# The Informed Student-Consumer: Regulating For-Profit Colleges by Disclosure

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*"You either stick to the status quo or you change it. Crack open your potential and see what you're capable of, not what you're comfortable with."*

—Kaplan University TV Commercial[1]

"KEEP DIGGING UNTIL YOU UNCOVER THEIR PAIN, FEARS, AND DREAMS . . . ."

—Kaplan Internal Presentation[2]

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[1] Kaplan College, *Kaplan: Change*, YouTube (Jan. 9, 2013), https://www.youtube.com/watch?v=pwlPK4_gLkw.

[2] Staff of S. Comm. on Health, Educ., Labor, and Pensions, 112th Cong., For Profit Higher Education: The Failure to Safeguard the Federal Investment and Ensure Student Success 63 (Comm. Print 2012) [hereinafter Harkin Report].

## INTRODUCTION

For-profit colleges and universities ("FPCUs") are expensive, supported almost entirely by government aid, and target a disproportionate number of low-income and minority students.[3] Compared to other public institutions, their students are less likely to graduate and far less likely to earn more than high school dropouts if they do.[4] Furthermore, they are saddled with higher levels of loans on which they are more likely to default.[5] Nevertheless, FPCUs remain popular, in part through ubiquitous commercials and internet advertisements. For example, the University of Phoenix claims it can help viewers achieve their dreams, even of becoming an astronaut.[6] Aside from commercials, FPCUs incentivize hordes of recruiters to enroll as many students as they can by finding "leads" and calling them or soliciting them in person.[7] Some particularly aggressive recruiters have even targeted homeless shelters.[8] Overall, marketing is a particularly vital tool for FPCUs because their profits depend on how many students they can enroll. Consequently, FPCUs spend billions of dollars on sales and market-

[3] David J. Deming et al., *The For-Profit Secondary School Sector: Nimble Critters or Agile Predators?*, 26 J. ECON. PERSPECTIVES 139, 140 (2012) [hereinafter Deming, *Agile Predators*].

[4] *See, e.g.*, John Lauerman, *For-Profit Colleges Charging More While Doing Less For Low-Income Families*, BLOOMBERG (Dec. 31, 2010, 3:26 PM), http://www.bloomberg.com/news/2010-12-31/for-profit-colleges-charging-more-while-doing-less-for-low-income-families.html, *archived at* http://perma.cc/72F3-SZ9K; Sophie Quinton, *Will a For-Profit Degree Help You Get a Job?*, THE ATLANTIC (Mar. 25, 2014, 10:50 AM), http://www.theatlantic.com/education/archive/2014/03/will-a-for-profit-degree-help-you-get-a-job/359527/, *archived at* http://perma.cc/PW67-NZ7X (summarizing data showing that 72% of career college programs produce graduates that go on to earn less than high school dropouts).

[5] *See* Quinton, *supra* note 4.

[6] *Rocket – University of Phoenix*, YOUTUBE (Dec. 31, 2013), https://www.youtube.com/watch?v=pcWm37lXAoo/.

[7] HARKIN REPORT, *supra* note 2, at 50–55.

[8] Daniel Golden, *Homeless High School Dropouts Lured by For-Profit Colleges*, BLOOMBERG (Apr. 30, 2010, 12:01 AM), http://www.bloomberg.com/news/2010-04-30/homeless-dropouts-from-high-school-lured-by-for-profit-colleges-with-cash.html, *archived at* http://perma.cc/T7GQ-SCX6.

ing, with some schools devoting a quarter of total revenue, more than they spend on instruction.[9]

Government actors have sought ways to address the poor results FPCUs have produced for their students. As a more politically feasible alternative to direct, substantive regulation, disclosure-based regulation has become increasingly popular in recent years and has been applied in such areas as credit card markets and menu labeling.[10] Regulation of FPCUs presents a clear case study of this trend. The Obama Administration has been attempting more stringent regulation of FPCUs for several years now, but industry litigation and lobbying have impeded its efforts.[11] For example, the proposed "Gainful Employment Rule" would restrict federal loan and grant money that can go toward schools whose students fall below certain employment and loan repayment rates.[12] The industry has devoted hundreds of pages of comments in opposition to the proposed rule, spent millions of dollars on lobbying, and waged thus-far successful court battles to prevent the rule's implementation.[13] In contrast, neither federal courts nor the FPCU industry has directed nearly as much ire toward the Department of Education's ("DOE") disclosure requirements.[14] California recently passed a law requiring that FPCUs disclose information about student debt levels, graduation rates, and employment rates to prospective students.[15] Massachusetts followed by recently enacting regulations that require similar disclosures and

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[9] *See* HARKIN REPORT, *supra* note 2, at 81–82; Marissa Miley, *A Lot of Branding But Not Much Understanding*, AD AGE (Sep. 7, 2009), http://adage.com/article/news/university-phoenix-spends-100-million-annually-advertising/138849, *archived at* http://perma.cc/48JW-323N.

[10] Memorandum from Cass R. Sunstein, Administrator of the Office of Information and Regulatory Affairs, to Heads of Executive Departments and Agencies (June 18, 2010), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/disclosure_principles.pdf, *archived at* http://perma.cc/6TAW-JQVG (describing the use of disclosure in the regulatory process and setting forth principles).

[11] *See* Chris Kirkham, *Obama Administration Revisits For-Profit College Student Debt Regulations*, HUFFINGTON POST (June 24, 2013, 4:44 PM), http://www.huffingtonpost.com/2013/06/24/for-profit-college-student-debt-regulations_n_3490434.html, *archived at* http://perma.cc/LJ69-7KSJ; Michael Stratford & Paul Fan, *Backed Into a Corner*, INSIDE HIGHER ED (May 7, 2014), http://www.insidehighered.com/news/2014/05/07/gainful-employment-fight-profits-make-familiar-arguments-against-different-landscape#sthash.fFRkBZwW.dpbs, *archived at* http://perma.cc/57DV-PNM7.

[12] *Obama Administration Announces New Steps to Protect Students from Ineffective Career College Programs*, U.S. DEP'T OF EDUC. (June 2, 2011), http://www.ed.gov/news/press-releases/gainful-employment-regulations, *archived at* http://perma.cc/834K-FRHP.

[13] Goldie Blumenstyk, *For-Profit Colleges Decry Gainful Employment Rule as Arbitrary and Biased*, CHRON. HIGHER ED. (May 27, 2014), http://chronicle.com/article/For-Profit-Colleges-Decry/146795/, *archived at* http://perma.cc/J99U-6YDB.

[14] *See* 34 C.F.R. § 668.6(b)–(c); Ass'n of Private Colleges & Univs. v. Duncan, 870 F. Supp. 2d 133, 155 (D.D.C. 2012); Stephen Burd, *New Disclosures Show What's Wrong with For-Profit Job Placement Rates*, EDCENTRAL (Feb. 20, 2014), http://www.edcentral.org/new-gainful-employment-data-shows-whats-wrong-profit-college-job-placement-rates/, *archived at* http://perma.cc/S3XC-8XBJ.

[15] *New California Law Requires Greater Disclosure of For-Profit College and Vocational School Performance*, PUB. ADVOCATES (Sep. 27, 2012), http://www.publicadvocates.org/press-releases/new-california-law-requires-greater-disclosure-of-for-profit-college-and-vocational-s, *archived at* http://perma.cc/RG25-PMNK.

also require that schools substantiate any promotional claim made in advertisements.[16]

It thus seems prudent to ask: Do required disclosures and disclaimers actually lead people, in this case student-consumers, to make better decisions? Significant evidence and recent legal scholarship suggest that they do not.[17] Nevertheless, this form of regulation continues to grow. In the context of FPCUs, this Note will examine the developments in law and legal theory that have facilitated the increased use of disclosure-based regulation, but at the same time may constrain their effective use.

Throughout the second half of the twentieth century, the field of law and economics has emphasized the rationality of consumers, and its antipaternalist, deregulatory arguments have extended into several areas of the law.[18] The evolution of modern First Amendment doctrine provides an illustration: the Supreme Court first brought commercial speech within the ambit of the First Amendment in 1976, then applied an increasingly strict review of marketing regulations in the following decades.[19] As a result, it is common in the Roberts Court era for for-profit companies to invoke the Free Speech Clause as a corporate shield to government regulation,[20] and FPCUs have indeed utilized the First Amendment in defending against the Gainful Employment Rule.[21]

At the same time, the Court has been lenient with respect to compelled commercial disclosures, applying only a rational basis test.[22] The Court jus-

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[16] *AG Coakley Announces Finalization of New For-Profit and Occupational School Regulations*, MASS. ATT'Y GEN.'S OFFICE (June 25, 2014), http://www.mass.gov/ago/news-and-updates/press-releases/2014/2014-06-25-for-profit-regulations.html, *archived at* http://perma.cc/F9B8-FY8W.

[17] *See, e.g.*, Kesten C. Green & J. Scott Armstrong, *Evidence on the Effects of Mandatory Disclaimers in Advertising*, 31 J. PUB. POL'Y & MKTG. 293, 293 (2012) (finding no evidence that government-mandated disclaimers in advertising achieve their intended effects); Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 651 (2011).

[18] Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimating Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 32 (2004). Law and economics and its antipaternalist justifications take a "Dispositionist" view of human agency, which presumes that people make decisions guided by their own internal traits, beliefs, and assessment of the information in front of them. *See* Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 147–48 (2003).

[19] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 754 (1976); Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) (calling for the application of strict scrutiny to commercial speech restrictions); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring) (questioning continued reliance on the *Central Hudson* test).

[20] *See* Victoria Baranetsky, *The Economic-Liberty Approach of the First Amendment: A Story of American Booksellers v. Hudnut*, 47 HARV. C.R.-C.L. L. REV. 169, 171 (2012) (discussing the transition to the "economic liberty" approach of the First Amendment); *cf.* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

[21] Ass'n of Private Sector Colleges & Univs. v. Duncan, 681 F.3d 427, 440 (D.C. Cir. 2012).

[22] Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 249 (2010).

tified this trend with antipaternalist reasoning similar to its justification for increased strictness in review of commercial speech restrictions.[23] Due to this dual trend, one scholar has suggested that modern First Amendment doctrine is subject to "deep capture": it favors a view of rational consumers in order to promote corporate influence and resist government regulation.[24] Consequently, some courts have resisted compelled disclosures on First Amendment grounds if they are evocative instead of purely informational.[25]

After examining the legal regime of commercial disclosures, this Note will contrast two theories to begin an account of why this approach is misguided and how we may improve failing disclosures, applied in the context of FPCUs. The theory of libertarian paternalism, which encourages disclosure-based regulation, is a response that attempts to unify antipaternalist concerns with evidence from cognitive sciences showing consumers often err in their decisionmaking.[26] Government thus should intervene in noncoercive ways to correct these errors, "nudging" consumers in the right direction.[27] Situationism, the second theory, focuses on powerful psychological forces and manipulation of those forces by those who stand to profit from them.[28] In the context of FPCU regulation, situationism suggests that simply disclosing information to consumers will not be enough to prevent FPCUs from taking advantage of vulnerable populations. This Note embraces situationism as an effective descriptor of the problems posed by disclosure-based regulation of FPCUs. FPCUs are currently incentivized to recruit as many students as possible without regard to their likelihood of success or well-being, and regulations like the Gainful Employment Rule that tie student outcomes to funding present one way of realigning these incentives. Nevertheless, the same deregulatory rhetoric influencing First Amendment doctrine has also impeded the political chances of more substantive regulation. This Note will therefore turn to libertarian paternalism and disclosure-based regulation as a more politically feasible option, examining how to improve the use of disclosures by being attentive to human cognition and advocating for a more accommodating legal regime that takes situational factors into account.

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[23] Allen Rostron, *Pragmatism, Paternalism, and the Constitutional Protection of Commercial Speech*, 37 VT. L. REV. 527, 544 (2013).

[24] David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-Food Advertising to Children*, 39 LOY. L.A. L. REV. 507, 551 (2006).

[25] *See, e.g.*, Entm't Software Ass'n v. Blagojevich, 469 F.3d 641, 652 (7th Cir. 2006); R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1214 (D.C. Cir. 2012).

[26] Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1167–68 (2003).

[27] RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE (2009).

[28] *See* Hanson & Yosifon, *supra* note 18, at 154.

## I. For-Profit Education's History and Present Context

First, this Note will introduce its case study in disclosure-based regulation — the rapid rise of the for-profit college sector.[29] This Part will chart a brief history of FPCU abuses as they expanded to meet unmet demand; the current context of unmet demand created by exclusive nonprofit and large public universities; the FPCU's extensive focus on a marginalized population of students; and early responses by state and federal governments to FPCUs.

### *A. A History of Abuses*

With demand growing in the mid-nineteenth century for training in business, managerial, and secretarial skills, and with public institutions failing to meet that demand, entrepreneurs saw an opportunity for profit.[30] At the time, the white, male, "class-bound, classical-bound" colleges did not teach vocational or applied skills.[31] In the 1850s, H.B. Stratton and P.R. Bryant founded a chain of fifty schools intended to teach "shorthand, bookkeeping, and the use of the newfangled mechanical typewriter," primarily to women excluded from college.[32] They advertised heavily, visited towns with brass bands, made stump speeches extolling the value of good penmanship and bookkeeping, and sold "scholarships" that were actually just tuition payments.[33] As the industry expanded during the Progressive Era, FPCUs first began to develop a reputation for "aggressive solicitation of students, misleading advertising, and inadequate curricula."[34] The FPCU industry emerged from the era with a tarnished reputation, but as a result it organized its first trade association, the National Association of Accredited Commercial Schools, to fight back against the charges.[35]

After World War II, the G.I. Bill allowed an enormous number of veterans to pursue postsecondary education. Five thousand trade schools were created in the five years after the passage of the G.I. Bill for veterans who wanted to pursue a trade rather than a liberal arts education.[36] Complaints about these schools soon started to roll into the Veterans Administration

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[29] The broad term "for-profit college" can encompass several different types of schools: trade schools, smaller independent for-profit schools, and larger chains of for-profit schools, including those that operate entirely on the internet. Deming et al., *For-Profit Colleges*, 23 Future of Children 137, 138 (2013).

[30] Deming, *Agile Predators*, *supra* note 3, at 139.

[31] Anya Kamenetz, DIY U: Edupunks, Edupreneurs, and the Coming Transformation of Higher Education 6 (2010).

[32] *Id.*

[33] August C. Bolino, Career Education: Contributions to Economic Growth 151 (1973).

[34] Craig A. Honick, *The Story Behind Proprietary Schools in the United States*, 91 New Directions for Community Colleges 27, 33–34 (1995).

[35] *Id.* at 36.

[36] Henry Hansmann, *The Evolving Economic Structure of Higher Education*, 79 U. Chi. L. Rev. 159, 165 (2012).

("VA") in Washington.[37] The General Accounting Office[38] ("GAO") released a study in 1951 in which it found that of the 1.7 million veterans who attended for-profit schools, only 20% completed their studies.[39] The report made clear that this result was not due to the veterans themselves, but to the practices of the schools. It found that 65% of the for-profit schools examined engaged in "questionable practices that resulted in excessive charges to the Treasury."[40] Following this report, the VA enacted the "85/15" rule, which provided that no institution could have a student body composed of more than 85% veterans.[41]

In 1972, the FPCU industry received a critical boon when Congress amended Title IV of the Higher Education Act of 1965 to allow FPCUs to receive federal student aid loans and grants.[42] Between 1970 and 1975, enrollment in higher education overall in the U.S. grew 30%, while enrollment in FPCUs grew 112%.[43] Congress made this amendment despite the Senate Education and Labor Committee's view that FPCUs attract students through "sophisticated advertising and unfulfillable promises" and "do not offer the quality of education which the schools claim is available."[44]

FPCUs continued their success until the late 1980s, when they once again stumbled into the national spotlight. Newspaper reports, television hidden-camera investigations, and a Senate investigation found that some FPCUs were aggressively recruiting outside welfare offices and homeless shelters, offering useless courses, and sometimes "outright folding overnight."[45] By 1990, the FPCU loan default rate was twice that of the higher education sector overall, a ratio that is still roughly true today.[46] In 1992, Congress amended the Higher Education Act to prohibit public aid to institutions that offered over 50% of their courses through "distance education programs" or with over 25% of their student-loan borrowers defaulting on their loans, and banning "incentive compensation" recruiting practices, in which recruiters are paid based on how many students they enroll.[47] As a result, 1,500 of 4,000 FPCUs lost accreditation.[48] In response, the industry took efforts to improve its image. The National Association of Trade and

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[37] John Aubrey Douglass, *The Rise of the For-Profit Sector in US Higher Education and the Brazilian Effect*, 47 EUR. J. EDUC. 242, 244 (2012).

[38] Now called the Government Accountability Office.

[39] HARKIN REPORT, *supra* note 2, at 132.

[40] *Id.* (quoting CHARLES A. QUATTLEBAUM, LEGISLATIVE REFERENCE SERVICE, EDUCATIONAL BENEFITS FOR VETERANS OF THE KOREAN CONFLICT 29 (1952)).

[41] *Id.*; *see also* Hansmann, *supra* note 36, at 165.

[42] *See* HARKIN REPORT, *supra* note 2, at 132.

[43] *Id.* at 132–33.

[44] *Id.* at 132 (quoting S. REP. NO. 92–346, at 51 (1971)).

[45] KAMENETZ, *supra* note 31, at 70.

[46] HARKIN REPORT, *supra* note 2, at 133.

[47] *Id.* at 134.

[48] KAMENETZ, *supra* note 31, at 70.

Technical Schools renamed itself the Career College Association and began spending millions of dollars in lobbying campaigns.[49]

A deregulatory trend emerged in the ensuing years, coinciding with the birth of the most powerful and representative example of the modern FPCU: the publicly traded mega-chain. In 1991, DeVry, Inc. became the first publicly traded, postsecondary, degree-granting institution.[50] In the five years between 1994 and 1999, FPCU companies raised more than $4.8 billion in private investment capital through more than thirty initial public offerings ("IPOs") and thirty follow-in offerings.[51] The five publicly traded entities that lead the proprietary sector today — Apollo Group (the parent company of the University of Phoenix), Education Management Corporation, Kaplan Higher Education, Career Education Corporation, and DeVry — were formed and grew rapidly during this period.[52]

The Department of Education likely assisted this growth by relaxing the 1992 Higher Education Act Amendments. In 2002, DOE established twelve expansive safe harbors in which FPCUs could avoid the recruiter compensation ban, and lessened the sanction to a fine rather than limitation or termination of Title IV funding.[53] As the biggest schools formed and expanded in the mid- to late-1990s, the stage was set for a large growth in enrollments in the 2000s, which is precisely what happened. From 2000 to 2009, enrollment in the for-profit sector tripled, while enrollment in the rest of higher education grew only 22%.[54] Almost 90% of this growth occurred due to the expansion of for-profit chains.[55] As of 2010, the University of Phoenix, the largest of the FPCU chains, enrolled 470,000 students.[56] In 1970, by contrast, the total enrollment in all for-profit, degree-granting institutions was 18,333.[57]

Modern FPCUs are expensive, supported almost entirely by government aid through loans, and disproportionately target minority and low-income students, leaving them with poor employment prospects and high levels of loans on which they are more likely to default.[58] FPCUs such as University of Phoenix, Drake College of Business, and Chancellor University have aggressively recruited at homeless shelters, encouraging the home-

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[49] *Id.*

[50] *See* RICHARD S. RUCH, HIGHER ED, INC.: THE RISE OF THE FOR-PROFIT UNIVERSITY 63 (2001).

[51] *Id.* The industry raised approximately $500 million in 1999 alone. *Id.*

[52] *See* Aaron N. Taylor, *"Your Results May Vary": Protecting Students and Taxpayers Through Tighter Regulation of Proprietary School Representations*, 62 ADMIN. L. REV. 729, 757–58 (2010).

[53] Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 TENN. L. REV. 515, 530 (2012) (citing 34 C.F.R. § 668.14(b)(22)(ii)(A)–(L) (2010)).

[54] Deming, *Agile Predators*, *supra* note 3, at 140.

[55] *Id.* at 141.

[56] Hansmann, *supra* note 36, at 166.

[57] Deming, *Agile Predators*, *supra* note 3, at 140.

[58] *See, e.g.*, Lauerman, *supra* note 4; Quinton, *supra* note 4.

less to pay high tuition with federal grants and loans, leaving them with debt when they fail to complete courses.[59] When G.I. Bill benefits expanded in 2009, FPCUs actively sought out veterans without regard to their ability to complete classes or repay loans.[60] During the first two years of availability of these benefits, FPCUs collected $1.6 billion, or 37%, of the total $4.3 billion dispersed by the program.[61] Eight of the top ten recipients of aid from the program were FPCUs.[62] These tactics made for an immensely profitable recession for FPCUs, which had two of the only successful IPOs in late 2008 and early 2009,[63] and whose stocks soared through 2009.[64] Top executives at the fifteen publicly traded FPCUs took home over $2 billion from 2003 to 2010.[65]

As a result, various state and federal actors have begun investigating and responding to FPCUs.[66] State and federal government regulations, detailed in section I.D, have been forthcoming but have not all taken effect.[67] Possibly as a consequence, FPCU enrollment has declined at a slightly higher rate than the rest of higher education.[68] Yet their significant place in the U.S. higher education system remains, as does their disproportionate share in the education debt bubble.

### *B. Rising Demand for College Education and a Shift in Supply*

The seemingly unassailable consensus that a college degree is essential for employment in today's economy, no matter the cost, has played an integral role in the growth of FPCUs.[69] Obtaining a college degree has been

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[59] Golden, *supra* note 8.

[60] Daniel Golden, *Veterans Failing Shows Hazards of For-Profit Schools in GI Bill*, BLOOMBERG (Sept. 23, 2010, 3:51 PM), http://www.bloomberg.com/news/2010-09-23/veterans-failing-to-learn-show-hazards-of-for-profit-schools-under-gi-bill.html, *archived at* http://perma.cc/5QCW-NPMW.

[61] HARKIN REPORT, *supra* note 2, at 27.

[62] *Id.*

[63] KAMENETZ, *supra* note 31, at 70.

[64] John Hechinger & John Lauerman, *Executives Collect $2 Billion Running U.S. For-Profit Colleges*, BLOOMBERG (Nov. 10, 2010, 12:02 AM), http://www.bloomberg.com/news/2010-11-10/executives-collect-2-billion-running-for-profit-colleges-on-taxpayer-dime.html, *archived at* http://perma.cc/KW49-EAFH.

[65] *Id.*

[66] *See, e.g.*, HARKIN REPORT, *supra* note 2; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-948T, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD AND ENGAGED IN DECEPTIVE AND QUESTIONABLE MARKETING PRACTICES (2010).

[67] *See infra* notes 112–128 and accompanying text.

[68] Chadwick Matlin, *The Reform of For-Profit Colleges: Can They Give Up Their Predatory Ways?*, THE ATLANTIC (Sept. 20, 2013, 11:51 AM), http://www.theatlantic.com/business/archive/2013/09/the-reform-of-for-profit-colleges-can-they-give-up-their-predatory-ways/279850/, *archived at* http://perma.cc/N9N4-WES4.

[69] *See* Cynthia English, *Most Americans See College as Essential to Getting a Good Job*, GALLUP (Aug. 18, 2011), http://www.gallup.com/poll/149045/americans-college-essential-getting-good-job.aspx, *archived at* http://perma.cc/ASQ5-UNP7; Mark Gongloff, *You Need a College Degree to Get a Job (And Crushing Debt to Get a Degree)*, HUFFINGTON POST (Oct. 22, 2013, 12:06 PM), http://www.huffingtonpost.com/2013/10/22/college-degree-job_n_4142

linked not only to better employment outcomes and greater wealth, but also to a more stable family life, better health, a longer life, less criminality, greater participation in civic life, and a greater level of happiness overall.[70] A recent Pew Research Center report's title, "The Rising Cost of Not Going to College," emphasizes the costs of inaction.[71] Despite the increasingly high costs of college and soaring student debt levels,[72] everyone, especially low-income people,[73] must pursue a college education.

The modern importance of a college education is likely due to the growth of the "knowledge content" in work, "spawning sound bites like 'information age,' 'knowledge economy,' 'knowledge capitalism,' and 'knowledge worker.'"[74] Technological changes in the workplace in the last few decades, such as increased computerization, have increased the demand across all industries for "nonroutine cognitive tasks," as opposed to "routine manual and routine cognitive tasks."[75] In turn, employers have begun to use college degrees as a sorting device for employees that will be suited to perform these tasks.[76] Due to the increasing value of a college education, there are more people from a more diverse set of ages, ethnicities, and incomes who are seeking or being encouraged to seek a college degree.[77]

As the demand for college education has increased in the past three decades, the flow of public and private resources to pay for it has moved. Generally, state spending on higher education has decreased in the last several decades, falling from 4.1% of total state government spending in 1984

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97.html, *archived a*t http://perma.cc/F7B3-W234; Emmarie Huetteman, *Michelle Obama Urges Students to Apply for College Aid*, N.Y. TIMES (Feb. 5, 2014), http://www.nytimes.com/2014/02/06/us/first-lady-urges-students-to-apply-for-college-aid.html, *archived at* http://perma.cc/AEP8-2WML.

[70] Michael Hout, *Social and Economic Returns to College in the United States*, 38 ANN. REV. SOCIOLOGY 379, 380 (2012). It is possible that some of these advantages are due to preexisting advantages enjoyed by those already more likely to go to college. *Id.*

[71] *The Rising Cost of Not Going to College*, PEW RESEARCH SOCIAL & DEMOGRAPHIC TRENDS (Feb. 11, 2014), http://www.pewsocialtrends.org/2014/02/11/the-rising-cost-of-not-going-to-college, *archived at* http://perma.cc/7GLB-CX7R.

[72] Shahien Nasiripour & Chris Kirkham, *Student Loan Defaults Surge to Highest Levels in Nearly 2 Decades*, HUFFINGTON POST (Sep. 30, 2013, 9:19 PM), http://www.huffingtonpost.com/2013/09/30/student-loans-default_n_4019806.html, *archived at* http://perma.cc/J2HZ-MPYX.

[73] EXEC. OFFICE OF THE PRESIDENT, INCREASING COLLEGE OPPORTUNITY FOR LOW-INCOME STUDENTS 3 (2014) (stating that college access for low-income students will be "critical to promoting social mobility").

[74] WILLIAM G. TIERNEY & GUILBERT C. HENTSCHKE, NEW PLAYERS, DIFFERENT GAME 29 (2007) (quoting ALAN BURTON-JONES, KNOWLEDGE CAPITALISM: BUSINESS, WORK, AND LEARNING IN THE NEW ECONOMY (1999)).

[75] David H. Autor et al., *The Skill Content of Recent Technological Change: An Empirical Exploration*, 118 Q. J. ECON. 1279, 1279 (2003).

[76] *See id.*

[77] *See* TIERNEY & HENTSCHKE, *supra* note 74, at 29 (describing the increase in older students attending college); EXEC. OFFICE OF THE PRESIDENT, *supra* note 73, at 2–9 (describing the President's plan for increasing the number of low-income students in college as a means of reducing income inequality).

to 2.4% in 1994 to 1.8% in 2004.[78] As state spending goes down, state college tuition rises as a percentage of household income.[79]

Rather than directly subsidizing the institutions themselves, governments have preferred to subsidize students directly through grants and, more commonly, loans.[80] Over the past ten years, state grants not based on need have grown at triple the rate of need-based grants.[81] Private nonprofit universities provide almost twice as much in grants for students in the top quintile of income as they do for students whose families are in the bottom quintile, and public institutions spend roughly the same amount in grants between the two.[82] Therefore, for the increasing numbers of nontraditional and low-income students that are facing pressure to attend college to increase their livelihood, their path is to attend whichever college is available, financing their education through loans and a meager supply of grants. FPCUs, which rely on federal grants and loans as their "lifeblood," direct their marketing and advertising at this segment of the population especially.[83]

### *C. Marketing and Advertising: A Focus on "Marginal" Students*

In a field where even the largest traditional universities spend a few million at most,[84] the largest publicly traded FPCUs annually spend hundreds of millions of dollars on sales and marketing each, billions of dollars combined.[85] The FPCUs studied in Senator Tom Harkin's 2012 investigation of FPCUs ("the Harkin Report") had a total of 32,496 recruiters compared to 3,512 career-services staff members.[86] Among the 30 companies, an average of 22.4% of revenue went to marketing and recruiting, 19.4% to profits, and 17.7% to instruction.[87]

On the receiving end of these marketing efforts are the people that will make up the typical FPCU student body: working class, low-income, vet-

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[78] Philip A. Trostel, *The Financial Impacts of College Attainment*, 51 RESEARCH HIGHER EDUC. 220, 221 (2010).

[79] TIERNEY & HENTSCHKE, *supra* note 74, at 40.

[80] *Id.* at 41–42.

[81] THE EDUCATION TRUST, PRICED OUT: HOW THE WRONG FINANCIAL-AID POLICIES HURT LOW-INCOME STUDENTS 2 (2011), *available at* http://www.edtrust.org/sites/edtrust.org/files/publications/files/PricedOutFINAL_2.pdf, *archived at* http://perma.cc/VE3L-L3DH.

[82] *Id.*

[83] *See* Deming, *Agile Predators*, *supra* note 3, at 150.

[84] Miley, *supra* note 9.

[85] Todd Wallack, *Attorney Generals to Congress: Don't Let For-Profit Colleges Use Federal Grants and Loans for Advertising*, BOSTON.COM (Mar. 18, 2013, 5:42 AM), http://www.boston.com/business/news/2013/03/17/attorney-generals-congress-don-let-for-profit-colleges-use-federal-grants-and-loans-for-advertising/lMzPoQYWOjKHlCepMMffOL/story.html, *archived at* http://perma.cc/KMB2-4AY7.

[86] Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. TIMES (July 29, 2012), http://www.nytimes.com/2012/07/30/education/harkin-report-condemns-for-profit-colleges.html, *archived at* http://perma.cc/7JG-5Q5J.

[87] *Id.*

eran, and minority students, especially those with incomes independent from their parents. African-American and Hispanic students make up nearly half of all students enrolled in FPCUs, compared to 28% of all undergraduates.[88] Sixty-four percent of students in FPCUs have incomes below the median for all undergraduates.[89] More than half of four-year students at for-profit colleges are financially independent from their parents, compared to 7% of students at four-year public colleges.[90]

FPCU proponents tout these numbers as a sign of the unprecedented access that they facilitate. Steve Gunderson, the President of the Association of Private Sector Colleges and Universities ("APSCU"), touts the above statistics as a sign that FPCUs have "expanded education opportunities" for "nontraditional students" in ways that nonprofit and public colleges cannot, whether due to "scheduling, location, or admission criteria."[91] Richard S. Ruch, the Dean of DeVry University, situates this claim in a historical context, claiming that the history of expanded opportunity for women and African Americans through FPCUs proves that then, as now, "the profit motive could work for the social good."[92]

The claim of expanding opportunity for underprivileged classes has had staying power, especially with the public focus on class disparities in education.[93] It is important to note that the objections raised by many skeptics of FPCUs do not contest that providing a college education to disadvantaged people is a worthwhile goal, but worry about the high costs of FPCUs and greater likelihood of FPCU students defaulting on loans[94] or that FPCUs are targeting such students with predatory, deceptive marketing.[95] Due to these marketing practices and the Wall Street ownership of FPCUs, some have compared them to the subprime mortgage sellers that similarly took advantage of low-income, minority populations.[96]

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[88] *Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 112th Cong. 32 (2011) (statement of Pauline Abernathy, Vice President, Institute for College Access and Success).

[89] *Id.* at 70 (letter of Wade Henderson and Nancy Zirkin to Secretary of Education Arne Duncan).

[90] KAMENETZ, *supra* note 31, at 71.

[91] *The Value of Education for Veterans at Public, Private and For-Profit Colleges and Universities: Hearing Before the Subcomm. on Economic Opportunity of the H. Comm. on Veterans' Affairs*, 113th Cong. 16 (2013) (statement of Steve Gunderson, President and CEO, Association of Private Sector Colleges and Universities).

[92] RUCH, *supra* note 50, at 55. However, the historical schools that Ruch points to appear to be more philanthropic or "civilizing" than profit-seeking. *See* William N. Hailmann, *Education of the Indian*, *in* MONOGRAPHS ON EDUCATION IN THE UNITED STATES 1, 9, 16–19 (Nicholas M. Butler, ed., 1904).

[93] *See, e.g.*, Joe Nocera, *Why We Need For-Profit Colleges*, N.Y. TIMES (Sep. 16, 2011), http://www.nytimes.com/2011/09/18/magazine/why-we-need-for-profit-colleges.html, *archived at* http://perma.cc/T3P-PPKP.

[94] *See, e.g.*, Abernathy Testimony, *supra* note 88, at 26.

[95] *See, e.g.*, Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J.C. & U.L. 45, 69 (2011).

[96] Matthew A. McGuire, *Subprime Education: For-Profit Colleges and the Problem With Title IV Federal Student Aid*, 62 DUKE L.J. 119, 121 (2012). Tellingly, Steve Eisman, an

A late-2013 lawsuit filed by the California Attorney General against Corinthian Colleges Inc. ("CCI") illustrates this divide between opponents that see harm in the targeting of minorities and low-income people, and FPCUs that see commitment to universal education. The complaint alleged that CCI engaged in a predatory scheme by targeting and misleading single-parent families near the poverty line, people that the company called "stuck" and "isolated" in internal documents.[97] In response, CCI called these allegations "insulting and preposterous" and claimed that it does not prey on students but helps them to "overcome academic and personal obstacles that stand in the way of completing their programs."[98] The case is ongoing in California.

However the higher percentage of marginalized students in FPCUs is portrayed, it seems clear that targeting these students fits within the marketing strategy of FPCUs for reasons central to the FPCU business plan. As FPCUs' private equity backers are well aware, firms that have a new business model enter an existing field not by competing with other well-established firms, but by "competing against non-competition."[99] FPCUs are competing not with private nonprofits and the top public colleges, but for the market of students that community colleges do not have the funds to cover.[100] By reducing financial aid, not providing flexibility to nontraditional students who may need to work during the day or raise families, and increasingly catering to wealthier students, private nonprofit and public universities have "abandoned their public purpose of expanding access in favor of the competitive arms race that higher education has become."[101] Such practices have left low-income populations on the margins of the higher education market and exposed needy students to unscrupulous for-profit recruiters.[102]

FPCUs gain not only an untapped demographic by targeting vulnerable students, but also the vast majority of their revenue. Because they value

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investor well known for shorting the stock of subprime mortgage sellers, has done the same for the FPCU industry, calling it "as socially destructive as the subprime-mortgage industry." Kambiz Foroohar & Esmé E. Deprez, *Big Short Eisman Vies with Goldman Over For-Profits*, BLOOMBERG (Jan. 24, 2011, 4:16 PM), http://www.bloomberg.com/news/2011-01-24/big-short-eisman-vies-with-goldman-sachs-in-value-faceoff-over-for-profits.html, *archived at* http://perma.cc/M4GJ-RDL5. Eisman created controversy by testifying against FPCUs in Congress while shorting their stocks. *Id.*

[97] Complaint at 2, California v. Heald College, LLC, No. 13-534793 (Cal. Super. Ct. Oct. 10, 2013); *see also* Stephen Burd, *A Crash Course in California Politics*, THE NEW REPUBLIC (Jan. 19, 2014), http://www.newrepublic.com/article/116147/corinthian-colleges-lawsuit-jerry-brown-settled-will-kamala-harris, *archived at* http://perma.cc/D42H-XPZL.

[98] Verified Answer at 2, California v. Heald College, LLC, No. 13-534793 (Cal. Super. Ct. Nov. 12, 2013).

[99] Guilbert C. Hentschke, *Evolving Markets of For-Profit Higher Education*, *in* FOR-PROFIT COLLEGES AND UNIVERSITIES: THEIR MARKETS, REGULATION, PERFORMANCE, AND PLACE IN HIGHER EDUCATION 23, 28 (Guilbert C. Hentschke et al. eds., 2010).

[100] *Id.* at 33–34.

[101] Omari Scott Simmons, *For-Profits and the Market Paradox*, 48 WAKE FOREST L. REV. 333, 337 (2013).

[102] *See* THE EDUCATION TRUST, *supra* note 81, at 2, 9, 11.

profit over prestige, FPCUs will look to constantly increase growth and therefore value inclusivity over exclusivity.[103] By targeting low-income students who qualify for federal grants and subsidized loans, the largest FPCU chains get over 80% of their revenue from federal sources.[104] The 90/10 Rule under the Higher Education Act limits FPCUs to receiving no more than 90% of their revenue from Title IV student aid.[105] Curiously, federal education benefits under the G.I. Bill are not included in the 90%, so FPCUs have aggressively recruited veterans in addition to low-income students.[106] Federal loans are not always enough for low-income students to pay the high costs of FPCUs, so some have begun lending directly to students, sometimes adopting particularly egregious lending practices.[107]

The pressure to recruit more students has led some FPCUs to develop aggressive and manipulative recruiting practices. The Harkin Report describes how schools developed sales practices to play on the emotions of vulnerable students.[108] For example, ITT's internal materials described one technique called the "Pain Funnel," in which the recruiter would expose vulnerabilities of the prospective student, such as working in a dead-end job, being unable to support his or her children, and failing parents or relatives. The recruiter would then ask progressively more painful questions about the situation, and then finally offer college as a way out of their painful situation.[109] Kaplan had a similar "getting to the pain" strategy.[110] Schools such as Kaplan and Apollo Group also instructed their recruiters in ways to overcome objections. For example, when students mentioned the high price, recruiters were trained to ask, "Can you afford not to go?"[111]

State and federal government responses have begun to address such aggressive and misleading marketing.

### *D. Legal and Regulatory Responses*

The Obama Administration has made clear its intention to regulate the FPCU industry. In fact, after President Obama's reelection, publicly traded FPCU stock prices plummeted, and FPCUs had to close many of their loca-

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[103] *See* KAMENETZ, *supra* note 31, at 33–35.

[104] Deming, *Agile Predators*, *supra* note 3, at 150.

[105] *Id.*

[106] Jaclyn Patton, *Encouraging Exploitation of the Military by For-Profit Colleges: The New GI Bill and the 90/10 Rule*, 54 S. TEX. L. REV. 425, 436 (2012).

[107] Such practices form the basis for a recent lawsuit initiated by the Consumer Financial Protection Bureau against ITT Tech. *CFPB Sues For-Profit College Chain ITT for Predatory Lending*, CONSUMER FIN. PROT. BUREAU, (Feb. 26, 2014), http://www.consumerfinance.gov/newsroom/cfpb-sues-for-profit-college-chain-itt-for-predatory-lending, *archived at* http://perma.cc/9DXU-GXPG.

[108] HARKIN REPORT, *supra* note 2, at 59.

[109] *Id.* at 60–61.

[110] *Id.* at 62–63.

[111] *Id.* at 63.

tions.[112] The Department of Education has adopted multiple regulations intended to curb excessive and misleading FPCU marketing and recruiting practices. In late 2010, it issued regulations that eliminated the incentive compensation ban safe harbors for recruiters that were put in place in 2002.[113] More notably, in June of 2011 the DOE proposed its Gainful Employment Rule.[114] The rule assesses FPCUs by either the percentage of their students that are repaying their loans, students' estimated loan payments compared to their discretionary income, or students' loan payments as a percentage of total earnings.[115] The first time a school fails to meet certain benchmarks within these metrics, it has to disclose the failure to current and prospective students. The second time, it must disclose to students that they may have trouble repaying their loans and provide information about transfer options. If a school fails three times in four years, it loses federal funding.[116]

By appealing to Congress with expensive lobbying campaigns,[117] and to the courts with litigation battles, FPCU proponents have fought the Gainful Employment Rule with a good degree of success thus far. The Association of Private Sector Colleges and Universities challenged the DOE regulations under the Administrative Procedure Act and the First Amendment in D.C. District Court.[118] The D.C. Circuit eventually struck down parts of the earlier recruiter compensation regulations as arbitrary and capricious and beyond the DOE's authority under the Higher Education Act.[119] The D.C. District Court then struck down parts of the Gainful Employment Rule as not a product of "reasoned decisionmaking."[120] Most recently, the DOE has

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[112] *For-Profit College Shares Tumble after President Obama Reelected*, HUFFINGTON POST (Nov. 7, 2012, 11:23 AM), http://www.huffingtonpost.com/2012/11/07/for-profit-school-shares-_n_2088339.html, *archived at* http://perma.cc/7UPC-WXBQ; Alex Veiga, *University of Phoenix Closing 115 Locations*, YAHOO! FIN. (Oct. 16, 2012, 8:22 PM), http://finance.yahoo.com/news/university-phoenix-closing-115-locations-213128283—finance.html, *archived at* http://perma.cc/AG59-DSEF.

[113] 34 C.F.R. § 668.14(b)(22)(i) (2012); 75 Fed. Reg. 66,831, 66,872–66,879 (Oct. 29, 2010) (to be codified at 34 C.F.R pt. 668).

[114] *Obama Administration Announces New Steps to Protect Students from Ineffective Career College Programs*, U.S. DEP'T OF EDUC. (June 2, 2011), http://www.ed.gov/news/press-releases/gainful-employment-regulations, *archived at* http://perma.cc/SHR8-77WX.

[115] *Id.*

[116] *See id.*

[117] Sharona Coutts, *For-Profit Schools Donate to Lawmakers Opposing New Financial Aid Rules*, PROPUBLICA (Sep. 17, 2010, 9:20 AM), http://www.propublica.org/article/for-profit-schools-donate-to-lawmakers-opposing-new-financial-aid-rules, *archived* at http://perma.cc/775E-8FSH; John Lauerman, *For-Profit Colleges Face State Crackdowns as U.S. Rules Delayed*, BLOOMBERG (Apr. 7, 2011, 12:01 AM), http://www.bloomberg.com/news/2011-04-07/for-profit-colleges-face-state-crackdowns-as-u-s-rules-delayed.html, *archived at* http://perma.cc/ML4L-26RZ (noting $6.6 million spent in 2010 by one trade group).

[118] Career Coll. Ass'n v. Duncan, 796 F. Supp. 2d 108, 113 (D.D.C. 2011).

[119] Ass'n of Private Sector Colleges & Univs. v. Duncan, 681 F.3d 427, 448 (D.C. Cir. 2012).

[120] Ass'n of Private Sector Colleges & Univs. v. Duncan, 870 F. Supp. 2d 133, 154 (D.D.C. 2012). *See also* Ass'n of Private Sector Colleges & Univs. v. Duncan, 930 F. Supp. 2d 210, 212 (D.D.C. 2013) (denying DOE motion to amend).

issued another formulation of recruiter compensation regulations, and APSCU has once again challenged them in court.[121]

Perhaps spurred by the delays in federal action, state governments have recently begun investigating and regulating FPCUs.[122] For example, Massachusetts recently enacted regulations of these practices through, among other things, restrictions on misleading advertising and required disclosure of information.[123] The advertisement regulations prohibit "deceptive language in general," but also specify several examples of prohibited activity, including guaranteeing employment without an actual guarantee and misrepresenting faculty qualifications, the likelihood of post-graduation employment, and probable earnings.[124]

The regulations also prohibit several types of marketing practices, including anonymous advertising, enrolling unqualified or ineligible students, and engaging in "high pressure sales tactics."[125] Finally, the regulations have robust disclosure requirements that FPCUs must give to prospective students before they enroll. These include a general requirement to disclose "any fact relating to the school or program . . . which is likely to influence the prospective student not to enter into the transaction with the school."[126] More specifically, schools must disclose, "clearly and conspicuously," the cost of the program, the graduation rates, and the completion time.[127] Schools receiving Title IV funds or offering institutional loans must disclose loan default rates, and those referring to employment placement in advertisements must disclose employment statistics.[128]

It is possible that these regulations will be challenged in court on a number of grounds, including under the First Amendment, as the federal government's disclosure requirements were. The Massachusetts regulations, which carefully restrict only misleading information and direct more attention to disclosure requirements, were likely developed with modern First Amendment doctrine's dual trend, discussed below, in mind.

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[121] Complaint, Ass'n of Private Sector Colleges & Univs. v. Duncan, No. 14-277 (2014).

[122] John Lauerman, *For-Profit Colleges Face New Wave of State Investigations*, BLOOMBERG (Jan. 29, 2014, 4:16 PM), http://www.bloomberg.com/news/2014-01-29/for-profit-colleges-face-new-wave-of-coordinated-state-probes.html, *archived at* http://perma.cc/P7CG-2SR8 (describing coordinated efforts by attorneys general in over twelve states, led by Kentucky Attorney General Jack Conway).

[123] 940 MASS. CODE REGS. § 31.00 (2014), Private Occupational Schools, http://www.mass.gov/ago/government-resources/ags-regulations/940-cmr-31-00.html#31.04:FalseorMisleadingStatementsorRepresentations, *archived at* http://perma.cc/5TUV-QEEH.

[124] *Id.* § 31.04.

[125] *Id.* § 31.06.

[126] *Id.* § 31.05.

[127] *Id.*

[128] *Id.*

## II. Commercial Speech Doctrine: Toward a World of Disclosure

Though the Supreme Court's commercial speech jurisprudence is far from clear, it appears to have two diverging trends. Restrictions on non-misleading marketing and advertising are increasingly suspect, while commercial speakers required to convey a government-mandated message have little remedy. The following Part charts the expansion of the First Amendment from its original coverage of the "market place of ideas"[129] and exclusion of profit-driven advertising, to its gradual incorporation of the marketplace of goods, to its increasingly strict supervision of government regulation of commercial advertising. Though more attention has been paid to the expansion of corporate speech rights in the political realm,[130] the realm of commercial speech doctrine may be undergoing similar changes. Since corporations have increasingly used the First Amendment as a defense to government regulations of marketing and advertising, governments responding to resultant harms have been forced to resort to techniques like information disclosure.

### *A. Beginnings: From Submarines to Energy Crises*

The history of the Supreme Court's commercial speech jurisprudence began when an enterprising entertainer attempted to distribute a flier that advertised his submarine on one side, and on the other side, protested a New York City local litter law that had prevented him from distributing the handbills originally.[131] Still unsuccessful, he brought an action for injunction that resulted in the first Supreme Court case to discuss the place of commercial speech within the First Amendment: *Valentine v. Chrestensen*.[132] The Second Circuit Court of Appeals first sided with the plaintiff, viewing the case as directly in line with contemporary Supreme Court cases that struck down local ordinances forbidding the distribution of handbills.[133] Celebrated judge and legal scholar Jerome Frank wrote a vigorous dissent criticizing the inclusion of commercial speech within the First Amendment's purview.[134] Frank suggested that although the protections of the First Amendment were broad

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[129] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); United States v. Rumely, 345 U.S. 41, 56 (1953) (Douglas, J., concurring) ("Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas.").

[130] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 362 (2010); *see, e.g.*, Case Comment, Citizens United v. FEC*: Corporate Political Speech*, 124 Harv. L. Rev. 75, 80 (2010) (describing "immediate firestorm" of controversy and commentary following *Citizens United*).

[131] Chrestensen v. Valentine, 122 F.2d 511, 512 (2d Cir. 1941), *decree rev'd*, 316 U.S. 52 (1942).

[132] 316 U.S. 52, 54 (1942).

[133] *Chrestensen*, 122 F.2d at 511 (citing Lovell v. City of Griffin, 303 U.S. 444 (1938); Schneider v. New Jersey, 308 U.S. 147 (1939); Hague v. CIO, 307 U.S. 496 (1939)).

[134] *Chrestensen*, 122 F.2d at 517 (Frank, J., dissenting).

and nearly absolute, they were never historically intended to cover strictly commercial speech: "Such men as Thomas Paine, John Milton and Thomas Jefferson were not fighting for the right to peddle commercial advertising. To note that fact is not at all to decry the profit-making zeal of the American business man."[135] Reversing the Court of Appeals, the Supreme Court curtly denied the injunction, holding that the First Amendment imposes no "restraint on government as respects purely commercial advertising."[136]

Commercial speech doctrine went largely unaddressed for the next two decades. The doctrine would not begin to shift until it became associated with larger social movements than mere profit-seeking. First in 1964 and then in 1975, the Court enjoined restrictions on advertisements for a civil rights campaign and abortion services, respectively.[137] The Court distinguished *Chrestensen* because these advertisements involved "matters of the highest public interest and concern," and also began to expressly heighten its review.[138] Due to such cases, commercial speech "did not make its way unescorted into the arena of constitutional protection."[139]

Scholarly support for the inclusion of commercial speech within the First Amendment was slow to materialize as well.[140] In the same era in which the Supreme Court began expanding the doctrine via other constitutional fields, economist Ronald Coase began advocating for the protection of purely profit-seeking commercial speech. In "Advertising and Free Speech," Coase argued that there was no legitimate reason for distrusting government regulation in the "market for ideas" but allowing it in the "market for goods."[141] Rather, we should distrust it in both areas, as regulation "leads to a worsening in the economic situation."[142] He lamented, "it is deemed necessary to regulate . . . how goods are to be labeled and described, and so on, lest consumers make the wrong choices."[143] He suggested that the market for ideas did not merit greater protection than the market for goods: "for the bulk of mankind . . . freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government."[144]

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[135] *Id.* at 524.

[136] *Valentine*, 316 U.S. at 54.

[137] New York Times Co. v. Sullivan, 376 U.S. 254, 255 (1964); Bigelow v. Virginia, 421 U.S. 809, 811 (1975).

[138] *Sullivan*, 376 U.S. at 266.

[139] Rostron, *supra* note 23, at 534.

[140] Note, *Freedom of Expression in a Commercial Context*, 78 HARV. L. REV. 1191, 1195 (1965); Note, *Developments in the Law: Deceptive Advertising*, 80 HARV. L. REV. 1005, 1027 (1967); Martin A. Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 GEO. WASH. L. REV. 429, 429–30 (1971).

[141] Ronald H. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1, 4 (1977).

[142] *Id.* at 5.

[143] *Id.* at 2.

[144] *Id.* at 3 (internal quotation omitted).

Echoing Judge Frank's historical argument, Professor Geoffrey Stone has argued:

> [In] crafting the Bill of Rights the Framers were not interested only or even primarily in what people care most about. . . . [T]hey were concerned primarily with what they understood to have been the most egregious historical abuses of government power . . . the danger that those in authority would suppress speech in order to control public discourse, insulate themselves from criticism, and perpetuate themselves in power.[145]

Yet Coase was part of a movement that was just beginning to fundamentally reshape traditional notions of American government. In the 1960s and 1970s, Chicago School economists such as Milton Friedman and George Stigler began tirelessly advocating deregulatory policy.[146] This policy, so central to the Reagan administration that began four years after "Advertising and Free Speech," would effect changes in legal doctrine throughout the 1980s and 1990s.[147] The changes that Coase advocated fit neatly within this movement.

Coase proved immediately prescient. The same year "Advertising and Free Speech" was published, the Supreme Court first signaled its acceptance of commercial speech under the First Amendment in a case that implicated no other constitutional rights. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[148] the Court struck down restrictions on advertising the prices of pharmaceutical drugs, making clear that the First Amendment protects speech that "does no more than propose a commercial transaction."[149] The Court's reasoning echoed the legal economist. The Court stated that the "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate."[150] It noted that "however tasteless and excessive" advertising may seem, it is "nonetheless dissemination of infor-

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[145] Geoffrey R. Stone, *Ronald Coase's First Amendment*, 54 J.L. & ECON. S367, S371 (2011).

[146] *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM 14–17 (1962); MILTON FRIEDMAN & ROSE D. FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 1–7 (1980); GEORGE J. STIGLER, MEMOIRS OF AN UNREGULATED ECONOMIST 148–69 (1988).

[147] *See* Chen & Hanson, *supra* note 18, at 27–34 (discussing the influence of the Chicago school on the U.S. legal and political climate and on corporate law doctrine in particular).

[148] 425 U.S. 748 (1976).

[149] *Id.* at 776 (Stewart, J., concurring).

[150] *Id.* at 763. It is important to note that the plaintiffs in this case were not the pharmaceutical companies themselves, but rather consumers seeking to obtain information about drug prices. This fact arguably made the case more appealing to the Justices, as it allowed them to frame the case in terms of the consumers' right to obtain truthful information, rather than having to hold that the pharmacists' "engaging in commerce is *itself* an expressive activity warranting First Amendment protection." Tamara R. Piety, *"A Necessary Cost of Freedom"? The Incoherence of* Sorrell v. IMS, 64 ALA. L. REV. 1, 23 (2012).

mation" essential to "private economic decisions" in the "free enterprise economy."[151]

Finally, the Court set the modern standard for commercial speech regulation in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[152] During the energy crisis of 1973, New York passed a law prohibiting commercial advertisements promoting energy usage, and the Court struck it down after it was extended past the crisis.[153] The Court utilized what it called a "four-part analysis."[154] First, it asked whether the speech concerned lawful activity and was not misleading.[155] If so, it then asked whether the government interest was substantial, whether the regulation "directly advances the governmental interest asserted," and whether it is "not more extensive than is necessary to serve that interest."[156] Although the Court has stated that the *Central Hudson* test does not impose a "least-restrictive-means requirement" commensurate with commercial speech's "subordinate position" in First Amendment doctrine,[157] in practice the Supreme Court has shown signs of moving toward strict scrutiny.

### *B. Greater Scrutiny of Prohibitive Regulation*

The Supreme Court has not upheld a commercial speech restriction since 1995.[158] Dissenting in *Virginia State Board*, Justice Rehnquist argued that "[u]nder the Court's opinion the way will be open not only for dissemination of price information but for active promotion of prescription drugs, liquor, cigarettes, and other products the use of which it has previously been thought desirable to discourage."[159] In the 1990s and early 2000s, the Court followed this path exactly, striking down restrictions on the advertising of prices for prescription drugs,[160] alcohol labeling and price advertising,[161] tobacco billboard advertising near schools,[162] and gambling.[163] During this time, the ideological makeup of the two sides of the issue reversed poles,

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[151] *Va. State Bd. of Pharmacy*, 425 U.S. at 765. Justice Rehnquist, the lone dissenter, decried a decision requiring "the Virginia Legislature to hew to the teachings of Adam Smith in its legislative decisions regulating the pharmacy profession." *Id.* at 784.

[152] 447 U.S. 557, 566 (1980).

[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 477 (1989).

[158] Jennifer L. Pomeranz, *No Need to Break New Ground: A Response to the Supreme Court's Threat to Overhaul the Commercial Speech Doctrine*, 45 Loy. L.A. L. Rev. 389, 391 (2012) (citing Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995)).

[159] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 781 (1976).

[160] Thompson v. W. States Med. Ctr., 535 U.S. 357, 366–77 (2002).

[161] Rubin v. Coors Brewing Co., 514 U.S. 476, 480–91 (1995); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996).

[162] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540–46 (2001).

[163] Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188–94 (1999).

switching from liberal proponents and a conservative dissenter to the current conservative proponents and liberal dissenters.[164]

The current Supreme Court revealed its take on commercial speech doctrine in *Sorrell v. IMS Health Inc.*[165] *Sorrell* dealt with a Vermont statute, the Prescription Confidentiality Law, which was aimed at preventing the nonconsensual use of doctors' records of their prescription decisions.[166] The legislature found that the sale of such information led to "expensive pharmaceutical marketing campaigns to doctors," causing doctors to make decisions based on "incomplete and biased information" because the "marketplace for ideas on medicine safety and effectiveness is frequently one-sided."[167] It thus required that doctors consent before their information could be used in this way.[168]

Writing for the Court, Justice Kennedy found that the law imposed "content- and speaker-based restrictions on the sale, disclosure, and use of prescriber-identifying information."[169] Because the law imposed restrictions on marketers but not researchers, for example, the law burdened "disfavored speech by disfavored speakers."[170] The Court thus suggested that "heightened judicial scrutiny" applied and struck down the law after nonetheless applying the *Central Hudson* test.[171] Although the Court acknowledged that some content-based restrictions are allowed for commercial speech, it stated that the Vermont law was not aimed at preventing "false or misleading information," but was simply based on a "difference of opinion."[172]

Justice Breyer dissented, joined by Justices Kagan and Ginsburg. He suggested that the heightened standards the Court applied were "out of place," and argued that regulatory programs "necessarily draw distinctions" on the basis of content and speaker; for example, imposing labeling restrictions on drugs but not furniture.[173] He concluded:

> At best the Court opens a Pandora's Box of First Amendment challenges to many ordinary regulatory practices that may only incidentally affect a commercial message. At worst, it reawakens *Lochner*'s pre-New Deal threat of substituting judicial for demo-

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[164] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York, 447 U.S. 557, 579 (1980) (Stevens, J., concurring); *44 Liquormart*, 517 U.S. at 518 (Thomas, J., concurring); *id.* at 517 (Scalia, J., concurring); *Thompson*, 535 U.S. at 378 (Breyer, J., dissenting). By the time *Lorillard* and *Thompson* were decided, Justice Stevens had moved away from the conservative Justices and was joining Justice Breyer's dissents, along with Justice Ginsburg.

[165] 131 S. Ct. 2653, 2659 (2011).

[166] Brief for Petitioners at 1, Sorrell v. IMS Health Inc., 131 S. Ct. 2653 (2011) (No. 10-779), 2011 WL 661712, at *1.

[167] *Sorrell*, 131 S. Ct. at 2661.

[168] *Id.* at 2660.

[169] *Id.* at 2663.

[170] *Id.*

[171] *Id.* at 2672.

[172] *Id.*

[173] *Id.* at 2673, 2677 (Breyer, J., dissenting).

> cratic decisionmaking where ordinary economic regulation is at issue.[174]

As with Justice Rehnquist's dissent in *Virginia Pharmacy*, Justice Breyer's dissent has shown early signs of prescience. In *United States v. Caronia*,[175] a Second Circuit panel concluded over dissent that the conviction of a pharmaceutical sales representative for conspiring to promote a drug for off-label use violated the First Amendment. The Second Circuit dutifully applied Justice Breyer's slippery slope scenario: it found that the Federal Drug and Cosmetic Act's misbranding provisions were content-based because they allowed promotion of government-approved drugs, but not off-label drugs, and speaker-based because they only targeted pharmaceutical manufacturers.[176]

*Sorrell* received relatively little attention when it was first decided.[177] Yet it appears to be part of a long movement arguing for the expansion of corporate rights under the First Amendment,[178] signaling to some scholars that the Supreme Court may finally take up the position of Justices Thomas and Scalia and abolish the differentiation of commercial speech under the First Amendment.[179] Such strict review has clear implications for the regulation of FPCU marketing. In *APSCU v. Duncan*, the D.C. Circuit affirmed the invalidation of the DOE's regulation sanctioning "misleading statements," defined as "any statement that has the likelihood or tendency to deceive or confuse."[180] The court held that the DOE's attempt to prevent confusion both went beyond its statutory authority under the Higher Education Act, and would raise "serious First Amendment concerns—even with respect to commercial speech."[181]

### *C. Disclosures and Compelled Commercial Speech*

*Citizens United*'s central holding striking down portions of the Bipartisan Campaign Reform Act ("BCRA") received quite a bit of media, schol-

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[174] *Id.* at 2685 (citation omitted).

[175] 703 F.3d 149, 152 (2d Cir. 2012).

[176] *Id.* at 163–64.

[177] Piety, *supra* note 150, at 3 (noting that the "November 2011 issue of the Harvard Law Review does not even mention it as a 'leading case' in the important First Amendment decisions from 2011").

[178] *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 520 (1996) (Thomas, J., concurring); Elizabeth Blanks Hindman, *The Chickens Have Come Home to Roost: Individualism, Collectivism and Conflict in Commercial Speech Doctrine*, 9 COMM. L. & POL'Y 237, 269–71 (2004); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 628 (1990).

[179] *See, e.g.*, Pomeranz, *supra* note 158, at 391.

[180] 681 F.3d 427, 452–53 (D.C. Cir. 2012).

[181] *Id.*

arly, and Presidential attention.[182] Yet flying under the public radar in the opinion was the Court's upholding of BCRA's disclosure and disclaimer provisions as justified by the Government's "informational interest" in "help[ing] viewers make informed choices in the political marketplace."[183] *Caronia* took a similar approach, going through a list of suggestions for regulating off-label drug use that involved providing more information, suggesting, for example, that the "government could develop its warning or disclaimer systems, or develop safety tiers within the off-label market, to distinguish between drugs."[184] Although the Court's commercial speech doctrine has become increasingly strict with regard to restrictions, it has become even more lenient if the Government is forcing the provision of information through disclaimers and disclosures.[185]

In the realm of fully protected speech, the "difference between compelled speech and compelled silence . . . is without constitutional significance."[186] Relatively little attention has been paid to compelled commercial speech doctrine, which the Court suggests is "more susceptible to compelled disclosure requirements."[187] The following will briefly attempt to provide some clarity to an unclear and changing field.[188]

The Court first set the standard for compelled commercial speech in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*,[189] which remains the central case for analyzing disclaimer requirements in advertising.[190] In *Zauderer*, the Court held that Ohio could not prevent attorneys from encouraging litigation in advertisements or require attorneys to advertise in a "dignified manner," but could require a disclaimer about fees.[191] The Court held the commercial speech cases inapplicable because those cases are "justified principally by the value to consumers of the infor-

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[182] Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010). *See, e.g.*, Case Comment, *supra* note 130, at 80 (describing "immediate firestorm" of controversy and commentary following *Citizens United*).

[183] 558 U.S. at 369.

[184] United States v. Caronia, 703 F.3d 149, 168 (2d Cir. 2012).

[185] *See* Nat Stern, *The Subordinate Status of Negative Speech Rights*, 59 BUFF. L. REV. 847, 870 (2011).

[186] Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796 (1988). The Court's compelled speech doctrine has its origins in *West Virginia State Board of Education v. Barnette*, in which the Court upheld the injunction of a law requiring students to recite the pledge of allegiance. 319 U.S. 624, 642 (1943).

[187] *Riley*, 487 U.S. at 796 n.9; Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 542 (2012) (stating that "little doctrine and academic writing explores the First Amendment implications of compelled commercial disclosures").

[188] Leslie Gielow Jacobs, *What the Abortion Disclosure Cases Say About the Constitutionality of Persuasive Government Speech on Product Labels*, 87 DENV. U. L. REV. 855, 859 (2010) (suggesting that product sellers have recently begun to "use the Free Speech Clause as a direct means of challenging information disclosure requirements").

[189] 471 U.S. 626, 651 (1985).

[190] Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250–51 (2010) (analyzing disclaimer requirements by close reference to *Zauderer*).

[191] 471 U.S. at 647–49.

mation such speech provides," so the advertiser had little protected interest in "not providing any particular factual information."[192]

The Court stated that "unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech," but "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers."[193] This statement constitutes the compelled commercial speech standard, and has generally been treated by lower courts as requiring only rational basis review.[194] Despite this relatively lenient review, multiple issues remain.

*1. Prevention of Deception*

The Supreme Court has never explicitly clarified whether its statement in *Zauderer* makes "preventing deception" the only permissible interest for which the government can require disclosures, or whether this was a context-dependent evaluation of the reasonableness of the requirements in that case. Some portions of Supreme Court commercial speech case law support the latter interpretation. If *Virginia Pharmacy* is justified by the consumer's interest in the "free flow of commercial information,"[195] then the advertiser's interest in "not providing any particular factual information" should be minimal regardless of whether the information is directed at correcting consumer deception.[196] The Second Circuit has taken this view, namely that even if requirements are merely intended to "better inform consumers about the products they purchase," *Zauderer*'s rational basis test still applies.[197] The California Supreme Court recently adopted this interpretation as well, stating that even if disclosure requirements are "simply to promote informational transparency," they are subject to rational basis review.[198]

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[192] *Id.* at 651 (emphasis in original).

[193] *Id.*

[194] *See, e.g.*, Spirit Airlines, Inc. v. U.S. Dep't of Transp., 687 F.3d 403, 412 (D.C. Cir. 2012), *cert. denied*, 133 S. Ct. 1723 (2013) (applying reasonableness review under *Zauderer* to Department of Transportation regulations requiring that airlines prominently display their total price in advertisements); Pub. Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 227 (5th Cir. 2011) (upholding attorney advertising disclaimer requirements under rational basis review); Conn. Bar Ass'n v. United States, 620 F.3d 81, 95 (2d Cir. 2010) (upholding bankruptcy disclosure requirements under rational basis review).

[195] Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 763 (1976).

[196] *Zauderer*, 471 U.S. at 628, 651.

[197] Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 115 (2d Cir. 2001) (upholding labeling statute requiring light bulb manufacturers to reveal the mercury content on the packaging of the light bulbs).

[198] Beeman v. Anthem Prescription Mgmt., LLC, 315 P.3d 71, 89 (2013) (upholding requirement that prescription drug claims processors provide information on fees); *see also* Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 310 (1st Cir. 2005) (upholding disclosure requirements of health benefit providers because they were "'reasonably related' to Maine's interest in preventing deception of consumers and increasing public access to prescription drugs").

Conversely, the D.C. Circuit has held that in order to impose disclaimer obligations, the government must show that "absent a warning, there is a self-evident — or at least 'potentially real' — danger that an advertisement will mislead consumers."[199] Because the FDA in *R.J. Reynolds* framed graphic cigarette label warnings "as general disclosures about the negative health effects of smoking" rather than being aimed at correcting any consumer misconception, the court applied *Central Hudson* instead of *Zauderer* and struck down the regulations.[200] The court relied on *Zauderer* and the recent Supreme Court opinion *Milavetz, Gallop & Milavetz, P.A. v. United States*[201] for its holding.[202] In *Milavetz*, the Court unanimously upheld advertising disclosure requirements under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 because they were "reasonably related to the [Government's] interest in preventing deception of consumers."[203] The Court's holding did appear to rest on the Government showing that its interest was aimed at combatting consumer deception, and did not require any evidence of consumer deception, only that the possibility of deception be "hardly a speculative one."[204] Yet the Court still did not address whether that showing was required if the Government were to advance another interest.

If *Milavetz* and *Zauderer* are read strictly and narrowly, there is a strong argument that the government can only require disclosures to prevent consumer deception. Yet ultimately, the strongest practical indication that the scope of *Zauderer* must be broader than simply preventing deception may be the "ubiquitous role that commercial disclosures play in modern regulatory schemes."[205] Concluding that a First Amendment challenge by prescription drug providers to disclosure requirements was "completely without merit," First Circuit Judge Michael Boudin wrote that there are "literally thousands of similar regulations on the books-such as product labeling laws, environmental spill reporting, accident reports by common carriers, SEC reporting as to corporate losses and (most obviously) the requirement to file tax returns to government units who use the information to the obvious disadvantage of the taxpayer."[206] While not all of these examples would fall into commercial speech doctrine, they illustrate the necessity of leniency in compelled commercial speech doctrine.

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[199] R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1214 (D.C. Cir. 2012).

[200] *Id.* at 1216.

[201] 559 U.S. 229, 232, 250 (2010).

[202] *R.J. Reynolds*, 696 F.3d at 1214.

[203] 559 U.S. at 253 (quoting Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 628 (1985)).

[204] *Id.* at 251, 253.

[205] Timothy J. Straub, *Fair Warning?: The First Amendment, Compelled Commercial Disclosures, and Cigarette Warning Labels*, 40 FORDHAM URB. L.J. 1201, 1261 (2013).

[206] Pharm. Care Mgmt. Ass'n v. Rowe, 429 F.3d 294, 316 (1st Cir. 2005) (Boudin, J., concurring).

*2. Factual and Uncontroversial*

Even if a government is given wide leeway in *when* it can require a commercial entity to speak, it may not have as much discretion in *what* it can require the entity to say. Separate from the standard stated above, the *Zauderer* Court mentioned that the information being disclaimed was "factual and uncontroversial," a statement that some courts have applied as part of the *Zauderer* holding.[207] Though the Supreme Court has not provided guidance on how to define "factual" or "uncontroversial," two circuit court decisions give sharp teeth to this requirement. In *Entertainment Software Association v. Blagojevich*,[208] the Seventh Circuit objected to Illinois's requirement that sellers of "sexually explicit" video games place a large "18" sticker on the front of their games.[209] The court applied strict scrutiny and struck down the requirement, finding that this information was "non-factual" in that the State's definition of the term "sexually explicit" was far more "opinion-based" than typical disclosures, and it was the State's definition, to which the video game manufacturer might object.[210]

*R.J. Reynolds* also applied the "factual and uncontroversial" requirement to invalidate the FDA's graphic tobacco warnings. The warnings included graphic images such as a "man smoking through a tracheotomy hole" and a "man wearing a T-shirt emblazoned with the words 'I QUIT.'"[211] The court described these warnings not as providing factual information, but as "unabashed attempts to evoke emotion (and perhaps embarrassment) and browbeat consumers into quitting."[212] In contrast, the Sixth Circuit upheld a facial challenge to the FDA's graphic warnings requirement in *Discount Tobacco City & Lottery, Inc. v. United States*,[213] demonstrating a vastly different understanding of *Zauderer*.[214] Although the makeup of such graphic images may be intended to evoke emotion in the consumer, the Sixth Circuit equated this to attempting to catch more people's attention and thus a permissible way of "promoting greater public understanding" of the risks of tobacco use.[215] Notably, the court rejected the argument that a disclaimer need be "factual and uncontroversial" at all, noting that the phrase only appeared once in *Zauderer* and that *Milavetz* stated only that disclaimers must be "factual."[216]

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[207] 471 U.S. at 651. *See, e.g.*, *R.J. Reynolds*, 696 F.3d at 1216 (applying "factual and uncontroversial" requirement).

[208] 469 F.3d 641 (7th Cir. 2006).

[209] *Id.* at 652.

[210] *Id.*

[211] R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1216 (D.C. Cir. 2012).

[212] *Id.* at 1217.

[213] 674 F.3d 509 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1996 (2013).

[214] *Id.* at 561.

[215] *Id.* at 564.

[216] *Id.* at 559 n.8.

The D.C. Circuit view, which allows only strictly factual disclosures, presumes that consumers only need more factual information to make informed choices and that government should not be putting its thumb on the scales. The Sixth Circuit, along with a recent article,[217] looks to the situation surrounding the disclosure and accepts certain means for making it effective. For example, the *Discount Tobacco* court noted both the decades of deception by the tobacco companies that led people to be unaware of the health risks of cigarettes, and the likelihood that smokers would either not read the warnings, or would not be educated enough to understand them in their old form.[218] It consequently allowed more evocative warnings. This debate is key to understanding the development of the law surrounding commercial disclosures, and its effective use for a field such as for-profit college regulation.

## III. Can Disclosures Be Effective? Libertarian Paternalist and Situationist Accounts

The increasing use of disclosure-based regulation has been influenced by both political and legal changes, which the above Part suggests are closely related. This Part begins with the underlying theory behind those changes: antipaternalism, or the belief that government has no place controlling what people hear in order to improve their welfare. The theories of libertarian paternalism and situationism both reject antipaternalism, but to different degrees. This Part will use libertarian paternalism and situationism to evaluate disclosures as a regulatory scheme.

### *A. Antipaternalism and Responses*

The modern shift in commercial speech doctrine has been guided in part by sentiments of antipaternalism.[219] For example, Justice Thomas has argued that restrictions on commercial speech assert an interest in "keeping people ignorant."[220] For-profit college advocates have expressed similar antipaternalist rhetoric in challenging government attempts to regulate. John G. Sperling, the founder and CEO of Apollo Group, refers skeptically to state regulatory protection of FPCU consumers, saying, "[t]hey . . . believe that consumers of educational services—even intelligent, well-educated

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[217] Ellen P. Goodman, *Visual Gut Punch: Persuasion, Emotion, and the Constitutional Meaning of Graphic Disclosure*, 99 Cornell L. Rev. 513, 517 (2014).

[218] 674 F.3d at 563.

[219] *See, e.g.*, Rostron, *supra* note 23, at 544; C. Edwin Baker, *Paternalism, Politics, and Citizen Freedom: The Commercial Speech Quandary in Nike*, 54 Case W. Res. L. Rev. 1161, 1172 (2004).

[220] Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001) (Thomas, J., concurring); Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 197 (1999) (Thomas, J., concurring).

adults—cannot adequately judge the value of the services they receive."[221] APSCU President Steve Gunderson has suggested that low-income students who are pursuing careers that are "personally rewarding" but not "financially rewarding" are "now being told you can't do that anymore, even though that's what you wanted to do."[222] Under this account, by regulating FPCUs, the government is imposing its own desires to frustrate the preferences of low-income consumers.

Antipaternalism abounds not only in commercial speech doctrine and FPCU policy discourse, but at the core of law and economics as well. As Milton Friedman argued in his seminal book, *Free to Choose*, "market competition, when it is permitted to work, protects the consumer better than do the alternative government mechanisms that have been increasingly superimposed on the market."[223] Under this view, any supposed inefficiencies in the market exist because rational consumers demand those inefficiencies, and any government intervention would be misguided and harmful.

Beginning most prominently in the early 2000s, however, the "rational actor" model has been increasingly undermined by social and cognitive scientists, who propose that humans inherently err in making many types of decisions, and that there may be a role for outside intervention.[224] These newer approaches have only recently begun to find their way into policies that attempt to structure individual choices to guide them to better outcomes.[225] This Part will examine two such theories: libertarian paternalism and situationism. First it will provide a brief description of how these theories relate to antipaternalism.

As its name suggests, libertarian paternalism seeks to incorporate many of the concerns underlying antipaternalism while still embracing government intervention in individuals' decisionmaking. Its "libertarian" side adopts the "straightforward insistence that, in general, people should be free to opt out of specified arrangements if they choose to do so," and promises not to "defend any approach that blocks individual choices."[226] At the same time, the "paternalism" side urges "self-conscious efforts, by private and public

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[221] RUCH, *supra* note 50, at 47.

[222] Steve Gunderson, *Exploring the Merits of the Gainful Employment Rule*, THE EVOLLLUTION, http://www.evolllution.com/opinions/audio-exploring-merits-gainful-employment-rule/, *archived at* http://perma.cc/N3ZF-Q8NK (last visited Jan. 13, 2015).

[223] MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE 222 (1980).

[224] *See, e.g.*, Daniel Kahneman & Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 49, 53 (Thomas Gilovich, Dale Griffin & Daniel Kahneman eds., 2002); Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 144–52 (2004); Sunstein & Thaler, *supra* note 26, at 1167–68; Timothy D. Wilson & Daniel T. Gilbert, *Affective Forecasting*, 35 ADVANCES IN EXPERIMENTAL SOC. PSYCH. 345, 346–53 (2003).

[225] *See* Sunstein Memorandum, *supra* note 10; Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1366–69 (2011) (describing regulatory actions taken that were informed by behavioral economics).

[226] Sunstein & Thaler, *supra* note 26, at 1161.

institutions, to steer people's choices in directions that will improve the choosers' own welfare."[227] Cass Sunstein argues that the notion that paternalism will inevitably be harmful and misguided as compared to "free" choosing depends on "empirical assumptions and perhaps even hunches," many of which are proven wrong by behavioral sciences.[228] Furthermore, some institutional structuring of choice is "inevitable," whether it comes from the private sector or from government.[229] Perhaps due to its conciliatory approach, as well as its leading proponent's prominent former policymaking role in the Obama Administration, libertarian paternalism has made its way into policymaking at multiple levels of government[230] and has been the subject of a significant level of recent scholarly attention.[231]

Situationism, guided by social psychology, explores the "gross extent to which we underestimate the power of the situation and wrongly presume that behavior is motivated by disposition."[232] Situationism highlights the "fundamental attribution error": the "bias in social perception" in which a person's behavior is attributed to "her own dispositional qualities," or her own thoughts and preferences, rather than to the situational forces around her.[233] Situationism is intensely critical of what it calls the "paternalism bogeyman."[234] When faced with any interventions that would call the validity of the rational actor's choice into question, legal economists respond "by highlighting only the most salient kinds of situational exercises of power over individuals, calling these paternalism, and demanding they yield in the name of the freedom that is assumed otherwise to govern."[235] According to situationism, then, in the name of avoiding these more obvious government interventions on choice "we may be turning ourselves over to less obvious, but no less powerful, influences," influences within the free market economy that legal economists extol.[236]

This Part examines both theories to establish a theoretical framework for evaluating the effectiveness of disclosure-based regulation. If this regulatory option is favored under the current political climate and First Amend-

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[227] *Id.* at 1162.

[228] Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 YALE L.J. 1826, 1877 (2013) [hereinafter *Storrs Lectures*].

[229] *Id.* at 1879. For example, any cafeteria, run by the government or otherwise, will place items in a fashion that will influence people. If the desserts are placed in a more prominent place, individuals are nudged toward eating sweets. The default options for employee retirement plans are another example of inevitable choice architecture. THALER & SUNSTEIN, *supra* note 27, at 2–3, 12.

[230] *See* Sunstein, *Empirically Informed Regulation*, *supra* note 225, at 1368.

[231] *See, e.g.*, Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913, 913–14 (2010); Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 HARV. L. REV. 1593, 1594 (2014).

[232] Hanson & Yosifon, *supra* note 18, at 153.

[233] *Id.* at 136 n.20 (quoting SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 67–86 (1991)).

[234] *Id.* at 336–40.

[235] *Id.* at 338.

[236] *Id.* at 339.

ment legal regime, we must ask whether it is achieving its desired goal: namely, successfully encouraging consumers to use the information to make better decisions.

### *B. On Disclosures*

FPCU proponents now contend that many of the above-described abuses were committed by "bad actors" and that the industry is now clean of those schools.[237] Under this view, there is no need for intrusive state and federal regulation. According to both libertarian paternalism and situationism, however, there are underlying forces operating within higher-education markets that cause student-consumers to sign up for expensive, low-quality educational programs. For libertarian paternalism, students' recurring cognitive errors in the college decisionmaking process make disclosure-based regulation a potentially helpful response. For situationism, these cognitive errors may be at work, but FPCU's manipulative marketing and their targeting of students in difficult social situations make disclosure inadequate.

Libertarian paternalism lays much of its foundations on Daniel Kahneman's work in behavioral economics. In the early 2000s, Kahneman and others sought to highlight several cognitive biases that explain why people commonly err in decisionmaking.[238] In their work on libertarian paternalism, Sunstein and Richard Thaler seek areas in which these cognitive biases may be leading people astray and look to correct those biases when they arise in the decisionmaking process.[239]

With respect to making decisions about which college to attend, two particular cognitive biases may factor in. First, research in cognitive science has demonstrated fairly convincingly that we as humans are generally "hardwired" to be optimistic and overconfident — what is referred to as the "optimism bias."[240] Even when making significant decisions, we are likely to unreasonably assume future success, discount the probability of failure, overvalue our choices once we have made them, and imagine the past as rosier than it was.[241] This bias can have significant costs. Tali Sharot and

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[237] *See, e.g.*, Alex Friedrich, *Political Differences Impede Regulation of For-Profit Schools*, MPR NEWS (Sept. 10, 2012), http://www.mprnews.org/story/2012/09/11/education/help-report-for-proft-college, *archived at* http://perma.cc/3JK3-AEH9 (quoting a Republican Congressman who stated, "I don't know that every time there is a bad actor . . . that you need to run and have a new statute"); Matlin, *supra* note 68 (describing the impression that the industry "wises up" after facing federal regulation).

[238] *See generally* THOMAS GILOVICH ET AL., HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT (2002); DANIEL KAHNEMAN & AMOS TVERSKY, CHOICES, VALUES, AND FRAMES (2000).

[239] *See* THALER & SUNSTEIN, *supra* note 27, at 19 (citing SHELLY CHAIKEN & YAACOV TROPE, DUAL-PROCESS THEORIES IN SOCIAL PSYCHOLOGY (1999)).

[240] *Storrs Lectures*, *supra* note 228, at 1849, 1855.

[241] TALI SHAROT, THE OPTIMISM BIAS: A TOUR OF THE IRRATIONALLY POSITIVE BRAIN xiv – xv (2011). As just one example, when people are asked what the likelihood is of them

her colleagues note in particular the "discounting of warning signs regarding financial risk," a contributing factor to the 2008 financial crisis.[242]

As Sharot explains, "[a]ttributing unrealistic low probability to negative life events" (such as failing to complete a degree program due to personal or instructional failures) and "unrealistically high probability to positive life events" (such as graduating and getting a job) "triggers debtors to borrow more than they would have borrowed otherwise."[243] Corporate marketers often capitalize on this optimism, and FPCU advertisements are no different, helping students picture their "dream job."[244] Likely as a result of these extensive marketing campaigns, FPCU students are more likely than others to have learned about their chosen colleges from advertisements.[245] Despite concerns about the level of debt that they are incurring, FPCU students remain optimistic that their degree will pay off in higher incomes and better employment outcomes.[246] For many this may be the case, but the high percentage of loan defaults among FPCU students shows that this optimism is unwarranted for most others.

The second cognitive bias affecting FPCU students rests on the fact that people's attention can be a "scarce resource."[247] The concept of salience refers to the subjects that attract people's attention, especially when making decisions.[248] Left unregulated, people providing contracts for things like credit cards and mortgages will often direct attention to the more positive aspects of the agreement and hide the risks involved.[249] One way FPCU recruiters have been accused of using salience to aggressively enroll students is through techniques described in section II.C such as the "pain funnel."[250] Schools used these pain-centered techniques designed to "stir up their emotions" in order to "create urgency."[251] By making the painful aspects of students' lives more salient, the risk of defaulting on loans becomes more shrouded.

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getting cancer in their lifetime or their marriage ending in divorce, most people say a number less than 33% and 50%, the respective average of each of those occurrences. *Id.* at 189.

[242] Tali Sharot et al., *Selectively Altering Belief Formation in the Human Brain*, 109 PNAS 17058, 17060 (2012), www.pnas.org/cgi/doi/10.1073/pnas.1205828109, *archived at* http://perma.cc/D243-PCM9.

[243] SHAROT, *supra* note 241, at 200.

[244] *See, e.g.*, ITT Technical Institute TV Commercial, *Dream Job*, iSPOT (Aug. 7, 2014), http://www.ispot.tv/ad/7tJN/itt-technical-institute-dream-job ("We can all picture a dream job. . . . A job that can make life better."); *University of Phoenix Television Commercial*, YOUTUBE (Feb. 10, 2013) http://www.youtube.com/watch?v=TK7MDtmd_EM ("You are cordially invited to a college graduation. Your own graduation. . . . Attend just one class and one learning team meeting per week.").

[245] PUBLIC AGENDA, PROFITING HIGHER EDUCATION? WHAT STUDENTS, ALUMNI AND EMPLOYERS THINK ABOUT FOR-PROFIT COLLEGES 9 (2014).

[246] *Id.* at 3.

[247] *Storrs Lectures*, *supra* note 228, at 1846.

[248] *Id.* at 1830–31.

[249] OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 23, 31, 31 n.28 (2012).

[250] HARKIN REPORT, *supra* note 2, at 60–61.

[251] *Id.* at 62–63.

This point can apply even to cases in which students are not being deliberately manipulated. Given the societal emphasis on college discussed in section II.C, it is likely that many students are choosing to ignore the risk of not being able to repay loans in favor of the much more salient risk of falling behind their peers in the marketplace by not attending college.[252] As there is some evidence that FPCU students were not aware of the differences between FPCUs and public institutions when they enrolled,[253] it is likely that they did not consider the risks associated with these institutions either.

Behavioral economics and libertarian paternalism suggest that disclosure may be an effective policy answer to the problems identified. Put simply, if people are unreasonably optimistic when making choices about whether to go to a particular college, or the relevant risks are not sufficiently salient, then the disclosure of information such as the loan default rate or post-graduation employment rate should make these risks salient and lead to better decisionmaking.[254]

Situationists Jon Hanson and David Yosifon are critical of behavioral economics and this resulting emphasis on disclosure. According to situationism, behavioral economics does not present human behavior realistically because choice biases still focus on "*choice*—the center of neoclassical economic theory."[255] Libertarian paternalism focuses on the moment of decisionmaking, suggesting several tweaks to the process without necessarily addressing the larger situational forces. Hanson and Yosifon thus state that "[libertarian paternalists] went looking for a theory that traditional anti-paternalists, and traditional legal economists, could accept without much quarrel, and that is exactly what they found."[256]

Even in the absence of cognitive biases, social psychology has shown that we are still vulnerable to aspects of our situational surroundings that we do not appreciate, whether they are part of our social background or forces that are deliberately manipulating us.[257] Under this account, simply providing information to the student-consumer at the time of her decision is not enough. Several situational forces would remain: the pressure of extensive FPCU corporate marketing efforts; the background of poverty and lack of other employment opportunities; the societal emphasis on going to college, whatever the cost; and the inability to attend a more traditional school setting. This panoply of exterior forces may lead even the most conscientious

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[252] *See The Rising Cost of Not Going to College*, *supra* note 71, at 3–4.

[253] PUBLIC AGENDA, *supra* note 245, at 11.

[254] *Storrs Lectures*, *supra* note 228, 1849, 1852 (stating that an "obvious response" to optimism bias is a "disclosure strategy" that "helps to counteract unrealistic optimism," and that "[w]hen people are making mistakes about probability, well-designed disclosure strategies, including warnings, could help").

[255] Hanson & Yosifon, *supra* note 224, at 83.

[256] *Id.* at 166 (referring to an article by Samuel Issacharoff, but grouping it with Sunstein and Thaler's *Libertarian Paternalism* article, *supra* note 26).

[257] *Id.* at 165 n.779.

and informed student-consumer to choose a college likely to result in loan default.

Consistent with the situationist account, many studies of disclosure requirements show complete ineffectiveness. One recent survey of eighteen studies related to government-mandated disclaimers found that the disclaimers caused confusion in all eighteen, and were ineffective or harmful in fifteen.[258] One study of corrective advertising — essentially disclosures about prior incorrect statements in advertising — found that they had relatively little effect if consumers previously had favorable opinions of the advertised company.[259] These studies suggest serious flaws in the view that disclosure will aid supposedly rational consumers in making better decisions, or correct the biases of slightly irrational consumers. Consequently, a few legal scholars have suggested that "failure is inevitable" for mandated disclosure policies.[260]

One response Sunstein and Thaler have given to those they characterize as finding libertarian paternalism "too limiting" is that there should be a "presumption" in favor of "freedom of choice" because it provides a "safeguard against confused or improperly motivated planners."[261] Libertarian paternalism is, as its name suggests, a deliberate compromise between those skeptical of government action and those who see it as necessary. Though it may miss some of the situational forces at work by portraying individuals as "boundedly rational choosers,"[262] libertarian paternalism is able to work with limitations such as those imposed by commercial speech doctrine to effect necessary changes.

Situationism may lead one to believe that governments should put their energy behind forcing more substantive regulation that alters FPCU financial incentives and shuts down those that leave too many students in default. The Gainful Employment Rule may be one such regulation. Another example is a recently passed state law in Maryland requiring that FPCUs establish a fund that would reimburse students' tuition if the school goes bankrupt or closes.[263] Going even further is an approach suggested by the chief execu-

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[258] Green & Armstrong, *supra* note 17, at 302.

[259] *See* Gita Venkataramani Johar, *Intended and Unintended Effects of Corrective Advertising on Beliefs and Evaluations: An Exploratory Analysis*, 5 J. CONSUMER PSYCHOL. 209, 213 (1996).

[260] Ben-Shahar & Schneider, *supra* note 17, at 651; *see also* Bubb & Pildes, *supra* note 231, at 1638 (arguing that mandatory disclosure fails "when (1) the underlying contractual complexity would remain and (2) firms have strong incentives to undermine choice in response to the required disclosures"); Lauren E. Willis, *When Nudges Fail: Slippery Defaults*, 80 U. CHI. L. REV. 1155, 1224 (2013) (suggesting that mandated disclosure policies might not work because consumers do not read them).

[261] Sunstein & Thaler, *supra* note 26, at 1200–01.

[262] *Id.*

[263] *See Maryland Senate Passes Bill to Regulate For-Profit Colleges*, BAL. BUS. J. (Mar. 22, 2011, 5:10 PM), http://www.bizjournals.com/baltimore/news/2011/03/22/maryland-senate-passes-bill-to.html, *archived at* http://perma.cc/94JV-YWAB.

tive of FPCU company Strayer Education: he argues that the government should require FPCUs to "share in the losses when a student defaults."[264]

Such laws may be worthwhile, but the trials of the Gainful Employment Rule demonstrate that they will be hard-fought. This Note will accept disclosure as a potentially useful option, and look to the extent it can be made effective by incorporating lessons from both libertarian paternalism and situationism. Libertarian paternalism attempts to incorporate situationism to the extent possible by recognizing that people's ability to make choices "depends on a social background, whose basic ingredients we need to be able to take for granted."[265] Sunstein and Thaler acknowledge that "information disclosure" can be "futile or counterproductive."[266] In order for disclosures to be effective, according to libertarian paternalism, the designers have to take cognitive sciences and human conditions into account and present the disclosures in a way that will drive people in a certain direction.[267] There cannot simply be an information dump, allowing a supposedly rational consumer to sort it out, and it cannot be presented in a way that might cause unforeseen negative consequences.[268] Sunstein and Thaler offer many suggestions for structuring choices that can be applied to creating disclosures and warnings, including the use of feedback, framing, choice structure, and salience. A warning system should give people *feedback* that conveys when they are doing well and when they may be making a mistake.[269] Disclosures should be *framed* in a way so as to make the risks clear and influence people to make the right considerations.[270] Disclosures should be *structured* so that choices with many complex moving parts can be simplified.[271] And, as discussed above, disclosures should use attention-grabbing devices so that the pertinent risks are made *salient*.[272]

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[264] Nocera, *supra* note 93.

[265] *Storrs Lectures*, *supra* note 228, at 1884.

[266] *See* Sunstein & Thaler, *supra* note 26, at 1183.

[267] *See id.*

[268] *See* Andrew Caplin, *Fear as a policy instrument*, *in* TIME AND DECISION 441, 442, 452 (George Loewenstein et al. eds., 2003) (noting when disclosures of health information can result in "counterproductive defensive responses" or "reduce the private incentive to gather information").

[269] THALER & SUNSTEIN, *supra* note 27, at 90–91. Thaler and Sunstein cite the Department of Security's color-coded terror alert system as an ineffective example because the colors do not inform what actions we are supposed to take. For example, "Orange" means, "All Americans should continue to be vigilant, take notice of their surroundings, and report suspicious items or activities to local authorities." Thaler and Sunstein wonder: "Weren't we supposed to be doing this at level Yellow?" *Id.* at 91.

[270] *Id.* at 36–37.

[271] *Id.* at 94–97.

[272] *Id.* at 99–101.

### *C. Effective Disclosures?*

It may be useful to examine an example of information disclosure requirements in another field that implicates behavioral biases and situational influences: obesity. This example may provide lessons for the use of disclosures in FPCU marketing.

#### *1. Obesity and Menu Labels*

Nationally, roughly two-thirds of U.S. adults are overweight or obese, and nearly one-fifth are obese.[273] This rise in obesity has led to increases in heart disease, stroke, type 2 diabetes, and cancer, and has led to annual medical costs of almost $150 billion.[274] As with student loans, behavioral biases impede decisionmaking at dinnertime. Due to consumers' hyperbolic discounting — over-valuing present benefits and devaluing future costs, better known as self-control lapses — many are unable to resist the present benefits of chocolate cake compared to the future costs.

Commentators have emphasized "personal responsibility" as the key problem with obesity.[275] Situationism finds such a focus particularly objectionable and would instead point to innate biological factors and corporations' manipulation of these factors.[276] Individuals are wired to overeat due to an evolutionary need "to consume high-energy foods without reference to present needs" and thus store energy,[277] a genetic preference for sweet and salty flavors,[278] and biological urges to consume more food.[279] Recent studies documenting these biological sources of behavior have even caused a prominent behavioral economist to "question [his] thinking" about the centrality of markets, preferences, and choices to the obesity epidemic.[280] Complementing these internal forces are powerful external forces: sophisticated vendors expert at manipulating the easily swayed eaters,[281] and larger social

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[273] *Id.* at 7.

[274] *Adult Obesity Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION (2012), http://www.cdc.gov/obesity/data/adult.html, *archived at* http://perma.cc/A22W-K5X7.

[275] *See* Jason L. Lusk & Brenna Ellison, *Who is to Blame for the Rise in Obesity?*, 68 APPETITE 14, 17 (2013) (finding in a survey that most people blame individuals for obesity, followed by parents, and find restaurants and manufacturers relatively less blameworthy).

[276] *See* Hanson & Yosifon, *supra* note 18, at 332–36 (discussing and responding to the "Personal-Responsibility bogeyman").

[277] Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1678 (2004).

[278] *Id.* at 1686.

[279] *See* Sendhil Mullainathan, *The Co-Villains Behind Obesity's Rise*, N.Y. TIMES (Nov. 9, 2013), http://www.nytimes.com/2013/11/10/business/the-co-villains-behind-obesitys-rise.html, *archived at* http://perma.cc/FKB7-C53A.

[280] *Id.*

[281] Benforado et al., *supra* note 277, at 1695 (discussing fast food restaurant strategies to increase purchases such as "wafting music" and "[c]hemical flavor configurations").

forces that restrict the availability of healthy foods in certain disadvantaged neighborhoods.[282]

Disclosure requirements have become a popular response. In 2006, the New York City Department of Health proposed the first menu labeling law in the nation, requiring all restaurants that voluntarily provided nutritional information of their food (most chain restaurants) to post the calorie content of each item on their menu.[283] Labeling requirements have spread to other cities and have been adopted by the federal government as part of the Affordable Care Act.[284] Empirically, the most complete study on the laws to date found that calorie posting caused average calories per food transaction to decrease by 14%, with larger decreases for individuals tending to purchase high-calorie foods.[285] Finally, there is the perception that these laws have helped reduce child obesity in New York City, although the evidentiary support is unclear.[286]

The law was immediately challenged in federal court on First Amendment grounds. Eventually reaching the Second Circuit, the New York State Restaurant Association ("NYSRA") argued that the *Zauderer* rational basis scrutiny should not apply when the disclosure was not intended to prevent deception, and that the current Supreme Court trend reflects "an increasing recognition that commercial speech is of vital importance to First Amendment values."[287] The court rejected these arguments, applying rational basis scrutiny because the laws required disclosure of "purely factual" information, and upheld that law as a permissible method of "promot[ing] informed consumer decision-making so as to reduce obesity and the diseases associated with it."[288]

The obesity disclosure policy provides simple feedback to the consumer at the point of decision: higher number bad, lower number good. Because calorie count is a single number located next to the item to be ordered, the salient risk is clearly identified. Some studies suggest, however, that results are limited and there is room for improvement.[289] For one, if consumers do

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[282] *Id.* at 1706 n.210 (noting the higher density of fast food restaurants in minority and low-income neighborhoods).

[283] Brent Bernell, *The History and Impact of the New York City Menu Labeling Law*, 65 FOOD & DRUG L.J. 839, 839 (2010).

[284] *Id.* at 839–40, 865.

[285] *Id.* at 869.

[286] Sabrina Tavernise, *Obesity Rate for Young Children Plummets 43% in a Decade*, N.Y. TIMES (Feb. 25, 2014), http://www.nytimes.com/2014/02/26/health/obesity-rate-for-young-children-plummets-43-in-a-decade.html, *archived at* http://perma.cc/57XL-JR9W (mentioning the menu label laws as part of a push to "combat obesity").

[287] Brief for Plaintiff-Appellant at 44–45, N.Y. State Rest. Ass'n v. N.Y.C. Bd. of Health, 556 F.3d 114 (2009) (No. 08-1892-cv), 2008 WL 6513103, at *44–45.

[288] *N.Y. State Rest. Ass'n*, 556 F.3d at 134.

[289] Scot Burton & Jeremy Kees, *Flies in the Ointment? Addressing Potential Impediments to Population-Based Health Benefits of Restaurant Menu Labeling Initiatives*, 31 J. PUB. POL'Y & MARKETING 232, 233 (2012); Brian D. Elbel, Joyce O. Gyamfi & Rogan Kersh, *Child and Adolescent Fast-Food Choice and the Influence of Calorie Labeling: A Natural Experiment*, 35 INT'L J. OBESITY 493, 497 (2011).

not see the calorie information at the time of purchase, then it quite clearly cannot have effect.[290] Consumers must also have the adequate knowledge and motivation to act upon the calorie disclosures, and they must not be overwhelmed by contextual cues, such as smells and comparative prices.[291] Average consumers may also need an element of surprise for the calorie disclosures to be effective; if they expect a Big Mac to be 1,500 calories and find out they are correct, there may be no effect.[292] It may be possible to address these limiting factors with attention to the cognitive processes.

*2. For-Profit College Disclosures*

The above discussion contains many lessons for structuring a regulation-by-disclosure policy for FPCU marketing. Because the Massachusetts disclosure-focused regulations are still in their infancy, there can only be speculation at this point as to their efficacy. The regulations do emphasize that the disclosures must be made "clearly and conspicuously," and require the disclosure of numbers such as loan default rate, employment rate, and cost — numbers that may be characterized in a fairly simple manner.[293] In practice, however, these disclosures could simply look like more paperwork coming at a time when the student has already made an initial decision, due perhaps to an earlier pitch by a recruiter. If they are to be useful, these disclosures should be required to be simplified and presented in a way best suited for grabbing the attention of the prospective student. Loan default rates, completion rates, and employment statistics could be enlarged and color-coded to provide clear feedback on the decision to be made.

The Obama Administration has begun implementing an approach closer to the menu label laws that applies to all higher education institutions, including FPCUs. During the 2013 State of the Union, the President announced that there would be a new College Scorecard that would allow prospective students to "compare schools based on a simple criteria: where you can get the most bang for your educational buck."[294] Though it is an independent informational initiative, it provides an example of how required disclosure could be done. The system is located on the Administration's website, allows prospective students to easily search for any school, and then reveals that school's average costs, graduation rates, loan default rates, and

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[290] Mary T. Bassett et al., *Purchasing Behavior and Calorie Information at Fast-Food Chains in New York City, 2007*, 98 AM. J. PUB. HEALTH 1457, 1458 (2008).

[291] Burton & Kees, *supra* note 289, at 235.

[292] *See id.* at 236.

[293] 940 MASS. CODE REGS. § 31.05 (2014).

[294] *Transcript of Obama's State of the Union Address*, ABC NEWS (Feb. 12, 2013), http://abcnews.go.com/Politics/OTUS/transcript-president-barack-obamas-2013-state-union-address/story, *archived at* http://perma.cc/72F3-SZ9K.

median borrowing levels.[295] Initially, these numbers were all listed on the page, with the only graphic being a line pinpointing each number.[296]

A report by the Center for American Progress found problems with the Scorecard's structure, and made some suggestions for how to make it a more "effective disclosure[ ]."[297] Soliciting feedback from prospective students, the report's authors found that the purpose of the Scorecard was not readily apparent to students, and that it generally felt like more "college stuff" to them.[298] The report made many recommendations, including relying on more consumer testing to design effective disclosures, utilizing commonly used terms, and hiring professional graphic designers.[299] As it currently stands, the Scorecard appears to have been changed with these recommendations in mind. For example, the categories of information are now displayed next to the national average and that school's recent rate of change, with color-coded graphics showing clearly whether each number is low, medium, or high.[300] Such a system seems to capture the simplicity and salience of an effective disclosure.

To ensure more students view a disclosure such as the Scorecard, it could be combined with the Massachusetts approach, resulting in a regime requiring prospective students to view the Scorecard before enrolling in FPCUs. A mandated disclosure system incorporating the Scorecard may take some lessons for effective disclosures into account, such as testing, salience, and simplicity, but if disclosures seek to counteract the situational pressures on prospective students, they may need to take an evocative approach like the one disfavored by the D.C. Circuit in *R.J. Reynolds*.

Given the apparent litigiousness of the FPCU industry, a mandated disclosure system will likely face a First Amendment challenge. The Massachusetts regulations, which require only strictly factual disclosures and are clearly aimed at preventing deception, seem permissible even under an *R.J. Reynolds* level of scrutiny. For requirements that are more graphic, evocative, or appear to express an opinion, however, the difference between the

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[295] THE WHITE HOUSE, COLLEGE SCORECARD, http://www.whitehouse.gov/issues/education/higher-education/college-score-card, *archived at* http://perma.cc/N3Z8-GRJR.

[296] JULIE MARGETTA MORGAN & GADI DECHTER, CTR. FOR AM. PROGRESS, IMPROVING THE COLLEGE SCORECARD: USING STUDENT FEEDBACK TO CREATE AN EFFECTIVE DISCLOSURE 2 (2012).

[297] *Id.* Aside from the constructive criticisms of the Center for American Progress report, the Scorecard has been subject to intense criticism from liberal arts universities who feel it is a flawed way to assess their "institutional value." Thomas A. Kazee, *College Scorecards and the Liberal Arts*, HUFFINGTON POST (Mar. 5, 2014, 11:55 AM), http://www.huffingtonpost.com/thomas-a-kazee/college-scorecards-and-th_b_4903782.html, *archived at* http://perma.cc/KTN6-VE6L.

[298] MORGAN & DECHTER, *supra* note 296, at 2.

[299] *Id.* at 2–3.

[300] *See* COLLEGE SCORECARD, *supra* note 295.

dispositionist outlook of the D.C. Circuit and the more situationist view of the Sixth Circuit could be crucial.[301]

The D.C. District Court has already tipped its hand on FPCU disclosures in dicta. In a subsequent decision in *APSCU*, the D.C. District Court again vacated and remanded several portions of the DOE regulations, including a rule requiring reporting and disclosure of student information.[302] While it only briefly touched on the First Amendment challenges in dicta, it also shed some doubt on the constitutionality of some of the DOE disclaimer requirements. The court observed that part of the rule forced certain failing schools to disclose that "a student who enrolls or continues to enroll in the program should expect to have difficulty repaying his or her student loans."[303] The court stated that it did not need to address the First Amendment issue because the rule had been vacated, but, after citing *Zauderer*, stated that it "doubts that the statement . . . is a purely factual one."[304]

If the federal government were to implement more evocative disclosure requirements, the D.C. Circuit's dispositionist First Amendment outlook may spell trouble. As the Sixth Circuit opinion shows, however, nothing in the First Amendment should prevent the government from taking the situation into account when enacting disclosure requirements.

## Conclusion

If FPCUs are "here to stay,"[305] steps must be taken to reduce their tendency to lead students into debt without a high enough income to repay loans. This Note has focused on mandated disclosure in depth at the expense of exploring some other options that may reduce the incentives of FPCU owners to sign as many students as possible, such as a more robust version of Maryland's approach of requiring FPCUs to take financial responsibility for defaulted students. We should also look to increasingly elitist private and large public schools, as well as overburdened community colleges, and seek ways to expand access for low-income students in those realms. Given the potential inadequacy of a disclosure-based regulatory regime, such policies should not crowd out other creative and comprehensive regulatory approaches.

However, if mandated disclosure is also here to stay, policymakers must pay close attention to principles for its effective use. If disclosures are to be a meaningful form of regulation, they will have to be persuasive,

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[301] *See generally* R.J. Reynolds Tobacco Co. v. Food & Drug Admin., 696 F.3d 1205, 1214 (D.C. Cir. 2012); Discount Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 561 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 1996 (2013).

[302] Ass'n of Private Sector Colleges & Univs. v. Duncan, 870 F. Supp. 2d 133, 158 (D.D.C. 2012).

[303] *Id.* at 154 n.7.

[304] *Id.*

[305] Matlin, *supra* note 68.

graphic, and take human behavior into account. They should abide by Sunstein's guidelines for effective disclosure, and regulators should be mindful of the broader context in which FPCU consumers operate. Situationist analysis of the FPCU industry will be important as well if such disclosures are to survive modern First Amendment scrutiny. There is some evidence that when the courts appreciate — or are "made to appreciate" — the powerful situational forces involved in an instance of marketing, they are more likely to "express[ ] a willingness to countenance commercial speech regulation."[306] The Sixth Circuit in *Discount Tobacco* provides an effective example of such awareness in its discussion of the history of deception by cigarette companies and cigarette consumer failures to read, understand, and fully process warning labels.[307] This type of jurisprudence is more realistic than the rational-actor, antipaternalist jurisprudence that currently dominates commercial speech doctrine.

This Note has explored several seemingly distinct areas, namely for-profit colleges, the history of First Amendment doctrine, and behavioral economics. Yet it is the intersection of these areas that is its main point: we must be aware of how we arrived at our current disclosure-based regulatory regime to evaluate whether it is suited to responding to problems with FPCUs. First Amendment doctrine has moved toward prohibiting direct regulation of marketing and instead encouraging information disclosure. The current disclosure-based regime fits comfortably in that doctrinal evolution, but it may do so by promoting "economic liberty" over more egalitarian concerns. Nevertheless, if government actors are to respond to issues such as the high incidence of student loan defaults in the for-profit college industry, they must be able to work within this regime by developing strategies for effective disclosure.

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[306] Yosifon, *supra* note 24, at 551–52.
[307] 674 F.3d 509, 563–65 (6th Cir. 2012).