The Cost of Opportunity: Student Debt and Social Mobility

Daniela Kraiem*

TABLE OF CONTENTS

* Practitioner in Residence and Associate Director, Women and the Law Program, American University Washington College of Law. A special thank you to Ann Shalleck, with whom I founded the Student Debt and Education Justice Project (studentdebtjustice.org), and who provided insightful comments on an early draft. Thank you also to John Dale, Eliam Kraiem, Jamie Abrams, Janie Chuang, Ben Leff, Fernanda Nicola, Angie McCarthy, the writers at SOC, and the participants in the Suffolk University Law School Research Symposium on Student Debt, all of whom stepped in with comments, support, and advice exactly when I needed them. I could not have completed this project without the excellent research assistance of Marie Vanderbilt-Mathews and Avie Zhao.

I. INTRODUCTION: WHAT DOES HIGHER EDUCATION MEAN TO YOU?

We use the language of the market to talk about higher education: College is an *investment* in your own *human capital*. College is a *necessity*. Rankings show us which schools provide the best educational *bang for your buck*. Students are *consumers* who must shop around for the best *return on investment.*

When we speak this way, we understand that we are speaking metaphorically. Education is a process of teaching and learning, of producing and transmitting knowledge from one generation to the next, and of using existing knowledge and skills to push the boundaries of what we know. Talking about higher education as a commodity simplifies this complex set of activities and allows us to easily communicate about how those activities can be bought, sold, and valued.

Metaphors, though, are not just convenient linguistic devices. They shape not only the way we talk, but also the way we think and govern. In this case, using the "education is a commodity" metaphor leads us to regulate it as though it were actually a real commodity with a single purpose: generating return on investment for the individual student in the form of higher wages. This simplistic framework leads us to finance and regulate higher education in ways that have created an astronomical rise in student debt.

The entire complex of market metaphors—*commodity, investment, consumer*—push higher education into the realm of consumer regulation, rather than a policy framework that places knowledge, learning, and widespread social mobility at the center. How does this work? If higher education is an *individual investment*, with primarily *individual returns on that investment*, then market logic dictates that individuals should pay for the opportunity, even if they have to mortgage their future to do so. Since the students are the primary *investors* in the *commodity* of higher education, they are the *consumer* in free market terms: a savvy individual who bears both the risks and rewards of his or her own investment. This leads to a resistance to regulating predatory schools, and forces competition among schools for prestige rather than quality. Simultaneously, we see a shrinking role for the state, in either paying for higher education directly, or in structuring the financing system to spread the risks and rewards. This has led to massive declines in state spending for higher education.

If higher education were cheap or low-risk, this allocation of risk and reward would not pose a problem or create high debt. But higher education is a labor- and resource-intensive activity, and it is more expensive than most individuals can afford to pay out of pocket. Because this *investment in human capital* has become more and more a *necessity*, we have come to accept, often without question, more and more borrowing to pay for it, to the tune of $1.2 trillion dollars. As a society, we, perhaps instrumentally, accept placing the burden increasingly on the student. We do this even though we know that higher education plays a much more complex role in our society than just the straightforward *investment in individual human capital*. We know that universities provide basic and applied research from which we all benefit. We know that community colleges broaden the tax base and provide benefits to the community at large in the form of libraries, open spaces, art, child care, and other benefits. We know that open-access schools create widespread social mobility and a better prepared workforce for a globalized future. And yet, the language of the market has limited how we think about higher education and naturalizes a shift from public investment to private pay, with loans as the primary mechanism.

The Higher Education Act (HEA), as currently formulated and enforced, reflects this thinking. The HEA is a weak tool for regulating the quality of a learning experience. The mechanisms created by this legal regime have proved entirely ineffective in terms of protecting both public and private investment in higher education.

The rise in unmanageable student debt carries enormous implications. It is easy to see how it harms individual students. We are all familiar now with the plight of for-profit vocational program students falling into default on $5,000 or $10,000 loans, often from low-quality schools, often without even a diploma to show for their efforts. We also know the struggle of law students and graduate students to repay $200,000 in a lousy job market. Beyond those individual cases, though, the unthinking acceptance of the high-debt model for funding higher education has disastrous consequences for us all. Unmanageable individual debt threatens widespread social mobility and contributes to growing inequality. Rising debt is undermining the economic recovery. Most disturbingly, the institution of higher education is itself threatened because public support for higher education has diminished.

The link between how we talk, how we think, and how we regulate becomes apparent when we carefully study the assumptions and background rules that make up much of what passes for higher education policy today. The purpose of this Article is to shed light on the assumptions created by language, because no amount of tinkering at the edges will stem the rise in student debt if we do not examine what drives the deeper policy choices hidden beneath the surface. I will explore how the "education is a commodity" metaphor operates not just in rhetoric but in law. To so do, I present three examples of how the language of the market shapes the legal and policy structures underlying higher education financing in ways that increase debt, reduce social mobility, and degrade higher education itself.

In the first example, I examine how proponents of for-profit education use the rhetoric of "consumer choice" to argue against federal regulation that might limit the flow of money to poor educational programs and protect students. For-profit vocational schools are free to offer subpar educational programs because, in the absence of strong statutory consumer protections, the principle of *caveat emptor*, or buyer beware, governs a complex transaction involving the school, student, and state. The elimination of moral hazard—a discourse common in lending—justifies the imposition of punitive debt collection measures, such as wage, tax, and benefit garnishment as well as negative credit history. Despite the valiant efforts of consumer advocates, these policies thwart the social mobility of students who must default by making it more difficult for them to find employment, housing, earn living wages, and rely on the social safety net.

In the second example, I examine how, by forcing providers into competition, as though higher education were purely a free market enterprise, the consumerist frame encourages spending on items that do not necessarily enhance teaching and learning, and has actually driven up, rather than reduced, costs. Since higher education is treated as a market, regulators can do little about the spiraling costs driving student loan burden. To explore this concept, I look at how antitrust rules and commercial rankings force nonprofit and public institutions into competition. In this case, competition—the hallmark of a free market—makes education *less* affordable. Schools, many of which are functionally equivalent, compete on the basis of tuition discounts, often called merit scholarships. Schools use merit scholarships to lure the students they want, such as wealthy students and those with the high test and class standing scores that can raise a *U.S. News & World Report* ranking. The growth in merit scholarship is responsible for at least some portion of the affordability crisis that drives high student loan burden, and explains why student loan burdens are so uneven. Because this takes place in the legal framework of a competitive market, policy makers are left with few tools to prevent the practice, despite the fact that it runs counter to federal efforts to promote college affordability, has negative impacts on low-income students and students of color, and generates part of the enormous danger to the economy posed by debt burden.

In the third example, I look at how disinvestment by states not only raises costs at public institutions, but also reduces capacity in open-access community colleges. In a market filled with individuals out to maximize only their own return on investment, there is little conceptual space for understanding why the public might want to expend limited state resources on higher education. Anti-government movements have succeeded in passing laws in many states that limit revenue generation, which has reduced state and local allocations for public higher education during times of fiscal constraint. Declines in state and local funding are a huge part of the puzzle of rising student loans. Dwindling state expenditure for public colleges and universities creates a self-reinforcing cycle in which the state is not providing the "new necessity."

The reduction of capacity in vocational, certificate, and two-year degree programs drives students toward much more expensive for-profit schools. These schools construct themselves as social entrepreneurs, but evidence shows that for-profits are a much poorer investment than public colleges. Students have higher student loans and worse educational outcomes than comparable students in public post-secondary schools. The loss of local public colleges robs communities of vital resources, and ultimately weakens both our communities and our relationship with higher education.

The damage created by the high-debt financing model is neither inevitable nor irreversible. In my larger project, I hope to contribute to the reframing of higher education so that we can construct better and more equitable ways to finance it. The question animating my deconstruction of "Education is a Commodity" is the search for different forms of financing and regulation that will support a more robust role for higher education than the mere individual investment in human capital. In the final section, I briefly introduce how language that invokes metaphors such as "Education is a Tool" (which is favored by those focused on social mobility and equality) and "Education is a Journey" (which still is the dominant metaphor used by educators) and "Education is a Community Enterprise" (which foregrounds the common interest we share in the institution of higher education itself) might be deployed in the service of a public policy and legal structure that draws upon a richer concept of the role of higher education in human development.

Changing how we talk about higher education will not magically create legal and regulatory change overnight, but it will at least show that relying on student loans is not inevitable or unavoidable. It will lead us away from accepting that some students will be winners, while the rest will lose social mobility in a horrible gamble. It will open space for a regulatory framework that helps us to meet our collective goals: a vibrant, socially mobile society in which higher education leads to innovation, supports the production and preservation of knowledge, and ensures that all people have the tools they need to meet their full potential.

II. BACKGROUND: WHY DOES OPPORTUNITY COST SO MUCH?

We rely on metaphors to describe higher education because it is enormously complex. Higher education encompasses all post-secondary schooling. It ranges from short vocational training certificate programs, to remedial education, to doctoral and professional degrees, and all of the two-year, four-year and specialist degrees in between. When we talk about higher education, we need to bear in mind that not all students are twenty-year-old undergraduates who live in dorms. Students these days, more than ever, are likely to be adults with dependents. To add to this complexity, schools themselves may be public, private nonprofit, or for-profit entities.

Over the past century, the United States developed an equally complex system of higher education financing in which the family, the student and the state all contributed some share of the funding. Financing mechanisms matter in higher education because higher education is not only expensive, it is also a risk. A student might fail, choose to engage in a field in which he or she is not able to get a job, is not able to work, or is not able to study at the right school. The funding mechanism allocates, spreads, or concentrates that risk. If parents pay for a student's education, they bear the risk. If the state subsidizes the education, the public collectively bears the risk. If the student takes out loans to pay tuition, then the lender and the student bear the risk.[1]

In the past twenty years, we have seen a massive shift in the level of risk we ask the students to bear in all of the components of the higher education system. Student loans take up more and more of the cost of education. The legal structure in which the federal government and private lenders make those loans shifts risk from the lenders to the student. The language of "Education is a Commodity" makes this shift in cost and risk allocation seem inevitable and natural. In this section, I give a quick overview of the shift, pointing out that it is merely one choice among many for how to fund a system of higher education.

A. Why Are Student Loans Growing?

Student loans, long a feature of the American higher educational landscape, have started to take on an outsized importance in student loan financing. In 2013, federal student loan debt nationwide topped 1.2 trillion dollars, exceeding even credit card debt.[2] Some of the increase can be attributed to a larger student body, so raw numbers alone do not tell the entire tale.

The picture for individual borrowers is more telling. Students today are taking on much more debt than in prior generations. In 2012, seventy-one percent of all graduates took out student loans.[3] Students who graduated in 2012 hold an average of $29,400 in student loan debt.[4] Twenty years ago, this picture looked quite different. In 1993, forty-seven percent of students took out loans, which averaged $9,450.[5]

At the center of this complex problem is a simple equation: costs have exceeded inflation. Sources of funding, such as parental contribution, student jobs, and public subsidies, no longer meet those costs. Students turn to loans

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1. *See generally* Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CAL. L. REV. (forthcoming 2015) (detailing student debt as mechanism transferring risk to student).

2. Rohit Chopra, *Student Debt Swells, Federal Loans Now Top a Trillion*, CONSUMER FIN. PROT. BUREAU (July 17, 2013), http://www.consumerfinance.gov/newsroom/student-debt-swells-federal-loans-now-top-a-trillion, *archived at* http://perma.cc/S2Q7-UGWJ (reporting increase in federal student loans). In this Article, I focus largely on federal student debt when I can obtain disaggregated statistics. Private loans raise different and equally fascinating questions, some of which are beyond the scope of this paper.

3. *Quick Facts About Student Debt*, INST. FOR COLL. ACCESS & SUCCESS (Mar. 2014), http://projectonstudentdebt.org/files/pub//Debt_Facts_and_Sources.pdf, *archived at* http://perma.cc/MGE2-U7RJ (depicting average student debt over time).

4. *Id.*

5. *Id.*

because they need a college education and have no other way to pay for it.

1. Rising Total Educational Cost Per Student

At the moment when a college degree became a necessary qualification for a job with decent wages, the cost of that degree went through the roof. Tuition costs are on average twelve times higher than they were in 1978, and have increased four times faster than the consumer price index over the past twenty-five years.[6] According to economist Ronald Ehrenberg, "[d]uring the last three decades, at private four-year academic institutions, under-graduate tuition levels increased each year on average by 3.5 percent more than the rate of inflation. The comparable increases for public four-year and public two-year institutions were 5.1 percent and 3.5 percent, respectively."[7]

The costs borne by students and their families have increased as the result of both rising total educational costs per student, and shrinking funding from alternative sources. The factors driving up total educational costs per student at public and nonprofit schools are complex, and many are beyond the scope of this Article. One factor that this Article will address is financial aid policy, including the redistribution of tuition dollars through merit-based aid.[8] Other cost drivers include construction, administrative costs, technology, and expenditures schools often determine they need to maintain a competitive position in relation to comparable schools. Labor costs are large, not because professors are paid all that well, but because teaching is labor intensive, and the best schools keep student-faculty ratios as low as possible.[9]

For-profit schools have different cost drivers. For-profits keep labor and infrastructure costs as low as possible. A 2012 Senate committee report noted:

> In 2009 the education companies that the investigation studied spent $4.2-billion, or nearly 23 percent of their revenue, on "marketing, advertising, recruiting, and admissions staffing," compared with $3.2-billion, or more than 17 percent of revenue, on instruction. During the same period, the companies' pretax profit amounted to slightly less than 20 percent of their revenue.[10]

Despite recent changes in the industry, for-profit schools still have high expenditures related to both marketing and the distribution of profit to

6. Michelle Jamrisko & Ilan Kole, *Cost of College Degree in U.S. Soars 12 Fold: Chart of the Day*, BLOOMBERG BUS. (Aug. 15, 2012), http://www.bloomberg.com/news/2012-08-15/cost-of-college-degree-in-u-s-soars-12-fold-chart-of-the-day.html, *archived at* http://perma.cc/4JTJ-P4TN (showing exponential increase in cost of college degrees).

7. Ronald G. Ehrenberg, *American Higher Education in Transition*, 26 J. ECON. PERSP. 193, 193 (2012).

8. *Id.* at 194.

9. RONALD G. EHRENBERG, TUITION RISING: WHY COLLEGE COSTS SO MUCH 5-6 (2000).

10. Michael Stratford, *Senate Report Paints a Damning Portrait of For-Profit Higher Education*, CHRON. OF HIGHER EDUC. (July 30, 2012), https://chronicle.com/article/A-Damning-Portrait-of/133253/, *archived at* https://perma.cc/68FP-4BLD.

investors. In 2009, the profit margin at publicly traded for-profits averaged 19.7% and generated $3.2 billion in profit.[11] Profits since that time have fallen as enrollment has declined (due in part to bad press), but distribution of profit still remains a significant expenditure. For-profit colleges pass marketing and profit distribution costs on to students in the form of tuition that may be hundreds of dollars per credit higher than tuitions at comparable public two-year colleges. As the number of students attending these schools increases, so does the average cost per student around the country.

2. Declining Sources of Funding

a. State Disinvestment

As real educational costs per student rose, other sources of funding could not keep up. State subsidy declined in real terms and student wages and family contribution could not increase enough to keep pace with the rise in cost.

Despite rising real costs, states are decreasing their investment in public higher education, directly impacting seventy-three percent of all undergraduates (a total of 14,800,000 students).[12] Between 2000 and 2010 (even prior to the economic crash in 2007) state funding per pupil dropped from around $8,300 to $6,500, or roughly twenty-one percent.[13] To make up for some of the lost state appropriation, public schools have started to either restrict access or rely more on tuition revenue, increasing "posted tuition" or the "sticker price."[14] Average posted in-state tuition at public four-year schools nationwide is now almost $9,000 per year, up from around $4,700 fifteen years ago.[15]

"Federal financial aid," a phrase which includes both grants and loans, has increased to enable students to cover the costs of posted tuition. This shifts the expense and risk from state governments to the federal government and the students. It also represents a shift away from support of institutions

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11. S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 82 (2012) [hereinafter HELP COMM.].

12. THE ECONOMICS OF HIGHER EDUCATION, U.S. DEP'T OF THE TREASURY 8 (2012).

13. Rajashri Chakrabarti et al., *Soaring Tuitions: Are Public Funding Cuts To Blame?*, FED. RES. BANK OF N.Y. (Sept. 19, 2012), http://libertystreeteconomics.newyorkfed.org/2012/09/soaring-tuitions-are-public-funding-cuts-to-blame.html, *archived at* http://perma.cc/K6LX-RYU8 (reporting numbers presented in 2011 dollars). Additionally, public funding includes federal funds from American Recovery and Reinvestment Act available since 2009. *See id.*

14. *See* Kevin Kiley, *The Cost of Values*, INSIDE HIGHER ED. (Oct. 8, 2012), http://www.insidehighered.com/news/2012/10/08/changes-funding-sources-shifting-public-university-admissions, *archived at* http://perma.cc/9GHV-RGUT (describing how decreasing state investment in public higher education has resulted in increased tuition).

15. *Average Net Price over Time for Full-Time Students at Public Four-Year Institutions*, COLL. BD., http://trends.collegeboard.org/college-pricing/figures-tables/average-net-price-time-full-time-students-public-four-year-institutions (last visited May 20 2015), *archived at* http://perma.cc/ZH88-9Q6H.

(traditionally the province of the states) to support of individuals in the form of portable aid (generally the province of the federal government).

Much of this increased federal financial aid, however, has been in the form of loans and not grants. In 2011, thirty-six percent of all federal aid was grant-based, as opposed to fifty-five percent in 1980.[16] Thus, while total financial aid packages are up, the value of federal grant aid to low- and middle-income students has plummeted in terms of its ability to cover tuition costs. In the late 1970s, "the maximum Pell Grant covered 99 percent of the cost of a community college, 77 percent at a public four-year college and 36 percent at a private four-year college. By 2010-11, these percentages had dropped to 62, 36 and 15 percent respectively . . . ."[17] Despite massive federal investment and recent adjustments, this is the smallest share of college costs in the history of the program.[18] If Pell Grants do not cover the real cost per student of higher education, it is no surprise that federal financial aid packages contain ever-increasing federal loans.

b. Stagnant Student Wages and Family Income

Student jobs, even full time, do not begin to fill the gap. PBS News Hour estimates that the last time that part-time wages would have covered expenses at a four-year public school was 2001.[19] The Milwaukee Journal Sentinel calculates that working enough to pay to attend a four-year public institution full time, even in a low-cost city, would be impossible at minimum wage.

> In 1978, a UW-Madison student paying his or her own way, without any help, had to earn $2,362. It could be done at minimum wage by working full-time through the summer and about 10 hours a week through the academic year, or a total 891 hours. Today, a full-time UW-Madison student going [sic] it alone couldn't physically work enough hours at minimum wage to earn $18,402 for tuition, fees, room and board. It would take 2,538 hours, or about 50 hours per

16. TAMARA DRAUT ET AL., THE STATE OF YOUNG AMERICA: ECONOMIC BARRIERS TO THE AMERICAN DREAM, DEMOS & YOUNG INVINCIBLES 27 (2013), *available at* http://www.demos.org/sites/default/files/publications/State-of-Young-America-TheDatabook.pdf, *archived at* http://perma.cc/EYU2-7ZAC; *see also* WITH THEIR WHOLE LIVES AHEAD OF THEM: MYTH & REALITIES ABOUT WHY SO MANY STUDENTS FAIL TO FINISH COLLEGE, PUB. AGENDA (Dec. 2009), http://www.publicagenda.org/files/theirwholelivesaheadofthem.pdf, *archived at* http://perma.cc/J3CZ-Y5GB.

17. Thomas B. Edsall, *The Reproduction of Privilege*, N.Y. TIMES (Mar. 12, 2012), http://campaignstops.blogs.nytimes.com/2012/03/12/the-reproduction-of-privilege/, *archived at* http://perma.cc/3AQE-ZL2N; *see also* Paul Krugman, *Building A Caste Society*, N.Y. TIMES (Mar. 12, 2012), http://krugman.blogs.nytimes.com/2012/03/12/building-a-caste-society/, *archived at* http://perma.cc/6MQF-9X7E; *Pell Grant Historical Figures*, FINAID (2013), http://www.finaid.org/educators/pellgrant.phtml, *archived at* http://perma.cc/2JYV-XLMD.

18. PELL GRANTS HELP KEEP COLLEGE AFFORDABLE FOR MILLIONS OF AMERICANS, INST. FOR COLL. ACCESS & SUCCESS (Apr. 2014), www.ticas.org/files/pub/Overall_Pell_one-pager.pdf, *archived at* http://perma.cc/D7BX-RKF4.

19. Paul Solman et al., *Can You Still Work Your Way Through College?*, PBS NEWS HOUR (May 30, 2012), http://www.pbs.org/newshour/multimedia/tuition-work, *archived at* http://perma.cc/28HK-9LUW.

week for 50 weeks.[20]

Family contributions also cannot make up the gap between rising real cost of education and declining state investment. During much of the twentieth century, household incomes rose due to increased productivity and the entry of massive numbers of middle class white women into the paid labor force.[21] Despite annual increases of two-to-three percent per year, middle class families managed, to some degree, to keep up with rising net tuition. Over the past thirty-five years, however, net tuition has continued to rise, while family incomes have declined.[22] With the massive loss of wealth in the housing crisis, and the lack of liquidity given the slow market in many areas of the country, families are even less able to contribute to the increased cost of college than before.

3. Unmanageable Debt

The result is that students finance more and more of their educations through student loans. Outstanding student loans quadrupled from $240 billion in 2003 to more than $1 trillion today.[23]

Many of these outstanding loans are manageable. Millions of Americans have taken out and repaid student loans. Even today the majority of students have a manageable amount of student debt, given their incomes and long-term employment prospects. On the other hand, this does not mean that there is not a serious problem, both at the individual and aggregate levels.[24]

Much of the noise around student debt comes from what we might call "unmanageable" student debt. The raw amount of a debt does not tell us whether a borrower will be able to repay it. We must look instead to debt-to-income ratio to determine a student's risk of default and its attendant collateral

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20. Karen Herzog, *Working Your Way Through College Doesn't Add Up for Today's Students*, MILWAUKEE WIS. J. SENTINEL (June 1, 2013), http://www.jsonline.com/news/education/working-your-way-through-college-doesnt-add-up-for-todays-students-b9922857z1-209807931.html, *archived at* http://perma.cc/FP3S-KHLR.

21. *See* EHRENBERG, *supra* note 9, at 6-7.

22. TRENDS IN COLLEGE PRICING, COLL. BD. 30 (2013), *available at* http://trends.collegeboard.org/sites/default/files/college-pricing-2013-full-report.pdf, *archived at* http://perma.cc/MCQ7-RA6G.

23. ROBERT HILTONSMITH, AT WHAT COST?: HOW STUDENT DEBT REDUCES LIFETIME WEALTH, DEMOS 2 (Aug. 2013), http://www.demos.org/sites/default/files/publications/AtWhatCostFinal_Demos.pdf, *archived at* http://perma.cc/BW33-4X8K (relying on Federal Reserve consumer and household debt data for 2003-13); *see also* AMY KLOBUCHAR, U.S. CONG. JOINT ECON. COMM., THE CAUSE AND CONSEQUENCES OF INCREASING STUDENT DEBT 1 (June 2013).

24. Programs such as income-based repayment, by capping the percentage of income that can be drawn for federal student loan repayment, render debt more manageable. This program will keep millions of students out of default—itself a worthy goal. It does not, however, solve the long-term question of how and why students amassed such high debt in the first place. It also does not substitute for well-thought out higher education policy that distributes precious federal resources in the most equitable manner possible, or ensure that higher education is of high quality.

consequences.

Millions of students have unmanageable debt, high debt-to-income ratios, and default rates above the average. According to economists affiliated with the Federal Reserve, one quarter of the 2005, 2007, and 2009 cohorts have defaulted, with default rates worsening over time.[25] For every student in default, two more are delinquent.[26]

If these unmanageable student loans were spread evenly among debt levels, income levels, types of schools attended, communities, genders and races, we might assume that some students are simply irresponsible. This is not the case.

Unmanageable debt clusters at the low end—for example, a student who started but dropped out of a vocational certificate program, might find herself $5,000 or $10,000 in debt without the skills to get a job earning over the minimum wage of $7.25 per hour. Although the raw number is relatively low, the debt is high relative to the student's income stream. Sadly, these low-loan students are the most likely to default.[27]

Unmanageable student debt also tends to cluster around other variables. Students who attend for-profit schools tend to borrow more frequently and more heavily, relative to future income streams, and are the most likely to default. In 2012, for-profit schools averaged twenty-two percent default rates, much higher than the eleven percent rate at public schools and the 7.5% rate at nonprofits. For-profit students account for forty-seven percent of all defaults, even though they represent only thirteen percent of all students.[28]

Student loan burden is not distributed evenly across races and genders. Disaggregated data are hard to come by, but several trends are apparent. Students with unmanageable debt are more likely to be low-income, female, black, and have dependent family members such as children or elderly parents.[29] For example, studies suggest that probability of default increases 4.5% with each dependent child.[30] Part of this is due to the fact that low-

25. Meta Brown et al., *Looking at Student Loan Defaults Through a Larger Window*, FED. RESERVE BANK OF N.Y. (Feb. 19, 2015), http://libertystreeteconomics.newyorkfed.org/2015/02/looking_at_student_loan_defaults_through_a_larger_window.html#.VUJ88y6E28g, *archived at* http://perma.cc/6KT4-E9HR.

26. ALISA F. CUNNINGHAM & GREGORY S. KIENZL, DELINQUENCY: THE UNTOLD STORY OF STUDENT LOAN BORROWING, INST. FOR HIGHER EDUC. POL'Y (Mar. 2011), http://www.ihep.org/assets/files/publications/a-f/Delinquency-The_Untold_Story_FINAL_March_2011.pdf, *archived at* http://perma.cc/L4GK-LFUP.

27. Brown et al., *supra* note 25. Longitudinal studies conducted by the Federal Reserve indicate "the highest default rates, at nearly 34 percent, are among the borrowers who owe less than $5,000. These borrowers made up 21 percent of the 2009 cohort." *Id.*

28. Press Release, Inst. for Coll. Access & Success, Student Loan Default Rates Show Continued Borrower Distress (Sept. 28, 2012), http://ticas.org/sites/default/files/legacy/files/pub//Release_CDRs_092812.pdf, *archived at* http://perma.cc/JA5B-PUBD.

29. More research is necessary to tease out which students find themselves with the most unmanageable debt. The correlations between race, socioeconomic status, parenting status, and student debt are clear enough to warrant further investigation.

30. J. Fredericks Volkwein & Bruce P. Szelest, *Individual and Campus Characteristics Associated with Student Loan Default*, 36 RESEARCH HIGHER EDUC. 58 (1995) (noting highest default rates among those without degree or certificate, earnings under $10,000, and dependent children); *see also* Jacob P.K. Gross et al.,

income, minority, parenting, and older students tend to cluster at for-profit schools. Even in other sectors, though, it appears that some students are far more likely to find themselves in trouble.

In general, borrowers who bear higher student loans are more likely to be female. Women are not only more likely to go to college than men, but they are also more likely to take out student loans than their male classmates. Sixty-eight percent of women attending college take out student loans, as opposed to sixty-three percent of men.[31] As the American Association of University Women notes, "[b]ecause women earn less than men do after college, student loan repayments make up a larger part of women's earnings."[32] Although women are not more likely to default, women take longer to pay off their loans than men, increasing the amount that women pay over time.[33] Additionally, women are more likely to be paying "an unmanageable amount"—more than eight percent of their income—toward their student loans.[34]

Students of color are more likely to have unmanageable debt-to-income ratios. Black students on the whole are more likely than white students to have above average levels of student loan debt. In recent years, twenty-seven percent of black students who earned bachelor's degrees had more than $30,500 in debt, compared to sixteen percent of whites.[35] Black students are more likely than white students to default on a loan, which possibly reflects a combination of the following factors: higher likelihood of borrowing; higher loan burden due to lower family wealth; increased likelihood of unemployment and lower wages due to discrimination; and discrimination in the housing market.[36]

What Matters in Student Loan Default: A Review of the Research Literature, 39 J. OF STUDENT FIN. AID 22 (2009) (reviewing literature regarding various independent variables contributing to rates of default).

31. CHRISTIANNE CORBETT & CATHERINE HILL, GRADUATING TO A PAY GAP: THE EARNINGS OF WOMEN AND MEN ONE YEAR AFTER COLLEGE GRADUATION, AAUW 23-24 (Oct. 2012), *available at* http://www.aauw.org/files/2013/02/graduating-to-a-pay-gap-the-earnings-of-women-and-men-one-year-after-college-graduation.pdf, *archived at* http://perma.cc/M38B-28HD.

32. *Id.* at 3.

33. *See* Gross et al., *supra* note 30, at 22.

34. *Id.* at 24.

35. ANNE JOHNSON ET AL., THE STUDENT DEBT CRISIS CTR. 22 (Oct. 25, 2012), https://cdn.americanprogress.org/wp-content/uploads/2012/10/WhiteStudentDebt-5.pdf; *see also* Ann-Marie Adams, *Student Debt in the Black Community: Hampering Our Ability To Enter the Middle Class*, WASH. POST (Nov. 12, 2012), http://www.washingtonpost.com/blogs/therootdc/post/student-debt-in-the-black-community-hampering-our-ability-to-enter-the-middle-class/2012/11/12/082747fa-2c47-11e2-9ac2-1c61452669c3_blog.html, *archived at* http://perma.cc/RQ2Y-YBKW (discussing disparity among races in student debt).

36. *See* Gross et al., *supra* note 30, at 21-22 (noting literature reviewed indicates "race/ethnicity emerges as one of the strongest predictors of default"); *see also* Sara Goldrick-Rab et al., *The Color of Student Debt: Implications of Federal Loan Program Reforms for Black Students and Historically Black Colleges and Universities*, WIS. HOPE LAB 12 (2014), *available at* https://news.education.wisc.edu/docs/WebDispenser/news-connections-pdf/thecolorofstudentdebt-draft.pdf?sfvrsn=4, *archived at* https://perma.cc/972A-76GS (noting students of color borrow more due to lower family wealth and higher attendance rates at schools that do not offer as much need-based aid, such as for-profit schools); Daniela Kraiem, *The Color of Student Debt*, STUDENT DEBT & EDUC. JUSTICE (Sept. 10, 2014), http://studentdebtjustice.org/2014/09/10/the-color-of-

Although not evenly distributed, unmanageable debt is on the rise. The purpose of this Article is to explore how we have come to tolerate the fact that some students will be left with so much debt that it threatens their social mobility, and threatens our economy as a whole. To do so, I explore the relationship between how we talk about education and how we regulate and fund it. To begin, I introduce the primary metaphors for higher education.

B. Metaphors We Regulate by

1. Why Metaphors for Higher Education?

Metaphors are more than pretty turns of phrase; they allow us to place new ideas within an existing mental landscape, or reframe existing ideas to incorporate new facts.[37] Metaphors allow us to take what we share about the physical world to describe abstract concepts in terms that we all understand. These powerful linguistic structures not only allow us to communicate; they shape thought itself.[38] Metaphors operate at the level of tacit knowledge, much of which forms the unexamined basis of legal and policy decision making.[39] Examples permeate our lives and every day speech, such as "More is Up" (as in, "the market *rose*") or "Seeing is Knowledge" (as in, "I *see* what you mean").

Most complex concepts spawn multiple metaphors—some of which may be contradictory—that illuminate different aspects of the concept. Choice of metaphor reveals a great deal about the ideological commitments of the speaker. It reveals how the speaker understands a concept and its place in the world. Speakers weave metaphors into their narratives, shaping how both they and the listener perceive and weigh ideas at a less than conscious level.[40]

Higher education in the United States is an enormously complex endeavor, implicating millions of students, faculty and staff, hundreds of thousands of classes, thousands of organizations and billions of dollars, not to mention an uncountable number of ideas. It is little wonder, then, that we find many different ways to talk about education. "Education is a Tool," for example, is reflected when we talk about education is a "*ticket* to the middle class," a "*key* to prosperity" or an "*engine* of social mobility." Educators often deploy "Education is a Journey." Teachers describe themselves as "*guiding* their students." My own school recently revised its curricular planning guide, and christened it "My Academic *Pathways*" or "*MAP*" for short.

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student-debt/, *archived at* http://perma.cc/L9EE-G4K3.

37. *See* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 244 (2003).

38. *See id.*

39. *See generally* STEVEN L. WINTER, CLEARING IN THE FOREST: LAW, LIFE, AND MIND (2001) (examining how metaphors lie at heart of much legal and policy decision-making).

40. *See generally* Jayne S. Docherty, *Narratives, Metaphors, and Negotiation*, 87 MARQ. L. REV. 847 (2004) (describing relationship between metaphor and storytelling).

At the core of my argument, I propose that we have allowed one metaphor—"Education is a Commodity"—to dominate our thinking about higher education. Although the metaphors of "Education is a Tool," "Education is a Journey," and "Education is a Community Enterprise," are still present in public discourse, I argue that the metaphor "Education is a Commodity" has shaped financing and regulation over the past forty years, and that it is increasingly drowning out the other available metaphors, and thus other understandings of the role of higher education in our society.

2. Three Market Metaphors for Higher Education

a. "Education Is a Commodity"

> Knowledge is perhaps the chief good that can be had at a price.[41]

Commodities are fungible objects that can be bought or sold. They are, in Hayek's formulation, "goods that can be had at a price."[42] Since knowledge is not an object, and is not really fungible, we have to understand Hayek to be speaking metaphorically.

The commodity metaphor is necessary because intangibles are hard to describe without resorting to a metaphor rooted in a physical, embodied experience.[43] In drawing upon the complex of metaphors, we do not assume that education actually is a physical object, rather than a set of activities, such as teaching and learning. Nor do we assume that because we talk about higher education in terms of consumption that the use of this term tracks classical economics or any other ideal definition of the term.

The "Knowledge is a Commodity" metaphor shares its origins with several primary metaphors for mind and ideas, at the most basic level, "Ideas are Objects," (as in, something you can *grasp*) or even more specifically, "Ideas are Products" (as in, that idea won't *sell*).[44] The most familiar expression of this metaphor in legal reasoning is Holmes' dissent in *Abrams v. United States* in which he situates speech within the *marketplace* of ideas.[45]

The point is this: We regulate and finance education *as though* it were a commodity, even though it is not an object. [46] If knowledge is a good, then it is

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41. F. A. HAYEK, THE CONSTITUTION OF LIBERTY 376 (Ronald Hamowy ed., 2011).

42. *Id.* at 376.

43. *See* LAKOFF & JOHNSON, *supra* note 37, at 115-16 (locating source for most metaphors in physical experience).

44. *Id.* at 10.

45. 250 U.S. 616, 624-31 (1919).

46. *See generally* MARGARET JANE RADIN, CONTESTED COMMODITIES (2001) (noting tendency of economists to reduce human interactions to commodity exchange).

sold somewhere. In a capitalist economy that somewhere is a market.[47] If education is a consumer good that can be had at a price, then institutions of higher education are businesses, engaged in selling a product (education) to a consumer (students).[48]

Market metaphors abound in both academic literature and popular press reports about higher education, and more specifically, student loans. In the next section, I will briefly unpack two of the most prevalent: "Education is an Investment in Human Capital," and "Students are Consumers." These will form the basis for our exploration of how the language of the market has shaped the financing and regulation of higher education.

b. "Education Is an Investment in Human Capital"

In his presidential address to the American Economic Association in 1960, University of Chicago Economist Theodore Schultz laid out the case for a new metaphor that some economists had started to deploy for education: *Investment in Human Capital.*

> Although it is obvious that people acquire useful skills and knowledge, it is not obvious that these *skills and knowledge are a form of capital*, that this capital is in substantial part a product of deliberate investment, that it has grown in Western societies at a much faster rate than conventional (nonhuman) capital, and that its growth may well be the most distinctive feature of the economic system.[49]

Schultz explained how economists could measure this new human capital, despite the fact that it could not be sold and thus was not a "real" commodity, in concrete terms that could then be input into an economic model:

> While any capability produced by human investment becomes a part of the human agent and hence cannot be sold; it is nevertheless "in touch with the market place" by affecting the wages and salaries the human agent can earn. The resulting increase in salaries is the yield on the investment.[50]

In two easy steps, Schultz entirely reframed not only how we understand education, but how we measure its worth: *Increased salary is the return on*

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47. *See generally* Jane Sjogren, *Viewing Higher Education as a Market IS a Trend*, 79 C. & U. J. 45 (2004).

48. GEORGE LAKOFF & MARK JOHNSON, PHILOSOPHY IN THE FLESH: THE EMBODIED MIND & ITS CHALLENGE TO WESTERN THOUGHT 532 (1999). *See generally* GAYE TUCHMAN, WANNABE U: INSIDE THE CORPORATE UNIVERSITY (2009) (describing corporatization of public universities in United States).

49. Theodore W. Schultz, *Investment in Human Capital*, 51 AM. ECON. REV. 1, 1 (1961) (emphasis added).

50. *Id.* at 8.

investment. Investing in human capital is now such a hegemonic concept that it is difficult to understand education in other terms.[51]

There are two ways to think about the return on investment in human capital, each of which lead to very different ways of thinking about who bears the risks and reaps the reward on investment. One might focus on *individual investment in human capital*. The other might alternatively emphasize *public investment in human capital*. While both are present in our system of higher education finance, I argue below that individual investment in human capital has outstripped public investment, leading to our tolerance for student loan burdens that are high enough to impede social mobility.

Those who support *public investment in human capital* tend to look to the broader social benefits of higher education, especially its role in creating widespread social mobility.[52] They describe investments in human capital as a necessity to prepare the national workforce to meet the challenges of the globalizing economy. They note positive correlations between public investment and state and local economic growth.[53] They highlight education's role as a lever in large-scale social engineering projects, such as promoting substantive equality for historically underrepresented minorities and equalizing women's access to cultural capital. They also tout the role of public support for basic research, the engine of the economy. They point to the construction of community-building institutions, such as theater and art centers, or local college sports teams. Repayment of the investment in this model comes in the higher income and property taxes paid by students over their lifetimes, as well as the myriad of other public goods that they claim flow from public investment. Supporters of this model, and users of this metaphor, tend to support institutional investment in public schools and low tuition.[54]

Libertarians and advocates of small government, on the other hand, tend to support an *individual investment in human capital*. Their position is that only individual students and their families should make the investment in education,

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51. *See, e.g.*, Santosh Mehrotra, *Human Capital or Human Development? Search for a Knowledge Paradigm for Education and Development*, 40 ECON. & POL. WKLY. 300, 300 (2005) (describing how concept of education as investment in human capital pervades conversations about development).

52. *See, e.g.*, SUZANNE METTLER, DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM 64-66 (2014); Linda E. Coco, *Mortgaging Human Potential: Student Indebtedness and the Practices of the Neoliberal State*, 42 SW. L. REV. 565 (deriding effects of market-based approaches and proposing more public-oriented approach to higher education); Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J. C. & U. L. 1 (2011) (arguing public good should trump private profit motive in higher education).

53. *See, e.g.*, J. Norman Baldwin & William A. McCracken III, *Justifying the Ivory Tower: Higher Education and State Economic Growth*, 38 J. EDUC. FIN. 181, 200-04 (2013) (finding public expenditures on highways and higher education most consistent predictors of state economic growth).

54. *See, e.g.*, Suzanne Mettler, *Equalizers No More: Politics Thwart Colleges Role in Upward Mobility*, CHRON. OF HIGHER EDUC. (Mar. 3, 2014), *available at* http://chronicle.com/article/Equalizers-NoMore /144999/, *archived at* http://perma.cc/4G8G-HPP5 (highlighting role of higher education in creating equality); *Values*, NAT'L FORUM ON HIGHER EDUC., http://thenationalforum.org/aboutus/values/ (last visited May 20, 2015), *archived at* http://perma.cc/DN7N-RUJB.

as they will reap the majority of the return in the form of higher wages. Advocates of small government see little need to invest in public institutions, do not see a role for the state in promoting equality and social mobility, and do not believe that the state should spend funds to create community-building institutions, preferring instead to let the market provide solutions to social problems.[55] Over the past thirty years, this position is increasingly (although not exclusively) tied to the metaphor of "Education is a Commodity," which naturalizes individualistic and market-based solutions to the problem of widespread access to education. Supporters of this position tend to see self-funding as the ideal and moral way to fund higher education.[56]

Even within the libertarian tradition, there are several approaches to the question of state involvement in higher education. In the 1960s, some economists, including Theodore Schultz's student, Milton Friedman, saw investment in the kind of human capital fostered by vocational and professional training as the proper subject for only private lending. He argued that the benefits flowed to the individual, the loan could be repaid out of higher earnings, and as such, the state should not intervene at all.[57] He saw no role for the state in the promotion of any education that could lead to higher wages. Others, like Friedrich Hayek, were willing to consider subsidy for more elite and less "applied" forms of education, such as those in economics departments.[58]

Still others, including Schultz, recognized that while the benefits might flow to the individual, there was a need for some limited government intervention because the capital markets were failing to make loans for investment in human capital available to the middle class. In the 1960s, this camp advocated for federal government intervention, but not in the style of institutional investment or GI-bill style vouchers. Instead, they advocated intervention in the capital market in the form of loan guarantees.

If all of these positions sound familiar, it is because all of them—*public investment* and weak and strong forms of *individual investment*—have found expression in different parts of our complex system of financing higher education. In 1965, the Higher Education Act reflected a mix of approaches. It drew on the "Education is a Tool" metaphor to justify programs that would unlock the human capital and social mobility of students of color, such as institutional support for historically black colleges and universities.[59]

It also drew on the "Education is a Commodity" metaphor. In 1965, the primary intervention for low- and middle-income students was a correction of

55. *See* Milton Friedman, *The Role of Government in Education*, *in* ECONOMICS AND THE PUBLIC INTEREST (1955).

56. *See id.*

57. *See id*.

58. *See* HAYEK, *supra* note 41, at 381-84.

59. *See* Higher Education Act of 1965 § 301, 20 U.S.C. § 1051 (1965).

the capital market so as to promote *individual investment in human capital* by students: The Guaranteed Student Loan Program, under Title IV. The Senate report on the Higher Education Act noted in 1965 that a federal student loan program was necessary because cost had outpaced ability to pay and existing loan products did not meet the needs of students:

> For the average family with one or more children in college, the total investment in education is second in size only to the family investment in a home. Unlike home mortgage costs, which can be spread over two or more decades, the cost of higher education is heavily concentrated in a short span of years.[60]

Families wanted to invest, but the private loans available to them were improperly structured. The inability of families to borrow from the existing capital markets was market failure that justified government intervention in the form of loan guarantees.

This hybrid approach—a mix of limited institutional support for disadvantaged students with student loans for the middle class—mapped onto the most egalitarian impulses of President Lyndon Johnson's Great Society, as well as that of *investment in human capital.* The loan mechanism was an effective bridge for low- and middle-income students who otherwise would not have had quite enough resources to pay for a higher education to invest in their own human capital. It was also the cheapest way for the federal government to facilitate access to higher education for millions of low- and middle-income students.

At the same time, the loan mechanism itself solidified the *individual investment in human capital* as the primary concept in federal support of higher education. Historians of education policy point to the rise of neoliberal economic policies under President Ronald Reagan in the 1980s as the moment when "Education is a Commodity" came into the public discourse.[61] It is important to remember, however, that not only was the discourse of education as an *individual investment in human capital* present in the Higher Education Act from the outset, it shaped the regulatory and financing mechanisms put into place from the earliest days of the Act. As I will discuss below, those mechanisms set the stage for the "Education is a Commodity" metaphor to gain the outsized power it has in discourse today.

The language of *individual investment* in human capital remains powerful, and is now the primary way that we talk about higher education on all ends of the political spectrum. President Barack Obama, unveiling his plans to address student debt says that, "[a] higher education is the single best investment you

60. S. REP. NO. 89-673, at 4054 (1965).
61. *See* METTLER, *supra* note 52, at 64-66.

can make in your future."[62] Nearly every report, media account, or law review article about college or student debt starts with the facts regarding the earnings differential for college graduates, reinforcing that the proper measure of an education is "return on investment." Middle class parents fret that Junior's English degree is not a good investment, while Internet, subway, and bus ads for for-profits schools exhort students to "Invest in Yourself."[63] Students have to understand the act of taking a student loan as investment in their future earnings—otherwise the act does not make sense.

c. "Students Are Consumers"

The metaphor of education as investment in human capital, when combined with student loans, leads us to the next metaphor: "Students are Consumers." If students are taking loans to invest in their own human capital, then they are the investors. Investing in education, like all investments, is a gamble; despite the best efforts of the dismal science, no one knows precisely what the future will hold for them or for the economy at large. Students must, with their borrowed resources, make smart consumer decisions about that investment.

Anyone close to higher education has become accustomed to the "Students are Consumers" metaphor, even if it still rankles. My own university gives out a staff award for customer service. The *U.S. News & World Report* sells magazines by publishing its rankings of and guides to colleges, just like its guides for cars, vacation destinations, and hospitals. The federal government has even gotten into the consumer ratings game recently, with President Obama's administration promoting the College Scorecard so that students can "get the most bang for your educational buck."[64]

Advocates for increased funding for students have increasingly deployed a metaphor related to "Students are Consumers": "College is a Necessity." They point out that without the human capital created by an investment in education, students cannot survive in today's economy. In this formulation, higher education is still a commodity, but it has been elevated to a very special kind of commodity; one that, like food or shelter, merits government support. Students

62. President Barack Obama, Address at the University of Buffalo: Remarks by the President on College Affordability (Aug. 22, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/08/22/remarks-president-college-affordability-buffalo-ny, *archived at* http://perma.cc/3L3P-9UXP.

63. *See, e.g.*, Nick Anderson, *Going for the Hard Sell as Interest in English Major Declines*, WASH. POST (Apr. 10, 2015), http://www.washingtonpost.com/lifestyle/magazine/can-the-english-major-be-saved/2015/04/02/1e350ec2-ca53-11e4-a199-6cb5e63819d2_story.html, *archived at* http://perma.cc/AY8W-4QRJ; *Invest in Yourself*, UNIV. OF PHOENIX, http://www.phoenix.edu/student-orientation/paying-for-school/invest-in-yourself.html (last visited June 20, 2015), *archived at* http://perma.cc/VPT3-YUWA (exhorting students to "invest in yourself" by attending University of Phoenix and paying back student loans).

64. President Barack Obama, Remarks by the President in the State of the Union Address (Feb. 12, 2013), *available at* https://www.whitehouse.gov/the-press-office/2013/02/12/remarks-president-state-union-address, *archived at* https://perma.cc/G3ZP-7594; *see also* Andrew Gillen et al., *Degrees of Value: Evaluating the Return on the College Investment*, EDUC. SECTOR (May 9, 2013), http://www.educationsector.org/publications/degrees-value-evaluating-return-college-investment, *archived at* http://perma.cc/8JBN-U3MD.

are still consumers, but they are a special kind of consumer who can lay claim to limited government resources. Fundamentally unaltered is the underlying notion that individual benefits drive the justification for state backing of student loans, and unanswered is the challenge to public funding posed by neoliberal economists over fifty years ago: "[s]hould the returns from public investment in human capital accrue to the individuals in whom it is made?"[65]

III. THE HIGH COST OF OPPORTUNITY: THREE EXAMPLES OF HOW MARKET METAPHORS DRIVE STUDENT DEBT AND WEAKEN ALL SECTORS OF HIGHER EDUCATION

> There is . . . much confusion with regard to the welfare consequences of higher education, including consequences of the way in which it is financed and the resulting personal distribution of costs and benefits.[66]

Why does it matter whether the investment in human capital is an individual one or a public one? Whether education is a tool or a commodity? It matters because of what Schultz calls the "consequences of the way in which it is financed." In the language of law and economics, financing structure creates positive and negative externalities. We ignore them at our peril.

The current individual *investment in human capital* framework, in which some students take on heavy student loans, has devastating consequences for social mobility. Students who default find themselves worse off than if they had not attended a post-secondary school at all. Even students who are paying their loans often find that high debt burden reduces their ability to make other investments in their futures, like starting a business or buying a home. At a time of rising income inequality worldwide, the student loan crisis undermines the power of higher education to keep our country socially mobile.

How has this happened? In an individual investment framework, the student consumer bears the lion's share of the risk, and reaps reward in the form of higher wages. In free market logic, contributions to the public good, even if we only consider them as positive externalities, are uncertain and not included in the economic models of human capital. Negative externalities—including negative social consequences—may be ignored so long as it is economically efficient and not illegal for the producer to do so. Risk of default and risk of losing mobility due to heavy debt burden are risks that the student investor assumes when entering a free marketplace.[67]

Economic reductionism has an appealing simplicity, but the picture it paints

65. Schultz, *supra* note 49, at 15 (acknowledging Milton Friedman for raising issue).

66. Theodore W. Schultz, *Resources for Higher Education: An Economists View*, 76 J. OF POL. ECON. 328, 329 (1968).

67. *See* Glater, *supra* note 1 (suggesting current system of financing shifts risks to students).

is incomplete. It elides that students are taking on more risk than they can reasonably bear because they have no other choice. More and more students must gamble, but fewer will win. Higher education has become a necessity just to stay on, much less climb, the economic ladder, while the risks that students have to take to obtain it grow each year. Economic reductionism also ignores that the risks borne by the student affect us all. We all live in a nation that is less educated, less equal, less prepared, less resilient, and less mobile when our students are burdened by excessive debt.

In Part II, I laid out the market metaphors that shape the ideological foundation of our current system of higher education finance. Now in Part III, I explore three different examples that demonstrate how organizing our higher education finance system in an *individual investment in human capital* framework works in practice. In each example, I draw explicit lines between market rhetoric, law or policy, and rising unmanageable debt. In the first, I examine the devastating effects of applying legal rules such as "buyer beware" to students-consumers in the context of for-profit education, given outrageous rates of default and the severe consequences that follow. In the second, I explore how constructing education as a commodity and increasing competition in the context of nonprofit institutions, by setting up a merit scholarship arms race, actually drives tuition costs higher, thus contributing to harmful debt burden. In the third, I discuss how understanding education as an individual investment undermines the case for public institutions, leaving low-income students with fewer options for education and training and increasing reliance on poor quality for-profit schools. In each example, I examine how we have translated the market metaphors of commodity, investment, and consumption into the legal background rules governing higher education. I argue that the consequences of those choices degrade overall social mobility. Finally, I stress how thinking in these metaphors limits our ability to imagine change.

The construction of education as a commodity is harming students across all sectors of our educational system, and the entire institution of higher education. I selected these three examples out of many because they highlight different manifestations of the problem across different sectors of the higher education system. I turn first to the for-profit sector, and examine how market rhetoric leaves us helpless in the face of the high default rates that undermine the ability of low-income students to participate in the formal economy or rely upon the social safety net, two crucial components of social mobility.

A. "Consumer Choice" and Student Loan Default in the For-Profit Sector

> "Going to college should not be like going to a casino, where the odds are stacked against you and the house always wins."[68]

1. For-profit Schools Deploy the "Students Are Consumers" Metaphor

For-profit schools argue that their emphasis on "customer service" provides the answer to the access, affordability, and diversity dilemmas that plague American higher education.[69] In doing so, they deploy the "Students are Consumers" metaphor to justify their existence, draw in students, and to fend off attempts at regulating an extremely problematic industry. Head of the National Urban League and Corinthian College Board member, Marc Morial, summed it up nicely: "[c]areer colleges are different only in that they are the *schools of choice* for many at-risk students, including minorities, parents and full-time workers who believe these schools offer them the best shot at a good job in a field they will enjoy."[70]

Similarly, former for-profit school dean Richard S. Ruch notes that "[t]he strong customer-service orientation of the for-profit colleges . . . is one of the reasons a growing population of students is choosing them in pursuit of higher education."[71] He and others argue that for-profits moved aggressively to meet the demands of adult learners for conveniently located, evening courses that lead to specific career objectives.[72]

Similarly, for-profits moved into online education on the grounds that

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68. Chris Kirkham, *For-Profit Colleges Mount Unprecedented Battle for Influence in Washington*, HUFFINGTON POST (Apr. 25, 2011), http://www.huffingtonpost.com/2011/04/25/for-profit-colleges_n_853363.html, *archived at* http://perma.cc/KY2B-55G4 (quoting Senator Tom Harkin).

69. *See, e.g.*, Gary A. Berg, *Reform Higher Education with Capitalism?: Doing Good and Making Money at the For-Profit Universities*, 37 CHANGE 28, 33 (2005) (comparing for-profit universities' focus on serving students to "customer-based business philosophy"); RICHARD S. RUCH, HIGHER ED., INC.: THE RISE OF THE FOR-PROFIT UNIVERSITY 153-54 (2003) (arguing strong customer orientation shifts focus of power in for-profit schools to students); Anthony J. Guida Jr. & David Figuli, *Higher Education's Gainful Employment and 90/10 Rules: Unintended "Scarlet Letters" for Minority, Low-Income, and Other At-Risk Students*, 79 U. CHI. L. REV. 131, 131-32 (2012).

70. Marc H. Morial, *A Higher Education Stumbling Block for At-Risk Students*, WASH. POST (Jan. 7, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/01/06/AR2011010604385.html, *archived at* http://perma.cc/NHS5-9RH7 (emphasis added). Morial served on the board of Corinthian Colleges. *Corinthian Colleges Names Marc Morial to Board of Directors*, GLOBENEWSWIRE (Apr. 30, 2013), http://globenewswire.com/news-release/2013/04/30/542931/10030519/en/Corinthian-Colleges-Names-Marc-Morial-to-Board-of-Directors.html, *archived at* http://perma.cc/KN2X-NB56. Corinthian Colleges closed due to pressure from regulators, who alleged in civil and criminal actions a range of violations of federal and state regulations ranging from fraud to deceptive recruitment. *See* Alia Wong, *The Meltdown of a For-Profit College Behemoth*, ATLANTIC (Apr. 30, 2015), http://www.theatlantic.com/education/archive/2015/04/the-meltdown-of-a-for-profit-college-behemoth/391925/, *archived at* http://perma.cc/A6LJ-WJUW.

71. RUCH, *supra* note 69, at 153-54.

72. *See* RUCH, *supra* note 69, at 19; Berg, *supra*, note 69, at 33.

asynchronous distance education is the ideal solution for students who are employed or have family responsibilities.[73] Some go so far as to argue that, by focusing marketing and recruiting efforts on low-income African-American and Latino students who have few other choices for post-secondary education, they represent a new kind of market-based affirmative action.[74]

The consumer choice narrative hides the dirty truth of for-profit education. Although numbers have declined recently, between 1998 and 2008, the number of students at for-profit schools increased 255%, compared with a thirty-one percent increase in other degree-granting higher-education sectors.[75] For-profit students numbered 2.4 million in 2010. In 2010-11, for-profits issued twelve percent of all associate's degrees and seven percent of all bachelor's degrees.[76]

This would not be problematic, were it not for two salient facts. First, while roughly half of all undergraduates take out loans, ninety percent of those who attend for-profit schools take out loans.[77] For-profit colleges account for nearly half of student loan defaults (288,000 or forty-four percent) despite enrolling just twelve percent of students nationally.[78]

The causes of this grossly disproportionate default rate are a combination of poor educational quality, sky-high drop-out rates, students who are unprepared for college-level study, as well as outright fraud.[79] Schools recruit students who do not pass basic literacy tests, use boiler room tactics, mislead students about the transferability of credits, and fail to correctly inform students of the

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73. *See* Berg, *supra* note 69, at 33.

74. *See id.* at 32-33. *But see* Benjamin Todd Jealous & Marian Wright Edelman, *Why Government Must Rein in For-Profit Colleges*, USA TODAY (Feb. 7, 2011), http://usatoday30.usatoday.com/news/opinion/forum/2011-02-08-jealous07_ST_N.htm, *archived at* http://perma.cc/E222-LVJ8 (arguing under-regulated for-profit industry harms students of color).

75. Suevon Lee, *The For-Profit Higher Education Industry, by the Numbers*, PROPUBLICA (Aug. 9, 2012), http://www.propublica.org/article/the-for-profit-higher-education-industry-by-the-numbers, *archived at* http://perma.cc/85FW-3TUU.

76. Eduardo Porter, *The Bane and Boom of For-Profit Colleges*, N.Y. TIMES (Feb. 25, 2014), http://www.nytimes.com/2014/02/26/business/economy/the-bane-and-the-boon-of-for-profit-colleges.html?_r=0, *archived at* http://perma.cc/5MP7-QZRY.

77. *See* CRISTINA CHANG WEI & LAURA HORN, DEPT. OF EDUC., FEDERAL STUDENT LOAN DEBT BURDEN OF NONCOMPLETERS 1 (2013), *available at* http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2013155, *archived at* http://perma.cc/7RUQ-ZRZW (comparing prevalence of student loans based on first institution attended).

78. Press Release, Institute for College Access and Success, Despite Lower Rates, More Than 650,000 Defaulted on Federal Student Loans (Sept. 24, 2014), http://ticas.org/sites/default/files/legacy/files/pub//CDR_2014_NR.pdf, *archived at* http://perma.cc/3Q4D-7236, [hereinafter Institute Press Release] (providing calculations based on Department of Education data for 2013).

79. James, *supra* note 52, at 11. James argues that for-profit schools harm student by "(1) providing an educational experience that results in net harm to students; (2) harmful rent-seeking behavior; (3) securing student enrollment through fraud or deception; (4) securing student enrollment through misrepresentation, nondisclosure, and questionable business practices that do not amount to outright fraud; and (5) capitalizing on the absence of legal remedies." *Id.*; *see also* Nicolas R. Johnson, *Phoenix Rising: Default Rates at Proprietary Institutions of Higher Education and What Can Be Done To Reduce Them*, 40 J. L. & EDUC. 225 (2011); Rebecca E. Reif, *Knowledge is Power: Reform of For-Profit Educational Institutions on an Individual and Institutional Level*, 61 DRAKE L. REV. 251 (2012).

full costs of attendance; and that is all before students even get into the classroom.[80] Students and whistleblowers at schools all over the country allege that their for-profit school provided substandard education or programs that did not lead to promised credentials.[81]

Despite the alleged "customer-service orientation" of for-profit schools, students at for-profit schools are much more likely to drop out than comparable students in public or nonprofit private schools.[82] The Senate Health, Education, Labor and Pensions (HELP) Committee's recent study of thirty large for-profit schools found that "[o]verall, 54 percent of students who enrolled in a for-profit college in 2008-9 left without a degree by the middle of 2010."[83] The HELP Committee noted significant variation, with rates ranging from "27 percent to 84 percent withdrawal rates for individual undergraduate programs."[84] Thirty-nine percent of students dropped out of shorter graduate degree or certificate/diploma programs.[85] The HELP Committee estimated that 1.9 million students had failed to graduate over three years from just the sixteen largest for-profit colleges.[86] Dropout rates appear to be on the rise in the for-profit sector, although they have remained steady in other sectors. Dropout rates in the for-profit sector for students with federal student loans were an average of thirty-six percent in 2001, while they climbed to forty-six percent in 2009.[87]

With high debt-to-income levels and without a degree, non-completers are at the highest risk of defaulting on their loans and borrow more per credit.[88] A study of students who started school in 2001 but dropped out by 2009 found that among non-completers who started in for-profit institutions, nearly one-third (thirty-one percent) had accumulated federal loans totaling one hundred percent or more of their 2009 annual income, compared with twenty-one

80. *See* James, *supra* note 52, at 13-14; *see also* Daniela Kraiem, *Is Genesis Just the Beginning?*, STUDENT DEBT & EDUC. JUSTICE PROJECT (Sept. 19, 2014), http://studentdebtjustice.org/2014/09/19/is-genesis-just-the-beginning/#more-400, *archived at* http://perma.cc/52H3-4D7C (detailing allegations of misconduct against Corinthian College raised by CFPB).

81. *See, e.g.*, Daniela Kraiem, *Are you Sure You Want To Put That Question to a Jury?*, STUDENT DEBT & ECON. JUSTICE PROJECT (Aug. 21, 2013), http://studentdebtjustice.org/2013/08/21/are-you-sure-you-want-to-put-that-question-to-a-jury, *archived at* http://perma.cc/FA5Q-PLLP (reporting on whistleblower lawsuit brought against for-profit Globe University).

82. *See* Institute Press Release, *supra* note 78.

83. HELP COMM., *supra* note 11, at 16.

84. *Id.*

85. *See id.*

86. S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, RETURN ON THE FEDERAL INVESTMENT IN FOR-PROFIT EDUCATION: DEBT WITHOUT A DIPLOMA 3 (Sept. 30, 2010).

87. *See* WEI & HORN, *supra* note 77, at 5 (looking at non-completers who started in 1995-96 and 2003-04).

88. *See id.* at 9. Non-completers at for-profit schools borrow more per credit than any other group. For example, completers at a public two- or four-year school borrow $70 or $90 of federal loans per credit. Completers at for-profit schools borrow $220 per credit, and non-completers at those schools borrow $350 of federal loans per credit (and are also more likely to have private students loan debt as well). *See id.*

percent or lower in the other three sectors.[89] "Choice" alone does not make it good social policy.

2. The "Students Are Consumers" Metaphor Triggers Legal Background Rule: Caveat Emptor

The "Students are Consumers" metaphor does more than convince students that they have a "choice" of schools. Situating student loans in the realm of consumer law shapes the allocation of risk once they have made that choice. It places higher education financing and college choice squarely within the background legal rule for consumer purchases: *caveat emptor*, or buyer beware. In the realm of *caveat emptor*, wary buyers in a private marketplace are obliged to investigate their choices, and make informed decisions.[90] In a free marketplace, the behavior of the seller is irrelevant, so long as it does not violate a specific regulation. The obligation is not on the producer to sell a superior product. Rather, the consumer takes the risk of purchasing a poor product, or of overspending on a product.

Situating higher education in consumer law shapes regulation in two specific ways. First, federal and state governments do not regulate the quality of institutions of higher education directly. Students are supposed to vote with their feet. The higher education industry self-regulates through voluntary accreditation.[91] Federal and state governments play a limited role in this system. Federal and state governments will not generally provide financial aid to students who enroll in unaccredited schools. The Federal Department of Education designates which bodies may provide the accreditation required to draw down federal financial aid. Beyond that, students are on their own to determine not only whether a particular program meets their needs, but also whether that program will provide a quality education, including transferrable credits.

Further, because there is no government regulation of quality, there is no legal infrastructure to ensure that student consumers can purchase a superior educational product. There are excellent reasons, not the least of which is academic freedom, for keeping the government and state regulators out of the business of micromanaging what occurs in classrooms. On the other hand, reliance on a voluntary system of accreditation means that the only lever either the state or students have to regulate schools is one not designed for the task and does not place student social mobility at the fore: the financial aid system.

89. *See id.*

90. *See* Laidlaw v. Organ, 15 U.S. 178 (1817) (adopting *caveat emptor* as default rule in United States); Chandelor v. Lopus, 79 Eng. Rep. 3 (1603) (establishing *caveat emptor* as default rule in English common law).

91. *See generally Information About Accreditation*, COUNSEL FOR HIGHER EDUC. ACCREDITATION http://www.chea.org/public_info/index.asp (last modified Mar. 7, 2013), *archived at* http://perma.cc/C3QA-RTRG.

This means that most higher education policy is really "student loan law" and not education policy at all.

Protection of individual students is not at the core of the Higher Education Act regulatory regime, which generally does not allow private rights of action.[92] Operating against the background rule of buyer beware, Congress has limited regulation in the realm of "student loan law" to protecting the integrity of the market itself: correcting information asymmetry (by requiring disclosures) and preventing fraud (by allowing discharge of loans proved fraudulent).[93]

Beyond those minimal protections, the regulation of student loans is primarily centered on debt collection. There are some limited consumer protections that apply, such as notice or discharge for disability. Other than that, the framework is designed to facilitate debt collection by the federal government and its contractors, so as to prevent the *individual investment in human capital* from becoming a *public* one.

3. The Collateral Consequences of Default Thwart Social Mobility and Undermine Anti-Poverty Efforts

The consequences of failing, dropping out of, or defaulting on a debt to a for-profit school are enormous. Federal student loans carry unique and disastrous collateral consequences, instituted to prevent so-called "moral hazard."[94] To begin, they are permanent. Except in limited circumstances, both federal and private student loans cannot be discharged in bankruptcy.[95]

Further, the federal government (or its contractors) can impose a wide range of debt collection measures and sanctions on students who default.[96] These consequences, which I will describe below, include destruction of credit scores, with attendant damage to employment and housing prospects, loss of security clearances and professional licenses, non-judicial wage garnishment, tax

92. Thomas M. Cooley Law Sch. v. ABA, 459 F.3d 705, 710 (6th Cir. 2006) (holding HEA does not create private right of action). In the realm of private loans, the situation is stacked even more against the student, especially given the rise of mandatory binding arbitration agreements. *See* Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 TENN. L. REV. 515, 539-40 (2012).

93. This is not limited to the United States. Such trends are apparent worldwide. *See generally* Karsten Mause, *Considering Market-Based Instruments for Consumer Protection in Higher Education*, 33 J. CONSUMER POL'Y 29 (2009) (addressing market-based consumer information mechanisms world-wide).

94. The consequences described below apply primarily to federal student loans. Private lenders do not have the same collection powers, although default on a private loan triggers the same destruction of credit history.

95. *See, e.g.*, DANIEL A. AUSTIN & SUSAN E. HAUSER, GRADUATING WITH DEBT: STUDENT LOANS UNDER THE BANKRUPTCY CODE (2013) (describing limitations on discharge of student debt in bankruptcy); Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV 329, 363-68 (2013); Coco, *supra* note 52, at 589-95.

96. Although private lenders do not have the entire range of collection powers granted to the federal government, delinquency and default on these loans can wreak havoc on the credit histories and social mobility of borrowers. For more information regarding the collateral consequences of private student loans and possible remedies, see generally DEANNE LOONIN, NAT'L CONSUMER L. CTR., STUDENT LOAN LAW (4th ed. 2010).

garnishment, and garnishment of Social Security. These consequences imposed to reduce the moral hazard of non-collateralized lending, are not natural or inevitable. They are created by statute, and are the products of the specific legal regimes governing federal and private loans, and rooted in the default rule of buyer beware. They also destroy the social mobility of students, many of whom default on relatively small loans, and undermine anti-poverty efforts. The "Students are Consumers" framework and the discourse of student "choice" hides how the student debt collection system operates at cross-purposes with the core values of the educational system.

The reality of high default rates challenges the conventional wisdom, which holds that a student loan is part of a positive credit report, creating a narrative of a person who is both responsible and well prepared for the workforce.[97] While a student loan in repayment might not negatively affect a credit score, a default on a student loan will have a negative impact on a credit score and show up on a full credit report for as long as the debt is in default and then for at least seven years after it is paid in full.[98]

Student loan delinquency and default make it more difficult to obtain employment. Sixty percent of employers ask job applicants for their permission to run a credit report.[99] The negative credit histories created by student debt default compounds existing employment discrimination suffered by people of color. For example, the Equal Employment Opportunity Commission (EEOC) has brought charges against some employers (including Kaplan, a for-profit school, in its capacity as an employer) for race discrimination for the practice of using credit scores to deny employment, on the grounds that the practice has a disproportionate impact on African American applicants.[100]

A credit report and score lowered as the result of defaulting on a student loan will also impede the ability of student borrowers to purchase or rent housing. A borrower does not qualify for a Federal Housing Administration

97. *See* Equal Justice Works, *Understand the Impact of Student Loans on Credit Scores*, U.S. NEWS & WORLD REPORT (Jan. 2, 2013), http://www.usnews.com/education/blogs/student-loan-ranger/2013/01/02/understand-the-impact-of-student-loans-on-credit-scores, *archived at* http://perma.cc/PLF2-4SRJ.

98. *See* 20 U.S.C. § 1080(f) (2009); LOONIN, *supra* note 96, at 88; *Is Growing Student Loan Debt Impacting Credit Risk?*, FICO 8 (2013), http://www.fico.com/en/latest-thinking/white-papers/is-growing-student-loan-debt-impacting-credit-risk, *archived at* http://perma.cc/6H99-333M.

99. *Millions Need Not Apply*, N.Y. TIMES (May 29, 2011), http://www.nytimes.com/2011/05/30/opinion/30mon3.html?adxnnl=1&adxnnlx=1384038660-0FrofABEvPG6T3JBSiMY7Q; *see also* Kristen McNamara, *Bad Credit Derails Job Seekers*, WALL ST. J. (Mar. 16, 2010), http://online.wsj.com/news/articles/SB10001424052748703909804575123611107626180. Note that a handful of states limit this practice. *See, e.g.*, CAL. CIV. CODE § 1785.20.5 (West 2012); CONN. GEN. STAT. ANN. § 31-51tt (b) (West 2014); 820 ILL. COMP. STAT. ANN. 70/1 (West 2011); MD. CODE. ANN., LAB. AND EMPL. § 3-711 (West 2012); NEV. REV. STAT. ANN. § 613.570 (West 2013).

100. Press Release, EEOC, EEOC Files Nationwide Hiring Discrimination Lawsuit Against Kaplan Higher Education Corp. (Dec. 21, 2010), http://www.eeoc.gov/eeoc/newsroom/release/12-21-10a.cfm, *archived at* http://perma.cc/JQ7U-PYMA.

(FHA) loan if he or she is still in default.[101] The plunge in FICO score from a student loan default will very likely take a consumer out of the housing market entirely.[102] For those still able to take out a mortgage, a lower credit score means higher interest rates, thus driving up the cost of housing (and leading to loss of wealth in the form of home equity) for those who can least afford it.[103] Because landlords may refuse to rent or require extra deposits on the basis of low credit, a student loan default will also narrow rental housing options or make them more expensive.[104]

The collateral consequences of student loan default also keep students from getting the very jobs they went to school to get. Financial problems, including low credit scores, delinquency or default are the number one reason given for denial or loss of military security clearance, thus limiting job options for members of the military and security communities.[105] Many state laws allow

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101. *See HUD 4155.1*, U.S. DEP'T OF HOUSING & URBAN DEV., http://portal.hud.gov/hudportal/documents/huddoc?id=41551HSGH.pdf (last visited May 20, 2015), *archived at* http://perma.cc/X9MC-KDX4.

> If . . . a borrower is . . . presently delinquent on any Federal debt or has had a lien (including taxes) placed against his/her property for a debt owed to the Federal government, he/she is *not* eligible for an FHA mortgage until[:]
>
> [T]he delinquent account is brought current, paid, or otherwise satisfied, or
>
> [A] satisfactory repayment plan is established between the borrower and the Federal agency owed, which is verified in writing.

Id. at 4(A)(2)(f).

> Although a borrower's eligibility for an FHA-insured mortgage may be established by performing the actions described previously in this topic, the overall analysis of the borrower's creditworthiness must[:]
>
> [C]onsider a borrower's previous failure to make payments to the Federal agency in the agreed-to manner, and
>
> [D]ocument the lender's analysis as to how the previous failure does not represent a risk of mortgage default.

Id. at 4(A)(2)(i).

102. *See* Letter from Assistant Secretary for Housing - Federal Housing Commission, to All Approved Mortgages, Manual Underwriting (Jan. 21, 2014) (on file with author); *The Facts About FHA Housing Requirements*, FED. HOUS. ADMIN., https://www.fha.com/fha_article?id=325 (last visited May 20, 2015), *archived at* http://perma.cc/KW7T-GKRD.

103. *See generally Loan Savings Calculator*, MYFICO, http://www.myfico.com/myfico/creditcentral/loanrates.aspx (last visited May 20, 2015), *archived at* http://perma.cc/4X4Y-KCVU (providing calculator showing differential mortgage rates based on credit score). As of February 27, 2014, a borrower with a credit score of 760 would likely be offered a rate of 3.926, while a borrower with a score of 620 would be offered a rate of 5.15. *See id.* A thirty-year term on a $271,000 home, the average national cost as of 2010, results in an increased cost of $93,584. *See id.*

104. *See* Brandi Jewett, *Bad Credit, Bad Choices Serve as Barrier to Housing for Homeless*, GRAND FORKS HERALD (Nov. 1, 2013), http://www.grandforksherald.com/content/bad-credit-bad-choices-serve-barrier-housing-homeless, *archived at* http://perma.cc/8EYP-TDBD (citing poor credit as rental barrier).

105. *See Adjudicative Guidelines for Determining Eligibility for Access to Classified Information*, U.S. DEP'T OF STATE (Feb. 3, 2006), http://www.state.gov/m/ds/clearances/60321.htm, *archived at* http://perma.cc/DD7V-C4R2 ("An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds.").

for the suspension, revocation or restriction of a student's professional or vocational license for defaulting on state or federal student loans.[106]

If a student manages to find work, the debt collection efforts of the federal government reduce the value of that employment for the student, and can keep families in poverty. Federal student loans are subject to non-judicial wage garnishment, which means the federal government can garnish fifteen percent of disposable pay without a hearing.[107] Federal law requires that a tax offset be imposed whenever a debtor owes money to a federal agency, including the Department of Education or a student loan guarantee agency.[108] The federal government may seize tax refunds, including Earned Income Tax Credit (EITC) refunds, undermining a program that keeps 6.1 million Americans out of poverty each year.[109]

The federal government has the authority to seize portions of Social Security (including Social Security Disability) and other federal benefits to pay back defaulted student loans.[110] In 2012, more than 115,000 recipients had their Social Security benefits offset for defaulted student loans.[111] It is worth noting that beneficiaries who are likely to rely almost exclusively on Social Security for income are disproportionately female, particularly women of color.

4. Consumer Choice Rhetoric Undermines the Ability To Stop the For-Profit Industry from Harming Students

Each of the above collateral consequences of default, taken individually, might be a problem.[112] Taken together, they spell a destruction of social mobility for the student borrower, undermining their *individual investment in human capital*. In the aggregate, they start to thwart social mobility at the local and national levels, rendering our country as a whole less mobile. High cohort default rates also threaten the billions in *public investment in human capital*.

Regulation of the for-profit sector, situated as it is within a market-based framework, despite billions in federal subsidy, poses a significant political challenge.[113] The for-profit industry has poured millions of dollars into

106. *See* LOONIN, *supra* note 96, at 137 (listing state regulations allowing for restriction of licensing when member defaults on student loans).

107. *See id.* at 122-33 (explaining non-judicial wage garnishment).

108. *See id.* at 117 (explaining tax refund offset program).

109. *See* 31 U.S.C. § 3720A (2012).

110. 31 U.S.C. § 3716 (2012); *see* Lockhart v. United States, 546 U.S. 142, 145-46, 149-50 (2005).

111. *See* AnnaMaria Andriotis, *How Student Loans Could Hit Your Social Security*, MARKETWATCH (Aug. 10, 2012), http://www.marketwatch.com/story/how-student-loans-could-hit-your-social-security-2012-08-10; Steve Rhode, *More Losing Social Security to Student Loan Wage Garnishments*, HUFFINGTON POST (Aug. 14, 2012), http://www.huffingtonpost.com/steve-rhode/more-losing-social-security_b_1773159.html, *archived at* http://perma.cc/UG34-FXMH.

112. There are additional consequences to default not covered in this paper, including a prohibition on receipt of future federal student aid. These also contribute to the destruction of social mobility for students who default.

113. For an excellent analysis of how proponents deploy free market rhetoric to disrupt attempts to

lawsuits and lobbying efforts that deploy the "Students are Consumers" metaphor to fend off attempts at stronger regulation.

Some regulation has been successful in the past, at least at weeding out the worst and most predatory schools. In the early 1990s, default rates peaked at twenty percent[114] driven by disproportionately high default rates in schools derided as diploma mills.[115] The Department of Education imposed stronger regulations, including a more stringent default rate threshold in 1989.[116] Those regulations, combined with a roaring economy, eliminated the most predatory schools and reduced default rates for a time.

As in other industries, regulation of for-profit higher education tightens and loosens with the political winds. The Bill Clinton and George W. Bush administrations weakened regulation, especially around recruiting practices. Default rates started to rise again. By the middle of the Great Recession, student loan default rates had reached high enough levels to draw the attention of the media, Congress, and the Obama administration.

In 2009-2011, the Department of Education attempted to beef up regulation of for-profit schools. After a negotiated rulemaking, it promulgated regulations addressing "program integrity," including recruiting practices, assessment of a student's "ability to benefit" from a program, and increasing disclosure requirements.[117] Most of these regulations remain in place, although the for-profit industry successfully blocked portions addressing the "Gainful Employment Rule," which tied eligibility for federal funding to not just the traditional "cohort default rates" but also to a baseline debt-to-income ratio for students leaving programs.[118]

In the fight over the Gainful Employment Rule, the for-profit industry strategically deployed "Students are Consumers" and choice rhetoric to sway public opinion against increased regulation. For example, Education Management Corporation created a website, "SaveStudentChoice.Org," to urge its students to write their representatives.[119] The trade group for for-profit schools circulated fact sheets claiming that the "gainful employment regulation

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regulate in this sector, see generally Omari Scott Simmons, *For-Profits and the Market Paradox*, 48 WAKE FOREST L. REV. 333 (2013).

114. Tamar Lewin, *Student Loan Default Rates Rise Sharply in Past Year*, N.Y. TIMES (Sept. 12, 2011), http://www.nytimes.com/2011/09/13/education/13loans.html.

115. *See* HELP COMM., *supra* note 11, at 13.

116. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 1078-1, 103 Stat. 2106.

117. *Program Integrity Issues*, 75 Fed. Reg. 66,831-66,975 (Oct. 29, 2010) (codified at 34 C.F.R. §§ 600, 602, 603, 668, 682, 685, 686, 690, 691).

118. ASPCU v. Duncan, No. 11-cv-1314-RC (D.C. Cir. June 30, 2010) (memorandum opinion) (invalidating portions of gainful employment provisions of Program Integrity Rules codified at 34 C.F.R. §§ 600.2, 600.4, 600.5, 600.0, 668.6, and 668.8). For a description of the attempt to promulgate a gainful employment rule up through 2012 (and an example of the "human capital" discourse in action), see Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439 (2012).

119. SAVE STUDENT CHOICE: STUDENT ACCESS STUDENT CHOICE COALITION, http://www.savestudentchoice.org/ (last visited May 20, 2015), *archived at* http://perma.cc/4NTV-VHH5.

will deny millions of students access to programs that have a net economic benefit" and would "disproportionately impact students of color, women, and the economically disadvantaged."[120] Louisiana Governor Bobby Jindal claimed that Obama administration's focus on weeding out schools with high default rates was "tantamount to redlining educational opportunities."[121] Members of Congress tried block implementation via the 2015 appropriations process, writing that "the gainful employment regulation will severely limit some students' ability to use federal student aid at the college of their choice, a distinguishing tenet of the American higher education system."[122]

Perhaps ironically, the gainful employment regulation and others enforced by the Department of Education do not challenge the market frame itself. Instead, they function by taking the most toxic products out of the market. Along similar lines, the Securities and Exchange Commission, Federal Trade Commission, Consumer Financial Protection Bureau, and state Attorneys General have pioneered some outstanding strategies to reign in the worst of the for-profit schools.[123] Students and employees have also brought suit, bringing to light some of the most egregious practices.[124] These actions are necessary, timely, and worthwhile. They demonstrate the depth of the problem in the for-profit industry. They can, however, only weed out the worst apples. They cannot change the underlying structures that create the problem in the first place.

The for-profit industry and its supporters managed to delay implementation of various proposed Gainful Employment Rules for five years, until July, 2015.[125] That the for-profits can invoke choice as a compelling defense

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120. *Bad Public Policy: The Gainful Employment Regulation*, ASS'N. OF PRIVATE SECTOR COLLS. & UNIVS. (2014), http://www.apscu.org/news-and-media/press-releases/upload/CRA-Guryan-Summary.pdf, *archived at* http://perma.cc/WZG9-8YF6.

121. Bobby Jindal, *New Education Department Rules Help Elite College Students at the Expense of Poor and Minorities*, WASH. EXAMINER (May 28, 2014), http://washingtonexaminer.com/new-education-department-rules-help-elite-college-students-at-the-expense-of-poor-and-minorities/article/2548961, *archived at* http://perma.cc/XH9W-LL9X; *see also* Bruce Alpert, *Gov. Jindal, in Newspaper Column, Championed For-Profit-Colleges That His Brother Represented in Court*, TIMES-PICAYUNE (May 30, 2014), http://www.nola.com/politics/index.ssf/2014/05/gov_jindals_attorney_brother_r.html, *archived at* http://perma.cc/ENL3-8GDR (noting Jindal's undisclosed potential conflict of interest).

122. Letter from Representative John Kline, Chairman of the Committee on Education and the Workforce, U.S. House of Representatives et al., to Representative Harold Rodgers, Chairman of the Committee on Appropriations, U.S. House of Representatives, et al. (May 22, 2014).

123. *See* David Halperin, *Law Enforcement Investigations and Actions Regarding For-Profit Colleges*, REPUBLIC REPORT (Mar. 5, 2015), http://www.republicreport.org/2014/law-enforcement-for-profit-colleges/, *archived at* http://perma.cc/65DU-348E (providing list of regulatory actions against major for-profit companies).

124. *See, e.g.*, Daniela Kraiem, *Blowing the Whistle on For-Profit Education*, STUDENT DEBT & EDUC. JUSTICE (Mar. 6, 2014), http://studentdebtjustice.org/2014/03/06/blowing-the-whistle-on-for-profit-education/, *archived at* http://perma.cc/CV96-G6JZ (describing whistleblower and student suits brought against Harris (Premier Education Group)).

125. The Department of Education issued an updated Gainful Employment Rule in late 2014. Program Integrity: Gainful Employment, 79 Fed. Reg. 64,889 (Oct. 30, 2014) (codified at 34 C.F.R. §§ 600, 668). As

demonstrates the rhetorical power of the commodity and consumption framework. It papers over the terrible collateral consequences suffered by injured students, and the billions of taxpayer dollars at risk. Remaining in the market frame—and arguing about choice—keeps us from making forward-looking educational policy that creates meaningful access for students and strengthens communities over the long term.

My larger project focuses on what regulation that moves beyond a market framework might look like. Rather than have the federal government attempt to regulate quality via the federal aid system, what would a higher education law framework that had teaching, learning, and community as core values look like? I will begin to take up this question in Part IV. Before that, however, I will deconstruct how damage wrought by the market framework is not limited to the for-profit sector. It also harms students in the nonprofit and public sectors of higher education. By encouraging an arms race for school rankings, the "Education is a Commodity" metaphor has led to increased prices. Higher prices have led to increased debt burden. That debt burden, in turn, reduces social mobility for the middle class.

B. "Education Is a Commodity" and Rising Debt Burden in the Nonprofit Sector

1. "Education Is a Commodity" Metaphor Forces Competition for Rankings in Nonprofit Schools

If higher education is a market, then schools are the competitors offering a product. Schools are supposed to compete on various grounds such as quality, fit, reputation, price, and location. Students, as savvy consumers, are supposed to invest their education dollars well by hunting for the school that gives them what they want, at the best price.

Given the bewildering array of providers (also known as "schools") it is not surprising that a broker (in this case the *U.S. News & World Report*) stepped forward to provide a simplified metric for judging schools. The *U.S. News & World Report* acknowledges "[t]he host of intangibles that makes up the college experience can't be measured by a series of data points. But for families concerned with finding the best academic value for their money, the U.S. News Best Colleges rankings provide an excellent starting point for the search."[126]

Rankings—a simplified tool for the consumer—are not benign, neutral

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of this writing, the rule is due to go into effect July 1, 2015. *Id.* The Association of Private Sector Colleges and Universities has sued, asking that the October 30, 2014 regulation be vacated. Complaint for Plaintiff at 1, APSCU v. Duncan, No.14-01870-JDB (D.D.C. Nov. 6, 2014).

126. *How U.S. News Calculated the 2015 Best Colleges Rankings*, U.S. NEWS & WORLD REPORT (Sept. 8, 2014), http://www.usnews.com/education/best-colleges/articles/2013/09/09/how-us-news-calculated-the-2014-best-colleges-rankings, *archived at* http://perma.cc/3887-5JH6 [hereinafter *U.S. News College Calculation*].

observers of a self-regulating market. In a market driven by return on investment, in which many competitors offer virtually identical products, ordinal rankings take on an outsized importance. The situation is especially acute in smaller subsets of the market with standardized curricula, like law schools. To create a simple ordinal ranking, the magazine must use easy-to-measure data points as proxies for quality. The simplified metrics used to measure quality and value bend the market itself, as competitors change their behavior to meet the criteria set by the rankings, even if their connection to high quality teaching and learning are attenuated. Emphasis on measureable input and output also makes it possible to separate economic considerations (things money can buy) from harder to measure social policy (the effects of buying those things), even though in the real world, they are inexorably linked.

Much ink has already been spilled over the damage wrought to higher education by the rankings. In this example, I explore one aspect of how simple ordinal rankings are damaging higher education. The competition for commercial consumer rankings drives one significant factor in skyrocketing tuition: non-need based tuition discounting, also known as "merit scholarships," "financial aid leveraging,"[127] "price discrimination,"[128] or more cynically, "U.S. News Rankings Rebates."[129]

The huge growth in merit tuition discounting arose in response to one input measurement in the *U.S. News* rankings system. Class standing and standardized test scores of the entering class are easily measured inputs that have nothing to do with the quality of education offered at a school.[130] These inputs make up eleven percent of the *U.S. News* ranking for undergraduate programs[131] and twenty-three percent for law schools.[132] These inputs are not just measurable. As "enrollment managers" all over the country advise client colleges, they—and therefore the rankings—can be manipulated.

Schools offer merit scholarships to students who will have a beneficial effect

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127. Matthew Quirk, *The Best Class Money Can Buy*, ATLANTIC (Nov. 2005), http://www.theatlantic.com/magazine/archive/2005/11/the-best-class-money-can-buy/304307/, *archived at* http://perma.cc/28VT-JMFQ.

128. Robert A. Lawson & Ann Zerkle, *Price Discrimination in College Tuition: An Empirical Case Study*, 5 J. ECON. & FIN. EDUC. 1 (2006), *available at* http://www.economics-finance.org/jefe/econ/Lawsonpaper.pdf, *archived at* http://perma.cc/X8JQ-FGJU.

129. Daniel J. H. Greenwood, *Market Irrationality in the Law School 'Arms Race,'* HUFFINGTON POST (May 6, 2011), http://www.huffingtonpost.com/daniel-j-h-greenwood/market-irrationality-in-t_b_856400.html, *archived at* http://perma.cc/52NT-GXUS.

130. Henry E. Riggs, *How 'Merit' Aid Hurts the Needy—And Colleges*, CHRON. HIGHER EDUC. (Sept. 16, 2013), http://chronicle.com/article/Does-Merit-Aid-Abet-Tuition/141623/, *archived at* http://perma.cc/3E4P-25ZK.

131. The *U.S. News and World Report* assigns a weight of .08 to standardized test scores and .03 to grades (based on percentage of class in top ten percent of high school), for a total of roughly eleven percent of total undergraduate program rankings. *See U.S. News College Calculation*, *supra* note 126.

132. The *U.S. News and World Report* assigns a weight of .125 to median LSAT scores and .10 to median undergraduate GPA when calculating law school rankings. Sam Flanigan & Robert Morse, *Methodology: 2016 Best Law Schools Rankings*, U.S. NEWS & WORLD REPORT (Mar. 9, 2015), http://www.usnews.com/education/best-graduate-schools/articles/law-schools-methodology, *archived at* http://perma.cc/LL3B-DSKF.

on the school's ranking. This is not the simple rewarding of merit for a few super-talented students. A prescient reporter observed nearly ten years ago that, "[a]dopting data-mining and pricing techniques from the airline and marketing industries, they have developed a practice called *financial-aid leveraging* that allows a school to buy, within certain limits, whatever class it wants."[133] As a corollary, schools engage in a practice called "admit-deny" in which they strategically deny institutional aid to students who meet criteria for admission, but who do little to improve the school's rank.[134]

In a related move, schools looking to raise revenue often also give so-called merit aid to wealthy students who do not raise the school's ranking, but who can help the school's bottom line. The ideal merit recipient is a student who is both wealthy and has high class rank and standardized test scores. These disproportionately white students are often showered with competing tuition discounts from multiple schools.[135]

Tuition discounting for either high scoring or wealthy students who are able but unwilling to pay the full sticker price has skyrocketed in recent years.[136] At private nonprofit colleges in 1995-96, twenty-four percent received merit aid.[137] In 2008-09, forty-four percent received merit aid.[138] The average tuition discount (which includes both need and merit-based) for freshman at nonprofit schools in 2012 was forty-five percent.[139] This high and uneven discount rate reflects grossly inflated tuitions, which are then discounted in varying degrees for some students but not at all for others. The bottom line is that some students pay less, while other pay much more. Price discrimination helps to explain why many nonprofit and public school students have

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133. Quirk, *supra* note 127 (emphasis added).

134. *Id.* (describing admit/deny as practice of offering admission with weak financial aid package to deter enrollment).

135. Mark Kantrowitz, *The Distribution of Grants and Scholarships by Race*, FINAID.ORG 9 (Sept. 2, 2011), *available at* http://www.finaid.org/scholarships/20110902racescholarships.pdf, *archived at* http://perma.cc/WA6X-A7F5.

> Caucasian students receive a disproportionately greater share of merit-based institutional grants, with Caucasian students receiving 75.5% of merit-based institutional grants despite representing only 61.8% of the student population. Minority students, on the other hand, receive 24.4% of merit-based institutional grants, even though they represent 38.0% of the student population. Caucasian students are almost twice as likely to receive institutional merit-based grants as minority students.

Id.

136. *See* SANDY BAUM & LUCIE LAPOVSKY, TUITION DISCOUNTING: NOT JUST A PRIVATE COLLEGE PRACTICE, COLL. BD. 1-3 (2006).

137. STEPHEN BURD, UNDERMINING PELL, NEW AM. FOUND. 3 (2013).

138. *See id.*

139. Kevin Kiley, *Price of a Bad Economy*, INSIDE HIGHER ED (May 7, 2013), https://www.insidehighered.com/news/2013/05/07/nacubo-survey-reports-sixth-consecutive-year-discount-rate-increases, *archived at* https://perma.cc/4L2T-Q4TU (citing National Association of College and University Business Officers 2012 survey of private nonprofit schools). While much of this aid is need-based, a significant and rising portion of the aid is so-called merit-based.

manageable debt levels, while others have unmanageable debt levels, even though they attend the same schools and receive the same degrees.

2. Education Is a Commodity Triggers Legal Background Rule: Antitrust in United States v. Brown University

It wasn't always this way. Schools long refused to engage in a merit arms race, believing that it ran counter to their public service missions. From 1954 to 1991, a group of elite schools that called themselves the "Overlap Group" collaborated to ensure, among other things, that tuition discounts were made only on the basis of need, and not used as merit incentives for middle class students.[140] Many other groups of colleges collaborated within their regions with similar agreements.[141]

What changed? In *United States v. Brown University*,[142] the Department of Justice brought an antitrust suit against Overlap, alleging that its agreement amounted to illegal price fixing.[143] In doing so, it sought to apply antitrust regulation—the law of commerce—to higher education for the first time. Rather than fight the idea that antitrust law applied to higher education, most of the schools accepted a consent decree that ended Overlap's activities.[144] The decree barred the schools from even communicating regarding possible merit awards, thus creating a classic prisoner's dilemma.

The rhetoric and arguments deployed in *United States v. Brown University* allow us to trace how "Education is a Commodity" and related metaphors triggered the application of antitrust doctrine to higher education, thus forcing competition rather than cooperation. Massachusetts Institute of Technology (MIT) alone refused to join the consent decree. MIT relied on *Webster Junior College*, in which the D.C. Circuit Court of Appeals had held that the "proscriptions of the Sherman Act were 'tailored . . . for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions."[145] MIT argued that "MIT's function is to teach, to discover and to build. It is to leave to the next generation a better and more knowledgeable world. Yet in the eyes of the Antitrust Division, such an institution is indistinguishable from a manufacturer of toaster ovens or porcelain fixtures."[146]

The Justice Department sought to have the Sherman Act applied to Overlap,

140. Theodore J. Stachtiaris, *Antitrust in Need: Undergraduate Financial Aid and* United States v. Brown University, 62 FORDHAM L. REV. 1745, 1746-47 (1994).

141. *See* Stephen Burd, *Merit Aid Madness*, WASH. MONTHLY (Sept./Oct. 2013), http://www.washingtonmonthly.com/magazine/september_october_2013/features/merit_aid_madness046453.php?page=all, *archived at* http://perma.cc/79GT-CRGY.

142. 5 F.3d 658 (3d Cir. 1993).

143. *Id.* at 661.

144. *See id.* at 664.

145. Webster Junior Coll. Inc. v. Middle State Ass'n of Colls., 432 F.2d 650, 654 (D.C. Cir. 1970).

146. *A Brief History of Overlap and the Antitrust Suit*, MIT NEWS (Sept. 3, 1992), http://newsoffice.mit.edu/1992/history-0903, *archived at* http://perma.cc/TS66-A766.

and thus higher education more generally. In announcing the suit, Attorney General Thornburg stated: "[t]his collegiate cartel has denied [students] the right to compare prices and discounts among schools, just as they would in shopping for any other service or commodity."[147] Thornberg's arguments make clear the Justice Department's position that consumer protection, in this case in the guise of antitrust law, requires courts to sever economic rationale from the consequences of policy: "[t]he government argues that, absent an express exemption from the antitrust laws, the Sherman Act's prohibition of price-fixing must be applied rigorously in all sectors of the economy, without regard to potential social benefits or policy concerns."[148] Everything is commerce, unless Congress specifies otherwise.

The Third Circuit Court of Appeals agreed that higher education was indeed "commerce."[149] As the result of *United States v. Brown University*, Overlap and other groups like it stopped all communication regarding aid awards. Despite the scarcity of case law on the subject, it is now generally assumed that a coordinated effort to reduce the merit arms race would violate the Sherman Act.[150]

3. Buying Rankings with Merit Scholarships Drives Up Tuition

Twenty-five years after *United States v. Brown University*, competition for ranking has not reduced the costs to all, or even most, "consumers." On the contrary, when the Justice Department convinced the federal court to apply antitrust laws designed for traditional commodities to higher education, tuition increased, student debt skyrocketed, and an arms race that is harming all of higher education ignited.

United States v. Brown University reflects the assumption that price competition would lower prices for students.[151] After all, proponents argued, it

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147. Donald Robert Carlson & George Bobrinskoy Shepard, *Cartel on Campus: The Economics and Law of Academic Institutions' Financial Aid Price-Fixing*, 71 OR. L. REV. 563, 568 (1992) (quoting Dept. of Justice Briefing, Fed News Service, May 22, 1991).

148. *Id.*

149. *See* United States v. Brown Univ., 5 F.3d 658, 661 (3d Cir. 1993). The *Brown University* court upheld the lower court's conclusion that practices of private colleges agreeing to award aid based only on need implicates "trade or commerce," thus triggering application of the Sherman Antitrust Act, and remanding for further proceedings. *See id.*

150. Under the guise of providing "choices" for "consumers," the U.S. Department of Justice brought suit in 1995 against the American Bar Association for its refusal to accredit for-profit law schools, on the grounds that its refusal violated the Sherman Act's prohibition on agreements in restraint of trade. Complaint, United States v. Am. Bar Ass'n, (D.D.C., June 27, 1995) (No. 1:95CV01211). The ABA submitted to a consent decree, so the merits of the case were never fully litigated. *See* Renata B. Hesse & Jessica N. Butler-Arkow, *Application of the Antitrust Laws to Colleges and Educational Organizations*, AM. BAR 28, http://apps.americanbar.org/antitrust/at-committees/at-exemc/pdf/application.pdf, *archived at* http://perma.cc/B34W-CVP5. Since that time, accrediting bodies have feared that a failure to accredit for-profit schools on the basis of profit motive would be deemed a violation of the Sherman Act, although that proposition has not been tested in a court. *See id.* at 29.

151. *See* Hesse & Butler-Arkow, *supra* note 150, at 21-22.

worked in the airline industry.[152] In some measure, the Justice Department was right; colleges now engage in airline pricing. As education economist Ronald Ehrenberg notes, "[o]utlawing the Overlap Group has led to an increase in price competition for students and the size of financial packages going to *some* admitted applicants."[153]

Competition, however, has actually increased cost for most other students. Schools have to pay for those merit tuition discounts that attract high achieving and wealthy students. Wealthy schools can pay for them out of endowment funds.[154] Schools without large endowments must pay for merit discounts with tuition revenue.[155] If existing revenue is not sufficient for this purpose, schools must raise tuition faster than the rate of inflation.[156] When state and federal grants do not increase at the same rate, students have to pay these higher tuitions out of student loans.[157] As economist Ronald Ehrenberg explains, using tuition dollars to pay for those more generous merit packages "directly puts upward pressure on tuition because if the institution is unwilling or unable to cut other expenditures, it needs to find a way to replace the increased dollars taken for financial aid from its operating budget."[158]

The "some admitted applicants" Ehrenberg refers to tend to be disproportionately white and upper middle class. Everyone else, namely low and middle income students, make up for the lost revenue by paying increased tuitions. They are far *worse off* under this high tuition/merit discount regime than they would have been otherwise.

Many nonprofit schools, and some entire state public systems, have adopted a so-called "High-Tuition/High-Aid" model that they claim allows them to maximize merit-based tuition discounting and ensure access to needy students, all while maintaining revenue. The idea, which originated in private nonprofit schools (and has spread to public systems), was that schools would charge high sticker prices, enabling them to offer merit discounts to attract students who would raise their *U.S. News* ranking. They would then offer generous need-based discounts for low-income students.

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152. *See* Carlson & Shepard, *supra* note 147, at 588.

153. EHRENBERG, *supra* note 9, at 79 (emphasis added).

154. *See id.* at 77-78.

155. *See* Kevin Kiley, *Discounting Heads*, INSIDE HIGHER ED (Apr. 5, 2012), http://www.insidehighered.com/news/2012/04/05/nacubo-study-discount-rates-finds-another-increase-and-drop-enrollment, *archived at* http://perma.cc/AR75-YNU3 (asserting private schools spend almost forty-three percent of gross tuition revenue from first-time, full-time freshmen on institutional aid). Only ten percent of aid comes from endowments, and that is not evenly distributed among institutions. *See id.*

156. *See* EHRENBERG, *supra* note 9, at 79; ROBERT B. ARCHIBALD & DAVID H. FELDMAN, THE ANATOMY OF COLLEGE TUITION, AM. COUNCIL ON EDUC. 5 (2012), http://www.acenet.edu/news-room/Documents/Anatomy-of-College-Tuition.pdf, *archived at* http://perma.cc/6KTX-GPFJ.

157. There are, of course, multiple factors in ever-spiraling costs. Need-based discounts are another large component, but are beyond the scope of this paper, as they are not driven by market rhetoric.

158. EHRENBERG, *supra* note 9, at 79.

The reality has been far different.[159] Only three percent of schools have increased aid as much as they increased tuition.[160] In too many cases, other costs or merit-based discounting have absorbed the resources generated by tuition hikes, leaving low-income students with large "gaps" and middle income students with impossibly high sticker prices.[161] Only a few schools with large endowments meet the full needs of low-income students. Nearly two-thirds of the 479 nonprofit schools analyzed in a recent report by the New America Foundation "charge students from the lowest-income families, those making $30,000 or less annually, a net price of over $15,000 a year."[162] Even wealthy institutions are not always generous with need-based aid. Researcher Alex Holt notes that, "these institutions tend to use their institutional financial aid as a competitive tool to reel in the top—and most affluent—students to help them climb the U.S. News & World Report rankings and maximize their revenue."[163]

Non-need based price discrimination appears to have a disparate impact on students of color, who do not receive merit-based scholarships in proportion with their presence in the student body. At four-year colleges, minority students receive only 24.4% of merit scholarships, despite the fact that they make up thirty-eight percent of the student population.[164] In the longer term, there is evidence that in the years after schools ramp up merit aid, they begin to enroll smaller shares of low-income and black students than previously.[165]

4. High Debt Burden Thwarts Social Mobility and Drags Down the Economy

Rising tuition for most means rising debt burdens. While not as immediately devastating as the consequences of default, high debt burden thwarts the social and economic mobility that comes from building wealth. A hypothetical couple with bachelor's degrees and high incomes, who have the average student debt of $53,000, will lose $208,000—four times the amount of the loans—in projected wealth over their lifetimes.[166]

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159. *See generally* STEPHEN BURD, UNDERMINING PELL VOLUME II, NEW AM. FOUND. (2014), *available at* https://www.newamerica.org/downloads/UnderminingPellVolume2_SBurd_20140917.pdf, *archived at* https://perma.cc/KWX8-HFV9 (describing how high tuition/high aid disadvantages low-income students across nonprofit and public colleges and universities).

160. *See* Josh Freedman, *How Not To Help the Poor: The Lesson of Soaring College Prices*, ATLANTIC (July 10, 2013), http://www.theatlantic.com/business/archive/2013/07/how-not-to-help-the-poor-the-lesson-of-soaring-college-prices/277658/, *archived at* http://perma.cc/4HBB-PGD3.

161. *See id.*

162. Alex Holt, *The Higher Ed Arms Race: How the High-Tuition High-Aid Model Shuts Out Low-Income Students*, NEW AM. FOUND. (May 9, 2013), http://www.newamerica.net/taxonomy/term/2108?page=4.

163. *Id.*

164. Kantrowitz, *supra* note 135.

165. *See* Amanda L. Griffith, *Keeping Up with the Joneses: Institutional Changes Following the Adoption of a Merit Aid Policy*, CORNELL U. SCH. INDUS. & LAB. RELS. 4 (2009) (positing correlation between increased merit aid and decreased black student enrollment).

166. HILTONSMITH, *supra* note 23, at 1.

Over one-third of the typical loss comes from delayed or reduced home buying or $70,000 in lost home equity over time.[167] High debt-to-income ratios lock students out of the mortgage market. Borrowers making high student loan payments cannot save for a down payment for a first home. It is therefore no surprise that "market share of existing homes" of first-time homebuyers "was 30 percent in February 2013, compared to historical levels of 40 percent."[168]

The other two-thirds of the loss for our hypothetical young couple stems from delayed or skipped saving for retirement, with an average loss of $134,000 in retirement savings.[169] The Consumer Financial Protection Bureau worries that "rising student debt for younger consumers might delay participation in or reduce contributions to employer-sponsored retirement plans, leading to lost growth in those critical early years of labor force participation."[170]

The $208,000 figure represents the best-case scenario. People with higher than average debt suffer even larger losses, particularly African Americans, who tend to hold on average $4,000 more debt than the average graduate.[171] Single women and lesbian couples, on average, would likely lose more wealth than heterosexual couples, due to higher levels of debt and lower average income within households that consist only of women.[172]

High debt burden impedes entrepreneurship and small business formation, again disrupting the ability to build wealth, remain socially mobile, and improve local communities. Small business formation declines in counties as the level of student debt in a community increases.[173] As the Consumer Financial Protection Bureau points out, "[f]or many young entrepreneurs, it is critical to invest capital to develop ideas, market products, and hire employees. Student debt burdens require these individuals to divert cash away from their businesses so they can make monthly student loan payments."[174]

High debt burden also affects wealth accumulation in older borrowers. The American Association of Retired Persons (AARP) is concerned that for borrowers aged between fifty and sixty-four, "increasing debt threatens their ability to save for retirement or accumulate other assets, and may end up

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167. *Id.*

168. STUDENT LOAN AFFORDABILITY: ANALYSIS OF PUBLIC INPUT ON IMPACT AND SOLUTIONS, CONSUMER FINANCIAL PROTECTION BUREAU 8 (May 8, 2013), *available at* http://files.consumerfinance.gov/f/201305_cfpb_rfi-report_student-loans.pdf, *archived at* http://perma.cc/5G6N-NUKN.

169. HILTONSMITH, *supra* note 23, at 3 (discussing variation of average student debt based on race).

170. STUDENT LOAN AFFORDABILITY, *supra* note 168, at 9.

171. HILTONSMITH, *supra* note 23, at 3.

172. *See* CORBETT & HILL, *supra* note 31, at 23-24.

173. *See* Phyllis Korrki, *The Ripple Effects of Rising Student Debt*, N.Y. TIMES (May 24, 2014), http://www.nytimes.com/2014/05/25/business/the-ripple-effects-of-rising-student-debt.html (citing research presented previously at the Suffolk University Law School Research Symposium on Student Debt, by Brent Ambrose, Larry Cordell, and Shuwei Ma).

174. STUDENT LOAN AFFORDABILITY, *supra* note 168, at 8.

requiring them to delay retirement."[175]

The high debt burden of students is not just a problem for individuals who are not buying houses, starting businesses, or able to build wealth due to student debt.[176] The Federal Reserve has expressed concern that student debt burden is slowing the recovery of the housing market, as first time homebuyers are either denied mortgages due to debt-to-income ratio, or do not even attempt to borrow.[177] Based on research conducted by the Federal Reserve Bank of New York, the New York Times reports that:

> From 2009 to 2012, the homeownership rate fell twice as much for 30-year-olds who had a history of student loans than it did for those without such debt, they said. The finding upended traditional thinking, which held that student debt signaled higher earnings and higher chances of owning a home.[178]

The general level of indebtedness of young households remained the same, but young people had to fund their *individual investment in their human capital*, something that in prior generations might have been considered a *public investment*. They were forced to swap out educational debt for the kind of debt that fuels our consumer economy, such as houses, businesses, and cars.

Beyond the economy, merit-based price discrimination undercuts overall social mobility by undermining efforts to improve college access and affordability. Researchers at the Department of Education determined that in the 1990s, schools diverted institutional need-based aid toward merit scholarships when the federal government increased Pell Grants.[179] The same may also be true when alumni donations target need-based aid; schools funnel the new money toward existing need-based programs and use existing institutional funds to leverage new merit scholarships.[180]

Many administrators confess that they hate the merit discounting that drives tuition up, but know that not engaging in it would spell immediate disaster for their institution. Enrollment managers are under intense pressure to meet targets, regardless of the consequences for students or higher education as a whole. As one school administrator explained, "[y]ou're wanting people to

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175. *Id.* at 9 (quoting AARP).

176. *See* DRAUT ET AL., *supra* note 16, at 7; HILTONSMITH, *supra* note 23, at 1-9.

177. *See* Meta Brown & Sydnee Caldwell, *Young Student Loan Borrowers Retreat from Housing and Auto Markets*, FED. RES. BANK OF N.Y. (Apr. 17, 2013), http://libertystreeteconomics.newyorkfed.org/2013/04/young-student-loan-borrowers-retreat-from-housing-and-auto-markets.html#.U0RLecfPonI, *archived at* http://perma.cc/96M6-FSQ2.

178. Dina ElBoghdady, *Student Debt May Hurt Housing Recovery by Hampering First-Time Buyers*, WASH. POST (Feb. 17, 2014), http://www.washingtonpost.com/business/economy/student-debt-may-hurt-housing-recovery-by-hampering-first-time-buyers/2014/02/17/d90c7c1e-94bf-11e3-83b9-1f024193bb84_story.html, *archived at* http://perma.cc/3USQ-Y8ST.

179. BURD, *supra* note 159, at 3.

180. *See* Riggs, *supra* note 130.

take this grand, principled, big-picture perspective on their work, but holy shit, you miss your target and you're gone."[181] Another noted that, "[i]f you're sitting out there, you're not Harvard, and your competitors are offering merit-based aid, you've got to compete . . . . If you don't, you're going to fall on your moral sword."[182] Schools are locked into a "death spiral" in which they must keep raising tuition to prevent a slide in the rankings. The ability of any single school to resist the practice of merit discounting is limited, and the long shadow of *United States v. Brown University* makes concerted action unlikely.[183]

The *U.S. News & World Report* rankings themselves are not the proper subject of government regulation. The *U.S. News & World Report* sells magazines. It uses data provided by schools to create a product, in this case a product protected by the First Amendment.

Equally immune is nonprofit schools' use of tuition dollars to feed the merit discount arms race. While some kind of prohibition on merit aid could be accomplished through the lever of federal financial aid, it would be hard to make the case that the government should prohibit schools from this practice, given that each school has a unique economic situation and position within its "market."

Instead, we must revisit how we situate higher education within the legal and policy landscape. The idea that antitrust law forbids schools from voluntarily agreeing to limit the damaging practice reflects a specific and narrow understanding of the nature of education and its role in our society: higher education is commerce and commerce alone. We have the capacity to think far more expansively about the role and purpose of federal and state funding for higher education. The commodity, consumption, and individual investment metaphors have overrun more general principles of access, equity, and affordability. In this case, the consumer rights of the few have trumped those of the many. When antitrust principles force schools into a "death spiral," competition is not working the way it ought to. Instead it has led to higher debt burden and reduced social mobility for millions, and may well lead to reduced access as good schools that lose in this winner-take-all game are forced to close.

I have shown how market metaphors harm students who attend for-profit and nonprofit institutions, and how market metaphors harm the institutions themselves. It is tempting to assume that these sectors are easy targets for market metaphors, since for-profit and nonprofit schools are private companies

181. Quirk, *supra* note 127 (quoting David Kalsbeek of DePaul University).

182. *Id.*

183. *See generally* Patrick E. Hobbes, *Noblesse Oblige: Four Ways the "Top Five" Law Schools Can Improve Legal Education*, 33 U. TOL. L. REV. 85 (2001). Hobbes argued that the top five law schools should refuse to participate in *U.S. News* ranking process because they are the only entities with enough institutional power to disrupt the death spiral. *See id.*

in touch with the market itself. In the next example, I show how market metaphors damage students and communities by justifying and driving state disinvestment in public institutions as well.

C. "Individual Investment in Human Capital" and Disinvestment in the Public Sector

> As tuition at public universities becomes more expensive, middle-class parents say, "I'll bite the bullet and pay this for four years, but I don't want to pay for it a second time with taxes." And families who are frozen out of the system see public universities as something for the affluent. They'd rather see the state spend money on health care.[184]

1. "Individual Investment in Human Capital" Metaphor Spurs Declines in State Investment

Despite the prestige of the highly ranked private schools or the outsized share of media attention showered on the for-profit schools, public institutions are the backbone of our higher education system. They educate three-quarters of all American undergraduate students.[185] These institutions include two-year degree, and certificate granting community colleges, bachelor's and master's degree-granting state schools, and doctoral-granting state universities.

The public has a great deal of affection for public institutions. Local colleges and flagship public universities unite communities and provide a sense of local and state identity. They are the engines of many state and local economies.[186] They are often a focal point for local communities, deemed important local cultural and intellectual assets.[187] These schools—built with taxpayer dollars—have been from the early days of the United States an expression of *public investment in human capital.* [188]

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184. David Glenn, *Public Higher Education Is 'Eroding From All Sides,' Warn Political Scientists*, CHRON. OF HIGHER EDUC. (Sept. 2, 2010) (quoting Clyde W. Barrow, director of the Center for Policy Analysis at the University of Massachusetts at Dartmouth).

185. SANDY BAUM ET AL., TRENDS IN PUBLIC HIGHER EDUCATION: ENROLLMENT, PRICES, STUDENT AID, REVENUES, AND EXPENDITURES, COLL. BD. ADVOCACY & POL'Y CTR. 1 (May 2012), https://trends.collegeboard.org/sites/default/files/trends-2012-public-higher-education-expenditures-brief.pdf, *archived at* https://perma.cc/B5TQ-ARHS.

186. *See* Baldwin & McCracken III, *supra* note 53, at 184-85 ("[H]ighway expenditures, junior colleges (1997 to 2008), and state and local spending on higher education R&D are the most consistent predictors of state economic growth.").

187. DAVID F. SHAFFER & DAVID J. WRIGHT, A NEW PARADIGM FOR ECONOMIC DEVELOPMENT: HOW HIGHER EDUCATION INSTITUTIONS ARE WORKING TO REVITALIZE THEIR REGIONAL AND STATE ECONOMIES, ROCKEFELLER INST. 1-34 (Mar. 2010), *available at* www.rockinst.org/pdf/education/2010-03-18-A_New_Paradigm.pdf, *archived at* http://perma.cc/7KDM-TEF2.

188. *See generally* HIGHER EDUCATION ACT: FORTY YEARS OF OPPORTUNITY, TG RESEARCH &

Market metaphors have transformed the *public investment* landscape into one dominated by an *individual investment* framework. The effects in this sector are both more diffuse, and more damaging in the long term. Policies rooted in market metaphors are a deliberate retreat from building and maintaining civic institutions that serve multiple purposes, not all of which can be easily commodified and measured according to simplified metrics.

Despite affection for public institutions, funding for these schools has declined over the past decades. Many flagship schools are ever closer to public in name only. Tuition has been increasing at state universities. Community colleges are cutting capacity. Destroying these institutions will do great harm to the social mobility of students, especially those from low-income families, and degrade the quality of life in many communities around the country.

Market frameworks justify state reductions in financial support for public institutions. When we understand the investment in human capital to be individual, then the question of which institution the student chooses becomes irrelevant. The student must make the best choice for him or herself. The assumption is that the market will provide that student with good choices. If we only understand the return on investment to be higher wages for an individual, it becomes hard to see why the state should be a subsidized market participant competing with the private sector.

If instead we look for the return on investment in more public terms, we find a clear role for states and localities. For example, if having a local institution enlarges and stabilizes the local tax base, and increases wages for the entire community, then we might be able to see those public benefits as the goal itself, rather than simply a positive externality.[189] We might even view the benefits to the individual as the incidental benefits, important only in the aggregate. Backing up even further, we can see that public higher education as an institution (in the sociological sense) works to make our entire society more egalitarian and preserves widespread social mobility—creating not only short term outcomes that are positive, but strengthening our communities and nation in the long term.[190] The question animating my inquiry, as above, is how and why the market metaphors operate to eclipse this vision of public investment in institutions, and replace it instead with an individualist framework.

State and local funding for public institutions peaked several decades ago. State fiscal support for public higher education operations in 2011 was $6.30 per $1,000 in state personal income, more than a forty percent reduction from

ANALYTICAL SERVS. 11 (Nov. 2005) (detailing history of public funding for higher education in United States).

189. Glenn C. Blomquist et al., *Estimating the Social Value of Higher Education: Willingness To Pay for Community and Technical Colleges*, IZA (Feb. 2009), http://inpathways.net/dp4086.pdf, *archived at* http://perma.cc/63C2-W4KF (describing various metrics capturing social return on education, including increased and more stable tax base).

190. *See generally* JEFFREY D. SACHS, THE PRICE OF CIVILIZATION: REAWAKENING AMERICAN VIRTUE AND PROPERITY (2011) (arguing increased, well-targeted spending on public education will decrease inequality and increase social mobility).

the peak of $10.58 in 1976 (not adjusted for inflation).[191] State funding is an average of sixteen percent lower than it was a decade ago, in inflation-adjusted dollars.[192] States and localities contribute an ever-decreasing share to higher education as a whole accounting for 34.1% in 2010, as opposed to 60.3% in the mid-1970s.[193] According to the Treasury Department, "[s]tate funding declined from almost 60 percent of college and university revenue in the late 1980s to slightly below 40 percent today."[194]

States are not only disinvesting. They are also shifting state monies from institutional support to individual support, following the *individual investment in human capital* model. States traditionally supported institutions by funding schools directly through state appropriations. The federal government tended to fund schools indirectly by supporting students through grants, loans, and work-study.[195] Even states, such as California, that did fund students directly through its Cal Grant program, did so only as a supplement to robust institutional support.[196] Now, states are shifting away from institutional support to individual grant support.[197] These grants often take the form of so-called merit scholarships, such as Georgia's HOPE scholarship.[198] This upends the traditional legal and policy framework and replaces it with a far less stable alternative.

2. "Individual Investment in Human Capital" Metaphor Triggers Legal Background Rule: Limits on Revenue Generation

State budgets have been under extreme pressure the past few decades. In rough fiscal times, supporters of public education have been unable to stem the tide of cutbacks to higher education. Competition for scarce state dollars from K-12, Medicaid, and corrections are one factor in declining state investment in higher education. Higher education spending is discretionary, and is often a

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191. Thomas G. Mortenson, *State Funding: A Race to the Bottom*, AM. COUNCIL ON EDUC. (2012), http://www.acenet.edu/the-presidency/columns-and-features/Pages/state-funding-a-race-to-the-bottom.aspx, *archived at* http://perma.cc/PU65-GX83.

192. Karen Weise, *Public Funding for Higher Ed Hasn't Really Bounced Back*, BLOOMBERG (Jan. 21, 2014), http://www.bloomberg.com/bw/articles/2014-01-21/public-funding-for-higher-ed-hasnt-really-bounced-back, *archived at* http://perma.cc/8RRH-64LD.

193. *See* Mortenson, *supra* note 191.

194. THE ECONOMICS OF HIGHER EDUCATION, *supra* note 12, at 4.

195. *See* HIGHER EDUCATION ACT, *supra* note 188, at 17-19 (describing individual focus of federal funding delivered via HEA). The primary exception to this was Title III of the HEA, which made direct grants to minority-serving institutions. *See id.* at 20.

196. *See Major Features of the California Master Plan for Higher Education*, UNIV. OF CAL. OFFICE OF THE PRESIDENT (Jan. 2007), http://www.ucop.edu/acadinit/mastplan/mpsummary.htm, *archived at* http://perma.cc/KR4U-JGGA.

197. *See generally* EDWARD P. ST. JOHN ET AL., PUBLIC POLICY AND HIGHER EDUCATION: REFRAMING STRATEGIES FOR PREPARATION, ACCESS, AND COLLEGE SUCCESS (2013) (describing range of state approaches to higher education funding, and noting trend toward voucher-style funding).

198. GA. CODE ANN. § 20-3-519.2 (West 2014).

target during belt-tightening.[199]

Macro-economic factors alone do not explain variations in state spending or the decline in spending in all but two states. Seeing K-12 and healthcare as competition for scarce resources hides the fact that many states have been unable to raise revenue, either because it would be politically unpopular or because legislatures are subject to laws that make raising revenue inordinately difficult.[200] Laws championed by anti-tax and anti-government political movements, including the so-called "taxpayer revolts" (such as California's Proposition 13 or Colorado's TABOR law) have made them so.[201] These laws to impose automatic limits or to make raising taxes during fiscal crises difficult are, above all, political choices.[202]

The anti-government rhetoric that supports anti-revenue generation laws explains the disconnect between widespread affection for public institutions and the declining ability of states to pay for them. California's Proposition 13, the most famous of the so-called "taxpayer revolts," provides ample illustration of this in action. Howard Jarvis, the father of California's Proposition 13, "summarized his political views by saying, 'Our freedom depends on four words: Government must be limited.'"[203]

Despite Californians' enormous pride in the finest public higher education system in the world, Jarvis's Proposition 13 has had disastrous effects on public higher education in the state.[204] Proposition 13 amended the California state constitution in two ways. First, it reduced the level of property taxes by fifty-seven percent, and then limited future increases, thus reducing the ability of localities to raise funds.[205] Second, it required a supermajority of the state legislature to raise state taxes.[206] Each of these components had different consequences for higher education.[207]

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199. *See* METTLER, *supra* note 52, at 125 (noting while spending in these other areas increased, spending on higher education "at first stagnated and then deteriorated").

200. *See id.* at 112 (describing effects of Colorado's TABOR law on higher education budgets).

201. *See id.*

202. *See id.* at 122-28.

203. Robert Lindsey, *Howard Jarvis, 82, Tax Rebel, Is Dead*, N.Y. TIMES (Aug. 14, 1986), http://www.nytimes.com/1986/08/14/obituaries/howard-jarvis-82-tax-rebel-is-dead.html.

204. Proposition 13 has its roots in disagreements about the funding of K-12. In 1971, the California Supreme Court held, in a groundbreaking educational equity case, that localities had to share property tax revenue with the state so that the state could ensure K-12 monies were evenly distributed among school districts. *See* Serrano v. Priest, 487 P.2d 1241, 1266 (Cal. 1971). This pooling of K-12 funds to ensure equity spurred considerable anger, which the burgeoning anti-tax, anti-government movement harnessed to generate popular support for a ballot initiative popularly known as "Prop 13." However, Prop 13 has reached far beyond K-12 and affected many aspects of governance in the state.

205. CAL. CONST. art. XIIIA, § 1; *see also* Frederick Balderston et al., *Proposition 13, Property Transfers, and Real Estate Markets*, CAL. AGENCIES, at 24 (1979) (calculating that average homeowner experienced immediate fifty-seven percent decrease in property tax assessment).

206. CAL. CONST. art. XIIIA, § 3.

207. *See generally* Aaron Bady & Mike Konczal, *From Master Plan to No Plan: The Slow Death of Public Higher Education*, DISSENT (2012), http://www.dissentmagazine.org/article/from-master-plan-to-no-plan-the-slow-death-of-public-higher-education, *archived at* http://perma.cc/Q4P8-KKBV (providing analysis

The reduction in property taxes drained local coffers, shifting the balance of funding and power in higher education in the state. Before the passage of Proposition 13, local property tax revenue provided forty-eight percent of community college funding, while state appropriations provided forty-two percent.[208] After passage, the ratio stood at only twenty-one percent local revenue and sixty-seven percent state appropriation.[209] Localities suddenly had much less of a stake in the institutions seated in their communities. While it may not seem important—after all, the state was still providing much of the needed revenue—this move created a subtle shift away from understanding those local institutions as part of the community, and situated them instead as something belonging to a more distant state or federal government.

Proposition 13's restriction on raising state taxes eventually took its toll on California's higher education system. During the 1980s, the state maintained much of its funding for higher education, in part to offset the declining value of the federal Pell Grant. By the 1990s, however, California joined other states in making massive cuts to higher education budgets in recessionary times, while only partially restoring funding during boom times.[210]

At some points, such as during the height of the Great Recession, the federal government stepped in with increased Pell Grant funding.[211] This allowed many public schools, such as the University of California (UC) schools and the California State schools to rely upon increased tuition to replace lost state tax allocations. The irony here is that the move to limit state taxes did not necessarily reduce public funding. It merely transformed it from state *institutional* funding, to federal *individual* funding.

Anti-tax, anti-government activists frequently complain that federal grants and loans spur increased tuition.[212] This relationship is far more complex than supporters of the Bennett hypothesis contend. The increase in federal aid is not so much a pure increase. Rather, it is a shift from state spending to federal spending. As states have slashed institution-based funding, the federal government, in an attempt to maintain access to education for the future workforce, has stepped in with increased federal aid in the form of grants and loans.

Flagships and other prestigious public schools, such as those in the

of political and economic context of Prop 13 and effects on California higher education).

208. John Lombardi, *Community College Financing in the Post-Proposition 13 Era*, JUNIOR C. RESOURCE REV., Jan. 1979, at 3.

209. *Id.*

210. SARAH BOHN ET AL., THE IMPACT OF BUDGET CUTS ON CALIFORNIA'S COMMUNITY COLLEGES 9 (Mar. 2013), *available at* http://www.ppic.org/content/pubs/report/R_313SBR.pdf, *archived at* http://perma.cc/L9X2-3YE8 (discussing budget cuts and impacts upon community colleges).

211. Congressional Budget Office, *The Pell Grant Program: Recent Growth and Policy Options* (Sept. 5, 2013), https://www.cbo.gov/publication/44448, *archived at* https://perma.cc/MGD3-ECHH.

212. *See, e.g.*, Anne D. Neal, *'Bennett Hypothesis' Confirmed*, NAT'L REV. (Aug. 13, 2013), http://www.nationalreview.com/phi-beta-cons/355686/bennett-hypothesis-confirmed-anne-d-neal, *archived at* http://perma.cc/3ZW2-ST3T (quoting critics who believe increased financial aid leads to tuition increases at colleges).

University of California system, also raised external funds to compensate for lack of state funding. This creates yet another shift away from more local forms of control, this time from accountable public entities to private foundations and corporations. While states still control their flagship public institutions, many are public in name only.[213]

3. State Disinvestment Drives Debt by Forcing Community College Students into Expensive, Low-Quality For-Profit Schools

In this example, I focus primarily on the effects of market rhetoric at the certificate, vocational, and two-year degree level. Declines in state appropriation have been most keenly felt at community colleges, which have seen massive funding cuts in almost every state.[214] It is here that we see the most damage to widespread access to higher education.[215] It is also here—because students did not have access to the low-cost courses they needed—that we find the origins of much of the most unmanageable student debt as students turned to for-profits to fill the gap.

In fall 2011, forty-seven percent of all undergraduate students (over seven million students) attended public two-year or shorter duration programs.[216] These community colleges are vital engines of social mobility, as "these colleges also provide access to nearly half of all minority undergraduate students and more than 40% of undergraduate students living in poverty."[217] Cuts at this level are often invisible to the public, as the steady decline in capacity at the local open-access college does not often make national news.

Cuts in capacity drive low-income students toward much more expensive and often inferior for-profit schools, where they rack up high debt. This debt for short duration programs and two-year degrees is some of the most unmanageable student debt, and accounts for a great percentage of the cases with huge debt-to-income ratio disparities and defaults.[218] These are the

213. *See generally* TUCHMAN, *supra* note 48 (describing corporatization of public higher education).

214. *See* THE ECONOMICS OF HIGHER EDUCATION, *supra* note 12, at 23.

215. *See* Katherine Baird, *Access to College: The Role of Tuition, Financial Aid, Scholastic Preparation and College Supply in Public College Enrollments*, 36 J. STUDENT FIN. AID, no. 3, 2006, at 16, 33-35 (finding strong positive correlations between enrollment and capacity at public institutions for white and Hispanic students). Although black students' public enrollment rates are not greatly influenced by capacity, there is a strong correlation between public enrollment rates for black students and the supply of historically black colleges and universities. *See id.* at 20.

216. *See* LAURA KNAPP ET AL., ENROLLMENT IN POSTSECONDARY INSTITUTIONS, FALL 2011; FINANCIAL STATISTICS, FISCAL YEAR 2011; AND GRADUATION RATES, SELECTED COHORTS, 2003–2008, U.S. DEP'T OF EDUC. tbl.1 (2012), *available at* http://nces.ed.gov/pubs2012/2012174rev.pdf, *archived at* http://perma.cc/W46R-63UZ.

217. CHRISTOPHER M. MULLIN, WHY ACCESS MATTERS: THE COMMUNITY COLLEGE STUDENT BODY, AM. ASS'N OF COMM. COLLEGES 4 (2012), http://www.aacc.nche.edu/Publications/Briefs/Documents/PB_AccessMatters.pdf, *archived at* http://perma.cc/SGX5-ZX4G.

218. Meta Brown et al., *Looking at Student Loan Defaults Through a Larger Window*, FED. RES. BANK OF N.Y. (Feb. 19, 2015), http://libertystreeteconomics.newyorkfed.org/2015/02/looking_at_student_loan_defaults_through_a_larger_window.html#.VUJ88y6E28g, *archived at* http://perma.cc/5HZS-YVUR. Longitudinal

students with the most to gain and the most to lose from higher education, and the current decline in funding thwarts their attempts at social mobility. California's community college system, the largest public system of higher education in the country, exemplifies these challenges. California's community colleges serve multiple missions, including two-year degrees, transfer to four-year colleges, career technical education (certificates short of a degree), basic skills (like pre-college English, English as a Second Language (ESL), and other remedial education), and continuing education and workforce retraining for adults in the community. They do not generally receive large research grants, do not have endowments, hospitals, or other auxiliary sources of income, and do not generally engage in the kinds of public-private partnerships that now characterize the UC schools.[219]

Between 2006 and 2011, California community college spending per student dropped by $1,600, from $6,700 to $5,100.[220] A fiscal crisis in the state and an inability to raise revenue due to restrictions put into place a generation prior by Proposition 13 meant huge budget cuts. These cuts meant reducing staff, course offerings and student support, all factors that reduce educational quality in a system that had already been the subject of reductions in previous years. During that period, community colleges in California reduced class offerings by twenty-one percent.[221] This meant that students could not enroll in the courses that they needed due to overcrowding.[222] Those who could enroll found themselves in larger sections.[223] Overcrowding increases time to graduation or dissuades new students from enrolling at all.[224]

Budget cuts made it especially hard for schools to meet the needs of nontraditional students. Working parents, for example, might need to take fewer courses and need summer session or evening classes to stay on track. They also need ancillary services, such as on-campus childcare and counseling, often the first cut in lean times.[225] While there was a twenty-one percent decline in overall class offerings, there was a sixty percent decline in summer semester offerings. Spending cuts also damage rural community colleges, often situated in communities in which there are no other institutions of higher

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studies conducted by the Federal Reserve indicate that "the highest default rates, at nearly 34 percent, are among the borrowers who owe less than $5,000. These borrowers made up 21 percent of the 2009 cohort." *Id.*

219. POSTSECONDARY REVENUES BY SOURCE, NAT'L CTR. FOR EDUC. STATISTICS fig.1 (2013), https://nces.ed.gov/programs/coe/indicator_cud.asp (last visited May 20, 2015), *archived at* https://perma.cc/YX99-MAJ8 (comparing 2011-12 sources of revenue of two-year and four-year public institutions). *See generally* BOHN ET AL., *supra* note 210, at 10.

220. *See* BOHN ET AL., *supra* note 210, at 10.

221. *See id.* at 14.

222. *See id.* at 17.

223. *See id.*

224. *See* BOHN ET AL., *supra* note 210, at 14.

225. *See Low Income Single Mothers at Community College: Recommendations for Practices To Improve Completion*, WOMEN EMPLOYED 1 (2012), http://womenemployed.org/sites/default/files/resources/LowIncomeSingleMothersatCommunityCollege2012.pdf, *archived at* http://perma.cc/LVR3-F4J8.

education, disproportionately.[226] Faced with overcrowding, or schools that lack resources to provide good student services, multiple sections and nontraditional hours and locations, students who would not otherwise gain admission to college have two alternatives: forego a post-secondary education, or enroll in an open-access for-profit school.

Many withdrew from higher education. Per capita enrollment in public community colleges in California dropped to their lowest levels in twenty years during the recession, and the drop was especially large among first year and part-time students.[227] These drops came despite increases in the over-fifteen population.[228] Full-time equivalent student participation declined by fifteen percent, and the overall decline was twenty-one percent.[229]

The rest, though, enrolled in for-profit schools. For-profit schools deliberately move into areas where public funding is weak. They are more likely to enter a local market after the failure of a community college bond referendum.[230] According to the National Center for Education Statistics, during the period of massive state disinvestment, between 1990 and 2013, undergraduate enrollment at private for-profit institutions increased by 565%.[231]

Increased enrollment in for-profit schools has led to higher debt-to-income ratios upon leaving school, and increased levels of loan default for individual students, as described in my first example.[232] It also, as I will describe in the next section, impoverishes their communities.

226. *See* BILLY C. ROESSLER ET AL., EDUC. CTR. AT UNIV. OF ALA., THE DOWNWARD SPIRAL OF STATE FUNDING FOR COMMUNITY COLLEGES, AND ITS IMPACT ON RURAL COMMUNITY COLLEGES 1-2 (2006).

227. *See* BOHN ET AL., *supra* note 210, at 23-28 (describing sharp decline in enrollment and providing statistics).

228. *See id.* at 23.

229. *See id.* Some percentage of these students attended for-profit schools, while some opted to not attend post-secondary school at all. There is a dearth of ethnographic research regarding student choice in the context of state fiscal constraint and budget cuts. For an example of an analysis of this question using multilevel modeling, see Laura W. Perna & Marvin A. Titus, *Understanding Differences in the Choice of College Attended: The Role of State Public Policies*, 27 REV. OF HIGHER EDUC. , no. 4, Summer 2004, at 501.

230. Stephanie Riegg Cellini, *Crowded Colleges and College Crowd-Out: The Impact of Public Subsidies on the Two-Year College Market*, 1 AMER. ECON. J., no. 2, Aug. 2009, at 1, 25-27.

231. Nat'l Ctr. for Educ. Statistics, *Undergraduate Enrollment*, https://nces.ed.gov/programs/coe/indicat or_cha.asp (last visited May 20, 2015), *archived at* https://perma.cc/3JK6-UADJ. It should be noted that between 2010 and 2013, enrollment dropped in all sectors, with especially large declines in the for-profit sector. *Id.* The causes of this shift are not yet clear.

232. *See* David Deming et al., *For Profit Colleges*, 23 FUTURE CHILDREN 137, 151 (2013); Curan Mehra, *Cuts to Public Higher Education Funnel Students into For-Profit Colleges, Raise Financial Concerns*, DAILY CALIFORNIAN (Mar. 25, 2012), http://www.dailycal.org/2012/03/23/cuts-to-public-higher-education-funnel-students-into-for-profit-colleges-raise-financial-concerns/, *archived at* http://perma.cc/33DG-NYKS.

4. "Individual Investment in Human Capital" Takes the Social Out of Social Enterprise

> We are taking the community out of the community college.[233]

For-profit schools tout their entry into areas that could be served by public institutions as public service. They use the metaphor of "Education as a Commodity" to argue that, far from being the villains painted by the media, they are *social entrepreneurs*. They provide market-based solutions to the access dilemma faced by states that cannot or will not raise enough tax revenue to support community colleges. As Henry Bienen, a well-respected former college administrator in both the nonprofit and for-profit sectors, argued in the *Wall Street Journal*:

> Nonprofit public universities such as the University of California are cutting access because of cost pressures, and many students are now failing to find suitable places in state and community colleges. For-profit colleges offer these students paths to better careers and higher earnings. It is to no one's advantage to thwart a growing sector that is training underserved people.[234]

For-profits colleges argue they are saving states money. Inside Higher Ed reported on a recent study conducted by the Nexus Research and Policy Center on the impact of for-profits on state budgets.

> A newly released study found that four states would need to spend $8.4 billion over five years to educate the 1.4 million students who attend for-profits in those states. The report . . . calculated that number by looking at *state and local expenditures* necessary to serve those 1.4 million students in public institutions.[235]

Even those most critical of for-profit institutions, like the Senate HELP Committee, under the leadership of Senator Tom Harkin, concede that "[f]or-profit colleges have an important role to play in higher education."[236] The Committee notes that, "[t]he existing capacity of non-profit and public higher education is insufficient to satisfy the growing demand for higher education,

233. BOHN ET AL., *supra* note 210, at 15 (noting one community college administrator's response to survey conducted by authors).

234. Henry Bienen, *In Defense of For-Profit Colleges*, WALL ST. J. (July 24, 2010), http://online.wsj.com/news/articles/SB10001424052748703724104575378933954267308.

235. *If For-Profits Vanished*, INSIDE HIGHER ED (Mar. 18, 2014), https://www.insidehighered.com/quicktakes/2014/03/18/if-profits-vanished, *archived at* http://perma.cc/A5NL-V93S (emphasis added).

236. HELP COMM., *supra* note 11, at 1.

particularly in an era of drastic cutbacks in State funding for higher education."[237]

For-profit schools argue that they are not just providing choices in a free marketplace, but they are also providing services to those who would not have them otherwise. In the language of social entrepreneurship, in which education is a commodity, "Underserved Communities" become "Untapped Markets." Liberal leaders have jumped into the world of for-profit higher education, ostensibly because of the positive mission of these enterprises. Bill Clinton, for example, serves as the Honorary Chancellor of Laureate International Universities, one of the world's largest for-profit institutions with 800,000 students in thirty countries, including the United States.[238]

The rhetoric of social entrepreneurship does not match the reality of for-profit higher education. It hides the great losses created when we replace open access public institutions with for-profit ones. To begin, for-profit schools are not a cheaper equivalent to publicly funded institutions. They are not more efficient. In a much larger sense, starving local public institutions of cash and then replacing them with for-profit alternatives has negative consequences for the community that stretch far beyond even student loans. Taken together, these consequences show that for-profits are not a good alternative to state investment in institutions, no matter what the fancy brochures and subway ads might say.

a. Community Colleges Are a Better Investment of Private and Public Dollars

For-profits only appear to be cheaper for the taxpayer. It is not necessarily cheaper—it is merely a shift. The public investment shifts from the state government to the federal government. The Nexus study noted above failed to mention that while states would not have to pay out the money, the federal taxpayer would be contributing the vast majority of revenue—in some cases up to ninety percent or more—in the form of federal grants and loans.[239]

Up-front average cost to the taxpayer to subsidize student attendance at a for-profit school is lower by several thousand dollars.[240] Because the subsidy

237. *Id.*

238. *See* Mina Kimes & Michael Smith, *Laureate, a For-Profit Education Firm, Finds International Success (with a Clinton's Help)*, WASH. POST (Jan. 18, 2014), http://www.washingtonpost.com/business/laureate-a-for-profit-education-firm-finds-international-success-with-a-clintons-help/2014/01/16/13f8adde-7ca6-11e3-9556-4a4bf7bcbd84_story.html, *archived at* http://perma.cc/HE3E-UDXH.

239. CHRISTOPHER M. MULLIN, JUST HOW SIMILAR? COMMUNITY COLLEGES AND THE FOR-PROFIT SECTOR, AM. ASS'N OF CMTY. COLLEGES 8-9 (2012), http://www.aacc.nche.edu/Publications/Briefs/Documents/JustHowSimilar_11162010.pdf, *archived at* http://perma.cc/AUA5-JLAC ("Of the 1,889 for-profit institutions that received Title IV revenue, 62% received more than 60% of revenues from Title IV programs. At the largest five for-profit publicly traded corporations, 77% of their revenues came from Title IV programs.") (internal citations omitted).

240. *See* Stephanie Riegg Cellini, *For Profit Higher Education: An Assessment of Costs and Benefits*, 65 NAT'L TAX J. 153, 158-80 (2012) (finding for-profits cost federal taxpayers approximately $7,600 per year

comes from federal Pell Grants and student loan dollars, states do not fund the institution directly. Viewed in this shortsighted kind of calculation, subsidies are cheaper for strapped state governments, and slightly cheaper in terms of immediate federal investment. But, the lower up-front cost does not account for the costs associated with default, loan forgiveness, or discharge, which may not occur until years or even decades later.[241]

While public investment shifts, private investment is much higher. Profits have to come from somewhere. Attending a for-profit program costs $15,000 more per year for the student than attending a comparable public program.[242] The annual income of a person working at minimum wage is roughly $15,000. Students borrow most of this money in federal and private student loans. They graduate with much higher debt and default rates than comparable students at community colleges.[243]

For-profit schools are not more economically efficient than community colleges, even by their own *individual return on investment* metric. Students in one- and two-year certificate programs rack up as much debt as students of nonselective four-year public institutions, but in a much shorter period and with degrees or certificates that yield lower rates of individual return.[244] Economists have calculated that the required rate of return for an individual would need to be sixty percent greater to justify the increased cost of a for-profit school.[245] Instead, researchers have found that for-profit students get the same or a slightly smaller boost in wages as compared to students in public institutions. They are more likely to be unemployed six years after enrollment.[246] It is hard to see how a much higher debt-to-income ratio, with reduced chances of employment, is a more sound individual investment. As one group of researchers put it, "[t]he combination of equal or lower benefits and a higher cost of attendance suggests that for-profit institutions are not offering students as good a return on their investment as do other types of colleges."[247] This data, although somewhat incomplete, suggest that individuals would generally be better off investing precious public and private resources in an education at a public institution.

The shift from community colleges to for-profits is not just a bad bet for individuals; it is also a bad bet for the taxpayer, who is still subsidizing the education, but receiving much lower returns. The most simple way to measure *public return on investment* is by the higher taxes paid by people with post-

compared to community colleges at $11,400).

241. *See id.*

242. *See* Deming et al., *supra* note 232, at 152.

243. *See id.* at 142.

244. *See id.* at 140.

245. *See id*. at 153.

246. *See* David J. Deming et al., *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. ECON. PERSP. 139, 149 (2012).

247. *See* Deming et al., *supra* note 232, at 143.

secondary education.[248] If for-profit students do not get a larger boost in earnings than if they had gone to a public school, then the result is neutral. If they drop out, and find themselves in debt with no boost in earnings, then they are less likely to repay the taxpayer for the investment of Pell funds. If they default, discharge, or receive loan forgiveness, then they have not only cost the taxpayer the Pell funds, but also the loan funds.

b. Community Colleges Provide Community Returns

Taxpayers lose in other ways, too. By relying on for-profit schools to do what community colleges could do, taxpayers lose the production of knowledge traditionally provided by public institutions. They lose the noncredit workforce preparation and training provided by many public open access schools. They lose the public spaces and facilities that local schools provide. They also lose control over the quality of education offered in their communities. I'll consider each of these losses in turn.

i. Production of Knowledge

For-profit schools brag that their instructors do nothing but teach. By focusing on standardized information transfer from the instructor to the individual, for-profits eliminate the production of knowledge from the mission of a college or university. Observers such as former Federal Reserve Chief Ben Bernanke bemoan the decline of basic scientific research at doctoral granting research institutions due to public disinvestment.[249] This effect is just as profound with the loss of "production of knowledge" missions at public community colleges. The teachers who train medical assistants, welders, child care providers, and law enforcement personnel have a great deal to offer in terms of the production of knowledge about how to care for patients, rebuild the skilled trades, provide early childhood education, or improve the day-to-day operations of the justice system. So do the students in those courses. An elitist understanding of what knowledge is, and which research is worth supporting and disseminating, misses how students and teachers in vocational education programs have knowledge and skills to contribute to collective memory, innovation, and solving the problems of our times.

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248. *See* CHRISTOPHER M MULLIN, AM. ASS'N OF CMTY. COLLS., A SOUND INVESTMENT: THE COMMUNITY COLLEGE DIVIDEND 6-7 (2011), http://files.eric.ed.gov/fulltext/ED522914.pdf, *archived at* http://perma.cc/WNJ8-K3J7.

249. *See* Ben S. Bernanke, Chairman of the Federal Reserve Bank, Promoting Research and Development: The Government's Role, Address Before "New Building Blocks for Jobs and Economic Growth," (May 16, 2011), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20110516a.htm, *archived at* http://perma.cc/3KXM-DVEQ. *See generally* Robert D. Atkinson & Luke A. Stewart, *University Research Funding: The United States Is Behind and Falling*, INFO. TECH. & INNOVATION FOUND. (2011), *available at* www.itif.org/files/2011-university-research-funding.pdf, *archived at* http://perma.cc/L5A
H-HA7C (noting declines in state investment in public university research).

ii. Noncredit Instruction

Community colleges provide a huge amount of low cost noncredit instruction for members of the community. By the early 2000s, many community colleges were enrolling more noncredit than credit students.[250] Public funding cuts hit deeply at these noncredit courses offered to adults in the community, and for-profits do not replace them.

Much of this noncredit coursework is in workforce education and training, including courses that help workers climb career ladders, such as those needed by a home health aide who wants to become a medical assistant. It can include workforce-retraining programs to help workers transition from one job to another. It can include small business skills needed by those operating micro-enterprises, such as in-home childcare centers.[251] It can include noncredit continuing education for various professions who must constantly upgrade skills, such as teaching, court interpreting, or paralegal training. These programs can be stand-alone, or linked to credit-bearing programs. These programs are flexible and low-cost ways for local populations to respond to shifting labor market demands and employer needs.[252]

Noncredit training can also include ESL courses that help to integrate immigrants into communities, remedial basic skills courses for students who were poorly served by the K-12 system, and recreational courses that improve the quality of life for adult residents of a community. Some courses may be linked with social services, such as classes for prospective foster parents, or parenting classes for teen parents.

While some states provide funding for noncredit instruction, especially that linked to workforce development, many community colleges absorb some of the overhead costs of running these programs into general operating budgets. These vital noncredit courses will be lost with the reduction of state funding to the institutions and the transfer of taxpayer subsidy to for-profit schools that do not offer community-based programming.

iii. Public Spaces and Facilities

For-profit schools claim that they are more efficient because they do not

250. *See* MICHELLE VAN NOY ET AL., AM. ASS'N. OF CMTY. COLLS., NONCREDIT ENROLLMENT IN WORKFORCE EDUCATION: STATE POLICIES AND COMMUNITY COLLEGE PRACTICES 4 (2008), *available at* http://www.aacc.nche.edu/Publications/Reports/Documents/noncredit.pdf, *archived at* http://perma.cc/5E8T-N25P.

251. In 1999-2001, I co-taught noncredit or low-credit courses on "Legal Issues in Child Care" for proprietors of in-home child care centers at a local community college. The City and County of San Francisco subsidized these courses so that they could be offered at multiple locations, at convenient times, and in three languages. The classes helped women entrepreneurs, many of them immigrants, start and maintain small businesses and helped to increase the supply of stable high-quality child care in San Francisco, a net gain for the entire community.

252. VAN NOY ET AL., *supra* note 250, at 4.

spend as much on campuses and public spaces.[253] What is not included in this calculation of efficiency is that there are significant social returns to having real, physical public college campuses, especially in low income or rural areas.[254] Without them, we lose opportunities for members of the community to come together and share the local knowledge, art, and identity that enrich our lives. For example, Washington State has an innovative Art in Public Places initiative that provides funding for art installations on public college campuses.[255] Community members, along with the campus community, get involved in the selection and maintenance of these works of art, mostly by local artists.[256] Many community college campuses have theaters, arboretums, playing fields, and planetariums used by school children, members of the public, and students. Land-grant colleges house cooperative extension programs that provide business education—such as incubators for small farms that serve local markets with fresh food. They also provide public outreach on issues such as nutrition and pest management. Local college sports teams provide rallying points for communities.

It might be possible to replace each of these discrete "social returns" that community and open access colleges provide—at an additional cost, and with new infrastructure. Their loss, taken together, degrades the quality of life in our communities. For-profit schools, despite receiving virtually the same investment from the taxpayer, are not going to provide the same "social returns." They do not provide the same "bang" for the public dollar buck.

c. Community Colleges Are Subject to State and Local Control

With the shift from state institutional support to federal subsidy of for-profits, states lose control over the content and quality of the vocational education offered in local communities. Anti-revenue generation laws and other declines in state subsidy force a shift from local and state subsidy administered by people with local knowledge, to a much less well-regulated federal subsidy in the form of Pell Grants and subsidized or forgiven loans.

Not all community colleges are well run, and massive cuts drive some, such as the large San Francisco City College, into serious trouble.[257] Some require

253. Cellini, *supra* note 240, at 173-75 (describing capital expenditures of for-profit versus community colleges). Community colleges spend money on public facilities not provided by for profits. *Id.*

254. *See id.*; *see also* ROESSLER ET AL., *supra* note 226 (describing benefits of community colleges located in rural areas).

255. *Artcare: Collections Management Policy for Washington's State Art Collection*, WASH. STATE ARTS COMM'N 4 (June 2013), *available at* http://www.arts.wa.gov/media/dynamic/docs/ArtCare%20-%20Updated%202013-06.pdf, *archived at* http://perma.cc/QF3Q-CJKN.

256. *Id.*

257. *See* Nanette Asimov, *CCSF's Last Option To Avoid Closure Is Full of Uncertainty*, SFGATE (July 31, 2014), http://www.sfgate.com/education/article/CCSF-s-last-option-to-avoid-closure-is-full-of-5658386.php, *archived at* http://perma.cc/F5Q8-ALDX (describing threats to close San Francisco City College due to financial problems and other violations of accreditation standards).

major overhaul. But, at the very least, state and local policy makers have levers beyond accreditation and the financial aid system to support improvement and change in public schools. In the case of for-profit schools, their tools are much more limited.

This is not to say that there are no checks on for-profits, only that those checks are concerned primarily with shutting down predatory schools, rather than ensuring that local students have good educational choices. Faced with disastrous default and dropout rates, federal regulators, like the Consumer Financial Protection Bureau and Department of Education, have had little choice but to step in and increase oversight of for-profit programs. For example, Corinthian Colleges, the schools that board member Marc Morial defended as the "schools of choice," shut down in April 2015.[258] The schools were under investigation or sued by numerous state attorneys general and at least four federal agencies.[259] The Department of Education increased oversight "after the company failed to address concerns about its practices, including falsifying job placement data used in marketing claims to prospective students and allegations of altered grades and attendance."[260] The Department of Education then fined Corinthian $30 million for misrepresentation of job placement data.[261] It has since ceased operations, closed all campuses, and filed for bankruptcy.[262]

The shutdown, while necessary to preserve both the public investment and protect students, leaves a vacuum in the local communities in which those schools operated.[263] Without local community colleges or in a community like

258. *Corinthian Announces Cessation of Effectively All Operations*, CORINTHIAN COLLS. (Apr. 26, 2015), http://www.cci.edu/update.php, *archived at* http://perma.cc/2BG3-GJQB (announcing shutdown of all operations as of April 27, 2015).

259. Danielle Douglas-Gabriel, *For-Profit Corinthian Colleges Files for Bankruptcy*, WASH. POST (May 4, 2015), http://www.washingtonpost.com/news/business/wp/2015/05/04/for-profit-corinthian-colleges-files-for-bankruptcy/, *archived at* http://perma.cc/9D25-59R8 (noting suits filed or investigations spearheaded by state attorneys general and federal agencies including General Accounting Office, Consumer Financial Protection Bureau, and Department of Education); John Laurman, *Corinthian Falls After SEC Starts Probe on Recruitment*, BLOOMBERG NEWS (June 11, 2013), http://www.bloomberg.com/news/articles/2013-06-10/corinthian-colleges-shares-fall-after-sec-begins-investigation, *archived at* http://perma.cc/D392-59HL (reporting on SEC investigation).

260. Press Release, U.S. Department of Education Heightens Oversight of Corinthian Colleges, U.S. Department of Education (June 19, 2014), http://www.ed.gov/news/press-releases/us-department-education-heightens-oversight-corinthian-colleges, *archived at* http://perma.cc/E2KL-MSQB.

261. Press Release, U.S. Department of Education Fines Corinthian Colleges $30 million for Misrepresentation, U.S. Department of Education (Apr. 14, 2015), http://www.ed.gov/news/press-releases/us-department-education-fines-corinthian-colleges-30-million-misrepresentation, *archived at* http://perma.cc/X6 2G-G62H.

262. Dawn McCarty, *Corinthian Bankruptcy Caps Biggest U.S. Education Meltdown*, BLOOMBERG BUS. (May 4, 2015), http://www.bloomberg.com/news/articles/2015-05-04/corinthian-colleges-files-for-bankruptcy-after-closing-schools, *archived at* http://perma.cc/2NXC-KHQF.

263. *See* Hannah Albarazi, *Heald College Students Shocked by School's Sudden Closure*, SF BAY (Apr. 28, 2015) http://sfbay.ca/2015/04/28/heald-college-students-shocked-by-schools-sudden-closure/, *archived at* http://perma.cc/K2FA-MEMK; David Halperin, *For-Profit Corinthian Colleges on the Brink: Who's Responsible?*, HUFFINGTON POST (June 20, 2014), http://www.huffingtonpost.com/davidhalperin/for-profit-

San Francisco, where the community college was weakened by state disinvestment, where do these students turn for the education they need? Instead of increasing student choice, the choice to subsidize poorly performing for-profits instead of local public schools leaves students with *no* choices.[264] By skimping on local post-secondary school capacity, the states are robbing low-income communities of the resources they need to thrive.

IV. Enriching Our Metaphors for Higher Education

We use multiple metaphors to describe an intangible like education because education has multiple dimensions. The problem is not so much that education does not have economic aspects. Education does function in many ways like a commodity. The problem is that education is not reducible to a commodity alone. It also has other aspects that are increasingly drowned out in both public conversation and policy making. I briefly identify three, as a way of expanding the conversation about higher education regulation and financing: Education is a Tool; Education is a Journey; and Education is a Community Enterprise.

A. Education Is a Tool

The metaphor of "Education is a tool" remains latent in American higher education policy. The G.I. Bill and Pell Grant programs are the classic "tickets to the middle class." These programs, while public, facilitate individual investment with limited government oversight. What would happen if we opened an even more robust understanding of education as a tool? How might it widen the focus on to the development of local communities, states, and the nation as a whole?

American society has numerous examples of large scale tool language—engines, drivers, levers—from the past that might guide higher education policy in the future. The rhetoric of "education as a tool" drove the creation of the 1862 and 1890 Morill land grant colleges, which had as their chief purpose, "to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life."[265] The primary purpose of these colleges was to transform a nation of farmers into the workforce of the industrial era.[266] It forms the foundation of Title III of the Higher Education Act, which created federal institutional funding for historically black colleges and universities and other minority-serving institutions that supported the development of all of the collective human capital stymied by generations of

corinthian-col_b_5516063.html, *archived at* http://perma.cc/8GXU-KWAC.

264. *See* John Cote, *Bay Area For-Profit Colleges Shut Down*, SFGATE (July 29, 2014), http://www.sfgate.com/education/article/Bay-Area-for-profit-colleges-shut-down-5652933.php, *archived at* http://perma.cc/WK2X-U9GK (noting disproportionate impact of Corinthian shutdown on California students).

265. 7 U.S.C. § 304 (2012).

266. *See* HIGHER EDUCATION ACT, *supra* note 188, at 6.

racist educational policy.[267] In these cases, programs targeted large groups of people who would then provide uplift for entire communities. The benefits to the individual were incidental to the economic and social improvements unleashed for the community as a whole.

B. Education Is a Journey

It is striking that educators tend not to use either "tool" or "commodity" metaphors, but rather refer to education as a journey. The journey metaphor reveals that the people deeply involved in the day-to-day of teaching and learning understand it as a *process* and not as an *object*. What difference would it make in public policy if we organized, financed, and regulated higher education as if it were a process?

First, we might begin to situate higher education within the context of education as a whole, rather than as a separate entity.[268] We have a shared understanding of primary and secondary education as "public goods." All states guarantee some measure of free primary and secondary education to residents. Why shift to understanding education as a commodity at the college door? Understanding education as a lifelong process challenges the distinction between early childhood, primary, secondary, and higher education. It calls into question why we provide a free education, up through the twelfth grade, but not beyond, particularly when one's opportunity to continue the process of learning past the secondary level is so often tied to socioeconomic status, race, or geographic location.

Understanding students as learners on their way from novice to expert allows space for student research and production of knowledge. Conceptualizing students as consumers because they are not yet ready to produce knowledge at the leading edge often misses what students are capable of contributing. Every learner—in every kind of higher education—should be capable of producing, and given the skills to produce, situated knowledge about their area of expertise. What kinds of funding might facilitate this kind of teaching and learning?

Understanding education as a lifelong journey might also lead us to create policy that encourages students to return to school throughout life, rather than assume that they can acquire all the knowledge and skills they might need up front. Students might not develop strengths and interests until much later in

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267. *See* Higher Education Act of 1965, 20 U.S.C. § 1067q (2012); *see also* HIGHER EDUCATION ACT, *supra* note 188, at 20.

268. *See, e.g.*, ST. JOHN ET AL., *supra* note 197 (describing successful and failed efforts to align K-12 with higher education); Lia Epperson, *Bringing the Market to Students: School Choice and Vocational Education in the Twenty-First Century*, 86 NOTRE DAME L. REV. 1861, 1889-90 (2012) (arguing secondary level vocational training programs could be better aligned with those in higher education); Elizabeth Warren, *Issues: Education*, ELIZABETH WARREN FOR SENATE, http://elizabethwarren.com/issues/education (last visited May 20, 2015), *archived at* http://perma.cc/P432-DJGP (calling for better alignment of K-12, workforce training and higher education).

life. The global economy calls for workers with current and flexible skills. Changes from an industrial economy to a service and knowledge economy means that millions of existing workers need retraining. If we understood education as a continuous process, would we be better able to organize the funding of higher education to provide opportunities for adult learners to upgrade, improve, or change skills, without requiring them to go deep into debt to do so?

We know that middle-aged students struggle with student debt, often because their window for repayment is much shorter, and because they have additional expenses, such as dependent children. As breadwinners, they often cannot take unpaid internships that are required to break into many fields. They often cannot quit day jobs because they need employer-sponsored health care, and so often take longer to graduate or are at higher risk for dropping out. They need child care, often during weekends and evenings, so that they can go to class. People also need to work for stretches in between rungs on career ladders, meaning that they might prefer to intersperse time in school with job training. Could student aid policies be reformulated with the needs of diverse adult learners who move into and out of educational environments in mind? Would increased institutional support to local colleges make them better able to identify local employer needs, and create a plan to meet them by training or retraining the local workforce?

C. Education Is a Community Enterprise

A final set of metaphors to consider might revolve around the idea of "Education is a Community Enterprise." What would change if we understood educators not as social entrepreneurs but rather as community builders? What if we understood education and knowledge as something of a commons, an institution that belongs to all of us?

Recently, the Higher Learning Commission, one of the largest accreditors of for-profit schools imposed a public interest standard in its accreditation criteria; in doing so, the Higher Learning Commission's president, Sylvia Manning, noted, "[w]e felt it was important to make a statement—that education is a public good."[269] The standard requires that "[t]he institution's educational responsibilities take primacy over other purposes, such as generating financial returns for investors."[270] While the accreditation criteria are not likely to be a stringently enforced, it is at least a statement that the public is the primary beneficiary of educational endeavors, not the shareholder. How else might we

269. Paul Fain, *Profit and the Public Good*, INSIDE HIGHER ED (Mar. 12, 2013), https://www.insidehighered.com/news/2013/03/12/accreditors-new-standards-raise-bar-serving-public, *archived at* http://perma.cc/9HVP-DX8Y (quoting Sylvia Manning).

270. *The Criteria for Accreditation and Core Components*, HIGHER LEARNING COMM'N (Jan. 1, 2013), http://www.ncahlc.org/Criteria-Eligibility-and-Candidacy/criteria-and-core-components.html, *archived at* http://perma.cc/CD5E-SM7M.

structure the regulatory apparatus to keep higher education itself healthy? Might operating in the public interest trump the valorization of competition at all costs?

In 2012, the voters of California approved of Proposition 30, which levied a tax on the wealthy and increased the sales tax specifically to fund K-14 education.[271] Governor Jerry Brown, the son of Governor Pat Brown, who signed the California Master Plan for Education into law over fifty years ago, led an effort to convince Californians that *institutional support* for flagship schools, state universities, and open-access community colleges was the best way to preserve the collective asset held in trust by the people of the state. After years of declining budgets, schools received a much-needed infusion of cash, staving off closures, layoffs, and gross reductions of capacity. While the new money does not replace that lost in decades of decline, it does represent a reversal of the trend, and a statement from the public about what it values.

V. CONCLUSION: BEYOND OPPORTUNITY

Each example of how market metaphors operate, taken alone, might be dismissed. In isolation, we might see a few bad apples in the for-profit sector or nonprofit college administrators caught up in prestige games, or public schools suffering during cyclical bad economic times. Taken together, they paint a complex picture of how thinking and talking about education as a commodity has warped the entire educational landscape. The "Education is a Commodity" metaphor, operating at the level of tacit knowledge, has grossly oversimplified how we think about education.

We have shaped our financing and regulation of higher education in response to the commodity framework. Return on investment became the only metric, and has increasingly been narrowed to *individual return on investment*. Student loans became an enormous part of financial aid packages, rather than a bridge for a few middle class students. Along the way, we applied specific legal background rules to higher education finance—buyer beware, antitrust, and limitations on revenue generation—that both reinforce and are reinforced by the commodity framework.

Higher education, when dominated by the *individual investment in human capital* framework, is often described in terms of opportunity. Student loans give students the opportunity to purchase the necessity of higher education. This formulation of opportunity is perhaps the weakest form of formal equality. It is the equivalent of an admit/deny for millions; education is available, but at an unmanageable price. In the commodity framework, the government still subsidizes higher education, but quite differently. State funding for institutions

271. *Proposition 30: Temporary Tax To Fund Education. Guaranteed Local Public Safety Funding*, LEAGUE OF WOMEN VOTERS OF CAL., http://lwvc.org/election/2012/november/ballot-measure/proposition-30 (last visited May 20, 2015), *archived at* http://perma.cc/7BCJ-DA2X.

has decreased. Increased federal investment in individual grants has compensated for some but not all of that loss. Loans have skyrocketed. In this context, federal monies are far less regulated than state monies. The "Students are Consumers" metaphor created the assumption that students were somehow supposed to monitor quality for themselves. The end result is that the individual student has taken on more and more of the burden of funding education, all the while much less protected by regulation. Despite the market rhetoric, default and debt burdens threaten the social mobility of millions of students. The opportunity for higher education comes at an enormous cost to those students, many of whom find themselves only marginally better off or even worse off.

Laws framing higher education operate so far in the background that their influence is often hard to spot unless we take a step back and fully consider what an alternative set of background rules or underlying values might be. The existing background rules are laden with assumptions. They draw upon ideologies that devalue the role of the government, and valorize the role of the market. These ideologies are so powerful that they paper over when the framework fails on its own terms. I have shown that using highly risky individual loans to finance higher education does not create a more efficient system, or one in which the return on investment is maximized for the nation as a whole. The choice to continue with this framework is a political one, made on the basis of an underlying ideology. It is not necessarily based on how to best foster the teaching, learning, researching, and community-building at the heart of education.

Our communities and our nation pay a huge opportunity cost. By choosing to put our taxpayer dollars into an expensive higher education system that offers huge advantages to some students, while offering debt and poor educational quality to others, we have lost the opportunity to put those same dollars into a system that is more fair, equitable, and accountable. We are not making full use of our public investment, losing the tools we have to create a mobile and egalitarian society, and destroying the institutions that make our communities thrive.

People who understand education as more complex than a simple economic transaction have rich language to draw upon in making law and policy that will help us to shape the system of higher education that better reflects who we are as a nation. I have offered some alternative metaphors that might help us to think about, discuss, regulate, and finance higher education. This Article is only the beginning of a conversation about how to situate education as a tool, a journey, and as a community enterprise.

The question I raise is not which metaphor is the best, but rather, which values will we foreground when we make higher education law and set financing policy. When we choose words, we import the values and frameworks attached to those words. What are our values when it comes to higher education? Which words might we choose to reflect those values? How will we know success? Let's formulate our laws so that we get there. Placing teaching and learning, student success, and community engagement at the center of our language is the first step.