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## ARTICLES

### **The Risk of Complaining—Retaliation**

Ivan E. Bodensteiner 1

Several of the federal statutes that prohibit discrimination also prohibit retaliation against those who oppose discrimination or participate in proceedings aimed at addressing discrimination. Other federal statutes that prohibit discrimination do not explicitly prohibit retaliation, but the Court has determined that these statutes address retaliation as a form of discrimination. Retaliation, and the threat of retaliation, is frequently utilized as a means of discouraging those who believe they are a victim of discrimination from reporting such discrimination. Without courageous individuals willing to report discrimination, enforcement of the statutes that prohibit discrimination becomes less likely.

After a review of the federal statutes that address retaliation, either directly or as a form of discrimination, as well as the First Amendment as a potential source of protection for those who report discrimination, this Article encourages educational institutions to take a bold step and invite students, faculty, staff, and administrators to report discrimination. This approach is fitting for colleges and universities because it promotes the free exchange of ideas and it communicates an institution's commitment to actual equality. All of the institution's constituents should be encouraged to take an active role in helping it to address discrimination and achieve actual equality. For most institutions, this represents a substantial change in the culture.

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

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The rise of for-profit colleges and universities marks higher education as one of the latest sectors to be impacted by society's embrace of market economics principles in the delivery of public goods. Higher education, however, is a particularly problematic sector in which to encourage private wealth-building because education is a good that is both difficult to define or measure, and for which legal recourse is

often inadequate. Capitalizing on the indeterminate characteristics of education, for-profit institutions engage in predatory behavior at the expense of students and the public. The issue is not, however, just about self-dealing or unethical business practices. Rather, for-profit higher education further undermines democracy-sustaining norms about collective commitment to the public good, and the role of higher education in optimizing that good. This article makes both practical and normative claims, arguing that not only is regulatory activity in the sector ultimately futile, but that the for-profit motive in higher education is irreconcilable with higher education's role in maximizing both individual opportunity and collective advancement. The problem of for-profit higher education is in the premises.

### **Pedagogy on Trial: When Academic Freedom and Education Consumerism Collide**

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This article argues that within a marketplace academy, the academic freedom of faculty is placed at risk by a shift of pedagogical authority from the professoriate to student consumers. Case law suggests that the judiciary is becoming more receptive to student rights claims concerning what is taught, how it is taught, and the forms of expression deemed acceptable in the classroom. In the context of a growing accountability movement and the increasing legal protections afforded students, the ubiquitous institutional reliance on student ratings for purposes of faculty review is argued to, in effect, redefine excellence in teaching as that which satisfies students' tastes and preferences. Recent federal appellate court decisions have signaled a willingness of courts to ascribe academic freedom to universities but not their teaching faculty, as well as a reluctance to make judgments about the efficacy of the criteria used to evaluate faculty.

When a faculty member's pedagogy is put on trial, course content and teaching methods are scrutinized by judges who, lacking any pedagogical expertise, render decisions based on non-academic grounds. The courts, then, are found to leave faculty at the mercy of administrators who seek to monitor and manage them in ways that result in high student evaluations, thereby leading to the demise of faculty speech rights and academic authority, as well as greater student power to shape the education institutions offer them. In closing, this article outlines some implications of the growing case law that denies faculty pedagogical authority, recognizes students' claims of educational injustices, and empowers students with consumer sovereignty over higher education.

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### Defining “Gainful Employment” and Other Reforms in Federal Educational Lending

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The Department of Education has provided a new definition for "gainful employment" in the context of Federal educational lending. The definition includes metrics for determining how well for-profit institutions are placing their graduates into jobs and how capable those graduates are at paying back their student debts. The rule has the potential to have profound impacts on the for-profit higher education industry. This note attempts to analyze the rule and its repercussions and place it in the context of the broader educational lending system. This note places particular emphasis on the addition of "Income Based Repayment" as a potential catalyst for high-risk student borrowing.

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The article provides a legal-historical account of *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), the case in which a Supreme Court majority first recognized academic freedom as “special concern of the First Amendment.” The ruling emerges as the culmination of a process in which educators on the public payroll fought for First Amendment protections both for their own profession and for all public employees. This analysis has implications not only for our understanding of the case’s historical context, but also for the nature of academic freedom as a First Amendment right.

# THE RISK OF COMPLAINING—RETALIATION

IVAN E. BODENSTEINER \*

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## INTRODUCTION

Complaints made by those outside the power structure of an institution against those within the power structure can trigger retaliatory action. Retaliation is a deliberate action used to send a clear message that complaining is unwelcome and risky. It is employed to instill fear in others who might consider making a complaint in the future. Those with cause for complaining are frequently among the most vulnerable in an institution. Once they complain, they are labeled “troublemakers.” Retaliation, and the fear of retaliation, becomes a potent weapon used to maintain the power structure within the institution. It is extremely difficult to enforce laws, such as antidiscrimination laws, if the victims of discrimination and those with knowledge of it are afraid to complain. Congress recognized this and, as a result, several federal antidiscrimination laws include provisions making retaliation illegal.<sup>1</sup> In recent years, the Supreme Court has issued several decisions holding that retaliation is a form of discrimination and, as such, it is

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1. See *infra* Part I.

actionable under antidiscrimination laws that do not expressly prohibit retaliatory action.<sup>2</sup>

This Article will explore retaliation in educational institutions. In educational institutions, students are likely targets of discrimination. They are subject to retaliation by both teachers and the administration, because they are on the low end of the power spectrum. Teachers and other employees are subject to retaliation by the administration, including boards of trustees, because in that relationship teachers and employees have less power. Of course, lower level administrators may be subjected to retaliation by high-ranking administrators and board members, and high-ranking administrators are subject to retaliation by the board. As long as the target of a complaint has the authority to take an adverse employment action against the one complaining, or enough influence to cause someone else to take such action, the threat of retaliation is real. When the target of the complaint is the institution, there may be many individuals with both the incentive and authority to engage in retaliation.

While laws other than antidiscrimination laws, such as the Occupational Safety and Health Act<sup>3</sup> and the Fair Labor Standards Act (FLSA),<sup>4</sup> prohibit retaliation against those who complain or participate in enforcement proceedings, the focus of this Article is the more common retaliation claims that accompany efforts to enforce antidiscrimination laws and the Equal Protection Clause of the 14th Amendment to the Federal Constitution. Several of the antidiscrimination laws—including Title VII of the Civil Rights Act of 1964 (Title VII),<sup>5</sup> the Age Discrimination in Employment Act (ADEA),<sup>6</sup> the Americans with Disabilities Act (ADA),<sup>7</sup> and the Equal Pay Act (EPA)<sup>8</sup>—expressly prohibit retaliation against those who oppose discrimination or participate in proceedings to enforce the statutes. Other federal antidiscrimination statutes, including federal financial assistance statutes such as Title VI of the Civil Rights Act of 1964 (Title VI),<sup>9</sup> Title IX of the Education Amendments of 1972 (Title IX),<sup>10</sup> Section 504 of the Rehabilitation Act (§ 504),<sup>11</sup> and the Age Discrimination

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2. See *infra* Part I.E–F.

3. 29 U.S.C. § 660(c) (2006).

4. 29 U.S.C. § 215(a)(3) (2006). See *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (holding that the anti-retaliation provision in the FLSA, 29 U.S.C. § 215(a)(3), prohibiting discrimination against any employee who has “filed any complaint,” protects employees who file an oral complaint as well as those who file a written complaint).

5. 42 U.S.C. § 2000(e), et seq. (2006).

6. 29 U.S.C. § 621, et seq. (2006).

7. 42 U.S.C. § 12101, et seq. (2006).

8. 29 U.S.C. § 206 (2006).

9. 42 U.S.C. § 2000(d), et seq. (2006).

10. 20 U.S.C. § 1681, et seq. (2006).

11. 29 U.S.C. § 794 (2006).

Act,<sup>12</sup> as well as Reconstruction Era statutes that prohibit race discrimination in contracting and in property transactions,<sup>13</sup> address retaliation as an aspect of discrimination. These statutes, as well as the enforcement options, proof schemes and remedies, are discussed in Part I. Some retaliatory actions, taken by government institutions, are subject to challenge based on the free speech clause of the First Amendment to the U.S. Constitution.<sup>14</sup> Such claims are addressed in Part II. Next, Part III discusses whether current retaliation laws, and the First Amendment as currently interpreted in this context, actually encourage individual victims of prohibited discrimination to complain of such discrimination, to assist others who complain of discrimination, and to expose institutional corruption. This Part also includes a discussion of the psychology of retaliation, how retaliation or the fear of retaliation serves to suppress complaints and maintain the *status quo*, and addresses potential preventive measures institutions may take to avoid retaliation claims or at least place them in the best position to defend such claims. Finally, I suggest in this Part that any institution that is serious about preventing discrimination and achieving *actual* equality will actively promote complaints and protect those who have the courage to complain.

#### I. STATUTORY PROHIBITIONS OF RETALIATION

Several federal statutes that prohibit discrimination also prohibit retaliation against those who seek to enforce the antidiscrimination provisions or assist others in enforcing them. Some of these statutes expressly address retaliation, while others have been interpreted to address retaliation through the antidiscrimination provision itself.

##### A. Title VII of the Civil Rights Act of 1964

Title VII prohibits discrimination in employment based on race, color, national origin, religion, and sex, including discrimination based on pregnancy.<sup>15</sup> This Act generally applies to government and private employers with fifteen or more employees.<sup>16</sup> While it therefore applies to the vast majority of educational institutions as employers, some of those institutions may be exempt from claims of discrimination based on religion if the

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12. 42 U.S.C. § 6101, et seq.. (2006).

13. These statutes, 42 U.S.C. §§ 1981–82 (2006), are utilized to address race discrimination in a variety of activities, including employment, admissions, and housing.

14. Cases addressing freedom of speech in the employment context include *Garcetti v. Ceballos*, 547 U.S. 410 (2006); *Bd. of Cnty. Comm'rs, v. Umbehr*, 518 U.S. 668 (1996); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

15. 42 U.S.C. §§ 2000e-2(a) & 2000e(k) (2006).

16. 42 U.S.C. § 2000e(b) (2006).

educational institution is owned “in substantial part” by a religious organization or “if the curriculum of such school . . . is directed toward the propagation of a particular religion.”<sup>17</sup> Such religious institutions are subject to discrimination claims based on race, color, national origin, and sex, although there may be a limited “ministerial exception” based on the Religion Clause of the First Amendment.<sup>18</sup> Title VII explicitly addresses retaliation, providing:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.<sup>19</sup>

The first clause is referred to as the “opposition” clause, while the second is referred to as the “participation” clause.<sup>20</sup> Neither of the clauses requires the party alleging retaliation to establish actual discrimination. Instead, the complaining party need only show a reasonable belief that there is a viable Title VII discrimination claim.<sup>21</sup> The complaining party has the burden of showing a causal connection between the protected activity and the alleged retaliatory act.<sup>22</sup> In addition, the complaining party must show that the challenged action by the employer constitutes an “adverse employment

17. 42 U.S.C. §§ 2000e-1(a) & 2000e-2(e) (2006).

18. The “ministerial exception” is currently before the Supreme Court in *E.E.O.C. v. Hosanna-Tabor Evangelical Lutheran Church and School*, 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (2011) (in an action on behalf of a discharged teacher in an elementary school operated by a religious organization, alleging discrimination in violation of the ADA and retaliation, the Court held that the teacher was not a ministerial employee and rejected the school’s argument that the discrimination claim involved church doctrine, which should not be evaluated or interpreted by the courts).

19. 42 U.S.C. § 2000e-3(a).

20. *See, e.g., Crawford v. Metro.* 555 U.S. 271, 274 (2009).

21. *See, e.g., Collazo v. Bristol-Myers Squibb Mfg., Inc.*, 617 F.3d 39, 46–49 (1st Cir. 2010); *Pickett v. Sheridan Health Care Ctr.*, 610 F.3d 434, 441 (7th Cir. 2010). *See also Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001) (opposition is not protected where no reasonable person could have believed that the single incident in question constitutes actionable harassment).

22. *See, e.g., Henry v. Wyeth Pharm., Inc.*, 616 F.3d 134, 147–48 (2d Cir. 2010); *Leonard v. E. Ill. Univ.*, 606 F.3d 428, 431–33 (7th Cir. 2010); *Corbitt v. Home Depot, Inc.*, 589 F.3d 1136, 1156–61 (11th Cir. 2009); *O’Neal v. City of Chicago*, 588 F.3d 406, 410 (7th Cir. 2009); *Stephens v. Erickson*, 569 F.3d 779, 788–89 (7th Cir. 2009); *Zokari v. Gates*, 561 F.3d 1076, 1081–82 (10th Cir. 2009); *Herschman v. City Univ. of N.Y.*, 2011 WL 1210200, at \*12–13 & 16–19 (S.D.N.Y. Feb. 28, 2011); *Rodriguez-Monguio v. Ohio State Univ.* 2011 WL 335854, at \*14–16 (S.D. Ohio Jan. 31, 2011).

action.”<sup>23</sup> This means some retaliatory actions taken by an employer will not be considered actionable under Title VII.

The Court, in *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>24</sup> made several determinations that enhance the scope of the retaliation clauses. First, the Court indicated that the retaliatory action does not have to be employment related. For example, retaliatory criminal charges could violate the retaliation clauses.<sup>25</sup> Second, while the Court held that the anti-retaliation provision reaches only actions that are “materially adverse” to a reasonable employee or applicant, the victim of retaliation need only show that the challenged action “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination.’”<sup>26</sup> Reassignment of a laborer to duties that were more “arduous and dirtier” could be viewed as “materially adverse” to a reasonable employee.<sup>27</sup> Similarly, a thirty-seven-day suspension was actionable retaliation even though the plaintiff was reinstated with back pay.<sup>28</sup> The emphasis on whether a reasonable employee would be deterred from engaging in protected activity seems entirely consistent with the purpose of the anti-retaliation clauses.

Applying its holding in *Burlington*, that Title VII’s “anti-retaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment” and reaches any employer action that “well might have dissuaded a ‘reasonable worker from making or supporting a charge of discrimination,’”<sup>29</sup> the Court in *Thompson v. North American Stainless, LP*,<sup>30</sup> held that firing Thompson in retaliation for his fiancé’s charge of sex discrimination against their employer would violate Title VII.<sup>31</sup> Next, the Court held that Thompson is an “aggrieved” person for Title VII purposes, because he satisfies Article III’s standing requirements and therefore can sue the employer for a violation of Title VII.<sup>32</sup>

In another case, *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*,<sup>33</sup> the Court held that the “opposition clause” is not limited to employees who actually instigate or initiate a discrimination complaint; rather, it extends to an employee who disclosed a coworker’s

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23. See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 54–60 (2006) (plaintiff must show “that the challenged action ‘well might have dissuaded a reasonable worker from making or supporting a charge of discrimination’”) (quoting *Rochon v. Gonzalez*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)).

24. *Burlington*, 548 U.S. 53 (2006).

25. *Id.* at 61–64.

26. *Id.* at 68 (quoting *Rochon*, 438 F. 3d at 1219).

27. *Id.* at 71.

28. *Id.* at 71–73.

29. *Thompson v. N. Am. Stainless, L.P.*, 131 S. Ct. 863, 868 (2011).

30. *Id.* at 870.

31. *Id.* at 866.

32. *Id.*

33. *Crawford*, 555 U.S. 271 (2009).



sexually harassing conduct in response to questions posed to her during an internal investigation by the employer.<sup>34</sup> One can be in “opposition” to discrimination, without initiating a complaint, by simply responding to questions posed by someone else in a manner that discloses discrimination.<sup>35</sup> However, “opposition” is not protected by the antidiscrimination provision in Title VII where, for example, no reasonable person could have believed that a single incident in question constituted actionable sexual harassment.<sup>36</sup>

When the alleged protected activity consists of illegal conduct, or conduct that is extremely violent or disruptive of the employer’s business, or conduct suggesting a breach of necessary loyalty, confidentiality, or cooperation, the activity may not be protected by Title VII. Such was the case in *McDonnell Douglas Corp. v. Green*,<sup>37</sup> where an employee was involved in a “stall in” that tied up traffic at the employer’s plants during rush hour,<sup>38</sup> the Court said “[n]othing in Title VII compels an employer to absolve and rehire one who has engaged in such deliberate, unlawful activity against it.”<sup>39</sup>

The term “employee,” as used in the anti-retaliation provision, includes former employees. Therefore, a plaintiff who claimed his former employer provided a negative reference in retaliation for his having filed a complaint with the EEOC relating to his discharge has an actionable retaliation claim.<sup>40</sup> Like discrimination claims, retaliation claims can be proved using either the direct method or the indirect method established in *McDonnell Douglas*.<sup>41</sup> Under the direct method, a retaliation plaintiff alleging a violation of Title VII can avoid a summary judgment ruling by showing: (1) she engaged in

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34. *Id.* at 273.

35. *Id.*

36. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268 (2001). *See also* *EEOC v. Go Daddy Software*, 581 F.3d 951, 963–64 (2009) (distinguishing *Breeden* where the evidence suggests that the plaintiff spoke out two or three times about comments that had been made regarding his religion and national origin and the comments were not “isolated” from the terms and conditions of his employment, but rather were made when the plaintiff was informed that his position had been eliminated and that he could avoid demotion only by appealing to the individual who made the derogatory comments).

37. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

38. *Id.* at 794–95.

39. *Id.* at 803.

40. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 347 (1997).

41. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See, e.g.*, *Silverman v. Bd. of Educ. of the City of Chicago*, 637 F.3d 729, 740 (7th Cir. 2011) (indicating *Silverman* could defeat a motion for summary judgment by providing sufficient evidence of retaliation through either the direct or indirect method of proof, but holding that her evidence is insufficient under either method).

statutorily protected activity; (2) she suffered a materially adverse action by her employer; and (3) a causal link between the two.<sup>42</sup>

Application of the direct method is demonstrated in *Silverman v. Board of Education of the City of Chicago*,<sup>43</sup> where the plaintiff satisfied the first element because she had filed a charge of discrimination with the EEOC, “the most obvious form of statutorily protected activity.”<sup>44</sup> Further, she satisfied the second element by showing negative evaluations of her teaching and by showing that her contract was not renewed in 2006.<sup>45</sup> However, Silverman did not present “evidence that reasonably suggests” a causal link between the two materially adverse actions and her protected activity.<sup>46</sup> Therefore, she could not avoid summary judgment using the direct method of proof.

The most difficult hurdle for retaliation plaintiffs utilizing the direct method is showing a causal connection or link between the protected activity and the materially adverse employment action. Absent any remarks made by those responsible for the challenged decision, the most telling evidence may be the temporal proximity between the protected activity and the adverse action. While the courts generally recognize that temporal proximity can support an inference of retaliation, they differ on how close the protected activity and the adverse employment action must be to preclude summary judgment, absent any other evidence of a causal connection. For example, in a Title VII case where the plaintiff claims he was fired because he “opposed” the employer’s practice of favoring Hispanics over black workers,<sup>47</sup> the court indicated that “a suspicion” is not enough to get past a motion for summary judgment.”<sup>48</sup> Nevertheless, the court recognized that occasionally “an adverse action comes so close on the heels of a protected act that an inference of causation is sensible.”<sup>49</sup> Thus, the key is in the strength of the inference:

Deciding when the inference is appropriate cannot be resolved by a legal rule; the answer depends on context, just as an evaluation of context is essential to determine whether an employer’s explanation is fishy enough to support an inference that the real reason must be discriminatory. The District Court’s apparent belief that timing *never* supports an inference of

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42. *Id.* (citing *Jones v. Res-Care, Inc.*, 613 F.3d 665, 671 (7th Cir. 2010)). See also *Benuzzi v. Bd. of Educ. of the City of Chicago*, 647 F.3d 652, 664–66 (7th Cir. 2011) (sufficient evidence of retaliation under the direct method); *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 784–87 (7th Cir. 2007).

43. *Silverman*, 637 F.3d at 740–41.

44. *Id.* at 740.

45. *Id.* at 740–41.

46. *Id.* at 741.

47. *Loudermilk v. Best Pallet Co.*, 636 F.3d 312 (7th Cir. 2011) (plaintiff relied on the direct method of proof).

48. *Id.* at 315.

49. *Id.* See also *Clark Cnty. Sch. Dist. v. Breedon*, 532 U.S. 268, 273 (2001) (“very close” temporal proximity can suffice).

causation is untenable. The closer two events are, the more likely that the first caused the second. We think that an inference of causation would be reasonable here. A jury, not a judge, should decide whether the inference is appropriate.<sup>50</sup>

Silverman also argued that she established a *prima facie* case utilizing the indirect method of proof, pursuant to which she must demonstrate: (1) that she engaged in a statutorily protected activity; (2) that she suffered a materially adverse action by her employer; (3) that she met the school board's legitimate expectation; and (4) she was treated less favorably than similarly situated employees who had not engaged in protected activity.<sup>51</sup> Silverman satisfied the first three elements, but not the fourth. While the court's "similarly situated" inquiry is a "flexible, common-sense one,"<sup>52</sup> "the comparators must be similar enough that any differences in their treatment cannot be attributed to other variables."<sup>53</sup> Where a plaintiff utilizing the indirect method establishes all the elements of a *prima facie* case, the burden shifts to the defendant to produce a legitimate, non-retaliatory reason for the adverse action.<sup>54</sup> If the defendant provides such evidence, then the burden shifts back to the plaintiff to show that the reason(s) advanced by the employer was a pretext for retaliating against her.<sup>55</sup>

A major hurdle for a retaliation plaintiff utilizing the indirect method of proof is the "similarly situated" requirement for a *prima facie* case. In cases where the plaintiff has established a *prima facie* case and the defendant satisfies its burden by articulating a legitimate, non-retaliatory reason for the

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50. *Loudermilk*, 636 F.3d at 315 (reversing summary judgment in favor of the employer). See also *Castle v. Appalachian Technical Coll.*, 631 F.3d, 1194, 1197–99 (11th Cir. 2011) (a student suspended from the nursing program alleged she was suspended in violation of the First Amendment because she reported one of her instructors for falsifying attendance records. Assuming there was a retaliatory motive for the suspension, the court found the school administrators also had a lawful motive for suspending the student, and therefore, they could have reasonably believed that suspending the student would not violate the First Amendment, thus establishing qualified immunity); *Leitgen v. Franciscan Skemp Healthcare, Inc.*, 630 F.3d 668, 675 (7th Cir. 2011) (holding that suspicious timing alone is almost always insufficient to survive summary judgment and here the plaintiff did not overcome that general rule); *Abuelyaman v. Ill. State Univ.*, 2009 WL 3837012, at #9 (C.D. Ill. Nov. 13, 2009) (sufficient evidence of suspicious timing to defeat a motion for summary judgment).

51. *Silverman v. Bd. of Educ.*, 637 F.3d 729, 742 (7th Cir. 2011).

52. *Henry v. Jones*, 507 F.3d 558, 564 (7th Cir. 2009). See also *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Athletics Dep't*, 510 F.3d 681, 688 (7th Cir. 2007) (similarly situated requirements should not be applied mechanically or inflexibly).

53. *Silverman*, 637 F.3d at 742.

54. *Id.* at 742.

55. *Id.*

challenged action, meeting the pretext requirement is an obstacle. A showing of pretext, combined with the *prima facie* case, is sufficient to support a finding of retaliation.<sup>56</sup> In *St. Mary's*, the Court held that:

The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination . . . .<sup>57</sup>

There are circumstances in which the plaintiff can establish that an agent of the employer had a discriminatory or retaliatory animus, but may not be able to establish that the agent made the challenged employment decision. In *Staub v. Proctor Hospital*,<sup>58</sup> the Court considered "the circumstances under which an employer may be held liable for employment discrimination based on the discriminatory animus of an employee who influenced, but did not make, the ultimate employment decision."<sup>59</sup> The claim in *Staub* was based on the Uniformed Services Employment and Reemployment Rights Act (USERRA),<sup>60</sup> but its holding is applicable to discrimination and retaliation claims under the Acts addressed in this Article.<sup>61</sup>

Staub sued Proctor under USERRA, alleging that his discharge was motivated by hostility to his obligations as a military reservist. More particularly, Staub claimed that two of his supervisors, Mulally and Korenchuk, had such hostility. The hostility led them to make an unfavorable entry in his personnel record, which influenced the ultimate employment decision made by Buck.<sup>62</sup> Under Staub's theory, the discriminatory animus of Mulally and Korenchuk was sufficient to establish his claim, even assuming they did not intend to cause his dismissal, because Buck decided to fire Staub based on that entry. The Court stated:

[T]he supervisor's biased report may remain a causal factor if the independent investigation takes it into account without determining that the adverse action was, apart from the supervisor's recommendation, entirely justified. We are aware

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56. *Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993).

57. *Id.* at 511. *See also* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147–48 (2000) (case involving age discrimination).

58. *Staub v. Proctor Hosp.*, 131 S. Ct. 1186 (2011).

59. *Id.* at 1189. This is sometimes referred to as the "cat's paw" theory. *Id.* at 1190, n.1.

60. 38 U.S.C. § 4301, et seq. (2006)

61. Some lower courts have applied *Staub* in employment cases alleging retaliation. *See, e.g.*, *Gollas v. Univ. of Texas Health Sci. Ctr.*, 2011 WL 1834248 (5th Cir. May 12, 2011); *Baldwin v. Holder*, 2011 WL 2078614 (S.D. Tex. May 26, 2011); *Palermo v. Clinton*, 2011 WL 1261118 (N.D. Ill. March 31, 2011).

62. *Staub*, 131 S. Ct. at 1191–92.

of no principle in tort or agency law under which an employer's mere conduct of an independent investigation has a claim-preclusive effect. Nor do we think the independent investigation somehow relieves the employer of "fault." The employer is at fault because one of its agents committed an action based on discriminatory animus that was intended to cause, and did in fact cause, an adverse employment decision.<sup>63</sup>

Therefore, the Court held "that if a supervisor performs an act motivated by anti-military animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."<sup>64</sup> Applying this principle, the Seventh Circuit's holding that Proctor was entitled to judgment as a matter of law was reversed because Mulally and Korenchuk were acting within the scope of their employment when they took the actions that allegedly caused Buck to fire Staub; there was evidence that Mulally and Korenchuk's actions were motivated by hostility towards Staub's military obligations; there was evidence that Mulally and Korenchuk's actions were causal factors underlying Buck's decision to fire Staub; and there was evidence that both Mulally and Korenchuk had the specific intent to cause Staub to be discharged.<sup>65</sup> The Court left it to the Seventh Circuit to determine whether the jury verdict in favor of Staub should be reinstated or whether there should be a new trial because the jury instruction "did not hew precisely to the rule we adopt today."<sup>66</sup>

Before filing a civil action alleging either discrimination or retaliation in violation of Title VII, the person alleging discrimination or retaliation must file a charge with the EEOC or a state deferral agency within 180 days after the "unlawful employment practice occurred," or within 300 days if the state where the alleged discrimination or retaliation occurred has a "deferral agency."<sup>67</sup> Because filing a timely charge of discrimination or retaliation with the EEOC is not a jurisdictional prerequisite to litigation, the requirement is subject to waiver, estoppel, and equitable tolling.<sup>68</sup> The timeliness of a charge often turns on whether the charging party complains of a "discrete act," such as discharge, failure to hire, failure to promote, or instead complains of a hostile or harassing work environment.<sup>69</sup> In the latter situation, where the unlawful employment practice is based on the cumulative effect of individual acts, it suffices that one act occurring within the filing period will trigger

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63. *Id.* at 1193.

64. *Id.* at 1194.

65. *Id.*

66. *Id.*

67. *See* 42 U.S.C. § 2000e-5(e) (2006 & Supp III 2009).

68. *See* *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982).

69. *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002).

liability for the entire period of the hostile environment.<sup>70</sup> Prior to the decision in *Morgan*, several circuits held that a separate retaliation charge does not need to be filed, provided the retaliation is reasonably related to the initial charge of discrimination.<sup>71</sup> However, *Morgan* may have changed that because of its holding that discrete acts trigger a separate filing requirement.<sup>72</sup> Even where the charging party alleges that the retaliatory action was triggered by an EEOC charge of discrimination, the safest course may be to file a separate retaliation charge.

The relief available under Title VII to a retaliation plaintiff who establishes liability is quite extensive and includes equitable relief, such as reinstatement, back pay, and front pay.<sup>73</sup> Since the 1991 amendments to Title VII, compensatory and punitive damages are available under Title VII,<sup>74</sup> but these damages are subject to the statutory cap, which varies depending on the number of employees.<sup>75</sup> Punitive damages are not available against government,<sup>76</sup> and the standard for punitive damages is malice or reckless indifference to the federally protected rights of the plaintiff.<sup>77</sup> An employer “may not be vicariously liable [for punitive

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70. *Id.* at 120 (“a court’s task is to determine whether the acts about which an employee complains are part of the same actionable hostile work environment practice, and if so, whether any act falls within the statutory time period”). Cases have applied *Morgan* to § 1983 claims. *See, e.g.*, *Groesch v. City of Springfield, Ill.*, 635 F.3d 1020, 1027 (7th Cir. 2011); *Sharpe v. Cureton*, 319 F.3d 259, 267–68 (6th Cir. 2003); *RK Ventures, Inc. v. Seattle*, 307 F.3d 1045, 1061 (9th Cir. 2002).

71. *See, e.g.*, *Clockedile v. N.H. Dep’t of Corr.*, 245 F.3d 1, 4–6 (1st Cir. 2001); *Aviles v. Cornell Forge Co.*, 183 F.3d 598, 603 (7th Cir. 1999); *Shah v. N.Y. State Dep’t of Civil Serv.*, 168 F.3d 610, 614 (2d Cir. 1999).

72. *See, e.g.*, *Wedow v. City of Kansas City, Mo.*, 442 F.3d 661, 674 (8th Cir. 2006); *Horton v. Jackson Cnty. Bd. of Cnty. Comm’rs*, 343 F.3d 897, 899–900 (7th Cir. 2003); *Hazel v. Washington Metro. Area Transit Auth.*, 2006 WL 3623693 at \*7–8 (D.D.C. 2006).

73. 42 U.S.C. § 2000e-5(g) (2006). Front pay is compensation for future economic losses stemming from present discrimination that cannot be remedied by traditional rightful-place relief, such as hiring, promotion, or reinstatement. While front pay is available under Title VII, as a form of equitable relief, it is matter of discretion for the trial court. *See, e.g.*, *Hildebrand v. Ill. Dep’t of Natural Res.*, 347 F.3d 1014, 1032 n.12 (7th Cir. 2003). Back pay was also viewed as a form of equitable relief, but if the Title VII plaintiff is seeking compensatory damages, some courts allow the issue to go to the jury along with compensatory damages. *See, e.g.*, *Broadnax v. City of New Haven*, 415 F.3d 265, 271–72 (2d Cir. 2005); *Johnson v. Spencer Press of Maine, Inc.*, 364 F.3d 368, 379–80 (1st Cir. 2004).

74. *See* 42 U.S.C. § 1981a (2006).

75. *See* 42 U.S.C. § 1981a(b)(3) (2006). Back wages and interest, available under Title VII prior to the 1991 amendments, are excluded from compensatory damages for purposes of determining the cap.

76. 42 U.S.C. § 1981a(b)(1) (2006).

77. *Id.*

damages] for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's 'good faith efforts to comply with Title VII.'"<sup>78</sup> In addition, the prevailing party may be awarded attorney fees and expert fees.<sup>79</sup>

#### B. Age Discrimination in Employment Act

As suggested in the title, the ADEA<sup>80</sup> applies only to age discrimination in the employment context, and only to employers with twenty or more employees.<sup>81</sup> Like Title VII, the ADEA includes a section that expressly addresses retaliation.<sup>82</sup> The language in the ADEA is almost identical to that found in Title VII and, therefore, the cases interpreting these provisions are nearly interchangeable. However, there is a potential difference in interpretation based on *Gross v. FBL Financial Services, Inc.*,<sup>83</sup> where the Court held that an ADEA plaintiff alleging age discrimination must show that age was the "but-for" cause of the challenged decision, rather than a motivating factor. In contrast, Title VII provides for "mixed-motive" liability, allowing a plaintiff who establishes that a prohibited factor was a motivating factor in the challenged employment decision to hold the employer liable, even if the ultimate decision would have been the same without consideration of the impermissible factor.<sup>84</sup> If *Gross* is applied to retaliation claims under the ADEA, a mixed-motive claim of retaliation may not be available.<sup>85</sup>

78. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 545 (1999).

79. 42 U.S.C. § 2000e-5(k) (year). While prevailing plaintiffs are generally entitled to fees, prevailing defendants may recover fees "only where the action brought is found to be unreasonable, frivolous, meritless, or vexatious." See *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

80. 29 U.S.C. § 621, et seq. (2006).

81. 29 U.S.C. §§ 631(c)(1) & (2) (2006). The ADEA does not provide an exemption for religious institutions; at one time it provided an exemption allowing compulsory retirement of a tenured faculty member "who has attained seventy years of age." That exemption expired December 31, 1983. See Pub. L. No. 99-592, § 6(b), 100 Stat. 3342 (1986).

82. 29 U.S.C. § 623(d) (2006).

83. *Gross v. FBL Financial Serv, Inc.*, 557 U.S. 167 (2009). The Court essentially overruled *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), holding a different result under the ADEA is justified by the fact that Congress, when it amended Title VII in 1991 to include the mixed-motive provision, did not amend the ADEA.

84. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). The decision in *Price Waterhouse* was codified in part and modified in part by the 1991 amendments to Title VII, 42 U.S.C. § 2000e-2(m) (2006) and § 2000e-5(g)(2)(B) (2006). However, where the employer demonstrates that the same decision would have been made in the absence of the impermissible factor, relief is limited. *Id.*

85. See, e.g., *Materra v. JPMorgan Chase Corp.*, 740 F.Supp.2d 561, 578 n. 13 (S.D.N.Y. 2010) (discussing the issue); *Rasic v. City of Northlake*, 2009 WL

As with Title VII retaliation cases, ADEA plaintiffs alleging retaliation may utilize the indirect proof scheme under *McDonnell Douglas* and establish a *prima facie* case by showing (a) they engaged in protected activity, (b) an adverse employment action followed the protected activity, and (c) a causal link between the protected activity and the adverse employment action.<sup>86</sup> If the defendant articulates a legitimate, non-retaliatory reason for the challenged action,<sup>87</sup> then the plaintiff must show that the articulated reason was a pretext for retaliation.<sup>88</sup> A plaintiff alleging retaliation in violation of the ADEA can also utilize the direct method by presenting direct or circumstantial evidence of retaliation.<sup>89</sup>

The enforcement scheme for retaliation cases based on the ADEA is similar to that for Title VII cases. A victim of retaliation should file a charge with the EEOC.<sup>90</sup> The charging party has ninety days after receipt of notice from the EEOC, indicating the charge has been dismissed or otherwise terminated, to file a civil action.<sup>91</sup> The charging party does not have to wait for the notice of right-to-sue or notice of dismissal from the EEOC before filing a lawsuit.<sup>92</sup> The ADEA authorizes civil actions “for such legal or equitable relief as will effectuate [its] purposes,”<sup>93</sup> and it provides that it “shall be enforced in accordance with the powers, remedies, and procedures provided in [the Fair Labor Standards Act].”<sup>94</sup> While the ADEA does not

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3150428 at \*17 (N.D. Ill. Sept. 25, 2009) (*Gross* requires but-for causation in ADEA retaliation cases). *But see* *Smith v. Xerox Corp.*, 602 F.3d 320, 328-30 (5<sup>th</sup> Cir. 2010) (holding *Gross* does not control a Title VII retaliation claim).

86. *See, e.g.*, *Horowitz v. Bd. of Educ.*, 260 F.3d 602, 612 (7<sup>th</sup> Cir. 2001); *Sherrod v. Am. Airlines, Inc.*, 132 F.3d 1112, 1122 n.8 (5<sup>th</sup> Cir. 1998). Plaintiffs frequently attempt to establish the causal link by showing temporal proximity between the protected activity and the retaliatory action. *See, e.g.*, *Spengler v. Worthington’s Cyclinders*, 615 F.3d 481, 492–95 (6<sup>th</sup> Cir. 2010) (in some circumstances, temporal proximity combined with other evidence of retaliation is sufficient to establish a causal connection).

87. *See, e.g.*, *Imwalle v. Reliance Med. Prods., Inc.*, 515 F.3d 531, 546–51 (6<sup>th</sup> Cir. 2008).

88. *Id.* *See also* *Bayless v. Ancilla Domini Coll.*, 2011 WL 690273, at \*20 (N.D. Ind. Feb. 15, 2011).

89. *See, e.g.*, *Wright v. Southland Corp.*, 187 F.3d 1287, 1305-06 (11<sup>th</sup> Cir. 1999).

90. 29 U.S.C. § 626(d)(1) (2006 & Supp. III 2009).

91. 29 U.S.C. § 626(e) (2006).

92. 29 U.S.C. § 626(d)(1) (2006 & Supp. III 2009); 29 C.F.R. § 1626.18(b) (2011) However, one must wait until sixty days after filing a charge with the EEOC. *Id.*

93. 29 U.S.C. § 626(c)(1) (2006).

94. 29 U.S.C. § 626(b) (2006), which incorporates 29 U.S.C. §§ 211(b) (2006), 216 (except subsection a) (2006 & Supp. III 2009), and 217 (2006).



provide for the full range of compensatory damages,<sup>95</sup> consequential damages may be available in ADEA cases alleging retaliation.<sup>96</sup> Reinstatement is the preferred remedy under the ADEA, but trial courts have the discretion to award front pay where reinstatement is impracticable or impossible.<sup>97</sup> Liquidated damages may be awarded in cases of willful violations.<sup>98</sup> A prevailing plaintiff under the ADEA may obtain an award of attorney fees.<sup>99</sup>

A separate section of the ADEA<sup>100</sup> addresses age discrimination in federal employment, but the section does not address retaliation. Recently the Court, in *Gomez-Perez v. Potter*,<sup>101</sup> held that § 633a(a) prohibits retaliation against a federal employee who complains of age discrimination. After indicating that the “key question in this case is whether the statutory phrase ‘discrimination based on age’ includes retaliation based on the filing of an age discrimination complaint,”<sup>102</sup> the Court relied upon its reasoning in *Sullivan*<sup>103</sup> and *Jackson*<sup>104</sup> and the similarity of the statutory language involved in those two cases when compared with the provision of the ADEA at issue.<sup>105</sup>

### C. Americans with Disabilities Act

The ADA is similar to Title VII and the ADEA in that it includes a broad prohibition of retaliation, with both opposition and participation clauses.<sup>106</sup> This broad prohibition of retaliation, found in Title IV of the ADA, applies to efforts to enforce all three of the substantive titles of the ADA, which prohibit discrimination in employment (Title I),<sup>107</sup> public services provided by public entities (Title II),<sup>108</sup> and public accommodations provided by private entities

95. See, e.g., *Collazo v. Nicholson*, 535 F.3d 41, 44–45 (1st Cir. 2008); *Moskowitz v. Trs. of Purdue Univ.*, 5 F.3d 279, 283–84 (7th Cir. 1993).

96. See, e.g., *Moskowitz v. Trs. of Purdue Univ.*, 5 F.3d 279, 283–84 (7th Cir. 1993); *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 111–12 (7th Cir. 1990).

97. See, e.g., *Abuan v. Level 3 Commc’ns, Inc.*, 353 F.3d 1158, 1176–80 (10th Cir. 2003); *Julian v. City of Houston, Tex.*, 314 F.3d 721, 728–30 (5th Cir. 2002); *Cox v. Dubuque Bank & Trust Co.*, 163 F.3d 492, 498–99 (8th Cir. 1998).

98. 29 U.S.C. § 626(b) (2006). See also *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985).

99. 29 U.S.C. § 216(b) (2006), incorporated by 29 U.S.C. § 626(b) (2006).

100. 29 U.S.C. § 633a (2006 & Supp. III 2009). While this section is unlikely to be the basis for a claim against educational institutions, it is included here because of the decision in *Gomez-Perez, infra*, n.101.

101. *Gomez-Perez v. Potter*, 553 U.S. 474 (2008).

102. *Id.* at 479.

103. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969).

104. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

105. *Gomez-Perez*, 553 U.S. at 479–80.

106. 42 U.S.C. § § 12203(a) & (b) (2006).

107. 42 U.S.C. § 12111, et seq. (2006 & Supp. III 2009).

108. 42 U.S.C. § 12131, et seq. (2006).

(Title III),<sup>109</sup> but the enforcement scheme may be different for each of the Titles.<sup>110</sup> Due to the broad scope of the ADA, the anti-retaliation provision is available to address protected activity arising in a variety of circumstances in colleges or universities.

Title I of the ADA defines “discriminate” in employment contexts to include “excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association.”<sup>111</sup> Neither Title VII nor the ADEA contains a comparable provision. The scope of this provision is demonstrated by the relevant EEOC regulation,<sup>112</sup> which uses as an example an employer that refuses to hire an applicant, whose spouse has a disability, because the employer believes the applicant would have to miss work or frequently leave work early to care for the spouse. While § 12112(b)(4) is part of the prohibition against discrimination, since it addresses any actions taken based on one’s “relationship or association,” it can also be viewed as addressing a form of retaliation.

The enforcement scheme for employment-related retaliation under the ADA adopts the Title VII “powers, remedies, and procedures.”<sup>113</sup> Enforcement of Title II of the ADA, which addresses discrimination and retaliation in public services, is in accordance with the “remedies, procedures, and rights set forth in section 794a.”<sup>114</sup> Enforcement of Title III of the ADA, which addresses discrimination and retaliation in public accommodations and services operated by private entities, is in accordance with the “remedies and procedures set forth in section 2000a-3(a),”<sup>115</sup> which provides for “preventive relief” but not damages. Only Title I of the ADA, which adopts the Title VII enforcement scheme, is enforced by the EEOC. One who alleges retaliation

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109. 42 U.S.C. § 12181, et seq. (2006 & Supp. III 2009).

110. *See* 42 U.S.C. § 12203(c) (2006). This provision adopts the “remedies and procedures” available to address discrimination under each of the Titles. *See also* Datto v. Harrison, 664 F. Supp. 2d 472, 486–92 (E.D. Pa. 2009).

111. 42 U.S.C. § 12112(b)(4) (2006 & Supp. III 2009).

112. 29 C.F.R. § 1630.8 (2010).

113. 42 U.S.C. § 12117 (2006 & Supp. III 2009) (referring to several sections of Title VII).

114. 42 U.S.C. § 12133 (2006), which refers to 29 U.S.C. § 794a. *See infra* Part I.E.3.

115. 42 U.S.C. § 12188(a) (2006), which refers to 42 U.S.C. § 2000a-3(a) (Title II of the Civil Rights Act of 1964). A civil action under § 2000a-3(a) cannot be brought until thirty days after written notice has been given to the “appropriate State or local authority,” if there is such an authority. 42 U.S.C. § 2000a-3(c) (2006).

for employment-related protected activity will have to file a retaliation charge with the EEOC before litigating the claim.<sup>116</sup>

#### D. Equal Pay Act

While the EPA applies to all employers that have employees “engaged in commerce” or “in the production of the goods for commerce,”<sup>117</sup> it addresses only sex discrimination in wages.<sup>118</sup> Because the EPA is part of the FLSA, the retaliation provision of the FLSA applies.<sup>119</sup> Since 1979, the EEOC has had the power to enforce the EPA.<sup>120</sup> However, unlike Title VII, the ADEA, and the ADA, an employee challenging wage discrimination based on the EPA is not required to file a charge with the EEOC before pursuing litigation.<sup>121</sup> The FLSA makes it unlawful for any person:

to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee.<sup>122</sup>

Until recently, it was not clear whether internal, informal complaints made to a supervisor constitute protected activity under § 215(a)(3).<sup>123</sup> This was clarified when the Court in *Kasten* interpreted the provision more broadly and held it applies to oral as well as written complaints.<sup>124</sup> All appropriate legal

116. *See, e.g.*, *Farlin v. Library Store, Inc.*, 2010 WL 375236 at \*5 (C.D. Ill. Jan. 25, 2010); *Lesikar v. Frymaster, LLC*, 2005 WL 3359178 at \*3–4 (W.D. La. Dec. 8, 2005).

117. 29 U.S.C. § 206(a) (2006 & Supp. III 2009).

118. 29 U.S.C. § 206(d)(1) (2006).

119. 29 U.S.C. § 215(a)(3) (2006).

120. *See* 43 Fed. Reg. 19807 (1978), and P.L. No. 98-532, 98 Stat. 2705 (1984) (passed to address constitutional concerns about the Reorganizational Plan of 1978).

121. 29 U.S.C. § 216(b) (2006). *See also* *Washington Cnty. v. Gunther*, 452 U.S. 161, 168 (1981).

122. 29 U.S.C. § 215(a)(3) (2006). *See, e.g.*, *E.E.O.C. v. SunDance Rehab. Corp.*, 466 F.3d 490, 496 (6th Cir. 2006); *Soto v. Adams Elevator Equip. Co.*, 941 F.2d 543, 547–48 (7th Cir. 1991); *E.E.O.C. v. White & Son Enter.*, 881 F.2d 1006, 1010 (11th Cir. 1989); *Love v. RE/MAX of Am., Inc.*, 738 F.2d 383, 387 (10th Cir. 1984).

123. *See, e.g.*, *Lambert v. Genesee Hosp.*, 10 F.3d 46, 55 (2d Cir. 1993) (anti-retaliation provision does not encompass informal complaints made to a supervisor). *Compare* *Moore v. Freeman*, 355 F.3d 558, 563–64 (6th Cir. 2004), *with* *E.E.O.C. v. Romeo Cmty. Schs.*, 976 F.2d 985, 989 (6th Cir. (1992).

124. *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S. Ct. 1325 (2011) (holding that the anti-retaliation provision in the FLSA, 29 U.S.C. § 215(a)(3), prohibiting discrimination against any employee who has “filed any

and equitable relief, including liquidated damages, is available to a plaintiff who proves retaliation.<sup>125</sup>

#### E. Federal Financial Assistance

Here I discuss four federal provisions—Title VI of the Civil Rights Act of 1964,<sup>126</sup> Title IX of the Education Amendments of 1972,<sup>127</sup> Section 504 of Title V of the Rehabilitation Act of 1973,<sup>128</sup> and the Age Discrimination Act<sup>129</sup>—of significance to institutions of higher education that are recipients of federal financial assistance. Unlike Title VII, the ADEA, and the EPA, the federal financial assistance laws are not limited to employment discrimination. Title VI prohibits discrimination on the basis of race, color, or national origin by any recipient of federal financial assistance. It has been used extensively in the context of higher education, although its application to employment discrimination is limited to situations where the primary purpose of federal financial assistance is to provide employment.<sup>130</sup> Title IX prohibits sex discrimination by educational institutions receiving federal financial assistance. Section 504 provides that “[n]o otherwise qualified individual with a disability” can be excluded from or denied the benefits of any program or activity receiving federal financial assistance “solely by reason of her or his disability.”<sup>131</sup> The Age Discrimination Act states “no person . . . shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.”<sup>132</sup>

These provisions are an important part of the antidiscrimination landscape because most higher education institutions receive federal financial assistance. None of these statutes expressly addresses retaliation, although the Rehabilitation Act refers to § 12203<sup>133</sup> of the ADA in stating that the “standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I of the [ADA].”<sup>134</sup>

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complaint,” protects employees who file an oral complaint as well as those who file a written complaint).

125. 29 U.S.C. § 216(b) (2006).

126. 42 U.S.C. § 2000d, et seq. (2006).

127. 20 U.S.C. § 1681, et seq. (2006).

128. 29 U.S.C. § 794, et seq. (2006).

129. 42 U.S.C. § 6101, et seq. (2006).

130. 42 U.S.C. § 2000d-3 (2006).

131. 29 U.S.C. § 794(a) (2006).

132. 42 U.S.C. § 6102 (2006).

133. 42 U.S.C. § 12203 (2006).

134. 29 U.S.C. § 794(d) (2006).

## 1. Title VI of the Civil Rights Act of 1964

The U.S. Department of Education adopted a regulation providing that: [n]o recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act . . . , or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.<sup>135</sup>

At least one court has held that this regulation is an interpretation of Section 601's core antidiscrimination mandates.<sup>136</sup> As a result, Section 601 provides a private right of action to enforce this anti-retaliation provision.<sup>137</sup> In *Alexander v. Sandoval*,<sup>138</sup> the Court held that there is no private right of action to enforce disparate impact regulations designed to implement Title VI because Title VI does not "display an intent to create a freestanding private right of action to enforce regulations promulgated under section 602."<sup>139</sup> Applying *Sandoval*, the court in *Peters* concluded that the retaliation regulations found in § 100.7(e) are enforceable through Section 601 *only* to the extent that "they forbid retaliation for opposing practices that one reasonably believes are made unlawful by section 601," *i.e.*, intentional discrimination.<sup>140</sup> Thus, according to *Peters*, to the extent the regulation forbids retaliation for opposing actions with a disparate impact, "the regulations may not be enforced either via the section 601 private right of action or § 1983."<sup>141</sup>

In sum, based on *Sandoval* and *Peters*, victims of retaliation by institutions of higher education have a private right of action, based on Section 601 of Title VI, to enforce Section 100.7(e) of the DOE regulations, but only if the retaliatory acts were in response to opposition to or participation in efforts aimed at addressing intentional discrimination in violation of Title VI. There may be other avenues of relief based on *Jackson*<sup>142</sup> or on the First

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135. 34 C.F.R. § 100.7(e) (2011). *See also* 34 C.F.R. § 106.71 (2011) (incorporating § 100.7(e) by reference to enforce Title IX).

136. 42 U.S.C. § 2000d (2006) (stating, "[n]o person in the United States shall, on the ground of race, color or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.").

137. *Peters v. Jenney*, 327 F.3d 307, 316–21 (4th Cir. 2003).

138. *Alexander v. Sandoval*, 532 U.S. 275 (2001).

139. *Id.* at 293, referring to 42 U.S.C. § 2000d-1.

140. *Peters*, 327 F.3d at 319.

141. *Id.* at 319. According to the Court in *Peters*, the Court in *Sandoval* did not decide whether Title VI regulations could be enforced through § 1983.

142. *See infra* Part I.E.2. (discussing *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005)).

Amendment,<sup>143</sup> that apply to public colleges and universities. Because of the limited number of cases alleging retaliation in violation of Title VI,<sup>144</sup> the method of proof is not well established. However, the court in *Peters* provided some guidance for the lower court on remand, relying heavily on Title VII precedent.

According to *Peters*, the plaintiff “most show (1) that she engaged in protected activity; (2) that [the defendants] took a material adverse employment action against her, and (3) that a causal connection existed between the protected activity and the adverse action.”<sup>145</sup> The court recognized that retaliation plaintiffs may utilize either the indirect, burden-shifting scheme adopted in *McDonnell Douglas* or the direct method.<sup>146</sup> As in retaliation claims under other civil rights statutes, Title VI plaintiffs must show only that they “opposed an unlawful employment practice which [they] reasonably believed had occurred or was occurring,” i.e., the inquiry is whether plaintiffs have a good faith belief that the defendant engaged in a practice that violates Section 601 of Title VI and whether the belief was objectively reasonable in light of the circumstances.<sup>147</sup> The court also noted that “[o]ppositional activities are not protected unless they are proportionate and reasonable under the circumstances.”<sup>148</sup>

Victims of retaliation by educational institutions may file a written complaint with the U.S. Department of Education (DOE), Office of Civil Rights (OCR), within 180 days from the date of the alleged discrimination or retaliation.<sup>149</sup> Such complaints will be investigated and, if the investigation reveals a failure to comply with Title VI and implementing regulations, the OCR will attempt to resolve the matter by informal means.<sup>150</sup> If that fails, formal enforcement proceedings can be initiated in accordance with DOE

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143. See *infra* Part II.

144. *But see* *Hickey v. Myers*, 2010 WL 786459 (N.D.N.Y.). See also *Kimmel v. Gallaudet University*, 639 F. Supp. 2d 34, 42–43 (D.C. Cir. 2009); *Bisong v. Univ. of Houston*, 493 F. Supp. 2d 896, 911–15 (S.D. Tex. 2007); *Johnson v. Galen Health Inst., Inc.*, 267 F. Supp. 2d 679, 690 (W.D. Ky. 2003) (recognizing there is an implied private cause of action for retaliation under Title VI of the Civil Rights Act of 1964); *Franks v. Ross*, 293 F. Supp. 2d 599, 605 (E.D. N.C. 2003) (recognizing there is an implied private cause of action for retaliation under Title VI); *Mock v. South Dakota Bd. of Regents*, 267 F. Supp. 2d 1017, 1018 (D. S.D. 2003) (recognizing there is an implied private cause of action for retaliation under Title VI).

145. *Peters*, 327 F.3d at 320.

146. *Id.* at 321 n.15.

147. *Id.* at 320–21.

148. *Id.* at 321 n.16.

149. 34 C.F.R. § 100.7(b) (2011).

150. 34 C.F.R. § 100.7(c) (2011). Such complaints are not limited by the *Peters* private right of action analysis, i.e., they may include retaliation for opposing disparate impact discrimination.

regulations.<sup>151</sup> Ultimately, these proceedings can result in loss of federal financial assistance,<sup>152</sup> but before that happens the institution is entitled to a hearing<sup>153</sup> and it may seek judicial review if it is not satisfied with the results of the hearing.<sup>154</sup>

Exhaustion of the administrative remedies described above is not required.<sup>155</sup> Instead, individuals alleging discrimination or retaliation in violation of Title VI can go directly to court based on an implied right of action, initially recognized by the Court in a Title IX case<sup>156</sup> and subsequently extended to Title VI.<sup>157</sup> The proof scheme is discussed above<sup>158</sup> and the court may award equitable relief,<sup>159</sup> compensatory damages upon a showing of intentional discrimination,<sup>160</sup> as well as attorney fees.<sup>161</sup>

151. 34 C.F.R. § 100.8 (2011).

152. 34 C.F.R. § 100.8(b) (2011).

153. 34 C.F.R. §§ 100.8(c)–100.9 (2011).

154. 42 U.S.C. § 2000d-2 (2006); 34 C.F.R. § 100.11 (2011).

155. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 706 (1979) (Title IX); *Neighborhood Action Coalition v. Canton, Ohio*, 882 F.2d 1012, 1015 (6th Cir. 1989) (Title VI).

156. *Cannon*, 441 U.S. at 699 (interpreting Title IX, 20 U.S.C. § 1681, et seq.).

157. *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 610–11 (1983). *See also Alexander v. Sandoval*, 532 U.S. 275, 280 (2001) (holding that only Congress, not administrative agencies, can authorize causes of action; absent such congressional authorization there is no implied right of action to enforce a Title VI regulation); *Peters v. Jenney*, 327 F.3d 307, 316–19 (4th Cir. 2003) (applying *Sandoval*; concluding there is an implied right of action to enforce 34 C.F.R. § 100.7(e) insofar as the institution retaliated “for opposing practices that one reasonably believes are made unlawful by § 601” of Title VI).

158. *See supra* text accompanying notes 144–48.

159. *Guardians Ass'n*, 463 U.S. at 604–06 (allowing prospective, noncompensatory equitable relief in a disparate impact case); *Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 630 (1984) (allowing equitable relief in the form of back pay upon a showing of intentional discrimination in violation of § 504 of the Rehabilitation Act); *Adams v. Richardson*, 480 F.2d 1159, 1165–65 (D.C. Cir. 1973) (affirming broad injunctive relief against federal agency).

160. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75–76 (1992) (Title IX case stating the general rule that absent clear direction to the contrary by Congress, where there is a cause of action under a federal statute the federal courts have the power to award any appropriate relief). *See also Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1198 (11th Cir. 2007) (non-economic compensatory damages are available for intentional violations of the Rehabilitation Act § 504 claims); *Rodgers v. Magnet Cove Pub. Sch.*, 34 F.3d 642, 643–44 (8th Cir. 1994) (applying *Franklin* and holding that money damages are available for § 504 violations); *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 830 (4th Cir. 1994) (finding that *Franklin* permitted compensatory damages for § 504 claims). A later § 504 case, *Barnes v. Gorman*, 536 U.S. 181, 187–88 (2002), precluded punitive damages against public entities, indicating such damages should not be implied because it is doubtful the funding recipients “would have *accepted the funding* if

## 2. Title IX of the Education Amendments of 1972

Title IX prohibits sex discrimination in any education program or activity receiving federal financial assistance.<sup>162</sup> In *Jackson v. Birmingham Board of Education*,<sup>163</sup> the Court concluded “that when a funding recipient retaliates against a person *because* he complains of sex discrimination, this constitutes intentional ‘discrimination’ ‘on the basis of sex,’ in violation of Title IX.”<sup>164</sup> Therefore, Jackson, a teacher who alleged the school board retaliated against him because he had complained of sex discrimination in the high school’s athletic program, was allowed to proceed with his retaliation claim based on Title IX. Rejecting an argument based on *Sandoval*, the Court said “[i]n step with *Sandoval*, we hold that Title IX’s private right of action encompasses suits for retaliation, because retaliation falls within the statute’s prohibition of intentional discrimination on the basis of sex.”<sup>165</sup> The Court also rejected the board’s argument that Jackson could not rely on Title IX because he is an indirect victim of the alleged sex discrimination, holding that Title IX “does not require that the victim of the retaliation must also be the victim of the discrimination that is the subject of the original complaint.”<sup>166</sup>

In reaching its conclusion, the Court pointed to four previous Title IX decisions—*Cannon v. University of Chicago*,<sup>167</sup> holding Title IX implies a

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punitive damages liability was a required condition.” *Id.* See also *Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1191 (11th Cir. 2007) (finding that punitive damages are not available under the Rehabilitation Act under *Barnes*); *Bell v. Bd. of Educ. of Albuquerque Pub. Sch.*, 652 F. Supp. 2d 1211, 1212–14 (D. N.M. 2008) (emotional stress damages, like punitive damages, are not compensatory, therefore, they are not available under Title VI); *Singh v. Superintending Sch. Comm. for City of Portland*, 601 F. Supp. 865, 867 (D. Me. 1985) (punitive damages claim based on Title VI dismissed).

161. See 42 U.S.C. § 1988(b) (2006).

162. 20 U.S.C. § 1681, et seq (2006).

163. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).

164. *Jackson*, 544 U.S. at 174. See also 34 C.F.R. § 106.71 (2011) (incorporating 34 C.F.R. § 100.7(e) by reference to enforce Title IX); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (Title IX regulations incorporate Title VI regulation prohibiting retaliation); *Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 247–54 (5th Cir. 1997) (Title IX regulation creates implied right of action for retaliation under Title IX where retaliation is for allegations of noncompliance with substantive provisions of Title IX, such as systematic misallocation of resources among male and female athletes, and teacher/coach who complained of this misallocation has standing to challenge the alleged retaliation against her).

165. *Jackson*, 544 U.S. at 178. See also *Atkinson v. Lafayette Coll.*, 460 F.3d 447, 451–52 (3d Cir. 2006) (based on *Jackson*, the court reversed the dismissal of the plaintiff’s Title IX retaliation claim).

166. *Id.* at 179.

167. 441 U.S. 677 (1979).



private right of action to enforce the prohibition on intentional sex discrimination; *Franklin v. Gwinnett County Public Schools*,<sup>168</sup> holding that Title IX authorizes private parties to seek damages for intentional violations of Title IX; *Gebser v. Lago Vista Independent School District*,<sup>169</sup> holding that the private right of action under Title IX “encompasses intentional sex discrimination in the form of a recipient’s deliberate indifference to a teacher’s sexual harassment of a student”;<sup>170</sup> and *Davis v. Monroe County Board of Education*,<sup>171</sup> holding that the private right of action under Title IX reaches a recipient’s deliberate indifference to sexual harassment of one student by another student—as support for a broad interpretation of Title IX’s prohibition on discrimination on the basis of sex.<sup>172</sup> The Court stated that retaliation constitutes discrimination “on the basis of sex” because it is an intentional response to the nature of the complaint, i.e., an allegation of sex discrimination.<sup>173</sup>

*Jackson* is consistent with several other decisions holding that retaliation is a form of discrimination. Just before Title IX was enacted in 1972, the Court in *Sullivan v. Little Hunting Park, Inc.*,<sup>174</sup> held that § 1982,<sup>175</sup> which prohibits race discrimination in property-related transactions, provides a cause of action for anyone, regardless of his or her race, who alleges retaliation “for the advocacy of [the black person’s] cause.”<sup>176</sup> More recently, in *Gomez-Perez v. Potter*,<sup>177</sup> the Court held that § 633a(a)<sup>178</sup> of the ADEA prohibits retaliation against a federal employee who complains of age discrimination because “the statutory phrase ‘discrimination based on age’ includes retaliation based on the filing of an age discrimination complaint.”<sup>179</sup> In reaching this conclusion, the Court relied upon *Sullivan* and *Jackson*. Finally, in *CBOCS West, Inc. v. Humphries*, the Court held that § 1981,<sup>180</sup> which prohibits race discrimination in contracting, also prohibits retaliation against one seeking to enforce § 1981 rights.<sup>181</sup>

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168. 503 U.S. 60 (1992).

169. 524 U.S. 274 (1998).

170. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173 (2005).

171. 526 U.S. 629 (1999).

172. *Jackson*, 544 U.S. at 173–74.

173. *Id.* at 174. See also *Papelino v. Albany Coll. of Pharm. of Union Univ.*, 633 F.3d 81, 91–93 (2d Cir. 2011); *Atkinson v. LaFayette Coll.*, 460 F.3d 447, 452 (3d Cir. 2006); *Dawn L. v. Greater Johnstown Sch. Dist.*, 586 F. Supp. 2d 332, 374 (W.D. Pa. 2008).

174. 396 U.S. 229 (1969).

175. 42 U.S.C. § 1982.

176. *Sullivan*, 396 U.S. at 237.

177. 553 U.S. 474 (2008).

178. 29 U.S.C. § 633a(a) (2006).

179. 553 U.S. at 479 (2008).

180. 42 U.S.C. § 1981 (2006).

181. 553 U.S. 442 (2008).

*Jackson* is important, not only for its recognition that Title IX addresses retaliation, but also because it recognizes the importance of prohibiting retaliation as a means of encouraging enforcement of antidiscrimination provisions. The Court indicated that “if retaliation were not prohibited, Title IX’s enforcement scheme would unravel,” and that, without such protection from retaliation, “individuals who witness discrimination would likely not report it.”<sup>182</sup> Because the Title IX enforcement scheme depends on individual reporting as a means of placing recipients of federal financial assistance on “actual notice” of discrimination, to allow recipients to avoid such notice by retaliating against those who dare complain would subvert enforcement of the statute. The Court was unwilling to “assume that Congress left such a gap in its scheme.”<sup>183</sup>

While the Court in *Jackson* did not have to address the proof scheme, it did note that “*Jackson* will have to prove that the Board retaliated against him *because* he complained of sex discrimination.”<sup>184</sup> There is no reason to believe that plaintiffs will not be allowed to use both the direct method of proof and the indirect method established in *McDonnell Douglas* in attempting to establish retaliation claims.<sup>185</sup> In general, the enforcement scheme as well as the available relief is consistent with the Title VI scheme and relief.<sup>186</sup>

### 3. Section 504 of the Rehabilitation Act of 1973

As pointed out above,<sup>187</sup> Section 12203 of the ADA expressly prohibits retaliation.<sup>188</sup> Section 504 provides that the “standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under Title I

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182. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005).

183. *Id.* at 181.

184. *Id.* at 184.

185. *See, e.g., Atkinson v. Lafayette Coll.*, 653 F. Supp. 2d 581, 594–611 (E.D. Pa. 2009).

186. *See supra* Part I.E.1. *See also* *Lucero v. Nettle Creek Sch. Corp.*, 566 F.3d 720, 728–30 (7th Cir. 2009) (holding that a teacher’s reassignment from twelfth-grade English to seventh-grade English would not dissuade a reasonable teacher from bringing a discrimination charge against the school corporation and, therefore, the reassignment is not a materially adverse employment action); *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995) (by analogy to Title VII cases, the court finds allegations of retaliation, lacking in particular circumstances supporting inference of retaliation, insufficient to state a claim). *Compare* *Bolla v. Univ. of Haw.*, 2010 WL 5388008, at \*9–14 (D. Haw. Dec. 16, 2010) (court looks to Title VII cases for guidance).

Title IX regulations adopted by the U.S. Department of Education incorporate Title VI regulations. 34 C.F.R. § 106.71 (2011).

187. *See supra* Part I.C.

188. 42 U.S.C. § 12203 (2006).

of the [ADA].”<sup>189</sup> The courts interpret this reference to Section 12203 of the ADA as incorporating by reference the substantive ban on retaliation found in Section 12203(a) and (b).<sup>190</sup> Assuming this is a fair reading of Section 794(d), the incorporation of Section 12203 of the ADA is limited to employment.<sup>191</sup> Parties litigating claims alleging retaliation in violation of § 504 should look to cases interpreting Section 12203 of the ADA, which often rely on cases interpreting the anti-retaliation provision in Title VII.<sup>192</sup> Courts addressing claims of retaliation in violation of § 504 have applied *Burlington Northern*<sup>193</sup> to such retaliation claims.<sup>194</sup>

Retaliation claims based on § 504 are not limited to the employment context. A regulation adopted pursuant to § 504<sup>195</sup> incorporates the Title VI regulation<sup>196</sup> that prohibits retaliation. The all-inclusive language of the regulation, as well as § 504, supported a determination that a special education teacher had standing to challenge retaliation against her for voicing concerns that the County Office of Education was not complying with federal and state laws requiring special education services for children with a disability.<sup>197</sup> In addition, the teacher was allowed to pursue her retaliation claim based on Title II of the ADA.<sup>198</sup> In an action brought by a parent on

189. 29 U.S.C. § 794(d) (2006) specifically refers to §§ 12201–12204 and 12210 of the ADA and one of those sections, § 12203, addresses retaliation.

190. *See, e.g.*, *Reinhardt v. Albuquerque Pub. Schs. Bd.*, 595 F.3d 1126, 1132 (10th Cir. 2010); *Jarvis v. Potter*, 500 F.3d 1113, 1125–27 (10th Cir. 2007) (holding that although the Rehabilitation Act’s prohibition on discrimination does not explicitly mention retaliation, because of the references to the ADA in § 504, the Rehabilitation Act prohibits retaliation).

191. *See* 29 U.S.C. § 794(d) (2006), which refers to “a complaint alleging employment discrimination.”

192. *See, e.g.*, *Blazquez v. Bd. of Educ. of City of Chicago*, 2006 WL 3320538, at \*5 (N.D. Ill.) (teacher alleging § 504 retaliation claim against private individuals was dismissed, but upheld against Board of Education); *Smith v. District of Columbia*, 430 F.3d 450, 455 (D.C. Cir. 2005); *Cisneros v. Wilson*, 226 F.3d 1113, 1132–34 (10th Cir. 2000).

193. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

194. *See, e.g.*, *Mogenhan v. Napolitano*, 613 F.3d 1162, 1166 (D.C. Cir. 2010); *Reinhardt v. Albuquerque Pub. Schs. Bd. of Educ.*, 595 F.3d 1126, 1131–35 (10th Cir. 2010).

195. 34 C.F.R. § 104.61 (2011).

196. 34 C.F.R. § 100.7(e) (2011).

197. *See* *Barker v. Riverside County Office of Educ.*, 584 F.3d 821, 824–26 (9th Cir. 2009) (Congress did not intend to limit standing to only those with a disability).

198. *Id.* at 826–28 (the anti-retaliation provision of Title II of the ADA is found in a regulation, 28 C.F.R. § 35.134). *See also* *P.N. v. Greco*, 282 F.Supp.2d 221, 242–44 (D.N.J. 2003) (relying on the ADA retaliation provision, 42 U.S.C. § 12203, in an action by parents alleging retaliation for advocacy on behalf of their child and other students and requesting accommodations for their child).

behalf of her son with a disability, alleging retaliation in violation of § 504, the court indicated that she had to prove her son had engaged in protected activity, that the actions of the defendant were “sufficient to deter a person of ordinary firmness from exercising his rights,” and that a causal connection between the protected activity and the retaliatory action.<sup>199</sup> Thus, § 504 is available to anyone affiliated with a college or university who challenges action taken in retaliation for efforts to address discrimination based on a disability.

#### 4. Age Discrimination Act of 1975

The purpose of this Act is “to prohibit discrimination on the basis of age in programs or activities receiving Federal financial assistance.”<sup>200</sup> More specifically, the Act provides that “no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.”<sup>201</sup> An exemption provides that it is not a violation of the Act:

[f]or any person to take any action otherwise prohibited by the provisions of § 6102 . . . if, in the program or activity involved—  
(A) such action reasonably takes into account age as a factor necessary to the normal operation or the achievement of any statutory objective of such program or activity; or (B) the differentiation made by such action is based upon reasonable factors other than age.<sup>202</sup>

There is also an exclusion for employment practices.<sup>203</sup> Consistent with the federal financial assistance acts discussed above, the federal agencies providing the financial assistance have enforcement power.<sup>204</sup> In addition, the Act provides for civil actions in a United States district court, at least for injunctive relief after exhaustion of administrative remedies.<sup>205</sup>

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199. *See* S.L.M., ex rel. Liedtke v. Dieringer School Dist., 614 F. Supp. 2d 1151, 1162 (W.D. Wash. 2008) (quoting *Lauren W. v. DeFlaminis*, 480 F.3d 259, 267 (3d Cir. 2007) (requesting accommodation is protected activity)).

200. 42 U.S.C. § 6101 (2006).

201. 42 U.S.C. § 6102 (2006). *See also* 45 C.F.R. § 90.12 (2011).

202. 42 U.S.C. § 6103(b)(1) (2006). *See also* 45 C.F.R. §§ 90.14 & 90.15 (2010).

203. 42 U.S.C. § 6103(c) (2006). *See also* 45 C.F.R. § 90.3(b)(2) (2010); *Tyrell v. City of Scranton*, 134 F. Supp. 2d 373, 381–82 (M.D. Pa. 2001).

204. 42 U.S.C. § 6104(a)–(c) (2006). *See also* 45 C.F.R. §§ 90.42–90.45 & 90.47 (2010).

205. 42 U.S.C. § 6104(e)–(f) (2006). *See also* 45 C.F.R. § 90.50 (2010); *Rannels v. Hargrove*, 731 F. Supp. 1214, 1221 (E.D. Pa. 1990). However, there is no private right of action for damages. *See Tyrell*, 134 F. Supp. 2d at 383–84 (interpreting 42 U.S.C. § 6104).

While the statute does not address retaliation, it is addressed in a federal regulation, which says:

Each agency shall provide in its regulations that recipients may not engage in acts of intimidation or retaliation against any person who: (a) attempts to assert a right protected by the Act; or (b) cooperates in any mediation, investigation, hearing, or other part of the agency's investigation, conciliation, and enforcement process.<sup>206</sup>

Consistent with *Jackson v. Birmingham Board of Education*,<sup>207</sup> a victim of retaliation can argue that such retaliation constitutes discrimination in violation of § 6102.<sup>208</sup> Litigants should look to retaliation cases based on the other federal financial assistance statutes discussed above in Part I.E.1–3.

#### F. Race Discrimination in Contracting and Property Transactions (§§ 1981–1982)

These two Reconstruction Era provisions address only race discrimination, and “race” is defined broadly, but it does not include discrimination based solely on one’s place or nation of origin or religion.<sup>209</sup> Section 1981(a) provides that “[a]ll persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.”<sup>210</sup> In *Runyon v. McCrary*,<sup>211</sup> the Court held that § 1981 prohibits private schools from excluding qualified children solely because of their race. Section 1982 provides that “[a]ll citizens of the United States shall have the same right . . . as is enjoyed by white citizens . . . to inherit, purchase,

206. 45 C.F.R. §90.46 (2010). Whether there is a private right of action to enforce such a regulation is discussed in Part I.E.1, *supra*.

207. 544 U.S. 167 (2005). See discussion in Part I.E.2, *supra*.

208. 42 U.S.C. § 6102 (2006).

209. See *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (holding that the discriminatory animus must be “directed towards the kind of group that Congress intended to protect when it passed the statute”); *St. Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987). See also *Torgerson v. City of Rochester*, 605 F.3d 584, 600 (8th Cir. 2010) (noting that § 1981 does not encompass discrimination claims based on national origin); see also *Bachman v. St. Monica’s Congregation*, 902 F.2d 1259, 1261 (7th Cir. 1990) (Jewish couple’s claim of discrimination while attempting to buy property was not actionable under § 1981 solely because being Jewish is also a race when the claim was obviously rooted in discrimination based on religion); *Anooya v. Hilton Hotels Corp.*, 773 F.2d 48, 50 (7th Cir. 1984) (noting that § 1981 does not protect against religious discrimination); *Ahmed v. Mid-Columbia Med. Ctr.*, 673 F. Supp. 2d 1194, 1204 (D. Or. 2009) (§ 1981 protects individuals only from discrimination based on race and was not applicable to plaintiff’s claims based on religion; specifically, comments made about halal food were not actionable).

210. 42 U.S.C. § 1981(a) (2006).

211. 427 U.S. 160 (1976).

lease, sell, hold, and convey real and personal property.”<sup>212</sup> Like the funding statutes discussed above, neither of these two statutes includes an express prohibition of retaliation.

The Court first considered the retaliation issue under these statutes in *Sullivan v. Little Hunting Park, Inc.*, an action based on § 1982, noting that to permit the corporation to punish Sullivan “for trying to vindicate the rights of minorities protected by § 1982” would give “impetus to the perpetuation of racial restrictions on property.”<sup>213</sup> Later, in *Jackson v. Birmingham Board of Education*, the Court said “in *Sullivan* we interpreted a general prohibition on racial discrimination [in § 1982] to cover retaliation against those who advocate the rights of groups protected by that prohibition.”<sup>214</sup> When the Court first considered a retaliation claim based on § 1981, in *CBOCS West, Inc. v. Humphries*, the Court indicated it had consistently construed §§ 1981 and 1982 similarly because of the “common language, origin, and purposes.”<sup>215</sup> The Court concluded by saying “that considerations of *stare decisis* strongly support our adherence to *Sullivan* and the long line of related cases where we interpret §§ 1981 and 1982 similarly. . . . We consequently hold that [§ 1981] encompasses claims of retaliation.”<sup>216</sup>

The combination of *Sullivan* and *CBOCS* makes it apparent that both § 1981 and § 1982 address retaliation as a form of race discrimination. There is no requirement that plaintiffs alleging a violation of either of these sections exhaust administrative remedies. Generally, the relevant state’s personal injury limitations period governs litigation under §§ 1981 and 1982.<sup>217</sup> However, in employment-related cases, because most retaliation claims arise after the formation of the employment contract, the four-year statute of limitations set forth in 28 U.S.C. § 1658 will govern retaliation claims under § 1981.<sup>218</sup>

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212. 42 U.S.C. § 1982 (2006).

213. 396 U.S. 229, at 237 (1969). A few years later, in *Tillman v. Wheaton-Haven Recreation Ass’n, Inc.*, 410 U.S. 431, 439–40 (1973), where an action was challenging the operation of a community swimming pool, the use of which was limited to white members and their guests, the Court noted the common origin of §§ 1981 and 1982 and saw no reason to construe the two sections differently in rejecting the Association’s argument that it was exempt from those sections as a “private club.”

214. 544 U.S. 167, at 176 (2005).

215. 553 U.S. 445, 448 (2009).

216. *Id.* at 457. In *Delgado-O’Neil v. City of Minneapolis*, 745 F. Supp 2d. 894 (D. Minn.), the court held that *CBOCS* did not involve a state actor and, therefore, where the employer is a state actor a retaliation claim under § 1981 must be brought pursuant to § 1983.

217. See *Goodman v. Lukens Steel Co.*, 482 U.S. 656 (1987).

218. See *Jones v. R.R. Donnelly & Sons Co.*, 541 U.S. 369 (2004); *Johnson v. Lucent Technologies*, 6353 F.3d 1000, 1006–08 (9th Cir. 2011) (plaintiff’s §1981 retaliation claim is governed by the four-year limitations period in § 1658).

Private colleges and universities are subject to the restrictions imposed by §§ 1981 and 1982 because there is no government action requirement in either of those statutes.<sup>219</sup> Officials of such colleges and universities can be sued under these sections; however, they may be able to establish a qualified immunity defense that protects them from an award of damages unless there was a violation of clearly established rights.<sup>220</sup> Whether *respondeat superior* can be utilized to impose liability on private colleges or universities is not clear, but several lower court decisions hold that such liability is available.<sup>221</sup>

Suits against state universities and colleges, under §§ 1981 and 1982, are complicated by the decision in *Jett v. Dallas Independent School District*, holding that § 1983<sup>222</sup> provides the exclusive remedy for violation of the rights protected by § 1981 when a claim is brought against a state actor.<sup>223</sup> *Jett* also precludes *respondeat superior* liability in a § 1981 claim against state institutions, meaning such entities can be held responsible for the actions of their officials and agents only upon a showing that the individuals' actions were taken pursuant to entity policy or custom.<sup>224</sup> Section 1981(c), which was added by a 1991 amendment, states that "the rights protected by this Section are protected against impairment by nongovernmental discrimination and impairment under color of state law."<sup>225</sup> It is not clear whether the ruling in *Jett* was affected by this amendment to § 1981.<sup>226</sup> In short, the safe course for plaintiffs to follow when suing public colleges and universities alleging violations of § 1981 is to utilize § 1983 as the source of a cause of action to enforce the substantive rights provided by § 1981.

As in discrimination cases alleging violations of §§ 1981 and 1982, courts facing retaliation claims based on these two statutes generally look to Title

219. 42 U.S.C. § 1981(c) (2006). *See also* Runyon v. McCrary, 427 U.S. 160, 179 (1976) (applying § 1981); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 438 (1968) (applying § 1982).

220. *See, e.g.*, Lockridge v. Bd. of Trs. of Univ. of Ark., 315 F.3d 1005, 1010 (8th Cir. 2003); Felton v. Polles, 315 F.3d 470, 483–88 (5th Cir. 2002).

221. *See, e.g.*, Cabrera v. Jakobovitz, 24 F.3d 372, 385–88 (2d Cir. 1994); City of Chicago v. Matchmaker Real Estate Sales Ctr., Inc., 982 F.2d 1086, 1096–97 (7th Cir. 1992). *Compare* Daniels v. Dillard's, Inc., 373 F.3d 885, 888 n.4 (8th Cir. 2004). *See also* Gen. Bldg. Contractors Ass'n, Inc. v. Pennsylvania, 458 U.S. 375 (1982) (assuming, without deciding, that *respondeat superior* liability is available under § 1981).

222. 42 U.S.C. § 1983 (2006).

223. 491 U.S. 701, 731–35 (1989).

224. *Id.* at 735–36.

225. 42 U.S.C. § 1981(c) (2006).

226. *See, e.g.*, Burn v. Bd. of Cnty. Comm'rs of Jackson Cnty., 330 F.3d 1275, 1288 n.10 (10th Cir. 2003) (noting a split in the circuits). *See also* McGovern v. Philadelphia, 554 F.3d 114, 117–21 (3d Cir. 2009) (noting that five of six circuits that have considered the issue concluded that Congress did not intend to reject the ruling in *Jett*).

VII cases for guidance.<sup>227</sup> One significant difference, however, is that there is no need to exhaust administrative remedies before proceeding in court.<sup>228</sup> Another difference is the absence of a statutory cap on damages awarded under §§ 1981 and 1982.<sup>229</sup>

## II. FREEDOM OF SPEECH—FIRST AMENDMENT

A complaint is a form of speech.<sup>230</sup> Therefore, the First Amendment is in play when government retaliates against one who complains, but the Court has discounted substantially the value of speech by “insiders”<sup>231</sup> who complain about government institutions. For example, government employees, officials, and contractors, as well as applicants for employment and contracts, have limited protection when they speak on matters of public concern in their capacity as citizens, rather than pursuant to their official duties, and become the targets of retaliatory action because of their speech.<sup>232</sup> Additionally, public college and university<sup>233</sup> students’ speech may be protected.<sup>234</sup> Where such claims are appropriate, the statutory authorization for litigation is found in § 1983.<sup>235</sup>

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227. *See, e.g.*, Hicks v. Baines, 593 F.3d 159, 164–70 (2d Cir. 2010); Butler v. Ala. Dep’t of Transp., 536 F.3d 1209, 1213–14 (11th Cir. 2008).

228. *See, e.g.*, Tyson v. Gannett Co., Inc., 538 F.3d 781, 783 (7th Cir. 2008).

229. *See* 42 U.S.C. § 1981a(a)(1) (capping the limits on damages to actions brought under Title VII).

230. Konits v. Valley Stream Cent. High Sch. Dist., 394 F.3d 121, 124–25 (2d Cir. 2005) (complaint filed in court); Wolfel v. Bates, 707 F.2d 932, 933–34 (6th Cir. 1983) (suppression of prisoner’s complaint was unlawful absent a showing that the complaints were enticing dangerous activities).

231. By this, I mean individuals connected to an institution as, e.g., employees or students.

232. Garcetti v. Ceballos, 547 U.S. 410 (2006); Board of Cnty. Comm’rs. v. Umbehr, 518 U.S. 668 (1996); Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

233. Generally, private colleges and universities are not subject to such claims because the First Amendment restricts only government action.

234. *See, e.g.*, Castle v. Appalachian Technical Coll., 631 F.3d, 1194, 1197–99 (11th Cir. 2011) (student alleged she was suspended in violation of the First Amendment because she reported one of her instructors for falsifying attendance records; school administrators had a lawful motive for suspending the student, and could have reasonably believed that suspending the student would not violate the First Amendment). *Compare* Salehpoor v. Shahinpoor, 358 F.3d 782, 787–88 (10th Cir. 2004) (for a student concern, complaint, or grievance to be protected by the First Amendment it must be related to a public concern); Heenan v. Rhodes, 757 F. Supp. 2d 1229, 1239–1241 (M.D. Ala. 2010) (nursing student’s self-serving challenge to university grading and disciplinary policy did not constitute freedom of speech). The Supreme Court has substantially limited the First Amendment rights of elementary and secondary students. *See, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); Bethel



First Amendment claims are frequently brought by public college and university employees, such as faculty members, but students who experience retaliatory action due to speech may also assert such a claim. Free speech claims brought by faculty members often raise academic freedom issues as well,<sup>236</sup> including the question of whether the First Amendment protects academic freedom.<sup>237</sup> The extent of the protection provided by the First Amendment to college and university employees depends on the circumstances. As a starting point, plaintiffs must establish that they were speaking as citizens, rather than pursuant to their official duties as employees of the college or university. This limitation became a major hurdle when the

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Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986). Those limitations should, however, not be extended to college and university students. *See, e.g.*, McCauley v. Univ. of the Virgin Islands, 618 F.3d 232, 242–43 (3d Cir. 2010) (the pedagogical differences between elementary or secondary education and post-secondary education require greater leeway in the restriction of speech, but it is not an infinite protection); DeJohn v. Temple Univ., 537 F.3d 301, 315 (3d Cir. 2008) (the court recognized a limited right to control free speech in university classroom); Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243, 260 (3d Cir. 2002) (recognizing a difference in regulating student speech in elementary and high schools compared to public universities).

235. 42 U.S.C. § 1983.

236. *See, e.g.*, *Garcetti*, 547 U.S. at 425.

237. *See, e.g.*, *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (“We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition”); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. ‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools’” (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960))); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (noting that a governmental inquiry into the contents of a scholar's lectures at a state university “unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread”); *Hardy v. Jefferson Community College*, 260 F.3d 671, 679–82 (6th Cir. 2001) (recognizing a robust tradition of academic freedom in the classroom and concluding that a professor’s racially offensive terms were germane to the subject matter and protected); *Bishop v. Arnov*, 926 F.2d 1066, 1073–77 (11th Cir. 1991) (university has authority to reasonably control curriculum and content imparted during class time without violating professors right to academic freedom and free speech); *Parate v. Isibor*, 868 F.2d 821, 828 (6th Cir. 1989) (professor’s refusal to alter the grade of a student at the university’s request, which resulted in his termination, was a violation of his academic freedom and right to free speech).

Court, in *Garcetti v. Ceballos*,<sup>238</sup> determined that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>239</sup> The Court recognized that its analysis in *Garcetti* may not, however, control speech in an academic setting:

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.<sup>240</sup>

Since *Garcetti*, the lower courts have been inclined to treat “pursuant to their official duties” broadly, thereby precluding many First Amendment claims.<sup>241</sup> There is much uncertainty because the Court indicated that it had

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238. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

239. *Id.* at 421.

240. *Id.* at 425. *See also* *Adams v. Trs. of the Univ. of N.C. Wilmington*, 640 F.3d 550, 561 (4th Cir. 2011) (holding that *Garcetti* did not control the First Amendment speech claim of an associate professor alleging he was denied the position of tenured professor because of his speech reflecting conservative and Christian viewpoints). *Cf.* *Gorum v. Sessoms*, 561 F.3d 179, 186 n. 6 (3d Cir. 2009) (recognizing *Garcetti*’s reference to speech related to scholarship or teaching and the lack of clarity in applying the language, and concluding the speech at issue was completely unrelated to such activity); *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667, 670–74 (7th Cir. 2006) (college may direct its instructor to keep personal discussions about sexual orientation or religion out of a cosmetology class or clinic).

241. *See, e.g.*, *Bonn v. City of Omaha*, 623 F.3d 587, 592–93 (8th Cir. 2010) (public safety auditor’s report criticizing the police department is not protected under *Garcetti* because of her admission in response to an interrogatory that her report was “prepared as a function or official duty of [her] position as the Public Safety Auditor of the City of Omaha”; further, her comment to the media about the report was also made pursuant to her official duties); *Abcarian v. McDonald*, 617 F.3d 931, 935–38 (7th Cir. 2010) (*Garcetti* reaches claims against co-employees, at least where their actions directly advance the employer’s interest in maintaining an orderly workplace; plaintiff physician, who was the service chief of the Department of Surgery at the University of Illinois Medical Center, as well as head of the Department of Surgery at the University of Illinois College of Medicine, spoke pursuant to his official duties when he addressed risk management, fees charged to physicians, and surgeon abuse of prescription medications); *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 348–50 (6th Cir. 2010) (a teacher’s complaints to her supervisors about the size of her teaching caseload were made as a public employee rather than as a citizen and, therefore, were not protected); *Gorum v. Sessoms*, 561 F.3d 179, 185–86 (3d Cir. 2009) (plaintiff-

“no occasion to articulate a comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate,” and it rejected “the suggestion that employers can restrict employees’ rights by creating excessively broad job descriptions.”<sup>242</sup> This limitation, and the uncertainty surrounding it, chills much government employee speech and deprives the public of information about public institutions that is available only to employees.

If the government employee survives the *Garcetti* hurdle, the next question is whether the speech at issue addresses a matter of public concern. The “public concern” inquiry is also filled with substantial uncertainty, further chilling speech by government employees. While some speech, such as speech disclosing public corruption, certainly addresses a matter of public concern, speech alleging discrimination may or may not fit within this category, depending upon whether a court determines it primarily involves a personal grievance rather than a broader challenge to institutional practices.<sup>243</sup>

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professor’s assistance to a student facing disciplinary problems fell within the scope of his official duties because his experience with the university’s disciplinary code made him a *de facto* advisor to all students with disciplinary problems and because he used university resources to assist students; further, his revocation of the university president’s invitation to speak at a fraternity breakfast fell within the responsibility of professors aiding faculty and alumni involvement with student organizations and clubs as mentors and advisors).

242. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

243. *See, e.g.*, *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979); *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 181–84 (6th Cir. 2008) (plaintiff program coordinator’s conversations with a newspaper reporter, during which he primarily discussed allegations of sexual harassment against the executive director of the agency, addressed a matter of public concern); *Charles v. Grief*, 522 F.3d 508, 514–15 (5th Cir. 2008) (speech relating to racial discrimination almost always involves a matter of public concern); *Campbell v. Galloway*, 483 F.3d 258, 266–70 (4th Cir. 2007) (while complaints of sexual harassment in the workplace are not per se matters of public concern, viewing the plaintiff’s complaints in the light most favorable to her, the court concludes that her complaints addressed a matter of public concern; similarly, her complaints about inappropriate conduct directed toward her as a female officer and conduct directed at members of the public raised a matter of public concern); *Konits v. Valley Stream Cent. High Sch. Dist.*, 394 F.3d 121, 124–26 (2d Cir. 2005) (plaintiff’s prior lawsuit against these defendants, alleging retaliation for assisting another employee of the school district in her suit alleging gender discrimination, constitutes speech on a matter of public concern; “any use of state authority to retaliate against those who speak out against discrimination suffered by others, including witnesses or potential witnesses in proceedings addressing discrimination claims, can give rise to a cause of action under [Section 1983]”). *Compare Phelan v. Cook Cnty.*, 463 F.3d 773, 790–91 (7th Cir. 2006) (because the plaintiff did not allege or introduce evidence showing that she expressed concerns about sexual harassment in the workplace beyond concerns specifically related to

The requirement can apply to claims based on the Petition Clause of the First Amendment.<sup>244</sup>

Next, the plaintiff also has to show a causal connection between the speech and the challenged adverse employment action. While it is clear that action short of discharge may constitute an adverse employment action, less drastic retaliatory actions may not satisfy the requirement. This situation involves essentially the same issue that arises in retaliation claims based on the statutes discussed above in Part I.<sup>245</sup> In determining causation, some courts have adopted the “but-for” standard from *Gross v. FBL Financial Services, Inc.*,<sup>246</sup> a case interpreting the antidiscrimination provision in the ADEA.<sup>247</sup>

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her treatment, her speech did not address a matter of public concern); *Richardson v. Sugg*, 448 F.3d 1046, 1061–63 (8th Cir. 2006) (basketball coach’s comment characterizing what other coaches were telling athletes who were considering the University of Arkansas was made in the course of his explaining recruiting challenges caused in part by an NCAA investigation; while matters of racial discrimination are inherently of public concern, neither the content nor context of the statement here indicates the coach was addressing racial matters).

244. *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488 (2011).

245. The “Burlington Northern standard,” i.e., the victim of retaliation need only show that the challenged action “well might have ‘dissuaded a reasonable worker from making or supporting a charge of discrimination,’” should apply to First Amendment claims. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). *See, e.g.*, *Dillon v. Morano*, 497 F.3d 247, 254–55 (2d Cir. 2007) (the proper test in determining whether an employment action is adverse is whether the alleged acts “would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights”).

246. *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009).

247. *See, e.g.*, *Vereecke v. Huron Valley Sch. Dist.*, 609 F.3d 392, 400–03 (6th Cir. 2010) (interpreting “substantial or motivating factor” as “essentially but-for cause,” the court held that temporal proximity is rarely sufficient to establish causation, and here the temporal proximity plus other evidence was not sufficient to show that the adverse employment actions were taken against the plaintiff, at least in part, by a desire to retaliate for his speech); *Kodish v. Oakbrook Terrace Fire Prot. Dist.*, 604 F.3d 490, 502–09 (7th Cir. 2010) (applying the “but-for” standard adopted in *Gross*, the court concluded there was sufficient direct evidence, including the chief’s comment that he did not like unions because “you have to live and die by the rules,” for a reasonable jury to conclude that the plaintiff’s speech caused the discharge; however, because the Board of Trustees made the challenged decision, the chief’s anti-union comment had to be connected to the Board, and the court concluded that the plaintiff’s evidence would satisfy the “singular influence” standard as well as a less demanding standard, and, therefore, summary judgment against the plaintiff was improper); *Waters v. City of Chicago*, 580 F.3d 575, 584–86 (7th Cir. 2009) (applying the decision in *Gross*, the court stated that the plaintiff must prove that his speech “was the ‘reason’ that the employer decided to act,” and the defendant was entitled to judgment as a matter of law because the plaintiff presented no evidence showing he was discharged in retaliation for his refusal to campaign for his general foreman); *Fairley v.*

Assuming the plaintiff successfully establishes the three elements described above, a defendant can still prevail by showing that it would have taken the adverse employment action even in the absence of the protected conduct,<sup>248</sup> or by showing that the *Pickering* balance<sup>249</sup> weighs in its favor.

*Pickering* requires consideration of the following factors:

- (1) The need to maintain discipline or harmony among co-workers; (2) the need for confidentiality; (3) the need to curtail conduct which impedes the [employee's] proper and competent performance of his daily duties; and (4) the need to encourage a close and personal relationship between the employee and his superiors, where that relationship calls for loyalty and confidence.<sup>250</sup>

The stronger an employee's showing that the statements at issue address a matter of public concern, the greater the burden on government to justify its adverse action.<sup>251</sup> However, it is difficult for an employee to predict whether a court will apply the *Pickering* balance in favor of the employer; so employee speech is chilled by the lack of a better-defined standard.

Retaliation claims brought by college or university students alleging a violation of the First Amendment are not as common as retaliation claims by employees. A recent example of such a case is *Castle v. Appalachian Technical College*.<sup>252</sup> A former nursing student alleged that her suspension from the licensed practical nursing program was in retaliation for reporting one of her instructors for falsifying attendance records. The court held she could establish a First Amendment retaliation claim by showing that "(1) her speech was constitutionally protected; (2) she suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) there was a causal relationship between the adverse conduct and the protected speech."<sup>253</sup> To establish the causal connection, the court indicated the plaintiff would have to show that the defendant "was subjectively motivated to take the adverse action because of the protected speech."<sup>254</sup> If the plaintiff establishes the elements of a claim, the court held that the burden shifts to the defendant "to show that she would have taken the

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Andrews, 578 F.3d 518, 525–26 (7th Cir. 2009) (holding that the Gross standard applies to employees' freedom of speech claims against their coworkers). Compare *Greene v. Doruff*, 660 F.3d 975, 978–80 (7th Cir. 2011) (explaining the 7th Circuit decisions above in an attempt to reconcile them with *Mt. Healthy*, *infra* n. 248).

248. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).

249. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

250. *Breuer v. Hart*, 909 F.2d 1035, 1039–40 (7th Cir. 1990).

251. *Connick v. Myers*, 461 U.S. 138, 152 (1983); *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 192–97 (5th Cir. 2005).

252. *Castle v. Appalachian Technical Coll.*, 631 F.3d 1194, 1197–99 (11th Cir. 2011).

253. *Id.* at 1197.

254. *Id.*

same action in the absence of the protected conduct.”<sup>255</sup> Here, the plaintiff’s claim failed because the individual defendants were entitled to qualified immunity.<sup>256</sup>

If a retaliation plaintiff establishes a violation of the First Amendment, both equitable relief and compensatory and punitive damages are available. However, if the college or university is a state institution, the First Amendment claim must be brought against the responsible officials, in their official capacity for injunctive relief and in their individual capacity for damages, because the institution is not a “person” for purposes of § 1983.<sup>257</sup> The prevailing party in a § 1983 action can obtain attorney fees if certain conditions are fulfilled.<sup>258</sup>

### III. ACHIEVING THE PURPOSE OF ANTI-RETALIATION PROVISIONS

The purpose of anti-retaliation provisions is to encourage victims of discrimination to report discrimination, internally or externally or both, without fear of retaliation. In a college or university setting, the mere possibility of retaliation against employees or students who complain of discrimination can have a substantial chilling effect on their willingness to complain. Of course, if the victims of discrimination do not complain, discrimination is likely to continue unchecked.<sup>259</sup> Discrimination complaints against institutions are generally viewed negatively by their leaders and, therefore, as something that should be discouraged. However, enlightened educational institutions should view complaints of discrimination as an opportunity to improve the environment for faculty, staff, and students. In

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255. *Id.* (citing *Mt. Healthy Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977)).

256. *Id.* at 1199. *See also* *Constantine v. Rectors & Visitors of George Mason University*, 411 F.3d 474, 499–501 (4th Cir. 2005) (plaintiff alleging retaliation against her after she complained about a professor’s constitutional law exam and the university grade appeals process stated a First Amendment claim).

257. *Will v. Mich. Dep’t of State Police*, 491 U.S. 58 (1989). Independent of Will, the Eleventh Amendment can protect state institutions from an award of damages against them in federal court, absent their consent to suit. *See, e.g.*, *Regents of the Univ. of Calif. v. Doe*, 519 U.S. 425 (1997); *Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985); *but see Alden v. Maine*, 527 U.S. 706 (1999).

258. 42 U.S.C. § 1988(b). A prevailing plaintiff is ordinarily entitled to attorney fees “unless special circumstances would render such an award unjust,” *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983), while prevailing defendants recover fees “only where the suit was unreasonable, frivolous, meritless, or vexatious.” *Christianburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421 (1978).

259. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005) (“[r]eporting incidents of discrimination is integral to Title IX enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX’s enforcement scheme would unravel”).

other words, enlightened institutions will encourage discussion, including complaints, about their culture and environment. Institutions that take this approach understand the long-term benefit of being made aware of discrimination, as well as perceived discrimination, and taking affirmative steps to remedy the situation. Such institutions will want to create an atmosphere that encourages complaints and discourages retaliation. Because such conduct is contrary to human nature, it will take extraordinary and courageous leadership to create the appropriate atmosphere. Before suggesting steps that educational institutions might take, I will explore briefly the psychology of retaliation.

#### A. Psychology of Retaliation

In the employment context, only individuals with authority in the workplace can take adverse, discriminatory employment actions against employees. However, coworkers can engage in harassing actions that create a hostile work environment. Retaliation law addresses adverse employment actions taken against individuals who have questioned what they reasonably believe to be illegal discrimination directed at them or others. As with discriminatory actions, generally only individuals with authority in the workplace can take adverse, retaliatory employment actions.<sup>260</sup> But within the hierarchy of an institution, there can be several supervisory levels. Supervisors can discriminate and retaliate against those below them and can be the victims of discrimination and retaliation at the hands of those above them in the hierarchy.<sup>261</sup> Therefore, the least powerful members of a workforce are most likely to be the victims of illegal discrimination, and as such, the most likely to have reason to complain of discrimination. Of course, when they complain, they are the most vulnerable to retaliatory action.

Because most employers dislike complaints of discrimination, retaliation or the threat of retaliation may be viewed by employers as an important means of discouraging complaints. Current employees who feel they have been the victim of illegal discrimination are most vulnerable to retaliation, so they are most likely to be deterred from complaining about the discrimination. Those who are discriminated against in hiring or firing generally<sup>262</sup> are not subject to

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260. Of course those who complain can face a hostile work environment created by other workers. Even coworkers who agree with the complaints may be afraid to support, or appear to support, those who complain because they fear retaliation if they show the slightest understanding.

261. Recall the “cat’s paw” theory that recognizes employer liability where one without actual authority to make an adverse employment decision has a discriminatory animus and influences the person with authority to make the challenged decision. *See supra* notes 58–66 and accompanying text.

262. I say “generally” because the Court, in *Burlington Northern and Santa Fe Railway Co. v. White*, 548 U.S. 53, 61–64 (2006), recognized that retaliation made

retaliation by the employer because, by definition, they are not affiliated with that employer.

Social science helps us understand the psychology of retaliation and offers some insights on how to go about eradicating, or at least reducing, retaliation. Professor Brake, in her article on retaliation,<sup>263</sup> says the social science literature “shows retaliation to be a powerful weapon of punishment for persons who challenge the hierarchies of race and gender.”<sup>264</sup> More specifically, she discusses research that shows (1) “retaliation operates against a backdrop of widespread reluctance to acknowledge and report discrimination,” (2) “persons who challenge discrimination are often disliked by the beneficiaries of the social structure,” and (3) “the threat of retaliation functions as a powerful silencer,” thus “functioning to preserve the social order.”<sup>265</sup> None of this is surprising, at least not to anyone who has faced discrimination and retaliation, or represented victims of discrimination and retaliation.

How do social scientists explain the reluctance to acknowledge and report discrimination? Studies conducted by researchers show that “[a]voiding attributions of discrimination enabled the subjects to preserve their socially oriented self-esteem and their feelings of control over their destiny.”<sup>266</sup> The “threat that acknowledging discrimination poses to an individual’s sense of control and invulnerability” imposes a “psychological resistance to perceiving [yourself] as [a victim] of discrimination.”<sup>267</sup> Even if victims of discrimination overcome this psychological resistance, there is an additional obstacle—“the influence of social constraints and the fear of negative judgments if they [confront] the offender.”<sup>268</sup> This exists despite the victims’ expectation that they would confront discrimination if they did not report discrimination; there is a “striking gap between expected and actual responses to bias.”<sup>269</sup> In short, there is “an acute perception of the social costs” of publicly confronting discrimination.<sup>270</sup> The research relied upon by Professor Brake looked at the reluctance to acknowledge race and gender bias, but “it is consistent with other general psychological phenomena.”<sup>271</sup>

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unlawful by Title VII does not have to be employment related. So, for example, retaliatory criminal charges against a former employee may be actionable.

263. Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005).

264. *Id.* at 25.

265. *Id.* See also Linda K. Johnsrud, *Higher Education Support Professionals: The Fear of Speaking Out*, THE NEA 2003 ALMANAC OF HIGHER EDUCATION, 109 (2003).

266. Brake, *supra* note 263, at 27.

267. *Id.* at 28.

268. *Id.* at 30.

269. *Id.*

270. *Id.* at 32.

271. *Id.* at 26 n.11.



Next Professor Brake asks why people retaliate and says a “disturbing body of research demonstrates a high propensity for men and white persons to dislike women and people of color when they claim discrimination, even when the claim is meritorious.”<sup>272</sup> If those who confront discrimination with a complaint are disliked and viewed as “troublemakers” and “hypersensitive,” then complaining carries a social cost or penalty. “The greatest social penalty imposed on persons who claim discrimination is inflicted by social groups in a position of privilege with respect to the discrimination in question.”<sup>273</sup> Since males are usually in a position of privilege with respect to sex discrimination, and white persons are in the same position with respect to race discrimination, it is not surprising that females and people of color bear the brunt of the social penalty. This means they either choose not to complain or, if they complain, they are likely to face retaliation. “When women and persons of color identify and object to discrimination . . . they are perceived as transgressing the social order, setting in motion a dynamic that sets the stage for retaliation.”<sup>274</sup>

According to Professor Brake, “[r]etaliatio[n] performs important work in institutions” because it suppresses (chills) complaints about perceived inequality, and it preserves “institutional power structures.”<sup>275</sup> As to the former, an institutional climate that causes a general fear of retaliation allows the threat of retaliation, without actual retaliation, to perform the chilling function. This is the perfect situation for an institution that does not care about either its employees or its customers (students)—it does not have to face discrimination claims because everyone is afraid to complain; therefore, there is no need to actually retaliate.

The second function, preserving “institutional power structures,” is served well by actual retaliation or an institutional atmosphere that creates fear of retaliation. Not surprisingly, “retaliation preys on the most vulnerable persons in institutions” and “simultaneously magnifies the power of high-status persons to engage in discrimination.”<sup>276</sup> Common sense suggests that those in power in an institution are in a position to engage in discrimination and create an atmosphere in which the victims of discrimination are unlikely to complain about it. Absent unusually courageous individuals who find the strength to complain about discrimination, the institutional norms are not likely to change.

In sum, retaliation, like discrimination, “is a product of an organization’s existing climate and structures. It is more likely to occur in organizations with a high tolerance for, and incidence of, discrimination.”<sup>277</sup> An “existing

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272. *Id.* at 32.

273. *Id.* at 34–35.

274. *Id.* at 36.

275. *Id.* at 36–39.

276. *Id.* at 40.

277. *Id.* at 41.

climate and structure” that utilizes the threat of retaliation to suppress complaints is entirely inconsistent with the purpose of an institution of higher education. Such institutions should strive to create an environment in which the free exchange of ideas, including reporting and complaining, is encouraged. Understanding the psychology of retaliation informs efforts to create such an environment.

#### B. Creating a Tolerance for and Appreciation of Complaints

Presumably, academic institutions are interested in promoting the free exchange of ideas. Ideas come in many forms, including complaints. Members of an institution who really care about the institution and want it to improve must raise questions about deficiencies in it, both actual and perceived. Discrimination in violation of federal statutes is an obvious deficiency in any educational institution. The following list enumerates steps an educational institution might consider if it wants to eliminate discrimination and provide an equal opportunity to everyone—administrators, faculty, staff, and students—associated with the institution.<sup>278</sup>

##### 1. Clearly Establish/Confirm Its Commitment to *Actual* Equality.

An institution committed to *actual* equality is very different than an institution committed to legal or formal equality. The latter commitment simply means the institution will state, in all the appropriate places, that it does not engage in illegal discrimination, including harassment, and identify the person(s) to whom those who believe they have experienced discrimination may report it. An institution’s commitment to *actual* equality goes much further and assures its constituents that it will, for example, examine the impact<sup>279</sup> of its neutral practices and policies; that it is aware of the possibility of unconscious discrimination and implicit bias<sup>280</sup> and will engage in affirmative steps to address it; that it regularly will look at the results<sup>281</sup> of its nondiscriminatory hiring and student recruitment policies to

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278. Cf. Lisa Cooney, *Understanding and Preventing Workplace Retaliation*, 88 MASS. L. REV. 3, 14–17 (2003).

279. Some neutral policies and practices with a disparate impact may violate Title VII. See 42 U.S.C. § 2000e-2(k). However, disparate impact alone does not violate all anti-discrimination statutes or the Equal Protection Clause of the Fourteenth Amendment. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001) (Title VI); *Washington v. Davis*, 426 U.S. 229 (1976) (Equal Protection).

280. See, e.g., Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 99–107 (2008).

281. What might be one of the most successful anti-discrimination laws, Title IX, is interpreted by the U.S. Department of Education to require certain measurable results in athletic opportunities available to males and females. See

determine whether those policies yield a diverse faculty, staff and student body; that it regularly will examine promotion and tenure decisions to determine whether the faculty is diverse at all ranks; and that it regularly will review academic achievement to determine whether there is an equal opportunity to succeed. Further, this commitment to *actual* equality should be prominently and proudly displayed in the institution's publications and website, not buried with legally-required notices.

## 2. Publish an Invitation to Report/Complain of Discrimination.

As part of the commitment to *actual* equality, educational institutions should publicly emphasize the important role of reporting discrimination, and perceived discrimination, in the effort to achieve *actual* equality. Such an invitation demonstrates that an institution is serious about the commitment referred to above in item one. As stated by the Court in *Jackson*, “[r]eporting incidents of discrimination is integral to Title XI enforcement and would be discouraged if retaliation against those who report went unpunished. Indeed, if retaliation were not prohibited, Title IX’s enforcement scheme would unravel.”<sup>282</sup> Of course, the invitation to report discrimination must be accompanied by a strong anti-retaliation policy, which includes enforcement procedures designed to instill confidence that retaliation will not be tolerated.

## 3. Establish and Commit Resources to an Independent Office of Equal Opportunity.

If an educational institution is committed to equal opportunity, it will make it a priority and fund it accordingly. While it takes much more than money to have an effective enforcement office, the amount of money allocated to the office says much about the institution's level of commitment. Obviously, enforcement cannot be in the hands of those with the authority to engage in discrimination and retaliation, i.e., those with the greatest incentive to avoid vigorous enforcement of policies aimed at promoting *actual* equality. This situation gets very difficult because of an inherent tension. One wants to establish an office outside of the normal power structure with the responsibility of policing those in the power structure. To whom will those in the enforcement office report? The Board, the President, the General Counsel, or an independent body with representatives of all constituents of the

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Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71,418 (1979); Clarification of Intercollegiate Athletics Policy Guidance: The Three-Part Test, <http://www2.ed.gov/print/about/offices/list/ocr/docs/clarific.html> (1996); Dear Colleague Letter, [http://www2.ed.gov/print/about/offices/list/ocr/letters/colleagu\\_e-20100420.html](http://www2.ed.gov/print/about/offices/list/ocr/letters/colleagu_e-20100420.html) (2010). These interpretations and clarifications are entitled to deference. See *Mansourian v. Regents of University of California*, 602 F.3d 957, 965 n.9 (9th Cir. 2010).

282. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 180 (2005).

institution? Actual independence, as well as the appearance of independence for the enforcement office, is critical to assure that the people the institution wants to report will in fact feel confident they can report discrimination without retaliation. Confidence in the enforcement office will be enhanced if the constituents are convinced that the institution is sincere about creating an environment in which the free exchange of ideas, including complaints, is appreciated. Another way to enhance confidence in an enforcement office is to show that the office disciplines those who engage in discrimination or retaliation, instead of “disciplining” those who report or complain.

#### 4. Establish and Communicate Equal Opportunity Goals.

As stated in item one, the ultimate institutional goal is to achieve *actual* equality, but that aspiration is too general. Achieving such equality is a long-term goal that will require continuing effort and monitoring. In other words, this objective is not something that an institution achieves, then closes its enforcement office, assuming that equality will sustain itself. It is important to have interim goals so that progress can be measured. The goals must be communicated to the institution’s constituents so they can assist in implementation and understand that their participation, through reporting and complaining, is a critical aspect of the endeavor.

#### 5. Evaluate Regularly and Make Appropriate Adjustments.

This step is an important part of a commitment to *actual* equality because it demonstrates the institution’s commitment and provides an incentive to those responsible for implementing the commitment discussed in item one. In addition to regular self-evaluation, institutions should consider hiring an independent, outside evaluator, at least every few years. Like a financial audit by an independent auditor, this can avoid a cozy relationship between the evaluators and those whose effort is being evaluated. Outside evaluators, if selected on the basis of their detachment and expertise, can provide valuable insights and advice. The results of the evaluation should be made public, not only within the institution, but to the outside world as well. A commitment to *actual* equality can be a selling point for an educational institution, but only if the institution views it as a plus and promotes it accordingly. If an institution’s commitment to *actual* equality includes benign race-conscious actions, regular evaluations and adjustments become particularly important if such actions are challenged in court.<sup>283</sup>

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283. Institutions are often reluctant to promote their affirmative efforts to achieve equality because they are afraid it may be viewed negatively or lead to a challenge in court. Of course, that outcome is a possibility, but respectable institutions do not allow the threat of litigation to stand in the way of taking what they believe is the proper course of action. Following the steps outlined above should help in defending litigation, if the need arises. *See, e.g.*, Ivan E.

### 6. Discipline Those Who Engage in Discrimination and Retaliation.

If an institution is serious about its commitment to *actual* equality, it must deal with those who stand in the way of achieving such equality. All too frequently, institutional administrators get defensive upon receipt of a complaint of discrimination and assume the complaint is without merit. Such a response discourages internal complaints and encourages victims to seek assistance outside the institution, from the EEOC or a state or local “deferral” agency.<sup>284</sup> Once that happens, the institution goes into “litigation mode,” and, to some extent, it loses the opportunity to use the complaint as an incentive to make improvements.<sup>285</sup> The point is simply this—an institution that earns a reputation for taking complaints seriously, conducting prompt investigations without a pre-determined outcome, taking effective corrective action against offenders, and avoiding retaliation, is far more likely to avoid costly, protracted litigation than is one that fails to do those things.

### 7. Discipline but Don’t Demean.

Those who are disciplined for discriminating or retaliating are potential plaintiffs alleging discrimination or retaliation. Discipline, including discharge, can be imposed in a way that preserves the dignity of the individual being disciplined. Human nature suggests that one who feels demeaned, embarrassed, or unfairly treated is more likely to contest the adverse action than is one who feels respected. Institutions are at risk when they discipline an individual after he or she has reported or complained of discrimination. In this situation, it is particularly important to have and follow a process that is uniformly enforced.<sup>286</sup> Here, the prior steps may serve an institution well because there may be a presumption that an institution with a culture that promotes reporting and complaining is less likely to retaliate against one who acts in accordance with the culture promoted by the institution.

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Bodensteiner, *Although Risky After Ricci and Parents Involved, Benign Race-Conscious Action is Often Necessary*, 22 NAT’L BLACK L.J. 1 (2009).

284. See 42 U.S.C. § 2000e-5(c) & (e); 29 C.F.R. § 1601.74; E.E.O.C. v. Commercial Office Prods., Co., 486 U.S. 107 (1988) (discussing “work sharing” agreements between the EEOC and deferral agencies).

285. Of course, conciliation is a goal of both the EEOC and deferral agencies, but the lines may be more firmly drawn when a formal, outside complaint has been filed. The EEOC frequently offers mediation services to the parties.

286. It would not make sense to have a special process utilized to discipline individuals who have reported or complained of discrimination because subjecting them to a special process may itself be viewed as retaliatory.

8. Continuing Education and Training of Persons in a Position to Discriminate or Retaliate.

Inherent in all of the steps listed above is the need to communicate the “program” and give people in a position to make decisions the information and support needed. For example, a person who has never heard of unconscious discrimination is not in a good position to take steps to avoid it; a person who is inclined to see a complaint as a threat is more likely to engage in retaliation.

Encouraging complaints and reporting seems counterintuitive until one views complaints as a valuable source of information and fear as the antithesis of a learning environment. There are many talented people who attend and work for educational institutions. Why not invite them to participate in the exchange of information and ideas about how to achieve *actual* equality?

#### IV. CONCLUSION

There are ample laws addressing retaliation by colleges and universities. But, just as prohibiting discrimination does not necessarily result in equality, prohibiting retaliation does not necessarily remove the fear that prevents people from reporting and complaining about discrimination. If an institution is serious about ending discrimination, it has to encourage reporting and complaining. An institution that tolerates retaliation is not serious about ending discrimination and certainly lacks a commitment to achieving *actual* equality.

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

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## INTRODUCTION

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

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

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

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

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

2. *Id.*

3. *Id.*



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

#### THE BIG BUSINESS OF HIGHER EDUCATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12. See *id.*

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

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

15. See *id.* at 5–6.

16. See *id.* at 6.

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

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

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

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

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

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

19. Gonzalez, *supra* note 17.

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

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

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

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

24. Golden, *supra* note 1.

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

26. *Id.*

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

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

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

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

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

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

30. *Id.*

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

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

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

34. See Golden, *supra* note 1.

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

36. See Golden, *supra* note 1.

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

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

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

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37. See Goodman, *supra* note 33.

38. *Id.*

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

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

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

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

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

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

### B.A Niche Market

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

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

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

46. *Id.*

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

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

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

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

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

52. *Id.*

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

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

#### PREDATORY EDUCATION

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

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

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

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

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

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

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



### A. The Public Failure

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

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

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

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

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

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

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

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

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

62. *Id.*

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

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

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

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

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63. *Id.*

64. *Id.*

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

66. *Id.*

67. *Id.*

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

69. *Id.*

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

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

## ii. The Public Good of Higher Education

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

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

72. *Id.* at 1377–78.

73. Mark Rosenman, *Commercializing the Public Good*, HUFFINGTON POST, June 8, 2011, [http://www.huffingtonpost.com/mark-rosenman/commercializing-the-public-good\\_869265.html](http://www.huffingtonpost.com/mark-rosenman/commercializing-the-public-good_869265.html) (last visited Nov. 29, 2011).

74. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[E]ndowment, support, and maintenance of at least one college where the leading object shall be, without excluding other scientific and classical studies and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

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

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

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

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

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

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

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

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

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

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

97. *Id.*

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

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

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

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

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

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

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

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

103. *Id.*

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

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

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

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

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

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

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

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

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

109. *Id.* at 88.

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



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

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

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

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

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

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

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

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

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

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

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

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

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

### B.PredEd

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

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

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

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

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

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

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

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

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

i. For-Profits and the Public Good

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

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

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

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

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

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

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

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

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

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128. See Golden, *supra* note 1.

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

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

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

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

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

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

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

## ii. Market Failure and Predatory Education

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

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

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

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

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

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

138. *Id.*

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

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

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

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

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

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

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

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

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

144. Engel & McCoy define predatory lending as:

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

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

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

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

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

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

147. *See id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

159. *Id.*

160. *Id.*

161. *Id.*

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



## 2. Harmful Rent Seeking

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

## 3. Fraud and Deception

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

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

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

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

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

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

167. *Id.* at 7

168. *Id.*

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

#### 4. Misrepresentation and Questionable Business Practices

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

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

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

170. *Id.* at B8.

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

172. *Id.*

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

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

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

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

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

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

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

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

177. *Id.*

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

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

180. See *id.*

181. See Burd, *supra* note 173.

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

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

### 5. The Absence of Legal Remedies

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

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

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

183. See Field, *supra* note 1714.

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

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

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

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

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

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

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

188. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### 6. Preying on “The Niche”

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

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

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

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

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

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

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



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

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

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

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203. *Id.*

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

205. *Id.* at 2.

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

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

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

209. *Id.* at 71.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### REGULATION AND REMEDIES

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

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

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

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

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

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

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

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

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

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

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

225. See *id.* at 844

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

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

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

226. *Id.*

227. *See id.* at 844–45.

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

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

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

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

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

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

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

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

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

234. See Freedman, *supra* note 169.

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

#### B. The Futility of Regulation

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

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

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

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

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

249. *Id.*

250. See Vasquez, *supra* note 151.

## i. Rules, Rules, Rules

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

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

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

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

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

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

255. *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

269. See Willis, *supra* note 2677.

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

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

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

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

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

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

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

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

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

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

## ii. Regulatory Bodies

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

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

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

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

278. See *supra* notes 1977–199 and accompanying text.

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

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

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

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

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

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

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

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

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

285. *Id.* at 529–30.

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

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



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

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

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288. 16 C.F.R. § 254.3 (2010).

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

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

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

### C. The Problem Is In the Premises

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

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

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

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

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

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

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

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

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

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

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

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

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

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

301. See, *e.g.*, Andrea Fuller, *Compensation of 30 Private-College Presidents Topped \$1-Million in 2008*, CHRON. OF HIGHER EDUC., Nov. 14, 2010, at A1 (reporting on investigations into the high salaries of private college presidents whose leadership was questioned). Although Malani and Posner theorize that compensation structures at nonprofit organizations result in inefficiency, Hines, Horwitz and Nichols respond that such an argument assumes that nonprofits only pay their managers fixed salaries. To the contrary, with adequate safeguards, the IRS does permit incentive compensation plans at NPIs. See HINES ET AL., *supra* note 2755, at 1193–94. Moreover, Hansmann argues that even though NPIs may succeed in distributing some of their net earnings in the form of inflated salaries, it is still preferable to the efficiency losses to be expected as a result of a for-profit motive. Hansmann, *supra* note 9, at 844–45.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

#### CONCLUSION

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

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

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

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

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

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

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

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

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

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



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

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

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

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



# PEDAGOGY ON TRIAL: WHEN ACADEMIC FREEDOM AND EDUCATION CONSUMERISM COLLIDE

JORDAN J. TITUS\*

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## INTRODUCTION

The front page of the February 27, 2009 issue of *The Chronicle of Higher Education* featured an article concerning threats to the academic freedom of faculty<sup>1</sup> and another on student ratings (“student evaluations”) of faculty.<sup>2</sup> The authors treat their topics as separate, unrelated issues, yet the administrative use of student ratings is a subtle aspect of a more

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1. Peter Schmidt, *Professors' Freedoms under Assault in the Courts*, 55 CHRON. HIGHER EDUC. Feb. 27, 2009, at A1.

2. Thomas Barlett, “*Dear Professor: I Hate You*”—Anonymous, 55 CHRON. HIGHER EDUC. Feb. 27, 2009, at A1. The term *student evaluation of teaching* (with the acronym “SET”) has become synonymous with standardized surveys of student opinions about an instructor and a course. Whether these questionnaires indicate assessment of teaching effectiveness or merely reflect student satisfaction is the subject of passionate disagreement in academia. For purposes here, the term *student ratings* will be employed to refer to numerical data collected by means of such instruments.

widespread threat to intellectual freedom in academia. As this article will argue, within a marketplace academy, student ratings of faculty contribute to a shift of pedagogical authority from the professoriate to “student consumers,”<sup>3</sup> and place the academic freedom of faculty at risk.<sup>4</sup>

“In essence,” Mathew Finkin and Robert Post observe, “academic freedom consists of the freedom to pursue the scholarly profession according to the standards of that profession.”<sup>5</sup> Although in the past, courts have expressed a general obeisance to academic authorities, their increasing willingness to more narrowly define what constitutes an academic judgment that warrants judicial deference suggests the judiciary is “sliding toward a dangerous distrust of academic decision making.”<sup>6</sup> Recent federal appellate court decisions have ascribed academic freedom to colleges and universities, militating against academic freedom that might be accorded to teaching faculty of those institutions.<sup>7</sup> Courts have ruled that conflicts between the First Amendment rights of faculty and student complaints are to be decided by determining whether the classroom speech is “germane to the subject matter and advances an academic message,”<sup>8</sup> and whether the sanction (or the practice at issue) is “reasonably related to legitimate pedagogical concerns.”<sup>9</sup> Such determination requires judgments made on academic grounds, yet judges do not possess the expertise to distinguish between “legitimate and illegitimate academic decision-

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3. For critical commentaries on this metaphor, see Gabrielle Baldwin, *The Student as Customer: The Discourse of “Quality” in Higher Education*, 9 J. FOR HIGHER EDUC. MGMT. 131 (1994); Jill J. McMillan & George Cheney, *The Student as Consumer: The Implications and Limitations of a Metaphor*, 45 COMM. EDUC. 1 (1996).

4. This article does not attempt to examine the scope of academic freedom or the range of its contemporary threats, but focuses specifically on academic freedom in teaching for faculty in public colleges and universities in the United States, amidst growing consumerist demands in higher education.

5. MATTHEW W. FINKIN & ROBERT C. POST, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM 7 (2009).

6. J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 79 (2004). On the growing legalization of academia, see generally AMY GAJDA, THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION (2009).

7. See, e.g., Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third “Essential Freedom,”* 45 STAN. L. REV. 1835, 1837 (1993) (“[Academic freedom] protects quite expansively the scholarly enterprise from outside interference (grand juries, witch-hunting public officials, funding agencies, and other assorted patrons, critics, and ‘do-gooders’), but only grants limited protection to professors’ intramural speech or classroom activities against institutional interests.”).

8. *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 683 (6th Cir. 2001).

9. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (quoting *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002)).

making.”<sup>10</sup> Consequently, when pedagogy is subject to judiciary scrutiny, rulings are likely to be made based on non-academic considerations.

“[A]s higher education institutions act more like corporations, courts are more willing to see the policies and practices of institutions as ‘contracts’ with the ‘customers’ or ‘clients’ (students) regarding the quality of the ‘product’ (education).”<sup>11</sup> Within a growing accountability movement and the escalating marketing of college and university experiences,<sup>12</sup> standardized student ratings are offered by institutions for external appraisal as quantified evidence of quality and excellence.<sup>13</sup> In a consumerist academy, excellence in teaching becomes redefined as that which satisfies students’ desires and tastes.<sup>14</sup> When administrators monitor and manage faculty to teach in ways that result in high student ratings, teaching faculty no longer maintain control over pedagogical matters. In addition, judges increasingly view the protection of students’ interests in academic disputes as a judicial responsibility, and courts are becoming more sympathetic to students’ challenges of academic judgments.<sup>15</sup> The potential adverse impact of legal opinions following these trends are the demise of faculty speech rights and their pedagogical authority and control,

10. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 307 (1989).

11. Ann D. Springer, *Legal Issues for Faculty* ¶ 5, American Association of University Professors (Feb. 2004), <http://www.aaup.org/AAUP/protect/legal/topics/fac-legal-concerns.htm>.

12. For discussions of educational marketing, see Michael Mulnix, *College Students as Consumers: A Brief History of Educational Marketing*, 2 J. MARKETING FOR HIGHER EDUC. 123 (1989); Elaine El-Khawas, *Consumerism as an Emerging Issue for Postsecondary Education*, 56 EDUC. REC. 126 (1975). For accounts of what is variously termed *commercialization*, *commodification*, and *corporatization* of higher education, see DEREK BOK, *UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION* (2003); ROGER L. GEIGER, *KNOWLEDGE AND MONEY: RESEARCH UNIVERSITIES AND THE PARADOX OF THE MARKETPLACE* (2004); ERIC GOULD, *THE UNIVERSITY IN A CORPORATE CULTURE* (2003); DAVID L. KIRP, *SHAKESPEARE, EINSTEIN, AND THE BOTTOM LINE: THE MARKETING OF HIGHER EDUCATION* (2003); *BUYING IN OR SELLING OUT? THE COMMERCIALIZATION OF THE AMERICAN RESEARCH UNIVERSITY* (Donald G. Stein, ed., 2004); SHEILA SLAUGHTER & GARY RHOADES, *ACADEMIC CAPITALISM AND THE NEW ECONOMY: MARKETS, STATE, AND HIGHER EDUCATION* (2004); JENNIFER WASHBURN, *UNIVERSITY, INC.: THE CORPORATE CORRUPTION OF AMERICAN HIGHER EDUCATION* (2005).

13. See Derek Bok, *Reclaiming the Public Trust*, 24 CHANGE 13 (1992); Peter T. Ewell, *Assessment and Public Accountability: Back to the Future*, 23 CHANGE 12 (1991).

14. See DAVID RIESMAN, *ON HIGHER EDUCATION: THE ACADEMIC ENTERPRISE IN AN ERA OF RISING STUDENT CONSUMERISM* (1980).

15. See Cheryl A. Cameron et al., *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243, 282–87 (2005).

along with an increase in students' power to shape the education that colleges and universities offer them.

This article begins by examining conceptions of academic freedom, concentrating on its application when faculty clash with administrators who advocate for students' preferences concerning speech in the classroom.<sup>16</sup> Attention then shifts to student ratings of teaching, the ubiquitous means of student influence in higher education. An overview of the vigorous debates concerning their use in faculty evaluation is provided, and then cases are presented wherein student ratings have played a pivotal role in courts upholding administrative decisions adversely affecting faculty.<sup>17</sup> The article then reviews cases involving students' expressive rights claims challenging the academic freedom of faculty in their teaching,<sup>18</sup> and students' consumer dissatisfaction complaints concerning classroom experiences that were not to their liking.<sup>19</sup> Finally, attention is given to a conservative movement calling for "balance" and "neutrality" in curriculum.<sup>20</sup> In closing, the final section outlines some implications of the growing case law that denies faculty pedagogical authority, recognizes students' claims of educational injustices, and empowers students with consumer sovereignty over higher education.<sup>21</sup>

## I. ACADEMIC FREEDOM OF FACULTY IN TEACHING

### A. Conceptions of Academic Freedom

Academic freedom has been an essential aspect of higher education in the United States, as reflected in the American Association of University Professors' classic 1940 statement on academic freedom,<sup>22</sup> but the concept itself "eludes precise definition."<sup>23</sup> Some scholars have argued that the meaning and scope of constitutional academic freedom differs significantly

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16. See *infra* section II and accompanying notes.

17. See *infra* section III and accompanying notes.

18. See *infra* section IV A and accompanying notes.

19. See *infra* section IV B and accompanying notes.

20. See *infra* section IV C & D and accompanying notes.

21. See *infra* section V and accompanying notes.

22. American Association of University Professors (AAUP), *1940 Statement of Principles on Academic Freedom and Tenure with 1970 Interpretive Comments*, in POLICY DOCUMENTS & REPORTS 3 (10th ed. 2006). For a historical account of academic freedom, see RICHARD HOFSTADTER & WALTER METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955). For a discussion of the principles of academic freedom enunciated by AAUP, see Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 LAW & CONTEMP. PROBS. 3 (1990).

23. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 613 (4th ed. 2006).

from the concept of academic freedom within the academic profession.<sup>24</sup> According to J. Peter Byrne, constitutional academic freedom has not been consistently defined or recognized by the courts, such that “[a]ttempts to understand the scope and foundation of a constitutional guarantee of academic freedom . . . generally result in paradox or confusion. The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life.”<sup>25</sup> The Fifth Circuit Court of Appeals observed that “[w]hile academic freedom is well recognized, its perimeters are ill-defined and the case law defining it is inconsistent.”<sup>26</sup> As Byrne explains, “[t]he problems are fundamental. There has been no adequate analysis of what academic freedom the Constitution protects or of why it protects it. Lacking definition or guiding principle, the doctrine floats in the law, picking up decisions as a hull does barnacles.”<sup>27</sup>

When the U.S. Supreme Court decided *Sweezy v. New Hampshire* in 1957,<sup>28</sup> the plurality opinion by Chief Justice Warren referred to violations of academic freedom: “Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.”<sup>29</sup> In Justice Frankfurter’s concurrence, he stated that “the ardor and fearlessness of scholars” in their

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24. See Byrne, *supra* note 10; Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988); David M. Rabban, *A Functional Analysis of “Individual” and “Institutional” Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990); Mark Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831 (1987). *But see, e.g.*, Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35 (2002) (criticizing arguments favoring an institutional understanding of constitutional academic freedom). The conceptual divide was illustrated in *Cook v. Tadros*, 2000 U.S. Dist. LEXIS 21238 (D. Neb. Aug. 24, 2000). The district court ruled as inadmissible expert testimony by a law school professor on the general principles of academic freedom and the conduct that is traditionally regarded in a university setting as falling under the protection of academic freedom. Although the court stated that in order to determine whether speech was protected it had to be “understood in context,” the court also found that expert testimony concerning professional academic freedom would usurp judicial authority. *Id.* at \*5–\*7.

25. Byrne, *supra* note 10, at 252–53. *See also* Rabban, *supra* note 24, at 230 (“[T]he Supreme Court’s glorification of academic freedom . . . has produced hyperbolic rhetoric but only scant, and often ambiguous, analytic content.”).

26. *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982) (citations omitted).

27. Byrne, *supra* note 10, at 253.

28. 354 U.S. 234 (1957).

29. *Id.* at 250.

intellectual pursuits “must be left as unfettered as possible.”<sup>30</sup> Decades later, expressly addressing academic freedom in its teaching component, the Court stated that “academic freedom embodies the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment.”<sup>31</sup> However, when professorial academic authority and student consumerism collide, court opinions have often deferred to institutional administrators pursuing student satisfaction.

### B. Issues of Pedagogy and Assessment

Case law concerning intra-college and university disputes about teaching is inconsistent, as the Ninth Circuit Court of Appeals has observed.<sup>32</sup> Employing corporate language, the Eleventh Circuit has concluded that “[t]he university necessarily has dominion over what is taught by its professors and may so manage them.”<sup>33</sup> The Third Circuit has agreed that “a public university professor does not have a First Amendment right to decide what will be taught in the classroom.”<sup>34</sup> The Fifth Circuit, however, has expressed the view that academic freedom “protects against infringements on a teacher’s freedom concerning classroom content and method.”<sup>35</sup> Choosing to delineate separate areas of responsibilities, the Southern District of New York distinguished between an administration’s authority over curriculum and a professor’s “right to develop and use his or her own pedagogical method.”<sup>36</sup>

Various federal district and circuit courts have affirmed First Amendment protection for some forms of in-class expression by faculty that students have sought to limit. In two cases concerning pedagogy and classroom demeanor, both arising in the context of students’ allegations of sexual harassment in the classroom, courts upheld the faculty member’s right to select and implement teaching methods. In the first case, *Silva v.*

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30. *Id.* at 262 (Frankfurter, J., concurring).

31. *Edwards v. Aguillard*, 482 U.S. 578, 586 n.6 (1987) (citation and quotation marks omitted). For a discussion of the history of usages of academic freedom by the Supreme Court, see William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, 53 LAW & CONTEMP. PROBS. 79 (1990).

32. *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 971 (9th Cir. 1996) (“Neither the Supreme Court nor this Circuit has determined what scope of First Amendment protection is to be given a public college professor’s classroom speech.”).

33. *Bishop v. Aronov*, 926 F.2d 1066, 1068 (11th Cir. 1991).

34. *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488, 491 (3d Cir. 1998).

35. *Hillis v. Stephen F. Austin State Univ.*, 665 F.2d 547, 553 (5th Cir. 1982).

36. *Mahoney v. Hankin*, 593 F. Supp. 1171, 1175 (S.D.N.Y. 1984).



*University of New Hampshire*,<sup>37</sup> J. Donald Silva, a tenured faculty member in communications, was suspended for creating a hostile or offensive environment that violated the university's sexual harassment policy. Among other accusations,<sup>38</sup> six adult women filed formal complaints that in a technical writing class he had sexualized classroom discussion and used sexual innuendos that violated the university's sexual harassment policy.<sup>39</sup>

The court employed the standard of "reasonably related to legitimate pedagogical concerns" that the Supreme Court had introduced in *Hazelwood School District v. Kuhlmeier*.<sup>40</sup> In *Hazelwood*, the Court found that secondary school "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to pedagogical concerns."<sup>41</sup> Some lower courts have appropriated this standard and applied it to the censuring of teachers' speech by school administrators,<sup>42</sup> and to cases in higher education,

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37. 888 F. Supp. 293 (D.N.H. 1994).

38. Several students complained about his sexually suggestive remarks outside of the classroom, and expressed discomfort with speaking to him directly. *Id.* at 300–04.

39. On one occasion he compared the concept of focus to sexual intercourse: I will put focus in terms of sex so that you can better understand it. Focus is like sex. You seek a target. You zero in on your subject. You move from side to side. You close in on the subject. You bracket the subject and center on it. Focus connects experience and language. You and the subject become one.

*Id.* at 299. Silva explained that the purpose of his comparison was "to relate an abstract concept to everyday experiences most students are familiar with." *Id.* at 298.

40. 484 U.S. 260, 273 (1988).

41. *Id.* at 273. The Supreme Court held that in overseeing school-sponsored publications, school administrators may regulate student expressive activity to achieve three goals: to maximize student learning experience, to limit exposure to material inappropriate for students' maturity level, and to prevent the erroneous attribution of individual students' views to the school. *Id.* at 271. The Court declined to address the appropriateness of the standard at the postsecondary level. *Id.* at 273.

42. *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 775–79 (10th Cir. 1991) (finding pedagogical interests to include preventing speech that used a "position of authority to confirm an unsubstantiated rumor"; ensuring that "teacher employees exhibit professionalism and sound judgment"; and "providing an educational atmosphere where teachers do not make statements about students that embarrass those students among their peers."); *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993) (citing *Mailloux v. Kiley*, 448 F.2d 1242, 1243 (1st Cir. 1971) (per curiam)) (weighing "the age and sophistication of the students, the relationship between the teaching method and valid educational objective, and the context and manner of

including those concerning faculty classroom speech, such as *Silva*.<sup>43</sup> In *Silva*, the legitimate pedagogical concerns of the administrators were identified as “providing a congenial academic environment.”<sup>44</sup> *Silva* successfully asserted his own pedagogical interests, claiming that his statements served a “legitimate pedagogical, public purpose,” and the court agreed that his classroom statements advanced his valid educational objective of “conveying certain principles related to the subject matter of his course.”<sup>45</sup> The court did not identify the means by which the determination was made that *Silva*’s words and techniques for communicating the curriculum were pedagogically sound.<sup>46</sup> The court

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the presentation” in determining whether a regulation governing teacher speech is reasonably related to legitimate pedagogical concerns).

43. See, e.g., *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004) (concerning student speech in a university classroom); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002) (concerning student speech in a master’s thesis); *Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991) (upholding institutional authority over post-secondary faculty classroom speech referencing religious beliefs).

44. *Silva*, 888 F. Supp. at 313.

45. *Id.* at 316. The court categorized *Silva*’s comments under academic freedom but also suggested that *Silva* was protected as a public employee speaking on a matter of public concern. Here the court appropriated the Supreme Court’s test for identifying the First Amendment protection afforded to out-of-class speech of teachers as public employees, articulated in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). In *Pickering*, the Court detailed a balancing test in which the government’s legitimate interest as employer in maintaining an efficient workplace is weighed against the employee’s right as a citizen to comment upon “matters of public concern.” *Id.* at 568. The *Silva* court’s convoluted argument was that the preservation of academic freedom is a matter of public concern, and because the question of whether speech some people find offensive should be tolerated in schools is a matter of public concern, so too are *Silva*’s in-class comments. *Silva*, 888 F. Supp. at 316. Such reasoning about what constitutes a public concern seemingly would protect any kind of harassing speech by university professors. See Amy H. Candido, *A Right to Talk Dirty? Academic Freedom Values and Sexual Harassment in the University Classroom*, 4 U. CHI. L. SCH. ROUNDTABLE 85, 111 (1997); see also Todd A. DeMitchell & Richard Fossey, Commentary, *At the Margin of Academic Freedom and Sexual Harassment: An Analysis of Silva v. University of New Hampshire*, 111 EDUC. L. REP. 13, 28 (1996) (describing the court’s argument as “nonsense”).

46. The term *pedagogy*, originating from the Greek *paidagōgós*, meaning to lead a child, is used in the field of education to refer to the theory and practice of teaching. ROBERT K. BARNHART, *THE BARNHART CONCISE DICTIONARY OF ETYMOLOGY: THE ORIGINS OF AMERICAN ENGLISH WORDS* 550 (1995). District and circuit courts have provided various, sometimes contrary, elaborations on the concept, including opposing views on the status of pedagogy as protected speech. When the Tenth Circuit specified the meaning of the term, they stated: “The ‘pedagogical’ concept merely means that the activity is ‘related to learning.’” *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286 (10th Cir. 2004) (citing *Fleming v.*

judged Silva's in-class comments as ones "made in a professionally appropriate manner" and not so outrageous as to offend the sensibilities of a reasonable person.<sup>47</sup> The court then determined that the sexual harassment policy, as applied to Silva's speech, was invalid because it failed to take Silva's academic freedom into account.<sup>48</sup> The court unequivocally endorsed the view that "academic freedom permits faculty members freedom to choose specific pedagogical techniques or examples to convey the lesson they are trying to impart to their students."<sup>49</sup>

The second and more recent case in which a faculty member's academic freedom prevailed also rested on judgment of the pedagogical relevance of speech, absent any criteria for assessing pedagogical methods. In *Hardy v. Jefferson Community College*,<sup>50</sup> the Sixth Circuit Court of Appeals held

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Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 925 (10th Cir. 2002)). *See also* Boring v. Buncombe Cnty. Bd. of Educ., 98 F.3d 1474 (4th Cir. 1996), (Widener, J., dissenting), *vacated en banc*, 136 F.3d 364, 370 (4th Cir. 1998) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1663 (1971), and defining "pedagogical" as "educational"). *See generally* Brown v. Armenti, 247 F.3d 69, 75 (3d Cir. 2001) ("Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught."); Boring v. Buncombe Cnty. Bd. of Educ., 98 F.3d 1474 (4th Cir. 1996), *vacated en banc*, 136 F.3d 364, 370 (4th Cir. 1998) (holding that the makeup of the curriculum is a legitimate pedagogical concern); Searcey v. Harris, 888 F.2d 1314, 1319 (11th Cir. 1989) (. . . "the purpose of a curricular program is by definition 'pedagogical'"); Parate v. Isabor, 868 F.2d 821, 828 (6th Cir. 1989) ("[T]he professor's evaluation of her students and assignment of their grades is central to the professor's teaching method."); Hillis v. Stephen F. Austin State Univ., 665 F.2d 547, 553 (5th Cir. 1982) (the "claim that the refusal to assign a grade . . . constituted a 'teaching method' is unfounded."); Carley v. Ariz. Bd. of Regents, 737 P.2d 1099 (Ariz. Ct. App. 1987) (considering teaching methods as independent of teaching content, or content-neutral).

47. *Silva*, 888 F. Supp. at 313. The court did not accept the written complaints of harm the female students reported suffering as a consequence of Silva's harassing speech. Candido, *supra* note 45. The judge concluded that one of the professor's remarks (comparing a bowl of jello and a vibrator to a belly dancer) was not sexual in nature, and reasoned that the complainants' misinterpretation of this analogy misled them to regard Silva's focus statement as part of an offensive academic environment. *Silva*, 888 F. Supp. at 312-13.

48. *Id.* at 314.

49. *Id.* at 330 (citing affidavit of W. Van Alstyne). For an earlier case stating that professors may use their chosen teaching methods, see *Mahoney v. Hankin*, 593 F. Supp. 1171, 1175 (S.D.N.Y. 1984) (expressing support for dicta in prior cases that a professor's freedom to use their own chosen pedagogical method is a form of academic freedom). *See also* Hillis v. Stephen F. Austin State Univ. 665 F.2d 547, 553 (5th Cir. 1982) (stating, in dicta, that a professor's classroom content and method are protected by academic freedom).

50. 260 F.3d 671 (6th Cir. 2001).

that “a teacher’s in-class speech deserves constitutional protection.”<sup>51</sup> Kenneth Hardy had used “gender and racial slurs” in his lecture on “how language is used to marginalize minorities and other oppressed groups in society.”<sup>52</sup> He conducted a group exercise in which he asked students to suggest examples of “words that [had] historically served the interests of the dominant culture.”<sup>53</sup> Students’ suggestions included “the words ‘girl,’ ‘lady,’ ‘faggot,’ ‘nigger,’ and ‘bitch.’”<sup>54</sup> A student who was offended by the last two words discussed her concerns with Hardy and college administrators, and Hardy apologized to the student for any discomfort the class had caused her. The student then took her complaint to a vocal religious leader in the community, who raised the issue with college administrators and threatened to affect the college’s enrollment if disciplinary action was not taken. Subsequently, despite receiving favorable student course ratings, Hardy was informed that he would not be teaching in the future.

Hardy sued, claiming his rights under the First and Fourteenth Amendments to the United States Constitution had been violated.<sup>55</sup> Hardy also contended that university officials had retaliated against him for exercising his rights of free speech and academic freedom.<sup>56</sup> The class discussion reportedly was “academically and philosophically challenging,”<sup>57</sup> and the court described Hardy’s speech as “limited to an academic discussion of the words in question” and “not gratuitously used by Hardy in an abusive manner.”<sup>58</sup> The court determined that Hardy’s speech “was germane to the subject matter of his lecture on power and effect of language”<sup>59</sup> and concluded that an instructor’s speech, when it is “germane to the classroom subject matter and advances an academic message, is protected by the First Amendment.”<sup>60</sup> Like the *Silva* court, the Sixth Circuit treats pedagogical relevance as if it were a readily evident objective feature of speech, rather than their affirmed conclusion based on grounds not specified.

In another case of a similar nature decided just three months prior to *Hardy* concerning student complaints about a professor’s vulgar language, the same appellate court reached a contrary decision. In *Bonnell v.*

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51. *Id.* at 680.

52. *Id.* at 674–75.

53. *Id.* at 675.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* at 679.

59. *Id.*

60. *Id.* at 683. The appellate court also concluded that “Hardy’s lecture on social deconstructivism and language, which explored the social and political impact of certain words,” was on a matter of public concern. *Id.* at 679.

*Lorenzo*,<sup>61</sup> a female student in John C. Bonnell's English Language and Literature class (at Macomb Community College in Michigan) filed a sexual harassment complaint against him for using language in class that she claimed created a hostile learning environment. The plaintiff sought multiple remedies, including a written apology and Bonnell's immediate termination. According to administrators, the language at issue included profanity such as "shit," "damn," "fuck," and "ass," and sexual allusions such as "blow-job."<sup>62</sup> The college took disciplinary action when it deemed Bonnell's language to be gratuitous, vulgar, and obscene speech that was "not germane to course content (and thus educational purpose) as measured by professional standards."<sup>63</sup> Previously—when responding to a complaint by a parent of another of his students—Bonnell had defended his use of such language for purposes of "demonstrating an academic point," explaining that "he used the terms to 'point out the chauvinistic degrading attitudes in society that depict women as sexual objects, as compared to certain words to describe male genitalia, which are not taboo or considered to be deliberately intended to degrade.'"<sup>64</sup> The court ruled that an instructor's constitutional right to use profane words does not extend to using them in the context of the classroom when not germane to the subject matter.<sup>65</sup> The court did not indicate any standards for ascertaining if Bonnell's classroom profanity had served his alleged pedagogical intent or was simply gratuitous, and it did not indicate any grounds for accepting the college's claim that his profanity was not germane.

When employing the standard from *Hazelwood*,<sup>66</sup> courts have considered the relative importance of a professor's speech in pursuing an educational objective against the pedagogical concerns of administrators in controlling the professor's means to achieve that purpose. When such "balancing" tests are used, there is the impression of an objective weighing of competing interests, but as Richard Hiers has argued, such "balancing is inevitably and primarily a normative undertaking."<sup>67</sup> Answering the question whether an action is "reasonably related" to a pedagogical concern that is "legitimate" requires a normative judgment as to the relative importance of the competing interests. Judges, lacking higher education

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61. 241 F.3d 800 (6th Cir. 2001).

62. *Id.* at 805.

63. *Id.*

64. *Id.* at 803.

65. ". . . Plaintiff may have a constitutional right to use words such as 'pussy,' 'cunt,' and 'fuck,' but he does not have a constitutional right to use them in a classroom setting where they are not germane to the subject matter, in contravention of the College's sexual harassment policy." *Id.* at 820.

66. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). See *supra* notes 40–43 and accompanying text.

67. Richard H. Hiers, *Normative and Ostensibly Norm-Neutral Conventions in Contemporary Judicial Discourse*, 14 *LEGAL STUD. F.* 107, 126 (1990).

expertise, apparently decide whose pedagogical interests (motives, or objectives) will prevail on the basis of which constituency they see as legitimately holding power and control, thereby rendering that constituency's pedagogical interests to be legitimate ones.<sup>68</sup> When authority is declared to belong to institutions alone, the pedagogical soundness of administrators' determinations is presumed, even though subject matter and instructional expertise lies with the teaching faculty.

In the past, federal courts have afforded broad deference for the expertise and specialized knowledge of academic professionals in cases involving various kinds of academic decisions.<sup>69</sup> Recognizing "difficulties in deciding what is germane and what is not" in cases involving the more "discernable limits" of a union's or bar association's purposes, the Supreme Court has admitted that "the standard becomes all the more unmanageable in the public university setting."<sup>70</sup> The broad scope of what could be considered educational—"everything is in a sense educational"<sup>71</sup>—raises difficulties for determining pedagogical germaneness. The Court has acknowledged that "[i]t is not for the Court to say what is or is not germane to the ideas to be pursued in an institution of higher learning."<sup>72</sup>

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68. In such a formulation, the test is tautological. William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 238 (1999).

69. See *Bishop v. Aronov*, 926 F.2d 1066, 1075 (11th Cir. 1991) ("Federal judges should not be ersatz deans or educators."); *Faro v. New York Univ.*, 502 F.2d 1229, 1231–32 (2d Cir. 1974) ("Of all fields, which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision."); *Jiminez v. Mary Washington Coll.*, 57 F.3d 369, 377 (4th Cir. 1995) ("The federal courts have adhered consistently to the principle that they operate with reticence and restraint regarding tenure-type decisions."); *Kunda v. Muhlenberg Coll.*, 621 F.2d 532 (3d Cir. 1980):

Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

*Id.* at 548. For discussions of historical changes in judicial deference to academic decisions, see GAJDA, *supra* note 6, at 22–49; Robert M. O'Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729 (2010).

70. *Bd. of Regents of the Univ. of Wisc. v. Southworth*, 529 U.S. 217, 232 (2000) (referencing *Lehnert v. Ferris Fac. Ass'n*, 500 U.S. 507 (1991), where Justices disagreed about what expressive activity was or was not germane to a labor union's collective bargaining).

71. *Southworth v. Grebe*, 151 F.3d 717, 725 (7th Cir. 1998).

72. *Bd. of Regents of the Univ. of Wisc. v. Southworth*, 529 U.S. 217, 232 (2000).

The Supreme Court also has suggested that courts ought not to question the legitimacy or efficiency of educators' pedagogical methods.<sup>73</sup> Courts, though, have misplaced their support for administrators' claims of their own superiority over faculty in understanding students' pedagogical needs,<sup>74</sup> when increasingly in our corporate culture, higher education administrators are hired without academic credentials, and are selected from industry for their corporate experience rather than pedagogic skills or instructional expertise.<sup>75</sup> The decision in *Cohen v. San Bernardino Valley College*<sup>76</sup> made evident the judicial preference for the judgments of institutional administrators over the views of those who teach. Dean Cohen, a tenured professor of English and film studies, admittedly used an unorthodox confrontational style in the classroom that included regularly employing vulgarities and profanity, repeatedly discussing controversial topics (such as cannibalism, sex with children, and pornography), emphasizing topics of a sexual nature, and assigning provocative essay topics. When assigned an essay defining pornography, a student in his remedial English class requested an alternative essay topic; Cohen refused, and the student filed a sexual harassment complaint under a recently adopted sexual harassment policy. The institutional authorities found that

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73. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment."); see also *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 444 (5th Cir. 2001) ("It is not the job of federal courts to determine the most effective way to educate our nation's youth.").

74. The incompetence of administrators as evaluators of pedagogy was demonstrated in a federal circuit case, *Parate v. Isabor*, 868 F.2d 821 (6th Cir. 1989). Following a grading dispute, a dean and department head visited the classroom of a non-compliant professor, ostensibly to evaluate Natthu Parate's teaching. The dean interrupted Parate's teaching by shouting orders to Parate from the back of the classroom. The dean then assumed control of the class and berated Parate's teaching in front of the students. Subsequently, the dean replaced the Parate as instructor of the class and ordered him to attend as a student. The court rejected a claim that the classroom events constituted a violation of academic freedom, even though it found that the dean's actions were "unprofessional." The court concluded that the administrator's behaviors did not breach academic freedom because an incident of interference did not "cast a pall of orthodoxy over the classroom," even though Parate was removed as instructor following the classroom visit. For a discussion of the court's elusive reasoning in this case, see Donal M. Sacken, Commentary, *Making No Sense of Academic Freedom: Parate v. Isabor*, 56 EDUC. L. REP. 1107 (1993).

75. WASHBURN, *supra* note 12, at 205–07; Henry A. Giroux, *Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere*, 72 HARVARD EDUC. REV. 425, 438–42 (2002).

76. 883 F. Supp. 1407 (C.D. Cal. 1995), *rev'd in part*, 92 F.3d 968 (9th Cir. 1996).

through these in-class actions, Cohen had violated the college's sexual harassment policy and that his conduct warranted punishment. Cohen filed suit, arguing, in part, that his right to academic freedom prevented the institution from punishing him for his classroom behavior.

The trial court reviewed the extent of a professor's control over teaching methods and the restrictions on the state's control of classroom conduct:

[C]olleges and universities must have the power to require professors to effectively educate all segments of the student population, including those students unused to the rough and tumble of intellectual discussion. If colleges and universities lack this power, each classroom becomes a separate fiefdom in which the educational process is subject to professional whim.<sup>77</sup>

The court implied that, absent managerial control, a professor's pedagogy could be merely whimsical rather than the result of expertise and considered judgment about how students learn the subject matter. When the Ninth Circuit Court of Appeals reversed the lower court, it did so on grounds not explored by the lower court, focusing instead on the language of the contested sexual harassment policy. Finding the policy's terms to be "unconstitutionally vague," the court concluded that college officials had acted "on an entirely ad hoc basis" in applying the sexual harassment policy's "nebulous outer reaches to punish teaching methods that Cohen had used for many years" and had been viewed as "pedagogically sound" by his colleagues.<sup>78</sup> The court dodged addressing the question of faculty academic freedom by choosing to "decline to define the precise contours of the protection the First Amendment provides the classroom speech of college professors . . . ."<sup>79</sup> The opinion leaves unanswered if or when a professor has a constitutional right to use profane language in the classroom while employing nontraditional yet pedagogically legitimate strategies that some students and administrators find offensive.

In a more recent case, *Johnson-Kurek v. Abu-Absi*,<sup>80</sup> the appellate court held that any right of academic freedom in its teaching component belongs to the college or university and not the individual faculty member. Rosemary Johnson-Kurek, a part-time lecturer at the University of Toledo, alleged that a decision to deny her a second English course teaching assignment was made in retaliation for her refusal to comply with an administrative direction to communicate more explicitly with her students about what was required for their completion of a course she had taught the previous year, in which 13 of her 17 students had received grades of "Incomplete." In a listserv message, she informed students that grades of incomplete had been assigned for one of three reasons (formatting issues,

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77. *Id.* at 1419-20.

78. *Cohen*, 92 F.3d at 972.

79. *Id.* at 971.

80. 423 F.3d 590 (6th Cir. 2005).



improper citations, or the need for textual changes) but, for pedagogical reasons, she did not provide individualized information on deficiencies, leaving it up to the student to determine which reason applied in their own case. One student complained about the lack of specific direction, and her supervisor directed Johnson-Kurek multiple times to provide written, individualized, precise directions for each student on what they personally needed to do to finish the coursework and obtain a final grade. Johnson-Kurek did not comply. Her lawsuit was dismissed at the trial court level, and the Sixth Circuit affirmed, stating:

While the First Amendment may protect Johnson-Kurek's right to express her ideas about pedagogy, it does not require that the university permit her to teach her classes in accordance with those ideas. The freedom of the university to decide what may be taught and how it shall be taught would be meaningless if a professor were entitled to refuse to comply with university requirements whenever they conflict with his or her teaching philosophy.<sup>81</sup>

In line with issues of setting academic and pedagogic standards, circuit courts have tended to agree that institutions set the grading policies to which faculty are obligated to adhere.<sup>82</sup> In *Stronach v. Virginia State University*,<sup>83</sup> the federal court for the Eastern District of Virginia held that while academic freedom arguably protects a professor's right to *assign* a grade, it also protects the prerogative of the college or university (presumably its administrators) to *change* the grade over the professor's objection. Carey Stronach, a long-time tenured professor of physics at Virginia State University, had a dispute with a student about the grade he received on two quizzes, resulting in a final grade of "F," rather than an "A," as claimed by the student. The student submitted faxed copies of his score sheets to Stronach, who concluded the higher quiz scores were altered ones, not the grades actually earned. The student appealed to the chairperson of the department, who agreed with the student and changed the grade. Stronach sued the chairperson and other university officials for violating his academic freedom. The trial court judge ruled that academic freedom "is the *university's* right, and not the *professor's* right."<sup>84</sup>

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81. *Id.* at 595.

82. See Jennifer L.M. Jacobs, Note, *Grade "A" Certified: The First Amendment Significance of Grading by Public University Professors*, 87 MINN. L. REV. 813, 821 (2003); see also Evelyn Sung, Note, *Mending the Federal Circuit Split on the First Amendment Right of Public University Professors to Assign Grades*, 78 N.Y.U. L. REV. 1550 (2003) (reviewing different analyses among the circuit courts leading to same conclusion).

83. 2008 U.S. Dist. LEXIS 2914 (E.D. Va. Jan. 15, 2008).

84. *Id.* at \*7. Similarly, in *Parate v. Isabor*, 828 F.2d 821 (6th Cir. 1989), the circuit court stated that "[t]he professor's evaluation of her students and

In 2000, the Fourth Circuit Court of Appeals, in *Urofsky v. Gilmore*,<sup>85</sup> asserted that although academic freedom for individual professors may exist as a “professional norm,” it is not a legal standard or “constitutional right.”<sup>86</sup> The circuit court’s review of Supreme Court opinions erroneously concluded that if academic freedom exists, it is vested exclusively in the institution and not in individual professors.<sup>87</sup> More recently, in *Garcetti v. Ceballos*,<sup>88</sup> the Supreme Court held that when a public employee is speaking as part of his or her “official duties” (i.e., in the course of

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assignment of their grades is central to the professor’s teaching method.” *Id.* at 828. Institutional control was still preserved because the court held that Parate had “no constitutional interest in the grades which his students ultimately receive,” and thus his First Amendment rights would not be violated if university administrators changed the grade themselves, rather than compelling the professor to do so. *Id.* at 829.

85. 216 F.3d 401 (4th Cir. 2000) (en banc), *cert. denied*, 531 U.S. 1070 (2001).

86. *Id.* at 411. The court referred to the “audacity” of the claim of special constitutional protection for academic speakers, stating that it would be “manifestly at odds with a constitutional system premised on equality.” *Id.* at 411 n.13.

87. *Id.* at 412. (“The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.”). Challenging such misinterpretations of prior authority, Richard H. Hiers has meticulously demonstrated that the cases the circuit court cites, in fact, involved individual faculty claims of academic freedom, and no distinction was intimated in the opinions of the Court between a university’s academic freedom and that of its faculty. Hiers, *supra* note 24. *See also* Elizabeth Mertz, Comment, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U. L. REV. 492, 539 (1988) (“Universities can only claim special academic freedom protection when they act to shield individual scholars from outside intervention.”). The *Urofsky* decision has been criticized as “profoundly wrong as a matter of law” by J. Peter Byrne, a legal scholar relied upon by the majority for its reasoning. J. Peter Byrne, *Constitutional Academic Freedom in Scholarship and in Court*, 47 CHRON. HIGHER EDUC. B13, B13 (2001). *See also* Rebecca Gose Lynch, Comment, *Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights within the State’s Managerial Realm*, 91 CAL. L. REV. 1061, 1064 (2003) (characterizing the decision as “clearly incorrect” having “essentially relegated public university professors to being pawns of the state.”); Stacy E. Smith, Note, *Who Owns Academic Freedom? The Standard for Academic Free Speech at Public Universities*, 59 WASH. & LEE L. REV. 299, 353 (2002) (criticizing the court’s failure to appreciate the mission of academic scholarly speech); Kate Williams, Note, *Loss of Academic Freedom on the Internet; The Fourth Circuit’s Decision in Urofsky v. Gilmore*, 21 REV. LITIG. 493, 495 (2002) (describing the ruling as “erroneous” with “dangerous implications for academics nationwide.”).

88. 547 U.S. 410 (2006).

performing his or her job), then the employee's speech is entitled to no First Amendment protection and can be the basis for discipline or discharge.<sup>89</sup> Critics have pointed out that the speech *Garcetti* fails to deem protected is, in an academic setting at a governmentally-run college or university, the very speech that academic freedom is meant to protect.<sup>90</sup> In his dissenting opinion, Justice Souter wrote, "I have to hope that today's majority does not mean to imperil First Amendment protection to academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'" <sup>91</sup> The Court recognized that freedom of expression related to scholarship would be a cause of concern,<sup>92</sup> but the majority opinion side-stepped this issue, merely reserving the question of whether this standard applies to academic scholarship and classroom teaching.<sup>93</sup>

Legal commentators have outlined the serious threat to academic freedom the application of *Garcetti* to college and university faculty poses.<sup>94</sup> Most cases involving college and university faculty where *Garcetti*

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89. *Id.* at 421. Speech in carrying out one's professional duties is likened to commissioned work, and thus subject to the employer's control. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id.* at 421–22. To categorize the academic speech of professors as proprietary speech is antithetical to the idea of academic freedom, and it undermines the essential purposes of higher education institutions. R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793, 824–25 (2007).

90. Leonard M. Niehoff, *Peculiar Marketplace: Applying Garcetti v. Ceballos in the Public Higher Education Context*, 35 J.C. & U.L. 75, 91 (2008); Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 149 (2007); Wright, *supra* note 89, at 820.

91. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting) (citations omitted).

92. *Id.* at 425 (majority opinion) ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence.").

93. *Id.*

94. See American Association of University Professors, Report, *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos*, 95 ACADEME 67 (2009) (recommending the development of institutional policies and practices to define and protect academic freedom due to the failure of constitutional law in the courts to ensure it); Barbara K. Bucholtz, *What Goes around Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 TEX. WESLEYAN L. REV. 311, 316 (2007) (arguing that the decision "baldly threatens the academic freedom of scholars in public universities"); Risa L. Lieberwitz, *Linking Professional Academic Freedom, Free Speech, and Racial and Gender Equality*, 53 LOY. L.

has been applied have not concerned classroom speech or pedagogy, although they have involved situations of faculty expressing views based on their pedagogical or scholarly expertise.<sup>95</sup> In at least some of those decisions, courts have treated faculty speech related to scholarship or teaching as protected forms of speech.<sup>96</sup> Very few cases have directly addressed the relevance of the *Garcetti* caveat to a professor's classroom speech. In one such case, *Sheldon v. Dhillon*,<sup>97</sup> a federal district court in California held that a professor's speech in class about the scientific theories on homosexuality was protected, recognizing that the *Garcetti* official duties analysis did not apply to such academic speech. June Sheldon, an experienced adjunct biology instructor at San José Community College, was asked about the genetic basis of homosexual behavior by a student in her course on human heredity. In her response, the instructor noted the complexity of the issue being debated in the scientific community, cited a genetic example in the course textbook, and referenced

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REV. 165, 169 (2007) (concluding that following *Garcetti*, "the constitutional viability of individual rights of academic freedom is even more questionable."); Spurgeon, *supra* note 90, at 149 (observing that if *Garcetti* is applied to public college and university faculty, "it could provide a blunt weapon to those who would challenge the content of a professor's expression.").

95. Cases that have involved faculty speech as part of institutional governance have placed such speech outside the realm of free speech. *See, e.g.*, *Savage v. Gee*, 716 F. Supp. 2d 709 (S.D. Ohio 2010) (recognizing *Garcetti*'s academic freedom exception, but holding that the speech in question did not concern scholarship or teaching and was therefore unprotected under the official duties analysis of *Garcetti*); *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009) (citing Justice Kennedy's caution about blindly applying *Garcetti* to faculty speech and activities, and Justice Souter's warning, but finding that the speech in question was not related to scholarship or teaching and was not then protected faculty speech); *Hong v. Grant*, 2010 U.S. App. LEXIS 23504, at \*3-\*4 (9th Cir. Nov. 12, 2010) (stating that it is unclear whether university faculty have a First Amendment right to comment on administrative matters without retaliation, and deciding to "leave the question . . . for consideration in another case").

96. In *Adams v. Trs. of the Univ. of N. Carolina–Wilmington*, 640 F.3d 550 (4th Cir. 2011), the Fourth Circuit Court of Appeals, citing their earlier decision in *Lee v. York Cnty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007), stated that applying *Garcetti* to "the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment." *Adams*, 640 F.3d at 574. In *Kerr v. Hurd*, 694 F. Supp. 2d 817 (S.D. Ohio Mar. 15, 2010), a federal district court in Ohio ruled that a medical professor's speech to students was protected by the First Amendment, explicitly stating that in-class faculty speech falls within an academic freedom exception to *Garcetti*. The case is currently on appeal before the Sixth Circuit.

97. *Sheldon v. Dhillon*, 2009 U.S. Dist. LEXIS 110275 (N.D. Cal. Nov. 25, 2009).

the biological findings of a German scientist. Sheldon explained that the scientist's research presented only one set of theories from the nature versus nurture debate to be addressed in the course, which would cover how homosexual behavior may be influenced by both genes and the environment. Another student in the class complained to college officials about being offended by Sheldon's answer, alleging that she had "made 'offensive and unscientific' statements, including that there 'aren't any real lesbians' and that 'there are hardly any gay men in the Middle East because women are treated very nicely.'"<sup>98</sup> When terminated for "teaching misinformation as science,"<sup>99</sup> Sheldon sued in federal court, charging that her First Amendment and other rights were violated.

While making no determination on whether Sheldon's First Amendment rights were violated, the ruling stated that she had First Amendment rights and did not lose them by virtue of the speech in question having taken place while she was teaching at a public college. The court rejected the college's reliance on the *Garcetti* decision, noting that "by its express terms," the *Garcetti* decision did "not address the context squarely presented here: the First Amendment's application to teaching-related speech."<sup>100</sup> Acknowledging that prior appeals court opinions "recognized that teachers have *First Amendment* rights regarding their classroom speech, albeit without defining the precise contours of those rights,"<sup>101</sup> the court also noted that the Supreme Court has held that "a teacher's instructional speech is protected by the *First Amendment*."<sup>102</sup> If the defendants acted in retaliation of Sheldon's instructional speech, her rights would have been violated unless their conduct was reasonably related to a "legitimate pedagogical concern."<sup>103</sup> Because the court could not determine if the community college terminated her employment on the grounds of reasonable pedagogical concerns, it denied the college's motion to dismiss. In July 2010, the community college district settled the case by agreeing to pay Sheldon \$100,000 as compensation for lost wages and removing any references to her dismissal from her file.<sup>104</sup>

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98. *Id.* at \*6.

99. *Id.* at \*7.

100. *Id.* at \*11.

101. *Id.* at \*12–\*13.

102. *Id.* at \*13–14 (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)).

103. *Id.* at \*14.

104. *Id.* at \*2–3.

## II. STUDENT RATINGS OF TEACHING

## A. Issues of Validity

The evaluation of faculty performance in higher education is a broad field,<sup>105</sup> with legal issues permeating the various processes and criteria for review, as well as the uses that are made of those appraisals.<sup>106</sup> Numerical student ratings are a well-entrenched feature of faculty evaluation<sup>107</sup> and often are the only evidence used for judgments of teaching quality,<sup>108</sup> even though the voluminous accumulation of empirical research over several decades has not been compelling enough to produce consensus about their

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105. For authoritative works in the field, see LARRY A. BRASKAMP & JOHN C. ORY, *ASSESSING FACULTY WORK: ENHANCING INDIVIDUAL AND INSTITUTIONAL PERFORMANCE* (1994); JOHN A. CENTRA, *REFLECTIVE FACULTY EVALUATION: ENHANCING TEACHING AND DETERMINING FACULTY EFFECTIVENESS* (1993).

106. See John D. Copeland & John W. Murry, Jr., *Getting Tossed from the Ivory Tower: The Legal Implications of Evaluating Faculty Performance*, 61 MO. L. REV. 233 (1996); Roger W. Reinsch et al., *Evidentiary and Constitutional Due Process Constraints on the Uses by Colleges and Universities of Student Evaluations*, 32 J.C. & U.L. 75 (2005); William Arthur Wines & Terence J. Lau, *Observations on the Folly of Using Student Evaluations of College Teaching for Faculty Evaluation, Pay, and Retention Decisions and Its Implications for Academic Freedom*, 13 WM. & MARY J. WOMEN & L. 167 (2006).

107. James A. Kulik, *Student Ratings: Validity, Utility, and Controversy*, in THE STUDENT RATINGS DEBATE: ARE THEY VALID? HOW CAN WE BEST USE THEM? 9 (Michael Theall et al. eds., 2001). Student rating instruments are institutionally or commercially developed machine-readable standardized questionnaire forms, that typically include items for a holistic or overall rating of the course and of the instructor's effectiveness, as well as ratings of factors such as organization and structure of the course, appropriateness of the level of course difficulty and workload assignments, fairness and accuracy in assessment, clarity and communication skills of the instructor, the instructor-student relationship (instructor's development of rapport, their caring and concern for students, being respectful of students), various instructor qualities (such as preparation, level of knowledge, enthusiasm) and, less commonly, student self-rated learning. See CENTRA, *supra* note 105, at 52–58; Carol I. Young, *An Analysis of Student Evaluation Forms: Are They Compatible with Active Learning Strategies?*, 3 J. ACAD. BUS. EDUC., available at <http://www.abe.sju.edu/proc2002/young2.pdf>. Potential alternative sources for the assessment of teaching include teaching portfolios, developed curriculum, course syllabi, classroom observations by peers or administrators, scholarly research and publication on teaching, alumni opinions, student learning outcomes, and enrollment patterns. See, e.g., CHANGING PRACTICES IN EVALUATING TEACHING: A PRACTICAL GUIDE TO IMPROVED PERFORMANCE AND PROMOTION/TENURE DECISIONS (Peter Seldin & Associates eds., 1999).

108. Seldin & Associates, *supra* note 107, at 1.

psychometric quality.<sup>109</sup> The central issue in this very divisive debate is whether student ratings fairly and accurately indicate quality of teaching, with researchers either defending or denouncing such instruments.<sup>110</sup> Strong proponents of student ratings offer confirming evidence that student

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109. In the student ratings literature, the predominate question is one of *construct validity*, or the degree to which a rating instrument measures what it purports to measure (in this case, the construct of quality of teaching). Validity theory, as it has developed in the field of psychometrics, concerns the logical arguments and empirical evidence required to support interpretations, inferences, and actions based on data collected from a particular data-gathering procedure. For seminal writings on validity, see Lee J. Cronbach, *Test Validation*, in EDUCATIONAL MEASUREMENT 443 (Robert L. Thorndike ed., 2d ed. 1971); Lee J. Cronbach & Paul E. Meehl, *Construct Validity in Psychological Testing*, 52 PSYCHOL. BULL. 281 (1955); Samuel Messick, *Validity*, in EDUCATIONAL MEASUREMENT 13 (Robert L. Linn ed., 3d ed. 1989). For an historical perspective, see Lorrie A. Shepard, *Evaluating Test Validity*, in 19 REV. RES. EDUC. 405 (Linda Darling-Hammond ed., 1993). For overviews of the extraordinarily vast literature on the validity of student ratings, see Philip C. Abrami et al., *The Dimensionality of Student Ratings of Instruction: What We Know and What We Do Not*, in EFFECTIVE TEACHING IN HIGHER EDUCATION: RESEARCH AND PRACTICE 321 (Raymond P. Perry & John C. Smart eds., 1997); Kulik, *supra* note 107; John C. Ory & Katherine Ryan, *How Do Student Ratings Measure up to a New Validity Framework?*, in THE STUDENT RATINGS DEBATE: ARE THEY VALID? HOW CAN WE BEST USE THEM? 27 (Michael Theall et al. eds., 2001); Howard K. Wachtel, *Student Evaluation of College Teaching Effectiveness: A Brief Review*, 23 ASSESSMENT & EVALUATION HIGHER EDUC. 191 (1998).

110. Compare William E. Cashin, *Student Ratings of Teaching: The Research Revisited*, IDEA PAPER. No. 32, 6 (1995), available at [http://www.theideacenter.org/sites/default/files/Idea\\_Paper\\_32.pdf](http://www.theideacenter.org/sites/default/files/Idea_Paper_32.pdf) (concluding that “[i]n general, student ratings tend to be statistically reliable, valid, and relatively free from bias or the need for control; probably more so than any other data for evaluation”), and Peter A. Cohen, *Student Ratings of Instruction and Student Achievement: A Meta-Analysis of Multisection Validity Studies*, 51 REV. EDUC. RES. 281, 305 (1981) (concluding, based on meta-analysis, that “student ratings of instruction are a valid index of instruction effectiveness”), and Michael Theall & Jennifer Franklin, *Looking for Bias in All the Wrong Places: A Search for Truth or a Witch Hunt in Student Ratings of Instruction?*, in THE STUDENT RATINGS DEBATE: ARE THEY VALID? HOW CAN WE BEST USE THEM? 45, 46 (Michael Theall et al. eds., 2001) (assessing the research and concluding that student ratings are generally “reliable and valid”), with Randi L’Hommedieu et al., *Methodological Explanations for the Modest Effects of Feedback from Student Ratings*, 82 J. EDUC. PSYCHOL. 232 (1990) (arguing that the modest persistent positive effect of student ratings found in meta-analyses is attenuated by methodological and conceptual validity issues in the research), and Robert Sproule, *The Underdetermination of Instructor Performance by Data from the Student Evaluation of Teaching*, 21 ECON. EDUC. REV. 287 (2002) (arguing that instructor performance is underdetermined by student ratings data).

ratings are valid measures of teaching effectiveness, dismiss evidence to the contrary as the product of “unreplicable” and methodologically flawed research, and disparage rival positions as the misdirected “witch hunt” for bias that perpetuates “myths” needing debunking.<sup>111</sup> Opponents of student ratings question the construct validation approach for gathering evidence that student ratings are indicators of teaching competence given that faculty hold widely diverse views on the goals of teaching,<sup>112</sup> and there is no agreement on how to define good teaching itself.<sup>113</sup> In order to have content validity, the items on the student ratings questionnaires need to consist of a set of substantially invariant elements reflecting an acceptable definition of teaching effectiveness that transcends disciplines, subject matter, epistemologies, student capabilities, teaching methods, contexts, and so on.<sup>114</sup> Critics point out that the concept of effective teaching has generally been operationalized on rating forms by a list of observable behaviors embedded in a teacher-centered didactic model of pedagogy.<sup>115</sup> Although

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111. Theall & Franklin, *supra* note 110, at 45–48. *See also* Lawrence M. Aleamoni, *Student Rating Myths Versus Research Facts from 1924 to 1998*, 13 J. PERSONNEL EVALUATION EDUC. 153 (1999); Herbert W. Marsh & Lawrence A. Roche, *Effects of Grading Leniency and Low Workload on Students' Evaluations of Teaching: Popular Myth, Bias, Validity, or Innocent Bystanders?*, 92 J. EDUC. PSYCHOL. 202 (2000); Kenneth A. Feldman, *Identifying Exemplary Teachers and Teaching: Evidence from Student Ratings*, THE SCHOLARSHIP OF TEACHING AND LEARNING IN HIGHER EDUCATION: AN EVIDENCE-BASED EXPERIENCE 93 (Raymond P. Perry & John C. Smart eds., 2007).

112. *See* David Kember, *A Reconceptualisation of the Research into University Academics' Conceptions of Teaching*, 7 LEARNING & INSTRUCTION 255 (1997); Daniel D. Pratt, *Conceptions of Teaching*, 42 ADULT EDUC. Q. 203 (1992).

113. *See* Abrami et al., *supra* note 109, at 324–42 (critically analyzing three distinct definitions of teaching effectiveness); Cashin, *supra* note 110, at 2–3 (“Unfortunately there is no agreed upon definition of ‘effective teaching’ nor any single, all-embracing criterion.”); Kulik, *supra* note 107, at 10 (stating that “no one knows what measure to use as the criterion of teaching effectiveness.”); Herbert W. Marsh, *Students' Evaluations of University Teaching: Research Findings, Methodological Issues, and Directions for Future Research*, 11 INT’L J. EDUC. RES. 253, 285 (1987) (noting that “[s]tudent ratings, which constitute one measure of teaching effectiveness, are difficult to validate since there is no single criterion of effective teaching.”); Philip C. Abrami & Sylvia d’Apollonia, *The Dimensionality of Ratings and Their Use in Personnel Decisions*, STUDENT RATINGS OF INSTRUCTION: ISSUES FOR IMPROVING PRACTICE 97 (Michael Theall & Jennifer Franklin eds., 1990) (studying the uniformity of student rating forms and finding them to be inconsistent in their operational definitions of instructional effectiveness).

114. *See* Michael Scriven, *Summative Teacher Evaluation*, in HANDBOOK OF TEACHER EVALUATION 244 (Jason Millman ed., 1981).

115. *See* CENTRA, *supra* note 105, at 47–48 (claiming that “the typical student rating form is devised to reflect effectiveness in . . . teacher-centered methods”);



presumed to be representative of the components of all good teaching, this framework renders the instruments differentially consequential for those who engage in alternative forms of teaching.<sup>116</sup> Moreover, critics have argued that a professor's pedagogical goals can be qualitatively distinct from students' expectations for their teaching performance, such that an instructor's violation of students' expectations becomes misconstrued as instructional incompetence.<sup>117</sup>

Ostensibly, results from student surveys are supposed to increase the overall quality of teaching through a process of individual instructors converting student input into improved teaching, and by serving as summative profiles of professors' effectiveness to inform administrative decisions on hiring, retention, promotion, and compensation.<sup>118</sup>

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Arthur Best, *Student Evaluations of Law Teaching Work Well: Strongly Agree, Agree, Neutral, Disagree, Strongly Agree*, 38 SW. U. L. REV. 1, 16 (2008) (concluding that "the forms studied . . . overwhelmingly convey the idea that learning is a passive activity and that teaching consists of a one-way delivery process, with information and skills directed to students by the professor."); Sylvia d'Apollonia & Philip C. Abrami, *Navigating Student Ratings of Instruction*, 52 AM. PSYCHOLOGIST 1198, 1199 (1997) (arguing that typical student feedback forms are based on traditional didactic teaching models and "do not necessarily generalize across other instructional contexts"); Wilbert J. McKeachie, *Student Ratings: The Validity of Use*, 52 AM. PSYCHOLOGIST 1218, 1220 (1997) (pointing out that student rating forms collect information about "conventional classroom teaching"); Tom C. Wilson, *Student Evaluation-of-Teaching Forms: A Critical Perspective*, 12 REV. HIGHER EDUC. 79, 90-91 (1988) (arguing that student rating forms support a basically "conservative pedagogy" and a "reification of knowledge").

116. See Elaine Kolitch & Ann V. Dean, *Student Ratings of Instruction in the USA: Hidden Assumptions and Missing Conceptions About "Good" Teaching*, 24 STUD. HIGHER EDUC. 27 (1999) (finding a typical rating questionnaire to be more compatible with a transmission model of teaching than an engaged-critical model); G. Stevenson Smith, *Assessment Strategies: What Is Being Measured in Student Course Evaluations*, 13 ACCT. EDUC. 3 (2004) (describing the majority of interactions queried on rating forms as behaviors of the instructor rather than methods of developing students' thinking skills).

117. See Arnold S. Linsky & Murray A. Straus, *Student Evaluation of Teaching: A Comparison of Sociology with Other Disciplines*, 1 TEACHING SOC. 103, 112 (1973) (presenting student ratings as moral evaluations of the congruence of a professor's role performance with students' expectations); Richard J. Gigliotti, *Are They Getting What They Expect?*, 15 TEACHING SOC. 365 (1987) (finding that a professor's violation of students' expectations to be significantly related to student ratings); Jordan J. Titus, *Student Ratings in a Consumerist Academy: Leveraging Pedagogical Control and Authority*, 51 SOC. PERSP. 397 (2008) (finding students' expectations to be framed by a consumerist mentality of comfortable satisfaction fundamentally at odds with professors' instructional goals to challenge students to think critically).

118. *Formative evaluation* is assessment conducted while the activities are

Researchers, though, have failed to gather reliable evidence showing, with reasonable certainty, the purported improvements following institutionalizing a student ratings system.<sup>119</sup> While educational researchers

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forming (in progress), for the purpose of improvement. *Summative evaluation* is judging the worth of activities after their completion, with a focus on the outcome, and usually for the benefit of an external audience or decision-maker. The student rating forms are designed for summative (rather than formative) evaluation, and are distributed at the end of a course of study. There is little controversy concerning the formative role of student feedback, but much heated debate exists about use of student ratings data in summative evaluation for differential rewards. For the original distinction between formative and summative roles of evaluation, see Michael Scriven, *The Methodology of Evaluation*, in PERSPECTIVES OF CURRICULUM EVALUATION 39, 41–43 (R. W. Tyler et al. eds., 1967). For elaboration on the terms, see Michael Scriven, *Beyond Formative and Summative Evaluation*, in EVALUATION AND EDUCATION: AT QUARTER CENTURY 18 (Milbrey W. McLaughlin & D. C. Phillips eds., 1991). For a discussion on the inherent conflict between these two functions, see W. J. Popham, *The Dysfunctional Marriage of Formative and Summative Teacher Evaluation*, 1 J. PERSONNEL EVALUATION EDUC. 269 (1988).

119. See Kenneth A. Feldman, *The Seniority and Instructional Experience of College Teachers as Related to the Evaluations They Receive from Their Students*, 18 RES. HIGHER EDUC. 3 (1983) (reviewing studies and reporting student ratings of teaching to be either unrelated or positively related to academic rank, but unrelated or negatively correlated with instructor's age and years of teaching experience); David Kember et al., *Does the Use of Student Feedback Questionnaires Improve the Overall Quality of Teaching?*, 27 ASSESSMENT & EVALUATION HIGHER EDUC. 411 (2002) (finding that over a 4-year period, student ratings produced no evidence of improvement in the quality of teaching); Herbert W. Marsh & Dennis Hocevar, *Students' Evaluations of Teaching Effectiveness: The Stability of Mean Ratings of the Same Teachers over a 13-Year Period*, 7 TEACHING & TCHR. EDUC. 303 (1991) (using a longitudinal design and a diverse cohort of instructors, finding that teaching effectiveness as perceived by students was stable over time relative to increases in teaching experience). See also George W. Carey, *Thoughts on the Lesser Evil: Student Evaluations*, 22 PERSP. ON POL. SCI. 17, 17 (1993) (judging the belief that student ratings "provide appropriate quality control" to be "a highly dubious presumption at best"); Orlando J. Olivares, *Student Evaluations of Teachers: Intended and Unintended Social Consequences*, 15 J. ON EXCELLENCE C. TEACHING 105, 113 (2004) (arguing that there is "little if any direct evidence to suggest that the wide-spread use of teacher ratings has resulted in more effective teachers or more learned students"); Robert Powell, *Faculty Rating Scale Validity: The Selling of a Myth*, 39 C. ENG. 616, 626 (1978) (observing that "[t]hough student evaluation of faculty systems have been adopted in numerous colleges, there has been a lack of reliable research evidence that the official adoption of such systems within a department or college has ever improved the level of instruction"). But see Harry G. Murray, *Does Evaluation of Teaching Lead to Improvement of Teaching*, 2 INT'L J. ACAD. DEV. 8 (1997) (determining from a review of prior research that under certain conditions, but not others, the introduction of student ratings leads to improvement of teaching); L'Hommedieu

quite consistently identify a factor of effective teaching to be reflected by student learning,<sup>120</sup> most studies have found little or no correlation between objective measures of student achievement and students' ratings of their instructors.<sup>121</sup> At the same time, documentation grows of the different kinds

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et al., *supra* note 110 (finding from a meta-analysis, the overall improvement effect on teaching by student ratings to be too small for any practical value to instructors). Some researchers argue that by inducing lowered academic standards and grade inflation, student ratings can have negative effects on educational quality. See, e.g., VALEN E. JOHNSON, *GRADE INFLATION: A CRISIS IN COLLEGE EDUCATION* (2003); James J. Ryan et al., *Student Evaluations: The Faculty Responds*, 12 RES. HIGHER EDUC. 317 (1980).

120. See Cohen, *supra* note 110, at 283 (“Even though there is a lack of unanimity on a definition of good teaching, most researchers in this area agree that student learning is the most important criterion of teaching effectiveness.”); Marsh, *supra* note 113, at 720 (“The most widely accepted criterion of effective teaching is student learning . . .”). In this literature, one aspect of construct validation (or convergent validation) consists of demonstrating substantial positive correlation of student ratings with other purported measures of teaching effectiveness. See Cronbach, *supra* note 109. Assessing the construct validity of student ratings in this way is problematic if the measures used to validate those instruments are also of questionable validity. In this case, the criterion measure (amount of student learning) cannot be considered a perfect measure of the construct of interest (teaching effectiveness) because variables apart from the quality of teaching can influence the amount students learn. Serious concerns arise when certain measures of student learning, such as student scores on achievement tests, are used as a sole basis for evaluating an instructor’s teaching performance, a purpose for which such tests were not designed. See Jason Millman, *Student Performance as a Measure of Teacher Competence*, HANDBOOK OF TEACHER EVALUATION 146 (Jason Millman ed., 1981); Gene V. Glass, *Using Student Test Scores to Evaluate Teachers*, THE NEW HANDBOOK OF TEACHER EVALUATION: ASSESSING ELEMENTARY AND SECONDARY SCHOOL TEACHERS 229 (Jason Millman & Linda Darling-Hammond eds., 1990); Thomas Kane & Douglas Staiger, *Volatility in School Test Scores: Implications for Test-Based Accountability Systems*, BROOKINGS PAPERS ON EDUCATION POLICY 235 (Diane Ravitch ed., 2002); TIM R. SASS, THE STABILITY OF VALUE-ADDED MEASURES OF TEACHER QUALITY AND IMPLICATIONS FOR TEACHER COMPENSATION POLICY (The Urban Institute 2008); PETER Z. SCHOCHET & HANLEY S. CHIANG, ERROR RATES IN MEASURING TEACHER AND SCHOOL PERFORMANCE BASED ON STUDENT TEST SCORE GAINS (NCEE 2010-4004 2010).

121. A correlation coefficient is a number (ranging from -1.0 to +1.0) that expresses the extent (from none to perfect) and direction (positive or inverse) of relationship between two variables. Compare Miriam Rodin & Burton Rodin, *Student Evaluations of Teachers*, 177 SCIENCE 1164, 1165–66 (1972) (showing a strong negative correlation [-.75] between ratings and learning), and Penelope J. Yunker & James A. Yunker, *Are Student Evaluations of Teaching Valid? Evidence from an Analytical Business Core Course*, 78 J. EDUC. BUS. 313 (2003) (finding a statistically significant negative relationship between student evaluations and student achievement), and Ganesh Mohanty et al., *Multi-Method Evaluation of*

of faculty performances that can result in high student ratings irrespective of the quality of teaching.<sup>122</sup> Grading policies, for example, have been found to have at least a modest positive correlation with student ratings,<sup>123</sup>

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*Instruction in Engineering Classes*, 18 J. PERSONNEL EVALUATION EDUC. 139 (2005) (using pre- and post-tests of content knowledge, finding no relationship between student learning and student ratings), with David A. Dowell & James A. Neal, *A Selective Review of the Validity of Student Ratings of Teaching*, 53 J. HIGHER EDUC. 51, 60 (1982) (combining the results from six studies and calculating a weak “unimpressive” correlation [+0.20] between student ratings and learning), and Jeff Koon & Henry G. Murray, *Using Multiple Outcomes to Validate Student Ratings of Overall Teacher Effectiveness*, 66 J. HIGHER EDUC. 61 (1995) (finding a correlation of +0.304 between final examination scores and mean student ratings of overall teaching effectiveness), and Cohen, *supra* note 110 (finding from a meta-analysis of 41 studies, an average correlation of +0.43 between overall instructor rating and student achievement). When researchers have studied the relationship of achievement and ratings across consecutive courses with highly cumulative content, students of instructors they rate highly performed less well in subsequent courses than students of lower rated instructors. See Stephen Shmanske, *On the Measurement of Teacher Effectiveness*, 19 J. ECON. EDUC. 307 (1988); Yunker & Yunker, *supra*; Scott E. Carrell & James E. West, *Does Professor Quality Matter? Evidence from Random Assignment of Students to Professors*, 118 J. POL. ECON. 409 (2010).

122. See, e.g., Ian Neath, *How to Improve Your Teaching Evaluations without Improving Your Teaching*, 78 PSYCHOL. REP. 1363 (1996); Paul A. Trout, *How to Improve Your Teaching Evaluation Scores without Improving Your Teaching!*, 7 MONT. PROFESSOR, available at <http://mtprof.msun.edu/Fall1997/HOWTORAI.html>. Manipulative practices that faculty have reported using successfully to obtain more positive ratings include using food (snacks, chocolate, pizza) as an inducement. P. M. Simpson & J. A. Siguaw, *Student Evaluations of Teaching: An Exploratory Study of the Faculty Response*, 22 J. MARKETING EDUC. 199 (2000); Robert J. Youmans & Benjamin D. Jee, *Fudging the Numbers: Distributing Chocolate Influences Student Evaluations of an Undergraduate Course*, 34 TEACHING PSYCHOL. 245 (2007).

123. See, e.g., Anthony G. Greenwald & Gerald M. Gillmore, *Grading Leniency Is a Removable Contaminant of Student Ratings*, 52 AM. PSYCHOLOGIST 1209, 1210 (1997) (observing that “course grades are positively correlated with course evaluative ratings”); Kenneth A. Feldman, *Grades and College Students’ Evaluations of Their Courses and Teachers*, 4 RES. HIGHER EDUC. 69 (1976) (concluding that a student’s anticipated or actual course grade is positively associated with their evaluation of the course and instructor). Although there is general agreement that a correlation exists between expected grades and student ratings, there are multiple interpretations of the magnitude of this relation. For overviews of various explanations, see Herbert W. Marsh, *Students’ Evaluations of University Teaching: Dimensionality, Reliability, Validity, Potential Biases and Usefulness*, THE SCHOLARSHIP OF TEACHING AND LEARNING IN HIGHER EDUCATION: AN EVIDENCE-BASED EXPERIENCE 319 (Raymond P. Perry & John C. Smart eds., 2007).

prompting the contentious speculation that grading leniency can increase ratings.<sup>124</sup>

### B. Student Satisfaction

There is vigorous dispute over the possibility that variables extraneous to an instructor's teaching effectiveness influence student ratings.<sup>125</sup>

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124. As one assistant professor of English explained, "I still teach with the same rigor and enthusiasm and I still enjoy the material, but I don't hold students as accountable as I used to. I need to get tenure." Louise Churchill, *Professor Goodgrade: Or How I Learned to Stop Worrying and Give Lots of A's*, 52 CHRON. HIGHER EDUC. C1, C1 (2006). One prominent theory explaining the relationship between grades and student ratings is that an instructor's grading leniency influences ratings by students. See Charles F. Eiszler, *College Students' Evaluations of Teaching and Grade Inflation*, 43 RES. HIGHER EDUC. 483 (2002) (supporting the conclusion that student ratings may encourage grade inflation); Greenwald & Gillmore, *supra* note 123 (concluding that a grades-ratings correlation is due to instructors' grading leniency influencing ratings); Valen E. Johnson, *Teacher Course Evaluations and Student Grades: An Academic Tango*, 15 CHANCE 9 (2002) (arguing that there is conclusive evidence of a biasing effect of grades on student evaluations of teaching); J. E. Stone, *Inflated Grades, Inflated Enrollment, and Inflated Budgets: An Analysis and Call for Review at the State Level*, 3 EDUC. POL'Y ANALYSIS ARCHIVES, available at <http://epaa.asu.edu/epaa/v3n11.html> (arguing that an institutional reliance on student ratings results in lowered standards and grade inflation). *But see* Marsh & Roche, *supra* note 111, at 226 (explaining that "teachers cannot get higher than average SETs [student ratings] merely by offering easier courses and giving students higher than deserved grades"); John A. Centra, *Will Teachers Receive Higher Student Evaluations by Giving Higher Grades and Less Course Work?*, 44 RES. HIGHER EDUC. 495 (2003) (demonstrating minimal effect of expected grades on course ratings). For a critical summary of research on the leniency hypothesis, see Steven E. Gump, *Student Evaluations of Teaching Effectiveness and the Leniency Hypothesis: A Literature Review*, 30 EDUC. RES. Q. 55 (2007).

125. Student ratings are considered *biased* "to the extent that they are influenced by variables that are unrelated to teaching effectiveness," or *unfair* "to the extent that they are affected by variables that are not under the control of the instructor." Marsh, *supra* note 113, at 310–11. Variables that may confound measurement of teaching effectiveness include those associated with the administration of the evaluations (timing, rater anonymity, instructor's presence, stated purpose), characteristics of the course (electivity, meeting time, course level, class size, subject area, workload), characteristics of students (personality, prior subject interest, gender, expectations such as expected grade, emotional state, age, political views, prejudice), and characteristics of the instructor (rank, age, experience, reputation, research productivity, gender, race, sexual orientation, physical appearance and attractiveness, personality, expressiveness). For summaries of this vast literature, see Kenneth A. Feldman, *College Students' Views of Male and Female College Teachers: Part II—Evidence from Students' Evaluations of Their Teachers*, 34 RES. HIGHER EDUC. 151 (1993); Cashin, *supra*

Although popular instructors may be popular because they are excellent at enhancing student learning, there is considerable evidence to suggest that the instructor's perceived personality (their "likability") exerts a disproportionate and overwhelming "halo effect" on students' ratings of all specific aspects of a course.<sup>126</sup> There is less agreement concerning whether

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note 110; Anthony G. Greenwald, *Validity Concerns and Usefulness of Student Ratings of Course Instruction*, 52 AM. PSYCHOLOGIST 1182 (1997); Wachtel, *supra* note 109.

126. Initially termed "halo error," the phenomenon of halo effect refers to "suffusing ratings of special features with a halo belonging to the individual as a whole." Edward L. Thorndike, *A Constant Error in Psychological Ratings*, 4 J. APPLIED PSYCHOL. 25, 25 (1920). For research on students' general impressions of teachers influencing their ratings of specific teaching categories, see Philip C. Abrami et al., *The Relationship between Student Personality Characteristics, Teacher Ratings, and Student Achievement*, 74 J. EDUC. PSYCHOL. 111 (1982) (concluding from three studies, perceived instructor personality to be correlated with student ratings); Dennis E. Clayson & Debra A. Haley, *Student Evaluations in Marketing: What Is Actually Being Measured?*, 12 J. MARKETING EDUC. 9 (1990) (finding that personality was significantly related to student ratings); Dennis E. Clayson & Mary Jane Sheffet, *Personality and the Student Evaluation of Teaching*, 28 J. MARKETING EDUC. 149 (2006) (finding student ratings to be largely a measure of perceived personality); Michael Delucchi & Susan Pelowski, *Liking or Learning? The Effect of Instructor Likeability and Student Perceptions of Learning on Overall Ratings of Teaching Ability*, 2 RADICAL PEDAGOGY 1 (2000) (finding a positive effect of instructor likability on students' overall ratings of teaching ability, but not on students' perceptions of learning); Kenneth A. Feldman, *The Perceived Instructional Effectiveness of College Teachers as Related to Their Personality and Attitudinal Characteristics: A Review and Synthesis*, 24 RES. HIGHER EDUC. 139 (1986) (reviewing literature and finding that students' perceptions of the instructor's personality to be moderately to strongly correlated with student ratings of overall teaching effectiveness); Regan A. R. Gurung & Kristin M. Vespia, *Looking Good, Teaching Well? Linking Liking, Looks, and Learning*, 34 TEACHING PSYCHOL. 5 (2007) (finding the strongest single predictor of self-reported learning to be likability of the professor); Ronald B. Marks, *Determinants of Student Evaluations of Global Measures of Instructor and Course Value*, 22 J. MARKETING EDUC. 108 (2000) (determining that instructor personality had a very strong influence on overall ratings); Sally A. Radmacher & David J. Martin, *Identifying Significant Predictors of Student Evaluations of Faculty through Hierarchical Regression Analysis*, 135 J. PSYCHOL. 259 (2001) (revealing a significant relationship between an instructor's personality trait of extroversion and student ratings of teaching); Mark Shevlin et al., *The Validity of Student Evaluation of Teaching in Higher Education: Love Me, Love My Lectures?*, 25 ASSESSMENT & EVALUATION HIGHER EDUC. 397 (2000) (concluding from their study that student ratings of all aspects of a course are significantly affected by students' perceptions of an instructor's charisma); Wendy M. Williams & Stephen J. Ceci, *"How'm I Doing?": Problems with Student Ratings of Instructors and*

student ratings are overly sensitive to perceptions of an instructor's expressiveness and enthusiasm.<sup>127</sup> Some researchers have found effects of gender variables to be negligible,<sup>128</sup> while others have demonstrated certain complex ways in which gender matters in student ratings.<sup>129</sup> Studies

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*Courses*, 29 CHANGE 12 (1997) (demonstrating that content-free stylistic aspects of an enthusiastic teaching style result in substantially higher student ratings).

127. The original study on "educational seduction" described the "Dr. Fox effect" (Fox was the name of the pseudo-professor in the study) as students being seduced into the illusion of learning by a lecturer's charismatic style of delivery, even though she spoke nonsense. Donald H. Naftulin et al., *The Doctor Fox Lecture: A Paradigm of Educational Seduction*, 48 J. MED. EDUC. 630 (1973). Later studies referred to a lecturer's presentation style, or "expressiveness," as influencing student ratings of teaching. See John E. Ware, Jr. & Reed G. Williams, *The Dr. Fox Effect: A Study of Lecture Expressiveness and Ratings of Instruction*, 50 J. MED. EDUC. 149 (1975); John E. Ware, Jr. & Reed G. Williams, *An Extended Visit with Dr. Fox: Validity of Student Ratings of Instruction after Repeated Exposure to a Lecturer*, 14 AM. EDUC. RES. J. 449 (1977); Raymond P. Perry et al., *Educational Seduction: The Effect of Instructor Expressiveness and Lecture Content on Student Ratings and Achievement*, 71 J. EDUC. PSYCHOL. 107 (1979); Williams & Ceci, *supra* note 126. While advocates of student ratings have criticized the methodologies of these studies and dismissed their implications, they have not always denied the findings. See, e.g., Abrami et al., *supra* note 126, at 123 ("How students perceive the personality characteristics of their instructors appears related to their teacher effectiveness ratings.").

128. See, e.g., John A. Centra & Noreen B. Gaubatz, *Is There Gender Bias in Student Evaluations of Teaching?*, 71 J. HIGHER EDUC. 17, 32 (2000) (concluding that gender preferences in ratings "though statistically significant, are not large and should not make much difference in personnel decisions"); Juan Fernández & Miguel Angel Mateo, *Student and Faculty Gender in Ratings of University Teaching Quality*, 37 SEX ROLES 997, 1001 (1997) (finding that "the effect of student and faculty gender on teaching quality assessment is slight or almost non-existent").

129. See Kristi Andersen & Elizabeth D. Miller, *Gender and Student Evaluations of Teaching*, 30 PS: POL. SCI. & POL. 216, 217 (1997) (arguing that "student expectations of the instructor, including expectations based on gender role beliefs, play a significant role in student evaluations"); Christine M. Bachen et al., *Assessing the Role of Gender in College Students' Evaluations of Faculty*, 48 COMM. EDUC. 193 (1999) (using qualitative analysis to uncover how students' gender schema influences their assessments of faculty); Susan A. Basow, *Student Evaluations of College Professors: When Gender Matters*, 87 J. EDUC. PSYCHOL. 656, 664 (1995) (finding that professor gender interacts with "student gender, the discipline of the course, and the specific questions on the form"); Marilyn S. Chamberlin & Joann S. Hickey, *Student Evaluations of Faculty Performance: The Role of Gender Expectations in Differential Evaluations*, 25 EDUC. RES. Q. 3 (2001) (showing gender to be an important influence on how students evaluate professors); Christine Haight Farley, *Confronting Expectations: Women in the Legal Academy*, 8 YALE J.L. & FEMINISM 333 (1996) (concluding from her study

examining if race factors into student ratings are very limited in number, but those available suggest racial bias exists.<sup>130</sup> Recently, the role that physical attractiveness plays in student ratings<sup>131</sup> has received renewed attention in analyses of data from online anonymous rating websites that include scales for students to score their professor's sexual appeal (e.g., a

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of women in the legal academy that students exhibit gender-based stereotypes in their perceptions and evaluations of female law professors); Melanie Moore & Richard Trahan, *Biased and Political: Student Perceptions of Females Teaching About Gender*, 31 C. STUDENT J. 434 (1997) (suggesting that students perceive female instructors as more biased and politically motivated in teaching courses on gender than male instructors of such courses); Joey Sprague & Kelley Massoni, *Student Evaluations and Gendered Expectations: What We Can't Count Can Hurt Us*, 53 SEX ROLES 779 (2005) (finding gender bias in an analysis of students' descriptions of instructors).

130. See Kristin J. Anderson & Gabriel Smith, *Students' Preconceptions of Professors: Benefits and Barriers According to Ethnicity and Gender*, 27 HISP. J. BEHAV. SCI. 184 (2005) (revealing in an experimental study Latina professors being more affected than male or female Anglo professors by the interactive effects of gender and ethnicity in students' ratings of professors' warmth and capability); David A. Dilts et al., *Student Evaluation of Instruction: Objective Evidence and Decision Making*, 2 J. INDIVIDUAL EMP. RTS. 3 (1993 (finding from student self-reports, race of instructor to be significantly correlated with student ratings); Jai Ghorpade & J. R. Lackritz, *Student Evaluations: Equal Opportunity Concerns*, 7 THOUGHT & ACTION 61 (1991) (reporting highly significant differences in student ratings favoring white over minority faculty); Katherine Grace Hendrix, *Student Perceptions of the Influence of Race on Professor Credibility*, 28 J. BLACK STUD. 738 (1998) (suggesting that students employ different criteria to assess, and are more likely to question, the credibility and competence of Black professors than their white counterparts); Theresa A. Huston, *Race and Gender Bias in Higher Education: Could Faculty Course Evaluations Impede Further Progress toward Parity?*, 4 SEATTLE J. SOC. JUST. 591 (2006) (pointing to bias in student ratings against faculty of color); Jeannette M. Ludwig & John A. Meacham, *Teaching Controversial Courses: Student Evaluations of Instructors and Content*, 21 EDUC. RES. Q. 27 (1997) (demonstrating through an experimental study how race and gender interact with course content in students' expectations of professors); Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN'S L. REV. 235 (2008) (arguing that the conventional practices of collecting student ratings generates bias stemming from social stereotypes); Pamela J. Smith, *Teaching the Retrenchment Generation: When Sapphire Meets Socrates at the Intersection of Race, Gender, and Authority*, 6 WM. & MARY J. WOMEN & L. 53 (1999) (discussing racial stereotypes in student ratings of teaching).

131. See, e.g., Daniel S. Hamermesh & Amy M. Parker, *Beauty in the Classroom: Instructors' Pulchritude and Putative Pedagogical Productivity*, 24 ECON. EDUC. REV. 369 (2005); Gurung & Vespia, *supra* note 126.



chili pepper icon to represent “hotness”).<sup>132</sup> These studies report that “hot” professors receive higher ratings and more positive comments than professors perceived to be “not hot.”<sup>133</sup>

A common criticism of such rating websites is that they are consumer-oriented indicators of customer satisfaction rather than academic measures of teaching effectiveness,<sup>134</sup> a criticism that has also been directed toward the standard college or university-sanctioned rating forms.<sup>135</sup> When teaching performance is measured by student ratings, good teaching becomes equated with satisfying students’ expectations, and student satisfaction is met by factors such as providing enjoyable and entertaining classroom experiences.<sup>136</sup>

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132. Multiple online sites currently exist (including [www.professorperformance.com](http://www.professorperformance.com), and [www.rateaprof.com](http://www.rateaprof.com)) but [www.RateMyProfessors.com](http://www.RateMyProfessors.com) (RMP) is the most popular, boasting over 11 million ratings of over 1 million professors in over 6000 schools (as of June 2011).

133. James Felton et al., *Web-Based Student Evaluations of Professors: The Relations between Perceived Quality, Easiness, and Sexiness*, 29 *ASSESSMENT & EVALUATION HIGHER EDUC.* 91 (2004); James Felton et al., *Attractiveness, Easiness and Other Issues: Student Evaluations of Professors on RateMyProfessors.Com*, 33 *ASSESSMENT & EVALUATION HIGHER EDUC.* 45 (2008); Todd C. Riniolo et al., *Hot or Not: Do Professors Perceived as Physically Attractive Receive Higher Student Evaluations?*, 133 *J. GEN. PSYCHOL.* 19 (2006); Robert A. Lawson & E. Frank Stephenson, *Easiness, Attractiveness, and Faculty Evaluations: Evidence from RateMyProfessors.Com*, 33 *ATLANTIC ECON. J.* 485 (2005); Jennifer Bonds-Raacke & John D. Raacke, *The Relationship between Physical Attractiveness of Professors and Students’ Ratings of Professor Quality*, 1 *J. PSYCHIATRY, PSYCHOL. & MENTAL HEALTH* 1 (2007); Scott Freng & David Webber, *Turning up the Heat on Online Evaluations: Does “Hotness” Matter?*, 36 *TEACHING PSYCHOL.* 189 (2009); Kathleen M. Silva et al., *Rate My Professor: Online Evaluations of Psychology Instructors*, 35 *TEACHING PSYCHOL.* 71 (2008).

134. See, e.g., Elizabeth Davison & Jammie Price, *How Do We Rate? An Evaluation of Online Student Evaluations*, 34 *ASSESSMENT & EVALUATION HIGHER EDUC.* 51 (2009). Some researchers have argued for the legitimacy of RMP ratings after finding RMP and official student ratings to be correlated to some degree. See, e.g., James Otto et al., *Does Ratemyprofessor.Com Really Rate My Professor?*, 33 *ASSESSMENT & EVALUATION HIGHER EDUC.* 355 (2008); Michael J. Brown et al., *Rating Ratemyprofessors.Com: A Comparison of Online and Official Student Evaluations of Teaching*, 57 *C. TEACHING* 89, 91 (2009).

135. See Titus, *supra* note 117 (finding enjoyment widely used by students as sole criterion for ratings of instructors, thereby conflating students’ pleasure and teaching quality).

136. Kent L. Granzin & John J. Painter, *A New Explanation for Students’ Course Evaluation Tendencies*, 10 *AMER. EDUC. RES. J.* 115 (1973); Jerry W. Shepherd, *Relevance and Responsibility: A Postmodern Response. Response to “A Postmodern Explanation of Student Consumerism in Higher Education,”* 25 *TEACHING SOC.* 333 (1997); Titus, *supra* note 117; Paul A. Trout, *Disengaged Students and the Decline of Academic Standards*, 10 *ACAD. QUESTIONS* 46 (1997);

Despite considerable controversy about the value of student ratings, there is substantial agreement that problems result from an over-reliance on them as a basis for decisions in faculty employment and compensation.<sup>137</sup> The numerical and statistical accounts give the illusory appearance of precision and scientific objectivity and obscure the value judgments, opinions, and complexities of interpretation actually instantiated in the data.<sup>138</sup> At most institutions, the determination of professional status (such as tenure and promotion) and financial rewards (such as merit raises and bonuses) are firmly attached to student ratings.<sup>139</sup> Given the authoritative status granted student ratings simply from their ubiquitous use, when

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Jannecke Wiers-Jenssen et al., *Student Satisfaction: Towards an Empirical Deconstruction of the Concept*, 8 QUALITY HIGHER EDUC. 183 (2002).

137. See Reinsch et al., *supra* note 106 (arguing that student evaluations and their use by administrators raise a substantive due process rights issue); Wines & Lau, *supra* note 106 (concluding that the use of student evaluations as the sole source of evidence in assessing teaching effectiveness in faculty retention and promotion decisions might violate academic freedom and the First Amendment). See also Gerald M. Gillmore, *Student Ratings as a Factor in Faculty Employment Decisions and Periodic Review*, 10 J.C. & U.L. 557, 575–76 (1983–84) (arguing that “student ratings are a valid indicator of teaching quality in the aggregate,” yet concluding that “student ratings deserve to play a major role, but they were never intended to, not should they, shoulder the entire burden of the evaluation of faculty teaching”); Merritt, *supra* note 130, at 274 (explaining that “student evaluations impose serious risks of bias”); Theall & Franklin, *supra* note 110, at 46 (cautioning that “[e]ven when the data are technically rigorous, one of the major problems is day-to-day practice: student ratings are often misinterpreted, misused, and not accompanied by other information that allows users to make sound decisions”).

138. In modern society, quantification enjoys elevated prestige as an ideal means of representing reality. See ALFRED W. CROSBY, *THE MEASURE OF REALITY: QUANTIFICATION AND WESTERN SOCIETY, 1250–1600* (1997) (providing an historical account of the development of a quantification perception of the world); THEODORE M. PORTER, *TRUST IN NUMBERS: THE PURSUIT OF OBJECTIVITY IN SCIENCE AND PUBLIC LIFE* (1995) (investigating the appeal of quantification and the development of cultural meanings of objectivity); Donald W. Katzner, *Our Mad Rush to Measure: How Did We Get into This Mess?*, 3 METHODUS 18, 18–23 (1991) (discussing our cultural “enchantment with measurement” and “the myth of synonymy of objective analysis and measurement”).

139. The close association of salary to student ratings is illustrated by reforms at Texas A&M University. One policy for “holding tenured professors more accountable, viewing students like customers and universities like businesses,” awards faculty bonuses of up to \$10,000, based solely on end-of-semester anonymous student evaluations. Vimal Patel, *A&M Regents Push Reforms*, ¶ 1 (June 13, 2010), <http://www.theeagle.com/am/A-amp-amp-M-regents-push-reforms>. Future reforms involve measuring “teaching efficiency and effectiveness” by data on “salary and benefit cost, number of students taught over the last year, average ‘student satisfaction rating’ and ‘average percentage’ of As and Bs given.” *Id.* ¶ 46.

situated in a consumerist academy, student ratings can effectively serve to redefine excellence in higher education by distinguishing particular forms of pedagogy to be institutionally rewarded from forms to be penalized.<sup>140</sup> Because they are so consequential, student ratings, and all the biases they embody, can put pressure on faculty to self-censor their views if they are ones not popularly held, and to teach as students prefer.<sup>141</sup>

Institutionally authorized anonymous student ratings increasingly are posted on institutions' websites.<sup>142</sup> Students are not disinterested or neutral observers and, absolved of any accountability through anonymity,<sup>143</sup> can

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140. RIESMAN, *supra* note 14; Matthew D. Shank et al., *Understanding Professional Service Expectations: Do We Know What Our Students Expect in a Quality Education?*, 13 J. PROF. SERVICES MARKETING 71 (1995). Student ratings have become consequential enough that some faculty have resorted to unethical practices to alter scores. In one case, a math professor for 30 years at University of Saskatchewan (Stephen Berman), used RateMyProfessor.Com to anonymously post 80 comments over a seven-month period wherein he maligned some colleagues and complimented others. After an investigation (by a panel from outside the university), he was fired. Dan Carnevale, *U. of Saskatchewan Fires Tenured Professor Accused of Maligning Colleagues on RateMyProfessors.Com Web Site*, 52 CHRON. HIGHER EDUC. A28 (2006). In another case, a professor at the University of Iowa's College of Law resigned after allegations that he tampered with anonymous student evaluations. Kenneth Kress admitted replacing three unfavorable student-completed questionnaires with his own versions and altering portions of two others to improve his rating from an "average" score to one designated as "outstanding." Elia Powers, *Legal Turmoil for Former Law Prof*, INSIDE HIGHER ED, <http://insidehighered.com/news/2007/04/04/iowa>. The Iowa Supreme Court Attorney Disciplinary Board suspended his law license indefinitely. *Iowa v. Kress*, 747 N.W.2d 530 (Iowa 2008).

141. *See* Wines & Lau, *supra* note 106.

142. Texas law mandates that student ratings be posted on all public university websites. *See* TEX. EDUC. CODE ANN. § 51.974(h) (West 2009).

143. Researchers have found that student ratings when signed (yet confidential) tend to be more positive responses than anonymous ratings. *See* Christopher J. Fries & R. James McNinch, *Signed Versus Unsigned Student Evaluations of Teaching: A Comparison*, 31 TEACHING SOC. 333, 333 (2003); Eugene Stone et al., *Effects of Anonymity and Retaliatory Potential on Student Evaluations of Faculty Performance*, 6 RES. HIGHER EDUC. 313 (1977). The question of whether students have a privacy interest in evaluations they give to professors at the end of the semester arose in the case of a student who wrote disparaging comments on course rating forms. According to news accounts, the University of Georgia disciplined a student who responded to the question "What aspects of the course could use improvement or change?" by writing "[Professor X] is a complete asshole. I hope he chokes on a dick, gets AIDS and dies. To hell with all gay teachers who are terrible with their jobs and try to fail students!" Anonymity was waived and the student was found in violation of three University Codes of Conduct. Paul Ruddle, *Student cited for Survey Remarks*, RED AND BLACK (Oct. 27, 2007), <http://media.ww.redandblack.com/media/storage/>

penalize a professor who is not compliant with their consumer-oriented agenda, viewing instructional techniques used to educate them as a reason to punish an instructor with low ratings.<sup>144</sup> When students' unattributed critical comments are made accessible to the public, the consequences may be professionally damaging, yet targeted professors have little legal recourse.<sup>145</sup>

### C. Student Ratings in Court

Traditionally, courts have viewed the evaluation of the academic performance of faculty to be a matter for academicians, not the judiciary,<sup>146</sup>

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paper871/news/2007/10/22/News/Student.Cited.For.Survey.Remarks-3045812.shtm. See also, Randy Cohen, *Anonymity Breach*, N.Y. TIMES, Jan. 20, 2008 § 6 (Magazine), at 22, available at [http://www.nytimes.com/2008/01/20/magazine/20wwln-ethicist-t.html?\\_r=2&ref=magazine&oref=slogin](http://www.nytimes.com/2008/01/20/magazine/20wwln-ethicist-t.html?_r=2&ref=magazine&oref=slogin).

144. See Larry Crumbley et al., *Students' Perceptions of the Evaluation of College Teaching*, 9 QUALITY ASSURANCE EDUC. 197 (2001) (finding students rating conscientious instructors harshly for asking them questions they could not answer, grading strictly, giving quizzes, and assigning homework); Dilts et al., *supra* note 130 (reporting students' admissions of using the evaluation process to punish instructors they dislike).

145. Robert M. O'Neil, *Bias, "Balance," and Beyond: New Threats to Academic Freedom*, 77 U. COLO. L. REV. 985, 996 (2006). A case from California, *Curzon-Brown v. San Francisco Cmty. Coll. Dist.*, No. 307335 (San Francisco Super. Ct. 2000), provides an illustrative example. Daniel Curzon-Brown, an English professor, brought a defamation suit against the webmaster of a student-published website ("TeacherReview.com") which posted unedited, anonymous reviews of faculty at City College of San Francisco and San Francisco State University. Curzon Brown claimed to have been falsely labeled "homomaniac," "racist," and "mentally ill," among other profane and homophobic charges against him and other faculty ("bigoted," "mean old drunk," "just plain evil," and "perverted"). Debra J. Saunders, *Right to Flame Can't Make It Right to Flame*, S.F. CHRON., May 2, 2000, at A21. See also, Tanya Schevitz, *Prof Fights Web Trash Talk: City College Students Use Online Site for Harsh Attacks on Faculty*, S.F. CHRON., Apr. 6, 2000, at A1; Pamela Burdman, *City College Instructors Claim Web Defamation*, S.F. CHRON., May 1, 1998, at A1; Harriet Chiang, *City Instructors Sue Over Bad-Mouthing Web Site*, S.F. CHRON., Oct. 22, 1999, at A26. A physics professor, Jesse David Wall, joined the lawsuit when an amended complaint was filed seeking damages for offensive comments students had posted about them. The suit conceded that students may legally form and express these opinions, but disputed their right to do so anonymously. Shortly before the case went to hearing, and amidst concerns that the court would award to the defendant, the professors voluntarily dismissed their defamation suit and settled the case. Lisa Fernandez, *Instructor at City College Settles Suit on Web Critiques*, SAN JOSE MERCURY NEWS, Oct. 3, 2000, at 4B.

146. See TERRY L. LEAP, *TENURE, DISCRIMINATION, AND THE COURTS* 56 (2d ed. 1995) ("Judges have repeatedly expressed reservations about becoming

and their decisions generally have addressed the consistency and objectivity of procedures, but not the scientific standards of the evaluations.<sup>147</sup> The deference courts have granted in these cases generally has been to institutional administrators, not to those who teach. The remarkable consequences of this selective deference was illustrated in *Scheelhaase v. Woodbury Central Community School District*,<sup>148</sup> an early case concerning the termination of a grade school teacher. The circuit court accepted a school administrator's erroneous opinion, contrary to testimony by experts in the field, that a school teacher's incompetence was indicated by her students' scores on standardized achievement tests. A concurring judge explicitly stated that the school board "possessed the right and responsibility of evaluating its teacher personnel, and such evaluations, where they are based on some evidence, even though possibly erroneous, will not serve to make those determinations subject to judicial review as unconstitutionally arbitrary and capricious."<sup>149</sup>

Today, as far as courts are concerned, administrators can evaluate a faculty member's teaching by whatever means they choose, including student ratings, without the merits of those ratings meeting any academic or psychometric standard.<sup>150</sup> In *Yarcheski v. Reiner*,<sup>151</sup> a first-year tenure-track

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involved in academic personnel matters primarily because they feel ill equipped to question the subjective and scholarly evaluations that must be made regarding reappointment, promotion, and tenure decisions."); Copeland & Murry, *supra* note 106, at 246 ("Traditionally the courts have been reluctant to interfere in what has been basically deemed to be an academic exercise . . . . For the most part, the courts have viewed the evaluation of academic performance as an exercise outside the expertise of the courts and one better left to academicians.").

147. See BENJAMIN BAEZ & JOHN A. CENTRA, TENURE, PROMOTION, AND REAPPOINTMENT: LEGAL AND ADMINISTRATIVE IMPLICATIONS. ASHE-ERIC HIGHER EDUCATION REPORT. No. 1 (1995), at 139 ("Despite the subjectivity of measuring the quality of a faculty member's scholarship, service, and teaching accomplishments, courts will rarely, if ever, question the appropriateness of an institution's criteria (or how they measure them) for granting reappointment, promotion, or tenure."); ROBERT M. HENDRICKSON & BARBARA A. LEE, ACADEMIC EMPLOYMENT AND RETRENCHMENT: JUDICIAL REVIEW AND ADMINISTRATIVE ACTION. ASHE-ERIC HIGHER EDUCATION REPORT. No. 8 (1983), at 30 ("[C]ourts are more likely to review the fairness or reasonableness of the application of the decisional criteria than evaluate the relevance or appropriateness of the criteria themselves.").

148. 488 F.2d 237 (8th Cir. 1973).

149. *Id.* at 245 (Bright, J., concurring).

150. For summaries of academic freedom cases in Canada and the United States involving student ratings, see Robert E. Haskell, *Academic Freedom, Promotion, Reappointment, Tenure and the Administrative Use of Student Evaluation of Faculty: (Part II) Views from the Court*, 5 EDUC. POL'Y ANALYSIS ARCHIVES 1 (1997). <http://epaa.asu.edu/ojs/article/viewFile/618/74>.

151. 669 N.W.2d 487 (S.D. 2003).

faculty member at the University of South Dakota claimed that the university violated his academic freedom by over-reliance upon student evaluations that related complaints ranging from his “arrogance in the classroom to dissatisfaction with his disorganized teaching style.”<sup>152</sup> Thomas Yarcheski was formally evaluated as unsatisfactory in teaching, with the following commentary: “[S]tudent evaluations indicated students did not learn relevant material, indicated assignments were not helpful, and there was a lack of systematic presentations [sic].”<sup>153</sup>

Yarcheski filed a grievance arguing that his non-renewal resulted solely from student evaluations and that such over-reliance infringed on his academic freedom because it involved “students judging members of the academy” and “students controlling the destiny of faculty through their opinions and opinion surveys.”<sup>154</sup> The court observed that “[e]valuating academic performance is a venture beyond our expertise and our jurisdiction.”<sup>155</sup> In denying his appeal, the court first noted that academic freedom generally assures educators that there will be no interference in their First Amendment pursuits by administrators, other faculty, or students. On the other hand, “[u]nder the aegis of academic freedom, a university may determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”<sup>156</sup> Thus, a college or university may lawfully choose not to renew the contract of a nontenured professor whose pedagogical attitude and teaching methods fail to conform to the institution’s standards.<sup>157</sup> The court stated that institutions of higher learning must ensure the quality of the education they provide and that the use of student surveys as part of the teaching evaluation process is not an infringement of academic freedom.<sup>158</sup> Finally, the court concluded, “[s]urely, educational institutions have the right to expect that their teachers will be able to teach,” the implication being that while judges themselves admittedly defer to those with

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152. *Id.* at 489.

153. *Id.* at 494.

154. *Id.* at 497. When Yarcheski’s grievance was denied, he appealed in circuit court. After his attorneys filed an untimely brief, his case was dismissed and he filed a malpractice claim against them. The court ruled that his case would not have prevailed if the brief had been timely, and the district court affirmed.

155. *Id.* at 492.

156. *Id.* at 497 (citations and quotation marks omitted).

157. In the early 1970s, the Sixth Circuit Court of Appeals in *Hetrick v. Martin*, 480 F.2d 705 (6th Cir. 1973), also held that a university may terminate an instructor “whose pedagogical style and philosophy do not conform to the pattern prescribed by the school administration.” *Id.* at 706.

158. *See Yarcheski*, 669 N.W.2d at 498.

educational expertise, students' qualifications as evaluators of instructional quality need not be questioned.<sup>159</sup>

In *Carley v. Arizona Board of Regents*,<sup>160</sup> an untenured art professor was also unsuccessful in arguing that student ratings were an infringement on his academic freedom. Denny Carley was denied tenure and not retained based on a determination that his teaching was inadequate. His pedagogy in a commercial art course included regularly leaving classes and studio sessions unsupervised in order to promote a business atmosphere and instill independence and self-reliance. Carley characterized his professional style as being a "demanding teacher contrary to some student expectations" and maintained that his popularity suffered and resulted in low student evaluations.<sup>161</sup> His appraisals by various committees and administrators had been inconsistent. The court noted that students' complaints and low ratings of his teaching over a period of time featured prominently in multiple levels of decision making.<sup>162</sup> Carley argued that his teaching methodology was protected speech and that student evaluations should not be relied upon primarily or solely in faculty review because, in being critical of his methods, they were an infringement on protected activity. His appeal at the university level resulted in the institution's "University Academic Freedom and Tenure committee," with a six-to-three vote in his favor, finding that "Carley's rights to academic freedom and due process had been violated."<sup>163</sup>

Carley sued, claiming that he was engaged in a constitutionally protected activity—that his teaching methods were "protected speech"—and that this activity was a motivating factor in the university's decision not to rehire him.<sup>164</sup> He contended that the university must show he would have been terminated notwithstanding the protected activity.<sup>165</sup> Carley filed a complaint in superior court; when the superior court upheld the administrative decision, Carley filed a notice of appeal to the Court of Appeals of Arizona.<sup>166</sup> The court observed that "student evaluations," as a

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159. *Id.* As some commentators have observed, students do not meet the federal standards for giving expert testimony, yet "students are put into the role of being 'experts' as to proper pedagogy, without being experts on pedagogy." Roger W. Reinsch et al., *Evidentiary and Constitutional Due Process Constraints on the Uses by Colleges and Universities of Student Evaluations*, 32 J.C. & U.L. 75, 103 (2005).

160. 737 P.2d 1099 (Ariz. Ct. App. 1987).

161. *Id.* at 1101.

162. *Id.* at 1104.

163. *Id.* at 1100.

164. *Id.* at 1101.

165. *Id.* Carley's assertion the university must show he would have been terminated notwithstanding the protected activity refers to the rule established in *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, (1977).

166. *Carley*, 737 P.2d at 1101.

means for assessing teaching, had been upheld without discussion in a number of previous cases, and it pointed out that Carley offered no authority for supporting his claim that using only student ratings was impermissible.<sup>167</sup> The court refused to equate teaching methods with speech content and therefore did not recognize pedagogy as protected speech.<sup>168</sup> Because teaching methods were considered to be independent of teaching content, the court concluded that relying upon student evaluations expressing disapproval of Carley's teaching did not violate his First Amendment rights.<sup>169</sup>

In cases involving allegations of discrimination with respect to the summative use of student ratings, courts have chosen not to scrutinize the methodology of student ratings data-gathering. In *Jiminez v. Mary Washington College*,<sup>170</sup> a tenure-track economics professor received a terminal contract after an appraisal finding his teaching effectiveness to be "negligible." Students' letters of support for his classroom behavior and a student's testimony at trial suggested that he was the victim of a concerted effort at racial and national origin discrimination among some students seeking to have him terminated allegedly as the result of poor student evaluations. While the trial court found in his favor, concluding that his student evaluations were "tainted by collusion and racial and national origin animus,"<sup>171</sup> the appellate court reversed, judging the evidence of a student conspiracy to be "rank speculation" and "insubstantial."<sup>172</sup>

Even when the methods of data-collection are clearly defective, courts have favored an institution's position that student ratings accurately reflect teaching quality. In a sex discrimination case, *Brouard-Norcross v. Augustana College Association*,<sup>173</sup> the Eighth Circuit Court of Appeals unequivocally declared student ratings to be unbiased and ruled that "student reaction is a legitimate, nondiscriminatory factor on which to

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167. *Id.* at 1105. The four cases cited by the court were: *Lovelace v. Se. Mass. Univ.*, 793 F.2d 419, 425–26 (1st Cir. 1986); *Dyson v. Lavery*, 417 F. Supp. 103, 111 (E.D. Va 1976); *Lieberman v. Grant*, 474 F. Supp. 848, 866 (D. Conn. 1979); and *Peters v. Middlebury Coll.*, 409 F. Supp. 857, 867 (D. Vt. 1976). While most courts have not questioned the validity of student ratings, an exception to this widespread trend was provided in *Johnson v. Univ. of Pittsburg*, 435 F. Supp. 1328 (W.D. Pa. 1977). In this denial of promotion and tenure case, the district court was considering evidence of sex discrimination, and after a dean "deprecated" student ratings, the court reported that it had "placed little reliance on students' surveys" as reflecting teaching performance. *Id.* at 1367.

168. *Carley*, 737 P.2d at 1102.

169. *Id.* at 1103.

170. 57 F.3d 369 (4th Cir. 1995).

171. *Id.* at 376.

172. *Id.* at 380.

173. 935 F.2d 974 (8th Cir. 1991) (en banc).



evaluate tenure candidates.”<sup>174</sup> This declaration is especially troubling in light of the established facts in this case, in particular that the student rating forms had been distributed in a manner “distorted” from the regular procedure, sent to students in one course after they had received unfavorable grades yet not distributed to students in another course who all received “A’s.”<sup>175</sup> The court observed that Brouard-Norcross “neither alleges nor provides any evidence that the student evaluation forms, or the comments on them, are gender-biased in any way.”<sup>176</sup> The court was satisfied that if the forms were deemed to have content validity, no consideration need be given to the question of whether the data collected had been corrupted in ways that might impact the validation of their use as indicators of teaching quality.

Similarly, in *Bickerstaff v. Vassar College*,<sup>177</sup> the district court declared student ratings to be an “objective” indicator of “teaching of a high quality,” a criterion considered an exception to what was deemed the college’s otherwise vague and subjective promotion criteria—or, in the judge’s words, “just so much bafflegab.”<sup>178</sup> Joyce Bickerstaff, a joint Education/African Studies professor alleged that the college discriminated against her on the basis of gender and race in denying her promotion to full professor. As part of the evidence examined, the court considered whether the institution’s use of student ratings in its determination that she had failed to reach the required level of “marked distinction” in teaching was racially discriminatory. Unconvinced that different racial compositions of course enrollments accounted for her uneven student ratings,<sup>179</sup> the Second Circuit upheld the college’s use of “Course Evaluation Questionnaires” as the principal tool for assessing teaching ability.<sup>180</sup>

When used to assess teaching, the content on student rating forms, in effect, operationally defines it,<sup>181</sup> but courts have not scrutinized the adequacy or appropriateness of the assessment criteria that the forms contain. In *Wirsing v. Board of Regents of the University of Colorado*,<sup>182</sup> a

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174. *Id.* at 976.

175. *Id.* at 980–81 (Heaney, J. dissenting).

176. *Id.* at 976 (majority opinion).

177. 992 F. Supp. 372 (S.D.N.Y. 1998), *aff’d*, 196 F.3d 435 (2d Cir. 1999).

178. *Bickerstaff*, 992 F. Supp. at 375.

179. *Bickerstaff* had received very high ratings in over 80 percent of her African studies classes, where African American students made up one-fourth to one-third of the enrollment, compared with such scores in only about 40 percent of her education courses that enrolled few, if any, African American students. *Bickerstaff*, 196 F.3d at 448–50.

180. *Id.* at 454–56.

181. Sylvia d’Apollonia & Philip C. Abrami, *Scaling the Ivory Tower, Part I: Collecting Evidence of Instructor Effectiveness*, 6 PSYCHOL. TEACHING REV. 46, 51 (1997).

182. 739 F. Supp. 551 (D. Colo. 1990), *aff’d without opinion.*, 945 F.2d 412

tenured professor of education, Marie Wirsing, was put in the position of affirming the use of course evaluation procedures to which she took intellectual exception. She challenged the use of an assessment tool that was “contrary to her theory of education” and the scholarly intent of her courses.<sup>183</sup> Her philosophical opposition was on grounds that she taught her students that “teaching and learning cannot be evaluated by any standardized approach.”<sup>184</sup> Consistent with her views, she refused to administer the university’s standardized course evaluation forms for her classes and used a non-standard form instead. Additionally, Wirsing’s teaching performance had been evaluated and given the highest possible rating by a faculty committee. Wirsing argued that by forcing her to use the evaluation forms, the university was “interfering arbitrarily with her classroom method, compelling her speech, and violating her right to academic freedom.”<sup>185</sup>

The court held that although the professor “may have a constitutionally protected right under the First Amendment to disagree with the university’s policies, she has no right to evidence her disagreement by failing to perform the duty imposed upon her as a condition of employment.”<sup>186</sup> The adoption of a college or university policy of evaluation, the court found, is protected by “the University’s own right to academic freedom.”<sup>187</sup> The court reasoned that the evaluation forms “are not expressive of a content-based regulation” and therefore did not interfere with the professor’s academic freedom.<sup>188</sup> Because the court found it to be the purview of the university to select the means of evaluating teaching, it did not consider Wirsing’s claims that the standardized form in question lacked validity to be relevant.

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(10th Cir. 1991).

183. *Id.* at 553.

184. *Id.* at 552.

185. *Id.* at 553.

186. 739 F. Supp. at 553 (citation omitted).

187. *Id.* at 554.

188. *Id.* In determining whether a particular case of regulation of speech is constitutionally permissible, courts distinguish between *content-based* restrictions that place restraint on the message communicated, and *content-neutral* restrictions of communication that are without regard to the message. The Supreme Court has said that content-based restrictions must meet a more strict and exacting level of scrutiny than those that are content-neutral. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 758–63 (1997). See also Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46 (1987); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

## III. THE MARKETPLACE IN HIGHER EDUCATION

## A. Students' Expressive Rights

An emerging collection of cases arising from students' disagreements with professorial decisions places the professional autonomy of faculty in conflict with students' expressive rights, rather than against administrative controls on teaching. *Axson-Flynn v. Johnson*<sup>189</sup> involved a practicing member of the Church of Jesus Christ of Latter-Day Saints who was a student in the University of Utah's Actor in Training Program (ATP). Christina Axson-Flynn sued the university's theatre department professors for violating her right to free speech and free exercise of religion under the First Amendment by requiring students to perform in-class plays to which she had religious objections. The professors asserted that as part of the curriculum "it is an essential part of an actor's training to take on difficult roles, roles which sometime[s] make actors uncomfortable and challenge their perspective."<sup>190</sup> The student alleged that she told the department before being accepted into the ATP that she would not remove her clothing, use the words "God" or "Christ" as profanity, or "say the four-letter expletive beginning with the letter F."<sup>191</sup> After acceptance into the program, she omitted some words and phrases she found religiously objectionable in assigned scripts for in-class performances, without permission and without penalty. At the end of her first semester, her professors warned her that she would "no longer be given allowance on language."<sup>192</sup> She dropped the program and filed suit.

The trial court ruled against her, finding that she was "not being asked to be an instrument for, or to adhere to, an ideological point of view."<sup>193</sup> The court hypothesized that:

Were this [curriculum requirement] a First Amendment violation, then a believer in 'creationism' could not be required to discuss and master the theory of evolution in a science class; a neo-Nazi could refuse to discuss, write or consider the Holocaust in a critical manner in a history class. Indeed, a Catholic law student could not be required to make an argument in favor of

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189. 151 F. Supp. 2d 1326 (D. Utah 2001), *rev'd*, 356 F.3d 1277 (10th Cir. 2004).

190. *Id.* at 1328.

191. *Axson-Flynn*, 356 F.3d at 1281. The appellate court noted she had no religious objections to saying some words that could be considered swearing, such as 'shit'; her objections were limited to the words "fuck," (which she claimed debased her religious beliefs by vulgarizing what her religion held to be a sacred act appropriate only within a marriage), "goddamn," and its variants. *Id.*

192. *Axson-Flynn*, 151 F. Supp. 2d at 1329.

193. *Id.* at 1336.

capital punishment during an in-class exercise designed to enable law students to argue cases they find unsympathetic.<sup>194</sup>

On appeal, the Tenth Circuit acknowledged that courts have a long history of deferring to the professional judgment of faculty to determine what is pedagogically appropriate in the college classroom and, relying on *Hazelwood*, that in the context of a school curriculum, speech can be restricted or compelled as long as the decision is “reasonably related to legitimate pedagogical concerns.”<sup>195</sup>

The court stated that it gave “substantial deference to educators’ stated pedagogical concerns” and declined to “second-guess the *pedagogical* wisdom or efficacy of [their] goal,”<sup>196</sup> but it concluded that there was a question as to whether the justification for the script adherence requirement was truly pedagogical or a pretext for religious discrimination.<sup>197</sup> The appellate court therefore reversed and remanded the case for further proceedings to determine if the policy was actually neutral; if there was no underlying discriminatory purpose, the university could not be prohibited from requiring the student to use religiously offensive words. Before action was taken at the district level, a settlement was reached and the case was dropped.<sup>198</sup>

Courts have generally asserted the principle of judicial noninterference when students bring suit over their academic assessment by faculty,<sup>199</sup> but

194. *Id.*

195. *Axson-Flynn*, 356 F.3d at 1290.

196. *Id.* at 1292 (emphasis in original) (citation omitted).

197. *Id.* at 1293.

198. According to news accounts, the settlement required the university to appoint a committee to create a policy allowing students to request exemptions from curricular exercises that conflict with their religious beliefs, with an appeals process for students whose requests were denied. In addition, the university reimbursed Axson-Flynn for her attorneys’ fees (approximately \$250,000), tuition, and fees. The school invited her to rejoin the ATP; she declined. *See College, Mormon Student Settle Theatrical-Swearing Case*, FIRST AMENDMENT CENTER July 15, 2004, <http://www.firstamendmentcenter.org/college-mormon-student-settle-theatrical-swearing-case>; Angie Welling, *U., Axson-Flynn Settle Civil Rights Suit*, DESERET MORNING NEWS, July 15, 2004, at A1.

199. *See* Thomas A. Schweitzer, “Academic Challenge” Cases: Should Judicial Review Extend to Academic Evaluations of Students?, 41 AM. U. L. REV. 267, 295 (1992) (reviewing cases involving students challenging adverse academic evaluations by faculty and finding an “overwhelming deference shown by the courts to university professors and administrators who make the disputed academic judgments”); Virginia Davis Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C. & U.L. 141 (1981) (finding that in cases involving grades, courts usually practice judicial noninterference in academic decision making); Olivas, *supra* note 7, at 1841 (“Generally, in any situation in which students’ rights are pitted against those of faculty, academic tradition will prevail and faculty rights will triumph.”). *See also*

there is evidence of growing tension between the pedagogical authority of faculty and students' rights. *Brown v. Li*<sup>200</sup> concerned a master's degree candidate at the University of California at Santa Barbara, Christopher Brown, who covertly inserted a "Disacknowledgments" section to his thesis, after his thesis was initially approved, in which he vulgarly criticized certain individuals for allegedly obstructing his progress toward a degree.<sup>201</sup> When he attempted to file his thesis, including the unapproved addendum, in the university's library—in order to satisfy a university requirement—the dean and the thesis committee members were notified of the additional section. After they rejected his vulgar disacknowledgments, Brown drafted another version of the section that expressed the same sentiment without the profanity. The thesis committee refused to approve the "Disacknowledgments" section, even in its nonprofane form, because the thesis modified by the section no longer "satisfied professional requirements for publication in the discipline."<sup>202</sup> Brown was informed that his degree would be confirmed after he removed the section that he had added to the approved thesis.

After unsuccessfully pursuing internal grievances over the thesis committee's decision, Brown was placed on academic probation for exceeding the time limit for completing his degree requirements. Although the university later awarded him the degree, he sued, claiming violation of his First Amendment free speech rights by the delay in granting his degree and the exclusion of his thesis from the library. While the three-judge panel of the Ninth Circuit upheld the trial court's rejection of the validity of his constitutional claim, it did so by rendering three divergent opinions. Judge Graber's prevailing opinion expressly adopted the reasoning in *Hazelwood*,<sup>203</sup> transferring that secondary school precedent to higher

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Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 (1985) (citation omitted) (cautioning that federal courts are unsuited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions" and that courts "should show great respect for the faculty's professional judgment"); Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) ("Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

200. 308 F.3d 939 (9th Cir. 2002).

201. *Id.* at 943. The "Disacknowledgements" section read: "I would like to offer special *Fuck You's* to the following degenerates for of [sic] being an ever-present hindrance during my graduate career . . .," listing various people including the dean and staff of the graduate school, library managers, a former governor, university regents, and "Science." *Id.* at 942 (emphasis in original).

202. *Id.* at 943.

203. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

education, finding that the committee's rejection of his thesis was a legitimate decision, because it was "reasonably related to a legitimate pedagogical objective" (teaching about the proper format of a scientific paper).<sup>204</sup> The court acknowledged the thesis committee's right to make academic judgments about the completion of degree requirements and said it must defer "to the university's expertise in defining academic standards and teaching students to meet them."<sup>205</sup> The court described a faculty member as having a First Amendment right to "evaluate students as determined by his or her independent professional judgment,"<sup>206</sup> and therefore, the court found that "the committee members had an affirmative First Amendment right not to approve Plaintiff's thesis," which, in turn, "underscores [the student's] lack of a First Amendment right to have his nonconforming thesis approved."<sup>207</sup>

In his dissent, Judge Reinhardt rejected as inappropriate to the adult university setting of this case the reliance on a standard that the Supreme Court had used to dilute the free speech rights of high school students.<sup>208</sup>

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204. *Brown*, 308 F.3d at 952.

205. *Id.* Judge Ferguson agreed that Brown's First Amendment claim should be dismissed but disagreed with Judge Graber as to the reason. The concurring judge saw the case to be about "an erosion of academic integrity." *Id.* at 955 (Ferguson, J., concurring). Because Brown's insertion of the section was "academically dishonest," and the "First Amendment does not protect nor authorize deception," the rejection and the delay were justified. *Id.* at 956 (Ferguson, J., concurring).

206. *Id.* at 952 (opinion)

207. *Id.*

208. Most Supreme Court cases directly addressing First Amendment rights for students have arisen in the context of secondary public schools. For a discussion of those students' substantive speech rights, see C. Thomas Dienes & Annemargaret Connolly, *When Students Speak: Judicial Review in the American Marketplace*, 7 YALE L. & POL'Y REV. 343 (1989). For a discussion of the distinctions between the free-speech rights of students in secondary schools and students in post-secondary institutions, see Karyl Roberts Martin, *Demoted to High School: Are College Students' Free Speech Rights the Same as Those of High School Students?*, 45 B.C.L. REV. 173 (2003). For discussions of the misapplication of judicial standards from secondary to post-secondary settings, see Gail Sorenson & Andrew S. Lamanque, *The Application of Hazelwood v. Kuhlmeier in College Litigation*, 22 J.C. & U.L. 971 (1996); Mark J. Fiore, Comment, *Trampling the "Marketplace of Ideas": The Case against Extending Hazelwood to College Campuses*, 150 U. PA. L. REV. 1915 (2002). For discussions focused on the *Brown* court's error in deeming the constitutional interests of a graduate student to be equivalent to those of a high school student, see Adam R. Gardner, Comment, *Giving Credit Where it is Due? An "Acknowledgement" of Higher Education in America*, 37 LOY. L.A. L. REV. 69 (2003); Tom Saunders, Comment, *The Limits on University Control of Graduate Student Speech*, 112 YALE L.J. 1295 (2003).

For Judge Reinhardt, the university's reactions to Brown's critical speech raised a plausible claim that his thesis had been rejected to punish him for his offensive viewpoint.<sup>209</sup> Robert O'Neil has cautioned that if the student's view had prevailed in federal court, the potential implications for faculty academic freedom would have been grave, including the liability of the faculty members of his thesis committee for their academic judgments about degree completion.<sup>210</sup> In O'Neil's view, a ruling in the form of Judge Reinhardt's dissent could have left any academic decision concerning academic standards open to legal challenge, requiring defense in federal courts to prove its reasonable academic grounds.

### B. Educational Malpractice

Courts generally have been reluctant to recognize a cause of action for educational malpractice, one, that is, that alleges that an educational institution has failed to provide an adequate quality of education.<sup>211</sup> Recently, though, the growing trend to treat education as a product sold to students as consumers is reflected by courts increasingly accepting contract claims by students.<sup>212</sup> In *Alsides v. Brown Institute, Ltd.*,<sup>213</sup> students sued a trade school claiming misrepresentations were made in the school's brochure about the content and forms of instruction. The appellate court ruled that "a student may bring an action against an educational institution for breach of contract, fraud, or misrepresentation, if it is alleged that the institution failed to perform on specific promises it made to the student," and provided that the review did not require an inquiry into the intricacies of educational processes and theories.<sup>214</sup>

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209. *Brown*, 308 F.3d at 958 (Reinhardt, J., concurring in part and dissenting in part).

210. ROBERT O'NEIL, *ACADEMIC FREEDOM IN THE WIRED WORLD: POLITICAL EXTREMISM, CORPORATE POWER, AND THE UNIVERSITY* 229 (2008).

211. John G. Culhane, *Reinvigorating Educational Malpractice Claims: A Representational Focus*, 67 WASH. L. REV. 349, 350–53 (1992). In *Ross v. Creighton Univ.*, 957 F.2d 410, 416–17 (7th Cir. 1992) the court specified that a student cannot "simply allege that the education was not good enough . . . but must point to an identifiable contractual promise that the [university] failed to honor."

212. See GAJDA, *supra* note 6, at 214–22 (describing cases illustrating student contract rights); Todd A. DeMitchell & Terri A. DeMitchell, *Statutes and Standards: Has the Door to Educational Malpractice Been Opened?*, 2003 BYU EDUC. & L.J. 485 (2003) (considering malpractice liability of educators in the context of growing accountability measures in education); Peter F. Lake, *Tort Litigation in Higher Education*, 27 J.C. & U.L. 255 (2000) (reviewing trends in tort litigation and finding that courts increasingly consider student and institution relationships in terms of business categories). For a historical review of the "educational contract," see Nordin, *supra* note 199.

213. 592 N.W.2d 468 (Minn. Ct. App. 1999).

214. *Id.* at 473.

While breach of contract cases have been less successful when focused on the classroom context, the ruling in *Alsides* considered allegations specifically concerning curriculum content and pedagogical methods.<sup>215</sup> In another case, where a law student was unsuccessful in suing Loyola University of New Orleans over a legal profession course that was allegedly incomplete and unsatisfactorily taught, a dissenting judge's perspective reflects the legal implications of consumerism in higher education. In *Miller v. Loyola University of New Orleans*,<sup>216</sup> Judge Plotkin argued, in dissent, that:

In this day and age, with the ever increasing price of higher education, [colleges and] universities now aggressively market themselves to would be consumers. Students should have some form of remedy available to them when they are specifically promised something, which is not delivered. With the use of marketing tactics by [colleges and] universities, comes added responsibility and accountability to the consuming public.<sup>217</sup>

The adoption of a consumerist approach to accountability, assessment, and accreditation in higher education has pressured faculty to create comprehensive syllabi, detailing information about the professor, course content and materials, procedures, policies, prohibitions, penalties, as well as performance expectations as a form of "contract" between the professor and the students.<sup>218</sup> In the rhetoric of "greater transparency and accountability" deployed by a libertarian think tank,<sup>219</sup> Texas law now mandates that public colleges and universities in Texas post on their websites detailed syllabi for all undergraduate courses.<sup>220</sup> At the same time, increasing liability concerns have led some colleges and universities and the American Association of University Professors to encourage faculty to

215. Lake, *supra* note 212, at 309. Claims that the district court had dismissed and the appellate court allowed to proceed included: the institution failed to provide instruction on installing and upgrading software; instructors were frequently late or absent and wasted class time by discussing personal issues; the institute represented that students would have "hands on" training; and the institute did not provide enough hours of instruction as set forth in student materials. *See supra* note 213, at 474 n.3.

216. 829 So. 2d 1057 (La. Ct. App. 2002).

217. *Id.* at 1064 (Plotkin, J., dissenting).

218. *See, e.g.*, Jay Parkes & Mary B. Harris, *The Purposes of a Syllabus*, 50 C. TEACHING 55, 55–57 (2002); Jeanne M. Slattery & Janet F. Carlson, *Preparing an Effective Syllabus: Current Best Practices*, 53 C. TEACHING 159, 160 (2005).

219. *E.g.*, JAY SCHALIN, OPENING UP THE CLASSROOM: GREATER TRANSPARENCY THROUGH BETTER, MORE ACCESSIBLE COURSE INFORMATION 1 (John William Pope Center for Higher Education Policy 2008).

220. H.B. No. 2504, effective Sept. 1, 2009, available at <http://www.legis.state.tx.us/tlodocs/81R/billtext/pdf/HB02504F.pdf>.



employ tentative language, disclaimers, and warnings in their detailed syllabi as a form of protection against potential student challenges.<sup>221</sup>

### C. Balance and Neutrality

Based on the view that “academic freedom has a dark side,” mandatory website postings of syllabi is intended to expose “a professor’s deviation from normal expectations,” including engaging in “radical indoctrination” and “introduc[ing] material that is shocking, immoral and offensive to extremes.”<sup>222</sup> Prominently intersecting the debate over academic freedom are allegations that a disproportionate percentage of faculty are liberal, and that an ideological imbalance in the academy has led to the indoctrination of students to radical liberal viewpoints.<sup>223</sup> For decades, the professoriate has been found to be one of the most liberal occupations in America, but with diversity across disciplines within the academy and across institution types.<sup>224</sup> Studies claiming that the academy predominantly consists of

221. Springer, *supra* note 11, at ¶¶ 20–21. See also Paula Wasley, *The Syllabus Becomes a Repository of Legalese*, CHRON. HIGHER EDUC. March 14, 2008, at A1 (2008). Students have been found to view the syllabus as a contractual obligation, and interpret any shift from the course’s predictability as a violation of their consumer rights. Titus, *supra* note 117, at 411–12. In *Alsides v. Brown Inst., Ltd.*, 592 N.W.2d 468 (Minn. Ct. App. 1999) some of the allegations that the appellate court allowed to proceed are the kinds of complaints that students could raise if a professor deviated in some way, such as curriculum content or pedagogical method, from that specified on the course syllabus. Lake, *supra* note 212, at 309.

222. SCHALIN, *supra* note 219, at 4.

223. See GARY A. TOBIN & ARYEH K. WEINBERG, VOLUME I : A PROFILE OF AMERICAN COLLEGE FACULTY: POLITICAL BELIEFS AND BEHAVIOR. (2006); Barry Latzer & Jerry L. Martin, *Intellectual Diversity: Time for Action* (2005), available at <https://www.goacta.org/publications/downloads/IntellectualDiversityFinal.pdf>; Daniel B. Klein & Charlotta Stern, *Political Diversity in Six Disciplines*, 18 ACAD. QUESTIONS 40 (2004/2005); Daniel B. Klein & Charlotta Stern, *Professors and Their Politics: The Policy Views of Social Scientists*, 17 CRITICAL REV. 257 (2005); David Horowitz, *Democratic Abuse of the Academy*, (Apr. 19, 2004), available at <http://www.frontpagemag.com/Articles/Read.aspx?GUID=D59A6DEA-12F9-4C37-92BC-4E1DA41D0313>.

224. PAUL F. LAZARSFELD & WAGNER THIELENS, THE ACADEMIC MIND: SOCIAL SCIENTISTS IN A TIME OF CRISIS (1958); EVERETT CARLL LADD, JR. & SEYMOUR MARTIN LIPSET, THE DIVIDED ACADEMY: PROFESSORS AND POLITICS (1975); BRUCE L. R. SMITH ET AL., CLOSED MINDS? POLITICS AND IDEOLOGY IN AMERICAN UNIVERSITIES (2008); Michael A. Faia, *The Myth of the Liberal Professor*, 47 SOC. EDUC. 171 (1974); Richard F. Hamilton & Lowell L. Hargens, *The Politics of the Professors: Self-Identifications, 1969–1984*, 71 SOC. FORCES 603 (1993); Stanley Rothman et al., *Politics and Professional Advancement among College Faculty*, 3 FORUM (2005), available at <http://www.bepress.com/forum/vol3/iss1/art2/>; John F. Zipp & Rudy Fenwick, *Is the Academy a Liberal*

dangerous radicals are repeated by politicians and widely disseminated in the popular media,<sup>225</sup> despite scholarly criticism of the methodologies employed and conclusions drawn in those works.<sup>226</sup> Some recent work has suggested that the academy is not growing more liberal over time, and currently there is movement toward a more moderate faculty, with more heterogeneity of political opinion than previously believed.<sup>227</sup>

Based on selected course syllabi, the American Council of Trustees and Alumni (ACTA) has attacked undergraduate liberal arts curriculum for “professors . . . using their classrooms to push political agendas in the name of teaching students to think critically,” and higher education in general for being “narrow, single-minded, and tendentious.”<sup>228</sup> For conservative critics,

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*Hegemony? The Political Orientations and Educational Values of Professors*, 70 PUB. OPINION Q. 304 (2006); Neil Gross & Solon Simmons, *The Social and Political Views of American Professors* (Working Paper 2007), available at [http://www.wjh.harvard.edu/~ngross/lounsbey\\_9-25.pdf](http://www.wjh.harvard.edu/~ngross/lounsbey_9-25.pdf).

225. For example, in a report on a survey on higher education, a columnist stated, “America’s academic paradise harbors plenty of serpents.” 376 ECONOMIST 8 (September 10, 2005).

226. See JOHN LEE, THE “FACULTY BIAS” STUDIES: SCIENCE OR PROPAGANDA? (2006), available at [http://www.freeexchangeoncampus.org/index.php?option=com\\_docman&task=cat\\_view&gid=22&Itemid=25](http://www.freeexchangeoncampus.org/index.php?option=com_docman&task=cat_view&gid=22&Itemid=25) (critically reviewing reports by ACTA and by Horowitz); Zipp & Fenwick, *supra* note 224 (arguing that the studies are based on data that is unrepresentative of institutions and/or disciplines, and mistakenly focus on party identification rather than political ideology); Gross & Simmons, *supra* note 224 (noting specific methodological shortcomings); FREE EXCHANGE ON CAMPUS, FACTS COUNT: AN ANALYSIS OF DAVID HOROWITZ’S THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA (2006), available at [http://www.freeexchangeoncampus.org/index.php?option=com\\_docman&task=cat\\_view&gid=12&Itemid=25](http://www.freeexchangeoncampus.org/index.php?option=com_docman&task=cat_view&gid=12&Itemid=25) (critiquing Horowitz’s allegations and lack of evidence); FREE EXCHANGE ON CAMPUS, FACTS STILL COUNT: AN ANALYSIS OF DAVID HOROWITZ’S ONE-PARTY CLASSROOM (2009), available at [http://www.freeexchangeoncampus.org/index.php?option=com\\_docman&task=cat\\_view&gid=43&Itemid=25](http://www.freeexchangeoncampus.org/index.php?option=com_docman&task=cat_view&gid=43&Itemid=25) (examining Horowitz’s inaccuracies and baseless conclusions).

227. Gross & Simmons, *supra* note 224; Hamilton & Hargens, *supra* note 224; Zipp & Fenwick, *supra* note 224.

228. Anne D. Neal, *How Many Ward Churchills? A Study by the American Council of Trustees and Alumni* 3–4 (2006), available at <https://www.goacta.org/publications/downloads/ChurchillFinal.pdf>. Some ABOR publications have also relied exclusively on institutional website postings of course syllabi. See, e.g., DAVID HOROWITZ & JACOB LAKSIN, ONE PARTY CLASSROOM: HOW RADICAL PROFESSORS AT AMERICA’S TOP COLLEGES INDOCTRINATE STUDENTS AND UNDERMINE OUR DEMOCRACY (2009). A report by another group presented as evidence of the liberal slant of faculty, the frequency counts of the words ‘diversity’ and ‘freedom’ using Goggle searches of college and university websites. National Association of Scholars, *Words to Live By: How Diversity*

the prevalence of liberal professors inevitably leads to the oppression of a conservative minority. ACTA claims that almost half of American college students feel that professors use their classes to preach politics, and a quarter of them believe they must mimic their professors' views in order to get a good grade.<sup>229</sup> David Horowitz, a prominent conservative activist, provides anecdotal accounts from students of faculty lowering grades or verbally criticizing students for holding conservative political views.<sup>230</sup> Despite the compelling stories, there is no definitive empirical evidence of ideological bias on the part of liberal faculty; in fact, one contemporary study found that conservative students received grades equal to or higher than more liberal students.<sup>231</sup> There is some evidence, though, that students' own partisan or ideological views are correlated with their ratings of their professors. One study found that students tend to judge their faculty on the basis of their politics rather than merit; when students perceive their professors to be political allies they rate their courses more favorably than they do for those faculty members whom students perceive to be ideologically distant.<sup>232</sup> Few studies have tried to determine whether any relationship actually exists between faculty ideology and advocacy through pedagogy, but contrary to charges of indoctrination, two recent publications found that faculty politics have no significant impact on the political views of students.<sup>233</sup>

Nationwide efforts by advocacy groups have advanced the view that students' academic rights are being violated when students' views differ

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*Trumps Freedom on Academic Websites* (2006), available at [http://www.nas.org/polimage.cfm?doc\\_Id=873&size\\_code=Doc](http://www.nas.org/polimage.cfm?doc_Id=873&size_code=Doc).

229. American Council of Trustees and Alumni, *Politics in the Classroom: A Survey of Students at the Top 50 Colleges and Universities* (2004), available at [https://www.goacta.org/publications/downloads/PoliticsintheClassroom\\_.pdf](https://www.goacta.org/publications/downloads/PoliticsintheClassroom_.pdf); Jerry L. Martin & Anne D. Neal, *Defending Civilization: How Our Universities Are Failing and What Can Be Done About It* 5–6 (Revised and expanded 2002), available at <https://portfolio.du.edu/portfolio/getportfoliofile?uid=85865>.

230. For examples of recounted stories of injustices, see Horowitz, *supra* note 223; David Horowitz, *Campus Blacklist* (2003), available at [http://www.studentsforacademicfreedom.org/file\\_download/5/campusblacklistbooklet.pdf](http://www.studentsforacademicfreedom.org/file_download/5/campusblacklistbooklet.pdf). For discussions of discredited accounts, see SMITH ET AL., *supra* note 224; Mary Beth Marklein, *Ex-Liberal Navigates Right*, USA TODAY, (May 31, 2006), available at [http://www.usatoday.com/news/education/2006-05-31-horowitz-cover\\_x.htm](http://www.usatoday.com/news/education/2006-05-31-horowitz-cover_x.htm).

231. See Markus Kemmelmeier et al., *What's in a Grade? Academic Success and Political Orientation*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 1386 (2005).

232. See April Kelly-Woessner & Mathew C. Woessner, *My Professor Is a Partisan Hack: How Perceptions of a Professor's Political Views Affect Student Course Evaluations*, 39 PS: POL. SCI. & POL. 495 (2006).

233. See *id.*; Mack D. Mariani & Gordon J. Hewitt, *Indoctrination U.? Faculty Ideology and Changes in Student Political Orientation*, 41 PS: POL. SCI. & POL. 773 (2008).

from those of their faculty.<sup>234</sup> In slightly altered variations, an academic bill of rights (ABOR), such as the one developed by Horowitz,<sup>235</sup> has been initiated in the United States House of Representatives and twenty-eight state legislatures; although failing to become law, it has received serious consideration.<sup>236</sup> Ironically adopting the rhetorical frames of individual rights and academic freedom to legitimize their appeal, right-wing forces have waged a focused campaign to limit the autonomy of faculty and place control over what is taught and said in higher education classrooms under legislative oversight.

The ABOR and its derivatives seek to mandate the replacement of what they regard as ideologically based instruction with “more balanced, genuinely tolerant teaching.”<sup>237</sup> Values such as balance and “intellectual diversity” are invoked as ideological imperatives, with the ultimate aim of policing classroom knowledge and compelling a curriculum of “neutrality”<sup>238</sup> with “readings representing multiple views.”<sup>239</sup> Numerous academic groups have denounced such mandates, the ideological agenda they obscure, and government regulation of speech that they seek.<sup>240</sup> A

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234. On the website Students for Academic Freedom (<http://www.studentsforacademicfreedom.org/>), an organization founded by Horowitz, students’ allegations of faculty abuses against conservatives are tracked online. On “Politics in the Classroom” (<http://www.politicsintheclassroom.com/>) students can write anonymous reports on professors’ alleged use of classrooms for political purposes. On “No Indoctrination” (<http://www.NoIndoctrination.org/>) students are invited to document instances of blatant sociopolitical bias by faculty. On “Campus Watch” (<http://www.campus-watch.org/>) students can report Middle East-related “analytical failures, the mixing of politics with scholarship, intolerance of alternative views, apologetics, and the abuse of power over students.” Some universities, including Temple University and Pennsylvania State University, have adopted procedures for students to complain about professors who they believe have presented biased lessons in their classes. See Robin Wilson, *Using New Policy, Students Complain About Classroom Bias on 2 Pa. Campuses*, CHRON. HIGHER EDUC., July 23, 2008, available at <http://chronicle.com/article/Students-in-Pa-Complain-About/1004>.

235. *Academic Bill of Rights (ABOR)* (2003), available at <http://www.studentsforacademicfreedom.org/documents/1925/abor.html>.

236. For a history of ABOR and “intellectual diversity” legislation promoted by ACTA, see the Legislation Tracker by Free Exchange on Campus, [http://www.freeexchangeoncampus.org/index.php?option=com\\_content&task=section&id=5&Itemid=61](http://www.freeexchangeoncampus.org/index.php?option=com_content&task=section&id=5&Itemid=61). The text of different legislative versions of the ABOR is available at <http://www.studentsforacademicfreedom.org/documents/?c=Legislation-Texts>.

237. Neal, *supra* note 228, at 38.

238. ABOR, *supra* note 235, ¶ 15.

239. Latzer & Martin, *supra* note 223, at 13.

240. American Association of University Professors, *Freedom in the Classroom*, 93 ACADEME 54 (2007); American Association of University

danger of such legislation is that it could “invite diversity to be measured by political standards that diverge from the academic criteria of the scholarly profession.”<sup>241</sup> For example, assuming a posture of neutrality implies treating as credible even those opinions that have been repudiated within the discipline, and this is “flatly incompatible with a scholar’s accountability to professional standards.”<sup>242</sup> Balance is not a necessary component of pedagogy or an essential academic goal, but it is invoked by conservatives as a political strategy that could help to dismantle professorial authority.<sup>243</sup>

Byrne has pointed out that “[a] key flaw in the arguments for the ABOR is that faculties have no obligation to be viewpoint neutral in any constitutional sense regarding substantive disputes within their disciplines.”<sup>244</sup> Courts have made clear that students do not have the legal right to demand that classes be viewpoint neutral or “balanced.” In *Edwards v. Aguillard*,<sup>245</sup> the U.S. Supreme Court rejected the argument that a student’s academic freedom to be informed of both views (evolution and creationism) could justify the legislative requirement that both views be taught. The court reasoned, in part, that academic freedom meant academic freedom for teachers as well: “The Act [in question] actually serves to diminish academic freedom by removing the flexibility to teach evolution without also teaching creation science, even if teachers determine that such curriculum results in less effective and comprehensive science instruction.”<sup>246</sup> More recently, in *Board of Regents of the University of*

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Professors, *Statement on Academic Bill of Rights* (2003), available at <http://www.aaup.org/AAUP/comm/rep/A/abor.htm?PF=1>; American Council on Education, *Statement on Academic Rights and Responsibilities* (2005), available at <http://www.aaup.org/NR/rdonlyres/746CB2D9-7EFE-4A89-A0D3-76E5CAA7213E/0/ABORJointStatement.pdf>; Association of American Colleges and Universities, *Academic Freedom and Educational Responsibility* (2006), available at <http://www.aacu.org/about/statements/documents/academicFreedom.pdf>; FREE EXCHANGE ON CAMPUS, *MANUFACTURED CONTROVERSY: AN EXAMINATION OF THE “ACADEMIC BILL OF RESTRICTIONS” MOVEMENT* (2009), available at [http://www.freeexchangeoncampus.org/index.php?option=com\\_docman&task=cat\\_view&gid=44&Itemid=25](http://www.freeexchangeoncampus.org/index.php?option=com_docman&task=cat_view&gid=44&Itemid=25).

241. American Association of University Professors, *Statement on Academic Bill of Rights*, *supra* note 240, at ¶ 2.

242. FINKIN & POST, *supra* note 5, at 103.

243. See Henry A. Giroux, *Academic Freedom under Fire: The Case for Critical Pedagogy*, 33 C. LITERATURE 1 (2006).

244. J. Peter Byrne, *Constitutional Academic Freedom after Grutter: Getting Real About the “Four Freedoms” of a University*, 77 U. COLO. L. REV. 929, 945 (2006).

245. 482 U.S. 578 (1987).

246. *Id.* at 586 n.6. In *Edwards*, the Supreme Court struck down a Louisiana law that required when evolution was taught in public schools, creationism must also be taught. This 7–2 decision ended any prospect of public schools in the

*Wisconsin System v. Southworth*,<sup>247</sup> Justice Souter observed, in his concurrence, that within a university setting, “students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach . . . [and] claim that the University is somehow required to offer a spectrum of courses to satisfy a viewpoint neutrality requirement.”<sup>248</sup>

#### D. Hostile Environment

ACTA recommends that institutions include questions about a professor’s “social, political, or religious bias” on student rating forms.<sup>249</sup> As an expedient means of monitoring faculty behavior, institutions have begun adding questions to existing rating forms to gauge students’ perceptions of the political climate in the classroom, aiming to detect sexism, racism, and cultural insensitivity on the part of a faculty member.<sup>250</sup> Early research findings, explained in terms of “fundamental attribution error,”<sup>251</sup> suggest that students attribute hostility and

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United States being legally forced to teach creationism or “creation science,” or “the literal interpretation of the Book of Genesis.” *Id.* at 596. Later, antievolutionists adopted the term “intelligent design” which the district court, in *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707, 722 (M.D. Pa. 2005), determined to be “creationism re-labeled.”

247. 529 U.S. 217 (2000).

248. *Id.* at 242–43 (Souter, J., concurring).

249. Latzer & Martin, *supra* note 223, at 13. The questions they recommend are: instructor’s presentation of social and political issues (rated balanced and fair or biased and unfair); course readings on controversial issues (rated multiple perspectives or one-sided); classroom environment with respect to student expression of political or social views (rated tolerant to hostile); treatment of students who express political or social views (rated tolerant to hostile); use of classroom to present instructor’s personal political views (rated rare or infrequent to frequent); instructor comments on politics unrelated to the course (rated rare or infrequent to frequent). *Id.* at 34.

250. Stanley Coren, *Are Course Evaluations a Threat to Academic Freedom?*, ACADEMIC FREEDOM AND THE INCLUSIVE UNIVERSITY 104, 105 (Sharon E. Kahn & Dennis J. Pavlich eds., 2000).

251. The *fundamental attribution error* is a cognitive bias in explaining the behavior of others that places a heavy emphasis on others’ internal personality traits, characteristics, or motives, and underestimates external situational factors. The term was coined by Lee Ross, *The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process*, ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY, VOL. 10, 173, 184 (Leonard Berkowitz ed., 1977). For a seminal study in this area, see Edward E. Jones & Victor A. Harris, *The Attribution of Attitudes*, 3 J. EXPERIMENTAL SOC. PSYCH. 1 (1967). In student ratings research, the fundamental attribution error predicts that students cannot

discriminatory intentions to an instructor whose course content they do not like, or one who discusses research that reaches unpopular conclusions, or presents scientific evidence that does not agree with beliefs that they hold.<sup>252</sup> In addition, there is evidence of a “halo effect” in studies finding students with an unfavorable opinion of the course to be more likely to label the instructor as racist, sexist, and culturally biased.<sup>253</sup>

In *Cohen v. San Bernardino Valley College*, the trial court recognized that “[g]ood teaching should challenge students and at times may intimidate students or make them uncomfortable”; however, the court also presumed that the “rough and tumble” attribute of learning, while perhaps desirable, is unnecessary in higher education.<sup>254</sup> Contrary to the *Cohen* court, academics tend to define education as a commitment to “critically engaging the difficult,” that is, the “perplexing, challenging, troubling, unsettling, [and] intriguing.”<sup>255</sup>

Contemporary conservative critics of higher education accuse faculty of creating a hostile environment for students possessing conservative political or religious views. The ABOR defines academic freedom in terms that grant students an “intellectual independence” from intellectual authorities within the institution.<sup>256</sup> Their mandate states that “professors should never intimidate or treat unfairly students with a ‘dissenting’ point of view.”<sup>257</sup> Professional norms and ethics call for teachers to respect all of their students, but respect for students is not the same as acceptance of all viewpoints that students hold and express.<sup>258</sup> Because some students

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separate a message (such as objectively presented scientific data) from the messenger (a student’s perception of the instructor’s attitudes).

252. Stanley Coren, *When Teaching Is Evaluated on Political Grounds*, 6 ACAD. QUESTIONS 73 (1993); Stanley Coren, *Student Evaluations of an Instructor’s Racism and Sexism: Truth or Expedience?*, 8 ETHICS & BEHAV. 201 (1998); see also Moore & Trahan, *supra* note 129 (finding that students perceive female instructors teaching about gender as more biased and more likely to have a political agenda than male instructors teaching about gender).

253. On the concept of *halo effect*, see *supra* note 126. See also Heidi J. Nast, ‘Sex,’ ‘Race’ and Multiculturalism: Critical Consumption and the Politics of Course Evaluations, 23 J. GEOGRAPHY HIGHER EDUC. 102, 104 (1999) (arguing that by addressing “issues of homophobia, racism, classism, misogyny or heterosexism” in their curriculum, faculty can cause student discomfort that may result in negative evaluations).

254. *Cohen v. San Bernardino Valley Coll.*, 883 F. Supp. 1407, 1419–20 (C.D. Cal. 1995).

255. James F. Slevin, *Keeping the University Occupied and out of Trouble*, 130 ADE BULL. 50, ¶¶ 26–27 (2002). See also MARTHA NUSSBAUM, CULTIVATING HUMANITY: A CLASSICAL DEFENSE OF REFORM IN LIBERAL EDUCATION (1997).

256. ABOR, *supra* note 235.

257. Latzer & Martin, *supra* note 223.

258. FINKIN & POST, *supra* note 5, at 107.

experience criticism as hostility or harassment, charges of a hostile educational environment may reflect students' painful and difficult experiences when faculty interrogate their ideas.<sup>259</sup> In *Closed Minds?*, Smith, Mayer, and Fritschler argue that a risk-averse campus climate is beginning to emerge, with professors not confronting and challenging students' beliefs because of the anticipated negative student reactions and the detrimental consequences that follow.<sup>260</sup>

#### IV. CONCLUSION

Almost a century ago, Thorstein Veblen observed that "the ideals of scholarship are yielding ground, in an uncertain and varying degree, before the pressure of businesslike exigencies."<sup>261</sup> He warned against turning the university into a "corporation of learning,"<sup>262</sup> arguing that "the intrusion of business principles in the universities goes to weaken and retard the pursuit of learning, and therefore to defeat the ends for which a university is maintained."<sup>263</sup> Pedagogy lies at the core of the mission of colleges and universities, and is a site where professorial authority in teaching practices competes against the influence exercised by students who have been granted consumer sovereignty in a marketplace academy.

In many respects, the present drive for student control echoes the manifestation of student power in medieval universities of southern Europe, when sovereign power was vested in the student community.<sup>264</sup> In thirteenth century Bologna, professors were mere employees, annually selected by the students, and completely dependent on student fees for their university income.<sup>265</sup> Once selected, professors were compelled to take an oath of submission to the jurisdiction of an organized student guild.<sup>266</sup> Under the student governing system, professors were forbidden to attend university assemblies, yet bound to unquestionably obey any statutes the

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259. Titus, *supra* note 117.

260. SMITH ET AL., *supra* note 224.

261. THORSTEIN VEBLÉN, *THE HIGHER LEARNING IN AMERICA: A MEMORANDUM ON THE CONDUCT OF UNIVERSITIES BY BUSINESS MEN* 190 (Academic Reprints 1954) (1918).

262. *Id.* at 35.

263. *Id.* at 224. For a contemporary analysis of the conflicts between the principles of education and the market, see John McMurtry, *Education and the Market Model*, 25 J. PHIL. EDUC. 209 (1991). See also Robert N. Bellah, *Freedom, Coercion, and Authority*, 85 ACADEME 16 (1999).

264. See HASTINGS RASHDALL, *THE UNIVERSITIES OF EUROPE IN THE MIDDLE AGES VOL. I* 176–203 (1964).

265. *Id.* at 208.

266. *Id.* at 195.



student congregations proclaimed.<sup>267</sup> Student control over a lecturer's life was pervasive. At the beginning of the academic session, the students and professors reached agreement on the text material to be covered and its equal distribution over the course of the year.<sup>268</sup> Failure to reach a particular portion in the text by the previously specified date, or glossing over or omitting a portion of the material, rendered the professor liable to repay some or all of the student fees, depending on the extent of perceived professorial negligence.<sup>269</sup> Punctuality requirements were rigidly enforced. A professor was fined for starting a lecture a minute late or continuing after the prescribed time.<sup>270</sup> To ensure a professor's conformity to the statutes, at the beginning of the academic session, a professor had to deposit a specified sum with a city banker who acted on behalf of the students, and from this deposit any fines incurred were deducted.<sup>271</sup> Such formidable control was supported by a system of secret denunciations. Certain students were elected to act as spies who continuously monitored and assessed professors' lecturing performances and were obligated to report finable irregularities, such as a bad lecturing technique.<sup>272</sup>

Medieval student power succeeded in "reducing the masters to an almost incredible servitude."<sup>273</sup> Medieval student power movements, though, were not aimed at changing the established utilitarian function of the university of their time. Students were not concerned with the content of the curriculum, or even the selection of content for a course syllabus, as there was an agreed upon core of studies derived from a standard set of texts.<sup>274</sup> In contrast, the success of contemporary students' rights claims and demands for customer satisfaction is leading to their power to specify and enforce curricular requirements and forms of communicating the curriculum. As a result, faculty's fundamental control over the selection of ideas to expose students to, and the teaching techniques to employ, is now threatened.

The complicated combination of the commitment of colleges and universities to the market and commercialization, conservative emphases on stronger control over curriculum, and managerial forms of accountability in higher education, has led to widespread measurement policies and surveillance mechanisms that intrude upon and threaten our

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267. Alan B. Cobban, *Medieval Student Power*, 53 PAST AND PRESENT 28, 40 (1971).

268. *Id.* at 41.

269. RASHDALL, *supra* note 264, at 197.

270. *Id.* at 196.

271. Cobban, *supra* note 267, at 41.

272. RASHDALL, *supra* note 264, at 197.

273. *Id.* at 148. The titles of *master*, *doctor* and *professor* were used synonymously in the Middle Ages. Cobban, *supra* note 267, at 19.

274. Cobban, *supra* note 267, at 31.

most creative and critical pedagogical practices. The traditional role of the professoriate in guarding academic integrity is increasingly being challenged, as what students think of their professors and of their teaching gains greater importance to college and university administrators. Students exercise their influence constantly by their responsiveness or boredom in the classroom, and then by attributing a level of tedium or their inattentiveness to failure on the part of the professor to hold their interest.<sup>275</sup> Today's student culture is often described as one of disengagement<sup>276</sup> and entitlement,<sup>277</sup> so it should come as no surprise if students who enter colleges and universities with a consumer mentality are not comfortable accepting a professor's pedagogical authority and choose to file legal complaints in order to have their demands satisfied.

The imposition of a market logic into higher education has been facilitated by the power of a marketing discourse to frame the public conversation, by substituting the vocabulary of a market transaction (such as the student as consumer metaphor) for a pedagogical relationship. Institutionalization of the student consumer metaphor has been accompanied by a shift in the ways in which people think about education, transformed from a process of becoming (more learned) to a product for purchase (a grade, or a degree). The public has expressed concern about the value of postsecondary education as a personal investment, and higher education institutions have responded with structures designed "to engage citizens in determining how public higher education can serve them" with the aim of "providing world-class service and value to students."<sup>278</sup> Additionally, legislative bodies have identified specific performance and productivity measurements and dictated how institutions must provide evidence that they are achieving those institutional objectives or risk

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275. RIESMAN, *supra* note 14, at 278. *See also* Titus, *supra* note 117 (finding this general term of disapproval to be the most popular reason students give for assigning low ratings to professors).

276. *See, e.g.*, Holly Hassel & Jessica Lourey, *The Dea(r)th of Student Responsibility*, 53 C. TEACHING 2 (2005); Paul A. Trout, *Disengaged Students and the Decline of Academic Standards*, 10 ACAD. QUESTIONS 46 (1997).

277. *See, e.g.*, PETER SACKS, *GENERATION X GOES TO COLLEGE: AN EYE OPENING ACCOUNT OF TEACHING IN POSTMODERN AMERICA* (1996); Jill Singleton-Jackson et al., *Students as Consumers of Knowledge: Are They Buying What We're Selling?*, 35 INNOVATIVE HIGHER EDUC. 343 (2010).

278. Terry MacTaggart, *Shaping Alaska's Future: Setting Strategic Directions for the University of Alaska* 3 (2011). [http://www.alaska.edu/files/research/Shaping-Alaska's-Future\\_100311.pdf](http://www.alaska.edu/files/research/Shaping-Alaska's-Future_100311.pdf). The quotations are from a current report distributed at this author's institution, but the discourse of "service" and "value" is ubiquitous in American universities.

reductions in annual appropriations.<sup>279</sup> A logic of quantification gauges value within a framework of utility and materially measured performance, but an educated person is not quantifiable.

In efforts to increase the influence of populist values and dilute the academic authority of the professoriate, political pressure is being brought to bear on administrators to regulate faculty's academic speech. Cameron, Meyers, and Olswang argue that legislation based on ABOR and its progeny could provide "[e]nforceable rights [that] are likely to shift the balance of academic decision-making" from "professional educators and into the hands of students, government, or courts . . . ."<sup>280</sup> Aggrieved students, apparently possessing rights to consumer satisfaction, could file suit when a professor's lecture, course textbook, or classroom discussion inadequately incorporates dissenting viewpoints, or when their professor fails to affirm equal truth status of unsupported opinions that students express. Student spies of the thirteenth century now appear in the form of conservative student group websites posting anonymous accusations. In one controversial instance, a group at University of California, Los Angeles solicited class notes, handouts, and illicit recordings of lectures (offering \$100 for all three) of faculty "radicals" who were "actively proselytizing their extreme view in the classroom."<sup>281</sup> Such student privileges could further reduce faculty independence in their roles as teachers, while empowering courts to evaluate the adequacy of courses and professorial performance to determine whether students' rights have been infringed.

These are dangerous times for the professoriate. If faculty do not resist external demands and administrative monitoring, their residual freedom to define the curriculum, decide pedagogical strategies, and determine standards of student achievement will be eviscerated. To experience "intellectual growth and discovery" requires "the right to think the unthinkable, discuss the unmentionable, and challenge the unchallengeable."<sup>282</sup> Although judicial authorities have recognized a

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279. See F. King Alexander, *The Changing Face of Accountability: Monitoring and Assessing Institutional Performance in Higher Education*, 71 J. HIGHER EDUC. 411 (2000).

280. Cameron et al., *supra* note 15, at 290. Similarly, Byrne has stated that enactment of state statutes based on ABOR "would violate constitutional academic freedom because they would displace academic control of core educational decisions with lay political control." Byrne, *supra* note 244, at 945.

281. See Jon Weiner, "UCLA's Dirty Thirty," *Nation*, February 13, 2006, 23–24; Saree Makdisi, "Witch Hunt at UCLA," *Los Angeles Times*, January 22, 2006, M1. Subsequently, a university attorney warned that students who sold audiotapes of lectures could be violating professors' intellectual property rights, and the offer of payment was withdrawn.

282. REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION AT YALE 5 (1975), available at [http://yalecollege.yale.edu/sites/default/files/woodward\\_report.pdf](http://yalecollege.yale.edu/sites/default/files/woodward_report.pdf).

justification for deference to faculty on decisions that are fundamentally academic in nature, judges without any expertise in this area are increasingly mediating such conflicts. The conflicts arising from commodification in higher education are not simply about the autonomy of professors; at the heart of the disputes are opposing views on the nature and goals of education. As courts are increasingly inserted into disputes concerning pedagogy, fundamental educational issues become transformed into judicial rulings, distorting traditional values of college and university culture, and potentially causing damage to the academic enterprise itself.



# DEFINING “GAINFUL EMPLOYMENT” AND OTHER REFORMS IN FEDERAL EDUCATIONAL LENDING

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## INTRODUCTION

Access to higher education has changed radically from just one generation ago: competition to gain access to colleges and universities has grown much stronger;<sup>1</sup> the cost of education has grown dramatically;<sup>2</sup> the value of most degrees no longer confers the same benefits on today’s graduates.<sup>3</sup> These and other factors make it increasingly difficult for students to gain access to higher education, afford that education, and make their education pay off in the long run. As a result, students who are able to attend colleges or universities are, increasingly more often, left with high

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1. See *Getting in Gets Harder*, NEWSWEEK, Jan. 2, 2008, <http://www.newsweek.com/2008/01/02/getting-in-gets-harder.html>.

2. See *Fast Facts*, NAT’L CENTER FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=76> (last visited Nov. 17, 2011).

3. See Greg Ip, *The Declining Value of Your College Degree*, WALL ST. J., July 17, 2008, at D1, available at <http://online.wsj.com/article/SB121623686919059307.html>.

debt loads and dismal job prospects upon graduation.<sup>4</sup> As these changes become more pronounced, many now are questioning the value of higher education as the natural next step after graduating from high school. From the view of some economists, students may be acting rationally when they decide against pursuing higher education, even when those students would otherwise be considered highly qualified for, and would have a high likelihood of success at, the next academic level.<sup>5</sup>

It seems, however, students have largely ignored the economics of obtaining a college- or university-level education. More students than ever before are seeking access to higher education.<sup>6</sup> Whether this steady flow of new students is due to their own irrationality, the need to conform to societal norms, or the moral value of a college or university degree that economists are not able to measure, students continue to attend institutions of higher learning in the hopes that their lives will be better for having done so. Sadly, that proposition has not always proven true. The parents of today's college and university graduates started their working lives, on average, with only a fraction of the amount of debt taken on by their children. Furthermore, the diminished value of a college or university education in the employment market leads many students on to graduate-level programs that further compound the debt problem.

These areas of concern have not gone unnoticed by the federal government. Two significant changes in the laws regarding federal student assistance may transform the educational finance paradigm. The first of these is an effort by Congress to increase the availability of higher education: the College Cost Reduction and Access Act of 2007.<sup>7</sup> One of the cornerstones of this legislation was the creation of "Income-Based Repayment."<sup>8</sup> This law will reduce students' repayment obligations with regard to their federal student loans to less than fifteen percent of their annual adjusted gross income per year, with a maximum repayment term of

4. See Blake Ellis, *College Grads: \$24,000 in Debt*, CNNMONEY, Oct. 22, 2010, [http://money.cnn.com/2010/10/22/pf/college/student\\_loan\\_debt/index.htm](http://money.cnn.com/2010/10/22/pf/college/student_loan_debt/index.htm).

5. See *Are Too Many Students Going to College?*, CHRON. HIGHER EDUC. (Nov. 8, 2009), <http://chronicle.com/article/Are-Too-Many-Students-Going/49039/>. But see Lisa Barrow & Cecilia Elena Rouse, *Does College Still Pay?*, 2 ECONOMISTS' VOICE 41 (2005).

6. Sara Murray, *Grads Head to College in Record Numbers*, WALL ST. J., Apr. 28, 2010, <http://online.wsj.com/article/SB10001424052748703832204575210244203411342.html?mod=e2tw>.

7. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007).

8. 20 U.S.C.A. § 1098e (West 2010). The Secretary of Education was given the authority to promulgate this repayment system effective July 1, 2009. Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, § 451(a)(3), 122 Stat. 3078, 3261-62 (codified at 20 U.S.C. § 1087e(d)(1)(E) (West 2011)).

twenty-five years.<sup>9</sup> Essentially, students receiving most kinds of federal student loans will qualify for reduced payments if fifteen percent of their income is not enough to cover a normal payment on a ten-year repayment plan.<sup>10</sup> These repayment options are available to students who take on federal student debt regardless of whether they incurred that debt in an undergraduate or graduate program, or at a public, not-for-profit, or for-profit institution.<sup>11</sup>

It is not hard to see how this basic formula could reduce the debt burden on many students struggling after graduation to find employment or maintain an income high enough to make normal scheduled payments. This, in turn, may influence aspiring students’ decisions about whether to accept an educational opportunity in the first place. Students, knowing that they will never be obligated to pay back more than fifteen percent of their income, may be induced to pursue degrees or certificates that carry a low probability of leading to a job with a salary high enough to cover normal payments. Some students may even take this idea to an extreme and take on an unsustainable amount of debt without any intention of ever repaying the principal. For example, a law student may take on more than \$150,000 to pay for a juris doctor (J.D.) program, knowing she does not ever want to practice law. In fact, she could get her J.D. and work as a park ranger (assuming she is otherwise qualified), make yearly payments nowhere close to the rate necessary to pay off the accrued interest, and then cancel the entire principal after ten years because she has worked in a qualifying public interest position.<sup>12</sup>

The second legal change, and the primary topic of this paper, is the Department of Education’s rule change affecting the availability of federal educational loans to students who attend for-profit institutions of higher education. Under the Higher Education Act of 1965, students may take on federal educational loans if they are attending an “institution of higher education.”<sup>13</sup> For an entity other than a public or non-profit organization to qualify as an “institution of higher education,” the entity must demonstrate that its programs are “prepar[ing] students for gainful employment in a recognized occupation . . . .”<sup>14</sup> The final rule sets out quantitative

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9. 20 U.S.C.A. § 1098e(a)(3)(A)-(B), 1098e(b) (West 2010). In addition, the fifteen percent maximum is reduced to only ten percent and the maximum repayment term is reduced from twenty-five to twenty years for new borrowers in 2014. *Id.* at § 1098e(e).

10. 20 U.S.C.A. § 1098e(b) (West 2010).

11. *See Id.*

12. *See* 20 U.S.C.A § 1087e(m) (West 2010). This provision instructs the Secretary of Education to cancel the remaining principal and interest due after ten years of making payments while the debtor is employed in a qualifying public service position. For a definition of qualifying positions, see § 1087e(m)(3)(B).

13. 20 U.S.C.A. § 1091(a)(1) (West 2010).

14. 20 U.S.C.A. § 1001(b)(1) (West 2010).



guidelines for what constitutes “gainful employment” for purposes of the Act. The rule categorizes institutions based on their students’ debt-to-income ratio and educational loan repayment rates. For-profit educational institutions whose students have unfavorable debt-to-income ratios, poor repayment rates, or both, may be subject to more rigorous disclosure requirements in their admissions materials and practices, or they may lose the privilege of accepting tuition revenue from federal educational lenders altogether.<sup>15</sup>

Together these programs illustrate moves by the government to simultaneously increase the availability of a college or university education to aspiring students and punish institutions that seek to exploit the existing student loan regime or leave their graduates without a meaningful way to repay educational debts. Both programs have proponents and critics, but what is certain is that they will have a profound impact on the economics of higher education.

The goal of this paper is to analyze the recent rule change by the Department of Education regarding the definition of “gainful employment.” This discussion, however, would be incomplete without a basic explanation of the key changes in federal loan repayment effected by the College Cost Reduction and Access Act of 2007. Therefore, I begin Part II with a breakdown of the Act, particularly those provisions that establish Income-Based Repayment and the new incentives students realize as a result of its establishment. I continue in the same section to explain the final rule of the Department of Education. In Part III, I address the criticisms and critiques of the new rule and attempt to predict the rule’s real-world impact.

## I. THE NEW STUDENT LENDING LEGAL FRAMEWORK

This paper’s purpose is to explore the Department of Education’s definition of “gainful employment” for purposes of determining an institution’s ability to receive revenue from federal student loans. The rule’s primary purpose is to restrict the ability of for-profit colleges and universities to produce graduates with heavy debt burdens and no meaningful way to repay their student loans. I dedicate most of this paper to analyzing that rule. I begin, however, with an explanation of the other recent changes in the law that have significantly affected the way students finance their degrees. These changes served as a catalyst for the government’s rulemaking, as the Department of Education feared the new laws would further exacerbate the problems associated with students who attend for-profit colleges and universities.

### A. The College Cost Reduction and Access Act of 2007 and Income-

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15. See *infra* Part II.B.

### Based Repayment

Income-based repayment (“IBR”) was passed into law as part of the College Cost Reduction and Access Act of 2007.<sup>16</sup> It provides a mathematical formula to determine the maximum amount students must pay on their federal loans every year. As of July 1, 2009, a qualifying student may claim a “partial financial hardship” if his annual loan payment on a ten-year repayment plan is greater than fifteen percent of his gross adjusted income<sup>17</sup> less 150 percent of his family’s poverty level.<sup>18</sup> Stated differently, a student may claim a partial financial hardship if his annual repayment amount is greater than fifteen percent of his income after subtracting one and one-half times the poverty line. If the student qualifies for partial financial hardship, he is obligated to pay only fifteen percent of his adjusted gross income<sup>19</sup> less 150 percent of his family’s poverty level.<sup>20</sup>

For example, if a single individual with no dependents makes \$40,000 in 2011 while repaying his loan, the maximum mandatory payment under IBR would be \$3,549.75 a year, or \$295.81 a month.<sup>21</sup> The amount is automatically adjusted for income annually, or upon the request of the student after a significant change in income.<sup>22</sup> In addition, the government will pay the interest on certain subsidized federal loans for up to three years if the payment due under IBR does not cover the accrued interest, essentially eliminating the possibility that the principal balance will grow during the first three years of repayment on these types of loans.<sup>23</sup> On other loans, and all loans after three years, any interest not covered by the IBR-adjusted payment will be added to the principal.<sup>24</sup> Thus, while IBR can reduce payments, its use may result in the student paying more overall. For example, if a student is on IBR for an extended period of time early in his repayment and later experiences an increase in income such that he no longer qualifies for IBR, that student could face a much larger repayment burden due to having a larger principal than he would have had if he followed a standard repayment plan. For new borrowers in 2014 and after, the fifteen percent figure referenced above will be reduced to ten percent.<sup>25</sup>

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16. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007).

17. 34 C.F.R. § 682.215(a)(4)(i) (2010).

18. 42 U.S.C.A. § 9902(2) (West 1998); 20 U.S.C.A. § 1098e(a)(3) (West 2010).

19. 20 U.S.C.A. § 1098e(b)(1) (West 2010).

20. Stated formulaically:  $(.15(I-(1.5*P)))/12=M$ , where I = adjusted gross income, P = family adjusted poverty level, and M = monthly payment.

21.  $(.15*(40,000-(1.5*10890)))$ .

22. 34 C.F.R. § 682.215(e)(1) (2010).

23. 20 U.S.C.A. § 1098e(b)(3)(A) (West 2010).

24. *Id.* at § 1098e(b)(3)(B).

25. *Id.* at § 1098e(e)(1).

The Act also includes provisions for debt cancellation. If the student is employed in a qualifying public service position and makes payments under IBR or any other repayment program for ten years, the government will cancel the entire remaining principal and interest.<sup>26</sup> Similarly, students not employed in public interest positions may have their principal and interest cancelled after twenty-five years of payments under IBR.<sup>27</sup> For new borrowers in 2014 and after, the twenty-five-year term is reduced to twenty.<sup>28</sup> IBR is generally available to all federal student loans taken out by the student.<sup>29</sup> It is not available for Federal Parent PLUS loans taken out by the student's parents or guardians.<sup>30</sup> As long as the student-debtor would otherwise qualify for federal educational assistance, the IBR program does not discriminate against any particular institution, degree, or academic program. Thus, the only real limitation to a student's ability to borrow is credit history<sup>31</sup> and the maximums for each loan type where they exist.<sup>32</sup>

The need for the College Cost Reduction and Access Act and IBR came from the inadequacy of the available repayment options. There were four basic types of repayment plans available to student-debtors prior to the passage of the Act: (1) a fixed ten-year repayment plan, (2) a graduated ten-year repayment plan with lower payments at the beginning of the term, (3) an income-sensitive payment plan where the minimum payment would not be less than the interest payment on a ten-year plan, and (4) what has been described as Income Contingent Repayment (ICR).<sup>33</sup> ICR is the closest program to IBR, although it differs from IBR in many significant ways. First, ICR had no public service loan forgiveness.<sup>34</sup> Debt was

26. 20 U.S.C.A. § 1087e(m) (West 2010).

27. 20 U.S.C.A. § 1098e(b)(7) (West 2010).

28. *Id.* at § 1098e(e)(2).

29. *See* 34 C.F.R. § 685.221(a)(2) (2010).

30. *Id.*

31. 34 C.F.R. § 685.200 (2010). The Department of Education uses an easy-to-meet standard. As long as students have no current accounts in default, they should easily qualify. Once a student qualifies, he or she is offered the same interest rates as all other qualifying students. However, some federal loans, such as the Subsidized Stafford, are available only to students who demonstrate a financial need on their FAFSA filing. *See id.*

32. 34 C.F.R. § 685.203 (2010). Graduate students, who tend to take on much more debt than undergraduates, may take out a maximum Stafford amount (both subsidized and unsubsidized) of \$138,500 (considering undergraduate and graduate school), with the maximum subsidized amount being \$65,000. The annual maximum for graduate students is the cost of attendance less other financial aids, and there is no aggregate maximum.

33. 20 U.S.C.A. § 1087e(b)(9)(A) (West 2010).

34. Philip Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27, 32-33 (2007).

cancelled after twenty-five years of payments for any borrower.<sup>35</sup> Second, ICR did not reach the same types of debt as does IBR. Prior to 2006, the Federal Direct Loan program, which included the Grad PLUS Loans, did not exist. Therefore, the largest and often only lending that came from the federal government was in the form of Stafford loans.<sup>36</sup> All other educational funding for graduate students had to be found in the private debt market, and private loans were not eligible for ICR.<sup>37</sup> Thus, a substantial portion of student debt did not qualify for any income-sensitive repayment plan.<sup>38</sup> The amount paid on private student loans, moreover, was not a factor in determining a student’s payment ability under ICR.<sup>39</sup> Finally, ICR provided that payments would be capped at twenty percent of discretionary income and unpaid interest would be capitalized so that the principal could grow up to 110 percent of the original amount.<sup>40</sup>

Tuition rates for both graduate and undergraduate programs continued to increase in the several decades before IBR became available.<sup>41</sup> This resulted in some students financing more of their education with private loans, as they had exhausted their federal loan eligibility.<sup>42</sup> As a result, many students who may have been inclined to seek low-paying public service jobs were not able to “afford” that career choice.<sup>43</sup> Other students, once confronted with the reality of holding on to their student loans for twenty-five years (the waiting period before their loans would be forgiven) made the decision to abandon public service jobs and seek more lucrative employment in the private sector.<sup>44</sup> This flight from public service appears to be one of the primary motivators for Congress to reform the educational lending process.<sup>45</sup>

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35. *Id.*

36. Stafford loans come in two varieties, subsidized and unsubsidized. Both have traditionally offered comparatively low interest rates, although the rates occasionally change. The unsubsidized Stafford loan, like most loans, begins to accrue interest from the time of disbursement. For the subsidized Stafford loan, the government will pay the interest charges while the student is still in school. 20 U.S.C.A. § 1078 (West 2011).

37. Schrag, *supra* note 34, at 32-33.

38. *Id.*

39. *Id.*

40. 34 C.F.R. § 685.209 (2008).

41. See COLLEGE BOARD, [http://trends.collegeboard.org/college\\_pricing/report\\_findings/indicator/Tuition\\_Fees\\_Over\\_Time](http://trends.collegeboard.org/college_pricing/report_findings/indicator/Tuition_Fees_Over_Time) (last visited Nov. 17, 2011).

42. Schrag, *supra* note 34, at 29.

43. *Id.*

44. *Id.* (providing anecdotal evidence of graduates who would otherwise have stayed in their public service positions had it not been for their debt burden).

45. H.R. REP. NO.110-210, at 44 (2007). The report states:

The Committee believes that loan limits should only be raised in tandem with options for students to manage their debt. With students borrowing

Although the bill passed the House 273-149 and the Senate 78-18, there were certainly those who thought the bill's costs outweighed its benefits. For example, Congressman Souder of Indiana worried about the moral hazard caused by the shift in risk-bearing and accountability:

An income-based repayment program would eliminate once and for all any need for students to weigh their choice of college or university against which type of career they plan to enter after the degree. It's a disconnect with capitalism because you don't have to say, if I get this number of degrees and go this far, how is my job going to repay this? Should I go to a local campus? Should I go to a lower priced college? It's disconnected now based from your choice of employment. While the government surely has a role in increasing access to education, this program would totally strip any incoming college student from making a responsible choice. It's kind-hearted but reckless.<sup>46</sup>

In short, the moral hazard identified by Souder was that a student would pursue "riskier" degrees—those degrees with a small chance of resulting in a job capable of servicing the student's incurred debt—or that the student would pursue a degree with no expectation whatsoever of ever being able to fully pay back his debt.

The program is expected to come at a substantial price. The Congressional Budget Office (CBO) estimates that between 2008 and 2017 the income-based repayment program will cost \$1.8 billion.<sup>47</sup> In addition, the CBO estimates that the total amount of loan forgiveness over the same period will be \$2.6 billion, and that all the provisions of the Act affecting borrowers together will cost taxpayers \$16.3 billion.<sup>48</sup> It is not clear if the

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at record levels, ensuring borrower protections and alternative payment options is important. According to the Project on Student Debt, "over the past decade, debt levels for graduating seniors with student loans more than doubled from \$9,250 to \$19,200—a 108% increase (58% after accounting for inflation)." H.R. 2669 builds on the existing Income Contingent Repayment Program offered in the Direct Loan program. . . . The Income-Based Repayment proposal guarantees that borrowers will not have to pay more than fifteen percent of their discretionary income in loan repayments, and allows borrowers to have their loans forgiven after twenty years of payments. Payment options such as the Income-Based Repayment proposal serve to expand rather than restrict educational and economic opportunities for graduates who would otherwise be unable to afford to work as teachers or social workers. *Id.* (quoting *Quick Facts About Student Debt*, Project on Student Debt, available at [http://projectonstudentdebt.org/files/File/Debt\\_Facts\\_and\\_Sources.pdf](http://projectonstudentdebt.org/files/File/Debt_Facts_and_Sources.pdf)).

46. 153 CONG. REC. H7,538-39 (daily ed. July 11, 2007) (statement of Rep. Souder).

47. H.R. REP. NO. 110-210, at 70-71 (2007).

48. *Id.* at 67.

CBO study considered the moral hazard effect when coming to these estimates.

While the Act undoubtedly encourages students who otherwise would not be able to afford higher education to apply for admission to colleges and universities and incentivizes some students to pursue public interest careers, it also incentivizes additional financial risk-taking. This is best explained by example. Take student X, who is considering attending law school. Assume that X’s priorities are first practicing law, and second maximizing income. Assume also that X receives no moral satisfaction from a public interest position; he will choose a position strictly on compensation considerations. To pay for law school and its associated costs, X expects to borrow \$150,000.<sup>49</sup> Assume that X acts rationally in maximizing first his Federal Subsidized Stafford loans, second his Federal Unsubsidized Stafford loans, and financing the remainder with Federal Direct Grad Plus loans.<sup>50</sup>

For the sake of simplicity, assume there are three career options for law students.  $C_1$  is a private sector job paying \$145,000 per year.  $C_2$  is a ten-year debt-cancellation-eligible public interest job that pays \$50,000 per year.  $C_3$  is a private sector job paying \$50,000 per year. Table 1 shows X’s standard (ten-year) loan repayment schedule. Table 2 shows the actual repayment information if X elects to use IBR.

	SUBSIDIZED STAFFORD	UNSUBSIDIZED STAFFORD	GRAD PLUS	TOTAL
PRINCIPAL	\$25,500.00	\$36,000.00	\$88,500.00	\$150,000.00

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49. In order to simplify the results, I will treat these loans as beginning to accrue interest when repayment begins. In reality, the Unsubsidized Stafford and Grad PLUS loans will accrue interest beginning on the day of disbursement, usually the first day of a semester.

50. X will owe \$25,500 under Subsidized Stafford at 6.8%, \$36,000 under Unsubsidized Stafford at 6.8%, and \$88,500 under Direct Grad PLUS at 7.9%. The Direct Grad PLUS loan is a loan available only to students enrolled in a graduate degree program. Typically, a graduate student would use the PLUS loan to bridge the gap between the amount received in other forms of financial aid and the student’s expected expenses. The maximum a graduate student can borrow is the institution’s “cost of attendance,” which is a figure determined by the institution as an estimate of what enrolling in a particular program will cost the student.

RATE <sup>51</sup>	6.80%	6.80%	7.90%	
ANNUAL STANDARD PAYMENT	\$3,501.62	\$4,943.46	\$12,745.04	\$21,190.11

TABLE 2 - PAYMENT INFORMATION UNDER IBR			
	C1	C2	C3
STANDARD REPAYMENT	\$21,190.11	\$21,190.11	\$21,190.11
IBR MINIMUM PAYMENT	\$19,313.25	\$5,063.25	\$5,063.25
YEARS OF PAYMENTS	11.52	10.00	25.00
TOTAL PAYMENTS	\$222,521.59	\$50,632.50	\$126,581.25
CANCELED AMOUNT	\$-	\$123,434.52	\$302,756.25
INTEREST SUBSIDIZED DURING REPAYMENT	\$-	\$2,619.74	\$2,619.74

If X is able to work at C<sub>1</sub>, he may still qualify for IBR even though he is earning a substantial income because his minimum payment under IBR is less than it would be under the standard repayment plan. However, his payments are not significantly different from the standard repayment plan, and under IBR, X's loans must be fully paid off within eleven and one-half years of entering repayment.<sup>52</sup> Given X's high income, X may wish to make larger payments to avoid paying interest and to shed his debt as quickly as possible; there is, however, no requirement that he do this. Because X's income covers his interest payments on the Subsidized Stafford, no additional subsidies are provided on unpaid interest. Additionally, because X's IBR payment schedule is completed well before the twenty-five-year cancellation date, no amount of X's loan will be canceled.

If X is not hired at a C<sub>1</sub> position but is able to obtain the public interest position C<sub>2</sub>, the IBR payment is significantly reduced. If X makes IBR payments for ten years while holding this position, the remaining loan

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51. The interest rates for these types of loans are fixed at the rates represented above. For undergraduate students, the interest rates for Stafford loans changes year to year. Undergraduate students are not eligible for Grad PLUS loans. See DEPARTMENT OF EDUCATION, <http://www.direct.ed.gov/calc.html> (last visited Nov. 15, 2011).

52. The repayment period is longer than the standard repayment plan because under IBR the principal balance is paid down more slowly, which results in additional accrued interest, which in turn leads to a greater loan balance being serviced with comparatively smaller payments.

amount will be canceled. Furthermore, a portion of the accrued interest is subsidized during the first three years of repayment, as the IBR payment does not cover all of the interest payment on the Subsidized Stafford loan. While it is possible that X would make larger payments and attempt to get out of debt faster than required, this is unlikely, as it might come at a severely reduced standard of living. It is much more likely that X would make the minimum IBR payments and cancel the remaining debt after ten years.

If all else fails and X takes C<sub>3</sub>, X's IBR payments will not cover the interest. Therefore, X's payments will be equal to those at C<sub>2</sub>, but X will not have the option of canceling the debt after ten years. Rather, X must wait until the twenty-five-year statutory period is complete before the Department of Education cancels the remaining amount.<sup>53</sup> Because X's payments have not covered the interest, taxpayers will bear the entire principal and interest remaining, \$302,756.25. It is also noteworthy that X's total payments over twenty-five years would not be enough to cover the initial principal.

Overall, both IBR and the Direct Loan programs have fundamentally transformed the ways in which college and university students (especially graduate and professional students) finance their education. Prior to their enactment, students would decide whether to take out an educational loan just as they would any other loan: by looking at their overall ability to repay the loan in full. Now, the worst-case scenario facing students is that they pay less than fifteen percent of their income per year over an extended period of time. If he wishes, a student may choose to ignore with impunity the question of whether or not he will ever be able to repay the loan principal and interest.

Students pursuing an undergraduate degree are limited by the statutory maximums for their specific degree type;<sup>54</sup> graduate students, however, are limited only by the institutionally determined cost of attendance.<sup>55</sup> In either case, credit from the federal government for educational loans has become easier to access, and the requirement that the loan be repaid in a timely manner has been relaxed. More important, however, is that the new incentive structure of the loans dissociates students' expectation of repayment from the actual amount owed.

Students who attend for-profit colleges and universities may access most of the same federal loans as those who attend private not-for-profit or public colleges and universities. The for-profit institutions are uniquely

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53. Previously, the amount canceled would be considered income to the student for taxation purposes. Now, however, the IRC provides that amount canceled pursuant to the public service provisions is not included in income. 26 U.S.C.A. § 108(f) (West 2011).

54. 34 C.F.R. § 685.203 (2009).

55. See *supra* note 34 and accompanying text.



positioned to exploit the safety-net features of IBR and Direct Loans. Through marketing, admissions and financial aid counseling, these institutions may persuade students to attend by pointing out that their repayment requirements may not correlate with the amount borrowed. In 2010, the Department of Education indentified misuse of the incentives in IBR as one of the key reasons why restricting access to federal lending became a regulatory priority.<sup>56</sup>

#### B. New Definition of “Gainful Employment”

Under the Higher Education Act of 1965, students are eligible to take out most kinds of federal education loans if they are attending an “institution of higher education.”<sup>57</sup> To qualify as an “institution of higher education,” an entity other than a public or non-profit organization must demonstrate that its programs are “prepar[ing] students for gainful employment in a recognized occupation . . . .”<sup>58</sup> These for-profit institutions have never faced a requirement that they substantiate what those “gainful employment” opportunities might be.<sup>59</sup> The college or university, quite literally, was required only to check a box on a form certifying their program(s) would lead to gainful employment.<sup>60</sup> Thus, the gainful employment standard was anything that the for-profit college or university said it was.

Concern over for-profit programs has gained momentum for several reasons. First, there is concern that admissions and financial aid officers at for-profit colleges and universities engage in exaggeration, misrepresentation, and fraud when enrolling students and preparing their financial assistance materials.<sup>61</sup> Second, as profit-driven entities, for-profit institutions have an incentive to charge students more than would a

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56. Program Integrity: Gainful Employment [hereinafter Rulemaking], 75 Fed. Reg. 43616, 43622 (July 26, 2010) (notice of proposed rulemaking) (to be codified at 34 C.F.R. pt. 668).

57. 20 U.S.C.A. § 1091(a)(1) (West 2010).

58. 20 U.S.C.A. § 1001(b)(1) (West 2010).

59. Rulemaking, *supra* note 56, at 43618.

60. *See, e.g.*, Application for Approval to Participate in Federal Student Financial Aid Programs, DEP’T OF EDUC., <http://www.eligcert.ed.gov/ows-doc/eapp.pdf> (last visited Nov. 17, 2011).

61. MAMIE LYNCH ET AL., EDUC. TRUST, SUBPRIME OPPORTUNITY: THE UNFULFILLED PROMISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES 1 (2010), available at [http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime\\_report.pdf](http://www.edtrust.org/sites/edtrust.org/files/publications/files/Subprime_report.pdf). *See also* U.S. GOV’T ACCOUNTABILITY OFFICE, For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices, <http://www.gao.gov/products/GAO-10-948T> (last visited Nov. 17, 2011) (embedded video).

traditional non-profit or public college or university.<sup>62</sup> In the 2008-09 academic year, for-profit institutions received more than \$20 billion in revenue from federal student loans, which accounted for sixty-six percent of total revenue for the industry.<sup>63</sup> Indeed, some for-profit colleges and universities rank among the most profitable companies in the world. From 2005 to 2009, ITT Technical Institute was about ten percent more profitable than Apple and Procter and Gamble, and about twenty percent more profitable than Home Depot and Lockheed Martin.<sup>64</sup> The average student debt for graduates of for-profit institutions in 2007-08 was \$31,190, compared to \$7,960 at public institutions and \$17,040 at private non-profit institutions.<sup>65</sup> In addition, news outlets frequently report that for-profit college and university graduates are unable to obtain employment in their area of study.<sup>66</sup> The programs of the College Cost Reduction and Access Act of 2007 could potentially exacerbate these circumstances. Admissions officers and marketing representatives could push IBR as an option that would make any of their programs “affordable,” thus conditioning students to engage in the risky borrowing activities described in sub-part A of this section. The government affirmatively stated its preference against this sort of behavior: “While the Federal Government is providing new options for repaying loans over extended periods of time to protect a portion of the borrower population from the adverse impact of nonpayment, these repayment options should not be the norm.”<sup>67</sup>

Since 2008, the only restriction on for-profit post-secondary institutions has been the so-called “90/10” rule, which requires any for-profit college or university to derive at least ten percent of its revenue from sources other than federal student assistance.<sup>68</sup> This rule has failed to correct the

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62. LYNCH, *supra* note 63. Assuming that cost functions are relatively similar across public, not-for-profit, and for-profit institutions, all three types of institutions have an incentive to collect revenues above cost and use the funds for improvements and expansion; it is only for-profits, however, that have an incentive to provide a return for their shareholders.

63. *Id.* at 2.

64. STEVEN EISMAN, FOR-PROFIT EDUCATION: SUBPRIME GOES TO COLLEGE 13 (2010), available at <http://www.marketfolly.com/2010/05/steve-eisman-frontpoint-partners-ira.html> (last visited Nov. 17, 2011).

65. LYNCH, *supra* note 63, at 6.

66. See Nanette Asimov, *More Debts Than Diplomas From For-Profit Colleges*, S.F. CHRON., Dec. 1, 2010, at A1, available at [http://articles.sfgate.com/2010-12-01/news/25001273\\_1\\_nonprofit-colleges-and-universities-report-everest-college](http://articles.sfgate.com/2010-12-01/news/25001273_1_nonprofit-colleges-and-universities-report-everest-college). See also *For-profit National College of Kentucky subject of lawsuit*, UPI.COM, Sept. 28, 2011, [http://www.upi.com/Top\\_News/US/2011/09/28/for-profit-National-College-of-Kentucky-subject-of-lawsuit/UPI-23941317224859](http://www.upi.com/Top_News/US/2011/09/28/for-profit-National-College-of-Kentucky-subject-of-lawsuit/UPI-23941317224859).

67. Rulemaking, *supra* note 56, at 43621.

68. Non-Title IV Revenue (90/10), 34 C.F.R. § 668.28 (2011); Program Participation Agreement, 34 C.F.R. § 668.14(b)(16) (2011).

problems facing students; as a result, the Department of Education (Department) has begun taking action to substantially regulate the industry. The Department responded by proposing a rule in 2010 that defines “gainful employment” and subjects the integrity of all for-profit programs to a high level of scrutiny.<sup>69</sup> Beginning July 1, 2012, the Department will administer a two-pronged test to determine the viability of a particular program.<sup>70</sup> The first prong is a debt-to-income test. Under this test, programs whose graduates’ median annual debt payments do not exceed twelve percent of annual earnings or thirty percent of discretionary income are considered eligible institutions. Those who do not achieve either criterion are considered to have failed this prong of the test.<sup>71</sup> The second prong is a repayment rate test. If the average debt repayment rate of graduates is thirty-five percent or better, the institution will remain eligible for federal assistance; if the repayment rate is below that percentage, the institution is considered to have failed that prong.<sup>72</sup> For both prongs, the students considered in calculations are, in most circumstances, those in their third and fourth years of repayment, a class referred to as the “two-year period test” (2YP).<sup>73</sup> Using this metric rather than students’ first years in repayment is thought to provide a better picture of students’ prospects for long-term success and financial stability.

There are also several alternative student classes used for calculation purposes designed to accommodate those programs whose graduates experience an abnormal income growth pattern. In the first formulation of the 2YP test, the earnings information is determined by taking the median income of former students in the third and fourth years after entering repayment.<sup>74</sup> During the negotiated rulemaking process, however, it was brought to light that some programs’ graduates experienced several years

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69. Rulemaking, *supra* note 56, at 43616; Program Integrity: Gainful Employment – New Programs, 75 Fed. Reg. 66665 (Oct. 29, 2010) (final rule) (to be codified at 34 C.F.R. pt. 600).

70. While the regulations take effect in 2012, the Department determined in its final promulgation of the rule that it would allow institutions subject to the regulations a three-year grace period to enter into compliance. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34386, 34389 (June 13, 2011) (to be codified at 34 C.F.R. pt. 668). For instruction on what constitutes a “program” for the rule’s purposes, *see id.* at 34400; *see also* DEPARTMENT OF EDUCATION, Gainful Employment Electronic Announcement #11 - Determining Whether an Educational Program is a Gainful Employment Program (June 24, 2011), <http://ifap.ed.gov/eannouncements/062411WhatisGainfulEmploymentGEAnnounceNumber11.html>.

71. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34386, 34449 (June 13, 2011) (to be codified at 34 C.F.R. pt. 668).

72. *Id.*

73. *Id.*

74. *Id.*

of low income commonly followed by a relative spike, most often seen in medical and dental programs.<sup>75</sup> To account for these programs, several alternative classes were developed. For example, a “four year period” (4YP-R) class was developed. It tests the sixth, seventh, eighth, and ninth fiscal years after the student enters repayment if the student is in a qualifying medical or dental residency program.<sup>76</sup> By developing alternative classes from which to test income and debt data, the Department attempted to find the best indicators of the long-term financial health of a particular program’s participants. Table 3 shows the preceding information in tabular form:

TABLE 3 - QUANTITATIVE TEST OF PROGRAM INTEGRITY			
MEASURE	DEBT-TO-INCOME		
		Debt payment is below 12% of annual earnings or below 30% of discretionary income.	Debt payment is above 12% of annual earnings and above 30% of discretionary income.
REPAYMENT RATE	Above 35%	<i>Eligible</i>	<i>Eligible</i>
	Below 35%	<i>Failed Program</i>	<i>Eligible</i>

If a program fails both the repayment rate test and the debt-to-income test, the program is subject to progressively more burdensome restrictions the longer they continue to fail. Programs in their first year of failure are required to provide all of their current and prospective students with a debt warning consisting of the results of the two tests.<sup>77</sup> Programs in their second year of failure and programs that have failed two out of three consecutive years must, in addition to providing the debt warning, provide an explanation of what remedial steps the program plans to take, an explanation of the risk associated with continuing in the program, and an explanation of the difficulty the student is likely to have repaying his

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75. Rulemaking, *supra* note 58, at 43620. Some programs are customarily followed by lengthy internships or apprenticeships for which the pay is low, but those internships are typically followed by employment that is capable of sustaining debt payments. For example, medical students go through several years of residency during which their pay is relatively low, but once the residency period is over the graduates typically experience a large spike in income.

76. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. at 34, 449 (June 13, 2011) (to be codified at 34 C.F.R. pt. 668).

77. *Id.* at 34, 452.

debt.<sup>78</sup> If a program fails both tests for three of the four previous years, that program is considered an ineligible program, meaning that students enrolled in such a program are no longer eligible to borrow most federal student loans.<sup>79</sup> Because a vast majority of for-profit colleges and universities derive revenue from federal student loans, a program's ineligibility may well make its continued existence next to impossible.

One of the obstacles to creating the rule was determining what should and should not count as repayment sufficient to count toward an institution's "repayment rate." The problem is particularly profound when considering that students using repayment options like IBR may not actually be remitting monthly payments (or may not be paying a substantial amount), but may still have not defaulted on their educational loans.<sup>80</sup> In its first draft of the rule, the Department settled upon counting a loan as "repaid if the borrower (1) made loan payments . . . that reduced the outstanding principal balance, (2) made qualifying payments on the loan under the Public Service Loan Forgiveness Program . . . , or (3) paid the loan in full."<sup>81</sup> Thus, students using IBR would count toward their institution's repayment rate if their payments were sufficient to cover the accrued interest and some amount of the outstanding principal; otherwise, the student would be considered in default for purposes of these calculations. However, after receiving significant opposition to this position, the Department determined that "borrowers who meet their obligations under income-sensitive repayment plans are considered to be successfully repaying their loans even if their payments are smaller than accrued interest, so long as the program at issue does not have unusually large numbers of students in those categories."<sup>82</sup> Therefore, for-profit institutions no longer have to fear their graduates utilizing the IBR option. Under this test, however, a program is not judged by the median student

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78. *Id.* at 344, 52-53.

79. *Id.*

80. *See supra* notes 43-56 and accompanying text. The Department is not the only government organization struggling with how to classify students who have not defaulted on their loans but are otherwise not making payments capable of reducing their debt. The bankruptcy courts have begun to address whether students who repay under IBR can discharge their debt despite being required to pay nothing on their loans. *See, e.g.*, *Marshall v. Student Loan Corp.* (In re *Marshall*), 430 B.R. 809 (Bankr. S.D. Ohio 2010); *Vargas v. Educ. Credit Mgmt. Corp.* (In re *Vargas*), No. 08-82824, 2010 WL 148632, at \*4 n.2 (Bankr. C.D. Ill. Jan. 12, 2010); *Buckland v. Educ. Credit Mgmt. Corp.* (In re *Buckland*), 424 B.R. 883 (Bankr. D. Kan. 2010).

81. Rulemaking, *supra* note 56, at 43619.

82. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34386, 34389 (June 13, 2011) (to be codified at 34 C.F.R. pt. 668).

debt as it would under the debt-to-income test, but rather by the program’s aggregate student debt over the previous four years.<sup>83</sup>

For all but the colleges and universities that fall into the least restrictive category (those in category three with at least a forty-five percent repayment rate), a debt warning is required for incoming students.<sup>84</sup> The warning requirement has two components. First, the institution is required to place a “prominent warning” on all marketing and admissions materials, and counselors are required to provide an oral warning when conducting a meeting with potential students.<sup>85</sup> The warning must remind students “they may have difficulty repaying [their] loans obtained for attending that program.”<sup>86</sup> The second requirement is institution-specific. A qualifying institution must disclose both the result of its debt-to-income ratio test and the repayment rate of its recent graduates.<sup>87</sup>

Programs in the “restricted” category face the same debt-warning requirements just described and two additional burdens.<sup>88</sup> First, the institution is required to obtain affirmations from non-affiliated employers that “the curriculum of the . . . program aligns with recognized occupations at those employers’ businesses, and that there are projected job vacancies or expected demand for those occupations at those businesses.”<sup>89</sup> Program administrators are required to keep the size of the programs in line with the anticipated needs of employers.<sup>90</sup> Second, the institution may enroll only as many students receiving federal student loans as it had over the average of the previous three years.<sup>91</sup> Thus, under this requirement, an institution may enroll as many students as it wishes provided that the number of students receiving federal student loans does not exceed the three-year average.<sup>92</sup> Together, these requirements are designed to prevent higher-risk programs from growing any larger and to help align the size of graduating classes with the needs of employers.

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83. Rulemaking, *supra* note 56, at 43638.

84. *Id.* at 43639.

85. *Id.*

86. *Id.* This type of warning has been used previously in other industries such as the securities industry when the government has attempted to correct informational asymmetries. *See, e.g.*, Conditions to Permissible Post-Filing Free Writing Prospectuses, 17 C.F.R. § 230.433(c)(2) (2011) (describing the requirements for a written legend warning of risks of investment that must accompany marketing materials sent by the securities issuer).

87. Rulemaking, *supra* note 56, at 43639.

88. *Id.*

89. *Id.*

90. *Id.* at 43, 63940.

91. *Id.* at 43, 639.

92. Students who are not eligible for federal student loans under this requirement have the alternative option of private student loans.

The “death penalty” restriction is reserved for the worst offending institutions. If an institution is not able to satisfy any of the debt criteria, its students are no longer eligible for any federal student loans.<sup>93</sup> Students currently in attendance at those institutions remain eligible in the year that the restriction comes into effect and for one additional year after that.<sup>94</sup> This one- to two-year window, however, is probably sufficient to steer away at least some current students who use or anticipate using at least some federal student assistance to finance their education. The Department estimates that up to five percent of programs would currently fail both the repayment rate and debt-to-income ratio tests, covering about eight percent of the students currently enrolled in for-profit colleges or universities, some 300,000 students.<sup>95</sup> Significantly, however, in its final promulgation of the rule, the Department reserved the “death penalty” punishment for only those institutions that failed both tests for three out of four consecutive years.<sup>96</sup> In addition, this penalty can apply to no more than five percent of the for-profit industry (weighted by total enrollment) in a single fiscal year.<sup>97</sup> This change significantly reduced the impact a single year’s metrics could have on an institution’s standing with the Department.

The final provision of the rule restricts the ability of for-profit colleges and universities to create new programs at will. The first requirement of any new program is that the institution provides to the Department of Education the projected enrollment of the program during its first five years.<sup>98</sup> Second, the institution must provide the same type of employer verification needed for restricted-status programs to continue to operate.<sup>99</sup> The Secretary then makes a determination based on available labor statistics to determine if the program is eligible for federal student loans, and, if so, if the program should be placed in either restricted- or debt-warning status.<sup>100</sup>

The Department has identified several reasons to institute this rule. While for-profit institutions insist their success is a necessary component of President Obama’s plan to have the United States lead the world in college and university graduates by 2020,<sup>101</sup> there are systematic problems with generating too many graduates whose degrees do not lead to “measurable

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93. Rulemaking, *supra* note 56, at 43639.

94. *Id.*

95. *Id.* at 43671.

96. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34386, 34389 (June 13, 2011) (to be codified at 34 C.F.R. pt. 668).

97. *Id.*

98. Rulemaking, *supra* note 58, at 43639.

99. *Id.* at 43639-40.

100. *Id.*

101. See Jennifer Gonzalez, *For-Profit Colleges, Growing Fast, Say They Are Key to Obama’s Degree Goals*, CHRON. HIGHER EDUC., Nov. 8, 2009, available at <http://chronicle.com/article/For-Profit-Colleges-Say-The/49068/>.

outcomes.”<sup>102</sup> As the ratio of for-profit graduates increases relative to graduates of other types of institutions, the overall value of the degree in question will drop unless the for-profit degree holder is capable of performing to the same level as those who hold degrees in the same field from not-for-profit institutions.<sup>103</sup> To prevent the value of college or university degrees from being diluted, the Department determined it was necessary to intervene in order to ensure that graduates had employment opportunities upon leaving school.<sup>104</sup> Rather than regulating the types of programs offered and the manner in which they are offered, the Department chose to regulate based on the financial outcomes of each program’s graduates.<sup>105</sup>

A second consideration was concern for the student. Students from for-profit institutions often find themselves deep in debt post-graduation with academic credentials that do not translate into real-world benefits.<sup>106</sup> The Department has expressed its interest that student recipients of federal student loans are not only eventually able to repay their loans, but also that the loans are not “unduly burden[some].”<sup>107</sup> Even students who are able to repay their loans in ten years or longer may be unduly burdened during that process. Sandy Baum and Saul Schwartz, whose information was relied on by the Department in making this rule, recommend that a student’s annual loan payments not exceed eight percent of annual income.<sup>108</sup> IBR would cap a student’s payments at slightly less than fifteen percent of his or her income. Lenders of other financial products such as mortgages and car loans have also used the “eight percent rule” in determining whether a borrower in student loan repayment qualifies for the best interest rates.<sup>109</sup> Burdensome loans also have a significant impact on retirement savings. Many students face the difficult choice between beginning to save for

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102. Rulemaking, *supra* note 56, at 43617.

103. *Id.*

104. *Id.* This does not necessarily mean that for-profit colleges and universities are *per se* precluded from offering liberal arts degrees. *See, e.g.*, List of Bachelor’s Degree Programs, AM. PUB. UNIV. <http://www.apu.apus.edu/academic/programs/bachelors> (last visited Nov. 17, 2011).

105. Rulemaking, *supra* note 56, at 43617.

106. *Id.* at 43622.

107. *Id.* at 43621-22.

108. SANDY BAUM & SAUL SCHWARTZ, COLL. BD., HOW MUCH DEBT IS TOO MUCH?: DEFINING BENCHMARKS FOR MANAGEABLE STUDENT DEBT 2 (2006), *available at* <http://professionals.collegeboard.com/data-reports-research/cb/debt>. The study also suggests that the “eight percent rule” is not as significant for those with high incomes.

109. PATRICIA M. SCHERSCHEL, USA GRP. FOUND., STUDENT INDEBTEDNESS: ARE BORROWERS PUSHING THE LIMITS? 6 (1998), *available at* <http://www.luminafoundation.org/publications/studentindebtedness.pdf>.



retirement and servicing their educational loans.<sup>110</sup> Thus students' educational debts negatively affect their ability to borrow in the short term as well as their ability to accumulate wealth and save appropriately for retirement in the long term. This concern caused the Department to incorporate the debt-to-income ratio as part of their integrity test.<sup>111</sup>

Another concern of the Department is the taxpayer subsidies for those students in repayment who follow an alternative repayment path different from the typical ten-year standard repayment plan.<sup>112</sup> These alternatives can be costly endeavors for the government. As discussed above, IBR can significantly reduce the value (to the lender) of a loan. If a student is not able to achieve a high enough income over his or her repayment period, it is possible that the government will not receive enough payments to begin to cover the principal, let alone have payments that keep up with the accrued interest.<sup>113</sup> IBR and other income-sensitive repayment plans are designed to be a social safety net, not to be factored into students' own repayment calculus as they assess their educational options.<sup>114</sup> In addition to subsidized repayment plans, high-debt individuals are also common users of loan-deferment or forbearance. For some loans in deferment—normally while the student is attending school at least part-time and for six months after—the federal government will pay the interest due on the loan.<sup>115</sup> While subsidizing certain loans is part of Congress's plan to make higher education more accessible and affordable, subsidizing loans that do not result in gainful employment or in a substantial chance at repayment is throwing good money after bad. The Department estimates that three years

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110. See *Retirement Savings Versus Student Loans*, MOOLANOMY (Aug. 19, 2008), <http://www.moolanomy.com/782/retirement-savings-versus-student-loans/> (last visited Jan. 17, 2011). Without careful analysis, students sometimes pay off their loans *too* quickly and fail to take advantage of more advantageous ways of directing their money. For example, students may not maximize an employer-matching 401(k) plan, which may be a better yield than the interest charged to them on their educational loans.

111. Rulemaking, *supra* note 56, at 43621-22.

112. *Id.*

113. See *supra* Table 2. It is also significant, although not addressed in this paper, that students can act strategically in order to maximize the subsidies to them. For example, students may realize before they graduate that there is no potential of paying back their educational loans and maximize their borrowing with the expectation that every additional dollar borrowed will likely never have to be repaid.

114. See *supra* note 58 and accompanying text.

115. 20 U.S.C.A. § 1078 (West 2011). The Federal Subsidized Stafford loan can also be subsidized if the student chooses to enroll in IBR. If the student's proportional payment due on the subsidized loan is not enough to cover the interest payment, the government will continue to pay the unpaid amount for up to three years after deferment ends. 20 U.S.C.A. 1098e(b)(3) (West 2011).

of deferment may cost the government “up to twenty percent of the value of the loan.”<sup>116</sup> In addition, “forbearance” is available to students in repayment in some circumstances.<sup>117</sup> For example, the Department can reduce or temporarily eliminate the payments of an individual student if he or she is facing certain hardships, such as serious medical problems, inability to find full-time employment, and other types of economic and financial difficulty.<sup>118</sup> Forbearance, under the right conditions, is also available for the same type of deferment subsidies described above.<sup>119</sup> In light of the fact that many students’ deferment periods last well beyond four years and that forbearance is available to many students who are not able to find gainful employment, the government is right to reconsider subsidizing educations that are unlikely to lead to a debt-servicing level of income. While this phenomenon is experienced by some graduates of all types of higher education institutions, the degree and frequency that it occurs among graduates of for-profit institutions make them the “low-hanging fruit” for regulators.

An additional concern is the possibility of a student defaulting on his or her educational loans. In the years 2007-08, four out of every 100 students who attended a public or private not-for-profit college or university defaulted on their educational loans.<sup>120</sup> During the same time period, eighteen out of every 100 students who attended a for-profit college or university defaulted on their student debt.<sup>121</sup> Graduates of for-profit institutions offering a four-year program are particularly vulnerable, as twenty-five percent of all new graduates from those programs default on their loans.<sup>122</sup> Because defaults impose a cost on taxpayers, the Department has a strong interest in protecting its investment in students’ education. In 2009, \$9.2 billion worth of student loans went into default, an amount that the Department estimates to have a \$1 billion net present value.<sup>123</sup> Estimates created prior to the Department’s rulemaking stated that more than \$274 billion in loans will go into default in 2020 alone.<sup>124</sup>

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116. Rulemaking, *supra* note 56, at 43622.

117. 34 C.F.R. § 685.204-05 (2009). In most circumstances, the Secretary of Education has at least some discretion in granting forbearance. Some of the reasons contemplated by the regulation include medical problems, military service, bankruptcy, a degree or certificate track internship, or any economic hardship that results in the student paying more than twenty percent of his discretionary income. For some circumstances, a three-year limit applies to the forbearance, but others may go on indefinitely subject only to an annual review by the Secretary.

118. *Id.*

119. *Id.*

120. Rulemaking, *supra* note 56, at 43652.

121. *Id.*

122. *Id.* at 43653.

123. *Id.* at 43622.

124. EISMAN, *supra* note 66, at 40.

While financial incentives alone might be enough to serve as a catalyst for change, the Department also has a broader social concern associated with students defaulting on their loans. The Department has determined that defaults have a large negative impact on many former students in that they find it more difficult to obtain credit for houses, cars, or even further education.<sup>125</sup> In addition, a stigma is often attached to students experiencing financial ruin as a result of their educational choices. Their peers, observing the negative consequences of taking out student loans, may be dissuaded from pursuing their own education.<sup>126</sup> This has the unwanted effect of reducing the overall education level of the nation.<sup>127</sup>

A final concern is to correct the information asymmetry that exists in higher education. Students who attend for-profit colleges and universities are more likely to belong to low-income and racial or ethnic minority groups than are students at public or not-for-profit institutions.<sup>128</sup> While low-income and minority groups are more likely to suffer the financial pains of educational debt, “only about half of the difference in defaults [can] be explained by student characteristics.”<sup>129</sup> The Department and others believe that the other half is, at least in part, attributable to the characteristics of the institution.<sup>130</sup> There is a significant worry that students (and often their parents) lack the ability to properly analyze their options with respect to educational financing.<sup>131</sup> The fear is that “for-profit colleges use aggressive advertising to attract students from low-income families that lack financial sophistication and the ability to evaluate the benefits of attending a for-profit college.”<sup>132</sup> The rule purports to address this concern in two ways. First, by requiring all but the “best” for-profit institutions to provide a debt warning to their students, the Department is taking a step toward eroding the information asymmetry and making sure to provide at least a basic warning before students arrange their financing.<sup>133</sup> Second, by restricting or eliminating entirely federal funding for the most at-risk programs, the rule may well steer would-be students

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125. Rulemaking, *supra* note 56, at 43622.

126. *Id.*

127. *Id.*

128. JONATHAN GURRYAN & MATTHEW THOMPSON, CHARLES RIVER ASSOCIATES, REPORT ON GAINFUL EMPLOYMENT: EXECUTIVE SUMMARY 2 (2010), available at <http://www.docstoc.com/docs/43569247/Report-on-Gainful-Employment-Executive-Summary>.

129. Rulemaking, *supra* note 58, at 43654.

130. *Id.* at 43654-55.

131. See Richard Posner, *The Controversy over For-Profit Colleges*, BECKER-POSNER BLOG, June 20, 2002, <http://www.becker-posner-blog.com/2010/06/the-controversy-over-forprofit-collegesposner.html>.

132. *Id.*

133. See *supra* notes 86-89 and accompanying text.

toward other institutions or, in the alternative, at least away from the most at-risk educational debt.<sup>134</sup>

This rulemaking was a response to the current and foreseeable state of for-profit education and to the crisis of student debt facing the country. The final rule represents the product of the Department of Education’s own views and the views contained in the more than 90,000 comments submitted during the request for comment period.<sup>135</sup> There have been many criticisms of the rule itself and of goals the rule purports to accomplish. The remainder of this paper will focus on critiquing this new regulation both in its purpose and in its structure.

## II. CRITICISM OF THE “GAINFUL EMPLOYMENT” REGULATION

### A. Public Comments

It is no surprise that reaction to this rulemaking has been large and bipolar. The regulation, if it is sustained in the courts, will likely redistribute billions of dollars in the education industry and, in many cases, out of the for-profit sector entirely.<sup>136</sup> This regulation, combined with the anti-fraud regulations adopted before it, poses a serious threat to the very existence of many institutions, and certainly to the profit margins of all of them. Naturally, groups representing the for-profit higher-education industry were outspoken about their aversion to the rule. The 90,000 comments submitted to the Department of Education are strong evidence of the perceived importance of this rulemaking. However, skipping over the superfluous comments, there are several critiques that are intellectually honest and go after the substance of the rule itself. The Department has responded to those comments regarding the acceptance of new programs that, in its opinion, warrant a substantial response.<sup>137</sup>

One of the significant criticisms by the groups supporting for-profit colleges and universities is the use of eight percent of income as the high water mark above which debt payments are considered excessive. The Department relied heavily on an individual study sponsored by The College Board.<sup>138</sup> The Baum and Schwartz study, it is contended, was not a scientific study and the eight percent threshold was used because it had been a number used by mortgage underwriters years ago and long since abandoned.<sup>139</sup> Advocates of for-profit higher education point to specific

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134. *Id.*

135. *See* Program Integrity, *supra* note 71, at 66665.

136. Rulemaking, *supra* note 58, at 43676-88.

137. *See* Program Integrity, *supra* note 71, at 66665. For a complete list of public comments on this regulation, see [www.regulations.gov](http://www.regulations.gov).

138. *See supra* notes 108-111 and accompanying text.

139. *See* CAREER COLL. ASS’N, COMMENTS OF THE CAREER COLLEGE ASSOCIATION 35-36 (2010).

references within the study itself where the authors admit that the eight percent criterion is not supported by evidence; they point to other parts of the study where the authors use twenty percent as a benchmark as well.<sup>140</sup> Because of this, the commenters supporting for-profit institutions suggest that to rely upon the study as a basis for judging the entire industry is not only arbitrary, but also has potential to have a profound negative effect on hundreds of thousands of students.<sup>141</sup>

Another common criticism of the regulation is that the metrics focus on the short-term success of the students to the exclusion of other criteria that are more indicative of the students' long-term success. Critics claim that the Department's focus on only the early years after students complete their education is flawed. In their view, the benefits of a college or university degree accrue throughout a whole lifetime; thus, the Department should use a metric that is more appropriately designed to measure educational outcomes over the entirety of a student's career.<sup>142</sup> A study by Guryan and Thompson that was commonly cited by many for-profit commenters stated cogently:

[T]he basis of the debt limit on earnings early in the career stands in contrast with standard economic analysis of education, which clearly says that the choice of how much to borrow for schooling should be based on the benefits of schooling, and not on the earnings level at the beginning of a career. Any proposal aimed at helping students make smart decisions about investments in education should compare the costs of schooling to the gains that accrue over the full career as a result of that schooling. It should not compare costs to the level of earnings of recent graduates.<sup>143</sup>

Critics have also stated that the Department is not correct to claim that students of for-profit colleges and universities are significantly more likely to default simply because they attended a for-profit institution. By the Department's own admission, over half of the difference in default rates can be accounted for by student characteristics such as socioeconomic class, ethnicity, and race.<sup>144</sup> The critics claim that had the Department controlled for other student characteristics, the default gap would be substantially diminished.<sup>145</sup> The Department counters by stating that it controlled for the most significant student characteristics including "race, gender, persistence and completion, Pell Grant receipt, family Aid to

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140. *Id.*

141. *Id.*

142. See GURYAN & THOMPSON, *supra* note 130, at 3.

143. *Id.*

144. Rulemaking, *supra* note 58, at 43654.

145. See GURYAN & THOMPSON, *supra* note 130, at 3.

Families with Dependent Children receipt, income, and dependency status.”<sup>146</sup>

Some commenters also called for better treatment of students who attend institutions that are deemed ineligible. Under the rule, these students would continue to be eligible for federal loans for the remainder of the year the program becomes ineligible and then for one year after that.<sup>147</sup> For students who recently began a four-year program, it is likely that they would not be eligible to complete the program with federal educational assistance. This may require those students to transfer or completely abandon their educational path altogether. Commenters have suggested that the Department consider remedies for this category of students, such as discharge of the loans the student has already taken out.<sup>148</sup>

One of the more contentious points has revolved around the employer affirmations requirement necessary for programs facing restricted status and for any new program to be added.<sup>149</sup> For-profit groups have suggested that this requirement is far too burdensome; they suggest that employers will be unwilling to supply these affirmations out of fear they will be obligated to hire that number of graduates.<sup>150</sup> Others claim that the costs associated with collection of this information are too high.<sup>151</sup> Critics have also pointed to certain ambiguities in the affirmations, such as how far of a distance institutions will be permitted to go to obtain these affirmations.<sup>152</sup>

#### B. Legislative Reaction

The regulation has not gone unnoticed by Congress. Senator Harkin of Iowa, Chairman of the Senate Committee on Health, Education, Labor, and Pensions, has held several hearings on the state of the for-profit education industry and has indicated that he may introduce legislation that goes beyond what the Department has proposed in terms of restricting these

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146. Rulemaking, *supra* note 58, at 43654 n.16. For a thorough discussion of student characteristics and how they relate to debt, see SANDY BAUM & DIANE SAUNDERS, NAT'L STUDENT LOAN SURVEY, LIFE AFTER DEBT: RESULTS OF THE NATIONAL STUDENT LOAN SURVEY 31-37 (2008), available at <http://www.nelliemae.com/pdf/NASLS.pdf>.

147. See *supra* notes 95-99 and accompanying text.

148. See MOLLY CORBETT BROAD, AM. COUNCIL ON EDUC., COMMENTS ON PROGRAM INTEGRITY RULES 6 (2010), available at [http://www.nacua.org/documents/ACE\\_Letter\\_GainfulEmployment.pdf](http://www.nacua.org/documents/ACE_Letter_GainfulEmployment.pdf).

149. See *supra* notes 91-92, 100-102 and accompanying text.

150. Program Integrity, *supra* note 71, at 66666-67.

151. *Id.*

152. *Id.* This raises the sub-issue of whether for-profit institutions should consider the mobility of their students after graduation. This also presents a particular problem for institutions that offer online courses and have a national student population.

institutions.<sup>153</sup> The for-profit institutions, however, do have some allies. During the 2010 election cycle, for-profit colleges and universities made political contributions to more than 200 lawmakers' campaigns.<sup>154</sup> John Cline, chairman of the House Education and Workforce Committee, threatened to stop the rule from taking effect altogether.<sup>155</sup> While no legislation has left the committee stage as this note goes to press, lobbying Congress may be the industry's best hope of preventing implementation of the new regulation.

### C. Judicial Intervention

The Association of Private Sector Colleges and Universities (APSCU) filed suit in the United States District Court for the District of Columbia challenging the authority of the Department of Education to promulgate such regulations.<sup>156</sup> The plaintiffs have previously claimed that the Department lacks the legal authority to impose these types of regulations on the for-profit education industry.<sup>157</sup> The plaintiffs argue, *inter alia*, that the rule goes further than the statutory requirement of *preparing* students for gainful employment, but rather requires that the students actually achieve such employment. The Department maintains that "it is charged with the responsibility to ensure that institutions participating in these [federal loan] programs have the financial strength and administrative capability to do so."<sup>158</sup> Outside of the possibility of a procedural misstep by the Department, it appears that the authority of the Department to design and adopt the rule under the Higher Education Act will be the key issue in the courts.

## III. CONCLUSION

For better or for worse, higher education is changing. The recent adoption of programs such as Direct Lending and IBR have simultaneously made higher education more accessible and increased the possibility that student loans may never be repaid. The new regulation by the Department of Education may be just the first step in an attempt by the federal government to rein in loans likely to default. Having an educated population is an important societal interest, and easily accessible education is widely regarded as a public good. When taxpayer dollars are subsidizing

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153. See Diane Bartz, *Analysis: For-Profit Schools Attack Reform Rule by Lobbying*, REUTERS, Jan. 12, 2011, <http://www.reuters.com/article/idUSTRE70B6T020110112?pageNumber=1>.

154. *Id.*

155. *Id.*

156. *Career Coll. Ass'n v. Duncan*, 2011 WL 2690406 (D.D.C. July 12, 2011).

157. See CAREER COLL. ASS'N, *supra* note 141, at 12-16.

158. Program Integrity, *supra* note 71, at 66668.

our nation’s students, however, there is an equally compelling interest in seeing to it that those dollars are being spent productively.

If the new regulation is sustained by the judiciary, it will mark the first attempt to improve both the quality and affordability of the for-profit higher education industry. The goal is that through these regulations or some other legal or market mechanism, students who attend these schools will begin to make educational decisions that lead to better post-graduation outcomes.





# “A SPECIAL CONCERN”: THE STORY OF *KEYISHIAN V. BOARD OF REGENTS*

ELLIOT FRIEDMAN\*

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## INTRODUCTION

In the early morning of January 24, 1967, Harry Keyishian was awoken by a phone call to his home.<sup>1</sup> A friend who worked at the *New York Times* was ringing to tell him that the Supreme Court had sided with him and four colleagues against their employer, the State University of New York (SUNY) at Buffalo.<sup>2</sup> One of these colleagues, George Hochfield, saw the decision reported in that day’s paper and danced down the hall of his office building in jubilation.<sup>3</sup> The five SUNY professors had won constitutional backing for their refusal, three years earlier, to sign an anti-subversive loyalty oath required by New York state law.<sup>4</sup> The Court’s ruling ended years of stressful legal wrangling for the professors and, for Keyishian, an episode that had cost him his job teaching English at the upstate school.<sup>5</sup>

The Court’s decision in *Keyishian v. Board of Regents* did more than vindicate its plaintiffs.<sup>6</sup> It also fundamentally altered First Amendment law.<sup>7</sup> For much of the Cold War, educators on the public payroll had been

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\* Graduate student, Yeshiva University. I would like to thank Professor Ellen Schrecker for the years of dedicated mentorship that made this piece possible and for her help in revising the manuscript. I am also indebted to Yeshiva University’s Kressel Research Scholarship, which supported the research presented here.

1. *In Search Of The Constitution: For the People* (PBS video 1989).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. 385 U.S. 589 (1967).
7. *Id.*

subject to loyalty oaths and background checks.<sup>8</sup> These programs focused particularly on excluding members of “subversive” organizations such as the Communist Party.<sup>9</sup> In a 1952 decision, *Adler v. Board of Education*, the Supreme Court laid down two doctrines that provided such efforts with constitutional legitimacy.<sup>10</sup> First, it stated generally that government could condition employment (or other “privileges”) on cessions of First Amendment freedoms it could not require of a private citizen, an idea known as the “right-privilege” distinction.<sup>11</sup> Second, it identified the academy—charged with educating captive and vulnerable young minds—as a place especially deserving of ideological scrutiny.<sup>12</sup>

*Keyishian* negated both of these doctrines.<sup>13</sup> Justice Brennan’s majority opinion forbade the government from requiring public employees to give up First Amendment freedoms that they would otherwise enjoy as private citizens.<sup>14</sup> And it spoke of academic freedom as a “special concern” of the First Amendment.<sup>15</sup> With this phrase, he overrode *Adler*’s concern with the vulnerability of students’ minds and required that educators receive the same First Amendment protections offered to all government employees.<sup>16</sup>

The establishment of these two doctrines capped a decade and a half of legal challenges to the *Adler* precedent—efforts in which educators such as the SUNY Buffalo professors had been especially active.<sup>17</sup> It also pulled

8. By 1956, twenty-four states and two U.S. territories mandated loyalty oaths of all public employees. RALPH S. BROWN, JR., *LOYALTY AND SECURITY* 93 (1958). These oaths are distinct, as Brown points out, from “constitutional oaths” that simply pledge allegiance to the United States and its Constitution. *Id.* For teachers, the numbers rose even higher. Thirty-two states, as well as the District of Columbia, imposed some kind of loyalty requirement. William B. Prendergast, *State Legislatures and Communism: The Current Scene*, 44 *AM. POL. SCI. REV.* 556 (1950); Alan M. Sager, *The Impact of Supreme Court Loyalty Oath Decisions*, 22 *AM. U. L. REV.* 39 (1972–73).

9. For an examination of the application and abuses of one such program employed by the Federal government, see Thomas Emerson & David Helfeld, *Loyalty Among Government Employees*, 58 *YALE L.J.* 6 (1948).

10. 342 U.S. 485, 492–93 (1952).

11. *Id.* at 492. It was first enunciated by Oliver Wendell Holmes when he served as a justice on the Massachusetts Supreme Court. See *McAuliffe v. City of New Bedford*, 29 N.E. 517 (1892).

12. *Adler*, 342 U.S. at 493.

13. *Keyishian*, 385 U.S. at 589.

14. *Id.* at 605.

15. *Id.* at 603.

16. *Id.*

17. Among the Supreme Court cases involving the “right-privilege” doctrine in which educators participated are: *Wieman v. Updegraff*, 344 U.S. 183 (1952), *Slochower v. Bd. of Educ.*, 350 U.S. 551 (1956), *Shelton v. Tucker*, 346 U.S. 479 (1960), *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961), and *Baggett v. Bullitt*, 377 U.S. 360 (1964). Cases not involving educators include *Schwartz v.*

the legal carpet out from under the loyal-security programs that public employers at all levels had used to screen out subversives.<sup>18</sup> For the millions of people subject to such programs, receiving a paycheck from the government no longer meant giving up First Amendment freedoms.<sup>19</sup>

From the perch of the *Keyishian* case, we will examine the way that the Cold War shaped the attitudes of the courts, the academy, the government, and the public toward the freedoms enshrined in the First Amendment. We will see one example of American institutions grappling with a tension fundamental to all democratic societies: the attempt to uphold foundational liberties while simultaneously preventing people from using those liberties to destroy the country from within.

### I. *KEYISHIAN*—PART I

The Buffalo branch of the State University of New York seemed the perfect backdrop for a challenge to *Adler*. First, New York was the state whose laws produced *Adler v. Board of Education*. A suit from that state was more likely than any to test the question of whether *Adler*'s basic principles still stood. Second, Buffalo's campus joined SUNY only in 1963, with all its employees suddenly finding themselves public servants subject to loyalty-security requirements. Their involuntary transition into government work exemplified the expansion of the public sector that made the right-privilege doctrine much less benign than when first enunciated by Oliver Wendell Holmes (then sitting on the Massachusetts Supreme Court) in the late nineteenth century.<sup>20</sup> Third, Buffalo's union with SUNY

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Bd. of Exam'rs, 353 U.S. 252 (1957), *Speiser v. Randall*, 357 U.S. 513 (1958), and *Aptheker v. Sec'y of State*, 378 U.S. 500 (1964). For examples of cases in state courts, see *Bd. of Educ. v. Massachusetts*, 304 P.2d 1015 (1956) and *Beilan v. Bd. of Educ.*, 126 A.2d 327 (1956).

18. For the fundamental shift in legal doctrine caused by *Keyishian*, see the language used in *Ehrenreich v. Londerholm*, 273 F. Supp. 178, 180 (D. Kan. 1967) (“The ‘constitutional doctrine which has emerged’ since the *Adler* decision is that ‘legislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization or which is not active membership violates constitutional limitations.’”). For a list of subsequent loyalty oath cases in which *Keyishian* was cited, see Sager, *supra* note 8, at 22.

19. In 1956, the number was 8.5 million. See BROWN, *supra* note 7, at 178. Many states also imposed loyalty tests on private employees, especially for professional licensure. *Id.* at 181. If these numbers are taken into account, 13.5 million people were covered by loyalty tests, or approximately one out of five people in a workforce of 65 million. *Id.*

20. On the difference with regard to “right-privilege” between Holmes’s time and the 1960s, see William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968). For the extent of the expansion of public employment during this era, see Susan B. Carter, et al., *Government Employment and Compensation*, HISTORICAL STATISTICS OF THE

occurred at a time when the law was in a state of flux, making a tempting target for those brave enough to challenge the status quo.<sup>21</sup> The temptation would have been particularly strong at SUNY Buffalo, one of the few universities to retain a professor who had invoked the Fifth Amendment during the height of the McCarthy scare.<sup>22</sup> Still, these circumstances could do no more than provide a stage. Whether anyone would step onto it had yet to be determined.

The conflict that came to SUNY Buffalo arrived after nearly a decade of preliminary developments. The first of these, in 1953, was the extension of New York's anti-subversive law to public colleges and universities, requiring administrators at these schools to find ways to eliminate subversives from their institutions.<sup>23</sup> Three years later, in 1956, SUNY's Board of Trustees tried to enforce this law with a demand that all new hires sign a Certificate.<sup>24</sup> The document, known as the Feinberg Certificate (Certificate), pledged that the signers were not and never had been "member[s] of the Communist Party or any other organization that advocates the violent overthrow of the Government of the United States."<sup>25</sup> The applicants also provided addresses of former employers who could attest "to the qualities of the candidate[s'] citizenship."<sup>26</sup> As these requirements took hold, New York's Board of Regents took care to emphasize that they were only enforcing state law, not engaging in "witch-hunting."<sup>27</sup> Little did they know, however, that only a few years after authorizing these rules, many professors would not see them as so benign.

For five years, the Board of Trustees employed the Certificates without challenge. Then, in 1962, SUNY arranged to absorb the then-private

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UNITED STATES: MILLENNIAL EDITION ONLINE, <http://hsus.cambridge.org/> (last visited August 19, 2010). In 1929, approximately 3% of the United States' population received a government paycheck as salary or work relief (calculated based on 3,611,000 receiving such compensation out of 122,775, 046 counted in the 1930 census). *Id.* By 1967, the year of the *Keyishian* case, this percentage had jumped to 8% (16,169,000 receiving such compensation out of a total population of 203,211,926 counted in the 1970 census). *Id.*

21. *See supra* note 17. Many of the prior challenges to *Adler* had chipped away at the "right-privilege" doctrine and provided some room for a challenge to loyalty-security programs.

22. The episode, involving philosopher William Parry, occurred before Buffalo was absorbed by SUNY. *See* ELLEN SCHRECKER, *NO IVORY TOWER* 205–06 (1986).

23. Jerry Parsons, *The Feinberg Law* 45–46 (1970) (unpublished Ph.D. dissertation, on file with the SUNY Buffalo Library).

24. *Id.*

25. *Id.* at 50.

26. Procedure on New Academic Appointments (April 24, 1957) (on file with the SUNY Buffalo Library).

27. *Id.*

University of Buffalo into its system.<sup>28</sup> The local chapter of the American Association of University Professors (AAUP) immediately recognized that the merger made the University vulnerable to the state’s Feinberg Law. Their discomfort led them to issue a statement reaffirming the faculty’s commitment to academic freedom.<sup>29</sup>

Full-blown conflict, however, arrived only a year later. Over the summer of 1963, SUNY’s central administration decided to require all SUNY Buffalo professors—even those who had taught there before the merger—to sign the Certificate.<sup>30</sup> By late November, word of the new Certificate had spread among the faculty.<sup>31</sup> It arrived in their mailboxes about two weeks later.<sup>32</sup> In response, a committee set up by the local AAUP lambasted the Certificate as a violation of “[p]rinciples of academic freedom.”<sup>33</sup> Significantly, however, the committee conceded the Certificate’s constitutional legitimacy.<sup>34</sup> This moderation led the AAUP to confirm—multiple times—that it could not recommend that its members refuse to sign the Certificate.<sup>35</sup> The most substantive measure the AAUP offered to take on behalf of those who did not want to sign was to “consider the advisability of supporting individual cases as they may arise.”<sup>36</sup> One AAUP member recognized the vacuity of this statement when he scribbled on his copy of these words, in pink ink and with a large question mark: “how?”<sup>37</sup>

In this atmosphere, no professor could easily decide not to sign the Certificate, let alone consider challenging the state’s entire loyalty-security law. Not only had the AAUP refused to endorse a legal position against the document; almost all of the university’s 900 professors had signed the

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28. AAUP Resolution (May 5, 1962) (on file with the SUNY Buffalo Library).

29. *Id.* Apparently, Buffalo’s president, Clifford Furnas, had requested that the Feinberg Law not be enforced on his campus but, despite having initially acceded to the request, SUNY President Samuel Gould ultimately reneged and enforced the law anyway. KENNETH HEINEMAN, *CAMPUS WARS* 32 (1984).

30. Parsons, *supra* note 23, at 56–58.

31. *Id.*

32. *Id.*

33. *Id.* at 79.

34. Report to the AAUP Academic Freedom and Tenure Committee (undated) (on file with the SUNY Buffalo Library).

35. Letter from Constantine Yeracaris to AAUP Members (Jan. 3, 1964) (on file with State Univ. Buffalo); Yeracaris, Press Release (Jan. 20, 1964) (on file with the SUNY Buffalo Library).

36. AAUP Legal Report (Jan. 10, 1964) (on file with the SUNY Buffalo Library).

37. *Id.* Presumably, the mark was made by Bob Rodgers, whose Keyishian-related papers appear in this folder of the Lipsitz collection.

disclaimer by January's end.<sup>38</sup> All but five others would follow suit by June.<sup>39</sup>

But the story, of course, did not end with the 99.5% of the faculty who signed. Five people did hold out, each for individual reasons. Newton Garver, a young philosophy professor still completing his Ph.D., insisted that his Quaker religion forbade him to sign it.<sup>40</sup> Ralph Maud, an English professor well on his way to tenure, objected to the Certificate as "a demoralizing invasion of a person's privacy."<sup>41</sup> George Hochfield, an Associate Professor of English and the highest ranking member of the group, objected to the Certificate as a violation of civil liberties similar to what he had witnessed while teaching at Ohio State University.<sup>42</sup> There, he had joined students and faculty in protesting the university president's decision to bar certain controversial speakers from campus.<sup>43</sup>

The final two hold-outs objected not only to the Certificate, but to the entire anti-subversive law behind it. Harry Keyishian made his objections clear, stating "I declined to sign a Feinberg Certificate in the hope that my action would make possible a legal challenge to the Feinberg law."<sup>44</sup> This stance required sincere ideological commitment since, as a junior professor on a one-year contract, the university could simply refuse to offer him a position the following year without formal dismissal procedures.<sup>45</sup> George Starbuck, an accomplished poet hired to work in the library,<sup>46</sup> similarly emphasized that he did not enter this conflict for personal gain: "Had I wanted mere relief in equity," he wrote, "I would have found another job . . ." <sup>47</sup> Instead, he hoped that "by fighting to preserve my rights and employment at SUNYAB [*sic*], I may do some good for others in similar situations."<sup>48</sup>

By June of that year, individual attempts to break the standoff with the university had failed. They decided to band together to challenge the Certificate as a group.<sup>49</sup> They all shared significant risk in pursuing this

38. Parsons, *supra* note 23, at 64.

39. *Id.*

40. *Id.* at 90. As a conscientious objector, Garver had previously served a prison term for refusing to sign up for the draft. HEINEMAN, *supra* note 29, at 62.

41. Parsons, *supra* note 23, at 126. Letter from Ralph Maud to J. Lawrence Murray (June 29, 1964) (on file with the SUNY Buffalo Library).

42. Parsons, *supra* note 23, at 168.

43. *Id.* at 168–69.

44. *Id.* at 74.

45. *Id.* at 71.

46. *Id.* at 143.

47. Letter from George Starbuck to Louis Joughin (Feb. 6, 1964) (on file with the SUNY Buffalo Library).

48. *Id.*

49. Parsons, *supra* note 23, at 166–67. See also *id.* at 81–88 (about Garver), 168–69 (about Maud), 173–76 (about Hochfield), 163–67 (about Starbuck).

case. Because he refused to sign, Starbuck never even had the opportunity to begin his job at SUNY and had to collect unemployment.<sup>50</sup> Keyishian, because his contract was not renewed, moved in with his parents in Queens, New York, and worked various jobs while he completed his dissertation.<sup>51</sup> The three others were not fired, pending the outcome of the case, since they enjoyed protections provided by their longer term contracts. But they, too, sacrificed. All three suffered from delayed promotions and withheld raises.<sup>52</sup> Even Richard Lipsitz, the group’s attorney, readied himself “to lose a good deal of money by taking the case.”<sup>53</sup>

These strong sentiments and genuine sacrifices did not arise in a vacuum.<sup>54</sup> Though America had long since passed the height of 1950s McCarthyism, Cold War fears were visiting Buffalo at exactly this time. In April 1964, four months after the introduction of the Certificate and three before the five non-signers went to court, the House Un-American Activities Committee (HUAC) arrived. Paul Sporn, an English instructor at the university who had signed the Certificate, defied a subpoena to testify before the committee.<sup>55</sup> Because an informant had identified Sporn as a communist, the university administration took his refusal to appear as an admission of guilt and found that Sporn had lied in signing the anti-subversive pledge. They recommended immediate termination of his employment.<sup>56</sup>

Sporn’s firing struck fear into the faculty. They had thought that, by executing the Certificate, they had secured their jobs. But, now, anyone whom an informant could tenuously connect to the Communist Party stood to lose his job specifically *for* signing.<sup>57</sup> In their alarm, the faculty

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50. Parsons, *supra* note 23, at 166.

51. Email from Harry Keyishian to author (Jan. 21, 2010) (on file with author) [hereinafter Keyishian Email].

52. Letter from Richard Lipsitz to Herman Orentlicher (Sept. 7, 1966) (on file with the SUNY Buffalo Library).

53. Letter from George Starbuck to Foreman (Jan. 26, 1964) (on file with the SUNY Buffalo Library).

54. During the course of the Vietnam War, SUNY Buffalo became a hotbed of faculty and student political activism. HEINEMAN, *supra* note 29, at 66. However, the Feinberg Certificate affair and the Sporn affair preceded this later ferment and even helped inspire it. *Id.* at 108. See *id.* at length for a description of the political activism at Buffalo during the Vietnam era.

55. Parsons, *supra* note 23, at 209–12.

56. Hearing in the Matter of Paul Sporn (Oct. 27, 1964) (on file with the SUNY Buffalo Library).

57. Frank Nugent, Pamphlet, *The Feinberg Certificate at Buffalo I* (1965); Parsons, *supra* note 23, at 226; Harry Keyishian, Notes on the Feinberg Controversy (mailed to author on Aug. 20, 2009) (on file with author) [hereinafter Keyishian Notes].



protested vigorously on Sporn's behalf. They sent a petition, along with a number of sharply worded letters of complaint, to the university administration.<sup>58</sup> Local papers even quoted one of the non-signers, George Hochfield, excoriating the administration's decision to fire Sporn.<sup>59</sup> The Sporn episode made the faculty realize the actual harm that the Certificate could do.

Beyond the potential for immediate harm, the Sporn affair also made the non-signers' principles a matter of fierce public debate. Local papers and civic groups had already taken notice—mostly disapproving—of the five faculty holdouts.<sup>60</sup> Buffalo's largely working-class, conservative population had little sympathy for abstract rights such as academic freedom. They certainly did not want such rights to override measures taken in the name of combating communism. The case became a classic example of the "town and gown" conflict, with liberal professors fighting for causes that the local public could not support.<sup>61</sup>

The HUAC hearings raised the pitch of the conflict. On one side, the Student Senate provided funds so that willing parties could buy signs and picket the committee. Joan Baez, who had come to town for a concert, "startled some members of her concert audience by encouraging opposition to the committee."<sup>62</sup> These moves only fanned the suspicions of the other side. Rumors spread of a "serious and increasing infiltration by communists of both the faculty and student body."<sup>63</sup> In a speech from the House floor, New York congressman John Pillion wondered: "Is there a pipeline for the Communist Party into the faculty? Why are teachers with uncontradicted pro-communist backgrounds retained on the faculty? . . . Is there a communist pipeline for admission to the university?"<sup>64</sup>

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58. Petition to Clifford Furnas (July 27, 1964) (on file with the SUNY Buffalo Library); Parsons, *supra* note 23, at 223–26.

59. *UB Group Forms a Committee on Academic Freedom* (Buffalo Evening News Dec. 22, 1964) (on file with the SUNY Buffalo Library).

60. Keyishian Notes, *supra* note 57, at 4–5.

61. On Buffalo's population, see HEINEMAN, *supra* note 29, at 111–12. On their attitude towards the *Keyishian* case, see Keyishian Notes, *supra* note 57, at 4–5, 14–15. For Keyishian's reflections, see *id.* at 14–16. He noted that he and his colleagues could have done a better job of public relations. *Id.* The latter source notes the opposition of the two major local papers—the *Courier Express* and the *Buffalo Evening News*—to the legal efforts of the *Keyishian* plaintiffs. For an example, see the editorial cited *infra* note 66.

62. Keyishian Notes, *supra* note 57, at 9.

63. *Dr. Furnas Deplores Red Inferences Made Since HCUA Hearing* (Buffalo Evening News, May 26, 1964) (on file with the SUNY Buffalo Library) [hereinafter *Dr. Furnas*].

64. 93 CONG. REC. 10117-8 (1964) (on file with the SUNY Buffalo Library).

In the wake of all this negative publicity, President Clifford Furnas felt compelled to publish a statement in the local newspaper vehemently denying the charges of infiltration leveled at the university.<sup>65</sup>

The controversy did not focus solely on the generalities of communist infiltration. It turned specifically on the relationship between communism and academic freedom. The local Buffalo Evening News published an editorial addressed to the university’s student protesters with the title, “Academic Freedom?”<sup>66</sup> Representative Pillion, in turn, quoted the piece in his address to the House.<sup>67</sup> The editorial argued that the true threat to academic freedom was not the attempt to root out communists, but the subversives themselves, whose totalitarian ideologies would lead to “spiritual and intellectual blackout.”<sup>68</sup> Pillion urged SUNY and the New York legislature to conduct internal investigations and adopt “remedial legislation” to prevent such “communist infiltration.”<sup>69</sup>

## II. KEYISHIAN—PART II

Circumstances conspired to drive the five non-signers to court. However, two obstacles remained to their pursuing legal action. The first was money. Paying a lawyer required thousands of dollars that the young professors did not have. They had turned to the American Civil Liberties Union for assistance, but were rebuffed.<sup>70</sup> During the initial months of the dispute, each of the non-signers had also contacted the national office of the AAUP with a similar request. The AAUP kept “a close on eye on the situation,” but hesitated to expend funds on a losing case—or worse, on reaffirming “bad laws.”<sup>71</sup>

The big break came with the Supreme Court’s decision in *Baggett v. Bullitt*, handed down on June 1, 1964.<sup>72</sup> In that case, the Court sided with professors at the University of Washington who had challenged the state’s loyalty oath and the underlying anti-subversive statutes.<sup>73</sup> Both SUNY’s counsel and the non-signers recognized that this decision did not render New York’s statute—assumed to be better-written than Washington’s—similarly moot.<sup>74</sup> However, the Supreme Court’s ruling did bring one

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65. *Dr. Furnas*, *supra* note 63.

66. May 2, 1964 (on file with the SUNY Buffalo Library).

67. 93 CONG. REC., 10117-8.

68. *Academic Freedom?* (Buffalo Evening News, May 2, 1964) (on file with the SUNY Buffalo Library).

69. *Id.*

70. Keyishian Email, *supra* note 51.

71. Keyishian Notes, *supra* note 57, at 3–4.

72. 377 U.S. 360 (1964).

73. *Id.* at 368.

74. Letter from Crary to Clifford Furnas (June 24, 1964) (on file with the SUNY Buffalo Library); Keyishian Notes, *supra* note 57, at 5–6.

concrete benefit—it convinced the AAUP to finance the Buffalo holdouts’ legal challenge.<sup>75</sup>

This development still left unresolved their other major question: what legal approach to take. Ultimately, Richard Lipsitz, the local labor attorney handling the case, would make that decision.<sup>76</sup> But the non-signers had themselves been grappling with this issue since they first considered taking to the courts. Two approaches emerged. One, supported by both the local and national chapters of the AAUP, sought to protect the professors’ narrow interests by demanding institutional hearings that would exempt them from signing the Certificate.<sup>77</sup> They did not want to swipe more broadly at the anti-subversive statute for fear of goading the state into more efficiently applying its current law or, worse, passing a new, more legally sound one in its place.<sup>78</sup>

However, already in January of 1963, George Starbuck had hinted at the possibility of a broader approach. He could not stand the thought of arguing for his own rights while “throw[ing] the poor elementary school teacher out of the lifeboat.”<sup>79</sup> He did not want to “knuckle under” to the notion that states could, in most instances, impose ideological tests on their employees.<sup>80</sup> Harry Keyishian had expressed a similar sentiment when he indicated his desire to challenge the entire Feinberg Law rather than argue only for a personal exemption.<sup>81</sup>

With arguments pulling both for and against a broad legal challenge, two developments eventually settled the question. First, the university refused to grant the non-signers any institutional hearings. Thus, they did not have to decide whether to settle for an internal solution or take a bolder stand in the courts.<sup>82</sup> Second, the Supreme Court’s decision in *Baggett* convinced attorneys advising the group that a broad claim on First Amendment grounds—arguing that the law was “unduly vague, uncertain, and broad”—was possible.<sup>83</sup> Significantly, however, Lipsitz and his clients

75. Keyishian Notes, *supra* note 57, at 7.

76. For a brief background on Lipsitz, see Fred O. Williams, *Labor of Love: Richard Lipsitz Sr. Has Been Labor’s Advocate for More than Fifty Years*, BUFFALO NEWS, May 7, 2003, at B6. Keyishian was, apparently, the most high profile case Lipsitz ever handled in a practice that focused primarily on local labor issues.

77. Letter from Charles Morgan to Hunt (Mar. 20, 1964) (on file with the SUNY Buffalo Library); Letter from Rollo Handy to Furnas (May 26, 1964) (on file with State Univ. N.Y. Buffalo).

78. Keyishian Notes, *supra* note 57, at 11.

79. Letter from George Starbuck to Foreman, *supra* note 53.

80. *Id.*

81. Parsons, *supra* note 23, at 74.

82. Transcript of Record at 10, Keyishian v. Bd. of Regents, 385 U.S. 589 (1967).

83. *Id.*; Keyishian Notes, *supra* note 57, at 11.

did not try to challenge either principle laid down in *Adler v. Board of Education*. Their brief never argued that the government could not condition employment on the cession of First Amendment rights.<sup>84</sup> And it did not contest the notion that the classroom deserved especially close ideological scrutiny because of the presence of vulnerable young minds.<sup>85</sup>

Having decided on the line of attack, Richard Lipsitz filed his brief in Federal District Court on July 8, 1964.<sup>86</sup> This step capped months of decisions and preparatory work, but it represented only the beginning of a long process. For the next two and a half years, the non-signers' case yo-yoed up and down the federal judicial food chain. Initially, the outlook for the plaintiffs was less than promising. John O. Henderson, the presiding judge, saw little merit to the plaintiffs' case and refused to bar SUNY from enforcing its anti-subversive policies.<sup>87</sup> He found that the plaintiffs raised “no substantial federal question” because the matter at hand had been “laid to rest by the Supreme Court’s decision in *Adler v. Board of Education*.”<sup>88</sup>

Though the professors' initial attempt to pull away from *Adler* had failed, they quickly decided to appeal, having known from the outset that their fight would not end at the level of the District Court.<sup>89</sup> A day after Henderson made his ruling, Harry Keyishian gave Lipsitz formal instructions to continue with the case.<sup>90</sup> The non-signers would now ask the U.S. Court of Appeals for the Second Circuit to order a three-judge panel to hear their case. This time, two allies joined the plaintiffs and filed briefs *amici curiae*: the AAUP and the ACLU.<sup>91</sup>

Making it through this stage of the process took more than half a year. The parties filed briefs five months after Judge Henderson's decision and argued the case in March 1965.<sup>92</sup> The plaintiffs labored again to convince the judges not to shut down their suit because of the *Adler* precedent.<sup>93</sup> On May 3, 1965, the five non-signers found out that their arguments had reached a sympathetic ear. Where Henderson had refused to look beyond the *Adler* precedent, Judge Thurgood Marshall, writing for his peers on the Appeals Court, acknowledged the numerous ways in which the case at

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84. Brief for Appellees, *Keyishian*, 385 U.S. 589 (No. 105).

85. *Id.*

86. Transcript of Record at i, *Keyishian*, 385 U.S. 589 (No. 105).

87. *Keyishian v. Bd. of Regents*, 233 F. Supp. 752, 753 (W.D.N.Y. 1964).

88. *Id.* at 753–54. Henderson cited some of the cases that limited the scope of *Adler*, including *Baggett*, but he contended that the Feinberg Law fell within the bounds set by those rulings.

89. *See, e.g.*, Keyishian Notes, *supra* note 57, at 11.

90. Letter from Harry Keyishian to Richard Lipsitz (Sept. 4, 1964) (on file with the SUNY Buffalo Library).

91. Parsons, *supra* note 23, at 234.

92. *Id.* at 235.

93. *Id.*

hand differed.<sup>94</sup> In particular, he noted the string of holdings that limited the government's rights to condition employment on whatever terms it saw fit.<sup>95</sup> And he took notice of the ways in which New York's law resembled the one struck down in *Baggett*.<sup>96</sup> The court decided to order a three-judge panel to hear the case.<sup>97</sup>

The disagreement between the Court of Appeals and Judge Henderson reflected a broader fundamental dispute in the legal community over the constitutional status of loyalty-security programs. Judge Henderson saw the *Adler* decision as the basic, binding instruction on the state's right to purge communists from its employment rolls. Subsequent cases that struck down loyalty programs only confirmed, with their narrow holdings, the basic soundness of the *Adler* doctrine.<sup>98</sup> On the other hand, the Court of Appeals saw that, ever since *Adler*, the Supreme Court had slowly been chipping away at the principles that upheld New York's law. In so doing, the Court had suggested a new direction that implicitly, if not yet explicitly, would gradually undo what *Adler* had done. This tension arose yet again once *Keyishian* reached the Supreme Court, but that moment still lay more than a year in the future.

While *Keyishian* had been wending its way through the courts, the tension over the Feinberg Certificate had been building on Buffalo's campus. The '64–65 academic year began with the five holdouts' decision to file suit fresh on the minds of students and faculty. A joint group of students and professors met with SUNY President Samuel Gould to air their grievances.<sup>99</sup> They also picketed mid-year graduation ceremonies and conducted regular demonstrations. Still, as fall semester gave way to spring, the Certificate stood.<sup>100</sup>

The atmosphere of discontent thickened in the early months of 1965. Poet Gregory Corso came to Buffalo to teach a course on Shelley. Weeks into the semester, he was fired for refusing to sign a Certificate.<sup>101</sup> This caused such an uproar on campus that, when the issue arose again with another faculty member, President Gould stepped in to halt dismissal proceedings.<sup>102</sup>

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94. *Id.* at 235–36.

95. *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965).

96. *Id.* at 238–39.

97. *Id.* at 236.

98. See *Keyishian v. Bd. of Regents*, 255 F. Supp. 981, 992 (D.C.N.Y. 1966) (narrowly construing *Wieman v. Updegraff*, 344 U.S. 183 (1952), *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278 (1961), and *Baggett v. Bullitt*, 377 U.S. 360 (1964)).

99. *History of Feinberg and the University*, SPECTRUM, June 15, 1965 at 1 (on file with the SUNY Buffalo Library).

100. *Id.*

101. *Id.*

102. *Id.*

But this did not stem the tide of protest. The AAUP, previously so timid in its stance on the Feinberg Certificate, suddenly became aggressive. In March of 1965, at the AAUP’s national convention, the Buffalo chapter introduced a resolution asking the organization to provide moving expenses for faculty members who would resign in protest against loyalty oaths.<sup>103</sup> A special AAUP committee began studying the matter. Upon returning from the convention, four SUNY Buffalo AAUP members sent a letter to President Gould highlighting the recent developments. If nothing changed soon, they threatened, SUNY—already experiencing difficulty recruiting distinguished professors—would start hemorrhaging valuable faculty.<sup>104</sup>

The mounting pressure eventually proved too much for the powers that be. President Gould, in his May meeting with the SUNY Board of Trustees, asked the body to repeal the Feinberg Certificate.<sup>105</sup> As he later told a student newspaper, “the feelings of the academic community” had made an impression on the Board.<sup>106</sup> On May 13, ten days after the Court of Appeals sided with the non-signers, the board of trustees voted unanimously to approve Gould’s motion.<sup>107</sup>

The rescission of the Feinberg Certificate brought “great jubilation” to the Buffalo campus.<sup>108</sup> Many had fought the disclaimer requirement since its introduction; their efforts had finally borne fruit. But, even though the Certificate had instigated the controversy over the Feinberg Law, its demise did not end the strife. After all, the law barring subversives remained in place. Professors and students alike had, by this point, come to see the loyalty requirements as odious—regardless of how they were enforced.<sup>109</sup> And, though the most blatant aspect of the anti-communist regime had just vanished, those hiring new SUNY employees still bore the responsibility of satisfying themselves of the person’s loyalty.<sup>110</sup> The non-signers decided, therefore, to pursue their case despite the Certificate’s cancellation.

Ironically, the repeal proved detrimental to the legal case of the five holdouts. The month before, the appellate court had ordered a three judge panel of the district court to hear the professors’ case. News of the

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103. Letter from Bob Schneidau to Davis (Mar. 31, 1965) (on file with the SUNY Buffalo Library).

104. Letter from Carl Moos et al. to Gould (Spring 1965) (on file with the SUNY Buffalo Library).

105. *Gould Announces Unanimous Decision*, SPECTRUM, June 15, 1965 at 1 (on file with the SUNY Buffalo Library).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Editorial Comments*, SPECTRUM, June 15, 1965 (State Univ. N.Y. Buffalo).

110. Statement to Prospective Professional Appointees (July 1965) (on file with the SUNY Buffalo Library).

Certificate's cancellation became public on June 10, 1965, only six days before Richard Lipsitz was to present arguments in front of that panel. The news gave the panel additional reason to reject the professors' claims. The professors had, among other points, complained that the lack of institutional hearings deprived them of "procedural due process."<sup>111</sup> But since the trustees had repealed the Certificate, the professors' loyalty could be tested only in a direct meeting with a university official. Such a meeting would give the professor ample opportunity to explain and, therefore, satisfy the demand for due process.<sup>112</sup> The trustees' withdrawal of the Certificate had, in the eyes of this court, left the plaintiffs with nothing to complain about. Relying on this and other arguments, the District Court denied the plaintiffs all relief requested.<sup>113</sup>

With their defeat locally, the non-signers had to decide whether to present their case to the Supreme Court. Some of the plaintiffs, like Harry Keyishian, had fully expected that the case would end up there.<sup>114</sup> However, going this route posed its own set of challenges. As with their initial foray into the judicial system, the five faculty members faced the problem of finances. The national AAUP had been paying the legal bills for the past year and a half, but the organization doubted that it could cover the cost of a Supreme Court appeal. Other crises, including a faculty strike at St. John's University in Queens, had been draining its resources. Buffalo's AAUP was told to start raising its own funds.<sup>115</sup>

At the meeting in which this development came out, some tried to put a positive spin on the situation: by donating, AAUP members would become "more actively" committed to "AAUP principles."<sup>116</sup> This perspective, however, only reflected the relative apathy with which most Buffalo faculty had treated the court challenge. This apathy only grew with the repeal of the Certificate, the absence of which gave many on the faculty the sense that they had secured their freedoms. A significant number apparently did not even realize that, behind the Certificate, an entire complex of laws remained in place.<sup>117</sup>

This became even clearer after fundraising efforts were underway. After setting up an ad hoc committee in late February, a letter went out to AAUP members explaining why the organization had taken up an appeal in

111. *Keyishian*, 255 F. Supp. at 990 (W.D.N.Y. 1966).

112. *Id.* at 989-91.

113. *Id.* at 989.

114. Keyishian Notes, *supra* note 57, at 11.

115. Minutes of Meetings Discussing Fundraising for Supreme Court Appeal (Jan. 27, 1966) (on file with the SUNY Buffalo Library).

116. *Id.*

117. Letter from Leo A. Loubere to Am. Ass'n of Univ. Professors (undated) (State Univ. N.Y. Buffalo); Letter from Am. Ass'n of Univ. Professors to Colleagues (Feb. 28, 1966) (on file with the SUNY Buffalo Library).

the first place and asking anyone who could to contribute. Two months into the campaign, only 47 of the 2,800 full- and part-time faculty members had contributed.<sup>118</sup> The donations from this .02% of the faculty totaled \$671—far below the \$2,500 that Richard Lipsitz had suggested as his fee.<sup>119</sup> Lipsitz himself sensed the AAUP’s financial hardships when, in stating this figure, he noted his willingness “in all sincerity” to consider modifying the fee if the AAUP “considered [it] to be out of line.”<sup>120</sup>

The money, of course, was only one of the problems. The plaintiffs also had to convince the Supreme Court to take the case, hardly a sure thing given that they had difficulty even persuading the district court to convene a three judge panel to hear their case. Lipsitz himself portrayed the situation optimistically. He thought the facts of the case to be as perfectly suited as any to challenge the Feinberg Law, and he blamed his lack of success so far on the lower courts’ unwillingness “to disturb *Adler*.” On the Supreme Court, by contrast, “there would be a substantial number of the present justices who would not agree with [the *Adler*] decision.”<sup>121</sup>

Lipsitz’s optimism carried the day; the AAUP soon granted permission to appeal to the Supreme Court.<sup>122</sup> Then the work began on persuading the Court to take the case. At first, Lipsitz tried to distinguish his case from *Adler* by emphasizing that his clients were college and university professors who enjoyed a special right of academic freedom and not, as in *Adler*, public school teachers.<sup>123</sup> He drew heavily on a 1957 decision, *Sweezy v. New Hampshire*,<sup>124</sup> in which a plurality—though not a majority—of the Supreme Court had recognized academic freedom as constitutionally protected under the First Amendment.<sup>125</sup> Lipsitz now hoped that this newfound freedom would find its way into the thinking of the majority. If it did so, Lipsitz could win his case without challenging *Adler*.

Nevertheless, in response to a brief filed by the counsel for New York State, Lipsitz decided that challenging *Adler* was exactly what he needed to do. Mere membership in a group should not, he said, disqualify someone for public employment.<sup>126</sup> He added emphatically that those aspects of

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118. Letter Regarding the Voluntary Fund (undated) (on file with the SUNY Buffalo Library).

119. *Id.*; Letter from Richard Lipsitz, to Herman Orentlicher (Jan. 22, 1966) (on file with the SUNY Buffalo Library).

120. *Id.*

121. Letter from Richard Lipsitz to Herman Orentlicher (Jan. 5, 1966) (on file with the SUNY Buffalo Library).

122. Parsons, *supra* note 23, at 241.

123. *Id.* at 154.

124. 354 U.S. 234, 250 (1957).

125. *Id.*

126. Answer to Motions to Dismiss at 9, *Keyishian*, 385 U.S. 589 (No. 105).



*Adler* inconsistent with this notion “should be overruled.”<sup>127</sup> With this statement, *Keyishian v. Board of Regents* now asked the Court to do much more than rule on a single state’s loyalty program. It challenged the Court to overrule a doctrine that had served as the basis for loyalty-security programs since the Cold War began.

The Supreme Court did not hesitate to take up the challenge. Eight out of the nine justices voted to hear the case, issuing an “Order Noting Probable Jurisdiction” on June 20.<sup>128</sup> From there, progression was slow. The attorneys filed briefs the following September and argued the case in front of the Court on November 17.<sup>129</sup> Oral arguments centered on technical questions involving the procedures used to ensure employees’ loyalty.<sup>130</sup> The briefs, on the other hand, presented the fundamental disagreements between the two sides. Both raised many points of law, but the central constitutional question remained whether *Adler*’s view of the rights of state employees should stand.<sup>131</sup>

After hearing oral arguments, the justices gathered in conference for an initial vote on the case. Four justices—Earl Warren, Hugo Black, William Douglas, and William Brennan—supported the plaintiffs and voted to overturn the decision of the District Court.<sup>132</sup> Four others—Tom Clark, John Harlan, Potter Stewart, and Byron White—voted to uphold the lower court decision.<sup>133</sup> The deciding vote fell into the lap of Abe Fortas.<sup>134</sup> At first, the tie-breaking justice indicated he would join Warren, Black, Douglas, and Brennan, but he quickly added that “he did not know which way he would ultimately turn.”<sup>135</sup> Fortas’s ambivalence reflected a nuanced attitude towards loyalty-security programs—particularly those affecting academics—that he had cultivated as an attorney in private practice. He had refused to represent academics known to have been

127. *Id.*

128. Stephen Goodman and Abraham Sofaer, Opinions of William J. Brennan Junior, VIII (on file with the Library of Cong.); Parsons, *supra* note 23, at 245.

129. Parsons, *supra* note 23, at 245–47, 260.

130. *Id.* at 270.

131. Brief for Appellees at 20, *Keyishian*, 385 U.S. 589 (No. 105); Reply for Appellants at 10–11, *Keyishian*, 385 U.S. 589 (No. 105). Within this broad framework, both sides maneuvered to make their positions seem less extreme. The state, for example, downplayed the extent to which its law deprived people of employment based on their association. In their view, *prima facie* disqualification did not amount to actual deprivation of employment. *See, e.g.*, Brief for Appellees at 11, *Keyishian*, 385 U.S. 589 (No. 105).

132. For a list of the justices’ votes, see Fred Graham, *High Court Voids Laws on Loyalty*, N.Y. TIMES, Jan. 24, 1967, at 1+.

133. *Id.*

134. *Id.*

135. Goodman and Sofaer, *supra* note 128, at VIII.

communists.<sup>136</sup> But he had also provided millions in free counsel to Owen Lattimore, a professor accused of serving as a communist agent.<sup>137</sup> Fortas knew first-hand the damage anti-communist hysteria could cause.<sup>138</sup>

Since the initial vote produced no definitive outcome, Chief Justice Warren decided to assign the writing of an opinion and see if a majority would agree to join it. Brennan, apparently, hoped that Warren would give that job to Fortas as a way of convincing him to vote with the court's liberal wing. In the end, though, Warren asked Brennan himself to draft a decision. Brennan now bore the burden of formulating an argument that would not only reflect his views on the case, but that would also convince Justice Fortas to join.<sup>139</sup>

In constructing such an argument, the former New Jersey Supreme Court justice faced a decision markedly similar to that which had previously confronted Richard Lipsitz. On the one hand, he wanted to overturn New York's loyalty law. On the other, he had to deal with the *Adler* precedent. Like Lipsitz before him, Brennan tried at first to distinguish the case at hand from *Adler*.<sup>140</sup> Additions to the Feinberg Law since 1952 might, he thought, allow him to throw out the statute without explicitly overturning the decade-and-a-half old precedent.<sup>141</sup> But then he, too, decided to abandon the attempt and instead get rid of *Adler* entirely.<sup>142</sup> He now had to convince the other justices to come along.<sup>143</sup>

The first step was to draft an opinion for circulation. The resulting piece negated *Adler*'s two central doctrines. First, he undercut the right-privilege distinction with his insistence that “constitutional doctrine which has emerged since [*Adler*] has rejected [the] premise . . . that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.”<sup>144</sup>

Second, he parried the claim that an exception to this rule should be made for the unusually sensitive area of the schoolroom. Rather than extra ideological scrutiny, educators deserve special ideological breathing space:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate

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136. See SCHRECKER, *supra* note 22, at 143.

137. *Id.*

138. *Id.* at 143, 166.

139. Goodman and Sofaer, *supra* note 128, at VIII.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967).

laws that cast a pall of orthodoxy over the classroom . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection [citations omitted]." <sup>145</sup>

With these words, Brennan attempted to grant Richard Lipsitz's wish and, for the first time, elevate academic freedom to the subject of a Supreme Court majority opinion.

All of these efforts, however, went into a legal opinion that had not yet received the backing of the majority of the court. Brennan still had to win over Justice Fortas. To begin the process, he circulated the opinion among his colleagues and, within a week, had the approval of the three justices who had already committed to supporting the non-signers' case. <sup>146</sup> Still, no word came from Fortas. <sup>147</sup>

In fact, rather than win any unexpected favor from his colleagues, Brennan's decision touched a raw nerve for Justice Clark, who set about writing a biting dissent. Clark's dissent displayed utter disdain for the "blunderbuss fashion in which the majority couches its 'artillery of words.'" <sup>148</sup> Beyond his dislike for the opinion's form, however, he was horrified at its implications: "[N]either New York nor the several States that have followed the teaching of *Adler v. Board of Education* for some 15 years, can ever put the pieces together again." <sup>149</sup>

To emphasize the point, Clark added in the margins of a later draft a Churchillian phrase that he ultimately included in the final version: "No court has ever reached out so far to destroy so much with so little." <sup>150</sup> Brennan's opinion would, he foresaw, undermine the loyalty-security programs that had rested for so long on the *Adler* decision.

What prompted such a colorful response? His deeply felt reaction stemmed from something more profound—and more personal—than a mere legal disagreement. <sup>151</sup> It related to the majority's contention that, since *Adler*, the Court had undermined the 1952 ruling's "major premise." <sup>152</sup> On the purely legal plane, Clark countered that none of the

145. *Id.* at 603.

146. Goodman and Sofaer, *supra* note 128, at VIII.

147. *Id.*

148. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 620 (1967).

149. *Id.* at 622 (citations omitted).

150. Draft of Opinion (undated) (on file with the Tarlton Law Library). *See also Keyishian*, 385 U.S. at 622.

151. *Keyishian*, 385 U.S. at 621–23, 627–28. Clark did, of course, disagree on various points of law. For example, he did not think the terms of the New York statute nearly as vague and uncertain as did Brennan.

152. *Id.* at 605.

decisions cited by the majority had ever explicitly done that.<sup>153</sup> But behind that legal-textual argument lay something deeper.

Ever since his days as Attorney General during the Truman administration, Clark had tried to strike a careful balance between the state’s right to combat subversion and the civil liberties of the people affected by such efforts. For example, as the nation’s highest law enforcement officer, he defied senatorial pressure to prosecute supposed communist spies, insisting he found no evidence of the “transmittal of information relating to the national defense.”<sup>154</sup> He would not “institute prosecutions to justify the publicity seekers.”<sup>155</sup>

In his early years on the Court, this balancing act emerged yet again. In 1952, when the *Adler* case came before the justices, Clark sided with the majority, voting to enshrine the right-privilege distinction in constitutional law.<sup>156</sup> Yet, later that year, when Clark was assigned to write the majority opinion in another case, *Wieman v. Updegraff*,<sup>157</sup> he sided on technical grounds with a group of professors challenging their state’s anti-subversive statute. He did make clear that he was not overruling *Adler*.<sup>158</sup> But he also emphasized the importance of limiting the state’s power to combat subversion “in time of cold war and hot emotions when ‘each man begins to eye his neighbor as a possible enemy.’”<sup>159</sup>

His words, carefully crafted to uphold *Adler* while preventing extreme applications of its doctrine, came back to haunt him fifteen years later. The Second Circuit Court of Appeals had cited them in its decision that *Adler* should not predetermine *Keyishian*’s outcome.<sup>160</sup> Justice Brennan, in turn, cited the court of appeals, as well as Clark’s opinion, as proof that “constitutional doctrine has developed since *Adler*.”<sup>161</sup> In so doing, Brennan used a passage that Clark had designed specifically to uphold *Adler* as the very basis for undermining that case. It was this use of Clark’s words against their author—and not merely the suggestion that subsequent cases had overridden *Adler*—that so incensed the justice from Texas.

In early drafts of his dissent, Clark considered making his anger on this matter explicit:

The first two [cases cited by the majority], *Wieman v. Updegraff*

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153. *Id.* at 624–25.

154. Emerson and Helfeld, *supra* note 9, at 14.

155. *Id.*

156. *Wieman v. Updegraff*, 344 U.S. 183 (1952).

157. *Id.*

158. *Id.* at 191–92. His ruling was on the technical grounds that the Oklahoma statute had forbidden both knowing and unknowing membership, whereas *Adler* had allowed the government to forbid only knowing membership.

159. *Id.* at 191.

160. *Keyishian v. Bd. of Regents*, 345 F.2d 236, 239 (2d Cir. 1965).

161. *Keyishian*, 385 U.S. at 606.

and *Slochower v. Board of Education*, were both written by me, and in both cases *Garner* and *Adler* were discussed at some length and approved . . . . For the majority to say that these cases undercut *Adler* . . . just won't wash.<sup>162</sup>

In yet another draft, Clark tried to rephrase the point:

Today, however, the Court says that "constitutional doctrine . . . has rejected *Adler's* major premise." It can find no authority in this Court to do this . . . It does cite [unintelligible] cases of this Court but not one are [*sic*] in point. Indeed, I wrote two of the cases, *Wieman v. Updegraff* and *Slochower v. Board of Education*, in which the Court approved both *Garner* and *Adler* and discussed them at some length.<sup>163</sup>

In the final version of the dissent, Clark decided to omit any reference to his authorship, perhaps for reasons of tact. But the drafts show that the former attorney general thought it possible to structure loyalty-security programs to ensure security and respect civil liberties. He believed equally strongly in the communist threat and in the state's obligation to combat it within constitutional bounds. Brennan incensed Clark by upsetting this delicate balance with the very words used to create it.

Clark and Brennan simply held different perspectives on the central Cold War question: did communism threaten America more through direct attempts at subversion or through the ways it forced society to bend civil liberties? Clark took a clear stance on this question in the last line of his dissent: "The majority says that the Feinberg Law is bad because it has an 'overbroad sweep.' I regret to say—and I do so with deference—that the majority has by its broadside swept away one of our most precious rights, namely, the right of self-preservation."<sup>164</sup>

He continued by noting the compounded danger of doing so in the "public educational system [that] is the genius of our democracy."<sup>165</sup> As he put it in an earlier draft of that paragraph, he believed that the majority had swept away "the right of self-preservation" in "the most vulnerable spot that it could find."<sup>166</sup>

His opinion completed, Clark circulated it two weeks after Brennan had issued his. The piece quickly won the approval of the three justices who had previously committed to Clark's position. The decision now rested in Justice Fortas's hands.

Ironically, it was Justice Clark's reply, rather than Brennan's opinion, that drew Fortas to the Court's liberal wing. Fortas was "outraged by the

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162. Draft of Clark's Dissent (undated) (on file with the Tarlton Law Library) (citations omitted).

163. *Id.* (citations omitted).

164. *Keyishian*, 385 U.S. at 628.

165. *Id.*

166. Draft of Clark's Dissent, *supra* note 162.

dissent and its ‘McCarthyistic’ tone.”<sup>167</sup> Perhaps he was reminded of his days representing Owen Lattimore. Indeed, Clark himself was well aware of his piece’s stridency. He even wrote Brennan a note offering to change the language “if you think I am too ‘tough’ on you.”<sup>168</sup> Fortas could not swallow the “McCarthyistic” perspective on the communist threat. And so Brennan’s opinion became that of the majority, with the ruling publicly announced the Monday after Fortas’s decision.<sup>169</sup>

On January 23, 1967, the Justices read their opinions from the bench.<sup>170</sup> The occasion “was marked with some of the most impassioned oratory which followers of the Court had ever seen”—appropriate for a case in which much more than narrow legal or constitutional questions were at stake.<sup>171</sup> Brennan derided the dissent for “indulg[ing] in richly colored and impassioned hyperbole”; Clark responded by noting that his opinion “must have ‘hurt’.”<sup>172</sup> He then continued by trying “to rouse his fellow citizens in righteous indignation” against the majority’s dangerous stance.<sup>173</sup> The full force of the Cold War debate emerged from the Supreme Court bench.

The announcement of the decision ignited immediate, heated controversy. For the Buffalo professors, now scattered across the country, the decision ended years of suspense and vindicated their stubborn stance.<sup>174</sup> But they also recognized that this decision touched much more than New York’s law. In response to a query from a friend, Lipsitz exulted that “[the decision’s] effect, according to the dissent, is virtually to destroy the possibility of any constitutional legislative means of removing ‘subversives’ (whatever that means) from public employment.”<sup>175</sup> This may have seemed positive to him, but it did not please many others.

Newspapers, television stations, and cartoonists inveighed against the Supreme Court’s stance. A typical reaction of the media read “Communists 5, American people 4.”<sup>176</sup> Brennan himself received dozens

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167. Goodman and Sofaer, *supra* note 128, at VIII.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. Goodman and Sofaer, *supra* note 128, at VIII.

173. *Id.* at IX.

174. On remand to the district court, they all received back pay and court costs, though none of those who had already left decided to return to SUNY Buffalo. See Parsons, *supra* note 23, at 272–74.

175. Letter from Richard Lipsitz to Mr. and Mrs. Thomas Connolly (Feb. 10, 1967) (on file with the SUNY Buffalo Library).

176. Letter from J. William Quinn to William Brennan (Feb. 2, 1967) (Library of Cong.). For other examples, among many, see *To Russia with Love*, N.Y. DAILY NEWS, Jan. 25, 1967, at 19 (on file with the Library of Cong.); *The Baby Goes out with the Bathwater*, CHI. TRIB., Jan. 24, 1967, at 16 (on file with the

of angry letters from a broad range of individuals, everyone from state legislators<sup>177</sup> to elementary school children.<sup>178</sup> This widespread reaction reflected the sensitivity—and significance—of the arena into which the Supreme Court had stepped.

Ultimately, judges, as well as the public, recognized that *Keyishian* represented a fundamental turning point in the battle against loyalty oaths.<sup>179</sup> In case after case, *Keyishian* served as a key precedent in dismantling loyalty statutes.<sup>180</sup> And this was not only in cases involving employment. *Keyishian* expanded legal rights to government “privileges” ranging from Medicare<sup>181</sup> to public schooling.<sup>182</sup>

In the decades since the 1967 decision, subsequent Courts have modified the *Keyishian* precedent.<sup>183</sup> In one recent example, the Court limited the First Amendment protection of employee speech to comments not made “pursuant to [the employee’s] official duties.”<sup>184</sup> Dissenting in that case, Justice David Souter worried that such a narrowing would threaten academic freedom of professors at public colleges and universities.<sup>185</sup> His words demonstrate that, even in the twenty-first century, academic freedom and the rights of public employees continue to move together.<sup>186</sup>

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Library of Cong.); *Reds Win, 5 to 4*, TULSA TRIB., Jan. 24, 1967 (on file with the Library of Cong.).

177. Letter from Harrison Mann, Jr. to Clark (Jan. 24, 1967) (on file with the Library of Cong.).

178. Letter from Sandi Gray to William Brennan (Jan. 28, 1967) (on file with the Library of Cong.).

179. *See, e.g., Ehrenreich*, 273 F. Supp. at 180: “Until the announcement of the *Keyishian* decision (January 23, 1967), it is likely that we would have held that plaintiffs’ constitutional rights are not violated by the requirement that they subscribe to the Kansas test oath. [...] While *Adler* has not specifically been overruled, the Supreme Court, speaking through Mr. Justice Brennan, has rejected its major premise.”

180. *See Sager, supra* note 8, at 76–77, tbls.IV, V.

181. *Reed v. Gardner*, 261 F. Supp. 87 (C.D. Cal. 1966).

182. *Richards v. Thurston*, 304 F. Supp. 449, 452 (D. Mass. 1969).

183. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968). *See also Connick v. Myers*, 461 U.S. 183 (1983).

184. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

185. *Id.* at 438–39.

186. In another example of the connection between the two, the Court of Appeals for the Fourth Circuit ruled in *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000) that individual academic freedom includes only those rights already enjoyed by all public employees. For further discussion, see *infra* note 190.

## III. CONCLUSIONS

*Keyishian v. Board of Regents* fundamentally altered the relationship of the First Amendment to the academy and to the rights of all government employees. Previous historical writing, however, has failed to recognize the centrality of the case to the story of the Constitution during the Cold War.<sup>187</sup> Even legal scholars who cite the case reference it either solely for its statement on academic freedom<sup>188</sup> or solely for its position on employee rights.<sup>189</sup> Few have recognized the significance of the decision as a cohesive unit—one in which academics won rights both for themselves and for all public employees.

Besides being a failure of historical analysis, this oversight has affected the interpretation of the legal doctrine *Keyishian* promulgated. Many writers, reading *Keyishian*'s passage on academic freedom in isolation, have concluded that the ruling intended to grant educators First Amendment protections beyond those guaranteed to all public employees. When these writers cannot find any instance where such special protection would be necessary, they conclude that academic freedom as a constitutional doctrine is meaningless. They then go one step further, arguing that, to the extent that constitutional academic freedom exists, it protects not individual academic employees, but the institutions that employ them. This has the ironic effect of insulating personnel decisions made by colleges and universities from scrutiny brought about by lawsuits such as that in *Keyishian*.<sup>190</sup>

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187. The only full-length piece dedicated to the case is that of Jerry Parsons. Parsons, *supra* note 23. See his evaluation of the meaning of the case. *Id.* at 286.

188. Examples of this are functionally infinite. For a judicial example, see *Regents v. Ewing*, 474 U.S. 214, 226 (1985). For academic literature, see, e.g., J. Peter Byrne, *Academic Freedom: A “Special Concern” of the First Amendment*, 99 *YALE L.J.* 251 (1989).

189. See, e.g., Peter C. McCabe III, *Free Speech of Government Employees*, 60 *IND. L.J.* 339 (1985).

190. For a judicial example, see *Urofsky*, 216 F. 3d at 410–15. For academic literature, see, e.g., Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 *U. COLO. L. REV.* 907, 909–10 (2006); Byrne, *supra* note 188, 264, 301–02, 309. Each argues that, constitutionally, academic freedom has little content as an individual protection of academics against their public university employers. They conclude, therefore, that constitutional academic freedom should be applied primarily to institutions rather than individuals. This has the effect of insulating personnel decisions made by colleges and universities from scrutiny brought about by lawsuits from their employees. Thus, a concept that began in *Keyishian* as a protection of individual professors ends up being used to protect colleges and universities from challenges by those very same professors. For a contrasting perspective, see David M. Rabban, *Academic Freedom: Individual or Institutional?*, 87 *ACADEME* 16–20 (Nov.–Dec. 2001). He points out that other lower courts have recently applied academic freedom as an individual freedom and



Our analysis reveals, however, that the doctrine of academic freedom is meaningful specifically because it never intended to extend academics' rights beyond those enjoyed by all public employees. The plaintiffs in *Keyishian* won their case most fundamentally through the assertion of rights that applied to all civil servants. But they used the doctrine of academic freedom to parry the claim that such rights should not apply in the especially vulnerable classroom setting. By taking note of the Cold War context, we realize that the doctrine of academic freedom was responding to a common Cold War claim about the vulnerable schoolroom rather than attempting to create a uniquely expansive First Amendment right.

Beyond the legal point, this integrated view of *Keyishian* also provides a vision of the academy that runs counter to one current in popular culture. We hear about academics as residing in ivory towers, apart from the needs and concerns of society at large. Ellen Schrecker has already definitively shown that this was not the case during the 1950s and 60s. As repeated victims of McCarthyist persecutions, academics of that era hardly enjoyed the luxury of a life above the fray.<sup>191</sup> *Keyishian* and its broader context augment this perspective, demonstrating that academics were not mere victims. Instead, they took part in—and, in many cases, led and won—the fight against some of the most wide-spread and concrete abuses of the McCarthy era.

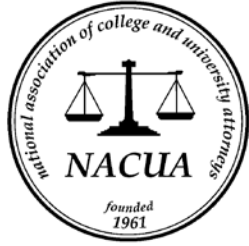
Finally, this perspective allows *Keyishian* to serve as a window through which to view the ways American society handled the Cold War's challenges to First Amendment liberties. Individually, academic freedom and public employment rights appear as technical legal topics. However, when viewed together in their Cold War context, they become united reflections of a deeper story. They show the ongoing struggle of a democratic society to protect itself from attack while trying to preserve the values that would make the effort worthwhile.

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not only as an institutional one. He does not, however, spell out how such a freedom would differ substantively from that already enjoyed by other public employees.

191. SCHRECKER, *supra* note 22.





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The National Association of College and University Attorneys (NACUA), established in 1961, is the primary professional association serving the needs of attorneys representing institutions of higher education. NACUA now serves over 3,000 attorneys who represent more than 1,400 campuses and 660 institutions.

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