SUBPRIME EDUCATION: FOR-PROFIT COLLEGES AND THE PROBLEM WITH TITLE IV FEDERAL STUDENT AID

MATTHEW A. MCGUIRE†

ABSTRACT

Federal student-aid policy is designed with the goal of expanding access to higher education for all students. It has been enormously successful in achieving that goal. Yet, for many students, federal student aid has served only to burden them with oppressive student-debt obligations. These obligations are a particular problem with respect to the for-profit higher-education sector, which receives a large and ever-growing proportion of federal aid. This Note examines the interaction between federal student-aid policy and for-profit institutions, arguing that the noble goals of modern federal student-aid policy enable the very practices that lead to negative outcomes for many students by creating a lucrative market for "subprime education." This Note analyzes a continuum of approaches to reducing the negative student outcomes caused by many for-profit institutions, concluding that the blame lies not with for-profit institutions but with federal student-aid policy. Ultimately, the modern federal student-aid regime requires regulators to choose between abetting negative student outcomes and reducing access to higher education. This dilemma can be avoided only by deemphasizing the student-oriented aid model in favor of an institution-centered model that is focused on reducing the price of education.

INTRODUCTION

Title IV of the Higher Education Act of 1965 (HEA)[1] established the foundation for federal student aid in higher education.[2] The HEA

---

† Duke University School of Law, J.D. expected 2013; Drake University, B.A. 2010. Thank you to Professors Joseph Blocher and Jane Wettach for their assistance throughout the writing process, and to Jake Charles, Sarah Eichenberger, Katie Ertmer, Tina Praprotnik, and the staff of the *Duke Law Journal* for their diligent editing. I would also like to thank Jessica Whitney, Bill Brauch, and the Consumer Protection Division of the Iowa Attorney General for introducing me to this fascinating subject. Finally, I would like to thank Susan Elgin for her extraordinary patience, kindness, and support.

rests upon the basic premise that every student, regardless of personal wealth, should have the opportunity to pursue career training or a degree.[3] "[T]his Nation could never rest while the door to knowledge remained closed to any American," President Johnson said after signing the bill.[4]

Today, the United States continues to make a substantial financial commitment to keeping the "door to knowledge" open for all. During the 2009–10 academic year, the federal government awarded $146.5 billion in grants and loans to students through Title IV programs.[5] Title IV funds go toward programs at every degree level, to traditional and nontraditional students, and to students at public, private nonprofit, and private for-profit colleges and universities alike.[6]

Indeed, a significant share of those funds has gone to students at for-profit institutions. During the 2009-10 academic year, the for-profit sector received $32 billion in Title IV student aid—more than 20 percent of all federal aid.[7] These institutions have been instrumental in expanding access to higher education for populations historically underserved by public and nonprofit institutions: adult nontraditional students, students from disadvantaged economic

1. Higher Education Act of 1965, Pub. L. No. 89-329, tit. IV, 79 Stat. 1232 (codified as amended in scattered sections of 20 U.S.C. §§ 1070 to 1099c-2, 42 U.S.C. §§ 2751–2756b (2006 & Supp. IV 2011)).

2. *E.g.*, Brian Pusser & David A. Wolcott, *A Crowded Lobby: Nonprofit and For-Profit Universities and the Emerging Politics of Higher Education*, *in* EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES 167, 170 (David W. Breneman, Brian Pusser & Sarah E. Turner eds., 2006).

3. *See* S. REP. NO. 89-621, at 28 (1965) ("What is badly needed now is a comprehensive program for financing the college costs of all who have a legitimate need.").

4. President Lyndon B. Johnson, Remarks at Southwest Texas State College upon Signing the Higher Education Act of 1965, 2 PUB. PAPERS 1102, 1105 (Nov. 8, 1965).

5. NAT'L ASS'N OF STUDENT FIN. AID ADM'RS, FEDERAL STUDENT FINANCIAL AID: 2011 NATIONAL PROFILE OF PROGRAMS IN TITLE IV OF THE HIGHER EDUCATION ACT 2 (2011), *available at* http://www.nasfaa.org/EntrancePDF.aspx?id=5328.

6. *See* 20 U.S.C. § 1001 (2006 & Supp. IV 2011) (defining eligible institutions). Institutions within the for-profit higher-education sector have also been named, among other terms, "career colleges" and "proprietary institutions." *E.g.*, Nicholas R. Johnson, *Phoenix Rising: Default Rates at Proprietary Institutions and What Can Be Done To Reduce Them*, 40 J.L. & EDUC. 225 *passim* (2011); VA. CAREER COLL. ASS'N, http://www.va-cca.org (last visited Sept. 14, 2012). This Note will use the term "for-profit" to distinguish these institutions from higher-education providers that are organized as nonprofit institutions.

7. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-150, FOR-PROFIT SCHOOLS: EXPERIENCES OF UNDERCOVER STUDENTS ENROLLED IN ONLINE CLASSES AT SELECTED COLLEGES 1 (2011) (reporting that the "for-profit colleges received almost $32 billion in grants and loans" under Title IV); *supra* text accompanying note 5.

backgrounds, and members of minority groups.[8] But for-profit institutions are also strongly correlated with poor student outcomes. Compared to similar students at nonprofit institutions, students at for-profit institutions are more likely to fail to complete a degree, carry more onerous student-debt loads upon graduation, and default on student loans.[9] Due in large part to these poor student outcomes, many for-profit institutions frequently find themselves in the news, characterized as unscrupulous or predatory,[10] leading to questions about the propriety of government support for some for-profit institutions. In fact, federal aid constitutes nearly all of the revenue of many of the most prominent for-profit institutions.[11] Unfortunately, current law incentivizes the practices of the for-profit sector that lead to negative outcomes. Much like lenders in the subprime mortgage market, for-profit institutions find themselves in a position to benefit handsomely from the debt of marginally creditworthy borrowers without bearing any accompanying risk.

This Note examines the interaction between the Title IV student aid program and the for-profit higher-education industry.[12] Ultimately, Title IV's portable-subsidy student-aid model lies at the root of the problems associated with many for-profit institutions.[13] Regulators attempting to alleviate these problems under the Title IV framework have an unsavory choice: tighten access to student aid and, therefore, restrict educational opportunity, or continue to

8. *See* Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45, 53 (2011) (noting that such student groups "choose for-profit . . . education at disproportionate rates"); *see also infra* Part II.A.2.

9. *See infra* Part II.C.

10. *See, e.g.*, Andréa Ford, *Going for Broke*, TIME, May 9, 2011, at 44, 44 (noting that "[a]necdote by anecdote, a firestorm has been building around for-profit education for some time" and referring to for-profit education as "a predatory industry"); Peter S. Goodman, *In Hard Times, Lured into Trade School and Debt*, N.Y. TIMES, Mar. 14, 2010, at A1 ("Critics say many schools exaggerate the value of their degree programs, selling young people on dreams of middle-class wages while setting them up for default on untenable debts, low-wage work and a struggle to avoid poverty."); *Frontline: College, Inc.* (PBS television broadcast May 4, 2010), *available at* http://www.pbs.org/wgbh/pages/frontline/collegeinc (examining the controversy surrounding for-profit educational institutions).

11. *See infra* notes 152–154 and accompanying text.

12. For an excellent recent discussion of the interaction between Title IV and for-profit institutions, see generally James, *supra* note 8.

13. The portable-subsidy model seeks to expand access to education by granting funds to students to use to defray education costs at their institution of choice. Brian Pusser, *Higher Education, Markets, and the Preservation of the Public Good*, *in* EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES, *supra* note 2, at 23, 36.

facilitate negative student outcomes.[14] Instead, a reemphasis of the public-supply model would allow government to avoid that dilemma.[15]

Part I of this Note outlines the goals and structure of the current regime for administering and regulating federal student aid. Part II explores the rise of the for-profit education industry and the consequences of its expansion. Part III analyzes the impact of the current legal and regulatory student-aid regime on the for-profit education industry, concluding that Title IV student aid enables the negative outcomes associated with the industry and that the tools that the Title IV regime provides to reduce the occurrence of these outcomes are ineffective. Finally, Part IV examines a continuum of possible approaches to solving the systemic issues introduced in Part III. Ultimately, none of these approaches prove satisfying. This Note, then, suggests looking outside of the Title IV portable-subsidy framework for a solution.

I. TITLE IV STUDENT AID

Title IV student aid represents one of many possible approaches to increasing access to higher education. This Part explores the evolution of Title IV's student-oriented financial-aid model and outlines the regulatory regime surrounding the program.

A. The Preeminence of Market-Oriented Student Aid

Prior to the Servicemen's Readjustment Act of 1944 (G.I. Bill),[16] federal support for higher education took the form of direct support for public institutions, such as land grants for state universities through legislation such as the Morrill Act.[17] The G.I. Bill, by contrast, created a student-aid program oriented around portable

14. *See infra* Part IV. This Note also argues that more finely tuned regulation, although potentially helpful, does not sufficiently solve this fundamental dilemma. *See infra* Part IV.C.

15. The public-supply model entails supporting public educational institutions as a means of reducing the price of education for students. Pusser, *supra* note 13, at 34–35.

16. Servicemen's Readjustment Act of 1944 (G.I. Bill), ch. 268, 58 Stat. 284, *replaced by* Veterans' Benefits, Pub. L. No. 85-857, 72 Stat. 1105 (1958) (codified as amended at 38 U.S.C. (2006 & Supp. IV 2011)).

17. Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. §§ 301–309 (2006 & Supp. IV 2011)); *see also* GARY A. BERG, LESSONS FROM THE EDGE: FOR-PROFIT AND NONTRADITIONAL HIGHER EDUCATION IN AMERICA 40 (2005) (describing the Morrill Act, which provided land grants to endow colleges designated by a state's legislature, and its importance to the development of state institutions of higher education).

subsidies.[18] Title IV of the HEA further expanded upon this model by offering grants to the neediest students and a guaranteed student-loan program to low- and middle-income students.[19] The guaranteed student-loan program encouraged private lenders to offer student loans on favorable terms to the borrower.[20]

Though students at for-profit institutions were allowed to receive funds from the original G.I. Bill,[21] the for-profit sector was associated with "[s]candals, fraud, and abuse."[22] As a result, the HEA originally only offered aid to students at nonprofit higher-education institutions.[23] In 1972, Congress reaffirmed its commitment to using portable subsidies[24] when it amended the HEA to make Title IV funds available to students at for-profit and career-oriented schools.[25] Future amendments also shared the goal of expanding access to higher education through portable subsidies.[26]

---

18. *See* Pusser, *supra* note 13, at 36 ("GI Bill grants . . . were awarded to individuals rather than to institutions and served as a forerunner to [Title IV] . . . ."). See *supra* note 13 for a brief description of the portable-subsidy student-aid model.

19. S. REP. NO. 89-621, at 23 (1965). Educational opportunity grants were later renamed Pell Grants. Education Amendments of 1980, Pub. L. No. 96-374, tit. IV, pt. A, sec. 402(a), § 411(a)(1)(C), 94 Stat. 1367, 1401 (codified as amended at 20 U.S.C. § 1070(a) (2006 & Supp. IV 2011)).

20. Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students To Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 21 (2011).

21. *See* G.I. Bill §§ 3, 11, 58 Stat. at 288–90 (stating that students could receive aid for enrolling "at any approved educational or training institution," defined broadly without reference to the nonprofit or for-profit status of the institution).

22. KEVIN KINSER, FROM MAIN STREET TO WALL STREET: THE TRANSFORMATION OF FOR-PROFIT HIGHER EDUCATION 21 (2006).

23. *See, e.g.*, Higher Education Act of 1965, Pub. L. No. 89-329, tit. IV, pt. B, § 421(a)(1), 79 Stat. 1232, 1236 (codified as amended at 20 U.S.C. § 1071 (2006 & Supp. IV 2011)) (opening the guaranteed loan program to "[s]tates and nonprofit private institutions and organizations").

24. *Cf.* Pusser & Wolcott, *supra* note 2, at 170 ("[A] contest was waged over whether the focus of federal financial support should be on institutions . . . or on direct student aid . . . .").

25. Education Amendments of 1972, Pub. L. No. 92-318, tit. I, pt. D, § 417B(a), 86 Stat. 235, 258, *replaced by* Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1367 (codified as amended at 25 U.S.C. § 640c-2, scattered sections of 28 U.S.C., and 42 U.S.C. § 2753 (2006 & Supp. IV 2011)). The HEA was expanded to include for-profit institutions in order to "broaden the range of options beyond traditional baccalaureate programs." 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, *supra* note 2, at 51, 55.

26. For example, the Higher Education Technical Amendments of 1979, Pub. L. No. 96-49, 93 Stat. 351, enacted measures to entice private lenders to lend at larger amounts to students at for-profit institutions. These efforts to expand the impact of Title IV have continued to the present day, marked by the elimination of the 50-percent rule for distance education, *see infra*

The evolution of the Title IV program reflects a longstanding commitment to expanding access for students within the market for higher education. Broad societal access to higher education is thought to provide certain civic benefits, such as increasing the population's ability to participate in democratic institutions,[27] developing future leaders,[28] addressing shortages of skilled or educated workers, and promoting American competitiveness in scientific and technological development.[29] If higher education furthers the public good, as the HEA appears to contemplate, then government intervention to increase production is justified.[30] Of course, higher education confers substantial private benefits on individuals as well.[31] Even in 1965, higher education was seen as increasingly necessary for modern workers,[32] a trend that has only accelerated in the modern information economy.[33]

Federal efforts to expand access to higher education can generally be classified under one of two approaches. The public-supply model involves direct public investment in educational institutions.[34] These subsidized institutions, in turn, can expand access to higher education because they can offer education at a lower price. This is the dominant approach at the state level[35]—states operate

---

note 73, and the federal government becoming the direct lender for all Title IV loans in 2010 and reinvesting the savings into the Pell Grant program, Glater, *supra* note 20, at 31.

27. Pusser, *supra* note 13, at 37.

28. Glater, *supra* note 20, at 18.

29. *See* S. REP. NO. 89-621, at 20 (1965) ("[C]urrent and future shortages of trained personnel present a serious threat to an expanding and viable economy.").

30. *See* Glater, *supra* note 20, at 36 (exploring congressional rhetoric about the need for the nation to expand access to higher education).

31. *See id.* at 37 (listing economic benefits associated with education, including higher levels of employment and wealth, mobility within the labor market, and better working conditions).

32. *See* S. REP. NO. 89-621, at 4 ("Schooling has become and will continue increasingly to be a normal part of adult life.").

33. *See* Aaron N. Taylor, *"Your Results May Vary": Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations*, 62 ADMIN. L. REV. 729, 744–45 (2010) ("This relatively new emphasis on knowledge as a tool of economic vitality has . . . changed the motivations and mindsets of students.").

34. *See supra* note 15 and accompanying text.

35. *See* Bridget Terry Long, *Does the Format of a Financial Aid Program Matter? The Effect of State In-Kind Tuition Subsidies*. 86 REV. ECON. & STAT. 767, 767 (2004) ("State appropriations to public colleges form the most significant higher aid policy in the United States."); *see also e.g.,* MICH. COMP. LAWS ANN. § 388.1801 (West 2012) (appropriating state funds directly to state institutions and, in much smaller quantities, to student financial-aid programs); Act of Dec. 20, 2011, S.H.B. 2058, pt. VI, §§ 601–609, 2011 Wash. Adv. Legis. Serv. 2nd Spec. Sess. Ch. 9 (Lexis Nexis) (allocating over $2 billion to state universities and

massive public university systems, in addition to community colleges—and abroad.[36] Before the HEA, the direct support of institutions was also the federal government's dominant approach, through programs such as the Morrill Act that assisted states in providing affordable higher education.[37]

By contrast, the portable-subsidy model embodied by Title IV involves granting students portable government benefits, such as grants or loans with favorable terms, to expand access to higher education by enabling the student to defray the costs of attendance.[38] These two approaches may seem similar, but the differences between funding an institution and funding an individual student are great. Title IV, therefore, represents a major shift in federal higher-education policy. In an effort to "provid[e] the necessary and needed tools" for higher education, the federal government primarily shifted those tools to students as market actors rather than to state and local higher-education institutions.[39]

B. Title IV Eligibility for Institutions

A complicated regulatory triad determines a higher-education provider's eligibility to receive Title IV funds from students. The triad consists of state government, the higher-education industry, and the

---

community colleges over two years and $300 million to financial aid); FISCAL SERVS. DIV., IOWA LEGIS. SERVS. AGENCY, SUMMARY OF FY 2012 BUDGET AND DEPARTMENT REQUESTS 73–76 (2010), *available at* https://www.legis.iowa.gov/DOCS/lsaReports/BudgetAnalysis/BudgAnalysis2012.pdf (cataloguing nearly $500 million allocated by the state to fund its universities, in contrast to under $60 million for the state's financial aid budget).

36. David D. Dill, *Allowing the Market To Rule: The Case of the United States*, 57 HIGHER EDUC. Q. 136, 137 (2003).

37. *Id.* at 136; *supra* note 15. Given the diversity of actions this approach contemplates and their varied policy implications, for the purposes of this Note, readers are encouraged to envision simple grants to states or state public institutions as a paradigmatic manifestation of the public-supply model. Federal support for educational institutions could, however, take innumerable forms. On one extreme, the federal government could invest in operating its own educational institutions, and investments under the public-supply model need not be limited to public institutions—substantial tax breaks offered to public and private nonprofit educators alike would qualify as well.

38. *See* Pusser, *supra* note 13, at 32 (explaining that the HEA is founded upon a market model). The Pell Grant, essentially an education voucher, is perhaps the quintessential example of the portable-subsidy model. *See supra* note 13.

39. Johnson, *supra* note 4, at 1104; *see also* David W. Breneman, Brian Pusser & Sarah E. Turner, *The Contemporary Provision of For-Profit Higher Education: Mapping the Competitive Market*, *in* EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES, *supra* note 2, at 3, 6 ("HEA also shifted control of the largest share of federal financial-aid dollars from institutions to individuals.").

federal government.[40] Title IV requires states to establish "minimum standards for integrity, financial stability, and educational quality."[41] States also regulate higher-education providers through a variety of channels unrelated to Title IV eligibility, such as consumer-protection statutes and tort law.[42]

Title IV requires higher-education institutions to be accredited by a federally recognized accrediting agency.[43] Accrediting agencies, which are made up of professionals from the education industry, evaluate educational methods.[44] Though accreditation has become a critical part of the government's Title IV regulatory structure, to accreditors, the process is not viewed as a method of ensuring minimum educational standards.[45]

In determining eligibility for Title IV, the federal government, through the Department of Education, declines to evaluate pedagogical effectiveness.[46] The Department of Education does, however, certify accreditation organizations; only certified accreditors may grant the accreditation required for Title IV eligibility.[47] These federal standards are generally procedural and structural, designed to ensure that the accrediting agencies themselves are worthy arbiters of quality.[48] The federal government also monitors institutional compliance with Title IV regulations to ensure only eligible students receive federal student aid.[49]

---

40. Mark L. Pelesh, *Markets, Regulation, and Performance in Higher Education*, *in* FOR-PROFIT COLLEGES AND UNIVERSITIES: THEIR MARKETS, REGULATION, PERFORMANCE, AND PLACE IN HIGHER EDUCATION 91, 92 (Guilbert C. Hentschke, Vicente M. Lechuga & William G. Tierney eds., 2010).

41. LISA K. FOSTER, CAL. RESEARCH BUREAU, CRB 04-010, FOR-PROFIT POSTSECONDARY EDUCATIONAL INSTITUTIONS: OVERVIEW OF ACCREDITATION AND STATE AND FEDERAL OVERSIGHT 3 (2004), *available at* http://www.library.ca.gov/crb/04/10/04-010.pdf.

42. *See* Patrick F. Linehan, Note, *Dreams Protected: A New Approach to Policing Proprietary Schools' Misrepresentations*, 89 GEO. L.J. 753, 763–78 (2001) (discussing state-level public and private law relating to for-profit institutions).

43. 20 U.S.C. § 1099b(j) (2006 & Supp. IV 2011).

44. Pelesh, *supra* note 40, at 92.

45. JANE V. WELLMAN, COUNCIL FOR HIGHER EDUC. ACCREDITATION, RECOGNITION OF ACCREDITATION ORGANIZATIONS: A COMPARISON OF POLICY & PRACTICE OF VOLUNTARY ACCREDITATION AND THE UNITED STATES DEPARTMENT OF EDUCATION 4 (1998), *available at* http://www.chea.org/pdf/RecognitionWellman_Jan1998.pdf.

46. Pelesh, *supra* note 40, at 92.

47. 20 U.S.C. § 1099b(a).

48. WELLMAN, *supra* note 45, at 3.

49. *See generally* 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 (2009), *available at*

Finally, the Department of Education also administers a variety of institutional-eligibility rules regarding receipt of Title IV funds. If an institution's former students have unacceptably high cohort default rates on Title IV loans, for example, the institution loses the ability to accept Title IV funds.[50] A cohort default rate is a measure of the number of students who default on their student loans compared to the total number of students who began repayment on their loans at the beginning of a measured period.[51] Loans are considered to be in default if a student is 270 or 360 days behind payments—depending on the loan—within the first three years of repayment.[52]

Some Department of Education rules apply only to for-profit institutions. The 90/10 rule, for example, requires that a school receive at least 10 percent of its revenue from non-Title IV sources.[53] Federal and state student aid from other programs, such as veterans' benefits or federal and state job training grants, actually count toward the 10 percent, along with institutional loans offered to students by the school itself.[54] Additionally, for-profit institutions are barred in most instances from offering recruiters incentive-based payments.[55] Finally, a for-profit institution must offer programs that prepare students for "gainful employment in a recognized occupation."[56] For most of the statute's history, this HEA provision had little force because it merely prohibited programs with no direct connection to recognized occupations.[57] In 2011, however, Department of Education

---

http://www.gao.gov/assets/300/294057.pdf (examining the rigor of Title IV compliance oversight by the Department of Education).

50. 34 C.F.R. § 668.206(a) (2012).

51. Johnson, *supra* note 6 at 233.

52. 34 C.F.R. § 668.183(c).

53. *Id.* § 668.28(a).

54. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-4, FOR-PROFIT SCHOOLS: LARGE SCHOOLS AND SCHOOLS THAT SPECIALIZE IN HEALTHCARE ARE MORE LIKELY TO RELY HEAVILY ON FEDERAL STUDENT AID 14 (2010), *available at* http://www.gao.gov/assets/320/310897.pdf; *see also infra* Part III.B.2.

55. 34 C.F.R. § 668.14(b)(22)(i) (2011), *vacated in part by* Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012). The D.C. Circuit required the Department of Education to retain a safe-harbor rule allowing incentive compensation based upon students' program completion rates. *Id.* at 448.

56. 20 U.S.C. § 1002(b)(1) (2006 & Supp. IV 2011).

57. *See* OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., ED-OIG/A09E0015, UNIVERSITY OF PHOENIX'S PROCESSING OF STUDENT FINANCIAL AID DISBURSEMENTS FOR THE HIGHER EDUCATION ACT, TITLE IV PROGRAMS 8 (2005), *available at* http://www2.ed.gov/about/offices/list/oig/auditreports/a09e0015.pdf (interpreting the "gainful employment" provision, 34 C.F.R. § 668.8 (2005), to prohibit the University of Phoenix to receive Title IV funds for an associate's degree program in General Studies).

regulations attempted to condition Title IV eligibility on student outcomes: measures of students' loan repayment and debt-to-earnings ratios.[58] Those debt measures, however, were vacated by a federal district court in 2012, and when—or in what form—they will take effect remains in doubt.[59]

II. FOR-PROFIT HIGHER EDUCATION

For-profit institutions are a major force within the modern higher-education industry. This Part explains the historical evolution and defining characteristics of the industry and explores the theoretical justifications supporting the for-profit sector's social value. This Part then analyzes negative student outcomes closely associated with many for-profit institutions.

A. *Overview of the For-Profit Higher-Education Industry*

1. *History and recent growth.* The modern for-profit higher-education industry is marked by the incredible diversity of its institutions.[60] The University of Phoenix, a giant in the industry and by far the largest of all of the corporate schools, boasts hundreds of thousands of students, campuses across America, and programs in

---

58. For a full explanation of how these measures were calculated, see 34 C.F.R. § 668.7 (2011), *vacated by* Ass'n of Private Sector Colls. & Univs. v. Duncan, No. 11-1314 (RC), 2012 WL 20505237 (D.D.C. June 30, 2012).

59. *Duncan*, 2012 WL 2505237, at *1. It is quite possible—perhaps even likely—that these rules will reemerge soon. The district court found that the gainful employment rules themselves were a permissible exercise of the Department of Education's rulemaking authority in this arena. *Id.* at *8. Rather, the specific thresholds set by the Department of Education for the loan-repayment measures were arbitrary and capricious, "not based upon any facts at all." *Id.* at *1, *15. The other student outcome measures were found to be inseverable from the loan-repayment measure and the entire substantive rule was vacated. *Id.* at *16. Nevertheless, the Department of Education plans to use its established rulemaking authority to restore the framework designed by the gainful-employment rules. Goldie Blumenstyk & Charles Huckabee, *Judge's Ruling on 'Gainful Emplyoment' Gives Each Side Something To Cheer*, CHRON. HIGHER EDUC. (July 2, 2012), http://chronicle.com/article/Ruling-on-Gainful-Employment/132737.

60. This Note will only discuss for-profit institutions that offer a bona-fide educational experience to students. For an overview of the phenomenon of "diploma mills," which are businesses that provide unearned educational certification, see generally 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 (2009).

many fields and at virtually all degree levels.[61] Yet most for-profit institutions serve fewer than one hundred students and provide training in a specific field such as hair styling or clerical work.[62]

The for-profit higher-education industry traces back centuries.[63] Generous Progressive-era programs following the public-supply model diminished the sector's influence in the early twentieth century, as the modern research university became prominent and as states began to sponsor vocational education through community colleges.[64] The 1972 amendments to the HEA transformed the industry by opening for-profit schools up for federal student aid.[65] Meanwhile, increasing employer demand for trained white-collar workers made students more willing to buy what for-profit educators were selling.[66] For-profit institutions capitalized on these opportunities. Between the 1970s and the 2000s the industry "shifted from one of loosely affiliated, independently operated vocational schools to one that is streamlined, highly sophisticated, and investor-focused."[67]

Beginning in the 1990s, the for-profit sector became marked by massive, publicly traded companies.[68] For-profit institutions have always aggressively controlled their costs, but it was not until this period that the industry fully realized profitable economies of scale.[69] Between 1998 and 2008, enrollment at for-profit schools increased by 225 percent; by the end of that period enrollment totaled nearly twenty million students.[70] Between 2008 and 2010, the rate of increases in enrollment within the sector doubled.[71] A small number of large schools are responsible for this increase. In 2009, five

---

61. David W. Breneman, *The University of Phoenix: Icon of For-Profit Higher Education*, *in* EARNINGS FROM LEARNING, *supra* note 2, at 71, 71–73.

62. Linehan, *supra* note 42, at 755–56.

63. RICHARD S. RUCH, HIGHER ED., INC.: THE RISE OF THE FOR-PROFIT UNIVERSITY 54–57 (2001).

64. KINSER, *supra* note 22, at 19.

65. Breneman et al., *supra* note 39, at 6.

66. *See supra* note 33.

67. Johnson, *supra* note 26, at 230.

68. KINSER, *supra* note 22, at 22.

69. *See id.* at 85–89 (discussing how for-profit institutions generate economies of scale).

70. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 2 (2010).

71. Goodman, *supra* note 10.

institutions alone enrolled over 800,000 students.[72] Much of that growth was fueled by online education. After the 2005 repeal of the 50-percent rule, which prohibited Title IV-eligible schools from enrolling more than half of their students in distance-education courses, for-profit schools expanded their online programs with vigor, and new, predominantly online institutions emerged.[73] In fact, for-profit institutions now enroll more students online than at physical campuses.[74] Higher education can be a lucrative business. The eight largest publicly held and the eight largest privately held for-profit institutions earned a combined profit of $2.7 billion dollars in 2009.[75]

2. *Students at for-profit institutions.* Student populations in the for-profit sector are as diverse as the institutions themselves, with demographics varying depending on the degree programs offered. For-profit institutions serve comparatively more low-income students and members of underrepresented minority groups than nonprofit institutions,[76] and the industry caters to first-generation college students.[77] For-profit schools have also been enormously successful in attracting older adult students.[78] The diversity of the student population is unsurprising, given the industry's traditional focus on vocational training. As the industry has grown, however, much of the growth has come from students pursuing four-year degrees, not from vocational education.[79]

B. For-Profit Higher Education in Theory

Proponents of the for-profit sector contend that the sector's increasing success is a reflection of the changing nature of higher

---

72. Taylor, *supra* note 33, at 756.

73. S. HEALTH, EDUC., LABOR & PENSIONS COMM., at 2.

74. Jason G. Caudill, *Questions and Research Opportunities in Online Education*, 39 BRIT. J. EDUC. TECH. 920, 920 (2008).

75. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., THE RETURN ON THE FEDERAL INVESTMENT IN FOR-PROFIT EDUCATION: DEBT WITHOUT A DIPLOMA 4 (2010).

76. *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges: Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions*, 112th Cong. 6 (2011) (statement of Pauline Abernathy, Vice President, Institute for College Access and Success), *available at* http://help.senate.gov/imo/media/doc/Abernathy.pdf.

77. BERG, *supra* note 17, at 79.

78. RUCH, *supra* note 63, at 145–46; James, *supra* note 8, at 83.

79. KINSER, *supra* note 22, at 73.

education.[80] In a globalized, information-based economy, higher education—whether it takes the form of a certificate, a two-year degree, a four-year degree, or beyond—is increasingly necessary for the American workforce.[81] Students "increasingly view[] education as a product and themselves as consumers."[82] This notion of the student-as-consumer has fundamentally altered the student-educator relationship.

This consumer-centric view of education comports well with the for-profit education model. To schools like the University of Phoenix, education *is* a product, and students *are* consumers.[83] For-profit schools tout their no-frills, businesslike approach, and many students respond favorably.[84] Students at for-profit institutions seek a specific educational experience, tailored toward career advancement, and have little desire for all the trappings of a traditional undergraduate education.[85]

Furthermore, for-profit institutions have stepped into a void not filled by traditional higher education, an industry that is to some degree unwilling to meet this increasing demand for higher education. Nonprofit institutions are certainly not required to pursue growth strategies, and in practice they do not—often opting to increase their institutional prestige instead.[86] By maintaining restrictive admission

---

80. *See* RUCH, *supra* note 63, at 135–59 (discussing the changes taking place in higher education and what nonprofit institutions could learn from for-profit schools).

81. *See* Taylor, *supra* note 33, at 744 ("[J]ust like the knowledge-based economy facilitates opportunity and success for possessors of vital knowledge, [higher education] 'increasingly eliminates those without education and training beyond high school from employment opportunities that can support a middle-class standard of living.'" (quoting NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., MEASURING UP 2006: THE NATIONAL REPORT CARD ON HIGHER EDUCATION 20 (2006), *available at* http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/News/Press_Releases/Higher_education_performance/Measuring_Up_2006.pdf)).

82. Taylor, *supra* note 33, at 745.

83. RUCH, *supra* note 63, at 144.

84. *See id.* at 132–34 (illustrating the "no-nonsense academic experience" provided by for-profit institutions).

85. *See id.* at 134 ("For-profit students are serious about their studies. Their goal is to 'get in, get out, and get a job,' and they are not particularly concerned about their collegiate social life. . . ."); *see also* Michelle Howard-Vital, *The Appeal of For-Profit Institutions*, CHANGE: MAG. HIGHER LEARNING, Jan./Feb. 2006, at 68, 70 ("Although for-profits rarely offer extensive campus and student activities in comparison to more traditional institutions, students do not appear to miss them.").

86. RUCH, *supra* note 63, at 16.

standards, many nonprofit schools exclude large populations of students, but for-profit institutions are open to anyone who can pay.[87]

But admissions standards do not tell the whole story. The nonprofit institutions that place the least emphasis on admissions standards, such as community colleges, are also becoming less able to increase access to education.[88] State funding for public institutions, once merely trending downward, has plummeted because of recessionary budget shortfalls.[89] As a result of decreased public financial support, tuition has increased sharply when it merely increased steadily in the past.[90] Because public institutions seek to expand access to higher education by using direct subsidies to keep tuition prices low,[91] the erosion of those subsidies—and the commensurate increase in tuition prices—greatly impairs those institutions' ability to expand access to higher education.

Traditional higher education is also an industry dominated by norms and tradition.[92] For all their virtues, these norms cause traditional colleges and universities to be slow to respond to threats or opportunities.[93] For-profit schools share none of these constraints, and they respond rapidly to market changes.[94] For example, many institutions have virtually eliminated admissions standards to take

87. *Cf.* Dill, *supra* note 36, at 149 (noting nonprofit institutions' "overwhelming focus on admissions selectivity"). Title IV, of course, seeks to ensure that, if admitted to a higher-education institution, anyone can pay.

88. *See* STEPHEN G. KATSINAS, MARK M. D'AMICO & JANICE N. FRIEDEL, ACCESS AND FUNDING IN PUBLIC HIGHER EDUCATION—THE 2011 NATIONAL SURVEY (2011) (surveying diminishing financial resources for public education). On the other hand, arguments can be made that consumer demand is actually unduly inflated because of Title IV student aid policies. *See infra* Part IV.B.

89. KATSINAS ET AL., *supra* note 88, at 4; *see also* Lee Gardner & Goldie Blumenstyk, *At Calif. Public Colleges, Dreams Deferred*, CHRON. HIGHER EDUC., Aug. 17, 2012, at A4 (outlining how state budget cuts greatly constrain California state universities' educational capacities).

90. KATSINAS ET AL., *supra* note 88, at 6.

91. *See supra* note 35 and accompanying text.

92. *See* RUCH, *supra* note 63, at 149 ("[M]any traditional colleges and universities have been resistant to change, responding slowly and adapting reluctantly."); *cf.* Dill, *supra* note 36, at 139 n.3 ("[A]cademic freedom and tenure in the US has been more influenced by professional norms and sanctions than by government regulation.").

93. *See, e.g.*, RUCH, *supra* note 63, at 14 ("Standing in the way of quick, effective decision making is the tradition of shared governance.").

94. *See id.* at 149 (acknowledging "how quickly and effectively some of the for-profit education companies have responded to change").

advantage of the "disadvantaged student market."[95] For-profit institutions offer targeted, in-demand programs, lack tenure, conduct no research, and operate year-round.[96]

If the purpose of the HEA is to expand access to higher education for those who are otherwise unable to participate, then arguably no sector of the higher-education industry serves that purpose better than the for-profit sector.[97] By catering to groups that have been traditionally absent from higher education, for-profit institutions are expanding access.[98] Proponents also argue that for-profit institutions achieve the goal of expanding access to higher education at less cost to the taxpayer than would nonprofit institutions. For-profit institutions receive almost all their revenue from tuition.[99] By contrast, public institutions receive a smaller portion of their revenues via tuition and a large proportion from public subsidy.[100] Private nonprofit institutions receive comparatively less revenue from tuition and rely on donations to cover the balance.[101] Nonprofit institutions also receive significant tax breaks, whereas for-profit institutions pay taxes on the profits they generate.[102] Finally, proponents of the for-profit sector argue that their profit motive leads to pedagogical innovation in comparison to calcified traditional institutions.[103]

C. Negative Outcomes Associated with the For-Profit Sector

1. *Unsavory Practices.* Unfortunately, the practices of many for-profit institutions may undermine their proponents' arguments. Unlawful conduct appears to flourish within the sector. Between 1998

---

95. Bonnie K. Fox Garrity, Mark J. Garrison & Roger C. Fiedler, *Access for Whom, Access to What? The Role of the "Disadvantaged Student" Market in the Rise of For-Profit Higher Education in the United States*, 8 J. FOR CRITICAL EDUC. POL'Y STUD. 203, 205 (2010).

96. RUCH, *supra* note 63, at 75.

97. *See* BERG, *supra* note 17, at 79 (explaining the University of Phoenix's desire to offer an efficient education that is "tied closely to the desire to provide access to diverse populations").

98. *See* Garrity et al., *supra* note 95, at 219 (highlighting how the for-profit sector attracts disproportionate numbers of minority and low-income students).

99. RUCH, *supra* note 63, at 98. The remaining 5 percent comes from ancillary operations such as bookstores. *Id.*

100. *Id.* at 97–98.

101. *Id.* at 98.

102. *Id.* at 101.

103. Michael J. Seiden, *For-Profit Colleges Deserve Some Respect*, CHRON. HIGHER EDUC., July 10, 2009, at A80.

and 2004, 74 percent of the Department of Education's institutional fraud cases involved for-profit schools,[104] and the industry's troubled history is well documented.[105] The industry seems to be rid of schools that solicited enrollments and delivered literally nothing in return, but deceptive and fraudulent recruitment practices and unlawful receipt of Title IV aid still persist.[106]

Much of this unlawful conduct stems from the heavy institutional emphasis on recruiting within the for-profit sector. Many for-profit schools run massive, aggressive sales operations, with teams of recruiters in call centers hunting any and all prospective students.[107] Many institutions' recruiting strategies target the "disadvantaged student"[108] and "inflate the high hopes of many students who may be unlikely to achieve the promised successes."[109] Student website queries can result in hundreds of calls.[110] Military students are targeted with particular zeal, thanks to their generous veterans' benefits.[111] Even though institutions may not offer recruiters incentive-based pay in most instances,[112] recruiters nonetheless feel tremendous pressure to bring in students, resulting in unlawful conduct even when the institutions themselves publicly disclaim such

---

104. DEANNE LOONIN & JULIA DEVANTHÉRY, NAT'L CONSUMER LAW CTR., MAKING THE NUMBERS COUNT: WHY PROPRIETARY SCHOOL PERFORMANCE DATA DOESN'T ADD UP AND WHAT CAN BE DONE ABOUT IT 11 (2005). For-profit institutions account for less than 40 percent of all higher-education institutions and only about 9 percent of all enrollments. Guilbert C. Hentchke, Vicente M. Lechuga & William G. Tierney, *For-Profit Colleges and Universities in a Knowledge Economy*, *in* FOR-PROFIT COLLEGES AND UNIVERSITIES: THE RISE OF FOR-PROFIT UNIVERSITIES, *supra* note 40, at 1, 2.

105. *See, e.g.*, *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges*, *supra* note 76, at 14–16 (statement of Pauline Abernathy, Vice President, Institute for College Access and Success) (chronicling decades of concern over practices at for-profit institutions); *see also supra* notes 10, 22 and accompanying text.

106. LOONIN & DEVANTHÉRY, *supra* note 104, at 10.

107. *E.g.*, Barry Yeoman, *The High Price of For-Profit Colleges*, ACADEME, May–June 2011, at 32, 34.

108. Garrity et al., *supra* note 95, at 204–05.

109. Joshua Woods, *Opportunity, Ease, Encouragement, and Shame: A Short Course in Pitching For-Profit Education*, CHRON. HIGHER EDUC., Jan. 13, 2006, at B10.

110. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES 15 (2010), *available at* http://www.gao.gov/assets/130/125197.pdf.

111. *See generally* S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., BENEFITTING WHOM? FOR-PROFIT EDUCATION COMPANIES AND THE GROWTH OF MILITARY EDUCATIONAL BENEFITS (2010) (explaining the perverse incentives created by generous military educational-benefits programs); *see also infra* notes 207–209 and accompanying text.

112. *See supra* note 55 and accompanying text.

behavior.[113] An undercover investigation by the Government Accountability Office (GAO) found that recruiters at every for-profit school targeted by the study made deceptive, if not totally fraudulent, statements to investigators posing as prospective students.[114] For example, one school told the GAO's undercover applicant that barbers could earn $250,000 per year; others encouraged the undercover applicant to take out large amounts of debt because "no one will come after you if you don't pay."[115]

Educational expenses are minimized at many for-profit colleges and universities. The largest and most successful corporate schools standardize the curriculum and de-emphasize the faculty.[116] At the University of Phoenix, most of the instructors are part-time, and central administrators determine course content.[117] Some major for-profit institutions spend more of their budgets on recruiting than on education.[118] Others receive more revenue from Pell Grants alone than they spend in total instructional expenses.[119] There is nothing legally problematic with such an arrangement, because Title IV does not require a school to allocate a certain amount of its budget toward education.[120]

2. *Debt, Dropouts, and Defaults.* Despite their low operating costs, for-profit institutions are expensive. Most for-profit programs cost more than the average nonprofit program,[121] and students at for-profit institutions are more likely to borrow than students at their

113. Even some industry proponents have difficulty denying this point. *See, e.g.*, RUCH, *supra* note 63, at 96 ("[For-profit institutions] use selling techniques to enroll students, leading them through a decision process that, however inadvertently, is not always based on accurate information, may sometimes lead to a certain amount of misrepresentation, and usually involves sales closure tactics that pressure students to sign up.").

114. For examples of these statements, see U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 110, at app. I.

115. *Id.* at 10, 12–13.

116. *See* RUCH, *supra* note 63, at 112, 118 (noting that for-profit institutions tend to manage the curriculum centrally and minimize the governing role of faculty).

117. Breneman, *supra* note 61, at 77.

118. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 6 (2010).

119. Garrity et al., *supra* note 95, at 217. There are some nonprofit institutions that do this as well, but there are comparatively few of them. *Id.*

120. S. HEALTH, EDUC., LABOR & PENSIONS COMM., at 5.

121. *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges*, *supra* note 76, at 14 (statement of Pauline Abernathy, Vice President, Institute for College Access and Success).

nonprofit counterparts.[122] When students do borrow, they usually borrow more than students at nonprofit institutions.[123] This is true even after accounting for demographics.[124] Sometimes loans offered through federal aid programs do not cover the total costs of attending school, and students at for-profit institutions are more likely to take out private loans to cover the remaining cost.[125] For-profit institutions themselves are increasingly likely to offer students loans after a 2008 regulatory reform relaxed the 90/10 rule.[126]

Large amounts of debt lead to poor student outcomes in two ways. First, even if a student's earning power increases as a result of the degree, the student may not earn enough to repay his or her student loans. It is difficult to determine what proportion of for-profit college graduates are unable to find "gainful employment" or a use for their degree or certificate,[127] but anecdotes of graduates who find that their degrees are formally[128] or informally unrecognized by employers are common.[129] According to one study, students of for-profit institutions who dropped out are *less* likely to default on their loans than students who earn degrees, because so many graduates are

122. *Id.* at 3.

123. *Id*.

124. *Id.* at 6–7.

125. *Id.* at 4.

126. DEANNE LOONIN, NAT'L CONSUMER LAW CTR., PILING IT ON: THE GROWTH OF PROPRIETARY SCHOOL LOANS AND THE CONSEQUENCES FOR STUDENTS 25–27 (2011). Institutional loans are no longer counted within the "90" part of the 90/10 rule's calculation. 34 C.F.R. § 668.28(a) (2012).

127. For an overview of the inadequacies of student-performance data collection and reporting, see LOONIN & DEVANTHÉRY, *supra* note 104, at 36–38.

128. When schools are sued for fraudulent recruitment tactics, the suits often concern a school's lack of authority to confer required professional licensing. *See, e.g.*, Class Action Complaint at 24–28, Montgomery v. Corinthian Colls., Inc., No. 10CH50281 (Ill. Cir. Ct. Nov. 23, 2010) (No. 10CH50281), 2010 WL 4815908, ¶¶ 103–13 (alleging that Everest College recruited students for a Medical Assistant program without the accreditation required for students to obtain employment after graduation).

129. *See, e.g.*, Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386, 34,386–87 (June 13, 2011) (codified at 34 C.F.R. pt. 668.7 (2011), *vacated by* Ass'n of Private Sector Colls. & Univs. v. Duncan, No. 11-1314 (RC), 2012 WL 20505237 (D.D.C. June 30, 2012)) (discussing how, in addition to students who default on their loans, there is another sizeable cohort of students who experience significant financial burdens as a result of an education that did not help them advance in a career); *see also Frontline: College, Inc.*, *supra* note 10 (sharing stories of students' negative outcomes after attending for-profit institutions).

unable to pay their debt even if the degree increased their earning power.[130]

Yet even the students who do drop out remain saddled with debt. Though graduation rates can vary dramatically from school to school, for-profit students graduate at far lower rates than their nonprofit counterparts.[131] For example, the six-year graduation rate for bachelor's degree students is 22 percent at four-year for-profit institutions, which is less than half of the rate at nonprofit institutions.[132] For certain demographic groups, the outcomes at for-profit schools are even more troubling. African-American students, for example, graduate half as often—at a rate of just 16 percent—at for-profit schools as they do at nonprofit schools.[133] The data show that many for-profit schools, particularly the largest institutions, are churning students: in one year between 2008 and 2009, sixteen of the largest for-profit institutions' four-year degree programs turned over more than 57 percent of their student body.[134]

Students who attend for-profit schools are also more likely to default on loans than their nonprofit counterparts. The Department of Education estimates that students in two- and four-year programs at for-profit institutions are three times as likely to default over the lifetime of their federal Stafford loans compared to student borrowers as a whole.[135] Even controlling for student demographics and income, students at for-profit schools are still significantly more likely to default than other students.[136] In 2010, the two-year default rate for students at for-profit institutions was double that of students at nonprofit institutions.[137] Default rates on institutional loans are nearly

---

130. *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges*, *supra* note 76, at 11 (statement of Pauline Abernathy, Vice President, Institute for College Access and Success).

131. *Id*. at 9–10.

132. *Id.* at 9.

133. *Id.*

134. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 5 (2010).

135. LOONIN, *supra* note 126, at 10.

136. JONATHAN GURYAN & MATTHEW THOMPSON, CHARLES RIVER ASSOCS., REPORT ON GAINFUL EMPLOYMENT 15 (2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/oira_1840/1840_04232010-h.pdf.

137. *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges*, *supra* note 76, at 7 (statement of Pauline Abernathy, Vice President, Institute for College Access and Success). Students at for-profit institutions make up only 10 percent of the student population. *Id*.

50 percent at some for-profit schools,[138] and losses from private loans grew so much that in 2008 some private lenders ceased lending to students at for-profit schools altogether.[139]

The consequences to students of defaulting on a loan are severe. Federal student loans have some borrower-friendly protections built in—such as favorable interest rates and income-based repayment—but they are nearly impossible to discharge in bankruptcy.[140] Defaulting on federal student loans leads to harsh sanctions, such as the garnishment of the student's wages and ineligibility for student aid in the future.[141] Private and institutional loans are even worse. They lack many of the federal loans' consumer protections yet remain nondischargeable in bankruptcy, often with significantly higher rates and unfavorable terms.[142] Because of these factors, one poor college-borrowing decision can haunt a student for life.[143]

Admittedly, education is difficult to measure and evaluate, and as for-profit educators stress, their schools teach in innovative ways that are even more difficult to assess, such as online-only education.[144] The for-profit sector, however, is results-oriented in a way traditional nonprofit higher education is not.[145] Students at for-profit institutions are more interested in career advancement than in purely academic pursuits,[146] and school recruitment tactics reflect this.[147] It is

138. LOONIN, *supra* note 126, at 19.

139. *Id.* at 10–11.

140. *See* DEANNE LOONIN, NAT'L CONSUMER LAW CTR., PAYING THE PRICE: THE HIGH COST OF PRIVATE STUDENT LOANS AND THE DANGERS FOR STUDENT BORROWERS 12–15 (2008) (highlighting the differences between federal and private student loans). For an analysis of how even the law of student loan dischargeability itself leads to poor outcomes for students, see Amy E. Sparrow, Comment, *Unduly Harsh: The Need To Examine Educational Value in Student Loan Discharge Cases Involving For-Profit Trade Schools*, 80 TEMP. L. REV. 329 (2007).

141. *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges*, *supra* note 76, at 2 (statement of Pauline Abernathy, Vice President, Institute for College Access and Success).

142. *See* LOONIN, *supra* note 140, at 2–6 (outlining the dangers of private loans); LOONIN, *supra* note 126, at 2 (outlining the dangers of institutional loans).

143. *See* Daniel Golden, *Homeless High School Dropouts Lured by For-Profit Colleges*, BLOOMBERG (Apr. 30, 2010, 12:01 AM ET), http://www.bloomberg.com/news/2010-04-30/homeless-dropouts-from-high-school-lured-by-for-profit-colleges-with-cash.html ("In the Cleveland shelters, you can still find people with trade school debts from 20 years ago.").

144. *See supra* notes 94–96 and accompanying text.

145. *See* Ann I. Morey, *Globalization and the Emergence of For-Profit Higher Education*, 48 HIGHER EDUC. 131, 143 (2004) (comparing for-profit institutions' missions with those of liberal-arts educators).

146. *See supra* notes 83–86 and accompanying text.

appropriate, therefore, to evaluate for-profit institutions based on student outcomes because the institutions themselves promise positive student outcomes.

III. FOR-PROFIT INSTITUTIONS AND THE LAW

Federal student aid has fueled the success of for-profit institutions. This Part explains how Title IV has enabled the for-profit higher-education industry's growth and, with it, the incidence of negative student outcomes. Section B examines why the surrounding legal and regulatory regime is unable to prevent those negative outcomes.

A. The Impact of Title IV on For-Profit Institutions

1. *The For-Profit Business Model.* Throughout the 2000s, the Apollo Group, which is the parent company of the University of Phoenix, was an extremely profitable investment.[148] But in 2005, shareholders sued the corporation for securities fraud, alleging that Apollo had failed to disclose a Department of Education report that found that the University of Phoenix had violated Title IV's incentive compensation bans.[149] The mere threat that Phoenix would become ineligible for Title IV funds was worth $277 million to the investors.[150]

As noted earlier, tuition payments account for a significantly higher percentage of revenue at for-profit institutions than at nonprofit institutions.[151] Federal student aid makes up a substantial portion of those tuition revenues. Federal aid, from all sources, makes

---

147. *See* Woods, *supra* note 109 ("The advisors almost always described the benefits of education in terms of future material rewards . . . .").

148. For a discussion of Phoenix's attractiveness to investors, see Andreas Ortmann, *Capital Romance: Why Wall Street Fell in Love with Higher Education*, *in* EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES, *supra* note 2, at 145.

149. *In re* Apollo Grp., Inc. Sec. Litig., No. CV 04-2147-PHX-JAT, 2008 WL 3072731, at *1 (D. Ariz. Aug. 4, 2008), *rev'd*, No. 08-16971, 2010 WL 5927988 (9th Cir. June 3, 2010); Doug Lederman, *Jury Orders U. of Phoenix Parent To Pay $277 Million*, INSIDE HIGHER ED. (Jan. 17, 2008, 4:00 AM), http://www.insidehighered.com/news/2008/01/17/apollo.

150. *See* Lead Plaintiff, the Policemen's Annuity and Benefit Fund of Chicago's Consolidated Class Action Complaint for Violations of Federal Securities Laws at 11–12, *In re Apollo Grp., Inc. Sec. Litig.*, 2008 WL 3072731 (Lead Case No. CV 04-2147-PHX-JAT), 2005 WL 6259503 ("Because for-profit secondary education providers . . . are so dependent on Title IV loan programs, any negative or potentially adverse news or announcements that might impact Title IV qualification . . . are important to reasonable investors and are material to the market." (emphasis omitted)).

151. *See supra* notes 99–102 and accompanying text.

up nearly 90 percent of the revenue for fourteen of the largest for-profit institutions.[152] In 2009, Title IV aid alone accounted for over three quarters of the overall revenue of the five largest for-profit schools.[153] This degree of reliance on Title IV funds is characteristic of the for-profit sector. For-profit institutions enroll a tenth of all students in higher education and receive almost one quarter of all Title IV funds.[154]

2. *Title IV's Role in Fueling Negative Student Outcomes.* Reliance on tuition revenue, particularly Title IV student aid, helps to explain two noteworthy practices within the for-profit sector. First, the reliance on tuition revenue sheds some light on the intense recruiting focus of many for-profit institutions. Without other sources of revenue, enrollment growth is necessary for revenue growth.[155] Second, the fact that Title IV need-based aid has proved so lucrative illuminates why the student populations at for-profit institutions differ from those at nonprofit institutions. Students whom traditional institutions consider to be unqualified for admission are, for the most part, still eligible to borrow money to pay for an education at a for-profit institution.[156] The result is an industry full of institutions that are "built to swallow Title IV funds in the way a whale gathers up plankton."[157]

In some sense, this extensive recruiting activity by for-profit institutions serves the purposes of the HEA because the federal student-aid program looks to increase access to higher education.[158] More access is thought to be better, and it is imperative for historically underserved, low-income, and nontraditional students to pursue higher education.[159] For-profit institutions have been

---

152. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., THE RETURN ON THE FEDERAL INVESTMENT IN FOR-PROFIT EDUCATION: DEBT WITHOUT A DIPLOMA 10 (2010).

153. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 4 (2010).

154. *Id.*

155. *See* RUCH, *supra* note 63, at 85–88 (explaining pricing strategies at for-profit institutions).

156. *See* BERG, *supra* note 17, at 67 ("[T]he University of Phoenix . . . counters criticism of its open admissions policy with accusations of elitism. . . . [A]nyone who wants an education should be able to receive it.").

157. Daniel Kruger, *Blackboard Jungle*, FORBES MAG., Dec. 13, 2004, at 118, 120.

158. *See supra* Part I.A.

159. *See supra* notes 27–33 and accompanying text.

successful at expanding access to these populations.[160] But access to higher education is not contemplated within the HEA as an end unto itself, but rather a means to increased student and societal welfare.[161] For many students at for-profit institutions, Title IV only mires them in debt.[162] Even further, it appears that increased reliance on Title IV itself is strongly correlated with negative student outcomes in the for-profit sector.[163] How does Title IV turn access to higher education from an opportunity into a trap?

Under Title IV, a school suffers few consequences for negative student outcomes.[164] Students are responsible for paying their own debt and the government assumes the risk of default.[165] This arrangement bears a strong resemblance to the subprime mortgage market, which flourished in the 2000s as many lenders avoided bearing the risk from their lending activities.[166] Lenders in the subprime market profited by ignoring creditworthiness, increasing lending activity, and divesting themselves of the risk.[167] Title IV funds are available to any student who has been admitted into an academic or vocational program. Economic tests for student creditworthiness were flatly rejected.[168] In most other contexts, borrowers must pass some measure of creditworthiness, and it is in the lender's best interest to lend only to worthy borrowers. Title IV encourages schools to accept many students who must then borrow significant

---

160. *See supra* notes 76–79 and accompanying text.

161. *See supra* notes 27–33 and accompanying text.

162. *See supra* Part II.C.

163. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-97-103, PROPRIETARY SCHOOLS: POORER STUDENT OUTCOMES AT SCHOOLS THAT RELY MORE ON FEDERAL AID 3 (1997), *available at* http://www.gpo.gov/fdsys/pkg/GAOREPORTS-HEHS-97-103/pdf/GAOREPORTS-HEHS-97-103.pdf.

164. Legal and regulatory devices meant to restrain school conduct are discussed *infra* Part III.B.

165. *See supra* notes 121–147 and accompanying text.

166. For a comparison between the current market for student loans and the subprime mortgage market, see LOONIN, *supra* note 140, at 6–9; compare Katherine Mangu-Ward, *Education for Profit: Why Is Everyone Flaming the University of Phoenix?*, REASON, July 2008, at 39, 40 ("As with subprimes, a nonnegligible portion of consumers won't be able to stay afloat . . . . But the students who do graduate—like the millions who use subprime deals to gain a firmer foothold in the housing market—have a much different story to tell.").

167. *See, e.g.*, Martin F. Hellwig, *Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis*, 157 DE ECONOMIST 129, 139–42, 146–47 (2009) ("The risks of [subprime] mortgage finance [were] thus transferred from the originating institution . . . .").

168. *See* Glater, *supra* note 20, at 12 n.1 (citing one senator's belief that an "economic test" of creditworthiness would impose "an ever greater obstacle to higher education as rising prices ma[k]e paying for college more challenging").

sums to attend, even if the schools would never lend to the students themselves.[169]

For a profit-maximizing institution, Title IV sets up a system of perverse incentives. When a student takes out tens of thousands of dollars in debt and receives little value in return, both the student and the government are worse for the exchange, but the school keeps its tuition dollars. When a student enrolls and receives a Pell Grant, only to drop out after a few months, the student is somewhat worse off—having exhausted his or her Pell Grant, which could have been applied toward a future educational venture—but the government has spent thousands of dollars with very little return, and the school has received free money. Indeed, a for-profit institution earns its profits by minimizing per-student expenditures and by maximizing student debt. Because the students' debt is owed to the government or private lenders, rather than to the school, many schools have little stake in their students' outcomes.

3. Inadequacies of the Market Model for Higher Education. Those within the for-profit higher-education industry believe that market pressures mitigate Title IV's perverse incentives.[170] This argument can be articulated in two ways. One view is that the student consumers can and will differentiate between high- and low-quality institutions, weeding out institutions that fail to deliver value to students.[171] The other view is that the marketplace merely reflects consumer preferences, for better or for worse—that successful for-profit schools are merely delivering what consumers demand.[172]

The former explanation is incorrect, the latter, irrelevant. First, students are not, in fact, able to evaluate accurately the quality of an educational institution before enrollment.[173] Information asymmetries plague the enrollment process, and students simply cannot obtain the data they would require to evaluate rigorously many for-profit

169. The existence of a burgeoning institutional-loan market does not contradict this statement. As discussed *infra* Part III.B.2, institutional loans are likely viewed as loss leaders that allow schools to preserve their 90-10 eligibility.

170. *See* RUCH, *supra* note 63, at 140–43 (naming the marketplace as a "guardian of institutional quality and integrity").

171. *See* Breneman, *supra* note 61, at 89 ("[A]n institution such as the University of Phoenix has a huge stake in building and sustaining its reputation for quality, and . . . short-run profit maximization . . . runs contrary to long-run profit maximization linked to reputation.").

172. RUCH, *supra* note 63, at 144.

173. Pusser, *supra* note 13, at 32–33.

schools based on clear, objective criteria such as job placement or completion numbers.[174] The available data are often flawed or unintelligible.[175] Furthermore, many individuals recruited by for-profit colleges are unfamiliar with the market for higher education and may be easily swayed by a relentless aspirational campaign about their educational investment—particularly when the federal government will be providing generous assistance.[176]

Second, massive federal intervention has already skewed the market for higher education. The entire purpose of Title IV is to use government aid to increase consumer demand for higher education.[177] Indeed, for-profit institutions receive such a high percentage of tuition revenue from Title IV that government intervention—not any inherent demand on the part of students—may be the prime mover in the story of enrollment successes at many for-profit institutions.[178] When a government program drives consumer behavior, merely positing that the market reflects consumer demand does not answer the question of whether the market prevents misuses of that government program. Surely Congress, when it enacted the HEA, did not intend for Title IV to leave students worse off.[179]

Furthermore, evidence suggests that the market for higher education, propelled by Title IV portable-student subsidies, may play a role in decreasing overall student welfare by leading to higher prices. Because consumers are unable to evaluate institutions accurately, students turn to secondary indicators of quality such as prestige.[180] But prestige is expensive to generate and maintain.[181]

174. *See* LOONIN & DEVANTHÉRY, *supra* note 104, at 28–29 ("No admissions representative gave official completion rate statistics. . . . Job placement rates were equally difficult to obtain. Most admissions officers would not give placement in the form of a rate."). For this study, the authors attempted, often unsuccessfully, to obtain job-placement and completion-rate information from schools and the federal and state regulatory bodies and accreditation agencies. *Id.* at 27.

175. *Id.* at 35–39.

176. *See* Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386, 34,456 (June 13, 2011) (codified at 34 C.F.R. pt. 668.7 (2011), *vacated by* Ass'n of Private Sector Colls. & Univs. v. Duncan, No. 11-1314 (RC), 2012 WL 20505237 (D.D.C. June 30, 2012)) ("Students . . . often have limited information, little or no experience choosing [schools], and asymmetric information . . . . [T]hese gaps in information sometimes lead to students and their families making suboptimal choices. . . .").

177. *See supra* notes 3–4 and accompanying text.

178. *See supra* notes 150, 152–154 and accompanying text.

179. *See supra* notes 27–33 and accompanying text.

180. Dill, *supra* note 36, at 146–47.

181. *Id.* at 152–53.

Indeed, this dynamic may be responsible for the steady rise in the price of education at nonprofit institutions.[182] In this respect, enabling the student as a consumer could lead to students, as a group, being worse off than otherwise. This is not to say that the market has no value in sorting student consumers across the higher-education landscape. Rather, the market simply does not sufficiently constrain the conduct of for-profit institutions in a way that would satisfactorily prevent negative student outcomes and abuse of the Title IV program.

B. *The Inadequacy of Available Legal Tools in Preventing Negative Student Outcomes*

To date, the Title IV regulatory regime has failed to prevent for-profit institutions from turning the program from an opportunity into a trap. Individual students find that litigation provides redress in only the most outrageous cases, because only a small portion of negative student outcomes arise from clearly illegal conduct. Regulatory devices meant to prevent abuse of Title IV have proven themselves ineffective or easily evaded. And industry oversight, a keystone of the Title IV regulatory triad, is not up to the task demanded of it.

1. *Student Litigation Options and the Legality of a Bad Deal.* A variety of litigation options exist for students who find themselves worse off after their experiences with for-profit institutions. Suits for fraudulent misrepresentations during the recruitment process are the most common and fruitful option for potential litigants.[183] In certain cases, such as when recruiters make "specific and isolated" representations that are easily proven as false and material, such as accreditation or licensing status, fraud litigation can be an effective tool for redress.[184]

Even the most ardent skeptics of the for-profit higher-education industry, however, would concede that a great deal of negative student outcomes do not implicate recruiting fraud. Getting a bad

182. *See* RUCH, *supra* note 63, at 86 ("[C]ompetition among non-profit institutions . . . has fueled the creation of costly amenities . . . which may have little to do . . . with the quality of education.").

183. *See* Linehan, *supra* note 42, at 766 (explaining why fraudulent-misrepresentation suits are "appealing weapons" in comparison to less frequently used litigation tools for addressing negative student outcomes at for-profit schools).

184. *Id.*

deal is problematic, but not unlawful.[185] Nor should the courts be in the business of investigating the wisdom of individual student debt loads or choices to attend schools that are more expensive than alternatives,[186] particularly when so many burdensome debts would not have been possible without federal intervention in the first place.[187]

That said, it is worth asking whether courts do, in fact, protect against deceitful conduct. Misrepresentations go unpunished because of the sheer number of variables that interact with a student on his or her path from recruitment to default.[188] This uncertainty undermines virtually every prong of a plaintiff's fraud case, from falsity[189] to scienter[190] to reliance[191] to causation.[192] Fraud doctrine, therefore, would appear to do very little to rein in schools' recruiting behavior.

2. *Shortcomings of Title IV Regulatory Devices.* With so many for-profit institutions reliant on Title IV as a revenue source, the threat to revoke an institution's eligibility to receive funds through the program might seem excessively forceful.[193] However, the regulatory regime has failed to prevent Title IV from facilitating negative student outcomes. The strings attached to eligibility are too weak to serve their intended purpose.

Regulating the cohort default rate might seem to be the regulatory device most tailored to the problems at hand, because it

185. *Cf.* 34 C.F.R. § 668.7 (2011), *vacated by* Ass'n of Private Sector Colls. & Univs. v. Duncan, No. 11-1314 (RC), 2012 WL 20505237 (D.D.C. June 30, 2012) (attempting to hold for-profit institutions accountable for negative student outcomes through the gainful employment rule).

186. This view is reflected by the "academic abstention" doctrine, whereby courts generally steer clear of qualitative judgments of educational institutions. Linehan, *supra* note 42, at 764–65.

187. *See* S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., THE RETURN ON THE FEDERAL INVESTMENT IN FOR-PROFIT EDUCATION: DEBT WITHOUT A DIPLOMA 11–12 (2010) (bemoaning the role federal dollars play in fueling burdensome debts).

188. *See* Linehan, *supra* note 42, at 768 (noting the impact of "student ability, labor demand, [and] other factors outside the control of the school").

189. *See id.* at 767 ("[F]orward-looking statements that rely on factors outside the school's control lack . . . the requisite degree of falsity . . . .").

190. *See* Taylor, *supra* note 33, at 764 ("[P]roprietary schools are able to hide behind the fact that much of what determines a graduate's job prospects is outside of the school's control.").

191. *See* Linehan, *supra* note 42, at 768 ("[I]t is generally recognized that one does not have the right to rely on statements that are predictive of the future.").

192. *See id.* at 769 (noting "courts' concern about their own inability to discern a causal link between the student's failure to learn and the school's educational program").

193. *See supra* Part III.A.1.

directly measures student outcomes. A school loses eligibility to receive Title IV funds if, for three consecutive years, more than 25 percent of its students default on certain federal student loans within two years of the time when the students began repayment, or if during any single year more than 40 percent of a student cohort defaults.[194] Most students are granted a six-month grace period after graduation or withdrawal before making payments on their loans, and it takes between 270 and 360 additional days of nonpayment before a student is considered in default.[195] Because of additional procedural requirements, "[i]t takes about 600 days for a borrower to default on a [Title IV] loan after the student ends attendance."[196] Additionally, many students in financial trouble are eligible for payment postponement measures, including deferrals based upon financial hardship.[197] A student who passes through the cohort window while in deferment is not counted as having defaulted, even if the student defaults immediately upon the expiration of the deferral.[198]

With such a brief window within which a student could default for the purposes of the cohort default rule, it is a wonder that any schools ever fail this measure. It seems sensible to cap measures of the cohort default rate after some time. As time passes, the school's effect on the student's outcome is outweighed by a variety of intervening factors. Too-stringent cohort default-rate calculations would also discourage schools from admitting low-income students or other students from populations associated with higher default rates. However, two- or three-year rate calculations are far too narrow to have any impact on preventing negative student outcomes when defaults are so much higher over the lifetime of the loan.[199] It even appears that because the short measurements offer such little time for

---

194. 34 C.F.R. §§ 668.183, 668.187 (2012). For loans originating after 2009, the cohort default rate is calculated with a three-year rather than a two-year window. *Id.* §§ 668.200–02.

195. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., ED-OIG/A02H0007, FINAL AUDIT REPORT: TECHNICAL CAREER INSTITUTES, INC.'S ADMINISTRATION OF THE FEDERAL PELL GRANT AND FEDERAL FAMILY EDUCATION LOAN PROGRAMS 7 n.6 (2008), *available at* http://www2.ed.gov/about/offices/list/oig/auditreports/fy2008/a02h0007.pdf.

196. *Id.* at 7.

197. *See* 34 C.F.R. § 685.204 (outlining procedures for financial hardship deferment).

198. *See* Johnson, *supra* note 26, at 244 (explaining deferment and forbearance exclusions to the default rate calculation).

199. *See* S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 10 (2010) ("[D]efault rates . . . do not fully capture students who default. . . .").

students to default, many colleges can successfully delay default until after the period ends.[200] Ultimately, it is necessary to circumscribe the cohort default calculation, excluding many defaults out of fairness to the school, which highlights the limited utility of using cohort default rates as a method of reducing negative student outcomes. Even the Department of Education has conceded that the cohort default rate is a better measure of loss to taxpayers than of harm to students.[201]

The 90/10 rule is another major regulatory condition that is both lenient and easily avoided. Unlike the cohort default rate regulations, the 90/10 rule focuses on inputs rather than outputs. Because an institution's greater reliance on federal student aid is associated with poorer student outcomes,[202] the rule attempts to ensure that a school offers an education of sufficient quality to attract funds independent of those guaranteed by the federal government.[203]

Stated simply, the 90/10 rule requires that a for-profit institution receive more than 10 percent of its revenue from sources other than Title IV student aid.[204] Many sources of student aid can satisfy the 10 percent requirement, including veterans' benefits or institutional loans.[205] Compelling justifications exist for excluding each of these revenue sources from the 90-percent calculation.[206] In the aggregate, though, they allow schools to receive virtually all of their revenue from government yet remain in compliance.[207] This arrangement not only undermines the 90/10 rule itself, because an institution that obtains 93 percent of its revenue from the government, albeit indirectly, through students' tuition payments, has clearly not

---

200. *See Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges*, *supra* note 76, at 9 (statement of Pauline Abernathy, Vice President, Institute for College Access and Success) ("[C]olleges kept defaults down during, but not after, the period in which they were being tracked . . . .").

201. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386, 34,411 (June 13, 2011) (codified at 34 C.F.R. pt. 668.7 (2011), *vacated by* Ass'n of Private Sector Colls. & Univs. v. Duncan, No. 11-1314 (RC), 2012 WL 20505237 (D.D.C. June 30, 2012)).

202. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 163, at 3.

203. LOONIN, *supra* note 126, at 25.

204. 34 C.F.R. § 668.28 (2012).

205. *See supra* note 54 and accompanying text.

206. For example, the Department of Education understandably would not want to make a school choose between accepting the federal student aid for a low-income student receiving Title IV funds and that of a combat veteran receiving veterans' benefits.

207. *See* S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., THE RETURN ON THE FEDERAL INVESTMENT IN FOR-PROFIT EDUCATION: DEBT WITHOUT A DIPLOMA 10 (2010) (observing that one for-profit institution received 93.1 percent of its revenue from the federal government).

obtained independence from government funding. But it threatens the integrity of programs such as the veterans' benefit programs that may be used to satisfy the 10-percent requirement but that are, nonetheless, federal funding.[208] When a school's revenue balance begins to approach the 90-percent threshold, every dollar collected from a 10-percent source becomes immensely valuable. One veterans' benefits dollar allows a school to collect nine more Title IV dollars that they otherwise would have been barred from receiving, thus illuminating perhaps the best explanation for why veterans are so heavily recruited by for-profit schools.[209] These funding rules also explain why many for-profit schools seem ambivalent about outrageous write-off rates on their own institutional loans. Institutional loans can be viewed as "loss leaders" because they allow schools to expand their Title IV collection activities.[210]

The cohort default rate and the 90/10 rules are the two federal regulations that do the most work ensuring positive student outcomes within the Title IV aid program.[211] Other rules, such as the ban on incentive payments for recruiters,[212] are tailored more toward curbing fraud than preventing students from receiving a bad deal. Similarly, state oversight of for-profit schools tends not to address negative outcomes enabled by the Title IV program, because states have relatively little interest in the success or failure of Title IV.[213] Finally,

---

208. *See* S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., BENEFITTING WHOM? FOR-PROFIT EDUCATION COMPANIES AND THE GROWTH OF MILITARY EDUCATIONAL BENEFITS 4 (2010) ("Congress may have unintentionally subjected this new generation of veterans to the worst excesses of the for-profit industry . . . .").

209. More than one-third of payments from the Post-9/11 Veterans Educational Assistance Act of 2008, Pub. L. No. 110-252, tit. V, 122 Stat. 2357 (2008) (codified as amended at 10 U.S.C. §§ 16132a, 16163a, 38 U.S.C. §§ 3301, 3311–3324 (Supp. IV 2011)), went to students at for-profit institutions in the program's first year, *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges*, *supra* note 76, at 13 (statement of Pauline Abernathy, Vice President, Institute for College Access and Success).

210. *See* LOONIN, *supra* note 126, at 28 (noting one for-profit institution's begrudging acceptance of a loss of $75 million in private student loans).

211. *See supra* notes 50–55, 199–216 and accompanying text.

212. *See supra* note 55 and accompanying text.

213. *See* Linehan, *supra* note 42, at 782 ("[T]he states have relatively little to lose from student loan default resulting from proprietary schools' predatory practices . . . ."); *see also Improving For-Profit Higher Education: A Roundtable Discussion of Policy Solutions: Hearing Before the S. Comm. on Health, Educ., Labor, & Pensions*, 112th Cong. 4 (2011) (statement of Barmak Nassirian, Associate Executive Director, American Association of Collegiate Registrars and Admissions Officers), *available at* http://help.senate.gov/imo/media/doc/Nassirian.pdf ("[S]tates have none of their own resources at risk, [and] they have no particular . . . incentive to engage in meaningful oversight . . . .").

it is unclear what impact the Department of Education's new gainful employment rules[214] would have had on reducing negative student outcomes enabled by Title IV.[215] An extra set of performance standards could have provided students with welcome safeguards, but many critics suggested that the final language of the regulations was too weak to make a difference.[216]

3. *The Inherent Limits of Industry Sanctions.* Higher education has traditionally been a self-regulated field.[217] Norms and tradition inform many practices within the industry, including the dominance of the nonprofit form.[218] Accreditation served as a form of industry self-regulation long before it was incorporated into the federal regulatory structure.[219] Federal authority was first delegated to accreditors in 1952, in an amendment to the G.I. Bill.[220]

Within the regulatory triad, questions about the efficacy and value of academic programs or institutions are left to professional educators.[221] Given federal and state governments' great reluctance to qualitatively evaluate academic institutions, accreditation would seem an appropriate venue for ensuring positive student outcomes. In theory, Title IV access is only awarded to institutions that have been judged by experts and peers to deliver a satisfactory educational

---

214. 34 C.F.R. § 668.7 (2011), *vacated by* Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012). As noted *supra* note 59, it is possible that upon remand or through further rulemaking, the Department of Education reinstates the substance of the gainful employment rules.

215. *See* Michael Stratford, *193 Vocational Programs, All at For-Profits, Fail 'Gainful Employment' Test*, CHRON. HIGHER EDUC., July 6, 2012, at A14 (noting that when the Department of Education assessed for-profit institutions' compliance with the gainful employment rules before the rules were to go into effect, about 5 percent of programs at for-profit institutions would have been rendered ineligible for federal student aid).

216. *See, e.g.*, Johnson, *supra* note 6, at 261 (characterizing the rule as "a case of shockingly low expectations"). Perhaps more important is the dilemma outlined *infra* Part IV.C. If the rule had been truly successful at preventing poor outcomes, it would almost certainly have done so by sacrificing access to higher education, thereby limiting the *positive* impacts of Title IV.

217. *See supra* note 92 and accompanying text.

218. *See* Pusser, *supra* note 13, at 24 (noting the peculiarity of an industry dominated by nonprofit institutions); *see also supra* note 92 and accompanying text.

219. KINSER, *supra* note 22, at 100.

220. Veterans' Readjustment Assistance Act of 1952, ch. 875, pt. VI, § 253(a)(1), 66 Stat. 663, 675, *replaced by* Veterans' Benefits, Pub. L. No. 85-857, 72 Stat. 1105 (1958) (codified as amended at 38 U.S.C. (2006 & Supp. IV 2011)).

221. *See supra* note 44 and accompanying text.

product.[222] In practice, higher academic self-regulation fails to offer the scrutiny that would be required to prevent negative student outcomes at any significant level.

Accreditation fails to give for-profit institutions a sufficiently close look for three reasons. First, national accrediting agencies provide the requisite approval for most for-profit schools.[223] These agencies are more diffuse and have fewer resources than the six main regional accreditors, and their standards are generally considered lower because they operate on a smaller scale,[224] providing accreditation to career-oriented programs rather than institutions.[225] Accreditors with less administrative capability often appear to operate under a presumption to grant accreditation.[226] For an institution that treats accreditation as merely a business objective,[227] these national accrediting organizations are very appealing.

Second, regional accrediting organizations are known for more stringent standards,[228] but they have found it difficult to assess for-profit institutions that disregard the norms of traditional higher education.[229] For-profit institutions are industry rogues.[230] They treat faculty as contractors, removing them from the administrative process and curriculum development.[231] They treat education as a commodity with little inherent value.[232] They standardize curricula and ignore the

---

222. *See Bridgepoint Education, Inc.: A Case Study in For-Profit Higher Education: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 112th Cong. 1 (2011) (statement of Sylvia Manning, President, Higher Learning Commission, North Central Association of Colleges and Schools), *available at* http://help.senate.gov/imo/media/doc/Manning.pdf ("[T]o assess academic quality at the level of higher education, you need the authority of professional experience and current knowledge.").

223. KINSER, *supra* note 22, at 106.

224. *See Improving For-Profit Higher Education: A Roundtable Discussion of Policy Solutions*, *supra* note 213, at 2 (statement of Barmak Nassirian, Associate Executive Director, American Association of Collegiate Registrars and Admissions Officers) (explaining the practical difficulties in enforcing high standards for accreditors lacking in resources).

225. KINSER, *supra* note 22, at 98.

226. *See id.* at 3 ("Accrediting bodies have strong financial, political, and legal incentives to approve even the most questionable applicants.").

227. RUCH, *supra* note 78, at 141.

228. *See, e.g.*, KINSER, *supra* note 22, at 99 ("[R]egional accreditation has been traditionally perceived as an indication of quality and status." (citation omitted)).

229. *Id.* at 108–110.

230. *See* BERG, *supra* note 17, at 93–106 (describing "for-profit university culture").

231. *See, e.g.*, Breneman, *supra* note 61, at 85–86 (detailing this phenomenon at the University of Phoenix).

232. *Cf.* RUCH, *supra* note 63, at 18 ("The generation, dissemination, and advancement of knowledge are core values that are . . . more or less woven into the mission statement of

traditional academic calendar.[233] They install "campuses" in office parks around the country rather than in one single location, or in the case of some online schools, they have no campuses at all.[234] They have fundamentally different goals than traditional higher-education institutions, being neither philanthropic nor prestige-seeking.[235] Having moved past a time when for-profit institutions were categorically excluded from regional accrediting status,[236] accreditors have largely responded to the paradigm-shifting nature of for-profit institutions by holding fast to formalist requirements, such as mandating installation of hard-copy libraries.[237] Regional accreditors also struggle with evaluating institutions based in their region but with fundamentally national operations.[238]

Third, the accreditation process is vulnerable to capture, due to the fact that the enormously valuable Title IV funds are only available to accredited institutions.[239] For-profit institutions have purchased entire colleges to piggyback on the college's accreditation, dramatically expanding the old school's "existing" programs rather than starting from scratch and going through the accreditation process.[240] With so much at stake, considerable pressure is exerted upon accrediting agencies, which are financially dependent on their institutional members and whose officers are largely drawn from the

---

virtually every respectable, traditional academic institution. Even for-profit providers do not totally ignore these values, for they are more or less built into accreditation and state licensing standards.").

233. Many for-profit institutions eschew the semester format for a schedule in which students take one intensive five-week course at a time. *E.g.*, OFFICE OF INSPECTOR GEN., *supra* note 57, at 1.

234. *See* RUCH*, supra* note 63, at 44 (describing a typical campus of Strayer University).

235. *See id.* at 16 ("The non-profits are driven by . . . the prestige motive, as opposed to the profit motive on the for-profit side.").

236. KINSER, *supra* note 22, at 102–03.

237. *See* RUCH, *supra* note 63, at 41 (confessing that most of DeVry University's library investments were only made because of accreditation directives).

238. KINSER, *supra* note 22, at 108–10.

239. *See Improving For-Profit Education: A Roundtable Discussion of Policy Solutions*, *supra* note 213, at 2 (statement of Barmak Nassirian, Associate Executive Director, American Association of Collegiate Registrars and Admissions Officers) ("[A]ccreditation is dominated by the very entities that it is supposed to oversee.").

240. S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 2–3 (2010). Accreditors have begun to crack down on this behavior. *Bridgepoint Education, Inc.: A Case Study in For-Profit Higher Education*, *supra* note 222, at 3 (statement of Sylvia Manning, President, Higher Learning Commission, North Central Association of Colleges and Schools).

institutions they oversee.[241] Further, accreditors themselves continue to insist that their role is to evaluate educational institutions as educators, not to uphold the integrity of the Title IV system.[242]

IV. SOLVING TITLE IV: A CONTINUUM OF APPROACHES

If Title IV encourages the negative outcomes suffered by many students at for-profit schools, what can be done? This Part examines a variety of broad approaches to reducing negative student outcomes. These approaches differ based on their hostility toward the for-profit higher-education sector in an attempt to reduce negative student outcomes at those institutions. Ultimately, however, it is difficult to envision an approach working within Title IV that solves the problems posed by negative student outcomes at for-profit institutions to a satisfactory degree while still advancing the HEA's worthwhile goals.

A. Eliminate Federal Student Aid Eligibility of For-Profit Institutions

Participation by the for-profit sector in the Title IV student-aid program is certainly not a given; it took for-profit institutions seven years to be allowed into the program.[243] To combat negative outcomes associated with the for-profit sector, then, singling out the for-profit sector for the purposes of Title IV might seem to be a logical approach for policymakers. This approach could take many forms: Congress could simply return to the 1965 formulation of Title IV in which the for-profit sector is categorically excluded,[244] or Congress or the Department of Education could implement onerous measures singling out for-profit institutions for special treatment to exclude the industry *de facto*.

The argument for such an approach is straightforward. There are significant differences between for-profit institutions and the rest of the higher-education industry.[245] Some commentators argue that the profit motive is totally or to a large degree incompatible with the HEA's desire to increase the creation of a public good, particularly

---

241. *Improving For-Profit Education: A Roundtable Discussion of Policy Solutions*, *supra* note 213, at 2 (statement of Barmak Nassirian, Associate Executive Director, American Association of Collegiate Registrars and Admissions Officers).

242. ABUSES IN FEDERAL STUDENT AID PROGRAMS, S. REP. NO. 102-58, at 17–18 (1991).

243. *See supra* notes 23–25 and accompanying text.

244. *See supra* note 23 and accompanying text.

245. *See supra* notes 230–235 and accompanying text.

when such a thriving nonprofit cohort—with philanthropic goals generally aligned with those outlined in the HEA—already dominates the field.[246] Indeed, extinguishing the private, for-profit sector would result in a higher-education industry that more resembles its traditional state, in which for-profit institutions played a much smaller role.[247]

Plus, for-profit institutions are already singled out for special treatment under Title IV. As noted earlier, they were excluded entirely under the original version of the HEA.[248] Many of the Title IV regulations apply to the for-profit sector only, such as the "gainful employment" language in the 1972 amendments, their accompanying rulemaking, and the 90/10 rule.[249] Even nonprofit career colleges, which use ostensibly the same employment-focused educational approach as many for-profit institutions, are not legally required to prepare students for "gainful employment in a recognized occupation" in the way for-profit institutions are.[250]

This categorical approach, however, is shortsighted—in addition to being a political non-starter.[251] For-profit institutions surely create *some* social good. They offer education to populations that remain underserved by traditional higher-education institutions,[252] particularly as public funding for public universities and community colleges continues to plummet.[253] Further, because of the sheer number of schools within the industry and their great heterogeneity, there must be a large coterie of schools that does *not* contribute disproportionally to negative student outcomes. To the extent they

---

246. *See* S. HEALTH, EDUC., LABOR & PENSIONS COMM., 112TH CONG., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 1 (2010) ("[E]ach corporation must act in the interest of its shareholders. However, this imperative could conflict with the objective of Federal student aid programs . . . .").

247. *See, e.g.*, KINSER, *supra* note 22, at 23 ("Unlike [in] some earlier periods . . . there seems to be little doubt of the for-profit sector's survival.").

248. *See supra* note 23.

249. *See supra* notes 51–58 and accompanying text.

250. *See, e.g.*, 20 U.S.C. § 1002(b) (2006 & Supp. IV 2011) (drawing a distinction between traditional higher-education institutions and for-profit institutions); *see also* 34 C.F.R. §668.28(a)(1) (2012) (applying the 90/10 rule only to for-profit institutions).

251. *See* Sam Dillon, *Online Colleges Receive a Boost from Congress*, N.Y. TIMES, Mar. 1, 2006, at A1 ("[For-profits] have a full-blown lobbying effort and give lots of money to campaigns. In 10 years, the power of this interest group has spiked as much as any you'll find." (quoting Rep. Michael N. Castle) (internal quotation marks omitted)).

252. *See supra* notes 76–78 and accompanying text.

253. *See supra* note 88.

could be categorized as such, and this Note does not attempt to do so, excluding these "good" for-profit schools would only hurt students by reducing access without a corresponding reduction in negative outcomes. It is not even clear that the for-profit motive is actually incongruous with Title IV. After all, the HEA seeks to expand access to education to the broadest extent, particularly with regard to the very low-income, minority, or nontraditional students served disproportionately by for-profit institutions.[254]

For its boldness, such an approach would also be an underinclusive attempt to reduce negative student outcomes in higher education. Though students from for-profit institutions are responsible for a disproportionate number of Title IV loan defaults, for example, those students still represent less than half of the total number of overall defaults.[255] The lack of a profit motive has not stopped nonprofit institutions from steadily and dramatically increasing their own tuition prices over the last few decades.[256] What nonprofit institutions forego in profit they appear to make up for in inefficiency, often at the student's expense.[257] Nonprofit institutions also must deal with their own issues of institutional priorities and often find themselves working to increase their own prestige through measures unrelated to academic value.[258]

B. Reduce Access to Federal Student Aid

The approach at the other end of the spectrum treats for-profit and nonprofit institutions equally. If Title IV is truly fueling the negative student outcomes caused by for-profit schools, but if categorically excluding for-profit schools from the program is unwise or unpalatable, then it is Title IV itself that requires a second look. Under this approach, Congress could seek to reduce Title IV's capability to fuel negative student outcomes by reducing the federal investment in expanding access to education. This could be done by decreasing the amount of credit offered through the program or by implementing stronger gatekeeping measures to assess student

254. *See supra* notes 3–4, 8, 76–78 and accompanying text.

255. *See supra* note 137 and accompanying text.

256. *See supra* note 182 and accompanying text.

257. *See* RUCH, *supra* note 78, at 93 (positing that administrators at nonprofit institutions have "little or no financial incentive to increase operating efficiency . . . [and are] confronted with a significant disincentive to generate savings").

258. *See supra* note 180 and accompanying text.

creditworthiness before allowing them to borrow or otherwise receive aid.

If too much student access to credit were the problem, this approach solves it. At some point, credit offered for an education—and by extension, the educational opportunity the credit unlocks—simply may not put students in a position to succeed. No education at all might be better than a poor or incomplete one fueled by excessive debt. If a student is unable to extract sufficient value from the point of their enrollment forward, it serves neither the student nor society to allow that student to borrow against his or her own future. Some might argue that it is simply naïve to assume that all students are an appropriate fit for higher education, and that the current level of access to federal aid merely creates a market for subprime education.[259]

Though this Note does suggest that the Title IV program lies at the heart of many negative student outcomes,[260] the cure offered by this approach is worse than the disease. First, erecting barriers of creditworthiness to Title IV aid would result in a dramatic reduction in aid for the neediest students. A relatively small deemphasis on grant- and loan-based aid in favor of deductible tax credits has already had the effect of reducing access for the poor in favor of greater affordability to the middle class.[261] The same effect can be observed when need-based aid becomes merit-based.[262] Conditioning Title IV aid on creditworthiness—assessed via measures of prior academic performance, or even a student's assets—will almost certainly have the same effect.

An across-the-board reduction in availability of grant- or loan-based aid will result in great reductions in access to higher education, resulting in otherwise-worthy students missing out on the opportunity for an education. Reducing aid to students would also lead to worse outcomes for those students who are not deterred from pursuing an education despite the reduced level of aid. Private loans, after all, are available and sometimes necessary for students even under the current system, and their higher interest rates and lack of favorable

259. For an extensive comparison between the subprime mortgage market and the student loan "push market," see LOONIN, *supra* note 140, at 33–43.

260. *See supra* Part III.A.2.

261. JAMES B. STEDMAN, CONG. RESEARCH SERV., IB10097, THE HIGHER EDUCATION ACT: REAUTHORIZATION STATUS AND ISSUES 7 (2004).

262. Pusser, *supra* note 13, at 28.

federal-aid protections cause greater pain than Title IV loans if the student's investment proves to be unwise.[263]

This approach would represent an abandonment of the principles that underlie the HEA. Reducing access to credit, without some countervailing means of support, may indeed protect the public and save some students from themselves, but it would come at a significant cost: closing the "door to knowledge" for many Americans, including significant populations of low-income, minority, and nontraditional students.[264]

C. Strengthen the Title IV Regulatory Regime

The inadequacy of the regulatory regime responsible for guiding Title IV presents an opportunity to solve the problems associated with for-profit institutions and Title IV without sacrificing the goals of the program or categorically excluding the for-profit sector.[265] Expanding the time period for cohort default rates and taking steps to include students in deferment and forbearance would keep many schools more cognizant of student financial outcomes.[266] Reducing the 90/10 ratio or eliminating some of its exceptions would diminish the concern that high levels of institutional dependency on federal aid lead to worse student outcomes.[267] Strengthening borrower protections on student loans could mitigate the effects of an educational investment gone sour.[268]

The new gainful-employment rules were the Department of Education's most ambitious attempt to curb negative student outcomes at for-profit schools. Drawing from statutory language that had little effect for decades,[269] the rules acknowledged the inadequacy of the previous Title IV framework.[270] The rules addressed many of the practices responsible for negative student outcomes: disclosure of

263. *See* LOONIN, *supra* note 140, at 12, 18 (outlining the key differences between federal and private students loans and discussing the reasons why students turn to private loans).

264. *Cf.* Johnson, *supra* note 4 (emphasizing the government's goal of expanding access to higher education).

265. *See supra* Part III.B.

266. *See supra* notes 194–201 and accompanying text.

267. *See supra* notes 202–210 and accompanying text.

268. *Cf. supra* note 140.

269. *See supra* notes 56–57 and accompanying text.

270. *See* Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386, 34,454 (June 13, 2011) (codified at 34 C.F.R. § 668.7 (2011), *vacated by* Ass'n of Private Sector Colls. & Univs. v. Duncan, No. 11-1314 (RC), 2012 WL 20505237 (D.D.C. June 30, 2012)).

key performance information would have helped students evaluate institutions that recruit them, and the job-placement and debt-repayment measures would have, at least to some degree, tied a school's financial future to the well-being of its students.[271] The rule's original draft was even more potent, with less-forgiving standards placed upon schools and a "tiered" system of Title IV eligibility that would have allowed the government to restrict aid received by schools that underperform clearly, but not flagrantly.[272]

The gainful-employment rule represented a positive sign to many commentators who have clamored for a regulatory approach aimed directly at reducing negative student outcomes in the for-profit sector.[273] The history of Title IV regulation shows that measures such as this can indeed have *some* impact. After the implementation of the cohort default rate and the 90/10 rules in the early 1990s, many of the worst-offending schools were driven out of business and student defaults declined.[274]

But these regulatory tweaks—including even the strongest iteration of the gainful employment rule—do not and cannot address the structural issues inherent within the Title IV program. Regulations that would significantly decrease negative student outcomes enabled by Title IV, such as an iteration of the 90/10 rule under which a school could only derive 45 percent of its revenues from Title IV, would likely have the effect of reducing access.[275] Regulations that seek to curb negative outcomes without conceding any student access will resemble the current cohort default rate and 90/10 rules: easy to game for a minimally sophisticated actor.[276] It is a worthy endeavor to increase the likelihood a career-oriented school prepares its students for gainful employment, but these measures cannot themselves resolve the Title IV tug-of-war between stopping

---

271. *See id.* at 34,456 (noting a "failure to align institutional incentives with student success" and enacting rules that "ensure that institutions consider the affordability of [their students'] loans").

272. *Id.* at 34,388.

273. *See, e.g.*, Fawn Johnson, *Gainful Employment Rule: What Do We Think?*, NAT'L J. EDUC. EXPERTS BLOG (June 6, 2011, 9:10 AM), http://education.nationaljournal.com/2011/06/gainfulemployment-rule-what-do.php ("[T]he gainful-employment rule opens new possibilities for regulation . . . .").

274. KINSER, *supra* note 22, at 118; *see also supra* note 215.

275. *See* GOV'T ACCOUNTABILITY OFFICE, *supra* note 163, at 9–10 (suggesting a higher threshold but noting that such a revised rule would decrease access).

276. *See supra* Part III.B.2.

the law from enabling negative student outcomes and cutting off access.

D. *The Public-Supply Model: A Way Around the Inherent Tensions of Title IV*

Is the answer, then, that the negative outcomes that arise from for-profit colleges are simply a tradeoff inherent within Title IV's objective of expanding access to higher education? Thankfully, the answer is no. This tension is unavoidable within the portable-subsidy student-aid model that Title IV establishes as the federal government's primary method of expanding access to higher education. The public-supply model, however, offers an alternative.

To summarize, Title IV seeks to expand access to higher education by using the portable-subsidy model, which offers grants and favorable loans to defray a student's cost of attendance.[277] By contrast, the public-supply model expands access to higher education through direct investments in public institutions with the goal of reducing tuition prices. The public-supply model traditionally has involved states investing in their own public institutions.[278] As state funding for institutions declines, however, federal student aid through Title IV assumes an increasingly prominent role in the quest to expand educational access.[279]

An approach based on refocusing the federal government's student-aid policy on public support instead of student subsidies satisfies many of the objections to the three rejected approaches above. Categorically excluding for-profit universities from Title IV is a poor solution because it will sharply reduce access to career-oriented higher education.[280] It also unfairly shuts down those for-profit institutions that do not disproportionately contribute to negative student outcomes while leaving untouched a much larger industry group—nonprofit institutions—which still produce negative student outcomes in great numbers.[281] However, by deemphasizing Title IV funding in favor of tuition reductions at community colleges

277. *See supra* note 13 and accompanying text.

278. *See* Pusser, *supra* note 18, at 38–39 (noting increases in educational costs following a gradual policy shift away from a public-support model); *see also* Dill, *supra* note 36, at 142 (discussing how the market for higher education can increase the cost of education).

279. *See supra* notes 88–90 and accompanying text.

280. *See supra* Part IV.A.

281. *See supra* Part IV.A.

and state universities, the public-supply approach would diminish the role of for-profit institutions without decreasing overall access to higher education and without categorically excluding the for-profit sector.

Blunting the impact of Title IV by making credit less available to students would be similarly misguided.[282] Instead, the government could lessen the need to extend to students large amounts of credit by reducing the price of education through public support.[283] When the price of education is lower, students and taxpayers are harmed less when an educational investment does not succeed, yet student access remains undiminished.[284] Finally, an emphasis on public support for education allows the government far greater oversight of educational inputs and outputs than even the most intricate regulatory regime.[285]

Of course, public support of higher education is by no means a panacea for all that ails higher education. This approach sacrifices a great degree of consumer choice in the marketplace for higher education.[286] As current state funding levels demonstrate, a further emphasis on public support would leave many students at the mercy of the budgetary process, whereas Title IV aid—particularly the guaranteed loan program—is, for better or for worse, quite dependable.[287] Although shifting from Title IV's portable-subsidy approach to the public-support approach would require consideration of many more interests than are addressed in this Note, such a strategic shift would directly address the particular problems posed by for-profit colleges' relationship with Title IV. The public-support model relieves federal student aid's essential tension by striving to reduce poor student outcomes and fostering the increased levels of access to education promoted by Title IV. It does this all without singling out for-profit institutions within the higher-education marketplace.

---

282. *See supra* Part IV.B.

283. For an explanation of how this approach lowers costs, see *supra* notes 180–182 and accompanying text.

284. Contrast this approach with today's "high-price, high-aid" model, as described in Glater, *supra* note 20, at 41–42.

285. *See* Pusser, *supra* note 13, at 35 ("[W]here education is provided in public institutions with public funds, the public has the greatest influence over the institution and its activities.").

286. *See id.* at 36 (noting the value of consumer choice in higher education).

287. *See supra* note 253 and accompanying text.

CONCLUSION

For many prospective college students, Title IV federal student aid is the gateway to a better future. Without it, obtaining a valuable education would not be possible. But for many former students of for-profit institutions, Title IV has been nothing but the enabler of an oppressive financial situation. Indeed, the incredible success of many for-profit institutions has exposed the essential tension within Title IV. The program seeks to better individuals and society by expanding access to higher education, but by facilitating that access, the program often leaves students worse off. As long as Title IV pursues its goals by enabling students as market actors with portable subsidies and easy access to credit, this tension will remain. Efforts to rein in negative student outcomes will result in a reduction in access for the students who need it most.

The solution to this dilemma, then, is to shift from Title IV's student-oriented aid model and reemphasize public supply of higher education, characterized by direct investment in institutions to lower the cost of education and lessen students' need for aid. Obviously, this policy shift requires consideration of many more factors than discussed in this Note. But if curing negative student outcomes caused by for-profit institutions without reducing access to education were policymakers' supreme concern, this approach would indeed address it effectively and fairly.