rather, veterans prefer the flexible schedules, close proximity to home and families, and career-specific curriculums that FPIs offer.<sup>53</sup>

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45. See Michelle Howard-Vital, *The Appeal of For-Profit Institutions*, CHANGE: MAG. HIGHER LEARNING, Jan.–Feb. 2006, at 68, 69.

46. *Id.*

47. See *id.*; RUCH, *supra* note 7, at 32.

48. See Howard-Vital, *supra* note 45, at 68.

49. See Ann I. Morey, *Globalization and the Emergence of For-Profit Higher Education*, 48 HIGHER EDUC. 131, 135 (2004).

50. See COMM’N ON THE FUTURE OF HIGHER EDUC., U.S. DEPT. EDUC., A TEST OF LEADERSHIP: CHARTING THE FUTURE OF U.S. HIGHER EDUCATION xi (2006) [hereinafter TEST OF LEADERSHIP].

51. Kelly Field et al., *Cost, Convenience Drive Veterans’ College Choices*, CHRON. HIGHER EDUC., July 25, 2008, at A1.

52. *Id.*

53. See *id.* Sergeant Hawthorne, a staff sergeant in the Army Reserves, used his education benefits to obtain an online degree from for-profit American Military University, as he moved to four different states then to Iraq. He ultimately transferred the credits to George Washington University, where he obtained a bachelor’s degree. See Eric Lipton, *Colleges That Recruit Veterans Garner Profits*

To the extent that FPIs provide rolling admissions, admit students without the benefit of college and university entrance exams, provide flexible course times and locations, and even award credit for “life experiences” in lieu of academic performance, access to the institutions is easier for academically underserved students. Also, some of the institutions have laudably provided programs in fields for which there is unmet occupational demand that is likely to continue into the future.<sup>54</sup> These are realities on which FPIs ground their efforts to resist increased regulation,<sup>55</sup> and for which NPIs are partly to blame. Barring structural and societal changes that will expand access for this niche market to traditional NPIs, FPIs will likely continue to disproportionately serve this growing segment of the student population who desire some sort of post-secondary education or training.<sup>56</sup>

#### PREDATORY EDUCATION

*“There could be no education that was not at once for use in earning a living and for use in living a life.”<sup>57</sup>*

For-profit business models undermine the public good of higher education, while failures in the for-profit sector destabilize its delivery. In pursuit of the federal monies to which low-income students have access, FPIs capitalize on information asymmetries and valuation problems in the education sector, resulting in market failure and predatory education.

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*and Scrutiny*, N.Y. TIMES, Dec. 9, 2010, at A1 (“Vets are really not at college to get the traditional undergraduate experience . . . . We are already professionals. College is a box checker, meaning we need a college degree to go into whatever we want to go into.”).

54. See RUCH, *supra* note 7, at 81.

55. In expressing its opposition to new proposed federal rules to increase regulation of FPIs, the Career College Association concluded that the rules would impact 68,000 African-American students, and 79,000 Hispanic students annually. See Charles Dervarics, *Proposal Takes Aim at For-Profit Schools*, DIVERSE: ISSUES IN HIGHER EDUC., June 6, 2010, at 11; Gonzalez, *supra* note 17 (noting that for-profit college officials argue that their nontraditional students are older and often low-to-middle-income).

56. Between 2005 and 2015, most of the increase in the traditional college-eligible population will come from students of color, and students from low-income backgrounds. See Derek V. Price & Jill K. Wohlford, *Equity in Educational Attainment, Racial Ethnic, and Gender Inequality in the 50 States*, in HIGHER EDUCATION AND THE COLOR LINE: COLLEGE ACCESS, RACIAL EQUITY, AND SOCIAL CHANGE 59, 61 (Gary Orfield et al., eds., 2005) [hereinafter HIGHER EDUCATION].

57. W.E.B. DuBois, *THE EDUCATION OF BLACK PEOPLE: TEN CRITIQUES, 1906–1960*, at 112 (Herbert Apthorpe ed., 2001).

### A. The Public Failure

Higher education is a public good that benefits both individuals and society by promoting democracy and societal wealth. The shift in conceptualization of higher education from public to private good, however, occurs against the backdrop of a larger trend to merge public and private interests for the common good.

#### i. Merging Public and Private—A Trend

Mergers of private interest and public good are not anything new in American society, and have ranged in form from professional societies that regulate and restrict the activities of their members<sup>58</sup> to the contracts with private entities into which governments enter to provide public services.<sup>59</sup>

When private interests and profit-making are employed to advance the public good, there are sometimes casualties in the scramble to make a buck. Labeled “predatory” in the market context, legal scholarship is rife with documentation and analysis of business patterns and practices that unfairly exploit the vulnerabilities of disadvantaged participants in private markets in order to maximize profit margins. As such, debate continues as to the extent of influence and involvement that private interests should have in providing what are commonly understood to be public goods such as housing, healthcare, or education.<sup>60</sup>

Two examples highlight some of the typical problems in this context. Social impact bonds and social benefit organizations are recent attempts to galvanize the incentivizing force of self-interested pursuit for the public good.<sup>61</sup> In the social impact bond model, government can contract with a private-sector financing intermediary for the provision of social services.<sup>62</sup>

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58. See Mark R. Patterson, *Antitrust Liability for Collective Speech: Medical Society Practice Standards*, 27 IND. L. REV. 51 (1993) (discussing the intersection between antitrust law and conflicts of interest among medical societies).

59. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367 (2003) (cataloging examples of privatization of government programs, including Medicare and Medicaid managed care, welfare, education, and prisons). See, for example, Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000); for discussion of other treatments.

60. See, e.g., Mary Sigler, *Private Prisons, Public Functions, and the Meaning of Punishment*, 38 FLA. ST. U. L. REV. 149, 153–157 (2010) (discussing advantages and disadvantages of privatization of government functions).

61. See JEFFREY B. LIEBMAN, CTR. FOR AM. PROGRESS, SOCIAL IMPACT BONDS: A PROMISING NEW FINANCIAL MODEL TO ACCELERATE SOCIAL INNOVATION AND IMPROVE GOVERNMENT PERFORMANCE 2 (2011), available at [http://www.americanprogress.org/issues/2011/02/pdf/social\\_impact\\_bonds.pdf](http://www.americanprogress.org/issues/2011/02/pdf/social_impact_bonds.pdf).

62. *Id.*

Because the government will pay the intermediary at a future date only if it achieves certain performance targets, the intermediary obtains operating funds by issuing bonds to private investors who provide upfront capital in exchange for a share of the government payments that will be available should the intermediary meet the targets.<sup>63</sup> Touted as incorporating “performance-based payments and market discipline,” the social impact bond model, according to the Center for American Progress, can address current problems with government funding of social services, which include insufficient focus on outcomes and evaluation, delayed expansion of successful social programs, and risk-averse public officials unwilling to back promising new programs.<sup>64</sup>

Beneficial corporations (B-Corps.) and low-profit limited liability companies (L3Cs) are the latest attempt to blur the line between nonprofit and for-profit enterprises, combining the financial flexibility of a corporate entity with the social advantages of a nonprofit entity.<sup>65</sup> Under the B-Corp. model, social, environmental, or community goals are embedded into the company’s governing structure, such that boards of directors and officers are charged with adhering to those goals while also creating economic value for shareholders.<sup>66</sup> Similarly, L3Cs are for-profit organizations designed to retain the corporate advantages of limited liability corporations (including membership and financing flexibility) while maintaining a primary charitable purpose and abstaining from lobbying or political activity.<sup>67</sup>

Early signs of trouble, however, have already surfaced. Some scholars note that the goals of the hybrid forms—expanding the financing available to blended enterprises while also offering credible commitments to enforce the enterprises’ blended missions—are often in conflict, with the two goals “trad[ing] off against each other.”<sup>68</sup> Other concerns have been raised regarding the difficulty of determining whether and when an L3C’s social purpose has been subordinated to a profit motive.<sup>69</sup>

Moreover, normative questions remain about explicit mergers of private and public interests. Social entrepreneurs list mission, and not profits, as a primary motive in choosing the L3C business form,<sup>70</sup> and yet a move from the public sphere to the private is “not simply a neutral phenomenon; it

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63. *Id.*

64. *Id.*

65. See Elizabeth Schmidt, *Vermont’s Social Hybrid Pioneers: Early Observations and Questions to Ponder*, 35 VT. L. REV. 163, 168–69 (2010).

66. *Id.*

67. *Id.*

68. Dana Brackman Reiser, *Governing and Financing Blended Enterprise*, 85 CHI.-KENT L. REV. 619, 654 (2010).

69. *Id.*

70. See Schmidt, *supra* note 65, at 176.

carries inherent political and ideological implications” that can clash with more selfless missions.<sup>71</sup> Privatization, particularly as it refers to government transfer of public responsibilities to private hands, symbolizes a “withdrawal from civic life and reorientation towards the pursuit of self-interest” and also signals that a particular area of activity is “not an appropriate subject for public regulation or collective responsibility.”<sup>72</sup> Abdication of the values of “altruism, philanthropy and government responsibility for the common good” subjects the public good to whims of private market forces.<sup>73</sup> History has repeatedly shown, however, that the urgency of a bottom line will often subordinate the needs of the public to the interests of the private shareholders whose profit motive has, after all, been honored in these hybrid schemes.<sup>74</sup>

## ii. The Public Good of Higher Education

Like other public goods, higher education has been shaped by market concepts and private transactions. NPIs have engaged with increasing frequency in commercial ventures and for-profit activities, resulting in debate about the point at which this type of activity compromises NPIs’ tax-exempt status. The subject of this paper, however, is not educational institutions that operate for-profit arms or engage in for-profit activity not directly related to their educational mission. Rather, this paper focuses explicitly on FPIs—those colleges and universities guided by a for-profit motive when delivering higher education.<sup>75</sup> And, with the rise of FPIs has come the classic problems of the marginalized in the market. Ironically, the Center for American Progress has identified financial aid for students attending for-profit post-secondary institutions as an urgent problem that social impact bonds could be used to address.<sup>76</sup>

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71. Metzger, *supra* note 59, at 1377.

72. *Id.* at 1377–78.

73. Mark Rosenman, *Commercializing the Public Good*, HUFFINGTON POST, June 8, 2011, [http://www.huffingtonpost.com/mark-rosenman/commercializing-the-publi\\_b\\_869265.html](http://www.huffingtonpost.com/mark-rosenman/commercializing-the-publi_b_869265.html) (last visited Nov. 29, 2011).

74. *See id.*

75. The same trend can be observed in K–12 public education, as public charter schools are increasingly permitted to operate on a for-profit basis, and educational management organizations are given control of public schools, with the incentive of profits as motivation to improve the schools. As with higher education, the for-profit motive has led to self-dealing, abuse of public resources, and concerns regarding the propriety of the for-profit motive in K–12 public education. *See* Stephanie Strom, *For Charter School Company, Issues of Money and Control*, N.Y. TIMES, Apr. 24, 2010, at A1; Nicholas Confessore & Jennifer Medina, *More Scrutiny for Charter Schools in Debate Over Expansion*, N.Y. TIMES, May 26, 2010, at A20. *See also* Metzger, *supra* note 59, at 1389–92 (discussing the trend of privatization in public education).

76. *See* Liebman, *supra* note 61, at 27.

The shift in conceptualizing higher education from public good to private commodity is relatively recent. From the establishment of the first colonies<sup>77</sup> through the twentieth century,<sup>78</sup> American historical, cultural, and political understandings have framed higher education as a public good. The Continental Congress expressed a commitment to national education, reflected in their disposition of the Northwest Territories. Both the Land Ordinance of 1785<sup>79</sup> and the Northwest Ordinance of 1787 provided that portions of the land grants be reserved for public education.<sup>80</sup> Records from the Federal Convention of 1787 indicate that at least two delegates—James Madison and Charles Pinckney—proposed that the federal government be given specific powers to establish a University,<sup>81</sup> and endorsement for higher education also appeared at the state level, with states like Georgia, North Carolina, and Vermont making provisions for universities in their state constitutions.<sup>82</sup>

The preserved writings of the Founding Fathers further reflect an understanding of higher education as a public good. Lamenting the dearth of higher education opportunities in Pennsylvania, Benjamin Franklin emphasized the extent to which “[a]lmost all Governments have . . . made

77. New England colonists placed higher education next to godliness: “After God had carried us safe to New England, and wee [sic] had builded [sic] our houses, provided necessaries for our liveli-hood [sic], rear’d [sic] convenient places for Gods [sic] worship, . . . the next things we longed for, and looked after was to advance Learning . . . .” New England’s First Fruits (1643), *reprinted in* SAMUEL ELIOT MORISON, *THE FOUNDING OF HARVARD COLLEGE* 420, 432 (1935).

78. See Robert M. Berdahl, *Policies of Opportunity: Fairness and Affirmative Action in the Twenty-First Century*, 51 CASE W. RES. L. REV. 115, 117 (2000) (noting that the 1960s, in particular, was a period of high public investment in the public good of higher education, particularly because of a societal belief that higher education was integral to creating equal opportunity).

79. The Land Ordinance of 1785 authorized the sale of public lands in the Northwest that became Ohio, Indiana, Illinois, Michigan, and Wisconsin. See JUDITH AREEN, *HIGHER EDUCATION AND THE LAW: CASES AND MATERIALS* 38 n.1 (2009).

80. “[T]here shall be reserved the lot N 16, of every township, for the maintenance of public schools, within said township,” and “the Federal Government has included grants of designated sections of the public lands for school purposes in the Enabling Act of each of the States admitted into the Union since 1802.” James F. Shekleton, *Strangers at the Gate: Academic Autonomy, Civil Rights, Civil Liberties, and Unfinished Tasks*, 36 J.C. & U.L. 875, 936 (2010) (quoting The General Land Ordinance of 1785, 28 JOURNALS OF THE CONTINENTAL CONGRESS 375 (1904–37)). See also AREEN, *supra* note 79 (citing GEORGE N. RAINSFORD, *CONGRESS AND HIGHER EDUCATION IN THE NINETEENTH CENTURY* 38 (1972)).

81. See 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 at 321, 616 (Max Farrand ed., 1937).

82. See AREEN, *supra* note 79, at 40 nn. 2–3.

it a principal Object of their Attention, to establish and endow with proper Revenues, such Seminaries of Learning, as might supply the succeeding Age with Men qualified to serve the Public with Honor to themselves, and to their country.”<sup>83</sup> Similarly, Benjamin Rush, a signatory to the Declaration of Independence, supported the establishment of a “federal university under the patronage of Congress”<sup>84</sup> where students could master “every thing [sic] connected with government,” lest citizens be unprepared to maintain a republican government.<sup>85</sup>

Like Rush, the first six presidents of the United States specifically advocated establishing a national university.<sup>86</sup> George Washington appealed to Congress to establish such an institution, citing the need to assimilate youths in the “principles, opinions, and manners of our countrymen,” so that the union could be made more permanent, and the liberties of the country better guarded.<sup>87</sup> Although a national university was never established, Congress has repeatedly pledged financial support to public universities. The Morrill Act of 1862 allowed for the establishment of “land grant colleges” by subsidizing state college and university creation.<sup>88</sup>

The Founders understood, then, that higher education is necessary to prepare students to be good citizens, capable of thoughtful and responsible participation in a strong representative democracy.<sup>89</sup> Washington, Jefferson, and other Founders “regarded public colleges and universities as an extra-constitutional mechanism to preserve the republic by broadening the diffusion of learning across social classes and enlarging the population of persons possessing the skills required for democratic governance and

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83. See *id.* at 29 (quoting Benjamin Franklin, *Proposals Relating to the Education of Young in Pennsylvania* (1749)).

84. See DAVID MADSEN, *THE NATIONAL UNIVERSITY, ENDURING DREAM OF THE USA* 16 (1966) (quoting *LETTERS OF BENJAMIN RUSH* (L. H. Butterfield ed., 1951)).

85. See AREEN, *supra* note 79, at 32 (quoting Benjamin Rush, *Address to the People of the United States*, AM. MUSEUM, Jan. 1787, at 8).

86. See *id.* at 36 n.3.

87. See *id.* at 34 (quoting George Washington, *Message to Congress, December 7, 1796*, 1 AMERICAN STATE PAPERS: SPEECHES AND MESSAGES OF THE PRESIDENTS OF THE UNITED STATES TO BOTH HOUSES OF CONGRESS 31 (1833)).

88. 7 U.S.C. § 304 (2006) provides for the:

[E]ndowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, 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.

89. RUCH, *supra* note 7, at 159 (citing the beliefs of philosopher John Dewey).



useful in diversifying the economy.”<sup>90</sup> Particularly aware of the rigid class system that limited social mobility in Europe and concentrated wealth among the elite, the Founders expected higher education to not only bring “into action that mass of talents which lies buried in poverty,”<sup>91</sup> but also prevent concentration of powerful new aristocracies in the New World.<sup>92</sup>

Despite the best of original intentions, both class and race limited access to higher education. This did not, however, stop minority communities from conceptualizing education as a precursor to citizenship and participation in a free democracy. Even before the Civil War, free Blacks pursued higher education, supported by family wealth or abolitionist groups,<sup>93</sup> and were welcomed by liberal colleges and universities with a commitment to individual opportunity, if not racial equality.<sup>94</sup> Two historically black private colleges and universities, Lincoln University and Wilberforce University, were also established prior to the war.<sup>95</sup> Black monthly periodicals published in the first half of the twentieth century consistently publicized and celebrated African-American college and university attendance and the historically black colleges and universities that had been created for this purpose.<sup>96</sup> Led by intellectuals like W.E.B. Du Bois, higher education was, for middle-class blacks in particular, the currency of the realm: the opportunity to “place [them]selves in the proper light before the world” and display capabilities that would challenge white beliefs in Black inferiority.<sup>97</sup>

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90. Shekleton, *supra* note 80, at 934–35.

91. *Id.* at 935 (quoting Letter from Thomas Jefferson to José Correia da Serra (Nov. 25, 1817)).

92. Thomas Jefferson advocated for a national university to avoid sending American students to Europe for higher education, for fear that they would return with a taste for aristocracy and monarchy, and an “abhorrence” for the “lovely equality which the poor enjoys with the rich in his own country.” See AREEN, *supra* note 79, at 35 n.2 (quoting Letter from Thomas Jefferson to John Banister, Jr. (1785), reprinted in HENRY STEELE COMMAGER, *THE COMMONWEALTH OF LEARNING* 63–64 (1968)).

93. See Ellen N. Lawson & Marlene Merrill, *The Antebellum “Talented Thousanth”: Black College Students at Oberlin Before the Civil War*, 52 J. NEGRO EDUC. 142 (1983) (chronicling the story of the one hundred African American men and women who studied at Oberlin College before the Civil War).

94. See James Oliver Horton, *Black Education at Oberlin College: A Controversial Commitment*, 54 J. NEGRO EDUC. 477, 481 (1985) (tracing Oberlin College’s commitment to black education, from its founding until 1980).

95. Roy L. Brooks, *American Democracy and Higher Education for Black Americans: The Lingering-Effects Theory*, 7 J.L. & SOC. CHALLENGES 1, 24 (2005).

96. See Michael Fultz, “*The Morning Cometh*”: African-American Periodicals, Education, and the Black Middle Class, 1900-1930, 80 J. NEGRO HIST. 97, 105 (1995).

97. *Id.*

Major changes in the higher education landscape ultimately helped the United States realize its vision of broader access to higher education. The land-grant movement that began in the mid-nineteenth century established state colleges and universities for the purpose of educating those who could benefit from advanced education but were uninterested in the traditional divinity training provided by colleges like Harvard and Yale.<sup>98</sup> During the 1950s and 60s, legal and social movements increased access to higher education, and as access expanded, the democratic principle of “educat[ing] people who would then better serve society as workers, citizens, and leaders” was reinforced.<sup>99</sup> Landmark education legislation in the twentieth century, including the G.I. Bill, which subsidized higher education for veterans; the National Defense of Education Act of 1958, which provided federal funds for student loan programs; and the Pell Grant program, which established financial assistance for low-income students, reflected an enduring American belief in the ability of higher education to function as a “great equalizer.”<sup>100</sup>

Indeed, for students who do obtain quality higher education, the experience pays dividends. Higher education confers both economic and social benefits, preparing students for a vocation and enabling them to economically support themselves in the world.<sup>101</sup> Higher education has become increasingly necessary for occupational and economic success in the United States. While jobs that require on-the-job training are expected to see the greatest decline in numbers, ninety percent of jobs in the new fast-growing information and service economy will require some postsecondary education.<sup>102</sup> According to the Department of Labor, there will be close to four million new job openings in education, health care, and computer and mathematical sciences by the year 2014.<sup>103</sup>

Higher education is associated with lower rates of unemployment and higher income for all ethnic groups.<sup>104</sup> As a segue to gainful employment,

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98. See HOWARD R. D. GORDON, *THE HISTORY AND GROWTH OF VOCATIONAL EDUCATION IN AMERICA* 39–53 (2d ed. 2003).

99. See Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 127 (2003).

100. See MICHAEL S. MCPHERSON & MORTON OWEN SCHAPIRO, *THE STUDENT AID GAME* 11 (1998).

101. See RUCH, *supra* note 7, at 158.

102. TEST OF LEADERSHIP, *supra* note 50, at 7.

103. *Id.*

104. See SUSAN AUD, ET AL., U.S. DEPT. OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, *STATUS AND TRENDS IN THE EDUCATION OF RACIAL AND ETHNIC GROUPS* 144–46 (2010), available at <http://nces.ed.gov/pubs2010/2010015.pdf>; KATHRYN HOFFMAN, ET AL., U.S. DEPT. OF EDUC., NAT’L CTR. FOR EDUC. STATISTICS, *STATUS AND TRENDS IN THE EDUCATION OF BLACKS* 116 (2003), available at <http://nces.ed.gov/pubs2003/2003034.pdf>.

higher education is either a signaling game or a screening game. As the former, postsecondary education does not necessarily teach useful job skills. Rather, the main function of postsecondary education is to signal to employers that particular students are ambitious, hard working, responsive to training, and “conformist.”<sup>105</sup> As a screening game, formal education is a mechanism that employers can use to identify “fast learners” who can be trained quickly at lower cost.<sup>106</sup>

Individuals with higher education earn more than their high school graduate counterparts. Even after controlling for social class, test scores, marital status, labor force experience, and location, those holding bachelor’s degrees earn thirty to fifty percent more per year than those holding only high school diplomas; those holding associate’s degrees earn twenty to thirty percent more. An individual holding a bachelor’s degree will earn \$2.1 million over his or her lifetime, nearly twice as much as an individual with only a high school diploma.<sup>107</sup>

Degrees obtained through higher education also objectify cultural and social capital, conveying “officially recognized” competence and facilitating the establishment of a monetary value for which that competence can be exchanged on the labor market.<sup>108</sup> By signaling an affiliation with a particular institution, education can provide social capital, giving its possessors access to a network of “institutionalized relationships of mutual acquaintance and recognition.”<sup>109</sup> These networks can be mobilized to help graduates navigate any number of life’s challenges, from finding a job to securing elite educational opportunities for one’s children. Moreover, it integrates marginalized citizens, creating the stronger union necessary for national security.

Higher education also cultivates the educated citizenry necessary to maintain an enduring and vibrant democracy. There is a positive correlation between higher education and propensity to vote.<sup>110</sup> Even after controlling for social background and personality traits, college- and university-educated people have a greater interest in politics and political

105. See Alison Wolf et al., *Are Too Many Students Going to College?*, CHRON. HIGHER EDUC., Nov. 13, 2009, at B7; Creola Johnson, *Credentialism and the Proliferation of Fake Degrees: The Employer Pretends to Need a Degree; The Employee Pretends to Have One*, 23 HOFSTRA LAB. & EMP. L.J. 269, 296–97 (2006).

106. See Johnson, *supra* note 105, at 297.

107. TEST OF LEADERSHIP, *supra* note 50, at 7.

108. Pierre Bourdieu, *The Forms of Capital*, in SOCIOLOGY OF EDUCATION: A CRITICAL READER 83, 88 (Alan R. Sadovnik ed., 2007). To the extent that the cultural and social capital of education can be used to obtain financial benefit, both can also be considered economic capital. *Id.* at 89.

109. *Id.* at 88.

110. Voting rates among whites and Blacks generally increase with higher levels of educational attainment. HOFFMAN, ET AL., *supra* note 104, at 124.

activism, and show higher levels of humanitarianism and social conscience.<sup>111</sup> Public social benefits include civic engagement, increased charitable giving, lower public health costs, the production of a diverse cohort of leaders, and even the preservation of cultural heritage.<sup>112</sup>

Finally, education confers broad economic advantages. The benefits to taxpayers—even those without children in the public education system—include higher tax revenue for social support and insurance programs,<sup>113</sup> reductions in spending on such programs, and savings on the costs of incarceration, even given the increased costs of providing for increased educational attainment.<sup>114</sup> Unemployment rates are generally lower for people with higher levels of educational attainment than for those with lower levels.<sup>115</sup> A more educated citizenry also maintains a country's global standing, particularly as countries compete to retain high-value jobs and highly educated labor forces.<sup>116</sup>

Despite disagreement as to the definition of the phrase “public good,”<sup>117</sup> given its importance to national interests and personal, social and economic

111. See David Karen & Kevin J. Dougherty, *Necessary but Not Sufficient: Higher Education as a Strategy of Social Mobility*, in HIGHER EDUCATION, *supra* note 56, at 33.

112. See EARNINGS FROM LEARNING, *supra* note 11, at 37.

113. Even after subtracting the public revenue that has financed a degree, on average across countries belonging to the Organisation for Economic Co-Operation and Development (OECD), a male with a tertiary level of education will generate an additional \$86,000 in income taxes and social contributions compared to a male who has only completed a secondary level of education. See ORG. FOR ECON. CO-OPERATION AND DEV., EDUCATION AT A GLANCE 2010, 13 (2010) [hereinafter OECD].

114. See STEPHEN J. CARROLL & EMRE ERKUT, THE BENEFITS TO TAXPAYERS FROM INCREASES IN STUDENT EDUCATIONAL ATTAINMENT xiv–xx (2009). By “increased educational attainment,” the authors mean more time in school, rather than a “better education.” *Id.* The authors also did not account for the cost of developing programs designed to encourage increased educational attainment.

115. See THOMAS D. SNYDER & SALLY A. DILLOW, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEPT. OF EDUC., DIGEST EDUC. STATISTICS 2009, at 553 (April 2010).

116. See OECD, *supra* note 113, at 13.

117. Even the phrase “the public good” shares space in our discourse with “the common good” and “the public interest.” There are also many references to a different concept, “public goods,” in concert with the ascendance of market models and economic approaches to public life . . . . [Scholars argue that] the idea of the public good is a fundamentally unsettled, contested concept, . . . [and] that the public good is a dynamic and indeterminate social and cultural construct.

See EARNINGS FROM LEARNING, *supra* note 11, at 25–26 (quoting Brian Pusser, *Higher Education, the Emerging Market, and the Public Good*, in THE

development, education is commonly understood to be a public good, likened by some scholars to healthcare as a prerequisite for a well-functioning democracy and for a good life.<sup>118</sup> Moreover, the two commonly identified characteristics of a public good—nonrivalry<sup>119</sup> and nonexcludability<sup>120</sup>—can both be attributed to education.

In accordance with objections to the commodification of public goods,<sup>121</sup> education in the United States is distributed to all students for “free” in the primary and secondary public school system.<sup>122</sup> Despite having declined to declare education a “fundamental right,” even the federal judiciary has affirmed the “supreme importance” of education, characterizing education as a “most vital civic institution for the preservation of a democratic system of government,” which provides the “basic tools by which individuals might lead economically productive lives to the benefit of us all.”<sup>123</sup>

### B.PredEd

By forsaking research or service missions, failing to promote civic engagement, and yielding poor social and economic outcomes for graduates of the institutions relative to their peers at NPIs, FPIs do not further the public good of higher education. In addition, the for-profit

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KNOWLEDGE ECONOMY AND POST SECONDARY EDUCATION: REPORT OF A WORKSHOP 105, 118 (Patricia Albjerg Graham & Nevzer Stacey eds., 2002)).

118. See, e.g., AMY GUTMAN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 137 (2004) (“The three principles that provide the content of deliberative democracy—basic liberty, basic opportunity, and fair opportunity—also flow from the basic principle of reciprocity . . . . Those basic opportunities typically include adequate health care, education, security, work, and income.”).

119. One person’s enjoyment of the good of education does not interfere with the ability of others to enjoy it at the same time. See Hansmann, *supra* note 9, at 848.

120. Once education has been provided to one person, there is no way to prevent society in general from benefitting from the increased social and economic output cultivated as a result of the education. See *id.*

121. “The commodification objection states that certain basic public goods like education, environmental quality, sanitation, housing, and policing should be provided on a relatively equal basis regardless of individuals’ private resources.” Richard Schragger, *Consuming Government*, 101 MICH. L. REV. 1824, 1835 (2003).

122. Although American public schools do not charge admission or tuition fees, they are not actually free. Rather, public schools are funded through local property taxes, through which all taxpayers fund education, whether or not they have children in the public school system. See Bradley W. Joondeph, *The Good, the Bad, and the Ugly: An Empirical Analysis of Litigation-Prompted School Finance Reform*, 35 SANTA CLARA L. REV. 763, 765 (1995).

123. *Plyler v. Doe*, 457 U.S. 202, 221 (1982).

motive incentivizes providers to exploit the indeterminate nature of the good, resulting in market failure—net harm to students, rent-seeking behavior, fraud, deception, and the absence of legal remedies, all at the expense of the public and the underserved student population for-profits purport to help.

i. For-Profits and the Public Good

Ideals regarding the necessity of higher education for the public good are reflected in higher education legislation enshrining the different motives of FPIs and NPIs, and serve as a guide for congressional and executive spending. Section 101 of the Higher Education Act (HEA) explicitly acknowledges the differing priorities of FPIs and NPIs by preserving a dual definition of “post-secondary institutions” —NPIs are defined as “assets irrevocably dedicated to the public trust.”<sup>124</sup> The dual definition serves to make FPIs ineligible for federal funding provided to support institutions, as opposed to individual students. As such, although FPIs can enroll students with access to Title IV student loans, they are prohibited from receiving funds from Titles III and V of the HEA.<sup>125</sup>

In terms of spending, the Obama administration has proposed billions of dollars in aid to the nation’s community colleges to enable the institutions to produce five million more graduates by the year 2020.<sup>126</sup> In response to queries about the exclusion of FPIs from the aid programs, Robert M. Shireman, the U.S. Deputy Undersecretary of Education responded that “Institutional aid doesn’t make sense for the for-profit side of things, but it does make sense for the community-college side of things, where the owners are the public.”<sup>127</sup>

Shireman’s response is fitting. In the absence of a free postsecondary education system, NPIs have been committed to pursuing the public-good goals of education. In contrast, although heavily supported by federal funding, FPIs explicitly eschew a commitment to the public good, while

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124. See TIERNEY & HENTSCHE, *supra* note 6 at 162; 20 U.S.C. §§ 1001 et seq. (2008).

125. Title III programs support institutions that enroll large numbers of low-income students, while Title V programs support institutions with enrollment that is at least twenty-five percent Hispanic. For purposes of access to the Title IV student loan program, however, the HEA embodies a single definition of “post-secondary institution.” *Id.* at 162–63.

126. See President Barack Obama, Remarks in Warren, Mich. (July 14, 2009) (excerpts available at [http://www.whitehouse.gov/the\\_press\\_office/Excerpts-of-the-Presidents-remarks-in-Warren-Michigan-and-fact-sheet-on-the-American-Graduation-Initiative/](http://www.whitehouse.gov/the_press_office/Excerpts-of-the-Presidents-remarks-in-Warren-Michigan-and-fact-sheet-on-the-American-Graduation-Initiative/)).

127. See Jennifer Gonzalez, *For-Profit Colleges, Growing Fast, Say They Are Key to Obama’s Degree Goals*, CHRON. HIGHER EDUC., Nov. 8, 2009, at A17 (quoting Robert M. Shireman, U.S. Deputy Undersecretary of Education).

guided in large part, if not exclusively, by an obligation to maximize private wealth for their shareholders and investors. Public tax dollars prop up the industry through the provision of federally funded student loans and grants; indeed, publicly traded FPIs derive seventy-five percent of their revenue from federal funds in the form of federal financial student aid.<sup>128</sup> Despite this dependence on public money, FPIs lack even their own libraries, cutting costs by depending on student use of public libraries and publicly subsidized NPI libraries.<sup>129</sup> As admitted by a for-profit dean, doing social good is “not the primary objective of for-profit universities . . . . For-profit universities do not have as their primary mission the shaping of a more informed citizenry, or creating a more cultured population, or helping young people understand their heritage, their society, and its values.”<sup>130</sup>

FPIs also lack research or service missions. Unlike NPIs that “offer not only classes, but also free arts, cultural, recreational, social-service, business, and extension programs,”<sup>131</sup> FPIs exist solely to provide classes to students—at a profit. Inculcating a sense of community or civics is not always cost efficient, and yet NPIs are motivated by their service missions to pursue initiatives that do just that. In contrast, FPIs are motivated by their profit missions to eschew those same initiatives. Tenure, for example, is costly for NPIs, but helps ensure that instructors can push students to think critically about even their own schools without fear of reprisal. Tenure, however, is notably absent for faculty members at FPIs.<sup>132</sup> Moreover, some nonprofit community colleges offer their students support beyond remedial academic offerings, including access to physical and mental health professionals, food banks, and day care facilities—services that affect the bottom line and are notably absent at FPIs.<sup>133</sup> Although the public good of education is understood to promote democracy by including civic engagement and development of citizenship, research suggests that

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128. See Golden, *supra* note 1.

129. See SHEILA SLAUGHTER & GARY RHOADES, *ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND THE NEW ECONOMY* 4 (2004).

130. See RUCH, *supra* note 7, at 72–73.

131. TIERNEY & HENTSCHE, *supra* note 6, at 165 (citing Donald Heller).

132. See EARNINGS FROM LEARNING, *supra* note 11, at 40. The experiences of faculty at FPIs also present many problems, ranging from encouragement to falsify student grades and dumb-down curriculum, to harassment for objecting to unethical business practices. In response to an op-ed, the author has been contacted directly by a for-profit faculty member to discuss the absence of academic autonomy and freedom, the hiring of unqualified faculty, and the obligation of faculty to do anything to “keep bodies in the seats.” See also *The Fear and Frustration of Faculty at For-Profit Colleges*, CHRON. HIGHER EDUC., July 15, 2011, at B12 [hereinafter *Fear and Frustration*].

133. See, e.g., Josh Keller, *For the Jobless, Community College Offers a Safety Net*, CHRON. OF HIGHER EDUC., Feb. 11, 2011, at A23.

students in the for-profit sector are less likely than students at nonprofit community colleges to vote, participate in political activities, or become involved in their communities.<sup>134</sup>

Although a better-educated citizenry produces societal wealth in the forms of higher standards of living,<sup>135</sup> greater levels of productivity, higher rates of consumer spending, increased tax revenues, and decreased public expenditures for social services,<sup>136</sup> research suggests that for-profit students do not fare as well economically as their nonprofit public and private counterparts.<sup>137</sup> Studies from the 1970s and 1980s conclude that FPIs provided weaker economic returns to graduates than public sector institutions, a proposition that has also been supported by more recent studies.<sup>138</sup> Payscale, an online provider of employee compensation data, reported in 2010 that graduates of for-profit Kaplan University, for example, earn less income than the national average.<sup>139</sup> Mounting evidence suggests that poor returns are, in part, a result of subpar academic training delivered at the schools.<sup>140</sup>

## ii. Market Failure and Predatory Education

In addition to failing to serve the public good despite relying so heavily on public funds, FPIs have capitalized on the indeterminate nature of the good of education and the lack of adequate legal remedies. This creates market failure<sup>141</sup> in the form of fraudulent, abusive, and questionable business practices. More severe than simply allocating education inefficiently or disadvantaging investors, unethical behavior in pursuit of profit affects the livelihood of the students who attend the institutions.

Low-income, first-generation, and minority students are aggressively and unethically recruited by FPIs, sometimes with unsubstantiated promises of high post-graduation salaries and no obligation to repay

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134. See KEVIN KINSER, *FROM MAIN STREET TO WALL STREET: THE TRANSFORMATION OF FOR-PROFIT HIGHER EDUCATION* 77 (2006).

135. See TIERNEY & HENTSCHE, *supra* note 6, at 154–55.

136. See EARNINGS FROM LEARNING, *supra* note 11, at 36–37.

137. See KINSER, *supra* note 134, at 74.

138. *Id.*

139. See Daniel Golden, *Online Colleges Target Veterans: GI Benefit-rich Veterans Help Kaplan and Other Universities Avoid Federal Financial Aid Rules*, *BUS. WK.*, Nov. 8, 2010, at 26.

140. The obligation of faculty at the schools to “dumb-down” curriculum, falsify student grades, and tolerate inadequate academic progress has been repeatedly documented. See *Fear and Frustration*, *supra* note 132 and accompanying text.

141. “Market failure” means a failure of market mechanisms to correct for flaws like information asymmetry or unequally distributed power, thus diminishing or eliminating the likelihood that the market will produce optimal outcomes for all participants.



student loans. The inability of students to find gainful employment upon graduation is partially to blame for the disproportionate share of for-profit students who ultimately default on federal student loans. Ironically, it is this student population that stands to gain the most from higher education, and conversely loses the most when its education at FPIs is fraudulently rendered.

The word “predatory” is a term of art, the meaning of which has been contested<sup>142</sup> but nevertheless applied to business practices across various industries.<sup>143</sup> At its simplest, the definition of a predatory educator might be one who, in pursuit of profit, takes advantage of students by unfair, although not necessarily unlawful, means. Comparing the practices of many for-profit educators to the practices of predatory lenders, a similar pattern of behavior emerges between the two. These practices include: (1) providing an educational experience that results in net harm to students; (2) harmful rent-seeking behavior; (3) securing student enrollment through fraud or deception; (4) securing student enrollment through misrepresentation, nondisclosure, and questionable business practices that do not amount to outright fraud; and (5) capitalizing on the absence of legal remedies.<sup>144</sup>

### 1. Net Harm to Students: Student Loan Default

As already discussed, FPIs lack service missions, eschewing those initiatives that inculcate a sense of community or civics among students but fail to maximize profit. As a result, students in the for-profit sector are less

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142. The absence of a clear definition of predatory lending has served as an impediment to the creation of new remedies and increased federal regulation. See Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1259–60 (2002).

143. See, e.g., Phillip Areeda, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) (describing predatory pricing as an antitrust offense through which firms drive out or exclude rivals by selling at an unremunerative price); Creola Johnson, *Payday Loans: Shrewd Business or Predatory Lending*, 87 MINN. L. REV. 1 (2002) (labeling the business practices of certain payday lenders as predatory because they reap generous profits by taking advantage of consumers through unlawful and grossly unfair means); Engel & McCoy, *supra* note 142, at 1255 (identifying several factors that characterize predatory lending in the housing market).

144. Engel & McCoy define predatory lending as:

[A] syndrome of abusive loan terms or practices that involve one or more of the following five problems: (1) loans structured to result in seriously disproportionate net harm to borrowers, (2) harmful rent seeking, (3) loans involving fraud or deceptive practices, (4) other forms of lack of transparency that are not actionable as fraud, and (5) loans that require borrowers to waive meaningful legal redress. *Supra* note 142, at 1260–61.

likely than nonprofit students to vote or become involved in their communities.<sup>145</sup> For-profit graduates also see weaker economic returns on their education.<sup>146</sup>

Concerns regarding the low public and private returns on investment to for-profit graduates are compounded by the graduates' disproportionately high rates of student loan default.<sup>147</sup> To cover the cost of attendance, for-profit students borrow at significantly higher rates than their public and private nonprofit counterparts.<sup>148</sup> In the most recent year for which national data was available, almost one hundred percent of graduates from four-year, for-profit colleges and universities took out student loans and borrowed forty-five percent more than graduates from other types of four year institutions.<sup>149</sup> For bachelor's degrees, the median debt for for-profit students upon graduation is \$31,190, compared to \$7,960 and \$17,040 at public and private NPIs, respectively.<sup>150</sup>

Although accounting for less than ten percent of all college and university students, for-profit students account for forty-four percent of student loan defaults.<sup>151</sup> Broken down, the average short-term default rate of borrowers who attend FPIs is 11.9%,<sup>152</sup> compared to 6.2% of borrowers from public NPIs and 4.1% of borrowers who attend private NPIs.<sup>153</sup> Worse, when the long-term default rate is analyzed by loans,<sup>154</sup> instead of by borrower, the data reveals that forty percent of loans granted to

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145. TIERNEY & HENTSCHKE, *supra* note 6, at 165.

146. *See supra*, notes 134–140 and accompanying text.

147. *See id.*

148. *See* REBECCA HINZE-PIFER & RICHARD FRY, PEW RESEARCH CENTER, THE RISE OF COLLEGE STUDENT BORROWING 1 (2010) (“Students who attend for-profit colleges are more likely than other students to borrow and they typically borrow larger amounts. One quarter (twenty-four percent) of 2008 bachelor’s degree graduates at for-profit schools borrowed more than \$40,000 compared with five percent of graduates at public institutions and fourteen percent at not-for-profit schools.”).

149. DIANE CHANG & MATTHEW REED, THE INST. FOR COLL. ACCESS AND SUCCESS, STUDENT DEBT AND THE CLASS OF 2009, at 5 (2010). For-profit students make up about ten percent of the undergraduate population, and forty percent of all for-profit students take out private loans. *See* Letter from George A. Scott, Director, Education, Workforce and Income Security Issues, U.S. Gov’t Accountability Office, to Congressional Committees, GAO–10–86R, at 3 (Nov. 17, 2009).

150. EDUC. TRUST, *supra* note 32, at 6.

151. Michael Vasquez, *For-Profit Schools Grow—As Do Complaints*, MIAMI HERALD, Sept. 5, 2010, at A1.

152. “Short-term” is defined as defaulting within the first two years of repayment.

153. *See* Gonzalez, *supra* note 17.

154. “Long-term” is defined as defaulting within the first fifteen years of repayment.

borrowers who attend FPIs are in default within the first fifteen years of repayment.<sup>155</sup> Demographics do not fully explain the differences in default rate, as research shows that only fifteen percent of the variation in two-year college default rates between FPIs and NPIs can be explained by the low-income students that FPIs are more likely to enroll.<sup>156</sup> More generally, GAO reports have concluded that for-profit institutions perform worse than public and private nonprofit colleges on most measures of quality, even when student demographics are taken into account.<sup>157</sup>

The likelihood of default is not unknown to proprietary school officials, but it nevertheless fails to temper aggressive recruitment. Employees are trained to obscure the likelihood that graduates of the school will earn too little to repay their loans.<sup>158</sup> Recruiters also take advantage of dips in the economy, assuring students that their programs are an “antidote to hard economic times,” or a “safe way to be sure . . . [of] income.”<sup>159</sup> Such was the case of Jeffrey West, a twenty-one-year old man who enrolled in WyoTech, a chain of trade schools owned by Corinthian Colleges. Despite blanching at a sticker price of \$30,000 for a nine-month program in auto body refinishing and upholstering technology, he ultimately enrolled after being subjected to aggressive recruiting by WyoTech admissions officers, which included meetings at his home. Fourteen months after completing the program, Mr. West was still unable to find a job in his field.<sup>160</sup> He ultimately took a position weatherizing foreclosed homes six to seven days a week, struggling to make loan payments of \$600 a month.<sup>161</sup> Should Mr. West ultimately default on his loans, the public will pick up the tab; when borrowers default on student loans, taxpayers pay ninety-seven to one hundred percent of the losses.<sup>162</sup>

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155. This percentage is in comparison to thirty percent of community college students. Fewer community college students, however, borrow, resulting in a smaller actual number of defaults stemming from community college education. See Field & Brainard, *supra* note 40.

156. See *id.* See also EDUCATION TRUST, *supra* note 32, at 7 (citing JONATHAN GURRYAN & MATTHEW THOMPSON, CHARLES RIVER ASSOCS., REPORT ON GAINFUL EMPLOYMENT 15 (2010)).

157. Kelly Field, *Demographics Do Not Explain For-Profit Colleges' Shortcomings on Student-Success Measures*, GAO Says, CHRON. HIGHER EDUC., Dec. 7, 2011.

158. See, e.g., Goodman, *supra* note 33 (profiling Amanda Wallace, a former financial aid and admissions officer for ITT Technical Institute in Knoxville Tennessee, who left her job at ITT for the same reason).

159. *Id.*

160. *Id.*

161. *Id.*

162. See Field & Brainard, *supra* note 40.

## 2. Harmful Rent Seeking

Excessively high tuition rates at FPIs indicate rent-seeking behavior in the industry. Even after controlling for degree, FPIs are not only more expensive than most nearby public colleges and universities, but sometimes also more expensive than nearby private colleges and universities.<sup>163</sup> In the mortgage industry, higher interest rates and fees charged to less credit-worthy borrowers are justified as compensation for the higher risks entailed when servicing sub-prime loans. In the for-profit education sector, however, school owners do not have risks for which higher tuition compensates. Indeed, FPIs make money by virtue of access to the federal loans that accompany their students, regardless of whether students graduate and find gainful employment and meaningful community involvement. Subpar educational experiences at FPIs destroy value by wasting valuable resources, leaving students and society with little to show for it.

## 3. Fraud and Deception

FPIs have long attracted allegations of unethical business practices, including admitting unqualified students, lying about accreditation, and inflating graduation and job placement rates.<sup>164</sup> At many FPIs, recruiters also lie to applicants about the cost of attendance<sup>165</sup> or promote federal student loans by noting, “No one will come after you if you don’t pay.”<sup>166</sup> Other FPIs encourage applicants to falsify financial aid forms. A 2010 investigation by the Government Accountability Office featured a FPI admissions representative who encouraged an undercover applicant to claim three dependents when the applicant had none.<sup>167</sup> In another instance, an undercover applicant was encouraged not to report \$250,000 in savings on financial aid forms.<sup>168</sup>

Although fraud also occurs among NPIs, FPIs produce fraud in amounts disproportionate to their share of the market. Former Department of Education Inspector General John P. Higgins, Jr. testified to a House

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163. See *supra*, notes 25–30 and accompanying text.

164. See Hirsch, *supra* note 25, at 821. See also Eryn Brown, *Can For-Profit Schools Pass an Ethics Test?*, N.Y. TIMES, Dec. 12, 2004, at BU5.

165. See Kelly Field, *Undercover Probe Finds Widespread Deception in Marketing by For-Profit Colleges*, CHRON. HIGHER EDUC. (D.C., Aug. 1, 2010), <http://chronicle.com/article/Undercover-Probe-Finds/123744/> (citing instance in which a representative reported the annual cost of attendance for only nine months of classes, even though the program was described as year-round).

166. *Undercover Testing*, *supra* note 18, at 12.

167. *Id.* at 7

168. *Id.*

Committee in 2005 that seventy-four percent of higher education fraud cases in the early 2000s came from FPIs alone.<sup>169</sup>

#### 4. Misrepresentation and Questionable Business Practices

Prompted by rampant fraud and abuse in the late 1980s and early 1990s, Congress rewrote parts of the Higher Education Act in 1992 to curb problematic business practices among for-profit education institutions.<sup>170</sup> The bans on incentive compensation for recruiters, however, were ultimately relaxed, opening the door to aggressive and questionable recruitment practices like the targeting of homeless shelters. Since then, the occurrence of unethical business practices has steadily increased. Brent Park, a former recruiter with for-profit Ashford University who was fired for failing to make enrollment quotas, described a “boiler room” environment where “an army of recruiters” would call leads as many as twenty times a day.<sup>171</sup> In comments submitted to the Department of Education in 2010, Park wrote, “We are forced to do anything necessary to get people to fill out an application.”<sup>172</sup>

Intense pressure to maintain growth and meet recruiting goals has fueled the aggressive recruiting practices that include badgering potential enrollees, regularly admitting students who have not graduated from high school, improperly referring students lacking a high school diploma to local unaccredited high schools where they can purchase diplomas, and misleading students about classes and programs in order to secure enrollment.<sup>173</sup> Hearings in the summer of 2010, held by the Senate Committee on Health, Education, Labor, and Pensions, featured video clips pulled from an investigation by the Government Accountability Office in which undercover government applicants posed as prospective students at fifteen FPIs.<sup>174</sup> The clips, and the accompanying GAO Report, revealed deceptive or otherwise questionable recruiting practices at *all* fifteen institutions visited, including misinformation regarding accreditation status, graduation rates, employment and expected salaries, program duration and

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169. Samuel G. Freedman, *Tucked in Katrina Relief, a Boon for Online Colleges*, N.Y. TIMES, Oct. 12, 2005, at B8. See also Hirsch, *supra* note 25, at 821.

170. *Id.* at B8.

171. See Kelly Field, *Government Scrutinizes Incentive Payments for College Recruiters*, CHRON. OF HIGHER EDUC. (Aug. 1, 2010), <http://chronicle.com/article/Government-Scrutinizes/123728>.

172. *Id.*

173. See Stephen Burd, *Promises and Profits*, CHRON. OF HIGHER EDUC., Jan. 13, 2006, at A21.

174. See Kelly Field, *Lawmakers Focus Ire on Accreditors for Abuses at For-Profit Colleges*, CHRON. OF HIGHER EDUC. (Aug. 4, 2010), <http://chronicle.com/article/Lawmakers-Focus-Ire-on/123771>.

cost, and financial aid.<sup>175</sup> One video clip captured a recruiter telling a prospective student that barbers could earn \$150,000 to \$250,000 per year, even though the Bureau of Labor Statistics estimates that ninety percent of barbers make less than \$43,000 per year.<sup>176</sup>

Another video clip revealed a recruiter denying a student access to a financial aid officer to discuss his potential debt burden. The recruiter eventually summoned his supervisor, who badgered the student before ultimately destroying the student's application while accusing him of not being ready to "make the investment of time and money necessary to get [the student] to where [he] should be at this point."<sup>177</sup> Aggressive recruiting is further aided through mass media advertising, as FPIs spend over one billion dollars per year promoting their programs,<sup>178</sup> often on television.

The abusive business practices span the industry. In 2004, Apollo Group, the University of Phoenix's parent company, paid the federal government \$9.8 million in fines, after a U.S. Department of Education report detailed compensation and sales tactics that ranged "from illegal to unethical to aggressive."<sup>179</sup> According to the report, University of Phoenix's corporate culture placed undue pressure on enrollment counselors to meet or exceed admissions and recruitment targets, often tying compensation directly to the number of students enrolled, in violation of federal rules prohibiting such practices.<sup>180</sup>

In 2006, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) investigated for-profit InterContinental University because several class-action lawsuits by former employees, shareholders, and students alleged that recruiters were enrolling themselves and former students to meet recruiting deadlines, enrolling students who had not graduated from high school, and conveying an inaccurate level of admissions selectivity.<sup>181</sup> Similarly, in 2007, Florida Metropolitan University settled allegations levied by the Florida Attorney General's Office that the school had misrepresented the transfer value of its

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175. See *Undercover Testing*, *supra* note 18, at 6–17; Field, *supra* note 171.

176. See *Undercover Testing*, *supra* note 18, at 10 (video available at <http://www.youtube.com/watch?v=4XZp-2HDRG0>).

177. *Id.*

178. See Goldie Blumenstyk, *Economic Downturn Brings Prosperity and Opportunities to For-Profit Colleges*, CHRON. OF HIGHER EDUC., Dec. 19, 2008, at A13.

179. Dawn Gilbertson, *Student-Recruitment Tactics at University of Phoenix Blasted by Feds*, ARIZ. REPUBLIC, Sept. 14, 2004, available at <http://www.azcentral.com/specials/special42/articles/0914apollo14.html>.

180. See *id.*

181. See Burd, *supra* note 173.

classes.<sup>182</sup> In 2009, Alta Colleges, Inc. paid the federal government \$7 million to settle a lawsuit in which former employees alleged that Alta's recruiters lied to prospective students about job-placement rates and students' ability to transfer credits to other colleges and universities.<sup>183</sup>

Finally, as indication that some FPIs may even consider fines and suits to be the cost of doing business, Apollo Group was *again* subject to accusations of illegal behavior in 2010. Its wholly owned subsidiary, University of Phoenix, paid \$67.5 million in 2010 to both settle a False Claims lawsuit filed by two former recruiters who alleged that the institution violated both state and federal bans on incentive compensation, and to address several shareholder lawsuits, some of which alleged that the company misled investors about its student recruitment policies.<sup>184</sup>

### 5. The Absence of Legal Remedies

To limit legal remedies for students, FPIs sometimes require students to sign contracts with mandatory arbitration clauses that prohibit judicial remedies and block students from joining class-action suits.<sup>185</sup> In the education sector, however, such contract clauses are unnecessary given the futility of using legal remedies to remediate a fraudulently rendered education.

Similar to the difficulty of assessing the quality of K-12 public education,<sup>186</sup> higher education defies easy measurement or assessment.

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182. See Ron Matus, *After a Long Inquiry, State and FMU Settle*, ST. PETERSBURG TIMES, Nov. 6, 2007, at 1B. Florida Metropolitan has since been renamed Everest University. See FLORIDA METROPOLITAN UNIVERSITY, <http://fmu.edu> (last visited Oct. 15, 2011).

183. See Field, *supra* note 1714.

184. See *id.*; Kelly Field & Jennifer Gonzalez, *Education Dept. Will Release Stricter Rules for For-Profits But Delays a Pivotal One*, CHRON. OF HIGHER EDUC. (D.C., June 15, 2010), <http://chronicle.com/article/Education-Dept-Will-Release/65958>; Amanda Harmon Cooley & Aaron Cooley, *From Diploma Mills to For-Profit Colleges and Universities: Business Opportunities, Regulatory Challenges, and Consumer Responsibility in Higher Education*, 18 S. CAL. INTERDISC. L.J. 505, 518 (2009).

185. See Molly Redden, *Supreme Court Decision on Arbitration May Have Eroded For-Profit Students' Right to Sue*, CHRON. OF HIGHER EDUC. (June 21, 2011.), <http://chronicle.com/article/Supreme-Court-Decision-May/127964>.

186. K-12 adequacy litigation has illustrated the difficulty of assessing the quality of education in K-12 public education. More than focusing on equitable financing among public schools, adequacy litigation focuses on various educational inputs, including funding, necessary to achieve minimal educational outcomes. Accordingly, adequacy responds to how much is required to educate students based on their individual need, which may result in differentiated levels of financing. In the absence of clear standards by which to evaluate an adequate education, however, courts have instead tended to focus on equity in inputs. See,

Education is not singular in consumption, and the extension of benefits beyond the educated individual impedes singular measurement. Finally, the quality of education can be assessed neither in advance nor upon initial inspection. With the exception of skill sets that are easy to certify or test, education takes a significant amount of time to consume and evaluate for quality.<sup>187</sup>

These obstacles to assessment are only compounded by information asymmetry. Producers of higher education have more information about the product than consumers do, including graduates' employment rates unmediated by averages and other leveling factors, productivity figures for faculty, and institutional culture.<sup>188</sup> Recently, the problems asymmetry poses have been brought into particular relief in the legal education market, where blame for a supply-and-demand imbalance has been laid at the feet of law schools that have failed to warn potential students about a shrinking job market.<sup>189</sup>

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*e.g.*, *Rose v. Council for Better Educ., Inc.*, 790 S.W.2d 186 (Ky. 1989) (citing to curricular and funding inequalities when finding the school system unconstitutional and discriminatory); *McDuffy v. Sec'y of Exec. Office of Educ.*, 615 N.E.2d 516 (Mass. 1993) (comparing different school districts as support for the holding that Massachusetts is under constitutional obligation to provide all public school students with an adequate education). For more detail about the conflation of equity and adequacy, see also James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223 (2008).

187. The process of being educated is often a long-term process, rather than a singular exchange between student and instructor. See EARNINGS FROM LEARNING, *supra* note 11, at 113.

188. *Id.*

189. See David Segal, *Is Law School a Losing Game?*, N.Y. TIMES, Jan. 9, 2011, at BU1; Amir Efrati, *Hard Case: Job Market Wanes for U.S. Lawyers*, WALL ST. J., Sept. 24, 2007, at A1. Even as legal demand slacked, applications increased and more law schools were accredited, prompting the Young Lawyers Division of the American Bar Association to pass a resolution recommending that law schools more accurately disclose the employment rates of their graduates. See A.B.A. Young Lawyers Div. Res. 1YL, *available at* [http://www.abajournal.com/files/yld\\_res\\_1yl.pdf](http://www.abajournal.com/files/yld_res_1yl.pdf); Molly McDonough, *ABA Young Lawyers Want Law Schools to Provide Better Jobs, Salary Data Up Front*, A.B.A.J., Feb. 13, 2011, *available at* [http://www.abajournal.com/news/article/aba\\_young\\_lawyers\\_seek\\_transparency\\_in\\_law\\_school\\_employment\\_info](http://www.abajournal.com/news/article/aba_young_lawyers_seek_transparency_in_law_school_employment_info). The legal transparency movement has prompted both scholarship about whether law schools are violating consumer protection laws, and lawsuits by former students alleging misrepresentations about employment prospects. See also Joel F. Murray, *Professional Dishonesty: Do U.S. Law Schools That Report False or Misleading Employment Statistics Violate Consumer Protection Laws?* (May 27, 2011) (Working Paper), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1854709](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1854709) (arguing that although the FTC Act generally applies only to FPIs, the law has been extended to nonprofit organizations, and that law schools, in reporting false or misleading



The problem, however, goes beyond just information asymmetry and also includes evaluation. Just what *is* a good education? Economists might conclude that a quality education is measured by its ability to ensure that the recipient finds gainful employment.<sup>190</sup> Sociologists might look to the quality and complexity of social networks to which affiliation with an educational institution provides access for its graduates.<sup>191</sup> Certainly, the allure of the country's most elite colleges and universities is based, in part, on perceptions that these institutions provide better employment and social networking opportunities. Nevertheless, these measures are indeterminate.<sup>192</sup> Researchers and policymakers disagree about appropriate indicators of the quality of higher education,<sup>193</sup> and consistent and meaningful assessment of learning and life outcomes are not likely forthcoming.<sup>194</sup> Out of thirty possible indicators of educational quality

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employment statistics, are engaged in false advertising and deceptive practices); Complaint, *Alburda v. Thomas Jefferson School of Law* (2011), (No. 37-2011-00091898-CU-FR-CTL), 2011 WL 2109327.

190. See *supra* notes 105–107 and accompanying text.

191. See *supra* notes 108–109 and accompanying text.

192. Job-placement information is often difficult to obtain, as most academic arts and sciences departments do not track their graduates, and successful employment is affected by many factors, of which quality of education is only one. Moreover, assessing the worth of one's social network defies precise measurement.

193. The six-year graduation rate, or measure of the proportion of students who complete their programs within 150% of the normal time allotted, has been cited as one of the best measures of college performance. See David Glenn, *6-Year Graduation Rates: a 6-Minute Primer*, CHRON. OF HIGHER EDUC., (Dec. 6, 2010), <http://chronicle.com/blogs/measuring/6-year-graduation-rates-a-6-minute-primer/> 27573. The rate, however, is criticized as incomplete for not only failing to count students who take a long time to complete their degrees, but also for describing a minority of students by accounting only for those full-time, first-time students who enroll in the fall, while ignoring those students who transfer to other institutions and successfully graduate. The rate also fails to account for student learning or life outcomes. See Jeffrey Brainard & Andrea Fuller, *Graduation Rates Fall at One-Third of 4-Year Colleges*, CHRON. OF HIGHER EDUC., Dec. 5, 2010, at A1.

194. The negative consequences of failing to effectively assess higher education learning include the devaluation of the learning process itself, abrupt and unpredictable devaluation of the currency of higher education, continued exploitation of the federal financial-aid system, and limited upward mobility for institutions not located in “creative class” areas like Greenwich Village or Foggy Bottom. See Kevin Carey, *Student Learning: Measure or Perish*, CHRON. OF HIGHER EDUC. (D.C.), Dec. 12, 2010, at A72. Others warn that the standards which reduce education to single, incomplete measures, like the income-based gainful employment rule, will soon be applied more broadly to liberal arts departments across the country, instead of just the FPIs that are currently being targeted with the rules. See Diane Auer Jones, *Gainful-Employment Regulations: Coming Soon to a Campus Near You*, CHRON. OF HIGHER EDUC. (Dec. 7, 2010),

used by raters of higher education like U.S. News & World Report, Forbes, and the Academic Ranking of World Universities, fewer than ten are used by two or more raters, and almost no outcome measures are utilized.<sup>195</sup> Moreover, all measures, whether focused on instructors, quality of courses taken, or student experience after education is completed, are subject to limitation.<sup>196</sup>

Even assuming that the quality of education could be assessed, avenues of redress, should a student conclude that her education was poorly or fraudulently rendered, are few. Although outright fraud or misrepresentations are theoretically actionable using suits based in tort and contract, or under consumer protection regulation, the indeterminate nature of the good of education makes success through these avenues uncertain. Using “academic abstention” principles, courts are reluctant to either subject the professional judgments of educators to judicial review or impose on educators a duty of care for student outcomes.<sup>197</sup> Academic abstention also undermines the success of state consumer protection laws that include scienter and causation requirements subject to the principle. And even in those cases indicating a pattern of fraud and abuse, judges have used Supreme Court precedent to deny plaintiffs class-action status, limiting them to binding arbitration agreements instead.<sup>198</sup>

Accordingly, only suits alleging the most egregious instances of fraud will result in relief for misrepresentation or breach of contract. Even when legal action is successful, however, legal remedies can neither restore a student’s lost time nor guarantee transfer credit at another institution. Limited credit transferability, particularly between FPIs and NPIs,

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<http://chronicle.com/blogs/brainstorm/gainful-employment-regulations-coming-soon-to-a-campus-near-you/29663>.

195. See Alex Richards & Ron Coddington, *30 Ways to Rate a College*, CHRON. OF HIGHER EDUC. (Aug. 29, 2010), <http://chronicle.com/article/30-Ways-to-Rate-a-College/124160>.

196. Degrees attained by instructors, for example, do not necessarily ensure teaching quality. Similarly, income ten years after graduation is not the sole, or even the most preferable, assessment of student learning. See David Glenn, *Is Your Psychology 102 Course Any Good?*, CHRON. OF HIGHER EDUC., Dec 12, 2010, at A14.

197. See Patrick F. Linehan, Note, *Dreams Protected: A New Approach to Policing Proprietary Schools’ Misrepresentations*, 89 GEO. L.J. 753, 763–81 (2001) (describing the limited legal remedies available to victims of fraudulent practices at FPIs); Aaron N. Taylor, “*Your Results May Vary:*” *Protecting Students and Taxpayers Through Tighter Regulation of Proprietary Schools’ Representations*, 62 ADMIN. L. REV. 729, 763–67 (2010).

198. See, e.g., Redden, *supra* note 185 (discussing how *AT&T Mobility v. Concepcion* might have an impact on higher education class actions).

compounds the problem by making it difficult for students to enroll in alternative institutions without starting again from the beginning.<sup>199</sup>

#### 6. Preying on “The Niche”

Some scholars also consider discrimination against protected groups, even after controlling for risk, to be a feature of predatory business practices.<sup>200</sup> Scholarship has repeatedly documented the propensity of market economics to disadvantage people of color and other minorities in the market.<sup>201</sup> Much of this scholarship focuses on discrimination or the undervaluing of the labor of marginalized groups in the market. Discrimination in this sense is not the problem in the for-profit education market; in fact, minorities are aggressively recruited for enrollment in FPIs. The predatory behavior that does occur at their expense, however, is particularly distressing given the necessity of education in achieving economic, political, and social parity for minority groups in America.

Advocacy groups have begun to take notice of the extent to which students of color are falling victim to fraud and abuse in the for-profit sector. In May of 2010, “organizations representing students, higher education, consumers and civil rights” wrote Secretary of Education Arne Duncan to express concern regarding the high-pressure and deceptive sales tactics of FPIs.<sup>202</sup> The coalition specifically noted that low-income, first-

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199. See TIERNEY & HENTSCHE, *supra* note 6, at 167–70.

200. See, e.g., Nicole Lutes Fuentes, *Defrauding the American Dream: Predatory Lending in Latino Communities and Reform of California’s Lending Law*, 97 CAL. L. REV. 1279, 1286 (2009) (citing Kathleen C. Engle and Patricia A. McCoy, *Turning a Blind Eye: Wall Street Finance of Predatory Lending*, 75 FORDHAM L. REV. 2039 (2007)).

201. “[T]he limitations manifest in neo-classical economists’ analysis of race, markets, and social outcomes . . . are deeply rooted in two mainstream theoretical commitments: the market power hypothesis and an asocial, nonhistorical conceptualization of race and racism. Much of the discussion . . . has focused on the inability to reconcile the market power hypothesis with actually observed market outcomes.”

PATRICK L. MASON & RHONDA WILLIAMS, *RACE, MARKETS, AND SOCIAL OUTCOMES* 8 (1997) (summarizing, for example: a study that undermines economic mismatch theories by emphasizing the role of personal contracts and informal networks that bar minorities from skilled construction trades; a case study showing that employment discrimination and occupational segregation block African American entry into professional/managerial employment; and data challenging the notion that interracial differences in test scores are a major cause of interracial differences in wages).

202. Letter from Coalition, Inst. for Coll. Access & Success to Arne Duncan, Sec’y of Educ. (May 20, 2010), available at [http://projectonstudentdebt.org/files/pub/Neg\\_reg\\_coalition\\_support\\_letter\\_to\\_Duncan.pdf](http://projectonstudentdebt.org/files/pub/Neg_reg_coalition_support_letter_to_Duncan.pdf).

generation, and minority students attend FPIs at disproportionately high rates, “making them particularly vulnerable to illegal or unscrupulous acts” by proprietary schools.<sup>203</sup> The Education Trust went further, in a nod to the American economic crisis of 2007–10, labeling the “unfulfilled promise” of for-profit colleges and universities a “subprime opportunity.”<sup>204</sup>

Given the dependence of FPIs on tuition dollars, the availability of Pell Grants to low-income and minority students makes the students a particularly attractive demographic for recruitment. From 2003–04, more than twenty-five percent of Black, Hispanic, and low-income students began their college careers at FPIs, compared to only ten percent of whites and seven percent of non-low-income students.<sup>205</sup> In the 2004–05 academic year, although Blacks earned 8.9% of bachelor’s degrees and 11.3% of associate’s degrees, they accounted for fifteen percent of bachelor’s degrees, and 18.1% of associate’s degrees conferred by FPIs.<sup>206</sup> A similar pattern occurs for Hispanics, who earned 6.3% of bachelor’s degrees and 10.4% of associate’s degrees, but accounted for 9.6% of bachelor’s and 14.2% of associate’s degrees earned at FPIs.<sup>207</sup> The disproportionate rates are only magnified at the nation’s most successful FPIs. Racial and ethnic minorities made up thirty-nine percent of students enrolled at the University of Phoenix in 2006,<sup>208</sup> the largest and most recognizable for-profit university in the country.<sup>209</sup>

The vulnerability of lower-income minority students to default on student loans<sup>210</sup> does little to deter FPIs from aggressively recruiting and establishing facilities in high-minority urban centers.<sup>211</sup> In their zeal to make a profit, FPIs make unsubstantiated promises of lucrative and stable careers to students who have neither the academic preparation nor the financial support to complete a program. Moreover, recruitment in the for-profit education sector becomes psychologically and emotionally manipulative, as recruiters exploit educational and financial illiteracy as

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203. *Id.*

204. EDUC. TRUST, *supra* note 32, at 1.

205. *Id.* at 2.

206. Charles Pekow, *For-Profit Schools Popular Destination for Minorities*, DIVERSE: ISSUES IN HIGHER EDUC., Feb. 8, 2007, at 19. While this is disproportionate, I imagine that “enrollment” numbers would be even more startling than “graduation” numbers.

207. *Id.* In 2008, 15.2% of Black, 8.4% of Hispanic and 8.3% of American Indian students attended FPIs, as compared to only 6.3% of White students. *Id.* See AUD, ET AL., *supra* note 1044, at 127–28.

208. EARNINGS FROM LEARNING, *supra* note 11, at 72.

209. *Id.* at 71.

210. See TIERNEY & HENTSCHE, *supra* note 6, at 140.

211. See Amy E. Sparrow, *Unduly Harsh: The Need to Examine Educational Value in Student Loan Discharge Cases Involving For-Profit Trade Schools*, 80 TEMP. L. REV. 329, 335 (2007).

well as the unique psychological triggers of marginalized students to close the deal<sup>212</sup> with students typically hesitant to take on debt for higher education.<sup>213</sup> FPIs' television advertisements often feature minority actors who invoke Black culture through speech and phonetic conventions, fashion, and description of circumstance to encourage identification and, ultimately, enrollment among target minority populations.<sup>214</sup> Recruiters are trained to tell prospective students that a degree would make their parents proud and make them role models for their children.<sup>215</sup> Although pursuit of higher education can qualify a student to be a role model, as explained in testimony to the Department of Education, recruiters use such language to exploit the vulnerabilities of students with trying life circumstances.<sup>216</sup> FPIs ultimately make off with the revenue derived from the federal loans awarded to these students. Meanwhile, the students, unable to find

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212. See *infra*, notes 268–272 and accompanying text.

213. See, e.g., Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851, 872–73 (2010) (noting that both low-income and minority students are more price sensitive to tuition costs, with African-Americans, in particular, placing higher value on student aid and work in order to finance higher education, regardless of economic background). But see, Rachel E. Dwyer, et al., *Youth Debt, Mastery, and Self-Esteem: Class-Stratified Effects of Indebtedness on Self-Concept*, 40 SOC. SCI. RES. 727 (2011) (concluding that young people appear to gain a greater sense of mastery and self-esteem from carrying educational and credit card debt, and finding the effect most pronounced among students whose parents hail from the bottom twenty-five percent in income distribution).

214. See David Crockett, *Marketing Blackness: How Advertisers Use Race to Sell Products*, 8 J. CONSUMER CULTURE 245 (2008) (addressing how advertisers use representations of blackness to deliver promises about product benefits); Osei Appiah, *Effects of Ethnic Identification on Web Browsers' Attitudes Toward and Navigational Patterns on Race-Targeted Sites*, 31 COMM'C'N RES. 312, 313 (2004) (acknowledging segmented consumer marketing along lines of race, and noting that “segmenting Blacks based on race is good, but incorporating . . . additional . . . segmentation . . . may be . . . even better and more effective . . . .”); Creola Johnson, *The Magic of Group Identity: How Predatory Lenders Use Minorities to Target Communities of Color*, 17 GEO. J. ON POVERTY L. & POL'Y 165 (2010) (arguing that targeted advertising to minority communities through the use of celebrity spokespeople and community leaders should be considered discrimination).

215. See Field, *supra* note 171. Reports indicate that veterans were subject to the same emotional manipulation, with former recruiters from FPIs that targeted veterans admitting that their recruitment scripts instructed them to ask, “What about your family? Aren't you are [sic] doing this for them? You don't want to let them down.” Lipton, *supra* note 53.

216. “We are working the angle of their lifelong hardships and failures to convince them.” Field, *supra* note 171 (testimony of Brent Park, a former recruiter).

employment sufficient to support their debt, default on their student loan obligations and incur the harsh consequences that come with student loan default, including the difficulty of discharging student loans in bankruptcy proceedings.<sup>217</sup>

In response to efforts by the federal government to impose stricter regulation on the for-profit sector, some advocacy groups have come out against the proposed regulations, noting that the regulations are likely to punish the minority and working-class students who disproportionately attend FPIs.<sup>218</sup> Alma Morales Riojas, president of the Mexican American National Association, explained, “I’m not a cheerleader for the career colleges . . . [b]ut if we’re looking to educate our community, we need as many options as possible.”<sup>219</sup> Responses such as Riojas’ unfortunately legitimize the rendering of subpar educational experiences to minority students. Nothing is said of the vocational or certification tracks to which minority students are often limited at these schools. Meanwhile, their more advantaged counterparts at NPIs receive liberal arts educations that are understood to expand long-term career options and cultivate democratic citizens of the country and the world.<sup>220</sup>

Such responses also ignore how a for-profit scheme in higher education further entrenches societal structures that produce poorly educated students. To the extent that FPIs are disproportionately dependent on the loan dollars of students who are not academically prepared for traditional higher education, legitimizing a for-profit motive in the sector creates an interest

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217. See Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009) (concluding that the “undue hardship” litigation standard in bankruptcy raises serious concerns regarding access to justice for student-loan debtors); see also Sparrow, *supra* note 211 (analyzing the difficulty of qualifying for the “undue hardship” standard when student loans are at issue).

218. Advocates for minority students are split on whether the rules are beneficial or problematic. The NAACP and the National Council of La Raza endorse the proposed gainful employment rules, while the president of the Mexican American National Association has argued that it would relegate minority students at career colleges to “second-class status.” See Kelly Field, *For-Profits Spend Heavily to Fend Off New Rule*, CHRON. OF HIGHER EDUC. Sept. 10, 2010, at A1.

219. *Id.* See also Harry C. Alford, *Your Take: Halting Pell Grants at For-Profit Schools Will Hurt Minorities*, THE ROOT (Sept. 12, 2010, 11:08 PM), <http://www.theroot.com/views/your-take-halting-pell-grants-profit-schools-will-hurt-minorities>.

220. Furthermore, FPIs often train students in finite skill sets that can become obsolete. For a detailed defense of liberal arts education as necessary to maintain stable democracies, and of education for a “more inclusive type of citizenship,” rather than just for profit-making, see MARTHA NUSSBAUM, *NOT FOR PROFIT: WHY DEMOCRACY NEEDS THE HUMANITIES* 7 (2010).

group vested in a steady source of undereducated students. Given the limited K–12 educational opportunities for working class and minority students that steer these students to FPIs, the perverse incentive created to maintain those limitations, and the economic instability furthered in poor and minority communities when for-profit education results in mass loan default, eliminating predatory behavior in the higher education sector is both a moral and economic issue.

#### REGULATION AND REMEDIES

*“The struggle is not between market-based reforms and the educational status quo. It is about whether the democratic ideal of the common good can survive the onslaught of a market mentality that threatens to turn every human relationship into a commercial transaction.”*<sup>221</sup>

For various reasons, the for-profit market will not fix itself. The federal student loan programs, to which FPIs have access, are currently very profitable. As exemplified by those FPIs subject to repeated legal proceedings for illegal and unethical business practices,<sup>222</sup> the benefit of enrolling students through fraud and coercion exceeds the cost of legal discipline for illegal or unethical business practices. Moreover, regulation that denies repeat offenders access to the market only addresses those market participants who are eventually caught, doing very little to address offenders who fly under the radar indefinitely. Furthermore, competition in the market is stifled by information asymmetries and the absence of advertising in the higher education sector. Not only do NPIs commit much less of their revenue to advertising than FPIs, but providing specific price-points for education is difficult given the multiple factors that go into setting nonprofit tuition, including student’s financial background, the availability of state and federal financial aid, and the ability of NPIs to subsidize student tuition using endowment funds.

Accordingly, regulation might be an option for reigning in abuse in the sector. Regulation and consumer protection law that address fraud and abuse in the for-profit sector, however, is often under-enforced by state and federal agencies. Moreover, although laws and regulatory activity can be better targeted to address industry abuses directly, legal responses to predatory education will always be hampered by the indeterminate nature of the good of information, permanent market flaws in the sector, and the warping effect of the for-profit motive; the problem is in the premises. Accordingly, policymakers who are serious about ending predatory behavior in the industry must consider limiting participation in the federal

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221. Alex Molnar, *Charter Schools: The Smiling Face of Disinvestment*, 54 EDUC. LEADERSHIP 9, 15 (1996).

222. See *supra* notes 179–184 and accompanying text.

student financial aid program only to those areas least susceptible to fraud and abuse. Remaining monies should be channeled to NPIs, where the non-distribution constraint removes incentives for predatory behavior, and where education opportunities for those students currently recruited by FPIs can be maximized.

#### A. The Perils of For-Profit

Given the nature of higher education, fraud, ethical violations, and abuse can certainly occur at NPIs, but to the extent that they occur at higher rates in the for-profit industry, are they a result of the for-profit motive? Is the nonprofit form inherently more appropriate for the rendering of higher education?

Several theories about the structure of nonprofit and for-profit entities suggest that the answer to both of these questions is yes. Scholars have examined the unique role of nonprofit organizations, with much research focusing on the particular competency of nonprofit organizations in providing public goods. Limited by a non-distribution constraint, nonprofits are prohibited from distributing excess revenue to owners.<sup>223</sup> The very form of the nonprofit also remedies a specific type of market failure that we have examined in higher education: the inability of consumers to accurately evaluate the good, which results in contract failure—the inability to police producers of the good through ordinary contractual devices.<sup>224</sup> In such cases, consumers benefit by purchasing the good from nonprofit producers who, although capable of raising prices and cutting quality without fear of customer reprisal, lack the incentive to do so because profits cannot ultimately be distributed to managers.<sup>225</sup> Although nonprofit organizations may nevertheless still be incentivized to distribute earnings in the form of inflated salaries or special benefits to employees,

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223. See Hansmann, *supra* note 9, at 838. But see Evelyn Brody, *Agents Without Principles: The Economic Convergence of the NonProfit and For-Profit Organizational Forms*, 40 N.Y.L. SCH. L. REV. 457, 459–60 (1996) (critiquing the nondistribution theory as circular for its suggestion that nonprofits are created and maintained to provide those services for which the public cannot judge quality. If nonprofit status is a sign of trustworthiness, the legal form then “bestows a halo” on nonprofit organizations without merit, and also fails to help the public choose between competing nonprofits). See also Frances R. Hill, *Targeting Exemption for Charitable Efficiency: Designing A Nondiversion Constraint*, 56 S.M.U. L. REV. 675 (2003) (proposing a legislative model, to operate in conjunction with Hansmann’s nondistribution constraint, that targets exemption through a nondiversion constraint based on transfer taxes on diversion transactions within the organization, thereby justifying tax exemption not just on the basis of an absence of private benefit, but also on the presence of a public benefit).

224. See Hansmann, *supra* note 9, at 843–44.

225. See *id.* at 844



nonprofits offer a second-best, if imperfect, alternative to the for-profit motive.<sup>226</sup> Scholars have further theorized that market discipline for these difficult-to-evaluate goods can be so weak that efficiency losses to be expected from for-profit producers is likely greater than those expected from nonprofit producers.<sup>227</sup>

Contract failure features prominently in the provision of public goods. Even in those situations where consumers are willing to adequately contribute to the production of public goods,<sup>228</sup> contributors will nevertheless be wary that managers, motivated by a commitment to making a profit, are incentivized to solicit payments in excess of what is actually needed to pay for creation and distribution of the good. Arguably, this is just what has occurred in the for-profit education sector, exemplified by tuition for associate's degrees costing six to thirteen times more at FPIs than public NPIs and, in some instances, certificate programs costing almost twenty-seven times more.<sup>229</sup> In the nonprofit context, contributors would at least have some assurance that such an incentive was absent.<sup>230</sup> Notoriously difficult to evaluate and assess,<sup>231</sup> higher education is one such public good; consumers are best served by contracting for education from entities that lack the incentive to capitalize on those difficulties in the pursuit of profit.

Abusive business practices in the for-profit higher education sector are also linked to the lifecycle of FPIs. Access of FPIs to capital markets allows them to respond quickly to growth spurts in particular fields.<sup>232</sup> Rapid growth becomes problematic, however, as the success of for-profit enterprises eventually comes to depend on continued escalation of stock prices. When escalation expectations are not met, the threat of sharp and significant drops in stock valuation can lead the entities to engage in fraudulent practices in an effort to maintain share prices.<sup>233</sup> Indeed, rapid

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226. *Id.*

227. *See id.* at 844–45.

228. The nonrivalry and nonexcludability characteristics of public goods typically result in positive externalities that encourage free-riding. Moreover, when individual consumers consider the cost of their individual consumption of a public good, they fail to consider the benefit to society more generally, and thus undervalue the good. This results in insufficient support for the creation of those public goods.

229. *See Undercover Testing*, *supra* note 18, at 17.

230. *See* Hansmann, *supra* note 9, at 835, 849–51.

231. *See supra* notes 1866–196 and accompanying text.

232. *See* LESTER M. SALAMON, *THE RESILIENT SECTOR: THE STATE OF NONPROFIT AMERICA* 68 (2003).

233. *Id.* at 68–69. Similar trends have been observed in healthcare where, compared to for-profit providers, nonprofit providers are “slower to react to change, expanding capacity less quickly when demand rises, and dropping services or withdrawing from markets less frequently when profitability declines.” Mark

growth has been cited as the number one “risk factor for abuse” in the for-profit higher education industry,<sup>234</sup> which has both grown at an astounding pace and been plagued by unethical and illegal student recruiting, outright fraud, and predatory behavior regarding disadvantaged students.<sup>235</sup> Unsurprisingly, the latest wave of fraud and abuse in the industry comes just as years of “unrestrained” record enrollment growth in the industry are coming to an end.<sup>236</sup> In contrast, nonprofits are not dependent on rapid and ever-escalating growth to justify their existence. Accordingly, the involvement of nonprofit entities in fields like higher education is important because “the public has a crucial stake in maintaining a durable level of quality . . .”<sup>237</sup> in education, particularly during those times when the economy is unstable.

There are also indications that the for-profit motive undermines the very quality of education delivered at FPIs. As discussed earlier, assessing the quality of education can be difficult, although research does suggest that for-profit education fails to deliver the broader societal goods that higher education has been understood to provide. For-profit graduates, for example, have lower levels of civic engagement and enjoy weaker economic returns on their education.<sup>238</sup> Moreover, student outcomes are poorer at FPIs. Reports from as early as 1997 have found that FPIs have poor training-related placement rates that cannot be explained by heavy reliance of the schools on title IV funds.<sup>239</sup> Furthermore, only twenty-two percent of first-time, full-time, bachelor’s degree seeking students enrolled at FPIs earn degrees within six years, compared to fifty-five and sixty-five percent of students at public and private NPIs, respectfully.<sup>240</sup> Although

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Schlesinger & Bradford H. Gray, *How NonProfits Matter in American Medicine, and What to Do About It*, 25 HEALTH AFF. 287, 291 (2006).

234. See Freedman, *supra* note 169.

235. See *supra*, notes 173–180, and accompanying text. Similar trends have been observed in the health care sector, with nonprofit organizations appearing more trustworthy in delivering services, and being less likely to make misleading claims, have patients lodge complaints, or treat vulnerable patients differently from other patients. See Schlesinger & Gray, *supra* note 233, at 291.

236. See Goldie Blumenstyk, *As For-Profit Colleges’ Enrollment Growth Slows, Analysts See Signs of an Industry Reset*, CHRON. OF HIGHER EDUC. (D.C., Nov. 11, 2010), <http://chronicle.com/article/For-Profit-Colleges-May-Be-at/125379>. See also Tamar Levin, *Scrutiny and Suits Take a Toll on For-Profit College Company*, N.Y. TIMES, Nov. 10, 2010, at A1 (“The growth of the for-profit sector . . . has been nothing short of explosive.”).

237. See SALAMON, *supra* note 2322, at 69.

238. See *supra*, notes 134–140 and accompanying text.

239. See U.S. GOV’T ACCOUNTABILITY OFFICE, GAO/HEHS-97-103, PROPRIETARY SCHOOLS: POOR STUDENT OUTCOMES AT SCHOOLS THAT RELY MORE ON FEDERAL STUDENT AID 3 (2009).

240. See EDUCATION TRUST, *supra* note 32, at 2–3.

FPIs defend their rates by explaining that they serve a disproportionately disadvantaged student population, public and private NPIs with similar admissions policies or similar percentages of low-income students nevertheless graduate similar students at higher rates.<sup>241</sup> Widespread fraud and abuse, failure to deliver on public benefits, and poorer student outcomes make it plausible to conclude that the very quality of education at FPIs is not comparable to that rendered at NPIs.

Although the purpose of this paper is not to denigrate the private sector, we must acknowledge that “private organizations may not develop the institutional norms of professionalism and public service that characterize many public bureaucracies.”<sup>242</sup> Arguably, this reality is only heightened when applied explicitly to FPIs in the private sector (as opposed to private NPIs). NPIs encourage their managers to look inward to identify and respond not to incentives to create revenue, but to the needs of the public; the goal is not to make more money, but to provide better service. A motivation to provide better service, rather than increase profits, is what is most needed in the higher education sector, particularly for those marginalized students whose access to quality education has systematically been subpar. Accordingly, it is fitting that higher education operates primarily in the nonprofit context.<sup>243</sup>

This reality is tellingly illustrated by the efforts of NPIs<sup>244</sup> to lower both student loan default rates and boost minority graduation rates, even though the efforts to do so can undermine revenue. From early 2000 to 2004, one consortium of fourteen historically black colleges and universities committed to quarterly meetings and sharing of best practices, including the creation of “default management teams,” the re-examination of financial aid packages, improvement of retention programs, and financial

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241. *See id.*, at 3 (comparing data for six-year graduation rates among four-year institutions). Data suggesting that the completion rates of FPIs are significantly higher than that of community colleges problematically fails to control for transfer rates and program length. When corrected, community colleges and FPIs have completion rates of forty and sixty-one percent respectively. *See* CHRISTOPHER M. MULLIN, AM. ASS’N OF CMTY. COLLS., JUST HOW SIMILAR? COMMUNITY COLLEGES AND THE FOR-PROFIT SECTOR 8 (2010).

242. Freeman, *supra* note 59, at 574.

243. Twenty-two percent of employment in America’s nonprofit sector can be attributed to private, NPIs. Moreover, NPIs account for forty-six percent of the higher education sector. SALAMON, *supra* note 232, at 11. Assuming public colleges and universities can also be considered nonprofit, both percentages likely jump past fifty percent.

244. Although the term “nonprofit” generally applies to private nonprofit entities, to the extent that public institutions are also constrained by a nondistribution constraint, I use the term “nonprofit” institution to refer to both public and private nonprofit institutions of higher education.

literacy programs for students, all in an effort to lower loan default rates.<sup>245</sup> Other NPIs have enjoyed large gains in minority graduation rates by implementing pipeline programs that improve college-readiness, improving teaching in remedial and introductory courses, and monitoring student progress through advising and early warning systems.<sup>246</sup>

In contrast, the results of a 1998 survey administered to 1,000 venture capital firms to ascertain their interest in investing in for-profit education revealed that “potential return on investment,” as well as “size and growth” of the for-profit industry were the primary reasons to invest, while “improving education” was ranked last.<sup>247</sup> Models that compare revenue sources and spending by NPIs and for-profit entities further underscore a primary commitment to profit: FPIs rely almost exclusively on tuition for their operating revenue, while spending less than NPIs on instruction and support services.<sup>248</sup> Devoted to “student acquisition and retention,” FPIs spend twenty-three percent of their revenue on recruiting, as compared to one and two percent respectively, for public and private NPIs.<sup>249</sup> Today, at least one major FPI spends more on marketing than it does on actual education.<sup>250</sup>

#### B. The Futility of Regulation

To the extent that structural failures in the for-profit education market create opportunities for fraud and abuse, legislation and monitoring by regulatory agencies can all play some role, although the impact of these responses is ultimately limited. Moreover, the very debate about what form regulation takes obscures more fundamental issues about for-profit motives that maximize producer incentives to prey on already marginalized student populations.

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245. See ERIN DILLON & ROBIN V. SMILES, EDUCATION SECTOR, LOWERING STUDENT LOAN DEFAULT RATES, WHAT ONE CONSORTIUM OF HISTORICALLY BLACK INSTITUTIONS DID TO SUCCEED 7–11 (2010), *available at* [http://www.educationsector.org/sites/default/files/publications/Default\\_Rates\\_HBCU.pdf](http://www.educationsector.org/sites/default/files/publications/Default_Rates_HBCU.pdf).

246. See JENNIFER ENGLE & CHRISTINA THEOKAS, THE EDUC. TRUST, TOP GAINERS: SOME PUBLIC FOUR-YEAR COLLEGES AND UNIVERSITIES MAKE BIG IMPROVEMENTS IN MINORITY GRADUATION RATES (2010), *available at* [http://www.edtrust.org/sites/edtrust.org/files/publications/files/CRO%20Brief%20\(Top%20Gainers\).pdf](http://www.edtrust.org/sites/edtrust.org/files/publications/files/CRO%20Brief%20(Top%20Gainers).pdf).

247. See Morey, *supra* note 49, at 142.

248. Goldie Blumenstyk, *Why For-Profit Colleges Are Like Health Clubs*, CHRON. OF HIGHER EDUC. (May 5, 2006), <http://chronicle.com/article/Why-For-Profit-Colleges-Are/19963>. The model may not account, however, for factors like greater efficiency at FPIs.

249. *Id.*

250. See Vasquez, *supra* note 151.

## i. Rules, Rules, Rules

In response to high default rates and industry abuses among FPIs in the late 1980s and early 1990s, Congress made two key changes to the Higher Education Act that affect eligibility for federal student aid: the 90/10 rule, and the 50/50 rule.<sup>251</sup> Under the 90/10 rule, a proprietary institution may derive no more than ninety percent of its revenues from federal grants and loans;<sup>252</sup> the rule's rationale is that an institution's education should be worthwhile enough that students are willing to spend some of their own money to finance it.<sup>253</sup> Under the 50/50 rule, proprietary institutions may offer no more than fifty percent of their courses online or as correspondence courses.<sup>254</sup> Federal legislation has also set guidelines restricting the extent to which compensation for recruiters at FPIs can be tied to student enrollment.<sup>255</sup>

More recently, a series of hearings held by the Senate Committee on Health, Education, Labor, and Pensions during 2010 focused on for-profit higher education, with committee chairman Senator Tom Harkin vowing to crack down on "bad actors" in the industry.<sup>256</sup> Just weeks before the start of the hearings, the Department of Education proposed a series of new regulations set to take effect in 2011 that, although applicable to all public and private colleges and universities, are meant to curb the latest surge in abusive business practices in the for-profit sector. One set of rules eliminates "safe harbor" exceptions to bans on tying compensation to recruitment success.<sup>257</sup> The most hotly contested proposal concerned revisions to the "gainful employment" rule, which requires FPIs to demonstrate that they are adequately preparing their students for the workforce.<sup>258</sup> The revised rule employs a two-part test that considers both the percentage of borrowers repaying their federal student loans, as well as the relationships between total student loan debt and average earnings.<sup>259</sup>

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251. See Hirsch, *supra* note 25, at 824–25.

252. 20 U.S.C. § 1002(a)(3) (2006). See TIERNEY & HENTSCHE, *supra* note 6, at 172.

253. See Hirsch, *supra* note 25, at 827.

254. § 1002(a)(3). See TIERNEY & HENTSCHE, *supra* note 6, at 177.

255. *Id.*

256. See Kelly Field, *Senate Hearing on For-Profits to Feature Video of Government Undercover Investigation*, CHRON. OF HIGHER EDUC. (July 29, 2010), <http://chronicle.com/article/Hearing-on-For-Profits-to/123716>.

257. See Field & Gonzalez, *supra* note 1844.

258. The Higher Education Act of 1965 requires proprietary and vocational colleges to provide "an eligible program of training to prepare students for gainful employment in a recognized occupation." See 20 U.S.C. §§ 1001 et seq. (2008); see also Gonzalez, *supra* note 17.

259. The rule was vigorously contested by for-profit lobbyists, who were not in favor of a "metrics-based" approach to measure "gainful employment," and spent "hundreds of thousands of dollars" to lobby for rules that instead require

Under the rule, student loan dollars cannot be used at FPIs when graduates of the institutions carry debt loads that exceed thirty percent of discretionary income, and twelve percent of total income, and where less than thirty-five percent of former students are paying down the principal on their loans.<sup>260</sup>

Designed to specifically address problematic loan-default rates, an additional rule makes any college or university ineligible for federal student aid programs where, for three consecutive years, thirty percent or more of its borrowers default within three years of their scheduled repayment start, or where the institution's default rate exceeds forty percent in the most recent three-year period.<sup>261</sup> Less contentious rules mandate disclosure regarding accreditation status and retention, graduation, job placement, and debt burden rates;<sup>262</sup> require colleges and universities to evaluate the validity of student high-school diplomas; and strengthen the Department of Education's ability to address deceptive advertising, marketing, and sales practices.<sup>263</sup> These regulations can give students more of the information they need to make a decision regarding the value of enrollment, thereby remediating some of the information asymmetries that exist in the for-profit market.

The ability of regulations, however, to effectively stamp out fraud and abuse in the market is ultimately limited. In an effort to ensure that regulation in the for-profit sector is minimized, FPIs have challenged the authority of the Department of Education to promulgate the new rules.<sup>264</sup>

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more disclosures to students about graduates' salaries and debt levels. *See* Kelly Field, *Education Department Takes Aim at For-Profits With Student-Debt Rule*, CHRON. OF HIGHER EDUC. (July 23, 2010), <http://chronicle.com/article/Education-Department-Takes-Aim/123655>; Field & Gonzalez, *supra* note 1844.

260. *See* Field, *supra* note 259.

261. *See* Jeffrey Brainard, *For-Profit Colleges Face Risk Under New Rule*, CHRON. OF HIGHER EDUC. (July 11, 2010), <http://chronicle.com/article/For-Profit-Colleges-Face-Risk/66215>.

262. *See* Nick Anderson & Daniel de Vise, *Plan Wants Stricter Oversight of For-Profit College Claims*, WASH. POST, June 16, 2010, at A2; Field & Gonzalez, *supra* note 184; Gonzalez, *supra* note 17.

263. *See* Field & Gonzalez, *supra* note 1844. It has also been suggested that the Department of Education should increase oversight of eligibility requirements put in place to demonstrate that student borrowers have the ability to succeed in school before receiving federal loans. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-09-600, PROPRIETARY SCHOOLS: STRONGER DEPARTMENT OF EDUCATION OVERSIGHT NEEDED TO HELP ENSURE ONLY ELIGIBLE STUDENTS RECEIVE FEDERAL STUDENT AID 22-28 (2009), *available at* <http://www.gao.gov/new.items/d09600.pdf>.

264. In January of 2011, for-profit institutions filed suit, challenging the authority of the Department of Education to regulate the institutions in the ways proposed by the new rules, and requesting declaratory and injunctive relief. *See*

And, even assuming that authority is affirmed, the substance and stringency of legislation, as well as enforcement priorities, are all subject to political whims and changes in administration. The shift in enforcement priorities, for example, at the start of the second Bush administration regarding incentive compensation, or the unwillingness of the Department of Education to interpret provisions of the Higher Education Act in ways that maximize relief in the form of loan discharge for those students who are enrolled under false pretenses by a for-profit school,<sup>265</sup> both reflect these types of political changes. Rules that better protect students today can be pushed back, repealed, or interpreted more narrowly after today's lobbying effort or tomorrow's election.<sup>266</sup>

More problematically, many of the rules will also likely prove ineffective. Attempts to address quality by mandating disclosure, for

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Complaint and Prayer for Relief, *Career Coll. Assoc. v. Duncan*, (D.D.C. filed Jan. 21, 2011) (No. 1:11-cv-00138-RMC), 2011 WL 182900.

265. The Department of Education's narrow interpretation of the False Certification Rule limits loan discharge under the rule to only those students who were admitted absent a high school diploma. See Stephen Burd, *Relief Needed for Career College Students Who Have Been Tricked into Enrolling in Unaccredited Programs*, NEW AMERICA FOUNDATION, HIGHER ED WATCH, (June 28, 2011) <http://higheredwatch.newamerica.net/node/53985>. A broader interpretation would encompass those students who, despite having a diploma, were nevertheless admitted under false pretenses. *Id.*

266. FPIs were "rooting" for Republicans in the 2010 mid-term elections because Republican gains might ease the pressure on the for-profit sector. See Kelly Field, *For-Profit Colleges Hope for Republican Gains*, CHRON. OF HIGHER EDUC. (D.C.), Nov. 5, 2010, at A22; Stephen Burd, *Three Steps House Repubs May Take to Shield For-Profit Colleges*, NEW AMERICA FOUNDATION, HIGHER ED WATCH, (Nov. 10, 2010), [http://higheredwatch.newamerica.net/blogposts/2010/three\\_steps\\_house\\_republicans\\_may\\_take\\_to\\_shield\\_for\\_profit\\_colleges-39779](http://higheredwatch.newamerica.net/blogposts/2010/three_steps_house_republicans_may_take_to_shield_for_profit_colleges-39779) (detailing the "power position" of House Republicans in protecting FPIs' interests). In February, two Republican congressman offered amendments to the 2011 spending bill that would block the Department of Education from using any federal funds to enforce the gainful employment rule. See Kelly Field, *Lawmakers Seek to Block Enforcement of 'Gainful Employment' Rule*, CHRON. OF HIGHER EDUC. (Feb. 14, 2011), <http://chronicle.com/article/Lawmakers-Seek-to-Block/126369/>. By December of 2011, after a lobbying effort described by Department of Education officials as one of the most intense they had seen, the regulatory plan intended to crack-down on the for-profit higher education sector was significantly weakened. Ultimately, the final standards affected a maximum of 5 percent of schools in the sector, whereas original standards would have affected 16 percent. In addition, the start date for implementation of penalties was pushed back from 2012 to 2015, while a focus on disclosure was emphasized in the meantime. Eric Lichtblau, *With Lobbying Blitz, For-Profit Colleges Diluted New Rules*, N.Y. TIMES, Dec. 9, 2011. Disclosure, of course, does little to ameliorate abuse. See *infra*, note 267, 272, and accompanying text.

example, do not account for the failure of disclosure rules to ensure that recipients of the disclosed information make better decisions.<sup>267</sup> This concern is heightened in the context of students who are more likely to have been undereducated, and thus lack the financial and educational literacy necessary to understand the disclosed information they receive. These students also lack the alternative higher education opportunities even if the disclosed information does give them pause, and are further susceptible to certain psychological triggers that detrimentally affect their decisionmaking.

In mortgage lending, for example, potential African-American homeowners are plagued by misinformation and myths regarding the home-buying process, putting them at a disadvantage relative to the rest of the market despite the voluminous amounts of disclosure required at closing.<sup>268</sup> Furthermore, the unique history of exclusion from credit and ownership markets to which certain groups are subject also has a psychological effect, resulting in decisions that deviate from those of the socioeconomically and educationally privileged on which experimental research on decision-making is typically conducted.<sup>269</sup> Minorities, those with less education, or those with low income, may be likely to display unwarranted trust in their mortgage brokers or lenders because their fear of an unequal outcome makes them vulnerable to illusions of equality, such as being treated with superficial respect.<sup>270</sup> Similarly, fear of discrimination also negatively impacts decision-making. This fear can invoke stress, which impairs decision-making and also encourages subjects to engage in avoidance, thus restricting their activities in the transaction.<sup>271</sup> Finally,

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267. See Paula Dalley, *The Use and Misuse of Disclosure As A Regulatory System*, 34 FLA. ST. U. L. REV. 1089, 1113–19 (2007) (discussing the structural and cognitive impediments to effectively using disclosure to regulate). See also Howard Latin, “Good” Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193 (1994) (criticizing the efficacy of notice in product liability); Lauren Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending Price*, 65 MD. L. REV. 707 (2006) (criticizing regulation through notice in lending); Debra P. Star & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POL’Y & L. 85 (2010) (chronicling the social and psychological phenomena that limit the effectiveness of disclosure, including user-unfriendly disclosure forms, lack of contractual schemas, and social norms and signals that discourage careful reading of disclosures).

268. See FANNIE MAE, THE GROWING DEMAND FOR HOUSING: 2002 FANNIE MAE NATIONAL HOUSING SURVEY 9 (2002), available at <http://www.fanniemae.com/resources/file/research/housingsurvey/pdf/survey2002.pdf>.

269. See Willis, *supra* note 2677.

270. See Star & Choplin, *supra* note 267, at 104.

271. See Willis, *supra* note 2677, at 759–61.



disclosure requirements do little to address social norms that discourage careful and close reading of disclosures.<sup>272</sup>

Many of the proposed rules also focus exclusively on outcomes, and as such may have unintended consequences on those NPIs with graduates unable to find work despite having received a legitimately rendered education, free of fraud or misrepresentation.<sup>273</sup> The proper inquiry is not whether students are steadily employed after graduation, but rather whether, in pursuit of profit, FPIs knowingly and unethically recruit and enroll students for programs that will neither serve the student nor the public—and whether the sector's incentive to do so can ever be successfully managed.<sup>274</sup>

Problematically, the 90/10 rule sets an arbitrary cut-off for federal funding without any support for the proposition that educational quality is guaranteed if students are willing to use their own money to finance it. The refusal to use personal funds to finance education does not necessarily indicate inferior quality, just as the willingness to use personal funds does not necessarily indicate superior quality. At the same time, the rule takes for granted that public funds are used to fund all but ten percent of programs that don't serve the public good, in a market prone to failure. Furthermore, both the compensation and gainful employment rules allow predatory behavior to continue in the sector, provided that long-term consequences of that behavior are kept in check. As long as compensation at FPIs is not explicitly linked to recruitment, or as long as enough students have not fallen into loan default, problematic business practices can continue unabated with the help of public dollars.

Finally, and most importantly, current state and federal legislation attempts to reduce abuse without ever addressing the underlying causes of that abuse. Consumer protection regulations are most effective when violations can be clearly identified—"cases in which actions rather than

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272. See Star & Choplin, *supra* note 267, at 104–05.

273. According to the president and CEO of the National Black Chamber of Congress, if the gainful employment rule was applied to Historically Black Colleges and Universities, ninety-three percent would fail because of unacceptable repayment rates. See Alford, *supra* note 219.

274. One proposed solution that has not yet gained much traction is to require for-profits to shoulder some of the loss when their graduates default on student loans. Although it is conceivable that such a solution would temper aggressive recruiting practices at FPIs, other proposed solutions—including the gainful employment rule—similarly use the threat of financial penalty to influence FPIs' business practices. As with the other proposed solutions, however, it is not clear that such a solution would do anything more than temper problematic business practices, especially considering the significant profit incentives that likely remain even after a default penalty is imposed. Moreover, such a proposal does nothing to address the normative issues raised by this paper.

motives are at stake.”<sup>275</sup> Education, however, is an “experience good,”<sup>276</sup> difficult to regulate because assessment of the action—educating—is complicated, and a motive—the for-profit motive—is precisely what needs to be constrained in the market. Moreover, the difficulty in concretely measuring the “output” of education makes it unlikely that a for-profit structure, often tied to objectively verifiable targets and benchmarks, can incentivize for-profit managers to pursue social good in the education context. And, unlike other goods where consumers can quickly determine whether they have paid too much, information asymmetries and valuation problems linger even after initial education delivery. Although students may suspect, *ex post*, that a for-profit motive undermined the quality of their education, or subjected them to unethical recruitment, consumer protection laws neither provide relief nor change the nature of the good.<sup>277</sup> Suits in tort or contract are similarly unsuccessful.<sup>278</sup>

## ii. Regulatory Bodies

Regulatory bodies also have a role to play in changing the for-profit sector. In the United States, private agencies are largely responsible for determining whether institutions of higher education meet minimum standards of quality education.<sup>279</sup> The private agencies are in turn recognized by the Department of Education and the Council for Higher Education Accreditation, a private nongovernmental institutional membership organization that monitors the capacity of accrediting bodies.<sup>280</sup> Institutional accreditors, including the Accrediting Council for Continuing Education and Training, and the Council on Occupational Education, are responsible for accrediting for-profit, career-based,

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275. James R. Hines et al., *The Attack on NonProfit Status: A Charitable Assessment*, 108 MICH. L. REV. 1179, 1212 (2010).

276. See Andreas Ortmann, *How To Survive in Postindustrial Environments: Adam Smith's Advice for Today's Colleges and Universities*, 68 J. HIGHER EDUC. 483, 486–91 (1997) (explaining that education is a service subject to quality-assessment problems).

277. See Hines, et al., *supra* note 275, at 1212 (making a similar argument regarding for-profit charities).

278. See *supra* notes 197–199 and accompanying text.

279. See U.S. DEPT. OF EDUC., COLLEGE ACCREDITATION IN THE UNITED STATES, <http://www2.ed.gov/admins/finaid/accred/index.html>; JUDITH S. EATON, ACCREDITATION AND RECOGNITION IN THE UNITED STATES 7 (2008).

280. See U.S. DEPT OF EDUC., *supra* note 277; EATON, *supra*, note 277, at 23. The National Advisory Committee on Institutional Quality and Integrity held a series of meetings in early 2011 to discuss changes to the nation's accreditation system, including a greater federal role in the accreditation process. See Eric Kelderman, *Advisory Panel Hears Concerns as It Again Considers Changes in Accreditation*, CHRON. OF HIGHER EDUC. (Feb. 3, 2011), <http://chronicle.com/article/Advisory-Panel-Hears-Concerns/126251>.

institutions,<sup>281</sup> although the extent to which their accrediting process can effectively weed out schools that employ problematic recruiting and business practices is legitimately in question.<sup>282</sup> In states that specifically make it a violation of consumer protection statutes to operate without accreditation, suits can be brought against FPIs that improperly award degrees.<sup>283</sup>

To address issues of quality in higher education, accreditors might use a qualifications framework. Suggested by some scholars, the framework is a statement of learning outcomes and competencies a student must demonstrate in order to be awarded a particular degree.<sup>284</sup> Such a framework would enable students to determine what a particular degree represents to employers, and allow employers to understand which skills and knowledge a person possesses as a result of having been awarded a particular degree,<sup>285</sup> all the while lessening employer and student dependence on numeric credits that are not always transferable.<sup>286</sup> Similar to mandatory disclosure laws, such a proposal would address information asymmetries in the market by arming individuals with more information about their choices, without placing an additional burden on the government to regulate the quality of for-profit education.<sup>287</sup>

In addition to accreditation, regulatory entities can also have a stronger monitoring presence. The Federal Trade Commission, for example, has the authority to bring enforcement actions against FPIs that engage in deceptive trade practices. Indeed, in 1988, the FTC adopted special rules

281. See EATON, *supra* note 279, at 11.

282. The Higher Learning Commission of the North Central Association of Colleges and Schools, for example, was responsible for accrediting the disreputable American InterContinental University. See Eric Kelderman, *Under Obama, Accreditors Are Still in the Hot Seat*, CHRON. OF HIGHER EDUC. (D.C.), Sept. 12, 2010, at A1. See also Field, *supra* note 171 (documenting doubts expressed by senators regarding the rigorousness of an accrediting process that does not detect fraud, as well as plans to review the financing structure of the accrediting system for evidence of financial conflicts of interest).

283. See e.g., HAW. REV. STAT. §§ 446E-3, E-5 (2006).

284. See Holiday Hart McKiernan & Tim Birtwistle, *Making the Implicit Explicit: Demonstrating the Value Added of Higher Education by a Qualifications Framework*, 36 J.C. & U.L. 511, 524 (2010).

285. *Id.* at 529–30.

286. *Id.* at 529, 533–34. Unfortunately, such a proposal would support the tendency of some FPIs to award academic credit for on-the-job training or life experience, as a focus on student outcomes and competencies contemplates knowledge gained through non-academic means. *Id.* at 532–33.

287. Regulatory schemes using disclosure are part of a larger, and potentially problematic, trend in American law to “inform and educate rather than regulate,” while shifting the locus of decision-making away from the government and to an individual in the market. See Dalley, *supra* note 266, at 1092.

prohibiting for-profit vocational or distance learning schools from engaging in misrepresentations of accreditation.<sup>288</sup> Unfortunately, compliance with the rules is voluntary, and FTC enforcement regarding unaccredited schools has been a low priority.<sup>289</sup> Should regulation in this area become an area of focus for the FTC, use of consent decrees by the agency has potential to not only curb predatory behavior, but to also change the very culture of the sector.<sup>290</sup>

The failure, however, on the part of accrediting agencies and regulatory bodies to identify institutions like American InterContinental University lies, again, with difficulties evaluating the quality of education. And, like with regulation, commitment to the terms of consent decrees is subject to changing policy prerogatives of new administrations.<sup>291</sup> Finally, neither accreditation nor increased regulatory activity does anything to address the assessment difficulties in the sector, to remove the continual incentive for predatory behavior posed by a for-profit motive, or to bring the sector in line with our normative understandings of the purpose of higher education.

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288. 16 C.F.R. § 254.3 (2010).

289. See Creola Johnson, *Degrees of Deception: Are Consumers and Employers Being Duped by Online Universities and Diploma Mills?*, 32 J.C. & U.L. 101, 143 (2005). In response to the low-priority status of enforcement in this area, Professor Johnson proposes a new federal statute, entitled the “Authentic Credential in Higher Education Act,” which would impose affirmative accreditation disclosures on online schools and diploma mills, and establish criminal penalties specifically for fake degree providers and unaccredited schools that fail to meet those obligations. *Id.* at 155–56.

290. Consent decrees have been successfully used in antitrust, environmental, health care, and school desegregation litigation. Moreover, to the extent that consent decrees can address a wide range of business activity, they have the potential to change the predatory culture in which many FPIs currently operate. For example, in response to allegations that employers engage in racially discriminatory hiring, consent decrees can restructure an employer’s entire hiring process, including stipulations that address hiring criteria, training, promotion, and firing procedures. See Maimon Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 DUKE L.J. 887, 893–94 (1984). Similarly, consent decrees in the for-profit education sector might address legal, but misleading and unethical business practices like excessively aggressive recruiting.

291. See generally Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203 (1987) (exploring limits on judicial authority to bind the policy discretion of the executive based on preexisting consent decrees).

## C. The Problem Is In the Premises

Given improved regulation and assessment of the sector, there may yet be a limited space for FPIs. FPIs have a particular proficiency in providing training and degrees for skill sets that are easy to certify, benefit from experienced practitioners, and require modest physical plant requirements.<sup>292</sup> To the extent that FPIs are teaching “know-how” skills, like dental assistance or blood bank technology, rather than “know-why” skills, like economics or the fine arts, it may be easier to assess whether the public good of education received at a FPI functions properly.<sup>293</sup> Ultimately, it is likely that ownership-related differences can and do affect performance, and that addressing problems in for-profit education may best be accomplished by identifying those areas where the for-profit motive is least likely to compromise quality.<sup>294</sup>

Higher education policymakers must identify those fields, industries, and skill sets that are most amenable to testing and certification. For-profit program offerings range from less-than-two year certification programs to associate’s, bachelor’s, master’s and doctoral degrees. All of these programs are ripe for inquiry into their appropriateness in for-profit education. Research from the Department of Labor and public policy centers should also be able to provide predictions on the direction of the “new information and service economy,”<sup>295</sup> with insights as to those sectors that will see stable, long-term growth that can legitimately benefit from a labor-force trained at FPIs, and are thus least susceptible to economic changes that trigger fraudulent behavior in the sector.<sup>296</sup> This evaluation

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292. See Sarah E. Turner, *For-Profit Colleges in the Context of the Market for Higher Education*, in EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES 51, 58–59 (David W. Breneman, et al., eds., 2006).

293. See TIERNEY & HENTSCHE, *supra* note 6 at 126.

294. In health care, for example, differences in quality do appear in the provision of uncompensated care. See Schlesinger & Gray, *supra* note 233.

295. See *supra*, notes 102–103 and accompanying text.

296. A report released by the Center for American Progress, for example, found that FPIs focus on “support” occupations, like medical and dental assisting, rather than “practitioner” and “technician” fields like registered nursing and diagnostic technology, despite the reality that by 2018 the country is expected to need an additional one million nurses, but only 218,000 more medical assistants. JULIE MARGETTA MORGAN & ELLE-MARIE WHELAN, CTR. FOR AM. PROGRESS, PROFITING FROM HEALTH CARE: THE ROLE OF FOR-PROFIT SCHOOLS IN TRAINING THE HEALTH CARE WORKFORCE 3 (2011), available at [http://www.americanprogress.org/issues/2011/01/pdf/for\\_profit\\_health\\_care.pdf](http://www.americanprogress.org/issues/2011/01/pdf/for_profit_health_care.pdf). The focus on support, rather than practitioner, occupations raises questions about for-profit motivations in focusing on the former, as well as about the future of those students trained for positions that offer not only less professional autonomy, but are also ultimately un-needed. See Kelly Field, *For-Profit Colleges Could Do More on*

process, moreover, might also be incorporated into current accreditation procedures, withholding accreditation from those FPIs that award certificates and degrees in fields unsuitable for a for-profit motive.<sup>297</sup>

Beyond that, public funding for higher education should be restricted to the nonprofit sector. NPIs are certainly not without their flaws, one of the biggest being the sector's failure to effectively maximize access for underserved students.<sup>298</sup> Furthermore, due to both internal and external constraints on NPIs, college and university matriculation continues to be limited for low-income, first-generation, and minority students.<sup>299</sup> Internally, NPIs have been criticized for misalignment between cost structures and revenue, owing, in part, to inefficient governing<sup>300</sup> and compensation structures,<sup>301</sup> academic ratchet,<sup>302</sup> administrative lattice,<sup>303</sup>

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*Shortage of Health-Care Workers*, CHRON. OF HIGHER EDUC. (Jan. 20, 2011), <http://chronicle.com/article/For-Profit-Colleges-Could-Do/126004>.

297. Suggestions regarding the accreditation process necessarily trigger questions about the effectiveness of administrative agencies in regulating and monitoring for-profit and nonprofit education. See Jennifer Alexis Knight, *The Federal False Claims Act and the Accreditation of Institutions of Higher Education*, 60 DEPAUL L. REV. 755, 777–78 (2011). Literature on the role of the Department of Education, in particular, in addressing predatory behavior in higher education is scarce, leaving unanswered questions about the application of administrative theories regarding public choice and public interest to the problems which are the focus of this article.

298. See *supra*, notes 45–55 and accompanying text.

299. See WILLIAM G. BOWEN ET AL., EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION 73 (2005) (citing poor academic and social preparedness, information deficits, and financial hardship as factors that limit college opportunities for students from socioeconomically disadvantaged backgrounds).

300. Some literature indicates that the absence of course-by-course contracting, as well as the presence of salaries and tenure at NPIs make nonprofit faculty both unresponsive to the power of reputation and immune to incentives for good teaching and curricular innovation present at FPIs. See *e.g.*, Ortmann, *supra* note 276, at 486, 490–91.

301. See, *e.g.*, Andrea Fuller, *Compensation of 30 Private-College Presidents Topped \$1-Million in 2008*, CHRON. OF HIGHER EDUC., Nov. 14, 2010, at A1 (reporting on investigations into the high salaries of private college presidents whose leadership was questioned). Although Malani and Posner theorize that compensation structures at nonprofit organizations result in inefficiency, Hines, Horwitz and Nichols respond that such an argument assumes that nonprofits only pay their managers fixed salaries. To the contrary, with adequate safeguards, the IRS does permit incentive compensation plans at NPIs. See HINES ET AL., *supra* note 275, at 1193–94. Moreover, Hansmann argues that even though NPIs may succeed in distributing some of their net earnings in the form of inflated salaries, it is still preferable to the efficiency losses to be expected as a result of a for-profit motive. Hansmann, *supra* note 9, at 844–45.

302. Ratchet is the tendency for faculty to shift away from teaching, to student advising, counseling, and governing tasks. See Andreas Ortmann & Richard

and participation in the “college for all” movement that may be pushing unqualified or marginally qualified students into liberal arts education when they would be better served by vocational training.<sup>304</sup>

Externally, however, decreasing state and federal financial support for higher education is the primary reason for prohibitive tuition costs,<sup>305</sup> while waning public support for higher education generally is also to blame for the inability of NPIs to broaden access. According to a report of the Education Commission appointed by former Secretary of Education Margaret Spellings, gaps in college and university access remain significant for low-income Americans and ethnic and racial minorities, even after controlling for college and university preparation.<sup>306</sup> Only seventeen percent of Blacks and eleven percent of Latinos obtain bachelor’s degrees by age twenty-nine, while thirty-four percent of whites do so.<sup>307</sup> In 2001, sixty-five percent of whites sixteen to twenty-four years

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Squire, *A Game-Theoretic Explanation of the Administrative Lattice in Institutions of Higher Learning*, 43 J. ECON. BEHAV. & ORG. 377, 378 (2000).

303. Administrative lattice is the tendency, over time, for the number of administrators to grow relative to the number of faculty. *Id.* at 378.

304. *See* Wolf et al., *supra* note 105 (quoting analysis of Charles Murray that the four-year model is wrong for a large majority of young people). Former House Education and Labor Committee chairman William F. Goodling, for example, has stated that “we’re overselling college: the four-year traditional conception of a college education.” DAVID BOESEL & ERIC FREDLAND, NAT’L LIBRARY OF EDUC., COLLEGE FOR ALL? IS THERE TOO MUCH EMPHASIS ON GETTING A 4-YEAR COLLEGE DEGREE? 2 (1999). Similarly, former Labor Department Secretary Robert Reich has stated that “too many families cling to the mythology that their child can be a success only if he or she has a college degree.” *Id.* Other researchers have concluded that students in the lower two-thirds of their graduating high school classes may be better served by two-year programs leading to technical degrees. *Id.* at 12–13. Moreover, the utility of liberal arts degrees, regardless of ultimate career choice, is continually debated. *Id.* The purpose of this article is not to substantively evaluate the value of a liberal arts degree vis-à-vis associate’s or certification programs offered at FPIs and community colleges, although to the extent that the latter programs train students in finite skill-sets that can easily become obsolete and are also less likely to result in long-term job and income stability, the disproportionate channeling of poor, working-class, and minority students into the programs raise equity issues, to be discussed in future scholarship.

305. *See infra*, notes 311–314 and accompanying text. Between 1976 and 2004, the average tuition at public and private four-year institutions increased 732 and 693%, respectively. Donald E. Heller, *Can Minority Students Afford College in an Era of Skyrocketing Tuition?*, in HIGHER EDUCATION, *supra* note 56, at 83.

306. *See* TEST OF LEADERSHIP, *supra* note 50, at 7.

307. *Id.* Census data reviewed by *The Chronicle of Higher Education* similarly found that in 2009, twenty-eight percent of Americans twenty-five years of age and older held at least a four-year degree. The rate for Black Americans and Hispanic Americans, however, was just seventeen and thirteen percent,

of age had enrolled in a college or university, compared to just fifty-five percent of African-Americans and fewer than fifty percent of Hispanics.<sup>308</sup> These gaps in access are often due to lack of financing, as matriculation at traditional institutions of higher education remains closely correlated with economic status. Low-income high school graduates who perform in the top quartile of standardized testing attend colleges and universities at the same rate as high-income graduates who perform in the bottom quartile on the same tests.<sup>309</sup> In 2003, only fifty-four percent of high school graduates from the lowest income quartile enrolled in a college or university, compared to eighty-two percent of high school graduates from the top income quartile.<sup>310</sup>

Limitations in access are further restricted by public policy that has started to “view[...] higher education as more of a private benefit than a public good,” as indicated by dwindling state and federal funding of higher education programs,<sup>311</sup> the transformation of a grant-based federal loan

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respectively. Alex Richards, *Census Data Show Rise in College Degrees, But Also in Racial Gaps in Education*, CHRON. OF HIGHER EDUC., Jan. 28, 2011, at A24.

308. WILLIAM BOWEN ET AL., *EQUITY AND EXCELLENCE IN AMERICAN HIGHER EDUCATION* 75–76 (2006). The minority enrollment gap, of course, is largely due to the fact that minority students are more likely than other students to come from low-income families. College access is also impacted by academic preparation, with the effect of secondary-school quality having a particularly strong effect on bachelor’s degree attainment for African-American and Latino students. Unfortunately, low-income and minority students are significantly more likely than white students to attend underfunded, understaffed, socially and economically isolated secondary schools. See Derek V. Price & Jill K. Wohlford, *Equity in Educational Attainment, Racial Ethnic, and Gender Inequality in the 50 States*, in *HIGHER EDUCATION*, *supra* note 56, at 64. Cumulatively, these inferior academic experiences result in poor standardized test performance for minority students, if they are encouraged to take the tests at all. See BOWEN ET AL., *supra* note 308, at 79–84.

309. See TEST OF LEADERSHIP, *supra* note 50, at 9.

310. BOWEN, *supra* note 308, at 74 (quoting College Board findings).

311. Erin Oehler, *The Door to Higher Education: Accessible to All? Whether State-Funded Merit-Aid Programs Discriminate Against Minorities and the Poor*, 10 SCHOLAR 499, 536 (2008) (quoting William Kirwan, Chancellor of the University of Maryland System) (citing public policy change as reason for the emphasis shift in college and university admissions from access to competition). Contrary to popular public suspicion, there is no relationship between the availability of financial aid and the increasing price of higher education. Rather, the cost driver is decreasing state appropriations and grant revenues for higher education even as higher education costs increase. See THOMAS J. KANE, *THE PRICE OF ADMISSION: RETHINKING HOW AMERICANS PAY FOR COLLEGE* 5 (1999). In 1980, state and local appropriations paid for seventy-six percent of the cost of education at the institutions; by 2000, that percentage had dropped fourteen points, resulting in tuition increases and a sixty percent increase in the share of costs paid



system into a loan-based system, and the rise of state merit-based assistance programs. Increasing cuts to state and federal budgets supporting higher education have lead open-access campuses to limit enrollment or, in some cases, to close their doors.<sup>312</sup> Moreover, movements to curb or completely eliminate admissions and financial aid affirmative action programs have further undermined access for marginalized student groups to colleges and universities.<sup>313</sup> Add to this brew the positional arms race of college and university rankings that seek to order, in an overly simple way, that which is complex and nuanced, and it is no wonder that NPIs have not embraced the sort of changes<sup>314</sup> that would broaden access for underserved students. As a result, the equal opportunity ideals undergirding higher education in the United States are fading, denying access to poor, working class, and minority students in greater numbers.<sup>315</sup>

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for by students and their families. *Id.* The single overriding factor related to tuition increases at public four-year colleges and universities, for example, has been decreasing state appropriations. See ALISA F. CUNNINGHAM ET AL., *Study of College Costs and Prices: 1988-89 to 1997-98*, 4 EDUC. STATS. Q., Spring 2002, at 47, 51 fig. D. Similarly, community colleges that have historically received higher proportions of their revenue from state and local taxes than four-year institutions are increasingly relying on student tuition, to the detriment of their access missions. See Eric Kelderman, *As State Funds Dry Up, Many Community Colleges Rely More on Tuition Than on Taxes to Get By*, CHRON. OF HIGHER EDUC. (D.C.), Feb. 11, 2011, at A20. As indication of today's climate regarding government support for higher education, the bill proposed by House Republicans for the 2011 fiscal year cut Pell Grant amounts by fifteen percent. See Kelly Field, *House Republicans' Spending Bill for 2011 Would Cut Pell Grant by 15 Percent*, CHRON. OF HIGHER EDUC. (Feb. 13, 2011), <http://chronicle.com/article/House-Republicans-Spending/126356/>. Mainstream acceptance of FPIs is not surprising given the backdrop of a shift in public support for education.

312. See Jennifer Gonzalez, *At the White House, Praise and New Challenges for Education's 'Unsung Heroes'*, CHRON. OF HIGHER EDUC., Oct. 5, 2010, at A23 (noting that some community colleges have had to cap enrollments); Gonzalez, *supra* note 127 (reporting that at Miami Dade College, 30,000 students were unable to take needed classes because the college did not have money to hire enough faculty members, and that community colleges in California had to reduce enrollment by 250,000 because of cuts to state aid).

313. For a more detailed discussion of movements to eliminate admissions and financial aid affirmative action programs, see LEE COKORINOS, *THE ASSAULT ON DIVERSITY: AN ORGANIZED CHALLENGE TO RACIAL AND GENDER JUSTICE* (2003); Osamudia R. James, *Dog Wags Tail: The Continuing Viability of Minority-Targeted Aid in Higher Education*, 85 IND. L.J. 851 (2010).

314. Changes might include decreasing reliance on admissions criteria that correlate with race and class, adopting scheduling flexibility for students with work and family obligations, and making campus more hospitable for older students and veterans.

315. See Michael Mumper, *The Future of College Access: The Declining Role of Public Higher Education in Promoting Equal Opportunity*, 585 ANNALS AM.

The diversion of limited federal loan resources to FPIs only compounds the problems of the nonprofit sector and provides incentive for abuse in the for-profit sector, while the effect of the abuse on students reinforces social stratification that higher education is supposed to ameliorate. Despite flaws, the obstacle to direct profiteering from student funds at NPIs nevertheless results in lower rates of fraud and abuse;<sup>316</sup> not only do nonprofit managers at institutions of higher education have more altruistic motives than for-profit managers,<sup>317</sup> but the absence of a profit motive also eliminates a major incentive for higher education producers to exploit vulnerable market participants.

Furthermore, NPIs remain committed to the historical and contemporary goals of higher education. Indeed, the absence of an obligation to pursue practices that maximize wealth frees NPIs to pursue initiatives that do not necessarily result in more revenue, but nevertheless foster service, charity, civic participation, and self-actualization, all while broadening access for students. Finally, NPIs embody what should be our society's normative commitment to higher education, exemplified best by a historical commitment of government to low public college and university tuition,<sup>318</sup> and the dedication of our Founding Fathers to higher education, not in pursuit of profit, but in pursuit of maximizing the public good. In contrast, FPIs are not only problematic because of the difficulties in regulating the predatory incentives in the market, but also because the for-profit business structure in education is an abdication of the values of altruism, collective responsibility, and pursuit of a common good. In the for-profit higher education sector, the problem is in the premises.

#### CONCLUSION

Scholars assessing problems in the for-profit education industry take for granted that the use of federal funding in the sector is appropriate. This article's goal, however, is to challenge that very assumption. Given the public good nature of higher education, and the limitations of the for-profit sector in providing it, we must consider whether a for-profit motive is

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ACAD. POL. & SOC. SCI. 97 (2003) (arguing that public higher education may ultimately play the role of reinforcing and widening the nation's income distinctions).

316. In 2004 testimony before Congress, former inspector general of the U.S. Department of Education testified that "while fraud and abuse does occur at nonprofit and public-sector institutions, historically, fraud and abuse predominantly involves proprietary schools." See Freedman, *supra* note 168. He continued by noting that in the previous six years, nearly three-quarters of fraud cases came from the for-profit education sector. *Id.*

317. See Pusser, *supra* note 117, at 32; EARNINGS FROM LEARNING, *supra* note 11, at 72.

318. See Mumper, *supra* note 315, at 100–01.

appropriate in the context of higher education at all. FPIs have entered the “mature but growing market of older nonprofit and public institutions,”<sup>319</sup> and have seemingly achieved mainstream acceptance.<sup>320</sup> Nevertheless, the goal should not be to treat NPIs and FPIs similarly, for their motivations and goals are not the same. FPIs are motivated to maximize profit, because their ultimate obligation is not to students, but to investors.

Defenders of the private market for education may argue that market forces will take care of the bad actors. According to the argument, those institutions that engage in unethical recruiting practices, or who have poor retention, graduation, and job-placement rates, will attract fewer and fewer students as their reputations become more widely known. Even assuming student choice, however, information asymmetries, the experience-rich aspects of education, and insufficient or ineffective avenues for legal redress all undermine the corrective abilities of the market. In the meantime, in exchange for the financial benefits that go to shareholders of FPIs, the public has endured fraud and abuse at the expense of students, taxpayers, and the public good.

Questions do remain about the internal and external constraints of the nonprofit sector. The nonprofit higher education sector, however, is notably lacking the fraud and abuse prevalent in the for-profit sector. In addition, its graduates complete their educations without taking on as much debt as is incurred by for-profit students, and its goals and outcomes are in line with the public benefit purposes of higher education. Federal funding that is currently spent to maximize shareholder profit at FPIs would be better spent at NPIs with missions that include service to the public, and in the implementation of programs and initiatives that will improve access for all students to traditional institutions of higher education. Accordingly, outside of those limited areas identified as suitable for for-profit education and effective monitoring and regulation, FPIs’ access to the federal loan program should be prohibited.

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319. TIERNEY & HENTSCHE, *supra* note 6.

320. Jack Welch, the former General Electric Executive, owns a stake in for-profit Chancellor University in Cleveland; Goldman Sachs owns thirty-eight percent of the for-profit Education Management Corporation in Pittsburgh; and former President Bill Clinton took a position as honorary chancellor of Laureate International Universities, owned by the for-profit Laureate Education. *See* Golden, *supra* note 1, at 63. Similarly, retired and current leaders in higher education and NPIs increasingly serve on the boards of the publicly traded companies that own for-profit colleges and universities. Kelly Field & Paul Fain, *On For-Profit College Boards, Knowledgeable Insiders*, CHRON. OF HIGHER EDUC. Feb. 18, 2011, at A14. Acceptance of for-profit principles among education is also reflected in the rhetoric of K–12 public education reform, which has shifted from achievement, equity and fundamental rights to efficiency, cost-savings, and compensation.

To educate the niche student markets that FPIs have been attracting, state and federal governments should consider providing incentives for NPIs to better educate marginalized students.<sup>321</sup> In addition to providing traditional liberal arts curriculums, NPIs can be further encouraged to provide vocational education in the form of secondary and postsecondary public and nonprofit programs.<sup>322</sup> Initiatives like these can ensure that NPIs provide the flexibility and focus on career and technical education that they have been lacking.

Proponents of the market can consider this proposal a market solution of sorts. After all, enabling NPIs to better serve the vulnerable students currently recruited by FPIs creates a more competitive market for the career and vocational training FPIs currently purport to provide. In the meantime, public money will be spent at institutions that have been, and will continue to be, committed to the public good.

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321. Such initiatives have been proposed before. Although ultimately gutted, the Obama administration proposed a \$12 billion program for community colleges to improve remedial education, increase the number of transfer students from two-year to four-year colleges and universities, create stronger ties between colleges and employers, improve job-training, and provide online courses for students. See Jennifer Gonzalez, *Historic White House Summit to Put Community Colleges in the Spotlight*, CHRON. OF HIGHER EDUC. (Oct. 5, 2010), <http://chronicle.com/article/White-House-Puts-Community/124816>.

322. Vocational education has had a long history in the United States, starting in the form of apprenticeships in the early colonial period. Land-grant institutions continued this tradition, with an early mission of training farmers and home-economists. Today, vocational training is offered at high schools, training centers, and two and four-year colleges and universities, although the future of the programs is dependent on strong federal commitment. For a more detailed discussion of vocational training in the United States, see GORDON, *supra* note 98, at 34–46; ARTHUR F. MCCLURE, ET AL., *EDUCATION FOR WORK: THE HISTORICAL EVOLUTION OF VOCATIONAL AND DISTRIBUTIVE EDUCATION IN AMERICA* (1985).

