Students or Consumers? For-Profit Colleges and the Practical and Theoretical Role of Consumer Protection

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I. Introduction

In 2015, the Department of Education will disburse over $133 billion in federal student loans,[1] and will have over one trillion dollars in loans outstanding.[2] As tuitions rise and states reduce investment in higher education, students must turn to increasingly larger federal student loans to pay for college. Although the college investment still pays off for most students who graduate, many students enrolling in for-profit "career" colleges find that their investment has been worthless. Some find that their attempt to go to college was in fact worse than worthless: it has left them in debt that hurts their financial well-being, instead of helping.

This suggests a question: as college becomes increasingly synonymous with debt and the risk of loan default, should we regard college students as "consumers"?

This article explores the practical and theoretical legal consequences of calling students "consumers." To critics within the academy, calling students "consumers" threatens the mission of higher education, reducing it to a series of outcome-based monetary metrics, like jobs and salaries, to the detriment of learning, teaching, and academic freedom. To other critics, calling students "consumers" is a defeat because it implicitly accepts the premise that college is an individual investment product, rather than a public good creating an educated citizenry and providing a path out of poverty. But to consumer protection lawyers, students are unambiguously consumers—and as such, they can access an important body of consumer protection laws.

Calling students "consumers" is a metaphor and a framing device. The metaphors we use matter in the law and government, especially when arguing before judges in inherently subjective matters. They can set the stage for how the court views the power and reasoning of an agency, and can help agencies more confidently and persuasively assert their authority. They can

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[1] Dep't of Educ. Student Aid Overview Fiscal Year 2015 Budget Request 2 (2015), http://perma.cc/UHY3-YEJ3.

[2] Dep't of Educ. Student Loans Overview Fiscal Year 2015 Budget Proposal 9 (2015), http://perma.cc/3P3V-KD9V.

help shape an agency's internal culture and decision-making, and determine where it focuses its efforts.

For the past seven years, state and federal regulators, lawmakers, and interest groups have fought an increasingly pitched battle to rein in for-profit colleges. Given our gridlocked Congress, the prospect for federal legislative reform is dim at the moment. This leaves two main players: the U.S. Department of Education, and state and federal consumer protection or law enforcement agencies, including state attorneys general, the Consumer Financial Protection Bureau (CFPB), the Federal Trade Commission (FTC), and the Department of Justice (DOJ).[3] This article explores what conceiving of students as "consumers" might do to assist (or not assist) the goal of financing safe, affordable higher education. I conclude by proposing a new Consumer Protection Division of the Department of Education as a way to restore the integrity of the federal financial aid system.

II. The Trouble with For-Profit Colleges

"*They've ruined my life and the lives of many of my classmates*." – For-profit college graduate.[4]

For-profit colleges are the darkest corner of the larger debate on student loan debt and college affordability. They present the clearest case for calling students "consumers."

For-profits are big Wall Street business: over three-fourths of for-profit college students attend a school controlled by a publicly traded company or private equity firm.[5] The profit motive increases the moral hazard to short-change consumers in the name of profit.[6] This puts students in the position of buyers of a commercial product, sold to them using profit-maximizing marketing techniques that at times seem more fit for a car lot than an institution of higher learning. For-profit colleges also inevitably target low-income students, so almost all students must use student loans to attend. Thus, the consumption of a consumer financial product (a student loan) is synonymous with being a for-profit college student.[7]

For-profit colleges charge much more and produce much worse results than other types of schools. Students leave with more debt[8]—and often

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[3] John Fain, *Private Sector, Public Money*, Inside Higher Ed (June 29, 2012), http://perma.cc/UJ8Y-8KQ4. States such as California have enacted additional state-based reforms beyond consumer protection lawsuits. While these reforms have potential, they are beyond the scope of this article.

[4] Blake Ellis, *My College Degree is Worthless*, CNN Money (Nov. 2, 2014), http://perma.cc/Y5UL-G6F8.

[5] *Id.*

[6] *See* Robert Shireman, Center for American Progress, Perils in the Provision of Trust Goods: Consumer Protection & the Public Interest in Higher Education 9 (2014), http://perma.cc/38WD-FN8Q.

[7] *Id.* at 18.

[8] *Id.*

much lower graduation rates.[9] For-profit students have higher unemployment, lower earnings, higher default rates, and lower satisfaction compared to students at other types of schools.[10] For-profit colleges spend far more money on marketing, and far less on instruction, than public and non-profit colleges.[11]

Despite an extensive record of poor results and outright fraud, the sector has grown to eat up an incredible share of all federal financial aid for higher education: in recent years, almost one quarter of all grants and loans have gone to for-profits.[12] For-profit colleges have grown into a $30 billion plus per year industry, a vast amount of which comes from federal financial aid dollars.

III. Deceptive and Abusive Marketing Practices Flourish

> *"[B]eyond deceptive and immoral."* – Former for-profit college recruiter's description of the tactics her employer taught her to use.[13]

As has been well documented by countless government investigations, lawsuits, and media reports, for-profit colleges engage in high-pressure sales tactics and outright fraud to convince low-income students to enroll in their programs using federal student loans and grants, and sometimes private student loans as well.[14] For example, a Government Accountability Office (GAO) investigation uncovered for-profit college recruiters telling potential students that they could earn $250,000 as a barber;[15] that they would never have to repay their loans;[16] and lying about the school's accreditation.[17] The admissions personnel perfected professional consumer sales and marketing

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[9] *See id.* at 72–73.

[10] David Deming et al., *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?* 3 (Nat'l Bureau of Econ. Research, Working Paper No. 17710, 2011), http://perma.cc/N2ZA-45LT.

[11] S. Comm. on Health, Educ., Labor, & Pensions, 112th Cong., For Profit Higher Education: The Failure to Safeguard the Federal Investment & Ensure Student Success 3 (2012), http://perma.cc/AL7H-UPNF.

[12] Suzanne Mettler, Degrees of Inequality 165 (2014).

[13] Molly Hensley-Clancy, *Lower Education: How a Disgraced College Chain Trapped Its Students in Poverty*, Buzzfeed News (Nov. 13, 2014), http://perma.cc/XV2R-F9QZ.

[14] The CFPB's recent lawsuits against Corinthian College and ITT Tech detail schemes to push students into high-interest private student loans in order to evade regulatory requirements that at least ten percent of the school's revenue come from non-federal sources. The schools knew that these loans would likely have an astronomical default rate, but the private loans were essentially loss leaders required in order to access the much larger pool of federal aid. *See* Brief for Petitioner at 2, Consumer Fin. Prot. Bureau v. Corinthian Colls., Inc., No. 14-7194 (N.D. Ill. Sept. 16, 2014); Brief for Petitioner at 1–3, Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., No. 1:14-cv-292 (S.D. Ind. Feb. 26, 2014).

[15] U.S. Gov't Accountability Office, GAO-10-10-948T, For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud & Engaged in Deceptive and Questionable Marketing Practices 10 (2010), http://perma.cc/QC7M-ULT2.

[16] *Id.* at 24.

[17] *Id.* at 9.

techniques—compelling advertising; telemarketing; boiler-room psychological approaches to sales;[18] and online lead generation[19]—all with the goal of getting the student to take out federal loans to pay the school.

The groundbreaking and exhaustive report by Senator Tom Harkin's Health, Education, Labor and Pensions Committee detailed these sophisticated, manipulative high-pressure sales tactics perfected by the for-profit industry, which were deliberately designed to exploit the pain and vulnerability of struggling low-income students:

> One pervasive sales technique found in the documents of multiple companies is to manipulate a prospective student's emotions. One recruiting manager explained that recruiters "need to focus on . . . digging in and getting to the pain of each and every prospective student." According to this technique, a recruiter asks probing questions to find a prospective student's "pain"—about a dead-end job, inability to support their children, failing parents or relatives. They then use that "pain" to make the student feel vulnerable. Then, when the prospective student feels vulnerable, the recruiter will offer the prospective student the possibility of a college degree as the opportunity to make that pain go away.[20]

Investigations and lawsuits have also revealed for-profits engaging in a variety of unethical, fraudulent, and illegal activity to recruit students, from targeting brain-injured veterans to outright fabricating job placement rates. For example, Corinthian Colleges' Everest campus in Milwaukee touted an eighty to ninety percent job placement rate to prospective students, when in reality the placement rate dropped to as low as five percent for students who completed the programs.[21]

IV. Inside the Student Loan Default Factory: the High-Cost, Low-Value Business Model of For-Profit Colleges

> "*I hope you realize you're paying as much to go here as one would to go to Harvard. I hope you're getting your money's worth.*" – For-profit college professor to student.[22]

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[18] Chris Kirkham, *For-Profit College Recruiters Taught to Use 'Pain,' 'Fear,' Internal Documents Show*, Huffington Post (Feb. 8, 2011), http://perma.cc/2CBU-NW7F. One for-profit college recruiter told me that he had been sent to a month-long sales training. This training was so effective that he found he could persuade anyone to enroll if he got them in the door.

[19] Josh Keller, *Online Search Ads Hijack Prospective Students, Former Employee Says,* Chron. Higher Educ. (Sept. 7, 2011), http://perma.cc/WQJ9-Z5LD.

[20] S. Comm. on Health, Educ., Labor, & Pensions, 112th Cong., *supra* note 11, at 60.

[21] Brief for Petitioner at 16, Wisconsin v. Corinthian Colls., No. 2014 CX 00006 (Wis. Cir. Ct. 2014), http://perma.cc/H8RL-MZ4C.

[22] David Halperin, Stealing America's Future 3 (2014).

The results of for-profit college education are, by and large, dismal: high debt and high default rates.[23] For-profit programs are much more expensive than comparable public programs—up to four times as much.[24] Students pay more, but without better outcomes.[25] As the economist Stephanie Riegg Cellini noted in a journal article, "[i]n light of the vast amount of money spent by students and taxpayers on for-profit colleges and the limited evidence of their effectiveness, it seems appropriate to consider whether further regulation of the for-profit industry can be justified."[26] Commenting perhaps more succinctly to the New York Times on the costs and benefits of for-profits, Professor Cellini said simply, "[w]hy would you go?"[27]

Perhaps because for-profits spend only seventeen percent of their revenue on instruction, but twenty-three percent of their revenues on marketing, the quality of the actual education does not tend to match up with the professionalism of marketing and advertising.[28] One student recounted to a reporter about the poor teaching quality at her for-profit college:

> In her last two months at Everest, she has had seven teachers for a single medical assistant course. She tallies them off on her fingers: Most quit, one saying she'd never been paid, several moved, others disappeared with no explanation. "We show up and they're gone," she said. Instead of normal good-byes at the end of class, she said, students say to teachers, "Hope we see you tomorrow!"[29]

Loan default often follows enrollment at for-profit colleges, with severe consequences. By the most recent analysis of default rates, twelve percent of students enroll in for-profits, but for-profits account for forty-four percent of student loan defaults—288,000 defaulters.[30] Almost twenty percent of for-profit college students default within three years.[31] Student loan debt cannot be discharged in bankruptcy, and the government can garnish wages or collect payments out of social security.[32] Defaulting also results in a bad credit record that can hurt borrowers' ability to find a job or home.

The impact of for-profit colleges falls heavily on low-income students and students of color. A total of 1.36 million African American and Latino students enrolled in for-profits in 2012–2013.[33] Students of color enroll dis-

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[23] Deming et al., *supra* note 10, at 3.

[24] S. Comm. on Health, Educ., Labor, & Pensions, 112th Cong., *supra* note 11, at 3.

[25] David Deming et al., *For-Profit Colleges*, 23 Future Child. 137 (2013), http://perma.cc/6Q56-KB5X.

[26] Stephanie R. Cellini, *For-Profit Higher Education: An Assessment of Costs and Benefits*, 65 Nat'l Tax J. 153, 175 (2012).

[27] Eduardo Porter, *Why Aid for College Is Missing the Mark*, N.Y. Times (Oct. 7, 2014), http://perma.cc/3H3U-JGAW.

[28] S. Comm. on Health, Educ., Labor, & Pensions, 112th Cong., *supra* note 11, at 6.

[29] Hensley-Clancy, *supra* note 13.

[30] Press Release, Inst. for Coll. Access & Success, Despite Lower Rates, More Than 650,000 Defaulted on Federal Student Loans (Sept. 24, 2014), http://perma.cc/K8YS-MZAA.

[31] *Id.*

[32] *Id.*

[33] Center For Responsible Lending et al., Gainful Employment: A Civil Rights Perspective 3 (2014), http://perma.cc/9AC2-JNLZ.

proportionately in for-profits. Because for-profit colleges produce higher debt and default rates than public and private non-profits, students of color are hit harder by debt. Twenty-eight percent of all African American students enrolled in a 4-year college attend a for-profit, versus only ten percent of white students.[34] For-profit colleges graduate bachelor degree students of color at a much lower rate than other sectors: forty percent of African American students at public colleges complete their four-year degrees, versus only twenty-one percent who attend for-profits.[35] Their greater enrollment may be attributable to deliberate race-based targeting by for-profit colleges,[36] pre-existing income inequality that makes other options less feasible, and being the first in their families to attend college, giving them fewer available sources of knowledge about colleges.

The situation of students of color at for-profit colleges calls to mind the mortgage crisis. Like homeownership, higher education should be a key driver of the creation and retention of family wealth for people of color. Financing both college and higher education with loans can pay off in the end, under the right circumstances. But instead, "reverse redlining" results in communities of color receiving dangerous loans that risk their investment. Communities of color that have been previously denied access to credit ("redlined") are now suddenly targeted by expensive and risky forms of credit ("reverse redlined") because they lack other, safer options due to the legacy of redlining.[37] For mortgages, this scenario was fueled by securitization, which provided a large pool of credit and shifted the risks away from mortgage originators, and incentivized them to originate high-risk loans that they could sell immediately to be securitized.[38] Similarly, for-profits have everything to gain from placing students into loans for which the schools bear no risk at all.

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[34] PETER SMITH & LESLIE PARRIS, CENTER FOR RESPONSIBLE LENDING, DO STUDENTS OF COLOR PROFIT FROM FOR-PROFIT COLLEGES? 9 (2014), http://perma.cc/KML8-RC6S.

[35] CENTER FOR RESPONSIBLE LENDING ET AL., *supra* note 33, at 4.

[36] Second Amended Class Action Complaint at 3, Morgan v. Richmond Sch. of Health and Tech., Inc., No. 1:11-cv-01066-GK (D.D.C. Nov. 8, 2011), http://perma.cc/4YMZ-UAES.

[37] Charles L. Nier, III & Maureen R. St. Cyr, *A Racial Financial Crisis: Rethinking the Theory of Reverse Redlining to Combat Predatory Lending Under the Fair Housing Act*, 83 TEMP. L. REV. 941, 942 (2011).

[38] *See* NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, THE FINANCIAL CRISIS INQUIRY REPORT at xxiii-xxiv (2011), http://perma.cc/GW42-WLF3 (concluding that mortgage securitization allowed originators to take risky subprime loans off their books, fueling the crisis); Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Education*, 69 WASH. & LEE L. REV. 439, 477–78 (2012) (comparing pre-Dodd Frank mortgage securitization to current for-profit college regulation). Although the systemic effect of student loan debt is far less risky to the global economy than the mortgage crisis, the economic conditions leading to consumer protection abuses are clearly parallel.

V. The Inevitable and Inexorable Rise of For-profit Colleges

"*It's not education; I think it's just greed.*" – Navy veteran and for-profit college graduate.[39]

A. *The weak regulation of for-profit college credit*

So how did a federal loan program, intended to help low-income students access education to find better jobs,[40] become instead an instrument to drive low-income students further into economic misery? The market structure of higher education, coupled with ineffective regulation, paved the way. Under Title IV of the Higher Education Act (HEA), the federal government seeks to provide access to higher education through grants and loans made directly to students, who can use these funds at any properly accredited and licensed school—state-supported, private non-profit, or for-profit. This voucher-like system, with aid tied to the student rather than to the school, creates a market system where the schools compete for students' federal dollars, rather than the federal government directly funding schools.[41] The federal government's primary role is to facilitate "access" to the school of the student's choice, rather than to engage in detailed assessment of and control over the quality of the education itself.

Even though for-profit colleges completely depend on federal dollars to survive, the federal government does not have the degree of control it should have over the quality of education. Control over higher education is distributed among a regulatory "triad": the federal government, state governments, and third-party accreditors.[42] The federal government provides the loans and grants, and approves a list of third-party accreditation bodies.[43] The federal government's main source of regulatory power over colleges, then, is the purse: without Title IV federal funds, many colleges cannot survive, especially the large for-profit college companies that dominate the market. In order to access federal dollars, schools must be approved by accreditors and states. States traditionally fund public colleges and impose their own licensing requirements for all colleges operating in the state. Accreditors are supposed to assess whether schools or programs meet certain educational quality requirements. But accreditors have come under fire for failing to perform their gatekeeping function adequately. Critics argue that accreditors

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[39] Aaron Glantz, *GI Bill Funds Flow to For-Profit Colleges That Fail State Aid Standards*, Ctr. for Investigative Reporting (June 28, 2014), http://perma.cc/F9ZU-GBLM.

[40] Title IV federal student aid was intended to help low-income students access education. Mettler, *supra* note 12, at 92–93.

[41] *See* Omari Scott Simmons, *For-Profits & the Market Paradox*, 48 Wake Forest L. Rev. 333, 349 (2013).

[42] U.S. Gov't Accountability Office, GAO-15-59, Higher Education: Education Should Strengthen Oversight of Schools & Accreditors 4 (2014), http://perma.cc/EQ2H-T5ZZ.

[43] Postsecondary Nat'l Policy Inst., *Higher Education Accreditation*, New America (Mar. 1, 2013), http://perma.cc/N3ZN-RHSZ.

lack transparency, are reluctant to actually sanction colleges, function via a potentially biased peer-review system, and are infected by conflicts of interest since accreditors are funded by the colleges themselves.[44] The federal government can directly exercise a great deal of control by cutting off federal funds, as occurred with Corinthian Colleges, but this is a rare remedy and an extremely blunt instrument that does not directly implicate program quality.

Thus, accreditors have primary responsibility over the quality of educational programs, which they exercise weakly, while the federal government doles out almost unlimited money, but with little control over its deployment.[45] For their part, the schools bear very little risk if their students' federal loans default. The market-based federal student loan system, coupled with this ineffective regulatory framework, has opened the door to for-profit college abuses.

From the 10,000 foot view, this policy outcome seems to be inevitable. Every person with a social security number and a high school diploma[46] has an underwriting-free line of credit available to purchase higher education.[47] The sellers of higher education can rake in all the loan proceeds as immediate revenues, and bear very little risk if the loans default. It seems preordained that the market would create the supply of higher education to take advantage of this available, risk-free credit.

B. The growth of the for-profit college sector

For-profit colleges are not new, but their publicly-traded, Internet-fueled manifestation is a recent phenomenon, flourishing under weak regulation and the market-based higher education finance system.

Since 1972, Title IV of the Higher Education Act has allowed for-profit college students to use federal loans and grants to pay for their tuition and cost of living, subject to a legal requirement that career education programs "prepare students for gainful employment in a recognized occupation."[48]

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[44] *See id.*

[45] H.R. Rep. No. 112-177, at 19 (2011), http://perma.cc/GB9Y-8RKF.

[46] Prior to 2012, one did not even need a high school diploma to be eligible for a federal student loan. *See* U.S. Dep't of Educ., Office of Postsecondary Educ., GEN-12-01, Changes Made to the Title IV Student Aid Programs 1 (2012), http://perma.cc/G8NH-4LD3.

[47] Recognizing the role of easy access to credit in creating the for-profit college problem should not be taken to suggest that federal student loans should be subject to underwriting standards similar to private loans. Federal loans are supposed to be a form of safe, repayable aid to help students access college. Since students typically do not have high incomes or long credit histories at the time they take out the loans, traditional underwriting is inappropriate. The answer to the temptations created by easy access to student loan credit is not to impose underwriting standards on students, but rather to minimize risk and maximize quality. Maximizing quality means ensuring that college programs are affordable and prepare students for jobs, so that the investment pays off. Minimizing risk means helping distressed borrowers with income-based repayment plans, loan forgiveness in appropriate cases, and expanded bankruptcy rights.

[48] Mettler, *supra* note 12, at 92.

Military tuition benefits such as the GI Bill have been available for use at for-profits since after World War II.[49] The massive expansion of GI Bill benefits after 9/11 increased the pool of potential revenues, with a concomitant targeting of military veterans and families by the schools.[50]

As long as federal funding has been available to for-profits, there has been periodic concern about the value of the programs and deceptive marketing practices.[51] But it was not until the 2000s and the rapid expansion of very large, publicly traded for-profit colleges that the abuses began to accelerate in volume and severity. Driven by the private-equity and shareholder-value models that value short-term returns and profits, along with a relaxation in regulatory oversight under the Bush administration, for-profit colleges expanded quickly.

Deregulation and macroeconomic conditions added fuel to the fire in the 2000s. For-profits' interests enjoyed considerable influence in D.C. under the George W. Bush administration, with the appointment of an industry insider to the top higher education post in the Department of Education.[52] Among other deregulatory measures, the Bush Department of Education rolled back the rule placing limits on incentive compensation—the ability to pay recruiters on a per-student basis, which is a key driver in enrollment fraud and high-pressure sales tactics.[53]

The growth of the Internet also aided the expansion. Congress removed controls on online education in 2006 that had previously required schools to offer at least fifty percent of their classes on brick-and-mortar campuses, allowing for-profits to rapidly expand to the Internet.[54] By going online, for-profits could reduce overhead and the barriers to enrolling non-traditional students in brick-and-mortar campuses. The online model allowed for-profits to proliferate. Schools created easily replicable online programs and enrolled higher volumes of students, but failed to improve educational outcomes or meaningfully reduce costs.[55]

With the groundwork laid by regulatory reform, and a huge pool of assets embodied as students, for-profit colleges grew vertiginously. For-profits had every incentive to increase enrollment to the greatest extent possible to increase returns for their owners or shareholders.

From 1993 to 2010, the share of students in for-profits grew five times over.[56] After the restrictions on online programs were relaxed in 2006, en-

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[49] *Id.* at 6.

[50] *Id.* at 141–45; *see also* Glantz, *supra* note 39.

[51] For example, Representative Maxine Waters has been a champion for for-profit college students since the 1980s. *See* Mettler, *supra* note 12, at 87.

[52] *Id.* at 104.

[53] *Id.* at 106.

[54] *Id.* at 106–07; *see also* Sam Dillon, *Online Colleges Receive a Boost from Congress,* N.Y. Times (Mar. 1, 2006), http://www.nytimes.com/2006/03/01/national/01educ.html?pagewanted=all, http://perma.cc/LVD3-RYEZ.

[55] *See* David Deming et al., *The Disruptive Potential of Online Learning: Comparing the Cost & Quality of Online and Traditional Education*, Vox (Feb. 5, 2015), http://perma.cc/XTX4-MVN4.

[56] Mettler, *supra* note 12, at 88.

rollments soared. For example, between 2006 and 2009 enrollments at EDMC, funded by Goldman Sachs, grew by 500%. Overall, between 2006 and 2010, enrollment grew by eighty-nine percent.[57] By 2009, the University of Phoenix enrolled more than half a million students.[58] Other for-profits saw similar rapid expansions.[59]

Publicly traded for-profits such as the Apollo Group, backed by private equity and investment firms like Goldman Sachs, grew from $12 million in revenues in 1994 to $1.34 billion in 2003, with stock prices increasing from $0.72 to $63.36.[60] In recompense, CEOs received ten and twenty million dollar salaries.[61] These outsized gains flowed to investors, shareholders, and executives motivated by profit, pursuant to their for-profit corporate structure, rather than to the public or beneficial purpose that guides nonprofit corporate operations.[62]

VI. Students or Consumers?

> "*It's so sad that I worked so hard and have nothing to show for it . . . . I have nothing to show my children about why staying in school is so important . . . . My husband and I are still struggling to keep food on the table, a roof over our heads, and our bills paid. I feel so taken advantage of.* " – For-profit college graduate.[63]

The urgency of the for-profit college problem seems clear. Low-income students, driven by inequality and a poor job market, seek to go to college. They all have an entitlement to grants and underwriting-free credit to do so. For-profit colleges transform into a business neatly exploiting this market niche, funded largely by the federal government, with students bearing almost all of the financial risk.

But what kind of problem is this? Is it a problem of educational policy, or consumer rights?

Are students consumers? This question can be asked as a simple matter of statutory interpretation about the applicability of consumer protection law to higher education. But it can also be asked as a broader policy question, touching on the meaning and purpose of college, and the role of those who fund college. Students-as-consumers can also be a metaphor by which agencies and governments understand and articulate their own roles, and communicate them to the public and the courts.

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[57] *Id.* at 165.
[58] Deming et al., *supra* note 25, at 138.
[59] Mettler, *supra* note 12, at 107.
[60] *Id.* at 88.
[61] Deming et al., *supra* note 10, at 4.
[62] *See* Shireman, *supra* note 6, at 3–4.
[63] *See* Hensley-Clancy, *supra* note 13.

Legally speaking, "there is little doubt that a student is a consumer" under consumer protection law.[64] That a state attorney general can sue or investigate a for-profit college under her state's Unfair and Deceptive Acts and Practices (UDAP) law is not controversial.[65] To date, dozens of states have done so, as have the Federal Trade Commission and Consumer Financial Protection Bureau under their own consumer protection statutes.[66]

But in non-law enforcement circles, the notion of the college student as a "consumer" is not a given. Instead, it has drawn scrutiny and criticism from commenters who believe that calling students "consumers" is a metaphor that can harm the integrity of higher education by turning education into a commodity governed by the market, rather than by knowledge, tradition, and pedagogy.

As the linguist George Lakoff and philosopher Mark Johnson established in their seminal book *Metaphors We Live By*, turns of speech like the student-as-consumer metaphor are not just matters of expression—they influence how we perceive reality.[67] For example, using the language of war to talk about arguments (e.g., "attack a position") contributes to the belief that arguments have two incommensurate sides, and the goal is to beat the other side.[68] This belief in turn influences how we argue—engaging in "take no prisoners" rhetoric and "silencing" the other side, for example.[69] But if you imagine a culture where an argument is spoken of as a dance, the disputants might prioritize cooperation, using ritualized verbal and logical moves and balance.[70]

Extending the metaphors theory to the law, Mark Johnson urged the legal community to understand the role that metaphors play in framing reality, and thus the way we interpret and apply laws, and therefore the power of the state.[71]

At first glance, the theory of metaphors and framing might seem too abstract for legal practitioners. But it should ring true to lawyers seeking to move a decision maker in a new direction. The conscious use of metaphor to reframe reality is "a persuasive method intuitively recognized by lawyers: by shifting the way decision makers perceive and interpret situations involving people and events, novel characterizations and metaphors are sometimes able to compete with entrenched stereotypes and conventional categories."[72]

Elizabeth Warren adeptly employed the power of metaphor when she compared credit cards to toasters in the first article calling for the creation of

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[64] Carolyn L. Carter & Jonathan Sheldon, Unfair & Deceptive Acts & Practices 117 (8th ed. 2012).

[65] *See, e.g.*, David Halperin, *Law Enforcement Investigations & Actions Regarding For-Profit Colleges*, Republic Report (Apr. 10, 2015), http://perma.cc/H652-LAGD.

[66] *See id.*

[67] George Lakoff & Mark Johnson, Metaphors We Live By 3 (1980).

[68] *Id.* at 4.

[69] *Id.* at 4–5.

[70] *Id.* at 5.

[71] *See* Mark L. Johnson, *Mind, Metaphor, Law*, 58 Mercer L. Rev. 845, 868 (2007).

[72] Linda L. Berger, *Metaphor & Analogy: The Sun & Moon of Legal Persuasion*, 22 J.L. & Pol'y 147, 150 (2013).

the Consumer Financial Protection Bureau.[73] Just like a toaster subject to consumer safety regulations, she reasoned, consumer credit contracts are "products" that deserve a full spectrum of consumer protections on a product-by-product basis.[74]

Metaphors can be a powerful means of shaping perceptions because "in using a metaphor to describe something, we are trying to bring a better understanding of that 'something' to the audience by referencing a reference point that we already know and understand."[75] Applying the notion of "consumer" to students can powerfully reframe the concept of "student" as a legal and policy matter. It incorporates and highlights what we believe and know about consumers and financial products. For example, the term "students' rights" does not have much purchase. But "consumers' rights" resonates, bringing to mind the financial crisis, the advent of the Consumer Financial Protection Bureau, and the star power of consumer advocates like Senator Warren.

But the students-as-consumers metaphor is not without its critics. To professors and college administrators, it detracts from academic freedom, interferes with the student-teacher relationship, and even threatens the very purpose of higher education. The British professor Stefan Collini writes that:

> [T]he model of the student as consumer is inimical to the purposes of education. The paradox of real learning is that you don't get what you 'want'—and you certainly can't buy it. The really vital aspects of the experience of studying something (a condition very different from 'the student experience') are bafflement and effort . . . [a]nd it helps if you trust your guides rather than assuming they will skimp on the job unless they're kept up to the mark by constant monitoring of their performance indicators.[76]

Similarly, Miguel Martinez-Saenz and Steven Schoonover Jr. write in their article "Resisting the 'Student-as-Consumer' Metaphor" that:

> When universities prioritize the expansion of market demand for their "product," campuses cease to challenge students to engage in a sometimes painful and unpleasant process of self-discovery and knowledge creation that requires commitment, discipline, and persistence. Instead of selling the idea that higher education is about knowledge, growth, and development, then, we sell a sometimes

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[73] *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY (Summer 2007), http://perma.cc/2H5Z-XJLE.

[74] *See id.*

[75] Albert E. Scherr, *Genetic Privacy & the Fourth Amendment: Unregulated Surreptitious DNA Harvesting*, 47 GA. L. REV. 445, 513 (2013).

[76] Stefan Collini, *From Robbins to McKinsey*, LONDON REVIEW OF BOOKS (Aug. 25, 2011), http://perma.cc/PAQ8-HAC7.

misleading expectation of the student experience for which the "customer" is willing to pay.[77]

To these critics, the threat of student-as-consumer has two aspects. First, it entails a "customer is always right" mentality of consumer choice and sovereignty that runs counter to the purpose of teaching and academic discipline guided by a professor with higher status than the student.[78] Second, it changes higher education into a consumer product intended to produce monetary returns, which can be objectively measured as job placement rates and salaries. This, in turn, entails judging and sanctioning of universities and professors by external authorities based on these monetized outcomes, to the detriment of other outcomes, such as "enlightenment" and "growth," which cannot be measured in monetary terms.[79] The anxious reactions to President Obama's proposed college ratings plan by *all* sectors of higher education, not just for-profit colleges that stand to lose the most, reflects the academy's deep concern at being forced into the role of a service provider subject to unfamiliar new judgments.[80]

Scholars viewing for-profit colleges through the lens of race and equality also evince skepticism about a student-as-consumer transformation. The legal scholar Omari Scott Simmons cautions that "the more higher education is viewed as a commodity product indistinguishable from other consumer products and services, the stronger the principle of caveat emptor becomes for students."[81] To Simmons, if students are consumers, then the market principle of "buyer beware" applies, rather than the more protective standards that might apply to students. Implicitly, Simmons reasons that consumer protection law, under the current regulatory regime, cannot counter "caveat emptor" effectively. This means that turning students into consumers is potentially harmful. Instead of gaining new rights as consumers, students are yielded up, unprotected, to the market. Student-as-consumer leads to *greater* inequality, since it is the most vulnerable students who are cast friendless into the most market-driven form of higher education—for-profit colleges.

The sociologist Tressie McMillan Cottom's work suggests that the "consumer" label, with its implications of free choice between products on the market, may obscure and deflect responsibility for the underlying inequality that leads low-income and minority students to for-profit colleges. Cottom writes about the temptation to judge for-profit college students as "stupid" because of their choice of a for-profit college and misunderstand-

[77] Miguel Martinez-Saenz & Steven Schoonover Jr., *Resisting the "Student-as-Consumer" Metaphor,* ACADEME (Nov.–Dec. 2014), http://perma.cc/6KHY-HYP2.

[78] *Id.*

[79] *See id.*

[80] Doug Lederman, Michael Stratford, & Scott Jaschik, *Rating (& Berating) the Ratings*, INSIDE HIGHER ED (Feb. 7, 2014), http://perma.cc/HYJ8-UTU5.

[81] Simmons, *supra* note 41, at 344.

ing of "real" college.[82] But she cautions that the choice is made because of poverty and inequality, which would exist even if all for-profit colleges disappeared tomorrow. Focusing only on the students' bad consumer choice of a substandard educational product—even if we place the blame on the misdeeds of for-profit colleges—obscures the overall social and economic inequality creating the dynamic that propels poor students of color to for-profit colleges in the first place.

Finally, the legal scholar Twinette Johnson argues that discussing higher education in market terms loses sight of the more important policy goal of access to education.[83] Similar to Cottom's critique, Johnson suggests that the language of markets and an over-focus on protecting the federal government's "investment" obscures the greater goal of assuaging inequality through higher education.[84] To Johnson, calling a student a "consumer" might move the goalpost too far in the direction of markets, to the detriment of a public commitment to provide government-supported higher education. Professor Johnson's concerns echo academics from every sector who feel discomfited by the Obama administration's focus on "return on investment" and outcome-based rankings.

These critiques expose important pitfalls to adopting the student-as-consumer framework, and its potential impact on the structure of the university and higher education policy. But as a practitioner in the consumer protection field, I view the urgency of the harms posed by for-profit colleges as outweighing any of these concerns. As described below, I believe that the student-as-consumer framework could assist in creating a stronger network of legal protection for for-profit college students.

VII. Regulatory Approaches: Consumer Protection or "Program Integrity"?

The student-as-consumer metaphor is present most prominently, of course, in consumer protection law cases against for-profit colleges brought by state and federal consumer protection agencies. Consumer protection cases are an extremely important piece of the puzzle, and can achieve significant relief and reforms of specific institutions. But deception-based litigation may not be able to reach the core of the problem: college programs that are too expensive and provide too little value, creating too much debt and default. For that, the Department of Education must continue to exercise its rulemaking and oversight authority, but with the addition of a more robust consumer framework.

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[82] Tressie McMillan Cottom, *Let's Stop Condescending to For-Profit College Students*, Slate (Aug. 15, 2013), http://perma.cc/2QM9-GCMP.

[83] *See* Twinette L. Johnson, *Going Back to the Drawing Board: Re-Entrenching the Higher Education Act to Restore Its Historical Policy of Access*, 45 U. Tol. L. Rev. 545, 573 (2014).

[84] *See id.* at 574.

The Federal Trade Commission,[85] the Consumer Financial Protection Bureau,[86] and state attorneys general[87] have all initiated investigations or enforcement actions against for-profits under their consumer protection powers and Unfair and Deceptive Acts and Practices laws. To date, dozens of state attorneys general have investigated or filed suit against for-profit colleges.[88] Consumer protection groups that traditionally focus their regulatory advocacy on consumer protection agencies, as opposed to the Department of Education, have increased their involvement in the issue as well.[89]

The consumer protection approach to for-profit colleges has grown for one straightforward reason: it works. The legal authority granted by state UDAP statutes, the FTC Act, and by Dodd-Frank to the CFPB, fits well with the facts of for-profit college abuses. This in turn fuels the enforcement authorities' motivation to win cases.[90] Consumer protection regulators pursue the cases because they believe (correctly, in my opinion) that they have clear jurisdiction and can make strong cases against for-profit colleges.

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[85] *See, e.g.*, Nick Desantis, *DeVry Faces Inquiry From Federal Trade Commission*, Chron. Higher Educ. (Feb. 5, 2014), http://perma.cc/B62V-2NT7; *FTC Approves Changes to Vocational Schools Guides*, Fed. Trade Comm'n (Nov. 7, 2013), http://perma.cc/V4VV-KXGQ. FTC and state consumer protection-based involvement dates to the mid-1970s when for-profit colleges first became eligible for student loan funds, but the past few years have seen a blossoming of interest and concrete regulatory action. Daniel L. Bennett, Adam R. Lucchesi, & Richard K. Vedder, Ctr. For Coll. Affordability & Productivity, For-Profit Higher Education: Growth, Innovation & Regulation 38, 41–42 (2010) http://perma.cc/W6EG-B8S6.

[86] *See, e.g.*, *CFPB Sues For-Profit College Chain ITT for Predatory Lending*, Consumer Fin. Prot. Bureau (Feb. 26, 2014), http://perma.cc/8VWX-XDN8; *CFPB Secures $480 Million in Debt Relief for Current and Former Corinthian Students*, Consumer Fin. Prot. Bureau (Feb. 3, 2015), http://perma.cc/9RXU-4JJZ.

[87] *See, e.g.*, *Attorney General Kamala D. Harris Files Suit in Alleged For-Profit College Predatory Scheme*, State of Cal. Dep't of Justice (Oct. 10, 2013), http://perma.cc/2RJH-9S46; Dennis Domrzalski, *AG's Office Sues ITT Educational Services*, Albuquerque Bus. First (Feb. 27, 2014), http://perma.cc/RA2N-WDTF; *Attorney General Suthers Announces Consumer Protection Settlement with Argosy University*, Colo. Dep't of Law (Dec. 5, 2013), http://perma.cc/NVK3-D3E6; *A.G. Schneiderman Announces Groundbreaking $10.25 Million Dollar Settlement With For-Profit Education Company That Inflated Job Placement Rates to Attract Students*, N.Y. State Office of the Attorney Gen. (Aug. 19, 2013), http://perma.cc/A4AH-4QW5; Rod Boshart, *Ashford Agrees to $7.25 Million Iowa Settlement*, Quad-City Times (May 16, 2014), http://perma.cc/9PXV-YYGQ; Jonathan Bilyk, *Ill. AG's Lawsuit Against Westwood College Will Continue in Federal Court*, Legal Newsline (Sept. 16, 2014), http://perma.cc/Z7RD-2BJT.

[88] Halperin, *supra* note 65.

[89] Consumer groups first joined with education groups in 2005 to defend for-profit college regulations. *See, e.g.*, Mettler, *supra* note 12, at 110. Since then, the coalition has steadily added new partners, including a growing number of consumer groups. *See* Letter from AFL-CIO, et al. to President Barack Obama (Feb. 4, 2014), http://perma.cc/7J83-Q4MS (showing growth in consumer group participation).

[90] *See* Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing & Employment,* 45 UCLA L. Rev. 1401, 1439 (1998) (asserting that in the context of housing and civil rights affirmative litigation, "government inevitably acts cautiously—choosing to pursue only those cases that are near certain winners or that are politically uncontroversial"). Caution, especially for those wielding state power that can hale people into court, may be a virtue—so this observation is not necessarily a criticism of consumer protection agencies.

Consumer protection agencies generally have broad authority under UDAP statutes to address a wide variety of harmful practices in commerce.[91] Although state and federal UDAP statutes differ in some important respects, such as the availability of private remedies, they share the same DNA and a fundamental division between "unfair" and "deceptive" practices.[92] The CFPB's statute includes a third, new cause of action for "abusive" conduct, and some state UDAPs also reach "unconscionable" conduct.[93]

In general, consumer protection agencies favor deception cases. A deception case can be fairly clear-cut with the right facts, and for that reason is an attractive tool to use.[94] A deception claim generally has three elements: a misrepresentation; the misrepresentation is likely to mislead a reasonable consumer; and the misrepresentation is material—i.e., it goes to the core of the consumer's decision.[95] If the misrepresentation is express—in an advertisement or other marketing materials, for example—then materiality is presumed.[96] A deception case based on an express misrepresentation in an advertisement is especially efficient for an agency, since it will not have to invest its scarce resources in a difficult investigation into practices on the ground.

Common for-profit college abuses, such as outright lying about job placement rates in advertising materials,[97] may give rise to good deception claims. Indeed, of the cases filed so far, the majority are deception-based, with some important exceptions for the CFPB and the state of Massachusetts, which included abusive and unfairness counts.[98]

In contrast, an unfairness claim is much more complex. Under the FTC Act (and by extension the CFPB's statute), unfairness requires a showing of

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[91] *See* CARTER & SHELDON 1, *supra* note 64. The CFPB's authority includes new authority over "abusive" acts, and it introduces the UDAP acronym. Some states have enlarged their UDAP regulations to specifically cover for-profit college and trade school abuses. *See, e.g.*, *AG Coakley Announces Finalization of New For-Profit & Occupational School Regulations*, ATTORNEY GEN. OF MASS. (June 25, 2014), http://perma.cc/3SL4-WNUH.

[92] CARTER & SHELDON, *supra* note 64, at 1, 197, 722.

[93] 12 U.S.C. § 5531 (2006).

[94] G.S. Hans, *Privacy Policies, Terms of Service, & FTC Enforcement: Broadening Unfairness Regulation for a New Era*, 19 MICH. TELECOMM. & TECH. L. REV. 163, 172 (2012).

[95] *FTC Policy Statement on Deception*, FED. TRADE COMM'N (Oct. 14, 1983), http://perma.cc/HGF3-XLLM. Note that Dodd-Frank does not define "deception" for the CFPB, but the CFPB has stated that it will be guided by the FTC interpretation. False advertising claims have slightly different elements but are conceptually similar.

[96] *Id.*

[97] *See id.*; *see also* N.Y. STATE OFFICE OF THE ATTORNEY GEN., *supra* note 87.

[98] The CFPB and state of Massachusetts have made broader unfairness or abuse claims. *See, e.g.*, Complaint counts 1–3, Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc., ¶¶ 156-182, No. 1:14-cv-292 (S.D. Ind. Feb. 26, 2014), http://perma.cc/LAQ3-LMVL; Complaint, Commonwealth v. Corinthian Colls., Inc., and Corinthian Schs., Inc. ¶ 120.J, No. 14-1093 (Apr. 3, 2014), http://perma.cc/QAZ3-UWE7?type=pdf. The CFPB's case against Corinthian also includes an unfairness count, but it focuses on the comparatively peripheral issue of debt collection and is narrower in scope than the ITT unfairness and abusive counts. The central wrongdoing—tricking students into taking out private student loans by lying about the school—is represented in the deception count. Complaint counts 1–2, Consumer Fin. Prot. Bureau v. Corinthian Colls., Inc. ¶¶ 150–166, No. 1:14-cv-07194 (N.D. Ill. Sept. 16, 2014).

substantial injury that is unavoidable by a reasonable consumer, plus a cost-benefit analysis demonstrating that the challenged practice does not have "countervailing benefits."[99] Although deception claims certainly present their own legal hurdles, they are generally considered to be easier to pursue than unfairness claims. The FTC, for example, has been called "extremely reluctant" to use its unfairness authority in rulemaking and enforcement after being severely politically chastened for attempting to use it broadly in the 1970s and the subsequent creation of a much more difficult-to-plead unfairness standard.[100] Despite the recent advent of viable unfairness claims in cases related to the Internet, data privacy, and outright billing fraud, the agency's historical reluctance to proceed on unfairness grounds is still strongly rooted.[101]

Deception litigation may be unable to address the core harms of the conduct, particularly for financial products and associated practices. Harmful financial products often do not have visible misrepresentations (or omissions) at their core.[102] Instead, the core harm may stem from lack of underwriting—making loans that are destined to fail because the lender did not take into account the borrower's ability to repay—and other features that may push consumers into a "debt trap." Some examples include the high-interest private student loans made to Corinthian and ITT students, frequent rollovers and renewals for payday loans; unaffordable interest rate resets for adjustable rate mortgages; and brokers steering consumers into bad loans because the broker benefits from the loan.[103] Because these problems do not generally involve a misrepresentation about the nature of the product, but

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[99] 15 U.S.C § 45 (2006).

[100] *See, e.g.*, Matthew A. Edwards, *The FTC & New Paternalism*, 60 ADMIN. L. REV. 323, 336–43 (2008); J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, & Resurrection*, FED. TRADE COMM'N (May 30, 2003), http://perma.cc/S7PC-X36T. In recent years the FTC has increased its use of unfairness claims, achieving notable wins in data security cases and establishing a new legal framework for data security practices in a way that deception cases alone could not provide because of the more limited relief. Jenna Greene, *FTC Stakes Claim as Data Security Cop*, NAT'L L.J. (Jan. 23, 2015), http://perma.cc/8MEL-55QY. However, the FTC's use of its unfairness authority is not without risks, as industry pushes back against this expansion of authority. *See* Katie W. Johnson, *Future of FTC Data Security Enforcement Hinges on Forthcoming Wyndham Ruling*, BLOOMBERG (Jan. 6, 2015), http://perma.cc/EBC7-8KRB. In recognition of the difficulty of making unfairness claims, the FTC still tends to take a "belt and suspenders" approach by including a deception claim along with the unfairness claim, as it did in *Wyndham.* Complaint, Fed. Trade Comm'n v. Wyndham Worldwide Corp., No. CV 12-1365-PHX-PGR (Aug. 9, 2012), http://perma.cc/G5X4-Q8QJ. This serves to again illustrate the preference for deception claims. *See also* Daniel J. Solove & Woodrow Hartzog, *The FTC & the New Common Law of Privacy*, 114 COLUM. L. REV. 583, 638–40 (2014).

[101] *See, e.g.*, Stephen Calkins, *FTC Unfairness: An Essay*, 46 WAYNE L. REV. 1935, 1990 (2000); Edwards, *supra* note 100, at 349.

[102] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 23 (2008).

[103] Richard Cordray, Director, Consumer Fin. Prot. Bureau, Prepared Remarks at the Consumer Advisory Board Meeting (Feb. 27, 2014), http://perma.cc/99ER-Y587.

rather how the product operates, they can only be addressed through an unfairness (or abuse) claim—which is much harder to do.

Accordingly, enforcement actions may focus on known areas of consumer harm, but address peripheral conduct that fits a deception claim, instead of the central harm. For example, a recent FTC deception action against payday lenders focuses on misrepresentations about how and when fees will be charged, and not the basic unaffordability and inevitably high default rates baked into the design of the loan program.[104] Although such a case may indeed stop considerable consumer injury, it does not address the core consumer protection concern in a way that would have systemic impact. Instead, smart industry participants will simply ensure that they make the proper disclosures and representations, continuing their fundamentally unfair business models.

The CFPB's new "abusive" power—and its willingness to use its unfairness authority—has promise. However, these powers too have limitations in practice due to the CFPB's more limited jurisdiction. The CFPB's two pending cases against for-profit colleges, while extremely important, address the relatively more peripheral issues of private student loans, rather than the greater burden of federal student loans.[105] This is because the CFPB's jurisdiction is clearest over the private student loan programs. In theory, however, the CFPB could someday bring a case against a for-profit college based on its role in brokering or advising a student on federal student loans.

Although these consumer protection actions are extremely important to address some aspects of fraud widespread in the for-profit college industry, and to serve as a general warning that the industry is being watched closely by law enforcement, deception litigation alone cannot address other fundamental problems with for-profit colleges: their low graduation rates, high tuition and debt rates, high default rates, and poor earnings and employment outcomes for students. Savvy market participants may learn how to design non-fraudulent marketing practices and ad campaigns that are just correct enough to evade enforcement actions, while still enrolling vulnerable students in high-debt programs that do not pay off for them. And although strategic litigation against individual defendants can certainly change the practices of other market participants, only rulemaking can set generally applicable standards to prevent harm.

[104] Complaint for Injunction & Other Equitable Relief, Fed. Trade Comm'n v. AMG Servs., Inc., No. 2:12-cv-00536 (Apr. 2, 2012), http://perma.cc/V8EE-35J8.

[105] Complaint, Consumer Fin. Prot. Bureau, *supra* note 98; Complaint, Consumer Fin. Prot. Bureau v. Corinthian Colls., Inc., No. 14-7194 (N.D. Ill. Sept. 16, 2014), http://perma.cc/AUF3-E3KX.

VIII. The Department of Education as a Responsible Lender and Consumer Protection Agency

"*For a long time, I was just devastated and depressed. The diploma I got was worthless*." – For-profit college graduate.[106]

In light of the limitations of the consumer protection litigation approach in unlocking the potential of the student-as-consumer framework, Department of Education action is still necessary. But currently, the Department's focus is more on the "integrity" of its own programs, rather than the protection of individual consumers. Fully embracing the student-as-consumer model could strengthen the Department of Education's ability to exercise its regulatory power more effectively and decisively.

The Obama Department of Education has primarily attempted to address for-profit colleges through the aegis of "program integrity"—rules, audits, and reviews of for-profit colleges, intended to protect the federal dollars expended by the financial aid "program." Violating these rules can result in the higher education death penalty—being cut off from federal dollars.

The Department of Education has some potentially important regulatory tools at its disposal to ensure "program integrity." First, as part of the Department's power to monitor the federal dollars it disburses, the Department has the authority to assess the financial responsibility of for-profit colleges and throttle their ability to receive funds.[107] Exercising this tool resulted in the near collapse of Corinthian Colleges in 2014.[108] The capsizing of the for-profit college chain Corinthian Colleges, which received $1.4 billion of its $1.6 billion revenue in 2013 from federal student aid, illustrates this power. Although multiple states, the CFPB, DOJ, and SEC had all opened investigations or filed suits against Corinthian, only the Department's throttle on financial aid dollars resulted in Corinthian's almost immediate collapse and its subsequent fire sale to ECMC Group.[109]

Second, the Higher Education Act includes a suite of express provisions intended to oversee the marketing and outcomes of for-profit colleges. This includes the requirement that for-profit colleges "prepare students for gainful employment in a recognized occupation" in order to be eligible for Title IV funds (the "Gainful Employment" rule);[110] the ban on incentive compensation, which is intended to rein in the worst financial motivations to pres-

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[106] Chris Oberholtz et al., *Vatterott College Told to Pay Belton Woman $13 Million*, KCTV News (June 19, 2013), http://www.kctv5.com/story/22634184/vatterott-college-told-to-pay-belton-woman-13-million, http://perma.cc/ALA7-UKNX.

[107] 20 U.S.C. § 1099 (2012).

[108] Michael Stratford & Paul Fain, *Preventing Another Corinthian*, Inside Higher Ed (Aug. 19, 2014), http://perma.cc/635Y-Z39G.

[109] Paul Fain, *Fallen Giant*, Inside Higher Ed (June 26, 2014), http://perma.cc/X9XA-8M4G.

[110] Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890 (Oct. 31, 2014) [hereinafter Program Integrity] (to be codified at 34 C.F.R. §§ 600, 668).

sure students into enrollment by banning recruiters from receiving compensation based on securing student enrollments (the "Incentive Compensation" rule);[111] a ban on engaging in misrepresentation during recruitment (the "Misrepresentation" rule);[112] and a requirement that the school be authorized in the state in which it is located or where it provides online programs (the "State Authorization" rule).[113]

The Obama administration initiated a serious effort to regulate for-profit colleges using these statutory provisions early in President Obama's first term, beginning the rulemaking process in 2009.[114] But the rules have not fared well in court in the face of lawsuits by the for-profit college trade association.[115] The first Gainful Employment rule was struck down by a district court.[116] The Incentive Compensation and Misrepresentation rules likewise partially lost a court challenge and were remanded to the Department.[117] As of the publication of this article, the second attempt at a Gainful Employment rule is again in court facing a pending summary judgment motion by the for-profit college trade association.[118]

Embracing the student-as-consumer metaphor in rulemaking and litigation could help the Department surmount these court challenges. The Administrative Procedure Act (APA) standards give the courts a broad, subjective power to review an agency's "rationale" for the chosen remedy in the rule and to evaluate whether the agency has properly addressed counter-arguments raised during the rulemaking process. Because these standards are so broad and so subjective, framing can matter a great deal.

Although multiple doctrines have been used to define the standard of review for agency rulemaking, they can be largely boiled down to whether the agency's rule is "reasonable" or "arbitrary and capricious."[119] Reviewing courts are supposed to give deference to an agency's "reasonable" interpretation, rather than substituting their own judgment about the best solution. Reasonability is an inherently subjective standard.

An agency must also give notice to the public about a proposed rule and respond to any arguments raised by substantial numbers of commenters.[120] In effect, this may allow commenters from industry interest groups, such as the

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[111] 20 U.S.C.A. § 1094(a)(20) (West 2015).

[112] *Id.* § 1094(c)(3)(A) (West 2015).

[113] *Id.* § 1001(a)(2) (West 2012).

[114] Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616 (July 26, 2010) (to be codified at 34 C.F.R. § 668).

[115] *See* Ass'n of Private Sector Colls. & Univs. v. Duncan ("Duncan I"), 681 F.3d 427, 438 (D.C. Cir. 2012); Ass'n of Private Sector Colls. & Univs. v. Duncan ("Duncan II"), No. CV 14-277 (RMC), 2014 WL 4923023, 7–8 (D.D.C. Oct. 2, 2014); Ass'n of Private Colls. & Univs. v. Duncan ("Duncan III"), 870 F. Supp. 2d 133, 148 (D.D.C. 2012).

[116] *See Duncan III*, 870 F. Supp. 2d at 148.

[117] *See Duncan I*, 681 F.3d at 433.

[118] *APSCU Files Motion for Summary Judgment in Gainful Employment Regulation Litigation*, Ass'n of Private Sector Colls. & Univs. (Feb. 6, 2015), http://perma.cc/UKH2-6UBR.

[119] Richard J. Pierce Jr., *What Do the Studies of Judicial Review of Agency Actions Mean?*, 63 Admin. L. Rev. 77, 82, 86 (2011).

[120] 5 U.S.C.A. § 553(c) (West 2015).

for-profit college trade association, to force the agency onto their rhetorical ground. The commenter gets to frame the question, and the agency has to respond. The subjectivity of the standard of review, paired with commenters' ability to set the tone for the debate, may in essence shift the burden of persuasion to the agency if a commenter effectively reframes the discussion. As described in more detail below, the industry neatly performed this trick in the Incentive Compensation rule litigation.

Given the subjectivity and importance of proactive framing in APA litigation, the Department of Education's use of the student-as-consumer framework could provide the agency with more persuasive force, which will help it defend its rules under the subjective APA standards. In fact, the Department has been increasingly adopting the consumer framework. The first Gainful Employment rule in 2011 used the word "consumer" 15 times. The second rule in 2014 used it 113 times.[121] It has also incorporated consumer protection ideas, such as a ban on mandatory arbitration and behavioral economic interventions like "cooling off."[122]

Although the Department has made these initial moves towards a framework of student-as-consumer, it can go further by framing itself as a responsible lender—a logical outgrowth of the student-as-consumer framing. The Department is set to originate over $100 billion in federal student loans in 2015.[123] It manages a total of $744 billion in outstanding direct loans for a total of 28.5 million borrowers.[124] By any measurement, the Department is a very large consumer lender. However, when the Department speaks of the "consumer" in the 2014 Gainful Employment rule, the commercial exchange it has in mind is between the student-consumer and the school. It should now confidently recognize its own role as a responsible lender in the transaction.

The APA challenges to the Incentive Compensation and Gainful Employment rules highlight the opportunity presented by reframing the Department as a responsible lender. The Incentive Compensation rule interprets a fairly straightforward statutory text: the Higher Education Act (HEA) requires that schools agree that they will "not provide any commission, bonus, or other incentive payment based directly or indirectly on success in securing enrollments" as a condition of being permitted to receive federal student loans and grants.[125] The George W. Bush administration promulgated a series of "safe harbor" loopholes to the HEA incentive compensation require-

[121] *See* Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386 (June 13, 2011) (to be codified at 34 C.F.R. § 668); Program Integrity, *supra* note 110.

[122] Term Sheet, U.S. Dep't of Educ. (2014), at 4, http://perma.cc/V8G2-5APW?type=pdf.

[123] U.S. Dep't of Educ., Fiscal Year 2015 Budget Summary & Background Information 46 (2015), http://perma.cc/ZY4Y-68BM?type=pdf.

[124] *Id.*

[125] 20 U.S.C.A. § 1094(a)(20).

ments. This permitted aggressive recruiting to continue, which fueled abusive practices.[126]

The Obama administration promulgated a new Incentive Compensation rule that would have rolled back those safe harbors through a new rule that adhered more closely to the text of the HEA's clear prohibition on all forms of incentive compensation.[127] The Association of Private Sector Colleges and Universities (APSCU), the for-profit college trade association, filed an APA suit against the new Incentive Compensation rule in D.C. federal district court.[128] As a matter of statutory interpretation alone, the new rule seems like it should have withstood legal challenge, since it adheres much more closely to the HEA's plain language. But instead, it was overturned by the D.C Circuit court, and then remanded again by the District Court after the Department attempted to fix the rule.[129]

In the Incentive Compensation cases, APSCU argued that the Department failed to consider the for-profit colleges' argument that the stricter incentive compensation rules would harm "diversity outreach" and their ability to "successfully assembl[e] a diverse student body" and "could have an adverse effect on minority enrollment."[130] The D.C. Circuit ordered the Department to address this argument, which the Department attempted to do through a new Preamble to its regulations.[131] The new Preamble stated that the HEA requires the incentive compensation rule to apply to *all* recruiting activities, including those aimed at increasing diversity, and that all students of all races should be protected from the abuses inherent in incentive-based recruiting. But the district court again remanded the rule, holding that the Department must directly reply to APSCU's argument that the rule could decrease minority enrollment because it does not allow schools to pay recruiters on a per-student basis for increasing minority enrollment. APSCU has made a similar diversity argument in the pending litigation against the second Gainful Employment rule, arguing that the rule hurts minorities because so many minority students enroll in for-profit colleges.[132]

APSCU's gambit seems to be intended to force the Department to state outright that diversity is *not* a goal it seeks to promote at for-profit colleges. Obviously, it would be very difficult for the Department to articulate an anti-diversity position in any context. But the subjectivity of the APA standard of review, coupled with APSCU's ability to frame the issue and force the De-

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[126] *See* Mark Kantrowitz, *Elimination of the Safe Harbors for Incentive Compensation*, FinAid (Apr. 26, 2010), http://perma.cc/9V2J-SAPX.

[127] Ass'n of Private Sector Colls. & Univs. v. Duncan ("Duncan I"), 681 F.3d 427, 433 (D.C. Cir. 2012).

[128] *Id.*

[129] *Id.*; Ass'n of Private Sector Colls. & Univs. v. Duncan ("Duncan II"), No. CV 14-277 (RMC), 2014 WL 4923023, 7–8 (D.D.C. Oct. 2, 2014).

[130] *See Duncan I*, 681 F.3d at 433.

[131] *See* Program Integrity Issues, 78 Fed. Reg. 17,598 (Mar. 22, 2013) (to be codified at 34 C.F.R. §§ 600, 602, 603, 668, 682, 685, 686, 690, 691).

[132] Complaint, Ass'n of Private Sector Colls. & Univs. v. Duncan ¶ 9 ("Duncan IV"), No. 1:14-cv-01870 (Nov. 14, 2014).

partment to respond, led directly to this predicament, which it may also face in the Gainful Employment rule defense.

Employing the student-as-consumer framework could help the Department proactively battle APSCU's appropriation of the "access to education" and diversity framework in both the Incentive Compensation and Gainful Employment rules. The false dilemma between minority access to credit and consumer protection has been raised in many other consumer credit contexts, which should be adopted by the Department as examples. Established legal doctrines, such as the Equal Credit Opportunity Act, help shift the perspective away from access arguments, and refocus on the harm caused to consumers steered into bad financial products on the basis of race.[133] From this viewpoint, relegating students of color to underperforming and overpriced for-profit colleges is a kind of race discrimination and reverse redlining. This kind of behavior is not "diversity outreach." It is akin to discriminatory reverse redlining by a broker or an agent, which is impermissible for a responsible lender to tolerate.

The responsible lender/student consumer framework could also strengthen the Department's position regulating for-profit college loan outcomes through the Gainful Employment rule. Both the 2011 and 2014 Gainful Employment rules seek to condition career education programs' access to federal student loans through outcome-based metrics, including debt-to-earnings ratios after graduation and default rates. The first Gainful Employment rule also attempted to institute a repayment rate metric, which is considered a more accurate tool than default rates to measure student loan performance for all for-profit college attendees.[134] But the district court vacated the rule on the grounds that the Department had not used a correct rationale for setting the repayment rate threshold.[135] Essentially, the court thought that the Department had "graded on the curve" by comparing programs to each other and eliminating the worst performers, rather than evaluating each program on its own merits. The court believed that the plain language of the HEA did not authorize such an application of the law. For the second attempt at a Gainful Employment rule, the Department opted to leave out a repayment rate altogether because it could not come up with a threshold it felt was defensible in court.[136]

If the Department took on the framing of a responsible lender, it might have much greater confidence in its authority to determine performance standards for loan repayment and other Gainful Employment metrics. Lenders and banks manage their loan portfolios closely for their performance, as well as compliance with risk, reputation, and other relevant legal require-

[133] *See, e.g.*, *CFPB Bulletin 2013-02: Indirect Auto Lending & Compliance with the Equal Credit Opportunity Act*, Consumer Fin. Prot. Bureau (Mar. 21, 2013), http://perma.cc/E8F9-TLG5; Warren, *supra* note 73; Elizabeth Warren, *The Economics of Race: When Making It to the Middle Is Not Enough*, 61 Wash. & Lee L. Rev. 1777, 1794–95 (2004).

[134] *See* Letter from AFL-CIO, *supra* note 89.

[135] *See* Ass'n of Private Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 154 (D.D.C. 2012).

[136] Program Integrity, *supra* note 110.

ments. High default and non-repayment rates may indicate a problem with the loan origination process.[137] From this perspective, the Department has the clear discretion to set limits on the performance of its loan portfolio and remove programs that originate pools of bad loans, as part of its legal authority to monitor the "gainful employment" outcomes of its loan portfolio.

IX. The Consumer Protection Division of the Department of Education

The Consumer Protection Division of the Department of Education does not exist. But it should. A reorganization of the Department of Education could help inculcate a strong consumer protection ethos in the agency, and entrench the student-as-consumer model.

Currently, most oversight powers are located in the Federal Student Aid Programs (FSA), a quasi-independent subdivision of the Department of Education created specifically to give more autonomous control over federal student aid. FSA reviews whether for-profit colleges and other schools meet the "program integrity" legal requirements to participate in the federal financial aid program through program reviews of the individual schools via its legal authority to ensure the "integrity" of federal financial aid programs.[138]

In theory, the FSA's operations could entail vigorous enforcement of the Department of Education's suite of program integrity rules that could address for-profit college abuses: the Misrepresentation rule, the Incentive Compensation rule, the Gainful Employment rule, and the 90/10 rule. Violations of these rules should eventually result in the loss of ability to access the federal financial aid programs. Violations detected by FSA could also be referred to other law enforcement agencies with jurisdiction, and to accrediting bodies. FSA also oversees student loan debt collection and student loan servicing, which are also essential consumer protection functions for for-profit college students seeking to access loan discharges to which they may be entitled, or repayment assistance.[139]

However, FSA does not use its potential powers like a strong consumer protection regulator would. Instead, it has historically viewed its "customers" as schools, financial institutions and servicers, and students.[140] Its ability to prioritize consumer protection is thus limited and subject to an obvious

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[137] *See* Maura Dundon & Leslie Parrish, Ctr. for Responsible Lending, Rationale for Repayment Rate Accountability Metric & Threshold for Fall 2013 Gainful Employment Rulemaking 3 (2013), http://perma.cc/C5FM-HPEQ.

[138] *See generally* 20 U.S.C.A. § 1018(b)(2)(A)(vi) (West 2015); 20 U.S.C.A. § 1099(c) (West 2015); Fed. Student Aid, Program Review Guide for Institutions 2009 (2009), http://perma.cc/YH6Q-GZDX?type=pdf.

[139] U.S. Dep't of Educ., Federal Student Aid Annual Report (2013) at iv, http://perma.cc/DL5F-R53Q?type=pdf.

[140] Charmaine Jackson, Cong. Research Serv., The Office of Federal Student Aid: The Federal Government's First Performance-Based Organization 5 (2003) (WikiLeaks Document Release, February 2, 2009), http://perma.cc/3E4M-UZBD?type=pdf.

conflict of interest.[141] FSA has come under fire for its inability to safeguard consumer protections in the context of debt collection for this reason.[142]

Despite its powers, FSA has not been able to make inroads into reining in for-profit colleges. For example, a GAO report recently found that FSA staff responsible for school oversight did not even receive notices from accreditors about school violations of accreditation standards, which should be a key source of data for FSA to review.[143] A second GAO report also found that FSA failed to conduct proper oversight of the Incentive Compensation rule.[144]

The situation is similar to the problem with bank regulators prior to the financial crisis. As Elizabeth Warren observed in the article where she first planted the seed for the creation of the CFPB, banking regulators could not adequately protect consumers because "their main mission is to protect the financial stability of banks and other financial institutions, not to protect consumers."[145] Similarly, the DNA of FSA is to regard colleges, debt collectors, and student loan servicers as its constituents—not to focus on consumer protection for students, beyond getting loan funds swiftly deposited into their accounts.

Senator Warren concluded that "it is time for a new model of financial regulation, one focused primarily on consumer safety rather than corporate profitability."[146] Likewise, the Department of Education should be reformed to include a division specifically intended to oversee consumer protection. These reforms do not need to wait for Congress to act. A presidential Executive Order could mandate the creation of a new consumer protection investigation and enforcement division within the Department.

There is no legal barrier to the creation of a new Consumer Protection Division within the Department of Education. Although FSA does have a specific statutory mandate to monitor the "integrity" and "oversight" of the financial aid programs,[147] this does not constrain the President from creating a new unit that would be charged with vigorously investigating violations of the suite of Department of Education regulations that apply to for-profit colleges. Nothing in the Higher Education Act requires that FSA perform the program reviews; instead, the Secretary of Education delegates this responsibility to FSA.[148] Further, the Secretary has broad authority to prescribe regu-

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[141] *See* Deanne Loonin & Persis Yu, Nat'l Consumer Law Ctr., Pounding Student Loan Borrowers 19 (2014), http://perma.cc/E7TR-XAQY.

[142] *Id.*

[143] *See* U.S. Gov't Accountability Office, *supra* note 42, at 31, 78.

[144] *See* Letter from U.S. Dep't of Educ.'s Office of the Inspector Gen. to James Runcie, Chief Operating Officer of Fed. Student Aid (Mar. 24, 2015), http://perma.cc/SZJ2-3SHD?type=pdf.

[145] *See* Warren, *supra* note 73 (this is the first time Senator Warren called for creation of the CFPB); *see also* Bar-Gill & Warren, *supra* note 102.

[146] Warren, *supra* note 73.

[147] 20 U.S.C.A. § 1018(b)(2)(A)(vi) (West 2015).

[148] *See* 20 U.S.C.A. § 1099(c) (West 2015); Fed. Student Aid, *supra* note 138, at vii.

lations relating to the termination of eligibility to participate in federal financial aid programs.[149]

The Consumer Protection Division could be tasked specifically with investigating and enforcing violations of the Department's consumer protection law and regulations. It could also be charged with collecting student and borrower complaints and forwarding them to other interested state and federal agencies and accreditors. Notably, the division could still have authority to investigate, on an individual basis, whether for-profit colleges "prepare students for gainful employment," even if the Department's Gainful Employment rule never comes to fruition. The Department will still retain that statutory authority under the Higher Education Act, regardless of whether there is a rule interpreting it.[150] Once the division receives evidence of violations, it could recommend that the Secretary terminate or limit the school's eligibility to participate in the federal loan program.[151]

The division would be staffed by an experienced contingent of consumer protection lawyers, drawn from the Department, bank regulators, and state and federal consumer protection agencies, and supported by consultation with the CFPB and FTC. It should also include experienced undercover investigators empowered to covertly monitor colleges' compliance with consumer protection regulations, and be allocated resources to conduct thorough investigations.

The establishment of a consumer protection culture at the Department of Education could help restore the promise of the federal student aid program, and ensure that student loans do what they are supposed to do: help students build a better life for themselves, their family, and the nation.

X. Conclusion

The student-as-consumer framework has the potential to strengthen the integrity of the federal student loan system. Professors and university administrators fear that the notion threatens the purpose of higher education and their academic freedom because it gives students too much power and overfocuses on the monetary returns of college. Social justice theorists worry that student-as-consumer obscures the mission of access to education as a route for equality, and may introduce a notion of "caveat emptor" that shifts the blame to the consumer for choosing poorly in the marketplace. On the other hand, for-profit colleges have thus far succeeded in skillfully using framing to succeed in court by using arguments about access to education and diversity.

Both as a practical, legal matter and a matter of influencing the broader direction of policy, casting the student as consumer and the government as a

[149] *Id.* § 1094(c)(1)(F) (West 2015).
[150] *Id.* § 1088(b)(1)(A)(i) (West 2015).
[151] *Id.* § 1094(c)(1)(F) (West 2015).

responsible lender can move us closer to providing affordable higher education with the risk in the right place. In a policy and legal landscape where the government has been unable thus far to effectively stop for-profit colleges from exploiting the federal loan program, students are consumers who deserve protection. The government should be a responsible lender both enabling students to access education and protecting consumers from harmful loans.