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# Law and the Conundrum of Higher Education Quality

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*Although historically the federal government has been reluctant to assess the quality of the education offered by institutions of higher learning, the Department of Education under the Obama Administration quietly implemented a perspective on quality that focused on the financial outcome of a program of education for students. Those institutions that produce students who do not make progress on repayment of student loans or who default on such obligations are deemed low quality. The focus on the economic impact of higher education is not the only path forward; policymakers including regulators and courts could turn their attention to education inputs, as New York’s attorney general did in litigation against Trump University, rather than outputs. This Essay contends that the quiet acceptance in regulation and law of income as the best proxy of institutional quality is misguided and dangerous. The Essay warns that failure to grapple with the difficult question of quality of education threatens the quality of democracy.*

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## INTRODUCTION

Historically, judges, lawmakers, and regulators who together help shape the experience of higher education in the United States have trodden gingerly around the question of quality. There are good reasons for this: greater involvement raises the specter of government control of the content of education<sup>1</sup> and political leaders' use of their power to shape a curriculum intended to indoctrinate, rather than educate, students.<sup>2</sup> Despite these dangers, the federal Education Department (the "Department") under President Obama took on the challenge of assessing institutional quality. The regulatory effort responded to the rising cost of college<sup>3</sup> and increasing student debt burdens, both of which have become widely-discussed concerns in Congress<sup>4</sup> and more generally. Perhaps in part to avoid possible entanglement in sensitive issues including the scope of the protection afforded to institutions of higher education by the First Amendment, the Department's rules have focused not on direct assessment of what

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<sup>1</sup> See, e.g., *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (stating that public schools' role in "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes").

<sup>2</sup> See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (upholding First Amendment right of students to wear black armbands in political protest in part because "state-operated schools may not be enclaves of totalitarianism"). To be sure, at least one scholar has observed that the scope of First Amendment protection of *student* speech has weakened over time. See, e.g., Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 *DRAKE L. REV.* 527, 535 (2000). However, the Court has not bolstered the power of the state over or relative to schools, whether primary, secondary, or postsecondary. Rather, in post-*Tinker* cases in which the Court upheld punishment of student speech, a majority of the justices "emphasized the need for judicial deference to educational institutions." *Id.* at 536. Presuming to evaluate educational quality would not be consistent with this deference, which the Court has recognized in other contexts, including college admissions. See, e.g., *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016) (citing *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2419 (2013) (upholding the use of race as a factor in admissions decisions and stating that the judgment of the need to do so in pursuit of student body diversity is "in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper").

<sup>3</sup> THE COLLEGE BOARD, *TRENDS IN COLLEGE PRICING 2015*, at 16 fig.6 (2015), <https://trends.collegeboard.org/sites/default/files/trends-college-pricing-web-final-508-2.pdf>.

<sup>4</sup> Senator Elizabeth Warren has been outspoken on the subject. See, e.g., Senator Elizabeth Warren, *Floor Speech on Student Loan Debt* (Feb. 12, 2014), <https://www.warren.senate.gov/files/documents/2014-2-12%20Floor%20Speech%20on%20Student%20Loans.pdf>.

goes on in college classrooms, nor even on measures of institutional commitment to student learning, but instead on student financial outcomes, including the ratio of borrowers' student debt to their income and the frequency with which they default on their student loans.<sup>5</sup>

While the Department did not emphasize that its new rules effected a quality assessment,<sup>6</sup> the rules, which a panel of the federal Court of Appeal for the District of Columbia upheld in 2016,<sup>7</sup> do reflect a particular perspective. It is a view of quality that is consistent with other federal efforts, like the Obama Administration's "College Scorecard,"<sup>8</sup> to hold colleges and universities accountable<sup>9</sup> for certain student outcomes. It is the view that the value of higher education rests on the income earned after completion by students. High-quality institutions confer earnings that appropriately reward students for their investment in a course of study or a degree; in this view, higher education thus is an instrument purchased to enable the buyer to enjoy a private gain.

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<sup>5</sup> See, e.g., 34 C.F.R. § 668.403 (2017) (tying institutional eligibility to participate in federal student aid programs to (1) the ratio of student borrowers' debt to their discretionary income, calculated with reference to the federal Poverty Guideline and (2) the ratio of student borrowers' debts to average or median annual earnings).

<sup>6</sup> Indeed, in its Notice of Proposed Rulemaking describing the motivation behind the rules giving student borrowers a defense to repayment of federal loans under specified circumstances, the Department is careful to note that it "does not intend in these regulations to create a different legal standard" governing "claims asserting that educational institutions and their employees breached their duty to educate students adequately (otherwise known as 'educational malpractice')." Student Assistance General Provisions, 81 Fed. Reg. 39,330, 39,337 (June 16, 2016) (to be codified at 34 C.F.R. pts. 30, 668, 674, 682, 685, 686). The discussion in the Notice suggests that the Department worked hard to avoid explicitly taking a stance on any particular method to assess educational quality, consistent with its interpretation of prevailing law. See 34 C.F.R. § 668.403(c)(i)–(ii) (2017).

<sup>7</sup> See *infra* note 98 and accompanying text.

<sup>8</sup> Press Release, U.S. Dep't of Educ., Education Department Releases College Scorecard to Help Students Choose the Best College for Them (Feb. 13, 2013), <http://www.ed.gov/news/press-releases/education-department-releases-college-scorecard-help-students-choose-best-college-them>. President Obama announced the Scorecard to much fanfare in the State of the Union Address on February 12, 2013. See President Barack Obama, State of the Union Address (Feb. 12, 2013, 9:15 PM), <https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/remarks-president-state-union-address>.

<sup>9</sup> See, e.g., Arne Duncan, *Hold Shady Colleges Accountable*, POLITICO MAG. (July 1, 2015), <http://www.politico.com/magazine/story/2015/07/congress-help-hold-career-colleges-accountable-119601> (calling for an "accountability system" to help to protect students borrowing to pay for higher education).

The prevalence of market rhetoric in the context of education at every level, from preschool to graduate and professional school, is not new, but government adoption and approval of such a perspective in the context of higher education regulation is a developing phenomenon. The federal implementation of a commercial mindset<sup>10</sup> through the Scorecard tool and through rules constitutes a novel endorsement of higher education not only as commodity but as a commodity the quality of which is easily determined based on income students earn.

Prospective students — and institutions offering to provide higher education to them — receive mixed messages about their respective missions. On the one hand, students view education generally as a pathway to a more financially successful and secure life; on the other hand, they view higher education as affording a time to explore career paths and possibly to learn more about themselves, their aptitudes, and their interests.<sup>11</sup> Colleges, universities, and other providers seek to cater to both impulses, offering courses associated with relatively low postgraduate earnings as well as those associated with higher earnings. Federal aid policy is similarly ambivalent: the government offers financial aid to students to attend a remarkably wide variety of institutions, but offers those who borrow some protection against those actors most egregious in their exploitation of students and, indirectly, the public fisc. The consequences of teleological confusion include weak and at times conflicting policy efforts to expand access to higher education. For example, the federal government provides aid *ex ante* to students regardless of students' choice of course of study and consequently regardless of the likely income effects of that choice, but the Department's new rules and the Scorecard focus precisely on such *ex post* financial outcomes, as will be discussed in greater detail

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<sup>10</sup> Here I borrow the phrase used by Samuel E. Abrams in writing about privatization in the context of primary and secondary education. SAMUEL E. ABRAMS, *EDUCATION AND THE COMMERCIAL MINDSET* 14 (Harvard Univ. Press ed., 2016).

<sup>11</sup> These attitudes are evident in the survey of first-year college students conducted annually by the University of California, Los Angeles, which found that more than eighty-five percent of first-year students indicated that it was "very important" to go to college to "be able to get a better job" and nearly seventy percent indicated that going to college was very important "to make more money," while at the same time more than seventy-one percent indicated college was very important to "gain a general education and appreciation of ideas" and more than eighty-two percent thought college was very important to "learn more about things that interest [them]." KEVIN EAGAN ET AL., *HIGHER EDUC. RESEARCH INST., THE AMERICAN FRESHMAN: FIFTY-YEAR TRENDS 1966–2015*, at 70 (2016), <http://www.heri.ucla.edu/monographs/50YearTrendsMonograph2016.pdf>.

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below.<sup>12</sup> Both the rationale for federal aid policy and the purpose institutions of higher education are to serve have grown muddled,<sup>13</sup> and that lack of clarity at once presents a challenge to any effort to design an assessment of educational quality and an opportunity for advocates of one particular method of evaluation.

The Department's new rules seek to address serious problems. Perhaps most importantly, they combat the unequal impact of borrowing on differently situated students: only those who need loan aid are vulnerable to the risk that borrowing entails. They also seek to address the burden of debt on students in repayment. And they respond to revelations of misconduct, even fraud, at some large for-profit providers of higher education, which offer programs of study that students often do not complete and/or that do not result in students' obtaining employment sufficiently remunerative to manage their student loan obligations.<sup>14</sup> The "gainful employment" rules that were the subject of the District of Columbia Court of Appeal decision in 2016 sought to preclude participation in federal student aid programs under Title IV of the Higher Education Act of 1965 ("HEA")<sup>15</sup> by institutions at which the ratio of students' debt to their earnings rose too high.<sup>16</sup> The rules supplemented existing provisions conditioning institutional participation in Title IV programs on keeping the rate of student loan borrower default under specified levels.<sup>17</sup>

While the consequences of student debt and of defaulting on student loan payment obligations can be devastating for borrowers and the Department's rules make sense as a partial response, they do not provide much in the way of protection for students before they enroll. They instead either (a) penalize institutions at which students experience poor financial outcomes<sup>18</sup> or (b) provide a defense to repayment for students who fell victim to misrepresentations by such

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<sup>12</sup> See *infra* Sections II.C, II.D.

<sup>13</sup> See David Labaree, *Public Goods, Private Goods: The American Struggle over Educational Goals*, 34 AM. EDUC. RES. J. 39, 40 (1997) (arguing that the challenge confronting advocates of greater educational equity in access "is not that we do not know how to make schools better but that that we are fighting among ourselves about what goals schools should pursue").

<sup>14</sup> Program Integrity: Gainful Employment, 79 Fed. Reg. 16,426, 16,426 (Mar. 25, 2014) (to be codified at 34 C.F.R. pts 600, 668).

<sup>15</sup> This language refers to funds administered under Title IV of the Higher Education Act of 1965, Pub. L. 89-329 (1965), amended by Pub. L. 115-31 (2017).

<sup>16</sup> 34 C.F.R. §§ 668.403–404 (2017).

<sup>17</sup> 34 C.F.R. § 668.206(a) (2017).

<sup>18</sup> See *id.*

institutions.<sup>19</sup> These are not steps to expanding access to higher education but efforts to enable the persistence of the *status quo* by punishing the worst and most visible excesses. It is not the argument of this Essay that rules protecting borrowers and punishing institutions are bad policy, but that the form of help provided to students matters. A narrow focus on student financial outcomes has consequences.

The federal approach has two components, one operating *ex ante* and relying on disclosure, the other *ex post* and imposing penalties on institutions based on student financial outcomes. Each is addressed in greater detail in Part II below. This Essay warns that the disclosure remedy, which adds to an already overwhelming mix of information on higher education offerings from numerous sources, runs the risk of irrelevance to students who lack the expertise to evaluate the information they have and, as one-time investors in education, lack the incentive to develop such expertise. At the same time the disclosure remedy creates powerful incentives for institutions to focus on those data points that receive regulatory attention, just as they focus on data points that determine placement in influential rankings (“private rankings”) published every year by private sector actors.<sup>20</sup> In turn the institutional penalty risks trivializing myriad values historically associated with and attributed to higher education, including civic participation, public service, and the accumulation of knowledge as an end in itself.<sup>21</sup>

The regulatory focus on student financial outcomes in the context of higher education provides a striking contrast to the legislative approach in the context of primary and secondary education. In the former, enforcement of accountability relies on proxies for educational quality in the form of employment and income effects, perhaps because the subject matter taught is more complex and less susceptible to standardized testing. In the latter, students take tests as part of an effort to gauge learning directly, and institutions face consequences if test results are deemed inadequate.<sup>22</sup> Both approaches

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<sup>19</sup> See 34 C.F.R. § 685.206.

<sup>20</sup> See WENDY NELSON ESPELAND & MICHAEL SAUDER, *ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY* 4 (Russell Sage Found. ed., 2016).

<sup>21</sup> See Labaree, *supra* note 13, at 66-67.

<sup>22</sup> See, e.g., Every Student Succeeds Act, Pub. L. 114-95, § 1111(b)(2), 129 Stat. 1802, 1825 (2015) (requiring that state education agencies “implement[] a set of high quality student academic assessments in mathematics, reading or language arts, and science”). Some states, like California, also impose outcome requirements on teachers. CAL. EDUC. CODE § 44662(b) (2018). The meaning of statutory mandates, in turn may

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are flawed — neither earnings nor test scores necessarily function as reliable proxies for education quality<sup>23</sup> — but the different approaches make plain that alternative methods exist for assessment and the choice of tool reflects underlying, perhaps unexamined, normative beliefs. This Essay undertakes an analysis of a rather subtle phenomenon, the spread of a mindset, a set of values, assumptions, and presumptions; the goal is to move such beliefs to the foreground and subject them to critique.

The argument here is not that financial outcomes do not matter but that much else matters, too. For example, the mission of an educational institution could serve as a basis for evaluation of quality. If a provider identifies a benefit that the education on offer will provide, then the extent to which<sup>24</sup> students attain that benefit is a valid indicator of quality. If Trump University, the example explored further below,<sup>25</sup> makes claims about what the education will consist of, then fulfillment or failure to fulfill those claims certainly says something about quality, at least by the provider's own chosen unit of measure. This Essay does not seek to define quality *per se* or to prescribe the content of rules that undertake such an effort, but to expose how a particular perspective is dispersed, adopted, and implemented through law and regulation. Legal actors, including regulators, judges, and other institutions, play a critical role in this process, influencing the language of rules and affecting their interpretation.<sup>26</sup> The analysis further identifies reasons to expect that a material, instrumental, private conception of education will strengthen and spread.

Education reform occurs through legislation, regulation, and judicial intervention. This Essay joins and advances the legal academic conversation about the role of law in determining who enjoys access to higher education opportunity and correlated societal opportunity.

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be subject of controversy, with some groups demanding clear consequences for teachers whose students do not show improvement on standardized tests. *See, e.g., Doe v. Antioch Unified Sch. Dist.*, No. MSN15-1127, at \*23-24 (Cal. Sept. 19, 2016) (finding that California law does not require school districts to evaluate teachers based on scores of each teacher's students on standardized tests).

<sup>23</sup> *See, e.g.,* Kimberly West-Faulcon, *More Intelligent Design: Testing Measures of Merit*, 13 U. PA. J. CONST. L. 1235, 1240 (2011) (analyzing shortcomings and consistently disparate effects of standardized tests as predictors of academic performance).

<sup>24</sup> Or frequency with which.

<sup>25</sup> *See infra* Section II.B.

<sup>26</sup> REBECCA S. NATOW, *HIGHER EDUCATION RULEMAKING: THE POLITICS OF CREATING REGULATORY POLICY* 110 (John Hopkins Univ. Press ed., 2017).

The argument here is influenced by the ideas of pioneering education thinkers like John Dewey and social critics like Pierre Bourdieu, engages those of legal scholars including Lani Guinier,<sup>27</sup> Rachel Moran,<sup>28</sup> Michael A. Olivas,<sup>29</sup> and Kimberly West-Faulcon,<sup>30</sup> and responds to observations on the workings of federal higher education policy by scholars including Andrew Delbanco, Suzanne Mettler, and Susan Dynarski.

This Essay continues a project interrogating the federal role in provision and expansion of higher education access. One set of prior articles analyzed the financial barriers to access, explaining the risk of non-government education loans,<sup>31</sup> assessing the impact of student aid policy,<sup>32</sup> identifying the danger of curtailing federal aid policies out of misguided concern over systemic financial risk,<sup>33</sup> and analyzing the paradoxical challenge that while federal programs put higher education within reach of more students than ever, the reliance on debt imperils the achievement of the ultimate objectives of enabling such access.<sup>34</sup> A related article addresses the consequences of

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<sup>27</sup> See Lani Guinier, Comment, *Admissions as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 122-24 (2003) (arguing that processes that determine who attends elite institutions of higher education reflect political and cultural choices and biases and lamenting the absence of “public[] . . . conversation about the responsibilities of universities as engines of social mobility, producers of knowledge, and practitioners of democracy”).

<sup>28</sup> See Rachel F. Moran, *City on a Hill: The Democratic Promise of Higher Education*, 7 UC IRVINE L. REV. 73, 75 (2017) (analyzing privatization of higher education and identifying three distinct effects: commodification, or reducing the college degree to a dollar value; segmentation, as institutions of higher education compete rather than collaborate; and stratification, as gaps in resources and other attributes divide those institutions, with meaningful effects on students’ opportunities).

<sup>29</sup> See Michael A. Olivas, *Brown and the Desegregative Ideal: Location, Race and College Attendance Policies*, 90 CORNELL L. REV. 391, 416-17 (2005) (analyzing development of Supreme Court doctrine on higher education admissions practices and identifying relationships between and effects of race and place).

<sup>30</sup> See West-Faulcon, *supra* note 23, at 1295 (providing a critique of acceptance of standardized test scores as indicators of “merit” for admission to selective institutions of higher education).

<sup>31</sup> Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 11, 17 (2011) [hereinafter Glater, *The Other Big Test*].

<sup>32</sup> Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. 1561, 1584, 1564-65 (2015) [hereinafter Glater, *Higher Education Risk*].

<sup>33</sup> Jonathan D. Glater, *Student Debt and the Siren Song of Systemic Risk*, 53 HARV. J. LEGIS. 100, 106 (2016) [hereinafter Glater, *Siren Song*].

<sup>34</sup> Jonathan D. Glater, *Debt, Merit, and Equity in Higher Education Access*, 79 LAW & CONTEMP. PROBS. 89, 90-91 (2016).

prioritizing and rewarding specific measures of student merit,<sup>35</sup> while this Essay examines assessment of what might be termed institutional merit and the pernicious consequences of basing evaluation of higher education quality on financial outcomes.

The discussion that follows has three major parts. Part II briefly describes historical judicial deference to college and university autonomy and reluctance to evaluate institutional quality, then analyzes the adoption of assessments focused on financial outcomes and financial impacts of higher education. This analysis demonstrates how these assessments have assumed great prominence in evaluation of educational quality. This Part will analyze four manifestations of the acceptance, even endorsement, of use of debt, repayment, and income as indicators of quality: the “gainful employment” rules promulgated by the Education Department,<sup>36</sup> the approval of those rules by a panel of the Court of Appeal of the District of Columbia Circuit,<sup>37</sup> the Obama Administration’s Scorecard, and the new “defense to repayment” rules developed by the Department.<sup>38</sup> This Part concludes by identifying reasons that the adoption of a mercenary perspective on higher education is all but certain to continue and explaining why the trend matters.

Part III criticizes the reliance on student financial outcomes as a measure of the quality of an institution of higher education. Such a narrow focus creates undesirable incentives for students, who come to regard their educational experience as the purchase of a credential, and for institutions, which will modify their practices in order to protect themselves from any government sanction resulting from failure to meet the standards set in federal regulations. More profoundly, the myopic obsession with advanced education as means to achieve a higher income and nothing more impoverishes the endeavor itself. Since the time of the founding, education has been recognized as the engine driving civic engagement, worthy of pursuit because of its salutary effects upon our democracy. This Part suggests that much is to be gained by focusing at least as much on educational inputs, in addition to results, as litigation against Trump University suggests. A shift in emphasis away from

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<sup>35</sup> Jonathan D. Glater, *To the Rich Go the Spoils: Merit, Money, and Access to Higher Education*, J. COLL. & UNIV. L. (forthcoming 2018) (on file with the UC Davis Law Review).

<sup>36</sup> 34 C.F.R. § 668.401–.415 (2017).

<sup>37</sup> See *infra* Section I.C.

<sup>38</sup> Student Assistance General Provisions, 81 Fed. Reg. 39,330 (proposed June 16, 2016) (to be codified at 34 C.F.R. pts. 30, 668, 674, 682, 685, 686), <https://www.gpo.gov/fdsys/pkg/FR-2016-06-16/html/2016-14052.htm>.

potential economic advantage reflects an understanding that assessment of quality should include an assessment of institutional mission, which may manifest in investment in inputs.

Part IV concludes.

#### I. MONEY AS MEASURE

Traditionally, courts have shied from assessing the quality of higher education.<sup>39</sup> The opinions of the Supreme Court exhibit uncharacteristic humility in this, emphasizing the justices' lack of expertise in assessing students, teachers, or the institutions in which they interact.<sup>40</sup> Rather, judges explain that the judgments of educators deserve deference because of their expertise,<sup>41</sup> because they must make

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<sup>39</sup> See, e.g., *Bell v. Bd. of Educ.*, 739 A.2d 321, 324-25 (Conn. App. Ct. 1999) (observing that most courts have not recognized a cause of action for "educational malpractice"). However, the court in *Bell* drew a distinction between claims sounding in tort and claims sounding in contract, and noted that a plaintiff claiming contractual breach by an institution that did not, for example, offer a course that was promised to be available to the student, might succeed. *Id.* at 324-26; see also *Peter W. v. S.F. Unified Sch. Dist.*, 131 Cal. Rptr. 854, 855 (Cal. Ct. App. 1976) (denying student's claim that public school education was inadequate). However, courts have recognized an exception for certain kinds of narrow and technical training that, if negligently conducted, may create danger for the student and/or third parties; plaintiffs have sued commercially operated flight schools on a negligence theory, for example. See, e.g., *Newman v. Socata SAS*, 924 F. Supp. 2d 1322, 1324-30 (M.D. Fla. 2013) (summarizing law on educational malpractice claims in various jurisdictions and identifying circumstances under which claims may survive a motion to dismiss). Cases involving challenges to higher education provided by colleges and universities are not common but doctrinal deference has extended to such institutions' grading practices, for example, and other decisions regarding students. See, e.g., *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (ruling against student who challenged failing grade in large part because the courts are not "suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions").

<sup>40</sup> For example, in *Board of Curators of the University of Missouri v. Horowitz*, the Supreme Court declined to require a hearing in a case involving dismissal of a medical student for poor academic performance, and distinguished the case from one involving dismissal for disciplinary reasons because the "academic judgment of school officials that [the student] did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal . . . is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision." 435 U.S. 78, 89-90 (1977). The justices "decline[d] to ignore the historical judgment of educators and thereby formalize the academic dismissal process," further observing that in higher education in particular, "instruction becomes more individualized and more specialized" and the relationship of teacher and student becomes — and perhaps should become — yet less adversarial. *Id.*

<sup>41</sup> *Ewing*, 474 U.S. at 225 ("When judges are asked to review the substance of a

a “multitude of . . . decisions” involving assessment of students,<sup>42</sup> and because individual students may be treated in particular ways in order to enhance the overall educational endeavor.<sup>43</sup> Judicial review of academic decisions may trespass on teachers’ academic freedom, in turn protected by the First Amendment.<sup>44</sup>

These explanations justify judicial reluctance to pass on the quality of education provided, and have enabled courts to sidestep difficult questions that would otherwise need to be addressed concerning the purpose education serves. Only by answering such questions could the success of educators be assessed. The Court has addressed the role of higher education in democracy in lofty but vague and distant language focused on effects, noting that education may play a critical role in developing future leaders, for example.<sup>45</sup> Even in the context of primary and secondary education, which is compulsory, the justices have not taken on definition of educational quality,<sup>46</sup> though they have

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genuinely academic decision . . . they should show great respect for the faculty’s professional judgment.”).

<sup>42</sup> See *id.* at 226.

<sup>43</sup> See *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003) (upholding use of race in admissions decisions at a selective public law school in part because the university enjoys “educational autonomy” protected by the First Amendment and extending to the selection of students to admit (citing *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978))). Significantly, *Grutter* included a reminder that the discretion accorded to universities is subject to constitutional constraints, such that while academic judgments of values to pursue may receive deference, choices about methods to achieve those values may not. *Id.* The Court elaborated on this distinction in *Fisher v. University of Texas*. See *Fisher v. Univ. of Tex.*, 136 S. Ct. 2198, 2208 (2016) (recognizing judicial deference to the university’s decision to seek a racially diverse student body but not to its use of race in admissions processes “is narrowly tailored to achieve the university’s permissible goals”); *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2421 (2016).

<sup>44</sup> *Ewing*, 474 U.S. at 226 (adding concerns over federalism to the mix in the primary and secondary school context, and emphasizing that education has long been understood as the province of local and state government).

<sup>45</sup> See *McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637, 641 (1950).

<sup>46</sup> The Court put it well in *Brown v. Board of Education*:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably

justified the reorganization of public schools by citing the critical role played by education in society.<sup>47</sup> This limited doctrinal treatment of questions of higher education *telos* in turn has created a gap that other policymakers may fill, implementing as they wish the concrete values of the marketplace rather than the more abstract idealism expressed in cases like *Brown v. Board of Education*<sup>48</sup> or in the statements of political leaders.<sup>49</sup>

Institutions of the federal government and formal accreditors are not the only entities that affect the conduct of institutions of higher education and the students they serve. Members of college and university governing bodies also respond to actual and potential donors and other powerful, private actors, especially purveyors of rankings like that produced annually by *U.S. News & World Report*.<sup>50</sup> Secondary school guidance counsellors, private education consultants catering to relatively well-off families seeking an edge in selective admissions processes, and higher education providers themselves all produce information that influences perspectives on the quality of a given educational opportunity. The quantity of information sources begs the question of why the executive branch should seek to join the crowd, and there are good responses. First, the government has an interest in ensuring institutional accountability in order to protect the

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be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

347 U.S. 483, 493 (1954). The Court similarly valorized higher education in cases that, like *Brown*, turned on access. See, e.g., *McLaurin*, 339 U.S. at 641 (1950) (citing need for “trained leaders” to justify admission of black applicant to graduate school of education).

<sup>47</sup> While in rejecting challenges to different funding levels of public schools in wealthier districts, justices have argued that spending does not necessarily correlate with quality, they have not defined what quality is. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 23-24 (1973) (stating that it is an “unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it”).

<sup>48</sup> See *Brown*, 347 U.S. at 493.

<sup>49</sup> See, e.g., President Barack Obama, Remarks by the President on Higher Education and the Economy at the University of Texas at Austin (Aug. 9, 2010, 2:05 PM), <https://www.whitehouse.gov/the-press-office/2010/08/09/remarks-president-higher-education-and-economy-university-texas-austin> (reminding graduates that “education and opportunity, they always go hand in hand”). However, President Obama, in these and other remarks, has consistently emphasized that education matters because of its economic impact on the lives of students who complete courses of study. *Id.*

<sup>50</sup> See WENDY NELSON ESPELAND & MICHAEL SAUDER, *ENGINES OF ANXIETY: ACADEMIC RANKINGS, REPUTATION, AND ACCOUNTABILITY* 4 (Russell Sage Found. ed., 2016).

federal investment taxpayers have made in promoting higher education access by providing grants and subsidized loans to students. Second, the government's intervention can promote the underlying goals of promoting access, including promoting a more informed electorate, more innovation, and participation in public service. Private actors in the business of providing assessments of educational quality are not motivated by concern over such goals, nor do the criteria they use encourage higher education providers to pursue them.

This Part first provides background on the accreditation process for institutions of higher education, explaining why accreditors do not perform as reliable or consistent evaluators of quality. The discussion then turns to four moments in which the judicial, legislative, and executive branches have in recent years demonstrated their belief that higher education is properly assessed based on student financial outcomes. The first such move is the adoption by the Department, pursuant to authority granted previously by Congress, of rules penalizing those education providers whose students did not attain "gainful employment." The second move is the ultimate endorsement of the second iteration of those rules by a federal trial court and subsequently by a panel of the District of Columbia Circuit. The third is the rollout by the Obama Administration of the College Scorecard, seeking to provide more and more readily comparable information about college outcomes to prospective students. The fourth is the proposal by the Department to adopt new rules allowing borrowers to eliminate their federal student loan repayment obligations under specific circumstances involving misconduct by the education provider. All these actions, which implicitly or explicitly treat higher education as a private financial good, have been possible because of the historical reluctance to grapple with the question of the role higher education should serve.

#### *A. The Quality of Accreditation*

While members of Congress for decades have enacted legislation affecting colleges, universities, community colleges, and non-degree granting, postsecondary institutions, they have not imposed a mechanism for assessing institutional quality. No doubt this has to do with some of the same factors constraining courts, including respect for institutional autonomy, as well as appreciation of the powerful cultural role that colleges and universities in particular play in the United States. In addition, all these institutions actively lobby both federal and state lawmakers in pursuit of their own interests. And

most significantly, before sharp increases in student borrowing<sup>51</sup> and the wider acceptance of the idea of education as a personal investment in improving lifetime earnings, the risk to students of receiving a poor quality education was low. The government bore the risk of a poor educational outcome rather than a student<sup>52</sup> but any loss on the government's investment, made in the form of grant aid or direct institutional support, was less readily quantifiable than a loan default. The student recipient of grant aid, facing less financial harm from that poor education outcome in the absence of a heavy debt repayment burden, had little incentive to draw attention to the quality of the education. In the current environment, the highly visible prospect of student loan defaults has led to widespread attention to questions of quality because a low-quality education can have a devastating financial impact on students.

The executive branch historically has left to independent, non-governmental accreditation bodies the assessment of institutional education quality,<sup>53</sup> even though accreditation is a prerequisite to participation in the all-important federal student aid programs of Title IV of the HEA.<sup>54</sup> Concern over potential abuse of federal funds supporting access to higher education through legislation like the Servicemen's Readjustment Act of 1944,<sup>55</sup> otherwise known as the G.I. Bill, led to a Congressional call for executive recognition of accreditation bodies that would ensure that veterans received an

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<sup>51</sup> THE COLLEGE BOARD, TRENDS IN STUDENT AID 2015, at 9 tbl.1 (2015), <https://trends.collegeboard.org/sites/default/files/trends-student-aid-web-final-508-2.pdf> (showing steady increases in aggregate federal student loan borrowing).

<sup>52</sup> See Glater, *Higher Education Risk*, *supra* note 32, at 1609 (describing how requiring students to borrow shifted risk of poor financial outcomes to borrowers).

<sup>53</sup> A governmental role in providing and overseeing higher education has long been limited; states adopted structures incorporating boards of regents, for example, rather than subjecting institutions to potentially unpredictable legislative management. See Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1473 (2011). Not that the Department has not at times tried to influence accreditors, but such efforts have met with resistance from legislators. *But see* Cerin Lindgrensavage, *Regulatory Oversight of Student Financial Aid Through Accreditation of Institutions of Higher Education*, 45 J.L. & EDUC. 327, 334-35 (2016) (describing Congressional limits on the Department, which had tried to require accreditors to assess student outcomes). There are entities that accredit professional schools: the American Bar Association for law schools and the Liaison Committee on Medical Education, an entity jointly sponsored by the Association of American Medical Colleges and the American Medical Association, for medical schools, for example.

<sup>54</sup> See 20 U.S.C. § 1099(c) (2018).

<sup>55</sup> Pub. L. No. 78-345, 58 Stat. 283 (1944).

adequate educational experience on the government's dime.<sup>56</sup> However, the Department is actually prohibited from assessing, or specifying for accreditors a particular method of assessing, institutional quality.<sup>57</sup> There are a variety of these entities, some specialized by nature of the education, like the Accreditation Commission for Acupuncture and Oriental Medicine, and others that accredit institutions within a particular geographic area, like the Middle States Commission on Higher Education.<sup>58</sup> Accreditation can be "programmatic," meaning that it applies to an entire institution and all its units, or "specialized," applying only to the relevant unit of a larger institution or to a specialized, standalone institution.<sup>59</sup> The National Advisory Committee on Institutional Quality and Integrity ("NACIQI"), consisting of appointed members, recommends to the secretary whether to recognize a particular accreditor.<sup>60</sup> By statute, accreditors are to examine student achievement in light of an institution's mission; curricula; faculty; facilities and equipment; student support services; admissions practices; program length; degrees or credentials offered, among other criteria.<sup>61</sup> The various accreditors may adapt these in light of their own priorities and may add their own criteria for assessment of institutional quality,<sup>62</sup> but critical to the process is the element of peer review, in which faculty from other institutions evaluate the institution seeking accreditor approval.<sup>63</sup>

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<sup>56</sup> Areen, *supra* note 53, at 1483-84.

<sup>57</sup> Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, § 495(3), 112 Stat. 3090, 3324 (2008). This law also modified the structure of the National Advisory Committee on Institutional Quality and Integrity, which recommends accreditors to the Department, so that one-third of its board was appointed by Congressional Republicans, one-third by Congressional Democrats, and one-third by the secretary of the Department; previously, the secretary had authority to appoint all the members. Areen, *supra* note 53, at 1484.

<sup>58</sup> The federal Education Department recognizes dozens of accreditation bodies. For a list, see *Accreditation-Agency List*, U.S. DEP'T OF EDUC., <http://ope.ed.gov/accreditation/agencies.aspx> (last visited Oct. 1, 2017).

<sup>59</sup> *FAQs About Accreditation*, U.S. DEP'T OF EDUC., <http://ope.ed.gov/accreditation/FAQAccr.aspx> (last visited Oct. 1, 2017).

<sup>60</sup> Higher Education Opportunity Act of 2008, 20 U.S.C. § 1011 (2008). A separate, private entity, the Council for Higher Education Accreditation, whose members are education institutions themselves, also recognizes accrediting organizations. *CHEA at a Glance*, COUNCIL FOR HIGHER EDUC. ACCREDITATION (2015), [http://www.chea.org/userfiles/uploads/chea-at-a-glance\\_2015.pdf](http://www.chea.org/userfiles/uploads/chea-at-a-glance_2015.pdf).

<sup>61</sup> 20 U.S.C. § 1099b(a)(5) (2018).

<sup>62</sup> *Id.* § 1099b(a)(5)(A).

<sup>63</sup> See Areen, *supra* note 53, at 1481.

Because this Essay addresses the government's adoption and endorsement of particular measures of quality, the following discussion and analysis will not delve further into the byzantine world of accreditation, except to note certain structural reasons to worry that accreditors cannot enforce quality standards. First, conflicts exist because accreditors are membership organizations, meaning that they are responsible for assessing their own members, that they depend on members' dues to fund their operations,<sup>64</sup> and that members unhappy with one accreditor may be able to switch to another deemed more supportive. Second, peer review may be affected by the possibility that faculty at an institution under critical review one year may be conducting a review of the reviewing faculty's institution the next.<sup>65</sup> Third, accreditor reviews receive little attention from the public or, one federal investigation concluded, from the Department itself,<sup>66</sup> meaning that threat of disclosure is unlikely to serve as a deterrent to weak assessment and enforcement.<sup>67</sup> A federal agency review of accreditor conduct, which identified apparent inconsistency across accreditors and reported the rarity of imposition of sanctions on institutions seeking accreditation,<sup>68</sup> suggests that concerns over the weakness of the accreditation process are more than abstract.

### B. *The "Gainful Employment" Rules, Round One*

The Department's effort to require accreditors to take into account student financial outcomes was rebuffed by Congress in 2008,<sup>69</sup> but concern over and criticism of rising levels of student debt and, in particular, debt incurred to pay for programs of dubious quality, led to a renewed push to hold education institutions accountable. In 2011, the Department promulgated rules setting new standards for for-profit higher education providers, as well as non-degree-granting nonprofit and public institutions — a category including community colleges — to show that their training led to "gainful employment."<sup>70</sup> To

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<sup>64</sup> Lindgrensavage, *supra* note 53, at 347-49.

<sup>65</sup> *See id.* at 337, 348.

<sup>66</sup> *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-59, HIGHER EDUCATION: EDUCATION SHOULD STRENGTHEN OVERSIGHT OF SCHOOLS AND ACCREDITORS 36 (2014), <http://www.gao.gov/assets/670/667690.pdf>.

<sup>67</sup> *See id.* at 36-37. On the other hand, enforcement may also be chilled as a result of concern that the penalty of losing accreditation status and consequently losing access to Title IV aid funds may spell certain doom for the affected institution.

<sup>68</sup> *Id.* at 13, 30.

<sup>69</sup> *See* Lindgrensavage, *supra* note 53, at 335.

<sup>70</sup> *See* 34 C.F.R. § 668.8(c)-(d) (2017).

determine whether students were gainfully employed, the Department adopted two measures: first, the rate of student loan repayment by those enrolled in the education program, and second, the debt-to-earnings ratio of students who completed the program.<sup>71</sup> If students' rate of repayment fell too low or graduates' ratio of debt-to-earnings rose too high, the education program after a defined period would be excluded from Title IV programs, meaning that students would be unable to use federal student loans or grants to pay the cost of attendance. For many if not most institutions, this penalty would result in a devastating loss of enrollees.

In producing these rules, the Department developed definitions and tests to give content to terms in the legislation authorizing it to act, the HEA.<sup>72</sup> The regulatory initiative took place during the economic contraction of the "Great Recession" that followed the financial crisis of 2008. The number of people seeking additional education increased as the unemployment rate rose, presumably as more people sought qualifications that would improve the odds of finding a job.<sup>73</sup> But given the difficulty of finding employment in that climate, the rate of student loan defaults also began to increase,<sup>74</sup> leading to concern both for student borrowers who suffered the consequences of failure to meet their education loan repayment obligations<sup>75</sup> and for taxpayers ultimately exposed.<sup>76</sup> The regulatory focus on non-degree granting institutions also no doubt responded to investigations of and reports

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<sup>71</sup> This description is drawn from the Department's notice of proposed rulemaking related to the second effort to adopt "gainful employment" regulations. Program Integrity: Gainful Employment, 79 Fed. Reg. 16,426, 16,429 (proposed Mar. 25, 2014) (to be codified at 34 C.F.R. pts. 300, 668).

<sup>72</sup> 20 U.S.C. § 1001(b)(1) (2018).

<sup>73</sup> See David Leonhardt, *Students of the Great Recession*, N.Y. TIMES (May 7, 2010), <http://www.nytimes.com/2010/05/09/magazine/09fob-wwln-t.html?mcubz=0>.

<sup>74</sup> U.S. DEP'T. OF EDUC. OFFICE OF FED. STUDENT AID, DEFAULT RATES 1 (2013), <https://ifap.ed.gov/eannouncements/attachments/060614DefaultRatesforCohortYears20072011.pdf>. The three-year cohort default rate, reflecting student loan defaults within three years of entering repayment, rose to 14.7 percent in 2010 before beginning to decline. *Id.*

<sup>75</sup> Which can be devastating. See generally Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 191-94 (2009) (describing effects of exceptional treatment of student loan debt under the Bankruptcy Code).

<sup>76</sup> This could happen in two ways. Prior to 2010, the federal government both guaranteed federal student loans actually made by private lenders, including banks and other for-profit entities like Sallie Mae, and also made loans directly to students. David M. Herszenhorn & Tamar Lewin, *Student Loan Overhaul Approved by Congress*, N.Y. TIMES (Mar. 25, 2010), <http://www.nytimes.com/2010/03/26/us/politics/26loans.html?mcubz=0>. In 2010, Congress shut down the guaranteed loan program. *Id.*

on highly questionable conduct of for-profit institutions in recruiting students using false stories of lucrative future careers and exaggerated data on student outcomes.<sup>77</sup> The Department identified three concerns about these education programs: (1) that they fail to “train students . . . to obtain and maintain jobs in the occupation for which the program purports to provide training;” (2) that they “provide training for an occupation for which low wages do not justify program costs;” and (3) that they “experienc[e] a high number of withdrawals or ‘churn’ because relatively large numbers of students enroll but few, or none, complete the program, which can often lead to default.”<sup>78</sup>

The explicit goal of the Department was not to define institutional quality *per se* but to set an outer boundary, a floor beneath which institutions’ students must not fall. The Department sought to protect future students from enrolling in programs unlikely to confer upon them the employment and financial benefit necessary to repay student debts they would incur.<sup>79</sup> The rules precisely addressed education outcomes, rather than education experiences or even education opportunities, and that made sense given the fear of rising default rates.<sup>80</sup> The rules, which did not prevent students from enrolling at particular institutions or from borrowing to pay to attend, only afforded an *ex post* remedy, one that would protect future students.

When the Department used the rhetoric of “accountability” to make the case for the rules,<sup>81</sup> the language made clear that the governmental goal was to assign blame for a poor educational outcome, defined as a failure to achieve the employment goal assumed to be the reason underlying the decision to enroll in the first place, to the institution,

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<sup>77</sup> The Government Accountability Office (“GAO”) released a disturbing report in July 2007 describing the results of its investigation of the conduct of for-profit higher education providers. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES (2010), <https://www.gao.gov/new.items/d10948t.pdf>. The GAO reported that four of fifteen for-profit colleges contacted by investigators encouraged students to lie on forms enabling them to access federal financial aid. *Id.* at 7. Four representatives made false or misleading statements about the institution’s graduation rate and/or accreditation status. *Id.* at 9.

<sup>78</sup> Program Integrity: Gainful Employment, 79 Fed. Reg. 16,426, 16,426 (proposed Mar. 25, 2014) (to be codified at 34 C.F.R. pts. 300, 668).

<sup>79</sup> Efforts to protect students who had already enrolled at such institutions came later. See discussion *infra* Section I.D.

<sup>80</sup> Indeed, it did not take long for some critics of growth in student borrowing to warn of a potential financial crisis similar to that related to rising mortgage debt a few years earlier. This analogy could and still can undermine support of federal student loan programs. See Glater, *Siren Song*, *supra* note 33, at 119, 126, 135.

<sup>81</sup> See, e.g., Program Integrity: Gainful Employment, 79 Fed. Reg. at 16,427.

rather than to the student. To ensure that this allocation of blame was appropriate, the rule drew on aggregate measures; no single student's individual, poor experience had consequences for the institution. The intuition behind the design is this: One student's failure to earn a high income may be the fault of the student, but when more than thirty percent of students default on their federal student loans for three years in a row,<sup>82</sup> the institution properly bears blame.

The trade group that represented for-profit higher education providers, the Association of Private Sector Colleges and Universities ("APSCU"), immediately challenged the Department's regulations in federal court.<sup>83</sup> APSCU did not argue that the Department was impermissibly engaged in regulating institutional quality but that the rules were "arbitrary and capricious," in violation of the Administrative Procedure Act.<sup>84</sup> In 2012 the trial judge agreed with the plaintiffs that the student loan repayment rate required by the rules lacked a reasonable justification.<sup>85</sup> This initial effort by the Department to set a floor for institutional quality did not succeed.

### C. Round Two: Judicial Approval of Money as Measure

The Department did not give up on its effort to impose constraints on institutions that did not serve their students well and issued revised and more thoroughly supported regulations. The revised rules survived legal challenge in district court and on appeal, giving the Department a victory in its battle to rein in those for-profit colleges that saddle students with debt and provide little compensating benefit.<sup>86</sup> However, language in the opinion by a panel of the District of Columbia Circuit Court of Appeals endorsed a perspective on higher education that should trouble advocates of a greater federal role to promote access to college. The panel took on the question, does the federal government provide aid to college students in order to help them pursue a private good that has the sole virtue of providing a

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<sup>82</sup> This is the cutoff under the rules as proposed in 2014. *See id.* at 16,428.

<sup>83</sup> *See Ass'n of Private Colls. & Univs. v. Duncan*, 870 F. Supp. 2d 133, 137 (D.D.C. 2012).

<sup>84</sup> 5 U.S.C. § 706 (2018).

<sup>85</sup> *Duncan*, 870 F. Supp. 2d at 154.

<sup>86</sup> *See* David Halperin, *For-Profit College Industry, in Freefall, Convenes in Florida*, HUFFPOST (June 6, 2017), [http://www.huffingtonpost.com/davidhalperin/for-profit-college-indust\\_b\\_10308114.html](http://www.huffingtonpost.com/davidhalperin/for-profit-college-indust_b_10308114.html) (describing the for-profit institutions' "los[s of] yet another battle in its effort to block the Obama Administration's gainful employment rule").

personal financial benefit, or in order to promote the public good by enabling broader access to higher education that benefits others, too?

The challenge mounted in the case, *Association of Private Sector Colleges and Universities v. Duncan*,<sup>87</sup> was similar<sup>88</sup> to that leveled against the Department's first attempt to implement regulations limiting eligibility for participation in federal student aid programs to those institutions<sup>89</sup> that prepared students for "gainful employment."<sup>90</sup> As before, the plaintiffs claimed that the rules violated the Administrative Procedure Act.<sup>91</sup> In the HEA, pursuant to which the Department drafted the rules, Congress did not define the terms "prepare" or "gainful employment," leaving it to the Department to do so.<sup>92</sup> To assess whether a higher education provider prepared students for gainful employment, the regulations, implementing provisions of the HEA,<sup>93</sup> evaluated students' debt burdens. If an institution's student borrowers had to pay more than thirty percent of their discretionary income<sup>94</sup> and twelve percent of annual earnings to cover their education loan obligations, that institution failed to prepare students

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<sup>87</sup> *Ass'n of Private Sector Colls. & Univs. v. Duncan*, No. 15-5190, 640 F. App'x 5, 7 (D.C. Cir. 2016).

<sup>88</sup> Both complaints alleged that the rules were the result of "arbitrary and capricious" process at the Department and their promulgation consequently violated the Administrative Procedure Act, 5 U.S.C. § 706 (2018). *See Duncan*, 870 F. Supp. 2d at 149 (describing basis of claim); *Ass'n of Private Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 184 (D.D.C. 2015) (observing that the plaintiff "has rehashed its challenge to those earlier [versions of the gainful employment] regulations").

<sup>89</sup> The Department's regulations apply to education programs that lead to certificates or "other nondegree recognized credential" at nonprofit and public institutions and to proprietary institutions. Degree-granting public and nonprofit institutions are not subject to the same rules. 34 C.F.R. § 668.8(c)(3)-(d) (2017).

<sup>90</sup> *See id.* § 668.403 (2017).

<sup>91</sup> *Duncan*, 110 F. Supp. 3d at 181.

<sup>92</sup> *Id.* at 182, 185.

<sup>93</sup> Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965). The Department's regulations interpreted provisions codified in U.S. Code. *See* 20 U.S.C. § 1002(b)(1)(A)(i) (2018) (defining a "proprietary institution of higher education" as a school that "provides an eligible program of training to prepare students for gainful employment in a recognized occupation"); *see also id.* § 1002(c)(1)(A) (defining a "postsecondary vocational institution" as one that "provides an eligible program of education to prepare students for gainful employment in a recognized occupation"); *id.* § 1088(b)(1)(A)(i) (2018) (defining an eligible program of education as one that "provides a program of training to prepare students for gainful employment in a recognized profession").

<sup>94</sup> Discretionary income is defined as the higher of mean or median annual earnings less one and a half times the poverty guideline. *See* 34 C.F.R. § 668.404(a)(1) (2017).

for gainful employment.<sup>95</sup> Repeated failure of these tests, the “discretionary income rate” test and the “annual earnings rate” test, disqualified an institution for participation in federal student aid programs,<sup>96</sup> meaning that students attending that institution would be unable to use federal student loans and grants to cover costs of attendance. Given the reliance<sup>97</sup> of many institutions on federal student aid available pursuant to Title IV of the HEA, exclusion from the federal programs would likely be fatal.

This time the trial court judge disagreed and granted summary judgment to the Department. The judge concluded that the statutory term “gainful employment” was susceptible of multiple meanings and that the Department’s chosen interpretation therefore should receive deference under *Chevron U.S.A. v. Natural Resources Defense Council*.<sup>98</sup> The judge wrote that the statutory language also gave the Department discretion to choose a method to assess whether a program of education prepared students for gainful employment, however defined.<sup>99</sup> Finally, the judge found that the substance of the regulations withstood more than a dozen arguments by APSCU that they were arbitrary and capricious, because the Department this time provided extensive record supporting the two methods of determining whether enough students were gainfully employed.<sup>100</sup>

In a *per curiam* decision in March 2016, the D.C. Circuit affirmed.<sup>101</sup> But the appellate panel’s opinion endorsed a particular view of the goals of federal student aid, and concern over that view animated this Essay. Unlike the trial court, the appellate panel went beyond the question of the Department’s authority and process to address the federal government’s purpose in making credit available to students:<sup>102</sup>

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<sup>95</sup> See 34 C.F.R. §§ 668.403(a), 668.403(c)(2) (2017).

<sup>96</sup> 34 C.F.R. §§ 668.403(a)(1), 668.403(c)(4) (2017).

<sup>97</sup> See Press Release, Senator Dick Durbin, For-Profit Colleges and Federal Student Aid: Preventing Financial Abuses (June 30, 2010), <http://www.durbin.senate.gov/newsroom/press-releases/for-profit-colleges-and-federal-student-aid-preventing-financial-abuses> (“On average, [for-profit colleges] get three-quarters of their revenues from federal grants and loans . . .”).

<sup>98</sup> *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 110 F. Supp. 3d 176, 184-87 (D.D.C. 2015) (citing *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843-44 (1984)). Under *Chevron*, courts are to defer to an agency’s reasonable interpretation of legislation. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 844 (1984).

<sup>99</sup> *Duncan*, 110 F. Supp. 3d at 185-86.

<sup>100</sup> *Id.* at 198.

<sup>101</sup> *Ass’n of Private Sector Colls. & Univs. v. Duncan*, No. 15-5190, 640 F. App’x 5, 5 (D.C. Cir. 2016).

<sup>102</sup> The appellate panel explicitly acknowledged that its opinion offered “reasons in addition to those offered by the district court to conclude that the Department’s

The financial aid at issue is, after all, a “loan,” not a scholarship, grant, or award. It would be strange for Congress to loan out money to train students for jobs that were insufficiently remunerative to permit the students to repay their loans. And it would be a perverse system that, by design, wasted taxpayer money in order to impose crippling, credit-destroying debt on lower-income students and graduates. Had Congress been uninterested in whether the loan-funded training would result in a job that paid enough to satisfy loan debt, it would have created a federal grant system instead of a federal loan system focusing on preparation for gainful employment.<sup>103</sup>

What is troubling about the language of the D.C. Circuit panel is the narrowness of the vision that the judges recognized as justifying the federal involvement in higher education finance. The panel cited no legislative history in support of its assertions about Congressional motivation.<sup>104</sup>

The judges could have tried to use legislative history; the Department’s appellate brief identified testimony to Congress to the effect that students in vocational programs should earn enough to repay their loans.<sup>105</sup> Perhaps the appellate panel did not cite to this testimony, though, for the simple reason that it does not actually support the statement that federal legislators developed the scheme to provide student aid in the form of loans in order to “train students for jobs that were . . . [sufficiently remunerative.” Indeed, the testimony cited by the Department in its brief supported enactment of separate legislation (later merged with the HEA) creating an insurance regime for loan defaults by students at vocational schools; that legislation clearly indicates that Congress not only anticipated the risk that students might default on their loans but also intended to protect students from the consequences.<sup>106</sup> Further, it is one thing to worry about potential losses, the risk lawmakers worried about in 1965, but something else to suggest that Congress would not have provided aid in the form of loans at all unless lawmakers had intended that borrowers earn enough money to repay their obligations. Far from

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interpretation [of the law] is reasonable.” *See id.* at 7-8.

<sup>103</sup> *Id.* at 8.

<sup>104</sup> Put another way, no citations were omitted in the above excerpt. *Id.*

<sup>105</sup> Initial Answering Brief for Appellees at 26, *Ass’n of Private Sector Colls. & Univs. v. Duncan*, 640 F. App’x 5 (D.C. Cir. 2016) (No. 15-5190), 2015 WL 7352658.

<sup>106</sup> National Vocational Student Loan Insurance Act of 1965, Pub. L. 89-287, §§ 8(a)(2)(iii), 9(b)(1)(c)(iii), 11(a)(1), 11(c), 12(a) (1965).

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creating a program with the intention that it never suffer losses, lawmakers anticipated the possibility of losses and sought to mitigate the effects, creating a program that from the student perspective provided funding that was closer to grants.

In approving the Department's regulations, the appellate panel provided an answer to a question that the Department itself avoided, of how best to evaluate institutional quality. According to the court, good programs enable students to repay their loans. The deeper debate, which was not had in the pleadings and was not addressed in the lower court's memorandum opinion, provides the context in which the battle between the Department and for-profit institutions has taken place. Should institutional quality and consequent eligibility to participate in federal aid programs turn on measures like debt to income ratios and rates of repayment and default? Or should more difficult, perhaps qualitative aspects of the education experience matter? Put another way, which should we care about most, money or meaning?

The rhetoric of lawmakers at the time of the adoption of the HEA, which helped establish the federal aid regime that still operates today, did not focus on money. Nor does it appear from the legislative history that concern over institutional quality figured in congressional debate. Had members of the D.C. Circuit panel consulted the Congressional Record to see how lawmakers in 1965 spoke of the goals of the HEA and its loan program, they would not have found discussion of a borrower's postgraduate income relative to that borrower's debt burden. Rather, members of Congress in both parties focused on access.<sup>107</sup> Further, upon signing the Act, President Lyndon B. Johnson did not discuss socioeconomic mobility or wealth creation but equity: the law meant that "a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States [sic] and not be turned away because his family is poor."<sup>108</sup> This is not

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<sup>107</sup> See, e.g., 111 CONG. REC. 18, 22,691 (Sept. 2, 1965) (statement of Sen. Yarborough) (singling out the student aid provisions of the HEA as fulfilling a "promise[]" that is a "necessary part of the American way of life. It says that a man's background need not matter; it is his ability and will to get ahead that count. We will judge a man on what he is able to do and can do, not on his financial background. Today, implementation of this creed demands that a boy or girl have access to as much and as high a quality education as his or her ability allow"); see also 111 CONG. REC. 24, 21,882 (Aug. 26, 1965) (statement of Rep. Powell) ("Higher education I am sure the majority of the Members of this House would agree should not be reserved for the wealthy but should be available to the qualified young man or young woman whether the youth comes from a family that is rich or from a family that is poor.").

<sup>108</sup> Lyndon B. Johnson, President of the United States, Remarks at Southwest Texas

routine, rhetorical excess of a president. The legislation here did make a tremendous difference in the accessibility of higher education. The numbers of students enrolling in<sup>109</sup> and graduating from<sup>110</sup> college has soared in the fifty years since the Act.

While ambivalence and resistance have greeted policies intended to increase education opportunities for students who were members of groups historically excluded on the basis of race, the Act's goal of lowering financial barriers has encountered little opposition. Criticism of rising levels of federal student debt, for example, generally does not include advocacy of dismantling the government's student aid programs.<sup>111</sup> Rather, reform advocates often seek to bolster aid in the form of grants,<sup>112</sup> which do not need to be repaid and so do not hamper the student beneficiaries after they leave school.

The three-judge panel of the D.C. Circuit suggested that because the aid took the form of loans, lawmakers intended to steer student borrowers into jobs that paid enough to cover their obligations. But legislative purpose here is not so obvious. The existence of debt forgiveness programs designed to encourage students to pursue high-value, low-pay careers<sup>113</sup> suggests that there is at least some tension over the use of debt as a higher education policy tool. By making credit available to students, lawmakers intended to enable borrowers to go to college; one distinguishing feature of the Act relative to prior major legislation addressing college accessibility was the absence of a single, evident ulterior motive, like promoting study in fields related to national security.<sup>114</sup> Further, it is not clear that members of

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State College Upon Signing the Higher Education Act of 1965 (Nov. 8, 1965), <http://www.presidency.ucsb.edu/ws/?pid=27356>.

<sup>109</sup> *Digest of Education Statistics, Table 303.10*, NAT'L CTR. FOR EDUC. STAT. (Mar. 2015), [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_303.10.asp?current=yes](http://nces.ed.gov/programs/digest/d14/tables/dt14_303.10.asp?current=yes).

<sup>110</sup> *Digest of Education Statistics, Table 318.10*, NAT'L CTR. FOR EDUC. STAT. (Apr. 2015), [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_318.10.asp?current=yes](http://nces.ed.gov/programs/digest/d14/tables/dt14_318.10.asp?current=yes).

<sup>111</sup> This is the logical extension of arguments often made in criticism of rising student indebtedness, that easy access to federal aid distorts a market for higher education and leads students to borrow to pay for an education that they should not pursue. See Glater, *Siren Song*, *supra* note 33, at 110-11.

<sup>112</sup> Both candidates seeking to be the Democratic presidential nominee in the U.S. presidential election of 2016 proposed enabling students to graduate from college debt-free, equivalent to a radical increase in grant aid. See Patrick Healy, *Hillary Clinton to Offer Plan on Paying College Tuition Without Needing Loans*, N.Y. TIMES (Aug. 10, 2015), <https://www.nytimes.com/2015/08/10/us/politics/hillary-clinton-to-offer-plan-on-paying-college-tuition-without-needing-loans.html?mcubz=0>.

<sup>113</sup> See *Public Service Loan Forgiveness*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service> (last visited Sept. 28, 2017).

<sup>114</sup> This was the goal of the National Defense Education Act of 1958, which was

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Congress in 1965 intended loans to be the most widely-used form of federal student aid — as they have become<sup>115</sup> — because the Act also included a grant program, now known as Pell grants, which in ensuing decades provided nearly enough funds for students to pay the cost of attending public, four-year institutions.<sup>116</sup> Only when the size of the grants provided under this program did not increase to keep pace with the cost of college did students turn to loans.

So perhaps, just perhaps, lawmakers were not so worried about student borrowers' subsequent salaries and were more concerned about putting college within reach of students regardless of the outcome. Federal student aid is a manifestation of idealism: Even though not all students who benefit will graduate, not all students who graduate will be able to repay their debts, and not all students who benefit will pursue societally useful careers, those who want to pursue advanced education should not be denied the chance because of lack of money. The words of the D.C. Circuit panel undermine this idealism.

To be sure, the District Court and Circuit Court rulings bode well for future efforts by the Department to address financial abuses of students, and ultimately of taxpayers, if a future administration makes these goals a priority. In the wake of the collapse of the for-profit Corinthian College chain last year,<sup>117</sup> the Department developed rules that grant students relief from repayment obligations if they borrowed to pay for education at an institution that engaged in “unscrupulous conduct.”<sup>118</sup> Those new rules<sup>119</sup> seek both to clarify and simplify the

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passed in response to the security of the nation in light of recent events and which included a student loan program. National Defense Education Act of 1958, Pub. L. No. 85-864, §§ 101, 204, 72 Stat. 1580, 1581, 1584 (1958); see Glater, *Higher Education Risk*, *supra* note 32, at 1576.

<sup>115</sup> Loans are the dominant form of federal student aid. THE COLLEGE BOARD, *supra* note 51, at 12.

<sup>116</sup> SUZANNE METTLER, *DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM* 53 (2014). Several lawmakers extolled these “educational opportunity grants,” as they were initially known, as critical means of broadening higher education opportunity. See, e.g., 111 CONG. REC. 24, 21,891-92 (Aug. 26, 1965) (statement of Rep. Perkins) (“Too often in our country the poverty and lack of education of parents is descended upon their children. The surest path of escape from this endless, relentless cycle lies through the proposed educational opportunity grants and through the other provisions of title IV [of the HEA].”).

<sup>117</sup> See Tamar Lewin, *Government to Forgive Student Loans at Corinthian Colleges*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/education/us-to-forgive-federal-loans-of-corinthian-college-students.html>.

<sup>118</sup> Press Release, U.S. Dep’t of Educ., U.S. Department of Education Takes Further Steps to Protect Students from Predatory Higher Education Institutions (Mar. 11, 2016),

path to cancellation of students' federal student loans if their college committed certain improper acts or omissions.<sup>120</sup> Enabling students to mount a defense to repayment based on questionable conduct by an institution would be a major step forward in protecting borrowers who fail to graduate or who graduate with a degree that does not confer promised career benefits.<sup>121</sup>

#### D. *The "Scorecard"*

Even as the Department defended the new rules penalizing institutions that left students indebted and earning too little money to manage repayment, the Obama Administration pursued a complementary strategy. Both to promote disclosure of information on outcomes to prospective students and to create an incentive for colleges and universities to pursue goals desired by the administration, President Obama announced the launch of an online tool that would allow standardized, apples-to-apples comparisons of institutions.<sup>122</sup> The tool would contribute to disclosure of college and university performance measures to potential students and, as the president initially described it, would go further, providing a ranking of institutions to compete with rankings by various private entities like

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<https://www.ed.gov/news/press-releases/us-department-education-takes-further-steps-protect-students-predatory-higher-education-institutions>.

<sup>119</sup> See Press Release, U.S. Dep't of Educ., Department of Education and Attorney General Kamala Harris Announce Findings from Investigation of Wyotech and Everest Programs (Nov. 17, 2015), <https://www.ed.gov/news/press-releases/department-education-and-attorney-general-kamala-harris-announce-findings-investigation-wyotech-and-everest-programs>.

<sup>120</sup> See Negotiated Rulemaking Committee; Negotiator Nominations and Schedule of Committee Meetings-Borrower Defenses, 80 Fed. Reg. 63,478, 63,479 (Oct. 20, 2015), <https://federalregister.gov/a/2015-26626>.

<sup>121</sup> The Trump Administration has backed away from the rules. See Stacy Cowley & Patricia Cohen, *U.S. Halts New Rules Aimed at Abuses by For-Profit Colleges*, N.Y. TIMES (June 14, 2017), <https://www.nytimes.com/2017/06/14/business/student-loans-for-profit-schools-colleges.html>. As of this writing, several states have filed suit against the Department for the unilateral move, arguing — ironically — that the shift violates the same provisions of the Administrative Procedure Act relied upon by the for-profit college trade group in its earlier litigation. See Stacy Cowley, *18 States Sue Betsy DeVos over Student Loan Protections*, N.Y. TIMES (July 6, 2017), <https://www.nytimes.com/2017/07/06/business/dealbook/massachusetts-betsy-devos-lawsuit.html>.

<sup>122</sup> See President Barack Obama, Weekly Address: A New College Scorecard (Sept. 12, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/09/12/weekly-address-new-college-scorecard> (identifying virtues of the Scorecard including allowing students to compare institutions and incentivizing institutions to focus on goals other than improving placement in private rankings).

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*U.S. News*.<sup>123</sup> The ranking would take into account variables reflecting institutional characteristics not necessarily associated with academic excellence but with moral excellence. For example, the government's ranking would take into account the socioeconomic diversity of an institution's student body, and penalize those colleges and universities that did a poor job of enrolling and graduating poorer students. Prioritizing such nontraditional measures of education quality would have represented a break from the practices of private rankings.

Unlike regulations limiting institutional access to Title IV programs, the federal ranking would have functioned *ex ante*, providing students and families with information before they apply or enroll. Institutions would have an incentive to change their conduct in order to improve their placement on the ranking. For example, they might seek to enroll a more socioeconomically diverse class, thereby helping achieve a substantive goal of the Obama Administration. A higher ranking presumably would increase the desirability of an institution to prospective students. The critical aspect of the Obama Administration's ranking is its explicit normative move: although data on socioeconomic diversity is objective, including such data in assessing institutional quality reflects a value judgment that would differ from that made by makers of private rankings. The ranking would communicate to students and families not just the demographic characteristics of a student body, a data point the collection of which suggests it matters, but also relieves students from having to decide how to evaluate socioeconomic diversity. This normative function is significant because most students are not repeat consumers of higher education and so have little incentive to develop expertise in doing so. Students may also be less sophisticated than Department officials in evaluating information that they have. So while the ranking is a form of disclosure, it is higher order disclosure, providing not just data but a conclusion about how that data should affect perspective. The ranking is consequently a more paternalistic policy exercise because it implements particular values. This may explain why the ranking was a federal initiative: to achieve uniformity. Even if myriad accreditation entities broadened the scope of their quality assessments — unlikely

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<sup>123</sup> See Michael D. Shear & Tamar Lewin, *On Bus Tour, Obama Seeks to Shame Colleges into Easing Costs*, N.Y. TIMES (Aug. 22, 2013), <http://www.nytimes.com/2013/08/23/us/politics/obama-vows-to-shame-colleges-into-keeping-costs-down.html>; see also Press Release, Office of the Press Sec'y, The White House, Fact Sheet on the President's Plan to Make College More Affordable: A Better Bargain for the Middle Class (Aug. 22, 2013), <https://www.whitehouse.gov/the-press-office/2013/08/22/fact-sheet-president-s-plan-make-college-more-affordable-better-bargain->.

given their membership<sup>124</sup> — they probably would not adopt a uniform approach. To the extent that consensus on the values that institutions should pursue is lacking, the Obama Administration should have anticipated resistance to the ranking proposal.

And indeed, colleges and universities resisted the ranking.<sup>125</sup> Not only would the Obama Administration add to the list of rankings that institutions' administrators needed to worry about, it would also add new concerns that, to be addressed, would require reallocation of resources. Financial aid to a larger number of needy students would presumably improve an institution's placement on the Administration's list but would mean less money to spend on improving other markers of excellence that factored into rankings by private entities. At the same time, ignoring the executive branch's ranking might have material consequences beyond poor placement on the list; when President Obama outlined the ratings regime he envisioned in a speech in 2013, he said that “down the road we're going to use these ratings, we hope by working with Congress, to change how we allocate federal aid for colleges”<sup>126</sup> — an explicit warning that failure to try to achieve the goals driving the federal ranking system would have financial consequences.

As ultimately rolled out to the public, the Obama Administration's Scorecard, released early in 2013,<sup>127</sup> did not attempt to compete with, let alone supplant, rankings offered by various private publications.<sup>128</sup> Instead of rating institutions, the Scorecard presented certain data points — undergraduate population; average annual cost after taking into account financial aid; graduation rate; salary after attending; share of students making progress on repaying student loans; share of students taking out federal student loans; average debt of students who complete; graduation rate; retention rate; average SAT and ACT scores; most popular courses of study; and racial, ethnic, and socioeconomic diversity<sup>129</sup> — to enable students and their families to

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<sup>124</sup> See Lindgrensavage, *supra* note 53, at 337; *supra* note 1 and accompanying text.

<sup>125</sup> See Michael D. Shear, *Colleges Rattled as Obama Seeks Rating System*, N.Y. TIMES (May 25, 2014), [http://www.nytimes.com/2014/05/26/us/colleges-rattled-as-obama-presses-rating-system.html?\\_r=0](http://www.nytimes.com/2014/05/26/us/colleges-rattled-as-obama-presses-rating-system.html?_r=0).

<sup>126</sup> President Barack Obama, Remarks by the President on College Affordability, Syracuse NY (Aug. 22, 2013, 6:25 PM), <https://www.whitehouse.gov/the-press-office/2013/08/22/remarks-president-college-affordability-syracuse-ny>.

<sup>127</sup> Press Release, U.S. Dep't of Educ., *supra* note 8.

<sup>128</sup> See Michael D. Shear, *With Website to Research Colleges, Obama Abandons Ranking System*, N.Y. TIMES (Sept. 12/13, 2015), [http://www.nytimes.com/2015/09/13/us/with-website-to-research-colleges-obama-abandons-rankinging-system.html?\\_r=0](http://www.nytimes.com/2015/09/13/us/with-website-to-research-colleges-obama-abandons-rankinging-system.html?_r=0).

<sup>129</sup> See, e.g., *Southwestern University*, COLLEGE SCORECARD, <https://collegescorecard>.

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compare institutions. University officials voiced satisfaction with the Administration change of heart, noting that the provision of information, without the ranking, did not force institutions to change and potentially become more homogenous.<sup>130</sup> Implicit in their comments was the idea that diversity of institutional missions makes a single measure of quality impossible, that institutions should be judged relative to the goals they pursue; such subjective assessments obviously are appealing.

Abandoning the ranking approach meant that the Scorecard became one more source of information, complementary to private rankings, but not in competition with them. The retreat effectively conceded to the private rankings and the values, the particular view of what is relevant to educational quality, that they reflected: test scores matter, socioeconomic diversity does not. If students and families care about diversity, they have data from the Scorecard that they can factor into their decision-making, but they must meet the challenge of weighing that data on their own. Again, most students and families may not have the expertise to engage in that evaluation or the incentives to develop such expertise; they may respect the judgment of established media outlets that produce the private rankings. For overwhelmed parents and students, more information may not be helpful. After all, that is part of the appeal of a ranking: it is simple and does not require additional work by the person using it. The Scorecard as ultimately released may do little to counter or undermine the values incorporated into private rankings.

For purposes of this Essay, the abandonment of the ranking and, more importantly, of the new criteria it would have forced colleges and universities to worry about, matters. The threat of a federal rating system for higher education prompted, briefly, a conversation about the definition of quality and about possible measures beyond the commonly used indicators, including test scores of admitted and enrolled students, selectivity, graduation and retention rates, and academic reputation,<sup>131</sup> all of which are factors assessed by private purveyors of institutional quality rankings. By making socioeconomic diversity a factor, for example, the Obama Administration would have pushed back against the impetus to cater to students who do not need

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ed.gov/school/?228343-Southwestern-University (last visited Nov. 11, 2017).

<sup>130</sup> See Shear, *supra* note 128.

<sup>131</sup> These are among the indicators used by *U.S. News & World Report* in compiling its rankings. See Robert Morse et al., *How U.S. News Calculated the 2018 Best Colleges Rankings*, U.S. NEWS & WORLD REP. (Sept. 11, 2017, 10:00 PM), <https://www.usnews.com/education/best-colleges/articles/how-us-news-calculated-the-rankings>.

financial aid, to free up institutional resources for other uses. But the possibility that institutional goals might be dictated by the government raised college and university officials' hackles.<sup>132</sup> And the conversation over what constitutes higher education quality quickly subsided.

The Scorecard as implemented betrays a particular — and potentially misleading — conception of the transaction that students engage in when deciding whether to apply, whether and where to enroll, and how to pay for higher education. The adoption of the Scorecard presumes that students and families need disclosure of data on a particular set of outcomes in order to select an institution. The commitment to providing information to students and their families makes sense to the extent that decisions about higher education are like decisions about commercial purchases and that students and their families approach such decisions in the same way that they approach consumer purchases. Unfortunately, to assume that this analogy holds is risky for at least two reasons. First, even if true, the ability to spend time and money on making an informed purchase decision is unevenly distributed across the population. Those most likely to have the resources to study higher education providers in advance are also those most likely to use the Scorecard and least likely to need it given their other sources of information,<sup>133</sup> while those with the fewest resources are less likely to take advantage of it.

On the other hand, institutions, unlike students and families, repeatedly must respond to rankings. Colleges and universities have incentive to develop expertise to achieve their desired placement. The Scorecard may affect officials' decisions but they will have discretion to decide how much to worry about it and whether to change practices as a result of disclosure. Some institutions certainly trumpet

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<sup>132</sup> To be sure, college and university officials routinely criticize private rankings of institutions, but it is far from clear that those protests have had any effect on how those publications assess quality. Perhaps this is so because the idea of relying on student test scores and institutional exclusivity makes intuitive sense — provided that higher education is thought of as a private good that cannot be made available to all who might wish to pursue it. Further, it is probably significant that most of those objecting in the pages of *The New York Times* to the possibility of a federal ranking system were associated with prominent, highly selective institutions, most of which do not enroll large numbers of poorer students and whose reputation likely rests far more on their apparent commitment to academic excellence than to societal welfare.

<sup>133</sup> Stephen B. Plank & Will J. Jordan, *Effects of Information, Guidance, and Actions on Postsecondary Destinations: A Study of Talent Loss*, 38 AM. EDUC. RES. J. 947, 950 (2001) (identifying information on college admissions as a potentially significant factor in determining outcome of the selection process and finding disparities in access to information along socioeconomic lines).

characteristics that most private rankings ignore.<sup>134</sup> But it seems likely that if forced to choose between policies that affect information in the Scorecard and policies that improve placement in private rankings, college and university governing bodies will pursue the latter. This is rational, given the murky impact of the Scorecard relative to the clear consequences of shifting position in a ranking. The incentive effects of disclosure through the Scorecard will be relatively weak.

More significantly, the assumption that pursuing higher education is like purchasing a blender<sup>135</sup> or other commodity is likely wrong. Many types of services are more difficult to evaluate than tangible goods because it takes a long time to assess quality and because the service might be different for each person purchasing it.<sup>136</sup> Highly subjective and variable criteria play a role in the purchase decision,<sup>137</sup> with different aspects of the education experience figuring more or less prominently in student and family choices depending on their particular concerns and personal history. Many, perhaps most, students consume higher education infrequently, at once weakening the incentive and reducing the opportunities to engage in serious comparison shopping. Given these characteristics, higher education may be an exceptionally poor candidate for a regulatory regime emphasizing disclosure.

Moreover, even if higher education does resemble a blender, there is reason to believe that disclosure is a poor means of preventing consumer mistakes. In the context of securities investing, where lawmakers and regulators have consistently placed a premium on disclosure, scholars have increasingly questioned whether the

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<sup>134</sup> My home institution, the University of California, Irvine, emphasizes the socioeconomic diversity of its student body, for example. See, e.g., Press Release, Howard Gillman, Chancellor, Univ. of Cal., Irvine, UCI Named No. 1 College Doing the Most for the American Dream (May 26, 2017), <http://chancellor.uci.edu/engagement/campus-communications/2017/170526-college-access.php>.

<sup>135</sup> A Department official drew precisely this analogy in describing the initial college rating system. See Shear, *supra* note 125.

<sup>136</sup> Richard A. Epstein, *The Role of Accreditation Commissions in Higher Education: The Troublesome Case of Dana College*, 79 U. CHI. L. REV. 83, 84 (2012). Epstein cites health care and education as examples of services particularly difficult for purchasers to assess. *Id.*

<sup>137</sup> Students make choices about where to enroll based on instinct, institutional culture, geography — the list of potentially significant factors is as long and diverse as students themselves. See Jonathan D. Glater, *Some Parents Let Children Choose College, and Pay*, N.Y. TIMES (Apr. 10, 2006), <http://www.nytimes.com/2006/04/10/education/10aid.html> (describing students choosing to enroll at more expensive, private institutions despite the high cost, even when they had the option to enroll at lower-cost institutions that would not have required them to borrow).

approach is effective.<sup>138</sup> And public securities markets — characterized by a high degree of liquidity, dominance of repeat players with time and incentive to develop expertise and gather information — are a context in which disclosure would reasonably be expected to matter. If disclosure is effective at deterring unwise spending behavior anywhere, then it ought to work well in the context of securities, and there is strong evidence that it does not.<sup>139</sup> The odds that disclosure will sway relatively unsophisticated students and families making decisions about higher education, which encompasses numerous intangibles and multiple, subjective value judgments, are correspondingly lower — and the factors included in the Scorecard do not advance a more sophisticated understanding of what higher education seeks to achieve or how its quality should be assessed.<sup>140</sup>

#### E. *Defense to Repayment: New Minimum Standards*

After the gainful employment rules were re-issued, the for-profit higher education sector suffered a spectacular scandal. Corinthian Colleges, a for-profit institution with tens of thousands of students, collapsed<sup>141</sup> in the midst of investigations by state attorneys general,<sup>142</sup> the Securities and Exchange Commission,<sup>143</sup> and the Education Department.<sup>144</sup> Corinthian's demise prompted public outcry, media

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<sup>138</sup> See, e.g., Steven M. Davidoff & Claire A. Hill, *Limits of Disclosure*, 36 SEATTLE U. L. REV. 599, 599 (2013); Donald C. Langevoort, *Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture, and Ethics of Financial Risk Taking*, 96 CORNELL L. REV. 1209, 1212-13 (2011).

<sup>139</sup> See, e.g., Davidoff & Hill, *supra* note 138; Langevoort, *supra* note 138, at 1213.

<sup>140</sup> One possible response would be providing a statement on the potential shortcomings of the disclosure regime itself. But even this step is likely inadequate because the underlying concern is the non-obvious bias of the private rankings. This is a subtle point to convey.

<sup>141</sup> See Gretchen Morgenson, *Corinthian Colleges Used Recruiting Incentives, Documents Show*, N.Y. TIMES (June 23, 2016), <https://www.nytimes.com/2016/06/23/business/corinthian-colleges-used-recruiting-incentives-documents-show.html>.

<sup>142</sup> E.g., Press Release, Xavier Becerra, Attorney Gen., Cal. Dep't of Justice, Attorney General Kamala D. Harris Files Suit in Alleged For-Profit College Predatory Scheme (Oct. 10, 2013), <https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-files-suit-alleged-profit-college-predatory>; Press Release, Martha Coakley, Attorney Gen., Office of the Attorney Gen. of Mass., For-Profit School Sued for Deceiving Students and Facilitating Unfair Loans (Apr. 3, 2014), <http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-04-03-corinthian-complaint.html>.

<sup>143</sup> Corinthian Colls., Inc., Current Report (Form 8-K) (June 6, 2013), [https://www.sec.gov/Archives/edgar/data/1066134/000110465913048089/a13-14724\\_18k.htm](https://www.sec.gov/Archives/edgar/data/1066134/000110465913048089/a13-14724_18k.htm) (disclosing receipt of a subpoena from the Securities and Exchange Commission).

<sup>144</sup> Press Release, U.S. Dep't of Educ., Department of Education and Attorney General

attention, and, ultimately, Congressional expressions of concern.<sup>145</sup> The investigations turned up evidence that Corinthian fraudulently misled students about the likelihood that pursuing programs of study at one of Corinthian's institutions<sup>146</sup> would result in employment.<sup>147</sup> In an effort to assist students who took out federal loans to help pay for the cost of enrolling at Corinthian,<sup>148</sup> the Department moved to create a procedure that would enable students to eliminate their repayment obligations on federal student loans.<sup>149</sup> In the fall of 2016 the Department released the final version of new rules codifying a process through which student borrowers may defend themselves against repayment claims.<sup>150</sup>

Under the rules, a student borrower may assert a "defense to repayment" before a Department hearing officer. The student borrower must provide evidence that a higher education provider either "failed to perform its obligations under the terms of a contract with the student"<sup>151</sup> or "made a substantial misrepresentation . . . that the borrower reasonably relied on when the borrower decided to attend, or to continue attending, the school."<sup>152</sup> The decision of the

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Kamala Harris Announce Findings from Investigation of Wyotech and Everest Programs (Nov. 17, 2015), <http://www.ed.gov/news/press-releases/department-education-and-attorney-general-kamala-harris-announce-findings-investigation-wyotech-and-everest-programs>.

<sup>145</sup> See, e.g., Letter from Elizabeth Warren, Senator, U.S. Senate, to John B. King, Jr., Sec'y, U.S. Dep't of Educ. 1 (Sept. 29, 2016), [http://www.warren.senate.gov/files/documents/2016-9-29\\_Letter\\_to\\_ED\\_re\\_Corinthian\\_data.pdf](http://www.warren.senate.gov/files/documents/2016-9-29_Letter_to_ED_re_Corinthian_data.pdf) (expressing concern over the Department's response to allegations of misconduct and the pace of assistance to indebted former Corinthian students).

<sup>146</sup> Corinthian operated several institutions, including Heald College, Wyotech, and others. Tamar Lewin, *Government to Forgive Student Loans at Corinthian Colleges*, N.Y. TIMES (June 8, 2015), <https://www.nytimes.com/2015/06/09/education/us-to-forgive-federal-loans-of-corinthian-college-students.html>.

<sup>147</sup> See Press Release, U.S. Dep't of Educ., *supra* note 144.

<sup>148</sup> Or Corinthian entities, like Wyotech, Everest, and Heald College. See Lewin, *supra* note 146.

<sup>149</sup> See Press Release, U.S. Dep't of Educ., *supra* note 144.

<sup>150</sup> Student Assistance General Provisions, 81 Fed. Reg. 75,926 (Nov. 1, 2016) (to be codified at 34 C.F.R. pts. 30, 668, 674, 682, 685, 686).

<sup>151</sup> Student Assistance General Provisions, 81 Fed. Reg. 39,330, 39,417-18 (proposed June 16, 2016) (proposing language for new 34 C.F.R. § 685.222(c) and defining the scope of defense to repayment).

<sup>152</sup> *Id.* Evidence of a misrepresentation could include putting a borrower under time pressure to decide whether to enroll; discouraging a borrower from getting outside advice or information on a program or the financing of a program; and failing to respond to a borrower's request for more information. *Id.* Significantly, the rules would allow student borrowers to mount a defense that otherwise might be impracticable given the difficulty of establishing questionable conduct by the higher

hearing official, who conducts a “fact-finding process,” is final on the merits, but if adverse to the borrower may be appealed to the secretary of the Department.<sup>153</sup> Thus, the rules create a pathway for borrowers who otherwise would likely be stymied by court rulings that have generally defended education providers against claims of “educational malpractice.”<sup>154</sup> The rules conceive of education as a commodity, the purchase of which is governed by principles of contract, but only *ex post*, like the gainful employment rules and unlike the Scorecard.

At one level the Department’s choice of tactics does not surprise because the rules come in response to the disclosure of widespread improper conduct and potential fraud. A framework for assessing the quality of an education may appear irrelevant when the problem is an institution that has engaged in potentially criminal misconduct. Fraud is a serious problem, one that demands attention from regulators because individual students are poorly placed to protect themselves. The alleged wrongdoing at Corinthian suggests how vulnerable students are to manipulation and how few tools they have to avoid financial obligations they were deceived into accepting.<sup>155</sup> Regulators should protect students victimized by fraud, but is not clear why the government adopts a more aggressive tactic — going beyond disclosure — only after the fact.

This lack of a broader, forward-looking effort both to help and to protect students is striking.<sup>156</sup> The rules do not provide advance

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education institution, as evidenced by court rulings adverse to students of Heald College and other Corinthian Colleges entities. *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 932 (9th Cir. 2015) (concluding that students were bound by arbitration clause). Instead, student borrowers were forced to use existing procedures under 34 C.F.R. § 685.206(c), which allows a borrower to “assert as a defense against repayment, any act or omission of the school attended by the student that would give rise to a cause of action against the school *under applicable State law.*” 34 C.F.R. § 685.206(c) (2014) (emphasis added). The rules would not limit a borrower to use of state law violations as a basis for defense to repayment. *See* Student Assistance General Provisions, 81 Fed. Reg. at 39,417-18.

<sup>153</sup> Student Assistance General Provisions, 81 Fed. Reg. at 39,417.

<sup>154</sup> *Bell v. Bd. of Educ. of W. Haven*, 739 A.2d 321, 325 (Conn. App. Ct. 1999) (observing that the “vast majority of states . . . have rejected educational malpractice claims sounding in tort”).

<sup>155</sup> Of course, students who do not borrow to pay the cost of attending an institution that engages in fraud are also harmed. The new regulations do not create a cause of action for them; that would go beyond administration of Title IV funds. This suggests that consumer protection alone does not provide the framework that the Department and Congress apply to higher education. There must be concern over quality provided for federal funds.

<sup>156</sup> The conduct of Corinthian offers lessons valuable to development of a more sophisticated assessment of higher education quality. *See supra* Section I.E.

consumer protection by imposing affirmative obligations on institutions that students borrow to attend. The rules rely on specific, quantifiable outcomes like student loan repayment rates<sup>157</sup> and depend on finding<sup>158</sup> evidence of institutional misconduct. Again, the Department has avoided developing a more complex assessment of quality or its proxies and has limited its focus.<sup>159</sup> The antifraud regime constitutes only a floor and, in the absence of additional regulatory or legislative scrutiny, it is likely that this will be the only manner of federal assessment of quality.<sup>160</sup>

A group of for-profit institutions has sued to block the new rules, using arguments like those used to challenge the gainful employment regulations.<sup>161</sup> The outcome of the election in all likelihood portends a sharp decline in federal attention to the conduct of for-profit providers of higher education that have been the target of Department investigation under President Obama<sup>162</sup> and little effort to develop

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<sup>157</sup> Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 65,001 (Oct. 31, 2014) (to be codified at 34 C.F.R. § 668.413).

<sup>158</sup> The rules do not clarify responsibility for ferreting out the misconduct that might lead to students' eligibility for defense to repayment. Presumably the same patchwork regulatory system that for years failed to detect Corinthian's practices, despite the institution's high attrition rates and the low rates of loan repayment by its students, must generate the evidence that borrowers will have to rely on in the future. See Chris Kirkham, *Corinthian Boosted Figures to Obtain Federal Funds*, L.A. TIMES (July 16, 2014, 5:00 AM), <http://www.latimes.com/business/la-fi-corinthian-colleges-20140716-story.html> (reporting on Corinthian's default rate and attrition rate).

<sup>159</sup> And even efforts to help former Corinthian students have come under fire. Senator Warren has criticized the Department for moving too slowly to help too few students for months after the collapse of the for-profit chain, even as it continued student loan debt collection efforts directed at them. See Letter from Elizabeth Warren to John B. King, Jr., *supra* note 145, at 1.

<sup>160</sup> The Trump Administration is moving to abandon even this step. See Cowley & Cohen, *supra* note 121.

<sup>161</sup> See Complaint at 2, Cal. Ass'n of Priv. Postsecondary Schs. v. DeVos, No. 17-cv-00999 (D.D.C. May 24, 2017), <https://www.courthousenews.com/wp-content/uploads/2017/05/depted.pdf>.

<sup>162</sup> To be sure, as of this writing the Trump Administration has not provided much information on policy initiatives in higher education finance. However, given the involvement of the president-elect in the for-profit sector through Trump University, itself the subject of litigation over the poor quality of its programming, see *People v. Trump Entrepreneur Initiative*, 26 N.Y.S.3d 66 (2016), tough enforcement seems unlikely. This is also the verdict of the market: Prices of shares in for-profit higher education providers jumped in the wake of the election. Jonathan D. Glater, *Sometimes, Financial Market Predictions Are Correct*, EDUCATION LAW BLOG (June 16, 2017), [http://lawprofessors.typepad.com/education\\_law/2017/06/sometimes-financial-market-predictions-are-correct-by-jonathan-d-glater-.html](http://lawprofessors.typepad.com/education_law/2017/06/sometimes-financial-market-predictions-are-correct-by-jonathan-d-glater-.html). For example, prices of shares of Apollo Education Group, Inc., owner of the University of Phoenix, rose

meaningful assessments of educational quality. The next Part analyzes the danger of acceptance of student financial outcomes as dominant measure of education quality.

## II. THE FLAWED CASE FOR FOCUSING ON MONEY

The goal of holding institutions that provide higher education accountable for student outcomes has intuitive appeal. After all, those institutions that fail to keep their promises to students or that mislead their students into enrolling and borrowing to pay tuition should face some penalty. Financial outcomes also are attractive measures because they can be quantified with a degree of precision and they appear neutral; their use is often consistent with students' understanding of the purpose of investing in higher education; and, perhaps most importantly, they are easy to assess. The first section below will argue that these rationales do not hold up to scrutiny. The second offers an alternative perspective on quality, then analyzes the reasons that financial outcomes will nevertheless continue to be the sole target of regulators. The final section explains why our failure to grapple with the proper measure of quality matters.

### A. *What Financial Outcomes Do and Do Not Reflect*

As a threshold matter, the decision to focus on a financial outcome is not neutral but itself reflects a value judgment. If students should pursue higher education for reasons beyond the higher incomes they hope their investment will produce, then the assessment of education quality should be similarly expansive. This is in part an argument about the nature and value of education for its own sake but it is also a pragmatic argument based on the difficulty of anticipating correctly the value of a particular program of study. Forecasts of the needs of the future economy and the wages future jobs will pay are necessarily uncertain and predictions are vulnerable to hindsight bias;<sup>163</sup> they also fail to take into account the incredible diversity of student skills and

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more than six percent, to \$9.34 from \$8.73, between November 8 and 9, 2016. Susan Dynarski, *With Trump, Investors See Profits Again in For-Profit Colleges*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/upshot/with-trump-investors-see-profits-again-in-for-profit-colleges.html>.

<sup>163</sup> See Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 587 (2013) (describing “boom and bust cycles in the labor market known as ‘cobweb cycles,’” in which students pursue high-wage career paths, only to find years later when entering the job market that wages have fallen as a result of a glut of new entrants pursuing the same goal).

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interests. Put another way, a program of study that is associated with low wages for most or many of its graduates may still constitute a golden ticket for a particular student. To argue that the success of that particular student is outweighed by potential harm to other students is to engage in assessment that should be controversial. After all, deciding who should pursue a given course of study implicates questions of personal autonomy not to be lightly dismissed. And student success is a function of myriad variables, including effort, skill, and institutional effort and resources, and other factors. Employer needs change, economic conditions change, technology changes. Chance matters.

Even were it the case that students would respond to quality assessments based on financial outcomes by changing their plans — a dubious proposition<sup>164</sup> — the incentive to do so would be experienced quite differently by students of differing socioeconomic status. Rational students who feel greater pressure to earn higher incomes, perhaps to help repay their education-related debts, may forego certain courses of study and certain institutions, abandoning them to students who feel less constrained. Thus the institutions with the broadest offerings in subjects associated with lower graduate earnings may become enclaves of the relatively wealthy. At the nation's leading colleges and universities this is already the case to a significant degree: students from the top income quartile dominate campuses of the most selective institutions,<sup>165</sup> and students from high-income families are more likely to enroll in college overall.<sup>166</sup> In light of commitment to broadening higher education access, it is disconcerting for government policy to reinforce rather than combat the pattern.

Colleges and universities will almost certainly respond to quality assessments based on financial outcomes by expanding course

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<sup>164</sup> Jonathan D. Glater, *The Unsupportable Cost of Variable Pricing of Student Loans*, 70 WASH. & LEE L. REV. 2137, 2141-42 (2013) (responding to Prof. Simkovic, *supra* note 163, and warning that students may be unresponsive to incentives aimed at changing their choices of courses of study).

<sup>165</sup> Anthony P. Carnevale & Stephen J. Rose, *Socioeconomic Status, Race/Ethnicity, and Selective College Admissions*, in AMERICA'S UNTAPPED RESOURCE: LOW-INCOME STUDENTS IN HIGHER EDUCATION 106 (Richard D. Kahlenberg ed., 2004) (reporting that nearly seventy-five percent of students at the nation's top 146 undergraduate institutions come from the richest quartile and three percent come from the poorest one).

<sup>166</sup> See *Digest of Education Statistics: Table 302.30*, NAT'L CTR. FOR EDUC. STAT. (July 2014), [https://nces.ed.gov/programs/digest/d14/tables/dt14\\_302.30.asp](https://nces.ed.gov/programs/digest/d14/tables/dt14_302.30.asp) (depicting percentage of recent high school completers, enrolled in two-year and four-year colleges, by income level: 1975 through 2013). High income students are about twenty percent more likely to enroll in higher education than low income students. *Id.*

offerings in those subjects deemed most likely to lead to lucrative careers. Programs with a less evident value proposition, such as those in the humanities and arts, more often may have to justify the resources they consume. The less elite and less wealthy the institution, the greater the pressure to demonstrate the economic return on students' tuition payments.

It is far from clear that student expectations or desires should dictate the terms of assessment of quality of education. Complicating any such effort, the reasons students enroll at four-year institutions have changed over the decades. More first-year students than ever now cite the financial rewards they expect as a result of pursuing higher education.<sup>167</sup> Yet at the same time, a growing share of first-year students — nearly seventy-two percent in 2015 — say that “gain[ing] a general education and appreciation of ideas” was “very important” in their decision to go to college.<sup>168</sup> The surveys illustrate that students continue to value intangible and noneconomic aspects of higher education, and that in turn implies that students value institutional expertise in determining what should be taught.

Post-graduate earnings are indeed temptingly easy to measure. Yet however appealing it is to focus solely on the private, financial gain associated with higher education, doing so ignores both corresponding intangible and public benefits. There are the tax revenues collected on higher incomes, of course, but there are other desirable correlates like better health, which then relates to lower health care costs;<sup>169</sup> lower rates of criminal conduct, both promoting security and reducing the costs of law enforcement;<sup>170</sup> and perhaps even happiness. Even these measures do not take into account the benefits created by education institutions themselves as employers, generators of ideas, and engines of innovation from which others may benefit in numerous ways.

#### *B. Alternative Indicators of Quality — and Barriers to Their Adoption*

Direct evaluation of an educational experience, involving review of classroom teaching, assignments, and teacher feedback, may be costly, but it does not require mastery of a mysterious art. There are also other, less labor-intensive methods of assessing quality, beyond student outcomes, that are objectively manifest and susceptible to

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<sup>167</sup> See Eagan et al., *supra* note 11, at 70.

<sup>168</sup> *Id.* at 70.

<sup>169</sup> WALTER MCMAHON, *HIGHER LEARNING, GREATER GOOD* 18, 133 (The Johns Hopkins Univ. Press ed., 2009).

<sup>170</sup> *Id.* at 37, 127.

measurement. Some may be correlates but others relate directly to the experience of students. The development of a full set of criteria of institutional quality is well beyond the ambition of this article; in this section, the goal is to identify an alternative perspective for undertaking that task.

The litigation against Trump University offers a useful guide to thinking about evidence of institutional quality in the form of inputs to, rather than outcomes of, the education provided. In fraud litigation against the for-profit institution, the New York attorney general alleged that Trump University in its marketing materials made representations to prospective and current students about what its educational offerings would include and demonstrably violated those commitments.<sup>171</sup> The alleged misrepresentations included the following:

- implying that Trump University was in fact a “university” licensed to operate in New York under New York Law, when it was not;<sup>172</sup>
- stating that instructors at Trump University were “experts” who had been “handpicked” by Donald J. Trump, when they were not;<sup>173</sup>
- suggesting that Donald J. Trump would appear at seminars for Trump University students, when he did not;<sup>174</sup>
- representing that Trump University courses would teach participants “Donald Trump’s personal strategies and techniques for real estate investing,” when they did not;<sup>175</sup> and
- making “deceptive promises about the likelihood and speed of success” students of Trump University would experience.<sup>176</sup>

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<sup>171</sup> Verified Petition at 1, 14-16, 33, *People v. Trump Entrepreneur Initiative LLC*, No. 0451463, 2013 WL 4504841 (N.Y. App. Div. Aug. 24, 2013). The case settled in the fall of 2016. Steve Eder, *Donald Trump Agrees to Pay \$25 Million in Trump University Settlement*, N.Y. TIMES (Nov. 18, 2016), <https://www.nytimes.com/2016/11/19/us/politics/trump-university.html?mcubz=3>.

<sup>172</sup> Verified Petition, *supra* note 171, at 6.

<sup>173</sup> *Id.* at 1-2.

<sup>174</sup> *Id.* at 14. Instead, students were given a chance to take a photograph with a life-size cutout of Mr. Trump. *Id.* at 14.

<sup>175</sup> *Id.* at 14-15.

<sup>176</sup> *Id.* at 23.

Here, the institution providing the education gave students benchmarks for inputs to the student experience for which it was responsible. To the extent that institutions make such commitments, or representations, about the nature of the education to be provided, how closely they follow through is a fair indication of institutional quality, even outside the context of allegations of civil fraud.

Many, perhaps most, institutions do not explicitly represent to students that the educational experience they provide will include specific elements. No doubt this is in part because at many institutions students can affect both the experience and the outcome, for example, by choosing the courses they take. Even so, identification of meaningful inputs is not an impossible task; some accreditation bodies attend to particular forms of institutional spending, reflecting a concern over specific inputs.<sup>177</sup> While inputs are still proxies for quality, they are suggestive in that they reflect institutional goals and institutional motivation. Further, given the complexity of the educational experience and the myriad factors that determine outcomes for students, evidence of commitment to achieving a positive outcome may be the fairest indicator to rely upon. Vocational programs that claim to prepare students for careers in cosmetology invite assessment of their effectiveness in job placement. The same is true of community colleges that represent that their students will be able to transfer to four-year institutions. If the motives are good and the effort is there, then the outcome is less likely to reflect low quality and more likely to reflect the diversity of skills and aptitudes that

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<sup>177</sup> For example, the American Bar Association assesses the size of the libraries at law schools that it accredits. ABA STANDARDS & RULES OF PROCEDURE FOR APPROVAL OF LAW SCHOOLS. Standard 702(a) (AM. BAR. ASS'N 2016-17,) [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/Standards/2016\\_2017\\_standards\\_chapter7.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2016_2017_standards_chapter7.pdf). Of course, investing in a library does not a leading educational institution make, any more than mere keeping of a promise about the content of an educational program does. But at the least, institutions that do spend on student resources and that do deliver on their promises are more likely to prioritize satisfying both the accretor and the student, and that desire may be a useful indicator. Taking into account such a basic indicator of institutional priorities avoids judgments about the curriculum, pedagogy, or methods of evaluation and feedback, all of which implicate academic freedom. This kind of measure is easy enough to collect and some of them, at least, figure in commercial rankings of institutional quality. The Department has not attempted to adopt them. There are good reasons to question the Department's tendency to move slowly and conservatively — a tendency that may reflect resistance to progressive initiatives. See, e.g., Joy Milligan, *Subsidizing Segregation*, 104 VA. L. REV. (forthcoming 2018) (describing the resistance of the Department to enforcing anti-discrimination and integration mandates of civil rights legislation in the late 1960s).

students possess. A proper question for regulators seeking to distinguish institutions that are trying to do right by their students from those that make the student experience a low priority is, what reliably reveals motivation?

Many institutions do not specify the goals of the education they provide, the inputs to the experience, or the outcomes students may safely expect. At Harvard College, the promise is “truth,”<sup>178</sup> a pledge to which Yale adds “light.”<sup>179</sup> To judge the extent to which such institutions honor these commitments is to take on an impossible challenge. When a college promises to try to “make the room inside your mind a more interesting place to live for the rest of your life,”<sup>180</sup> any assessment is incurably subjective and potentially biased, although judgment of the effort put into achieving the goal seems reasonable. Yet the very breadth of ambition captured in such lofty rhetoric, emblazoned on the clothes undergraduates wear around campus, suggests the heights to which these elite institutions aspire. The statement of mission has meaning — though if more colleges and universities are held to their commitments, it is reasonable to expect that those expressions of purpose will be phrased with ever greater imprecision. Fortunately, characteristics other than colleges’ mottos or coats of arms reflect quality, both actual and aspirational.

It is unlikely that a conversation about the best way to assess the institutional commitment to student success is imminent. In fact, the Trump Administration is backing away from the task.<sup>181</sup> Even were higher education quality a priority for the executive or the legislative branches, financial outcomes are easier to assess, for all the reasons given in the preceding section. More fundamentally, two developments in higher education finance, both decades in the making, stand in the way. First, the pace of growth in the price of higher education has consistently outpaced the rate of inflation.<sup>182</sup> While rates of price increase that exceed those of other goods and services are nothing new, the second development has sharply

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<sup>178</sup> “Veritas.” See *History*, HARV. U., <https://www.harvard.edu/about-harvard/harvard-glance/history> (last visited Nov. 17, 2017).

<sup>179</sup> “Lux et veritas.” *Not Just Your Lux or My Veritas*, YALE DAILY NEWS (Aug. 31, 2012), <https://yaledailynews.com/blog/2012/08/31/not-just-your-lux-or-my-veritas>.

<sup>180</sup> Taline Cox, *What Is a Mawrter?: Exploring Our Connections from One Generation to the Next*, BRYN MAWR C. ALUMNAE BULL. (Aug. 2009), <http://www.brynmawr.edu/alumnae/bulletin/aug09/archways.html> (quoting former president of Bryn Mawr College, Pat McPherson).

<sup>181</sup> Cowley & Cohen, *supra* note 121.

<sup>182</sup> See THE COLLEGE BOARD, *TRENDS IN COLLEGE PRICING 2016*, at 3 (2016), [https://trends.collegeboard.org/sites/default/files/2016-trends-college-pricing-web\\_1.pdf](https://trends.collegeboard.org/sites/default/files/2016-trends-college-pricing-web_1.pdf).

increased the impact: government support, in the form of grants, has not compensated for the price increases. As a result, students and families bear an increasing share of an ever-larger burden. More and more students turn to debt to cope, thereby taking on a higher level of financial risk. This concrete, economic threat crowds out intangible, potentially countervailing benefits of higher education, pushing students to focus above all on ability to repay their student loans. In the absence of a well-structured policy intervention that reduces the risk of pursuing higher education, it is difficult to imagine that students and their parents will want to entertain the possibility that financial outcomes do not matter.

Sadly, as the argument for, and correspondingly the likelihood of, federal efforts to shift more of the burden of paying for higher education back to the government declines, the more accepted is the idea that such education is purely private and instrumental. The process thus reinforces itself, with rising costs to students forcing them to concentrate on education's financial benefits to them, and personal, commercial valuation of education in turn reinforcing the argument that government should not be in the business of subsidizing access. A fundamental shift in popular perspective on the reason to seek higher education is a necessary prerequisite to policy reform, yet that change in perspective is less likely as financing higher education becomes riskier. Placing the cost of higher education to students, in short, undermines the case for re-distribution away from the student.

### C. *Why the Definition of Quality Matters*

To lament the commodification of education and cultural devaluation of those fields of study not associated with high earnings potential is not to engage in a novel pastime. Cultural critics of various kinds have made such arguments for decades.<sup>183</sup> It is true that students cite the personal, financial benefits they anticipate as a result of obtaining higher education when asked why they seek it out.<sup>184</sup> And it is commonplace to hear advocates<sup>185</sup> and critics<sup>186</sup> of higher education

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<sup>183</sup> See, e.g., ROBERT N. BELLAH ET AL., *HABITS OF THE HEART* 279 (Univ. of Cal. Press ed., 1985) (lamenting that in the "contemporary multiversity, it is easier to think of education as a cafeteria in which one acquires discrete bodies of information or useful skills" and not as a site of development of shared values).

<sup>184</sup> EAGAN ET AL., *supra* note 11, at 70.

<sup>185</sup> See, e.g., David Leonhardt, *Is College Worth It? Clearly*, *New Data Say*, N.Y. TIMES (May 27, 2014), <https://www.nytimes.com/2014/05/27/upshot/is-college-worth-it-clearly-new-data-say.html>.

cite the personal, private benefits conferred. The more widely accepted the view of higher education as simply and solely a means to an income-generating credential, the more difficult the argument becomes for supporting and encouraging study in fields valued in the past for reasons other than their remunerative capacity — the arts, for example, or the classics. And it adds insult to injury that reduced support of these areas of study will disproportionately affect those students of more limited financial means: wealthy students will continue to be free to study whatever they wish, regardless of the potential financial consequences.

Something is lost when the law endorses the view that higher education is a purely private good, valuable for its potential economic benefit, rather than a complex experience,<sup>187</sup> benefitting the larger society in ways big and small, and deserving of more rather than less public support. This may seem a naïve argument in light of all the talk of education as an “investment” that provides the student with a “return” in the form of a higher income.<sup>188</sup> Nevertheless, characterizing higher education as a private good that is valuable to the extent that it confers a financial benefit on a student weakens the case for federal involvement in promoting college access entirely. Why, after all, should taxpayers support provision of a benefit that accrues to individual students? The response to that challenge should invoke more than protection of student borrowers, although borrowers should be protected. The response to that challenge should invoke the lofty idealism that lawmakers have displayed in approving legislation to expand access to higher education. Hopefully arguments like those used by the District of Columbia appellate panel to uphold rules that benefit students today will not undermine efforts to preserve opportunity for students tomorrow.

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<sup>186</sup> See, e.g., Peter Thiel, *College Doesn't Create Success*, N.Y. TIMES (Sept. 8, 2014, 4:34 PM), <http://www.nytimes.com/roomfordebate/2011/08/23/spending-too-much-time-and-money-on-education/college-doesnt-create-success>.

<sup>187</sup> See Daniela Kraiem, *The Cost of Opportunity: Student Debt and Social Mobility*, 48 SUFFOLK UNIV. L. REV. 689, 690 (2015) (identifying and analyzing “market metaphors” that “push higher education into the realm of consumer regulation, rather than a policy framework that places knowledge, learning, and widespread social mobility at the center”).

<sup>188</sup> See, e.g., Catherine Rampell, *College Is (Still) Worth It*, N.Y. TIMES (Feb. 1, 2013, 2:43 PM), [http://economix.blogs.nytimes.com/2013/02/01/college-is-still-worth-it-2/?\\_r=0](http://economix.blogs.nytimes.com/2013/02/01/college-is-still-worth-it-2/?_r=0).

CONCLUSION

This Essay has described instances in which the federal government has adopted or endorsed financial measures of quality and has argued that enshrining these mercenary values in law and regulation represents a danger not only to the affected institutions but potentially to students and, over time, to the wider, national community. This is not to argue that the federal government should not undertake assessments of educational quality but that the nature of the assessment matters.

A myopic focus on individual earnings outcomes related to higher education not only runs the risk of impoverishing diversity within and among institutions of higher learning, but also undermines the rationale for government intervention to make higher education more widely available in the first place: why subsidize another's investment when the return will not be shared? Such thinking reduces the likelihood that as a collective the nation will make it possible for students to pursue their studies and realize the intrinsic value of their higher education, even as individually, fewer and fewer students can afford — literally — to do so. A collective investment in access, like that undertaken in prior decades when need-based grants covered a greater share of tuition,<sup>189</sup> would move us closer to realization of higher education opportunity for all who would seek it.

The adoption of a narrow, commercial definition of quality does not represent an abstract critique of higher education as traditionally conceived but, as this Essay has argued, constitutes a concrete assault both on the historic role of the college or university in society and perversely on the accessibility of higher education to students historically excluded from opportunity in the United States. In a democracy, education arms the populace to recognize the false claims of conniving politicians and so resist the allure of demagoguery,<sup>190</sup> for an uneducated electorate may fail to apprehend the fragility of the institutions that preserve civil society. In a democracy, quality education is a national imperative that we neglect at our peril.

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<sup>189</sup> See, e.g., Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. 1561, 1575-77 (2015).

<sup>190</sup> See Thomas Jefferson, *A Bill for the More General Diffusion of Knowledge*, in JULIAN P. BOYD, 2 THE PAPERS OF THOMAS JEFFERSON 526 (Princeton Univ. Press ed., 1950).