FOR-PROFITS AND THE MARKET PARADOX

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"[W]e do not think it unreasonable for appellant to conclude that the desire for personal profit might influence education goals in subtle ways difficult to detect, but destructive, in the long run, of that atmosphere of academic inquiry..."1

INTRODUCTION

On November 7, 2012, the day following the re-election of President Barack Obama, the stocks of publicly traded For-Profit Colleges & Universities ("FPCUs") plummeted 1.6% to 12%.2 Several of the largest publicly traded FPCUs announced layoffs, school closings, and other operational decisions.3 Career Education Corporation announced it was closing twenty-three campuses and eliminating nine hundred jobs following a 23% drop in student enrollment and a $33 million net loss in quarterly performance.4 Also, Apollo Group, the largest FPCU operator, announced that its quarterly net income plummeted 60%.5 In the wake of this poor performance, particularly at its University of Phoenix campuses,

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4. Perez, supra note 3.
5. Veiga, supra note 3.
Apollo Group announced the closing of 115 locations: 25 main campuses and 90 small, satellite learning centers.6

These FPCU stock declines and the ensuing company responses were, in large part, due to the perception that a victory for the Obama Administration, as opposed to a Romney Administration, would mean stronger regulation and oversight of FPCUs.7 The respective campaigns took fundamentally opposite positions with respect to FPCUs: Democrats adopted a cautious narrative highlighting FPCU abuses, and the Republican ticket optimistically embraced FPCUs as a source of innovation, efficiency, and progress.8

These developments illustrate what can happen when a publicly traded FPCU stock plummets: campuses close and students are given the option to attend inconvenient alternative campus sites or pursue their degrees online.9 The narrative when an FPCU’s stock increases is not much better. Large publicly traded FPCUs focus on increasing enrollments while paying limited attention to retention and support services.10 With publicly traded FPCUs, the shareholder-wealth maximization potential of rapid expansion often supersedes community and pedagogical values.11 This cautionary tale illustrates how the rhetoric of vulnerable student access is overtaken by the reality of volatility, displacement, and further marginalization.

Today, market forces play an ever-increasing role in higher education. This reverses a historical trend characterized by state-centered expansion, public subsidies, and nonprofit organization.12

6. Id.
7. See For-Profit College Shares Tumble After President Obama Reelected, supra note 2.
11. See, e.g., Kelderman, supra note 9 (discussing an FPCU’s attempt to increase student enrollment, and thus profit margins, by shifting from physical classrooms to online courses).
In contrast to waning state influence, the private sector's impact on the United States higher education system has grown significantly, leading to a greater emphasis on competition, strategy, performance metrics, and efficiency.\(^\text{13}\) Within this context, FPCUs are having a transformative impact on higher education; yet this transformation disproportionately impacts vulnerable populations, subjecting them to greater market volatility and risk. The higher education market reflects competition among various types of institutions, such as public four-year colleges, community colleges, private nonprofit colleges, and proprietary schools.\(^\text{14}\) FPCU supporters contend that market competition between FPCUs and traditional colleges will produce better educational outcomes.\(^\text{15}\) They tout the disruptive innovation, reinvention, and efficiency of new digital technology and argue that online educational distribution should be embraced for a host of reasons.\(^\text{16}\)

Perhaps the most popular claim invoked to support the rise of FPCUs and reduce their regulatory burden is that they provide access to higher education for vulnerable students.\(^\text{17}\) Supporters contend that FPCUs fill a vacuum left by traditional higher education institutions. They claim that FPCUs serve disproportionately underserved, vulnerable, and nontraditional student populations and are necessary to meet the growing demand for higher education.\(^\text{18}\) Without greater FPCU participation, supporters contend there would be an undersupply of higher education options.\(^\text{19}\) They therefore assert that regulations, having

\(\text{\textsuperscript{13}}\) See generally Garry W. Jenkins, Who's Afraid of Philanthrocapitalism?, 61 CASE W. RES. L. REV. 753, 755 (2011) (discussing the potential negative consequences of importing for-profit business practices to the nonprofit context).

\(\text{\textsuperscript{14}}\) This Article recognizes that the idea that the United States higher education system functions as a market is a contested claim. But, for purposes of analysis, this Article adopts the market paradigm to explain various types of market failure.

\(\text{\textsuperscript{15}}\) See, e.g., Melissa Korn, For-Profit Colleges Get Schooled, WALL ST. J. (Oct. 24, 2012, 8:41 PM), http://online.wsj.com/article/SB10001424052970203937004578076942611172854.html (attributing the growth in online classes at traditional colleges to competition from FPCUs).


\(\text{\textsuperscript{18}}\) Id. at 137, 139.

\(\text{\textsuperscript{19}}\) See Joe Nocera, How to Improve on an F, N.Y. TIMES, Sept. 18, 2011, at MM64.
the impact of restricting enrollments, harm vulnerable student populations.\textsuperscript{20}

Generally, legal scholars have played a limited role in the ongoing debate concerning FPCUs.\textsuperscript{21} Other academic disciplines have taken the lead, analyzing problems associated with FPCUs and offering various reform options.\textsuperscript{22} The topical legal literature addressing the for-profit phenomenon, however, remains underdeveloped from a theoretical and pragmatic standpoint. Most of the literature concerning FPCUs is descriptive and highlights the abusive practices of for-profit institutions en route to proposing more rigorous reforms for FPCUs.\textsuperscript{23} This approach, singling out for-profit institutions, is incomplete because it fails to address broader market, institutional, and structural issues.

State budget shortfalls have made it extremely difficult for public four-year and community colleges to meet student higher education demand.\textsuperscript{24} This shortage of public options has created opportunities for FPCU growth. FPCU growth is countercyclical in the sense that when the economy slumps people seek additional educational credentials to improve their economic position and

\textsuperscript{20} See id.; Liz Willen, Putting the Brakes on the Growing For-Profit School Industry?, HECHINGER REP. (July 23, 2010), http://hechingerreport.org/content/putting-the-brakes-on-the-growing-for-profit-school-industry_3722/.

\textsuperscript{21} Indeed, much of the legal scholarship regarding FPCUs focuses on specific aspects of regulatory regimes, rather than the broader landscape. See, e.g., Guida & Figuli, supra note 17, at 132; see also Grant MacQueen, Closing Doors: The Gainful Employment Rule as Over-Regulation of For-Profit Higher Education That Will Restrict Access to Higher Education for America's Poor, 19 GEO. J. ON POVERTY L. & POL'Y 309, 310 (2012). But see, e.g., Amanda Harmon Cooley, The Need for Legal Reform of the For-Profit Educational Industry, 79 TENN. L. REV. 515, 519 (2012) (proposing widespread reforms for the for-profit educational sector).

\textsuperscript{22} See generally FOR-PROFIT COLLEGES AND UNIVERSITIES: THEIR MARKETS, REGULATION, PERFORMANCE, AND PLACE IN HIGHER EDUCATION (Guilbert C. Hentschke et al. eds., 2010); WILLIAM G. TIERNEY & GUILBERT C. HENTSCHKE, NEW PLAYERS, DIFFERENT GAME: UNDERSTANDING THE RISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES (2007); Kevin Kinser, From Main Street to Wall Street: The Transformation of For-Profit Higher Education, 31 ASHE HIGHER EDUC. REP. 1 (2006). See also DAVID W. BRENEMAN ET AL., EARNINGS FROM LEARNING: THE RISE OF FOR-PROFIT UNIVERSITIES xii–xv (David W. Breneman et al. eds., 2006).


\textsuperscript{24} See, e.g., Eric Kelderman, As State Funds Dry Up, Many Community Colleges Rely More on Tuition Than on Taxes to Get By, CHRON. HIGHER EDUC., Feb. 11, 2011, at A20; see also Eric Kelderman, Colleges to Confront Deep Cutbacks, CHRON. HIGHER EDUC., Jan. 7, 2011, at A1.
potential. Traditional higher education institutions, such as private nonprofits and public universities, do not provide flexibility or adequately cater to the needs of nontraditional students who may need to work during the day or raise families while furthering their education. Today's public institutions, particularly flagship four-year universities, largely cater to the same student demographics as selective private institutions. To some extent, public institutions have abandoned their public purpose of expanding access in favor of the competitive arms race that higher education has become. These unchecked market forces and competition among institutions further marginalize vulnerable students.

This state of affairs presents an interesting paradox: FPCUs, rather than nonprofits, are becoming a de facto path for many vulnerable students, particularly those of low socioeconomic status ("SES"), minorities, first-generation college students, nontraditional adult students, and veterans. Federal government funding has precipitated the migration of students to FPCUs. Its demand-side subsidization and portable financial aid programs, in most cases, bring benefits to millions of students. But the portable and loan-heavy nature of federal financial aid also has a downside: ill-informed, vulnerable students may be duped into selecting inferior educational options that differentially empower them.

This Article explores how the existing regulatory architecture does not adequately address four important issues surrounding FPCUs: market failures, demography, quality, and stratification. Without addressing these issues, the temptation of opportunism within the proprietary segment of higher education remains great and is perhaps too great to resist. Although FPCUs provide access to underrepresented populations, the regulatory framework when combined with market forces does not, at present, adequately

31. The decision of whether and where to attend college is a daunting task for most students. For many vulnerable students the college decision is even more daunting and akin to navigating a labyrinth.
protect government investments or students, and it does not address the broader issue of higher education stratification. History illustrates that competition alone will not adequately discipline FPCUs catering to concentrations of ill-informed students choosing among available higher education options. This is an issue of interest to the entire nation because it is linked to broader societal issues, such as promoting social mobility, reducing income inequality, and spurring economic growth. Education remains the most powerful tool our society has to address inequality; however, in some instances, FPCU expansion and practices exacerbate inequality and stratification.

Part I of this Article discusses historical attempts to curb for-profit higher education abuses and then describes the current regulatory framework, its development, and its weaknesses. Part II explores higher education market forces and failures that contribute to problems associated with FPCUs. Part III addresses key demographic transformations that are not adequately addressed by the current regulatory framework or institutional practices. Part IV describes quality concerns and the lack of empirical data on FPCU institutional and student outcomes that contribute to abuses and ad hoc higher education choices among vulnerable student populations. Part V examines the relationship between higher education stratification and the role of FPCUs. Finally, the Article concludes by suggesting areas of further research for legal scholars who can make significant contributions to rethinking and designing reforms to shape higher education in the contemporary environment.

I. REGULATORY FRAMEWORK

A. Historical Attempts to Reform FPCUs

Market dynamics, technological change, industry influence, and flawed regulatory design have undermined the effectiveness of reform, despite historical attempts to reign in FPCU abuses. Most existing regulations impacting FPCUs are relatively easy to satisfy or circumvent. In fact, the existing regulatory regime for FPCUs is the outgrowth of a consistent deregulation trend since the 1990s.

The current regulatory attention directed at FPCU abusive practices is not new. In 1897, the president of Northwestern University expressed the following skepticism concerning the quality and abusive practices of trade schools:

32. See Hansmann, supra note 12, at 166–67.
33. See WALTER McMAHON, Higher Learning, Greater Good 1 (2009) ("The net increases in costs to families has been accompanied by a reduction in participation by lower-income groups and minorities, as well as increased reliance on student loans at both public and private institutions.").
34. See HARKIN REPORT, supra note 10, at 156–57 (discussing the deregulation that brought about the present regulatory landscape).
The cause of professional as well as academic education suffers from the want of State supervision. This sort of thing, impossible in Europe, should be made impossible in America. Such a condition of affairs is demoralizing beyond question. The tendency of it is all in the direction of low standards. It imposes on the public a class of educational charlatans and works injury to the students whom it falsely pretends to educate.\(^{35}\)

During World War II, returning veterans used their GI Bill benefits to attend trade schools of questionable quality.\(^{36}\) According to a 1951 report from the General Accounting Office ("GAO"),\(^{37}\) 1.7 million veterans attended for-profit trade schools, but only 20% reported completing their studies.\(^{38}\) This report further found that nearly 65% of the for-profit schools studied engaged in "questionable practices" and wasted government funds.\(^{39}\) These abuses led to policy changes to prevent institutions from being established solely to profit from the payments received by veterans. For example, the Veterans Administration ("VA") enacted a rule called the 85/15 Rule. This rule provided that no more than 85% of an institution's student body could be comprised of veterans receiving VA funding.\(^{40}\) This rule embraced the following rationale: an FPCU with a minimum of 15% nonveterans in attendance, willing to pay their own money for such an education, signaled quality and safeguarded government investment.\(^{41}\)

Prior to 1972, the economic impetus for large, publicly traded FPCUs did not exist because only private nonprofits and public institutions could receive student aid funds under Title IV of the Higher Education Act of 1962 ("HEA").\(^{42}\) The extension of Title IV student aid fund eligibility to FPCUs significantly changed the trajectory of FPCU growth. By the late 1980s, however, significant problems emerged. Between 1989 and 1992, the Senate Permanent Subcommittee on Investigations conducted investigations that

\(^{35}\) WILLIAM K. SELDEN, ACCREDITATION: A STRUGGLE OVER STANDARDS IN HIGHER EDUCATION 49 (1960).


\(^{37}\) Now known as the Government Accountability Office.

\(^{38}\) See HARKIN REPORT, supra note 10, at 153.

\(^{39}\) Id.


\(^{41}\) Id. at 3–4.

uncovered abusive practices by FPCUs. These hearings ultimately led to the 1992 HEA Amendments that detrimentally impacted FPCUs. These reforms took the following shape: (1) an 85/15 rule limiting the amount of Title IV funds a FPCU could receive as a proportion of its revenue; (2) a 50% rule prohibiting institutions from receiving Title IV funds if they offered more than 50% of their programs as distance education programs; (3) a prohibition on institutions in all sectors from receiving Title IV funds if more than 25% of the institution's student loan borrowers were in default; and (4) an incentive compensation ban on paying college recruiters based on how many students enrolled. The impact of these 1992 reforms, however, was short-lived. For nearly a twenty-year period, deregulation significantly weakened the 1992 reforms. Thereafter, massive growth occurred within the FPCU sector until abuses, once again, captured the attention of state and federal lawmakers.

Between June 2010 and July 2012, the Senate Committee on Health, Education, Labor, and Pensions under Chairman Tom Harkin conducted an investigation focusing on the for-profit sector of higher education. The investigation made numerous findings and recommendations known as the "Harkin Report." The for-profit industry largely criticizes the report for being one-sided and singling out the industry. Criticisms aside, the report justifiably focuses attention on large, publicly traded FPCUs. This emphasis seems appropriate because in 2009 approximately 76% of students attending FPCUs attended an institution that was publicly traded or owned by a private equity firm. The focus on publicly traded FPCUs seems justified when one considers the extensive list of abusive practices: high tuition; aggressive and misleading recruiting; low retention rates; low spending on instruction and services; high spending on marketing and profit maximization; questionable academic rigor; lack of student services; poor job placement services; high debt loads; high student loan default rates; and failure of regulation.

According to the Harkin Report, the FPCUs studied employed 35,202 recruiters, compared to 3512 career services staff and 12,452...
support service staff in 2010.\textsuperscript{52} In the 2009 fiscal year, the FPCUs studied spent $4.2 billion, or 22.7\% of all revenue, on marketing and recruiting.\textsuperscript{53} In that same period, publicly traded FPCUs had an average profit margin of 19.7\% ($3.2 billion in pre-tax profit) and paid, on average, $7.3 million to their respective CEOs.\textsuperscript{54} These sobering statistics, at a minimum, suggest misplaced educational priorities in contrast to short-term shareholder interests. Although the Harkin Report did not result in significant reform of FPCUs, it nonetheless created an extensive public record of abuses within the industry that are part of an ongoing reform discussion among multiple stakeholders.

B. Current Regulatory Framework

The existing regulatory framework for FPCUs primarily derives from federal and state lawmakers as well as accreditation agencies. Despite the massive expansion of FPCUs, the current regulatory framework is much weaker than what existed two decades ago. The existing framework is outdated and inadequately addresses market failures, emerging demographics, quality, and stratification. Key elements of the regulatory framework include the Cohort Default Rate, the 90/10 Rule, the Gainful Employment Rule, accreditation, consumer protection, and corporate governance.

1. Cohort Default Rate

In order to receive Title IV student aid funds, all higher education institutions—nonprofit, public, or for-profit—must meet certain Cohort Default Rate thresholds.\textsuperscript{55} No more than 25\% of an institution’s students can default on their loans within two years of entering into repayment.\textsuperscript{56} Repayment obligations are often triggered six months following graduation or upon student withdrawal.\textsuperscript{57} In 2014, the threshold will rise to no more than 30\% of an institution’s students within three years of entering into repayment.\textsuperscript{58} These thresholds are quite modest, easily met, and easily circumvented.

2. 90/10 Rule

The 90/10 Rule limits the amount of Title IV funds an FPCU can receive as a proportion of its revenue.\textsuperscript{59} Specifically, all FPCUs must derive at least 10\% of their annual revenue from non-Title IV

\textsuperscript{52} Id. at 2.
\textsuperscript{53} Id. at 3, 7.
\textsuperscript{54} Id.
\textsuperscript{55} Id. at 150 n.697.
\textsuperscript{56} Id. at 174.
\textsuperscript{57} Id. at 174–75.
\textsuperscript{58} Id. at 175.
\textsuperscript{59} 90/10 Rule, 34 C.F.R. § 668.14(b)(16) (2012).
sources. A one-year failure to comply with the rule’s thresholds results in provisional participatory status in Title IV programs for two years. Two years of consecutive failures to comply results in ineligibility for Title IV funding. The 90/10 ratio curiously excludes GI Bill funds from the 90% threshold of funds that are a windfall for FPCUs. Notably, only three institutions out of 2042 lost eligibility pursuant to this rule in the most recent reporting period.

3. Incentive Compensation Ban

Generally, incentive compensation for recruiters encourages FPCUs to enroll large numbers of students while ignoring other important downstream educational concerns. In other words, “[t]his requirement is meant to curb the risk that recruiters will ‘sign up poorly qualified students who will derive little benefit from the subsidy and may be unable or unwilling to repay federally guaranteed loans.’” The first federal incentive compensation ban appeared in the 1992 HEA reauthorization. In essence, it banned higher education institutions from paying commissions and other forms of incentive compensation based upon securing enrollments or financial aid. This restriction applies to all higher education institutions, not just FPCUs. In 2002, however, twelve “safe harbors,” or exceptions, were introduced that significantly weakened the incentive compensation ban. In October 2010, following a number of high-profile scandals at FPCUs, the Department of Education (“DOE”) issued new incentive compensation regulations that eliminated the safe harbors.

60. Id.
61. HARKIN REPORT, supra note 10, at 156.
62. Id.
64. Mogilyanskaya, supra note 63.
65. United States ex rel. Hendow v. Univ. of Phx., 461 F.3d 1166, 1171–72 (9th Cir. 2006) (exploring allegations under the False Claims Act that the University of Phoenix knowingly made false promises to comply with the incentive compensation ban).
4. Gainful Employment Rule

In June 2011, the DOE adopted the “Gainful Employment Rule” (“GER”) as an attempt to help ensure that FPCU students receive a quality education leading to meaningful job prospects. This rule generated significant attention from industry and other interested parties. For example, the DOE received nearly 90,000 comments prior to publishing the final rule in 2011. The final GER provided that (1) the Student Loan Repayment Rate must be 35% or above; (2) annual loan payments (debt) for graduates must be 12% or less of annual earnings income; and (3) annual loan payments (debt) for graduates must be 30% or less of annual discretionary income. Failure to meet all three of these measures for three out of four years resulted in program ineligibility for Title IV funding. The Association of Private Sector Colleges & Universities (“APSCU”) challenged the GER in APSCU v. Duncan and prevailed. The District Court for the District of Columbia vacated the GER on grounds that the DOE failed to provide sufficient justification for its percentage thresholds for student loan repayments. Consequently, the GER does not currently impact FPCUs.

5. Accreditation

Federal law requires all postsecondary educational institutions to be accredited by “a nationally recognized accrediting agency.” The United States government accredits these agencies by maintaining a list of “reliable” accrediting authorities. Accrediting associations, which are controlled by the institutions they accredit, ostensibly function as a private sector form of quality assurance. Yet they fail to establish objective and clear minimum standards across institutions. Traditionally, they have functioned to assist institutions in defining and meeting their own internal goals rather than providing broader consumer protection.
standards among regional associations allow FPCUs to “accreditation shop” for the most lenient agency.  

6. Consumer Protection

Today’s regulatory environment reflects a lack of meaningful consumer protection against abusive practices, fraud, misrepresentations, and predatory practices. State licensing regimes, attorney general lawsuits, and common law contract claims as well as federal and state consumer protection statutes are not robust enough and too infrequent to provide meaningful relief. Also, 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.

7. Corporate Governance

The prevailing governance regime for publicly traded FPCUs does not necessarily penalize antipublic behavior or harm to third parties. This Article uses corporate governance to describe the systems by which companies are governed that include laws, practices, and norms. The legal framework impacting corporate governance functions both at the state and federal levels. The federal government, to a large extent through the Securities and Exchange Commission (“SEC”), regulates the external trading of securities and disclosure without addressing the internal affairs and operations of the corporations it regulates. Disclosure requirements are generally less intrusive than prescriptive substantive rules and are consistent with market-based theories. Better information, in theory, contributes to healthier markets, and greater disclosure presupposes a lesser need for judicial and regulatory intervention. On the other hand, state corporate law addresses the internal affairs of the corporation, primarily the relationship between shareholders and managers. The content of state corporate law is schematically conservative and provides

79. FPCUs may also purchase struggling nonprofit colleges to retain the accreditation status and then convert the school into a for-profit without seeking reaccreditation. See Cooley, supra note 21, at 565.
81. See Cooley, supra note 21, at 551–57.
82. See generally id. at 527–32 (discussing recruitment tactics and employment prospect).
84. Id.
85. Id.
86. Id.
substantial managerial discretion across a broad range of corporate decisions and activity. 87

For executives at publicly traded FPCUs, this scenario may lead to short termism where managers focus on quarterly earnings and reporting over long-term concerns such as educational quality. 88 Therefore, a permissive corporate governance regime coupled with lax substantive regulation for FPCUs does not adequately address broader public and student concerns. Although nonprofit educational institutions are not immune to governance issues such as agency costs, the idea that a FPCU’s “owner is ultimately in the business to make money will dim the self-same warm glow that a donor seeks in giving” to a traditional college or university. 89

II. MARKET DYNAMICS AND FAILURES

Competition is a permanent fixture of the higher education market. FPCUs are, in part, responding to an opportunity created by traditional higher education institutions. Accordingly, FPCUs cannot be understood or reformed without an understanding of key market failures and dynamics within the broader higher education market. Although some scholars are reluctant to fully embrace the market paradigm to describe the higher education system, the analysis of various types of market failure is nonetheless instructive.

A. Growth of FPCUs

Historically, most FPCUs were privately held with a single or few shareholders. 90 They were primarily trade schools offering job-specific certificate programs. 91 Although FPCUs have existed for well over a century, their enrollment has grown exponentially over the past decade. 92 In 1970, FPCU enrollment was approximately 18,333. Prior to 1972, only nonprofit and public educational institutions could receive Title IV funds under the HEA. 93

Title IV funds in the form of grants, loans, and work study provide support to millions of students and are a bedrock feature of the country’s higher education system. Similar to the GI Bill following World War II, Title IV federal financial aid is portable and

87. Id.
90. See McGuire, supra note 63, at 129.
91. See id.
92. See id.
functions like a voucher program, allowing students to use federal funds at a qualified higher education institution of their choice.\textsuperscript{94}

The post-1972 expansion of Title IV fund eligibility to FPCUs marks a watershed moment in the growth trajectory of for-profit higher education.\textsuperscript{95} Even at the time of this eligibility expansion, the Senate's Committee on Labor and Public Welfare expressed concern that for-profit schools might overreach with their selling and advertising practices while offering an inferior education.\textsuperscript{96} The availability of federal monies via grants and loans provided strong economic incentives and opportunities for for-profits to attract and compete for low- and moderate-income students. By 2009, enrollment spiked to 1.85 million, whereas FPCU enrollment constituted only 0.2% of enrollment at all degree-granting institutions in 1970.\textsuperscript{97} By 2009, the FPCU proportion of total enrollment at all degree-granting institutions grew to 9.1%.\textsuperscript{98} These numbers actually understate the rate of FPCU enrollment growth when one considers that FPCU enrollments more than doubled over the ten-year period from 2000 to 2010.\textsuperscript{99} Leading this growth were the fifteen largest publicly traded FPCUs, which accounted for approximately 60% of FPCU enrollment in 2008–09.\textsuperscript{100} The quintessential example of a large, publicly traded FPCU is the Apollo Group, which owns and operates the University of Phoenix and boasted net revenues of $4.7 billion in 2011.\textsuperscript{101} Today, the rapid expansion of publicly traded FPCUs is largely driven by online degree programs. FPCUs are moving aggressively into associate's and bachelor's as well as graduate and professional degree programs.\textsuperscript{102} The profit potential of online education has attracted investor capital including institutional investors, such as mutual funds and pension funds, as well as private equity firms.\textsuperscript{103}

Publicly traded FPCUs are for all intents and purposes supported by federal taxpayer dollars. Their dependence on federal funds cannot be understated. The higher education access rhetoric touted by FPCUs must be evaluated with consideration of the fact that FPCUs receive a windfall from government sources. In 2008–

\textsuperscript{94} McGuire, supra note 63, at 122 ("Between 1998 and 2008, enrollment at for-profit schools increased by 225 percent; by the end of that period enrollment totaled nearly twenty million students.").
\textsuperscript{95} Id. at 123 & n.26.
\textsuperscript{96} S. REP. No. 92-346, at 51 (1971).
\textsuperscript{97} Deming et al., supra note 63, at 6.
\textsuperscript{98} Id.
\textsuperscript{99} See id. at 2 (stating that fall enrollments accounted for by for-profit educational institutions increased from 4.3% in 2000 to 10.7% in 2009).
\textsuperscript{100} Id. at 3. On the other hand, the median Title IV-eligible FPCU had a fall 2008 enrollment of 172 students. Id.
\textsuperscript{101} Apollo Group, Inc., Annual Report (Form 10-K), at 5 (Oct. 22, 2012).
\textsuperscript{102} See McGuire, supra note 63, at 130.
\textsuperscript{103} See HARKIN REPORT, supra note 10, at 17.
2009, FPCUs accounted for 24% of all Pell Grant disbursements and 26% of all federal student loan disbursements. During the same period, FPCUs accounted for only 12% of all enrolled students. Historically, veterans have been especially susceptible to proprietary school abuses. Following World War II, the GAO investigated proprietary trade schools where veterans used their GI Bill funds. It found inferior educational quality among the proprietary trade schools and deemed this to be a misuse of federal funds. In the first year of the Post-9/11 GI Bill, FPCUs accounted for 36.5% of benefits disbursed. Veterans remain a key target student population for FPCUs.

The most significant FPCU statistic concerns student loan default rates. FPCU attendees account for 47% of all federal student loan defaults, and 24.9% of students enrolling in an FPCU default within three years of entering repayment. These default rates are even more problematic considering that 50% of FPCU students do not graduate. In light of these problems, most of the federal focus has been on safeguarding federal dollars.

B. The Publicly Traded FPCU Business Model

Publicly traded FPCUs reflect a tension between investor concerns and the broader public interest. They account for the substantial growth in the for-profit higher education industry, particularly expanding enrollment through online degree programs. These large FPCUs are not committed to a charitable purpose; their commitment ultimately runs to shareholders, especially institutional investors. They lack diversified revenue streams and rely heavily on government aid. For many businesses, this is a flawed and unsustainable business strategy.

104. Deming et al., supra note 63, at 10.
105. Id.
106. See HARKIN REPORT, supra note 10, at 153 (citing CHARLES A. QUATTLEBAUM LEGISLATIVE REFERENCE SERV., EDUCATIONAL BENEFITS FOR VETERANS OF THE KOREAN CONFLICT (1952)).
107. Deming et al., supra note 63, at 10.
108. Federal loans obviously present greater problems for students compared to grants and other forms of student aid.
109. Deming et al., supra note 63, at 11–12.
110. Drowning in Debt: Financial Outcomes of Students at For-Profit Colleges: Hearing Before the Subcomm. on Health, Educ., Labor, & Pensions, 112th Cong. 9 (2011) (statement of Pauline Abernathy, Vice President, Institute for College Access and Success) (stating that the six-year graduation rate for first-time, full-time bachelor’s degree students is 22% at four-year career colleges).
111. HARKIN REPORT, supra note 10, at 17.
112. Hansmann, supra note 12, at 166.
C. Nonprofit Versus For-Profit Form

Altruistic perceptions aside, the distinction between traditional colleges and FPCUs is somewhat blurred despite the different treatment of nonprofit higher educational institutions under the Internal Revenue Code and the HEA.

It is inaccurate to say nonprofits do not pursue profit. There is no legal requirement for nonprofits to operate at a loss to achieve exemption. Many educational institutions sell educational services and products to students much in the same fashion as commercial businesses like IBM. In carrying out their charitable pursuits, nonprofit educational institutions engage in a range of commercial activity that includes directly providing services to students or, pursuant to an arm's-length agreement, outsourcing the provision of services to a for-profit entity. Therefore, it is difficult to draw a bright line between nonprofit and for-profit commercial activity across a continuum. Similarly, it is difficult, as a practical and legal matter, to identify the point at which an organization goes beyond its exempt charitable purposes and acts primarily as a for-profit enterprise.

Under section 501(c)(3) of the Internal Revenue Code, charitable organizations must meet certain standards for exempt status, such as a charitable purpose like education, an absence of private inurement, and compliance with lobbying limits. The tax-exempt status of traditional higher education institutions is often justified because the institutions produce a service or product valued by a segment of society that is undersupplied by the private market and undersupported by the government. The historical tax exemption for private educational institutions dates back to colonial times where religious and educational institutions were exempted from local taxes. This exemption derived from the religious nature of educational institutions that primarily trained clergymen. Notwithstanding the historical or present rationales for nonprofit status, there is the strong tendency to associate nonprofits with a sense of altruism that is absent from for-profit firms. Nonprofit

115. See Colombo, supra note 113, at 848–49 (discussing the lack of uniformity in determining tax exemption based solely upon the degree of commercial activity).
116. See id.
117. Id. at 845–46; see also Treas. Reg. § 1.501(a)-1 (as amended in 1982); id. § 1.501(c)(3)-1 (as amended in 1961); id. § 53.4958-2 (as amended in 2008).
119. Id. at 844.
120. Id. at 844–45.
higher educational institutions, unlike FPCUs, receive significant donations from third parties.\textsuperscript{121} To an extent, nonprofit status may serve as a crude heuristic for quality in the higher education context.\textsuperscript{122} One can argue that nonprofit organization limits managerial incentives to exploit students and makes managers less sensitive to profit maximization.\textsuperscript{123} Instead, nonprofit organization can make managers more responsive to quality concerns.

\textbf{D. Competition}

When analyzing the impact of FPCUs, it is important to identify the specific higher education segment within which FPCUs operate without being overbroad. Many people attend for-profit institutions, complete their degrees, secure better jobs, and enhance their earnings. Having said that, abuses seem most prevalent among publicly traded, rather than privately held, FPCUs. Two-year for-profit institutions actually have significantly higher completion rates (i.e., 61.7\%) than public two-year community colleges (i.e., 36.3\%).\textsuperscript{124} Four-year for-profit completion rates (i.e., 42.7\%), however, are significantly lower than those of four-year private nonprofit (i.e., 71.5\%) and four-year public institutions (i.e., 60.5\%).\textsuperscript{125} Publicly traded FPCUs are the main target for regulators and the press. This focus is important and has implications for reform design. Regulators must choose from two narratives or a mixture thereof: a narrower bad apples reform narrative or a more extensive systemic reform narrative. In light of the former, one regulatory alternative is perhaps to shrink the FPCU sector, squeezing out the most problematic schools.\textsuperscript{126} But, as described in this Article, such an approach simply addresses yesterday's issues, ignoring current market and business dynamics.\textsuperscript{127}

Presently, FPCUs do not directly compete with selective higher education institutions and lack the reputational capital to do so. Instead, they compete primarily with nonselective institutions such as community colleges. For-profits, however, have recently expanded their presence into four-year degrees where they compete

\begin{itemize}
  \item \textsuperscript{121} See \textit{id.} at 881–85 (explaining the significance of third-party donations for certain nonprofit institutions).
  \item \textsuperscript{122} Hansmann, \textit{supra} note 12, at 170.
  \item \textsuperscript{123} See \textit{id.} at 164 ("[P]ersonal pride and satisfaction from providing high-quality services are important incentives for nonprofit managers.").
  \item \textsuperscript{124} \textsc{Nat'l Student Clearinghouse Research Ctr. & Project on Academic Success, Ind. Univ., Signature Report: Completing College: A National View of Student Attainment Rates} 27 (2012), available at http://www.studentclearinghouse.info/signature/4/.
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} See Hansmann, \textit{supra} note 12, at 174 (discussing how regulation adopted to increase the effectiveness of competition between FCPUs might shrink the for-profit education sector).
  \item \textsuperscript{127} See discussion \textit{infra} Part II.E.
\end{itemize}
with nonselective four-year colleges and access-oriented institutions such as Historically Black Colleges and Universities ("HBCUs"). The degree of competition between FPCUs and traditional institutions also depends upon the degree type or certificate program (e.g., nursing, education, business). Some experts predict that FPCUs will continue to displace or acquire less selective nonprofit colleges, but not seriously challenge selective institutions in the future.

E. Nonprofit Outsourcing and Collaboration

Even if the most recent attempts to reform FPCUs, such as the Gainful Employment Rule, were implemented to perfection, they are unlikely to work. The regulatory framework is outdated and does not adequately address outsourcing, strategic partnerships, and other business collaborations that blur the lines between FPCUs and traditional colleges. In order to remain eligible for exemption, charitable organizations must "primarily" pursue a charitable purpose. When carrying out such pursuits, nonprofits engage in a range of commercial activity that includes directly providing services or, pursuant to an arm's-length agreement, outsourcing services to a for-profit entity. Accordingly, a nonprofit institution may partner with a for-profit firm to provide distance education services to students. These strategic partnerships provide benefits beyond serving as an additional revenue stream for FPCUs and traditional institutions; they allow FPCUs to virtually circumvent existing regulations. By collaborating with established traditional institutions, FPCUs, which often lack reputational capital, can access new "higher-end" student populations and market segments. Similarly, traditional institutions are leveraging FPCU operational expertise and co-opting an array of FPCU business strategies to grow revenue streams and reach new student populations at lower costs. These new business models fall

128. HARKIN REPORT, supra note 10, at 19; Goldie Blumenstyk, Tom Joyner Venture Will Help Black Colleges Start Online Programs, CHRON. HIGHER EDUC. (Sept. 2, 2010), http://chronicle.com/article/article-content/124294/ (describing HBCUs' attempts to compete with for-profits by creating online programs).

129. Hansmann, supra note 12, at 180.


131. Id. at 1082, 1085–86.

132. Id. at 1078.

133. For example, Duke University's Fuqua School of Business offers a "Weekend Executive MBA" program, dividing instructional time between on-campus and online learning. Weekend Executive MBA, DUKE FUQUA SCH. BUS., http://www.fuqua.duke.edu/programs/duke_mba/weekend_executive/ (last visited Mar. 12, 2013).
outside the ambit of many current and proposed reforms.  

F. Market Failures

Increasingly, society and lawmakers view higher education as a market, an industry, and a private good. As this market perspective gains traction, students are likely to be viewed more as an analog to customers in the commercial context. A higher education system dominated by market-based forces has significant implications for how institutions serve, attract, and cater to students. The existing regulatory regime for FPCUs and reform discussion misunderstand the unique nature of the higher education market, student choices, and various types of market failure. Students and families, for a range of reasons, may harbor preferences for various types of higher education institutions. Yet the important question to ask is why students, in various demographics, hold certain preferences or cluster at certain types of institutions. Higher education exhibits more market competition and less government intervention than K-12 education. Seemingly, privatization and market-based reforms are a more natural fit for the higher education context. But, the potential of market-based reforms is limited by an assortment of well-documented market failures.

1. Information Asymmetries

The legal and social science literature on information asymmetries is quite extensive. Students from vulnerable backgrounds often lack key information concerning higher education opportunities that would allow them to make informed decisions about college. In addition, they often lack social capital, that is, the familial and extrafamilial networks, through which they can gather important information concerning higher education. A wealth of research shows that these students approach the college decision in

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134. One example of this trend is the Semester Online collaboration between ten universities, "offering about 30 online courses to both their students—for whom the classes will be covered by their regular tuition—and to students elsewhere who would have to apply and be accepted and pay tuition of more than $4,000 a course." Hannah Seligson, University Consortium to Offer Small Online Courses for Credit, N.Y. TIMES (Nov. 15, 2012), http://www.nytimes.com/2012/11/16/education/duke-northwestern-to-offer-semester-online-classes.html?_r=0.


137. For two examples of this, see generally BRENEMAN ET AL., supra note 22 and Cooley, supra note 21.

a more ad hoc manner.139 Furthermore, the nation's public schools are ill-equipped to provide individualized counseling to address students' academic and financial needs.140 This dearth of adequate counseling is actually heightened for nontraditional students who are further removed from secondary school.141 This scenario makes them more prone to being misled by or misinterpreting information concerning FPCUs.

2. Experience and Credence Goods

Higher education exhibits characteristics of what economists call experience and credence goods.142 Experience goods are goods whose quality is not discernible until after use.143 Credence goods are goods whose quality is difficult to ascertain even long after actual use, such as certain medical, legal, and automobile mechanic services.144 The difficulty students have in discerning educational quality makes them susceptible to opportunism by FPCUs much in the same way consumers could be duped into purchasing unnecessary automobile mechanic services or overpaying a law firm for superfluous legal services. Preferably, students and their families desire to make informed, ex ante decisions regarding the quality of educational institutions. When faced with incomplete information concerning product or service quality, students must rely on an array of crude heuristics such as reputation, recommendations from friends, and third party ranking systems. Unlike selective higher education institutions, where third party rankings (e.g., U.S. News & World Report and college guidebooks) serve as a proxy for quality, the information available concerning FPCUs and other nonselective higher education institutions is sparse and often unreliable.145 Accordingly, there are perverse incentives for FPCUs to offer low-cost, inferior services because the prospect of student discernment of quality is unlikely. At traditional institutions, tuition rarely exceeds total education costs due to institutional subsidies.146 FPCUs, however, do not subsidize

140. Simmons, supra note 138.
142. Here, the word "goods" is used to describe both tangible products and services.
145. See Stratford, supra note 49.
146. DELTA PROJECT ON POSTSECONDARY EDUC., COSTS, PRODUCTIVITY, AND ACCOUNTABILITY, WHO PAYS FOR HIGHER EDUCATION?: CHANGING
a meaningful portion of total educational costs. Instead, FPCUs charge tuition that normally exceeds total education costs. Within this context, hard-selling techniques used by FPCUs are not surprising; they are expected.

3. *Positional, Veblen, and Associative Goods*

Higher education, particularly at selective traditional private colleges, does not necessarily become less attractive because of its price. Normally, a lower cost can make a product or service more appealing to consumers. But, in the selective segment of the higher education market, a lower price may connote inferior quality.

Selective higher education institutions often function as positional goods, deriving their value largely from their ranking or desirability relative to other higher education institutions. Many selective schools fill their classes with a majority (e.g., two-thirds) of full-paying students who are not price sensitive. Selective and nonselective schools, generally speaking, market to different student demographics. The desirability and scarcity of selective college spots allows prestigious universities, in theory, to extract higher rents.

Thorstein Veblen, over a century ago, coined the term "conspicuous consumption" to describe consumer behavior where goods are purchased in part because they serve as wealth in evidence or status. Here, a higher price might generate more status. Veblen reasoned that people desired to rise into the upper classes and would emulate the purchasing behavior of the upper classes. Pierre Bourdieu embraces a similar perspective viewing higher education as a tool for cementing class distinctions.

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147. Id.
148. In 2000, Ursinus College, a small Pennsylvania liberal arts college, raised its tuition and fees roughly 18%. In the wake of this increase, Ursinus experienced a marked increase in applications. See Jonathan D. Glater & Alan Finder, In Tuition Game, Popularity Rises with Price, N.Y. TIMES, Dec. 12, 2006, at A1.
149. For a discussion of positional goods, see Fred Hirsch, Social Limits to Growth (1977) and Richard H. McAdams, Relative Preferences, 102 YALE L.J. 1, 18-26 (1992).
152. Id. at 81.
According to Henry Hansmann, higher education is an associative good where students and their families are not only interested in the price or the quality of instruction a college offers but also the characteristics of a college’s other students. A college’s most valuable resource is, perhaps, its student body. The associative character of higher education distinguishes it from other goods and services in the standard commercial marketplace. There is a strong tendency for similarly situated students to cluster at selective schools. Hansmann asserts that this phenomenon leads to greater stratification across various educational environments on the basis of personal characteristics such as SES. Many students’ parents perceive that admission to an elite college all but guarantees access to the nation’s top corporations as well as graduate and professional schools. This perception, to a large extent, is rooted in truth: a student’s classmates have a strong influence on his or her educational and social experiences and his or her social capital, as well as his or her personal and professional reputations.

Ironically, low-SES students, who according to several studies have the most to gain from access to selective higher education institutions from a socioeconomic advancement perspective, remain in short supply at selective higher education institutions. Instead, low-SES students are overrepresented at community colleges, for-profit colleges, and vocational schools despite demonstrating a strong desire to attain a bachelor’s degree. The above-mentioned higher education dynamics and market failures contribute to and reinforce stratification patterns among demographic groups. They also reflect how the market’s invisible hand may run counter to broader community and societal goals.

155. See Pusser, supra note 154.
156. Hansmann, supra note 154, at 12.
157. Id. at 11; see also Pusser, supra note 154.
159. Hansmann, supra note 154, at 11; Pusser, supra note 154.
160. Although vulnerable students have shown the greatest increase in the desire to attain a bachelor’s degree, they remain much more likely to end up attending a two-year college, a for-profit college, or no college at all as compared to better-situated students who shared the goal of attending a four-year college. See Jenny Nagaoka et al., The Consortium on Chi. Sch. Research at the Uni. of Chi., Barriers to College Attainment: Lessons from Chicago 4 (2009), available at http://www.americanprogress.org/wp-content/uploads/issues/2009/01/pdf/ChicagoSchools.pdf.
III. Demography

The United States once led the world in higher education completion. Yet, today its standing has declined relative to other industrialized nations. In 1995, the United States was tied for first in college graduation rates, but by 2006 the United States had fallen to fourteenth.\footnote{161} In 1970, 30% of all college students worldwide were enrolled in colleges in the United States.\footnote{162} By the 2001–02 academic year, however, the United States enrolled less than 15% of the world's college graduates.\footnote{163} In order to forestall this trend, the Obama Administration developed its goal to lead the world in college graduates by 2020.\footnote{164} This goal promotes the national interest of generating economic growth.\footnote{165} Achieving this goal, however, hinges on two important things: (1) FPCUs educating greater numbers of students to offset supply shortfalls caused by decreases in state funding to public colleges and shifts in public college priorities; and (2) expanding higher education attainment for vulnerable student populations, such as veterans, low-income and working-class students, students from underrepresented minority groups, first-generation college students, and nontraditional, adult students.\footnote{166}

Most of the relevant higher education legal literature focuses on the actions of a relatively small group of selective institutions.\footnote{167}
For example, the preferential admissions debate focuses on selective institutions that are often ranked by *U.S. News & World Report* and other college guidebooks. An education at a selective college is one of the most prized resources among middle- and upper-class families. Yet, most students—that is, approximately 75%—attend nonselective institutions with relatively open admissions. Limited attention is given to what happens to students who attend higher education institutions “off the grid”—that is, institutions other than selective colleges. There are approximately seventeen million undergraduate students in the United States, yet only a fraction of this number, nearly 25%, fit the traditional stereotype: the dorm-living, full-time student receiving significant financial support from parents. Actually, fewer than 14% of undergraduate students live on campus, and 82% of undergraduates work either part-time or full-time while enrolled in college to offset costs. A majority of students must balance real-world pressures of education, family, and work that, in turn, limit their degree of academic engagement. These competing demands simultaneously transform the structure of undergraduate education for many students. Accordingly, many students delay or postpone their college enrollment, pursue a low-cost option of two-year community college with thoughts of transferring to a four-year university, or cycle in and out of college. Research reveals that these student response patterns may, in theory, appear cost-effective, but in practice they lengthen the time to degree completion and significantly decrease the likelihood of attaining a degree.

For-profits contend that they serve different and more challenging student demographics in contrast to traditional
institutions. This contention is largely correct. Approximately 65% of FPCU students are twenty-five years old or older; this same age group constitutes 31% of students at traditional four-year colleges. FPCU students are also more likely to be minorities. For example, FPCU students were 22% African American in 2009, compared to 13% for all of higher education. FPCU students were 15% Hispanic in 2009, compared to 11.5% for all of higher education. Low SES is the most salient, demographic characteristic among FPCU students. A significant number of FPCU students are financially independent or come from low-income families. Notably, 79% of FPCU students financed their education through Pell Grants in 2009.

IV. QUALITY

Ostensibly, FPCUs are an important pathway for many vulnerable students, but only if they provide tangible value and opportunities for students. Although FPCUs highlight their positive impact on vulnerable student populations, there is a dearth of empirical data supporting this contention, particularly with respect to quality-related outcomes such as employment, income, and wealth. In addition to simply desiring better data regarding the quality of FPCUs, there is a general need for an improved higher education information infrastructure to allow for greater transparency, sophisticated analyses, and more useful assessments. There is little comparable evidence of college performance across higher education institutions. Privacy laws, inter alia, stand in the way of collecting meaningful data at the student level. In certain instances, higher education institutions have lobbied against greater data collection and transparency. Critics assert that such resistance and expressions of solidarity toward poor-performing higher education peers are an exercise in self-sabotage. Ultimately, there is a need to creatively use existing databases and other resources to link the approximate $155 billion in federal higher education spending to meaningful results. Proprietary FPCU
institutional level data on student populations could also inform academic research and the public, especially in the absence of publicly available data and robust disclosures.

Even if adequate data were available, the dearth of meaningful metrics remains an obstacle. Developing better metrics and methodologies to measure FPCU quality is complicated by a lack of consensus on what constitutes FPCU quality. Is it limited to instruction and sharing knowledge? Does it involve graduation rates or longer-term criteria? Does it include intangible factors like social capital? Despite their popularity, measures such as FPCU enrollments and degree completions alone are insufficient quality measures that fail to incorporate downstream outcomes (e.g., loan defaults, wage growth, career opportunities). Some critics argue that completion measures are flawed because they punish institutions based upon their student body demographics rather than their actual performance.\textsuperscript{186} They also assert that an overemphasis by federal and state policymakers on “degree completion” and “time-to-degree” measures could undermine access for vulnerable students as institutions “move upmarket” and enroll fewer minorities and low-income students.\textsuperscript{187} These concerns are overstated in light of current FPCU student demographics and FPCU overreliance on federal need-based aid sources.

Additional quality assurance measures beyond information disclosures are also needed. Such measures might include enhancing state licensing regimes; establishing more rigorous accreditation standards; conditioning federal funding on reasonable performance-based goals and metrics; creating substantive minimum standards for student services such as tutoring, financial aid counseling, and career counseling; and mandating preemptive industry self-regulation, including robust best practices to enhance FPCU reputations.

V. STRATIFICATION

College access and completion have two important dimensions—a quantitative dimension related to the number of students who matriculate and complete college and a qualitative dimension that relates to the quality of the educational setting students enter. A deeper examination of the entire higher education market reveals that vulnerable students with the greatest needs often receive an inferior education and enter educational settings that differentially empower them economically, politically, and socially. Without a broader picture of the higher education landscape, regulation and

\textsuperscript{186} Guida & Figuli, \textit{supra} note 17, at 132.

\textsuperscript{187} See, \textit{e.g.}, \textit{id.} at 145–50 (discussing how the Gainful Employment Rule and the 90/10 Rule actually serve to undermine that which they were designed to achieve).
reform are likely to attend to the concerns of a privileged minority of students as well as distort important debates surrounding college access and affordability.\(^\text{188}\)

The existing regulatory architecture and institutional practices accept a status quo where demographic groups cluster in certain educational environments. Affluent students cluster at four-year public and private universities, whereas working class, low-income, veterans, and underrepresented minority students cluster at two-year community colleges and FPCUs.\(^\text{189}\) For example, only 17% of students with a family income of $120,000 and above attend public two-year colleges.\(^\text{190}\) Only 1% of these students attend FPCUs.\(^\text{191}\) This discrepancy is troubling because it also suggests that only 1% of this socioeconomic cohort would use their own money to pay for an FPCU education when presented with other options.

These vivid stratification patterns raise questions concerning the traditional notion of education as a tool to address social inequality: Does the United States have two higher education systems—one for the vulnerable and one for the privileged? Is the higher education system a sorter along class, racial, and other demographic lines rather than a "great leveler"? Do we have different educational goals and expectations for different demographic groups (e.g., vocational versus liberal arts, online versus traditional instruction, selective versus nonselective, and workers versus leaders)? To a certain degree, the answer to all of the above questions is in the affirmative. Consequently, FPCUs are a key part of the debate on higher education stratification.

**CONCLUSION**

Although legal scholars have vigorously debated and explored issues of college access at selective colleges and universities, they have largely ignored the plight of the other 75% of students who make up our higher education system: students attending nonselective, traditional institutions and FPCUs. The above analysis of FPCUs reveals how outsourcing the fate of society's most vulnerable students to greater market risk, volatility, and failures may prove inconsistent with long-term individual and societal interests. Further research on higher education market failures,

\(^{188}\) Attewell & Lavin, *supra* note 170, at 86–87.


\(^{191}\) *Id.*
demographic shifts, quality, and stratification within the higher education sector is needed to address the new reality characterized by waning state influence and the growing influence of private forces. Legal scholars must account for and examine these market forces in order to formulate forward-looking higher education reforms that are adaptable to the modern context. The adoption of the market lexicon is not a capitulation to the market paradigm but instead one tool for better understanding market failures, imperfections, deficiencies, and of course, improvements.