Consumer Expectations and Consumer Protection

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Abstract

Regulators go to considerable lengths to shape specific product choices—the homes we buy, which college we attend, how we save for retirement. Yet the primary governmental mechanism shaping consumer choice may be our general expectations—our reasons for purchasing a home or higher education at all. This is consumer law's duality: consumers have great expectations, forged in part by the very same governmental actors that fashion legal mandates to protect them.

Divorced from conventional financial understandings, these great expectations are often premised on ideologies such as "property as masculinity" and "higher education as equal opportunity." This Article describes how the administration of these expectations—in higher education, homeownership, and retirement savings—limits the efficacy of consumer protection law's already problematic focus on disclosure.

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INTRODUCTION

A puzzling duality defines American consumer protection. On the one hand, agencies fill the Federal Register with reams of rulemaking to combat information asymmetries. On the other, these agencies perpetuate general consumer expectations in those very same markets. A large body of existing work analyzes the inefficacy of information-based regulation[1]—yet it neglects this Janus-faced institutional design and fails to reckon with that design's implications. Scholars may focus on agencies sharpening disclosures around adjustable mortgage interest rates, but what explains an agency's simultaneous insistence that homeownership defines not only American dreams, but also its morality?[2]

The Founding Fathers did not declare the value of higher education and homeownership at America's beginning. Rather, over the last century, governmental actors—including presidents, secretaries, and

1 *See infra* notes 10–19 and accompanying text.

2 *See, e.g.*, *Homeownership: The American Dream*, HUD USER, https://www.huduser.gov/portal/pdredge/pdr-edge-frm-asst-sec-081318.html [https://perma.cc/BC87-D2XB]; *infra* notes 201–05 and accompanying text.

agencies—have largely reinforced, and sometimes originated, general consumer expectations. For example, consider the expectation that homeownership and higher education yield universal rewards.[3] Americans largely remain loyal to the higher education and housing markets—and markets they are—despite financial downsides in each sector.[4] Those most likely to be affected by inferior colleges and unaffordable mortgages are often those most attached to beliefs in their importance.[5] These expectations overwhelm consumer protection law's efforts to focus attention on product-specific information.[6]

Contemporary information regulation has attracted scholarly attention, but consumers' great expectations have not.[7] Prominent critics of disclosure describe complex consumer decision making and criticize inscrutable credit card and cellular phone disclosures.[8] In the strong words of such critics, "[n]ot only does the empirical evidence show that mandated disclosure regularly fails in practice, but its failure is inevitable."[9]

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3 *See* discussion *infra* Sections II.A.3, II.B.3; *see also* Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2317 (2001) (describing how, with regard to the Clinton administration, the president's "methods of control necessarily involved [the president] himself . . . [and] [b]ecause he signed the directives and he made the public announcements, presidential control of administration became more personal—became, in fact, more presidential—than before.").

4 *See* discussion *infra* Sections II.A.3, II.B.3.

5 *See* discussion *infra* Section II.A.3.

6 *See* discussion *infra* Sections II.A.2, II.B.2, II.C.2; *see also* Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. Chi. L. Rev. 1309, 1311 (2015) (noting how "regulators seem intent on doubling down on disclosure").

7 For example, in *The Failure of Mandated Disclosure*, Omri Ben-Shahar and Carl E. Schneider only tangentially touch upon the role of prior expectations. 159 U. Pa. L. Rev. 647 (2011). "In short, people misunderstand mandated disclosures because they lack or misunderstand background information and because they have no theories, or the wrong theories, for interpreting what they are told." *Id.* at 717. The word "expectations" is found only thrice in the article. *See id.* at 658, 668, 725. Similarly, there is no discussion of the systematic role of prior beliefs or their historical or administrative contours in the failures of mandated disclosure.

8 *See* Margaret Jane Radin, Boilerplate (2013). In this latest tome on consumer protection, Radin extends her earlier literature on commodification in American law to argue that boilerplate contracts and incomprehensible disclosures in consumer markets strip individuals of rights without consent. *See id.* at xvi. Radin illuminates the historical and normative force of these rights, yet she does not directly address how historical ideologies or expectations inform consumer engagement with contracts and disclosures affecting those rights. *See id.* at 19–32; *see also* Ben-Shahar & Schneider, *supra* note 7, at 651 (discussing the regulatory failure of mandated disclosure without mention of such historical ideologies or expectations).

9 Ben-Shahar & Schneider, *supra* note 7, at 651; *see also id.* ("[M]andated disclosure rests on false assumptions about how people live, think, and make decisions . . . [and] on false assumptions about the decisions it intends to improve. . . . [I]ts success requires an impossibly long series of unlikely achievements by lawmakers, disclosers, and disclosees."); *id.* at 675 ("But even for food labeling—the simplest . . . of daily disclosures—evidence is mixed."). *But see* Richard Cras-

To be sure, there are circumstances in which information disclosure can change consumer decisions and the product offerings themselves.[10] Health care report cards change plan choice,[11] and home energy reports on peer usage can reduce energy consumption.[12] Restaurant hygiene disclosure appears to have mixed effects,[13] while nutritional labeling likely affects salad dressing choice.[14] Yet these are small potatoes—the daily expenses that do not change our lives. What works in high-frequency, low-investment markets may fail in low-frequency, high-investment, life-changing markets such as higher education and homeownership.[15]

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well, *Static Versus Dynamic Disclosures, and How Not to Judge Their Success or Failure*, 88 WASH. L. REV. 333, 351–63 (2013) (criticizing the presumption that disclosures are ineffective and advancing the need for scholars to distinguish between dynamic and static effects of disclosures).

10 Administrative law scholars have suggested a related but distinct point that "disclosures about [interest] group's membership, funding, and internal governance" could educate agencies, including consumer protection agencies, "who may be unaware of the internal dynamics of groups, especially those they infrequently encounter." Miriam Seifter, *Second-Order Participation in Administrative Law*, 63 UCLA L. REV. 1300, 1307 (2016). Such a framework moves beyond regulated party disclosure rules to explore how the regulatory process itself could benefit from "second-order participation" disclosures. *Id.*

11 Gerard J. Wedig & Ming Tai-Seale, *The Effect of Report Cards on Consumer Choice in the Health Insurance Market*, 21 J. HEALTH ECON. 1031, 1031 (2002) (finding that report cards and the "subjective measures of quality and coverage" they convey impact plan choices).

12 Ian Ayres et al., *Evidence from Two Large Field Experiments that Peer Comparison Feedback Can Reduce Residential Energy Usage*, 29 J.L. ECON. & ORG. 992, 992 (2013).

13 *See* Daniel E. Ho, *Fudging the Nudge: Information Disclosure and Restaurant Grading*, 122 YALE L.J. 574, 574 (2012) ("Despite [restaurant] grading's great promise . . . the regulatory design, implementation, and practice suffer from serious flaws: jurisdictions fudge more than nudge. . . . A good score does not meaningfully predict cleanliness down the road."); Ginger Zhe Jin & Phillip Leslie, *The Effect of Information on Product Quality: Evidence from Restaurant Hygiene Grade Cards*, 118 Q.J. ECON. 409, 409 (2003) (concluding that restaurant grade cards affect consumer choice and lead restaurants to make hygiene quality improvements).

14 Alan D. Mathios, *The Impact of Mandatory Disclosure Laws on Product Choices: An Analysis of the Salad Dressing Market*, 43 J.L. & ECON. 651, 651 (2000) (finding that mandatory labeling required by the Nutrition Labeling and Education Act, Pub. L. No. 101-535, 104 Stat. 2353 (1990), affected consumer choice in the salad dressing market).

15 *See* OREN BAR-GILL, SEDUCTION BY CONTRACT 26–27 (2012) (noting that frequency of product use and frequency of risk materialization provide more opportunities for consumer learning). In distinguishing between those contexts in which regulatory disclosure is and is not effective, scholars have also emphasized whether the regulation ultimately embeds itself in the "decision-making routines of information users." David Weil et al., *The Effectiveness of Regulatory Disclosure Policies*, 25 J. POL'Y ANALYSIS & MGMT. 155, 155 (2006); *see* ARCHON FUNG ET AL., FULL DISCLOSURE: THE POLITICS, PERILS AND PROMISE OF TARGETED TRANSPARENCY, at xi–xii (2007) (discussing the prospect that greater transparency "placed in the public domain and structured by government mandate" may improve consumers' choices in a variety of markets, including education).

In those markets, consumer expectations may be as powerful as traditional consumer protection. In neglecting consumer expectations as an exercise of state power, scholars also overlook those expectations' historical and normative contours.[16] These are the American ideals of masculinity, mobility, and private property that long preceded "nudges" and behavioral law and economics.

Financial regulation and behavioral law and economics scholars have acknowledged the importance of predisclosure beliefs in determining disclosure's efficacy. But they describe these beliefs as common "mistakes and misperceptions"[17] or "overoptimism," without fully appreciating history and the state's role.[18] Empirical economists have likewise recognized and studied the problems of consumer overconfidence while overlooking its deeper underpinnings.[19]

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16 *See* Gillian E. Metzger, Foreword, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 8 (2017) (explaining how "[t]he term 'administrative state' is frequently bandied about, but often carries very different meanings"). Metzger defines the administrative state as

> those oversight mechanisms, as well as other core features of national administrative governance: agencies wielding broad discretion through a combination of rulemaking, adjudication, enforcement, and managerial functions; the personnel who perform these activities, from the civil service and professional staff through to political appointees, agency heads, and White House overseers; and the institutional arrangements and issuances that help structure these activities.

Id.

17 In their foundational work on behavioral law and economics, Christine Jolls, Cass Sunstein, and Richard Thaler discuss the use of heuristics and "mental shortcuts" as an example of bounded rationality, yet the authors do not mention the origins of these shortcuts, much less the state's involvement in creating them. Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1477 (1998). *See* BAR-GILL, *supra* note 15, at 32–36 (discussing how disclosure mandates target "mistakes and misperceptions" with little elaboration of the origins of those mistakes and misperceptions); Shlomit Azgad-Tromer, *The Case for Consumer-Oriented Corporate Governance, Accountability and Disclosure*, 17 U. PA. J. BUS. L. 227, 257 (2014) (noting that information provision "could be used to correct mistakes of consumer misperception"). In an interview, Cass Sunstein notes his belief in the state's need to combat misperceptions, but his scholarship offers little acknowledgment of the state's role in creating those misperceptions. *See* John Carey, *Cass Sunstein: What Kind of Regulation Czar?*, BLOOMBERG BUSINESSWEEK (Feb. 26, 2009, 12:00 AM), http://www.businessweek.com/stories/2009-02-25/cass-sunstein-what-kind-of-regulation-czar [https://perma.cc/YE5Y-B9E5].

18 *See* Ryan Bubb & Prasad Krishnamurthy, *Regulating Against Bubbles: How Mortgage Regulation Can Keep Main Street and Wall Street Safe—from Themselves*, 163 U. PA. L. REV. 1539, 1540, 1548 (2015) (discussing how systemic "overoptimism" in the housing market requires more direct regulation than the Dodd-Frank Act's provisions, which rely on rational consumer models). Their work builds upon, and refers to, Robert Shiller's work on "bubbles" particular to the housing market. *See id.* at 1549; *see also* ROBERT J. SHILLER, IRRATIONAL EXUBERANCE, at xiii (3d ed. 2015) (defining bubble as a "situation in which news of price increases spurs investor enthusiasm, in a sort of psychological epidemic").

19 *See, e.g.*, Michael D. Grubb, *Overconfident Consumers in the Marketplace*, J. ECON.

Other scholars recognize the state's power to entrench public beliefs, but they rarely explore its meaning for consumer markets. This Article instantiates this power through accounts of marquee markets for higher education, homeownership, and retirement savings. In the mid-20th century, Richard Neustadt suggested that "the power to persuade" augmented constitutional and statutory grants of presidential power.[20] Contemporary empirical studies document the—sometimes deadly—effect of presidents' and bureaucrats' rhetoric on public action and opinion, as well as on the broader state.[21] Additionally, courts and scholars have recognized how public reaction depends upon the public's "trust and confidence" in the state's "public pronouncements,"[22] especially in issue areas defined by complexity or urgency.[23]

To take consumer expectations seriously, we must first consider the potential reasons that the government may want to inculcate expectations. Society or an individual consumer herself may benefit from expectations about a particular market. This may occur when cognitive biases undermine private valuations of a decision's costs and benefits or when the decision creates social externalities.[24] But beyond

PERSP., Fall 2015, at 9, 11–12 (discussing the general problem of consumer overconfidence and specific economic studies suggesting how learning is not a panacea).

20 RICHARD E. NEUSTADT, PRESIDENTIAL POWER 42–45 (1964).

21 *See, e.g.*, ANDREW B. WHITFORD & JEFF YATES, PRESIDENTIAL RHETORIC AND THE PUBLIC AGENDA 5 (2009) (empirically arguing that public presidential pronouncements since the 1970s have affected Drug Enforcement Agency and Attorneys General behavior in the war on drugs: "Among the most important of the president's institutional resources is . . . well-publicized policy rhetoric."); Damien Arthur & Joshua Woods, *The Contextual Presidency: The Negative Shift in Presidential Immigration Rhetoric*, 43 PRESIDENTIAL STUD. Q. 468 (2013) (summarizing studies regarding the president's rhetorical power in shaping public opinion and understanding of selected issues, including through State of the Union addresses); David Yanagizawa-Drott, *Propaganda and Conflict: Evidence from the Rwandan Genocide*, 129 Q.J. ECON. 1947, 1955 (2014) (studying how state radio increased violence during the Rwandan genocide). *See generally* SAMUEL KERNELL, GOING PUBLIC: NEW STRATEGIES OF PRESIDENTIAL LEADERSHIP (4th ed. 2007) (providing case studies of rhetoric's role in policymaking and presidential relationships with Congress).

22 *E.g.*, Macias v. State, 897 P.2d 530, 540 (Cal. 1995); *see also* Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 948–49, 952 (1996) (describing how the government has "many . . . tools" to "change norms, meanings, or roles," including "ensur[ing] accurate beliefs in order to persuade people to do something new or different").

23 Thomas Knecht & M. Stephen Weatherford, *Public Opinion and Foreign Policy: The Stages of Presidential Decision Making*, 50 INT'L STUD. Q. 705 (2006) (explaining that "the public is unusually dependent on elites and the mass media for the information and interpretations on which to base opinions," though engagement on foreign policy crisis issues exceeds engagement with more protracted, noncrisis policy issues).

24 *See, e.g.*, Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 979–84 (2001) (noting that individuals may value fairness as a positive social externality, affecting the individual's decision-making process).

welfarist rationales, consumer expectations may be shaped in the pursuit of ideological commitments. These commitments include homeownership as "building moral muscle," and a way to "put[ ] the man back in manhood."[25]

This Article's primary contribution is to uncover the role of public actors in the shaping of consumer expectations and juxtapose these expectations against contemporary consumer protection. It draws upon three major markets: higher education, homeownership, and retirement savings. To be clear, the markets for higher education and homeownership should not be conflated with the benefits of knowledge and housing, even as the sellers in those markets often seek to erase the distinction.[26]

Part I briefly introduces an idea that most will find familiar: product-specific information can be undermined by strong prior market expectations. It then develops a taxonomy of contexts in which the administration of consumer expectations might lead to desirable outcomes: cognitive biases and private valuation, externalities and social valuation, and ideology and intrinsic valuation. Part II describes for each of the three markets recent problems, attendant information regulation, and the administration of consumer expectations, all of which interact with, and often limit, these information mandates. Statutory and constitutional constraints mold consumer protection, but general consumer expectations impose unappreciated constraints.

Part III then explores three dynamics of consumer expectations and related exercises of administrative power. The first is regressivity, meaning that expectations may facilitate or impede equality goals. The second is consonance and dissonance—the ways that other agencies, the courts, and state governments may reinforce or disrupt these expectations.[27] The third is the process by which public actors could reshape these expectations. Part IV concludes.

This Article illuminates how administrative agencies—the Department of Housing and Urban Development ("HUD"), the Depart-

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25 Lawrence J. Vale, *The Ideological Origins of Affordable Homeownership Efforts*, *in* CHASING THE AMERICAN DREAM 15, 26 (William M. Rohe & Harry L. Watson eds., 2007) (quoting the National Association of Real Estate Boards).

26 *See, e.g.*, Thomas J. Sugrue, *The Housing Revolution We Need*, DISSENT MAG., Fall 2018, at 18 ("Today's calls for a 'right to housing' echo FDR's language, but promise to overcome the serious limits of the pro-homeownership, anti-renter, bank-friendly policies that are the New Deal's legacy.").

27 *See, e.g.*, Metzger, *supra* note 16, at 8 ("[N]ational administrative government contains within it tremendous variety, cooperation, and rivalry—a pluralistic dynamic that obtains within individual agencies as well.").

ment of Education ("DOE"), the Consumer Financial Protection Bureau ("CFPB"), and many others—are not only tasked with protecting consumers but are also partly responsible for market beliefs, from which consumers sometimes need protection. And, as this Article will show, this may be acutely true for poor and minority consumers, raising significant concerns about the administration of consumer expectations.

I. Theoretical Framework

This Article generates a tripartite taxonomy of justifications for the administration of consumer expectations. Before presenting that taxonomy, this Article motivates the role of expectations in information regulation by introducing Bayes' Theorem (a more formal introduction can be found in Appendix I). Readers familiar with Bayes' Theorem may wish to proceed directly to the taxonomy in Section I.B.

A. Bayesian Approach

A simplified Bayesian approach provides a framework to understand a central limitation of regulatory disclosure: consumers' expectations, or *prior* beliefs. The effect that any new information has on consumers' decisions hinges on the consumers' prior beliefs; new evidence is incorporated to form *posterior*, updated beliefs from these prior beliefs.[28]

Before approaching a specific product purveyor, a prospective consumer has some existing belief regarding the net return of market participation generally.[29] This "prior," the general probability of participation in a market, reflects social and state messaging, including that of the President, cabinet members, and administrative agencies.[30] The prospective consumer then approaches an institution, which discloses specific information regarding its programs and products. The "posterior," or a prospective consumer's conditional probability of

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28 *See generally* James Joyce, *Bayes' Theorem*, STAN. ENCYCLOPEDIA PHIL. (Sept. 30, 2003), https://plato.stanford.edu/entries/bayes-theorem/ [https://perma.cc/4HSW-Q627] (describing the concept of conditional probability).

29 Ronald Allen and Michael Pardo's epistemological critiques emphasize how the probative value of "evidence" is indeterminate and contingent on base rate probabilities and reference classes. Ronald J. Allen & Michael S. Pardo, *The Problematic Value of Mathematical Models of Evidence*, 36 J. LEGAL STUD. 107, 114–16 (2007). This Article, while abstracting from complex interdependencies, embraces Allen and Pardo's general critique by emphasizing the Bayesian role of prior expectations on evidence. *See also* Dan M. Kahan, *Laws of Cognition and the Cognition of Law*, 135 COGNITION 56 (2015) (applying Bayes' Theorem as a framework for jurors' information processing).

30 *See* discussion *supra* notes 20–23; *infra* notes 312–13 and accompanying text.

participation, is the updated likelihood that a consumer will attend a given institution or purchase a given product *after* the disclosure.[31] Strong prior beliefs limit disclosure's ability to forge a new posterior.

Put differently, disclosure mandates have limited efficacy because consumers' prior beliefs shape consumers' market participation. The state itself plays a large role in shaping those prior beliefs, so this Article focuses on consumers' general expectations and how the state and its various legal actors administer those expectations.

B. *The Arguments for Consumer Expectations*

This Article identifies three reasons that governmental actors—cabinet secretaries, agencies, and their bureaucrats—might seek to inculcate strong general expectations about a market and obscure its heterogeneity: cognitive biases, positive social externalities, and ideology.

1. *Biases and Private Value*

First, government actors seek to inculcate strong general expectations in order to promote choices that cognitive biases might otherwise deter. Individuals may believe that they will be the lucky ones—the firm equity partner, the Michelin-starred chef, the Museum of Modern Art-commissioned artist—even when rational probabilities might suggest otherwise. If disclosures contain extraordinary but desirable outcomes, optimism bias causes consumers to overweight the probability of such successes, just as pessimism bias leads consumers to inflate the probability of failures.[32]

As will be discussed in Part II, the state might use expectation shaping to "correct" these cognitive biases. Concerns that *product-specific* disclosures of outcomes could lead to a focus on particularly negative—or positive—outcomes may justify a higher—or lower—

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31 *See* MERLISE CLYDE ET AL., AN INTRODUCTION TO BAYESIAN THINKING § 1.1 (2020) (ebook), https://statswithr.github.io/book/the-basics-of-bayesian-statistics.html#bayes-rule [https://perma.cc/6MU4-A63K] ("[U]pdating [a] prior using Bayes' rule gives the information conditional on the data, also known as the posterior").

32 *See* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS 31–33 (2008) (discussing optimism bias). Imagine that distributional disclosures are commonplace, revealing the first quartile, median, and third quartiles of some financial returns from a purchase. Pessimism bias might cause a focus on, e.g., the first quartile, which may show low returns, while optimism bias might cause a focus on, e.g., the third quartile, which may show higher returns, even where other predictive characteristics are equal. Using the formal terms of the Bayesian framework, if the disclosure is denoted as B_I, pessimism bias will decrease $P(B_I \mid \hat{A}_I)$, because B_I will be interpreted as predicting smaller returns, while optimism bias will increase $P(B_I \mid \hat{A}_I)$, because B_I will be interpreted as predicting larger returns.

general expectation. Because of the changed general expectation, even with pessimism—or optimism—bias, the posterior belief and resulting decision are the same as if the bias were absent.

2. *Externalities and Social Value*

Second, government actors seek to inculcate strong general expectations because of concerns regarding social, as opposed to private, benefits. For instance, if attending a community college improves a particular individual's potential wages, then a prospective student will factor this into her decision making. But if the main benefits of her matriculation are social spillovers from having at an aggregate level a more educated citizenry—e.g., the benefits mainly revolve around social goals such as political stability, cooperation, and public goods provision—she may not consider those externalities in deciding whether to enroll. Thus, when individuals think they are less likely to accrue private benefits, private decision making may lead to a matriculation level below the social optimum.[33]

By increasing the expectation of private returns, the state can increase the posterior belief in private returns, thereby increasing participation levels and shifting the private equilibrium level of consumption towards the higher, social optimum.[34] Such socially beneficial "misperceptions"—overly sanguine portraits of higher education's value, for example—can even exist in equilibrium when, for example, no single actor has an incentive to disclose the "shrouded" truth.[35] More importantly, as discussed subsequently, the administration of consumer expectations is inherently general rather than specific, and it often relies on strongly worded but imprecise rhetoric.[36]

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33 The state itself may want to induce action under the guise of social externalities, even when those claims are based on hysteria rather than reason. Consider the mid-20th-century "Reefer Madness" propaganda campaign as a plausible example, particularly in contrast to the contemporary state-level legalization movement. Steven W. Bender, *The Colors of Cannabis: Race and Marijuana*, 50 U.C. DAVIS L. REV. 689, 690–92 (2016).

34 This is obvious from the fact that a higher $P(\hat{A}_1)$ leads to a higher $P(\hat{A}_1 \mid B_1)$. *See infra* Appendix I, Equation 1.

35 *See* Santosh Anagol et al., *Understanding the Advice of Commissions-Motivated Agents: Evidence from the Indian Life Insurance Market*, 99 REV. ECON. STAT. 1, 1 (2017) (providing empirical evidence of how commissions-motivated agents do not provide quality advice, explain caveats to consumers, or make product recommendations in the consumers' best interests); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q.J. ECON. 505, 508–10 (2006) (providing a theoretical exposition of conditions, namely consumer myopia, under which firms may not unshroud costly add-ons to their or their competitors' products).

36 *See* discussion *infra* Sections II.A.3, II.B.3, II.C.3.

Even if general expectations reflect a mean or median statistic, they do not necessarily reflect a particular individual's prospects.[37]

3. Ideology and Intrinsic Value

Third, government actors seek to inculcate strong general expectations in order to promote ideology. In the previous two cases, setting a prior expectation can improve upon a suboptimal equilibrium by increasing private and social welfare. In that sense, the bases for expectation shaping are instrumental and empirical, not normative. Yet expectation shaping can be premised on consumer expectations' intrinsic, and not just instrumental, value. Such expectations are justified normatively—they may be independently desirable to politicians and others regardless of their quantifiable behavioral and welfare effects.

This third basis, the value of ideology in and of itself, has been discussed extensively in the social and political theory literature.[38] The Nobel Laureate Douglass North offered a particularly rich definition: "[T]he subjective perceptions that people have about what the world is like and what it ought to be; ideology therefore affects people's perceptions about the fairness or justice of the institutions of a political economic system."[39]

In sum, correcting private biases and capturing social externalities may justify a state of consumer expectations. But bureaucrats may also simply be advancing an ideology, divorced from financial and social realities.

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37 Section II.A.2 turns to specific federal rulemakings from the DOE and the Federal Trade Commission ("FTC") surrounding higher education misrepresentation to illustrate how factual accuracy becomes hard to police, perturbing the definitional boundaries of misinformation itself.

38 One dictionary definition of "ideology" is "the integrated assertions, theories and aims that constitute a sociopolitical program." *Ideology*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/ideology [https://perma.cc/HES6-TRXB]; *see, e.g.*, Janet L. Dolgin, *Just A Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 638 n.1 (1993) ("By 'ideology,' I mean not a system of political beliefs, but the pervasive forms in terms of which people understand what it means to be human. This definition of ideology is similar to that of the French anthropologist, Louis Dumont." (internal citation omitted)); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CALIF. L. REV. 889, 899 (1992) (discussing the meaning of ideology and its interaction with methodology, which he describes as fundamentally an "ideological commitment").

39 Douglass C. North, *Ideology and Political/Economic Institutions*, 8 CATO J. 15, 15 (1988).

II. MARKET APPLICATIONS

To better understand the administration of consumer expectations and its possible justifications, this Article next explores its presence, development, and consequences in three prominent consumer markets: higher education, homeownership, and retirement savings. For each market, the analysis begins with a market overview and documents contemporary information regulation. Next, the analysis pivots away from these traditional consumer protections and chronicles the administration of consumer expectations. Finally, the analysis of each market concludes by classifying consumer expectations within Part I's three-part framework: cognitive biases, externalities, and ideologies.

A. Higher Education

1. The Market and the Problem

American higher education, particularly for-profit education, has fueled consumer debt, with aggregate student loan debt across sectors approaching $1.5 trillion.[40] The growing debt partly reflects higher principal amounts among borrowers as well as increasing struggles to pay off balances within conventional timeframes.[41] Race-based affirmative action increases minority representation in selective higher education,[42] but it also distracts from a more pervasive trend: the

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40 *See* FED. RES. BANK OF N.Y., RESEARCH & STATS. GRP., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT, at i (2019), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/hhdc_2019q2.pdf [https://perma.cc/4EEV-QFJF].

41 CONSUMER FIN. PROT. BUREAU, CFPB DATA POINT: STUDENT LOAN REPAYMENT 4–5 (2017). For a thoughtful contrast of the ex post progressivity of income-based repayment with the ex ante progressivity of federal aid, see John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 268–71 (2016).

42 Historically, race-conscious admissions have been concentrated at roughly only the top 20% of four-year institutions, or about 500 schools. Thomas J. Kane & William T. Dickens, *Racial and Ethnic Preference*, BROOKINGS INST. (Nov. 1, 1996), https://www.brookings.edu/research/racial-and-ethnic-preference/ [https://perma.cc/AW5G-YG4Q] ("[P]reference in admissions is much less evident at nonelite schools, where 80 percent of four-year college students enroll. At such schools—where the average four-year college applicant would have more than a 90 percent chance of acceptance . . . [—racial] differences in the probability of admission were not statistically distinguishable from zero. Racial and ethnic preference in college admissions is sometimes large—but it is primarily restricted to elite institutions."). Assuming nearly all four-year institutions are Title IV recipients, there were 3,026 schools in 2013, so 20% would result in 605 schools. *See* MELISSA CLINEDINST, NAT'L ASS'N FOR COLLEGE ADMISSION COUNSELING, 2019 STATE OF COLLEGE ADMISSION 17 (2019), https://www.nacacnet.org/globalassets/documents/publications/research/2018_soca/soca2019_all.pdf [https://perma.cc/3DY8-7TSY] (noting that the majority of surveyed colleges stated that race had "no influence" on first-year admissions decisions); *Fast Facts: Educational Institutions*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=84 [https://perma.cc/4PKV-U8SC].

overrepresentation of racial minorities and the poor in nonselective, for-profit institutions.[43] For-profit education's claims to minority access may simply veneer access to debt.[44]

For-profit institutions comprise a distinct market segment, operating different programs than the nonprofit sector. For-profit institutions, like the University of Phoenix, primarily award certificates and associate degrees, not bachelor's degrees.[45] Like nonprofit institutions, they are subject to statutory and regulatory conditions in exchange for the receipt of federal student aid;[46] but proprietary institutions are organized to pursue profits for shareholders.[47] This incentive to maximize profits theoretically leads for-profit institutions to develop several advantages over their public and nonprofit counterparts: increased incentives to retain and accommodate students,[48] quicker re-

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43 David J. Deming et al., *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, J. ECON. PERSP., Winter 2012, at 139, 146–47. This analysis resulted in the following comparisons between for-profit and higher education at large: African American (22% vs. 13%), Hispanic (15% vs. 11.5%), Age 25 years and over (65% vs. < 40%), and Women (65% vs. < 60%). *See id.* at 146, 147 tbl.1. The average Pell Grant per student in the for-profit sector was more than three times that in the nonprofit higher education sector. *See id.* at 147 tbl.1.

44 *See* Dalié Jiménez & Jonathan D. Glater, *Student Debt is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV. (forthcoming 2020) (manuscript at 19–23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3475224 [https://perma.cc/Q7NF-S26Q] (discussing "student debt as a paradigmatic example of predatory inclusion"); Omari Scott Simmons, *For-Profits and the Market Paradox*, 48 WAKE FOREST L. REV. 333, 334 (2013).

45 Gregory A. Gilpin et al., *Why Has For-Profit Colleges' Share of Higher Education Expanded So Rapidly? Estimating the Responsiveness to Labor Market Changes*, 45 ECON. EDUC. REV. 53, 53 (2015) (documenting growth in for-profit sector over the last two decades and the correlation between increased enrollment and occupational and wage growth in relevant sectors).

46 For example, see discussion *infra* Section II.A.2. For a comprehensive history of higher education law and institutional trends from an economic perspective, see generally Henry Hansmann, *The Evolving Economic Structure of Higher Education*, 79 U. CHI. L. REV. 159 (2012).

47 *See* John F. Horty & Daniel M. Mulholland III, *Legal Differences Between Investor-Owned and Nonprofit Health Care Institutions*, *in* THE NEW HEALTH CARE FOR PROFIT (Bradford H. Gray ed., 1983), https://www.ncbi.nlm.nih.gov/books/NBK216759/ [https://perma.cc/TZS5-XN4R]; *cf.* Henry Hansmann, *The Changing Roles of Public, Private, and Nonprofit Enterprise in Education, Health Care, and Other Human Services*, *in* INDIVIDUAL AND SOCIAL RESPONSIBILITY: CHILD CARE, EDUCATION, MEDICAL CARE, AND LONG-TERM CARE IN AMERICA 245, 263 (Victor R. Fuchs ed., 1996) (discussing myriad of reasons why a school may organize as a nonprofit or transition from a proprietary form to a nonprofit one); *id.* at 246 ("There is general scholarly consensus that the most convincing efficiency rationale for employing the nonprofit form . . . [is to provide] a crude but effective consumer protection device in severe situations of asymmetric information.").

48 *See* THOMAS BAILEY ET AL., FOR-PROFIT HIGHER EDUCATION AND COMMUNITY COLLEGES 9 (2012). To that end, for-profit institutions, such as the University of Phoenix, "freed

sponse times to enrollment demand and population booms,[49] and the ability to attract funds more easily.[50]

Despite these theoretical advantages, for-profit institutions appear to consume public and private resources for questionable ends. Many proprietary actors rely almost exclusively on public funds, including through their disproportionate receipt of Pell Grants.[51] They appear to spend less on instructional expenses than on marketing;[52] the majority of students in these institutions appear to leave without a degree or diploma, usually within only four months;[53] and students, on average, experience higher default rates and lower earnings.[54] Randomized controlled trials reveal how employers also treat credentials

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from the traditional academic schedules . . . offer courses at more convenient times and in more convenient locations (for example, malls near the intersections of interstates)." *Id.*

49 *See* Sarah E. Turner, *For-Profit Colleges in the Context of the Market for Higher Education*, *in* EARNINGS FROM LEARNING 51, 62 (David W. Breneman et al. eds., 2006) (finding that for-profit college enrollment changes are more closely correlated with changes in state college-age populations than changes in public sector college enrollment).

50 *See* BAILEY ET AL., *supra* note 48, at 9 (noting that proprietary institutions may turn to equity markets for funding instead of state legislatures).

51 *See* STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, & PENSIONS, 112TH CONG., FOR-PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 2–3 (Comm. Print 2012) [hereinafter FOR-PROFIT HIGHER EDUCATION REPORT] (noting that for-profit sector receipt figures grew sevenfold to $7.5 billion from the 2000–2001 to 2009–2010 school years); *see also Federal Pell Grant Program*, U.S. DEP'T OF EDUC., http://www2.ed.gov/programs/fpg/index.html [https://perma.cc/5L9Z-9JCE] ("[A Pell Grant] provides [federal] need-based grants to low-income undergraduate and certain postbaccalaureate students to promote access to postsecondary education.").

52 FOR-PROFIT HIGHER EDUCATION REPORT, *supra* note 51, at 5. The examined institutions spent $4.2 billion (or 22.7% of revenue) on marketing, advertising, recruiting, and admissions staffing expenses, as well as $3.6 billion (19.4%) on pretax profits, both of which exceeded the $3.2 billion (17.2%) spent on actual instruction. *Id.* at 6.

53 *Id.* at 1.

54 *See* Stephanie Riegg Cellini & Nicholas Turner, *Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data*, 54 J. HUM. RESOURCES 342, 344 (2019) ("We find that for-profit certificate students experience lower earnings and employment post-college than their public sector counterparts, a result that holds even after accounting for differences in student demographics and fields of study. . . . [Considering the counterfactual of no higher education and c]omparing average earnings gains to average debt in a back-of-the envelope calculation suggests that gains are not enough to offset debt and interest payments, leaving the average for-profit certificate student with a net loss of about $1,200 over her lifetime."). In another study, even after controlling for student demographics, degree types, city, and admissions selectivity, default rates at for-profit institutions are about six and eight percentage points higher than those at community colleges and nonprofit four-year institutions, respectively. *See* Deming et al., *supra* note 43, at 154 fig.5, col. 4. Moreover, controlling for pretransfer academic performance, students who transfer from community colleges to for-profit institutions earn significantly less than those who transfer to public or nonprofit institutions. Yuen Ting Liu & Clive Belfield, *The Labor Market Returns to For-Profit Higher Education: Evidence for Transfer Students*, 48 COMMUNITY C. REV. 133, 133 (2019).

from these institutions suspiciously.[55] The DOE noted these ongoing proprietary education concerns in the course of Obama-era rulemaking,[56] though the current administration has rescinded those rules.[57]

2. *Information Regulation*

Federal agencies and Congress employ information regulation to reshape consumer experiences in American higher education, including in for-profit education.[58] The DOE's College Scorecard has attracted bipartisan support for its emphasis on transparency and data.[59]

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55 A randomized audit study found no evidence that employers interview for-profit applicants any more frequently than those with no postsecondary education. *See* Rajeev Darolia et al., *Do Employers Prefer Workers Who Attend For-Profit Colleges? Evidence from a Field Experiment* 22–24 (Nat'l Ctr. for Analysis of Longitudinal Data in Educ. Research, Working Paper No. 116, 2014). The study includes three different levels of postsecondary attainment: some coursework but no credential, vocational credential, and associate degree. *Id.* at 9. The authors note three caveats on their interpretations. First, they may be capturing only the short-term effects of for-profit attendance—or lack thereof. *Id.* at 24. Second, their assignment of attainment and type of institution are orthogonal, so they may be missing effects based on differential persistence. *Id.* at 21. Third, they operate in specific labor markets: administrative assisting, customer service, information technology, medical assisting (excluding nursing), medical billing/office, and sales. *Id.* at 11–12, 22. There may be other labor markets where the effects are greater. *See* David J. Deming et al., *The Value of Postsecondary Credentials in the Labor Market: An Experimental Study*, 106 Am. Econ. Rev. 778, 778 (2016) (conducting a field experiment and finding that a "business bachelor's degree from a for-profit online institution is 22 percent less likely to receive a callback than one from a nonselective public institution").

56 Program Integrity: Gainful Employment, 79 Fed. Reg. 16,426, 16,434 (Mar. 25, 2014) (to be codified at 34 C.F.R. pts. 600, 668) ("As we noted in connection with the 2011 Prior Rule, the outcomes of students who attend for-profit educational institutions are of particular concern.").

57 *See* Program Integrity: Gainful Employment, 84 Fed. Reg. 31,392, 31,394–95 (July 1, 2019) (to be codified at 34 C.F.R. pts. 600, 668) (rescinding various portions of the Gainful Employment Programs); *see also* Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER) Act, H.R. 4508, 115th Cong. § 104(a)(1)(B) (as reported by H. Comm. on Educ. & the Workforce, Feb. 8, 2018), https://www.congress.gov/bill/115th-congress/house-bill/4508/all-info [https://perma.cc/2HUF-PKYT] (proposing removing former restrictions on providing aid to for-profit institutions).

58 *See* For-Profit Higher Education Report, *supra* note 51, at 13 (noting Congress's efforts over the years to conduct oversight). In response to deceptive targeting of service-members, an Executive Order required increased transparency for institutions receiving federal military and veteran educational benefits. *See* Exec. Order No. 13,607, 3 C.F.R. § 248 (2013).

59 U.S. Dep't of Educ., Technical Documentation: College Scorecard Institution-Level Data 2 (2019), https://collegescorecard.ed.gov/assets/FullDataDocumentation.pdf [https://perma.cc/RVB6-NN6N] ("The College Scorecard project is designed to increase transparency, putting the power in the hands of students and families to compare how well individual postsecondary institutions are preparing their students to be successful."); Press Release, U.S. Dep't of Educ., FACT SHEET: Obama Administration Announces Release of New Scorecard Data (Sept. 14, 2016), https://www.ed.gov/news/press-releases/fact-sheet-obama-administration-announces-release-new-scorecard-data [https://perma.cc/7GTQ-92Z9]; Press Release, U.S. Dep't of Educ., Secretary DeVos Delivers on Promise to Expand College Scorecard, Provide Meaningful Information to Students on Education Options and Outcomes (May 21, 2019), https://

In response to poor student outcomes in the proprietary sector, the DOE promulgated short-lived, performance-based regulations measuring "gainful employment" ("GE") programs through debt-to-income ratios, with underperforming institutions potentially losing federal funding.[60] Nearly all for-profit programs receiving Title IV funding are required to prepare students for "gainful employment" to maintain eligibility,[61] and almost all GE program students are in proprietary institutions.[62] In abandoning the Gainful Employment rules, the Secretary of Education abandoned performance-based consumer law for "transparency," a familiar trope.[63]

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www.ed.gov/news/press-releases/secretary-devos-delivers-promise-expand-college-scorecard-provide-meaningful-information-students-education-options-and-outcomes [https://perma.cc/2UNK-NZXQ].

60 Program Integrity Issues, 75 Fed. Reg. 66,832, 66,834 (Oct. 29, 2010) (to be codified at 34 C.F.R. pts. 600, 602, 603, 668, 682, 685, 686, 690, 691) ("The proposed regulations that were negotiated during negotiated rulemaking and included in the proposed regulations were developed . . . [t]o respond to problems identified by students and financial aid advisors about the aggressive sales tactics used by some institutions . . . [and] concerns about proprietary institutions."); Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34,386, 34,386 (to be codified at 34 C.F.R. pt. 668) (June 13, 2011) ("We also have concerns about recruitment practices and completion rates for particular programs offered by for-profit institutions. The Government Accountability Office (GAO) and other investigators have found evidence of high-pressure and deceptive recruiting practices at for-profit institutions."). The DOE released those programs' debt-to-earnings ratios in early 2017. Press Release, U.S. Dep't of Educ., Education Department Releases Final Debt-to-Earnings Rates for Gainful Employment Programs (Jan. 9, 2017), https://www.ed.gov/news/press-releases/education-department-releases-final-debt-earnings-rates-gainful-employment-programs [https://perma.cc/VZ5P-5UHT].

61 FED. STUDENT AID, U.S. DEP'T OF EDUC., GAINFUL EMPLOYMENT OPERATIONS MANUAL: PURPOSE/OVERVIEW 2 (2015), https://ifap.ed.gov/sites/default/files/attachments/GainfulEmploymentOperationsManual/01PurposeOverview2015.pdf [https://perma.cc/FF95-TLFK] ("All For-Profit (Proprietary) Institutions—All educational programs are GE Programs *except* for: [1] Preparatory course work necessary for enrollment in an eligible program; [2] Approved Comprehensive Transition and Postsecondary Programs for students with intellectual disabilities; and [3] Programs leading to a bachelor's degree in liberal arts that have been offered by the institution since January 2009 and which have been regionally accredited since 2007." (emphasis added)). Some nondegree programs at public and private nonprofit institutions are similarly considered GE programs. *Id.* The DOE estimates that there are around 50,000 GE programs nationally, with 60, 10, and 30% of those programs at public, private nonprofit, and proprietary institutions, respectively. Program Integrity: Gainful Employment, 79 Fed. Reg. at 16,433.

62 Program Integrity: Gainful Employment, 79 Fed. Reg. at 16,491 ("We have estimated that the 2010–2011 and the 2011–2012 total number of students enrolled in GE programs is projected to be 6,436,806 (the 2010–2011 total of 3,341,856 GE students plus the 2011–2012 total of 3,094,950 GE students). We estimate that 89 percent of the total enrollment in GE programs would be at for-profit institutions, 2 percent would be at private non-profit institutions, and 9 percent would be at public institutions.").

63 *See* Press Release, U.S. Dep't of Educ., U.S. Department of Education Proposes Overhaul of Gainful Employment Regulation (Aug. 10, 2018), https://www.ed.gov/news/press-releases/us-department-education-proposes-overhaul-gainful-employment-regulations [https://

In addition to the now rescinded performance-based rules, two predictable forms of information regulation have surfaced: disclosure and misrepresentation.[64] Certain GE-specific disclosure regulations tried to build on existing requirements by expanding both the relevant student populations[65] upon which the disclosed information was based, as well as the student populations to whom the disclosures were to be made.[66] The disclosures were to be made "prominently" and in a "simple and meaningful manner" in promotional materials to prospective students.[67] While these GE disclosure regulations survived judicial challenge, the Trump administration ultimately rescinded the regulations alongside the performance-based rules.[68]

The College Scorecard, which affects GE and non-GE programs alike, has persisted and taken on new significance. In the rescission of GE-specific disclosure regulations, the Secretary of Education emphasized the Scorecard's transparency across all sectors, covering public

perma.cc/8TEF-4VE7]; Program Integrity: Gainful Employment, 84 Fed. Reg. 31,392, 31,422 (July 1, 2019) (to be codified at 34 C.F.R. pts. 600, 668) ("The Department continues to believe that the best way to create a transparency and market-based accountability system that serves all students is by expanding the College Scorecard to include program-level outcomes data for all categories (GE and non-GE) of title IV participating programs, so that students can make informed decisions regardless of which programs or institutions they are considering."); Willis, *supra* note 6, at 1342 (analyzing Gainful Employment Rule in context of performance-based consumer law).

64 All three types of regulation faced serious judicial challenges. After the DOE first promulgated the regulations, the Association of Private Sector Colleges and Universities ("APSCU") waged a legal challenge before the District of Columbia Circuit, *see* Ass'n of Private Sector Colls. & Univs. v. Duncan (*APSCU I*), 681 F.3d 427 (D.C. Cir. 2012), and the district court for the District of Columbia, *see* Ass'n of Private Sector Colls. & Univs. v. Duncan (*APSCU II*), 870 F. Supp. 2d 133 (D.D.C. 2012). The courts originally vacated much of the DOE's rulemaking, leading to new rules ("the 2015 rules"), which were upheld in *APSCU III*. *See* Ass'n of Private Sector Colls. & Univs. v. Duncan (*APSCU III*), 110 F. Supp. 3d 176, 184–98 (D.D.C. 2015).

65 The GE-specific on time graduation rate disclosure requirement, for example, requires statistics on the percentage of students in "gainful employment" programs finishing in normal time. *See* 34 C.F.R. § 668.6(c) (2019). The statutory requirements instructed institutions to count only the percentage of full-time, first-time undergraduate students who graduated within 150% of the normal time. 20 U.S.C. § 1092(a)(1)(L), (a)(3) (2018).

66 The 2011 regulations require disclosure to all students considering gainful employment programs, rather than the existing statutory requirement of disclosure to only first-time, full-time undergraduates. *See* Program Integrity Issues, 75 Fed. Reg. 66,832, 66,838 (Oct. 29, 2010) (to be codified at 34 C.F.R. pts. 600, 602, 603, 668, 682, 685, 686, 690, 691).

67 34 C.F.R. § 668.6(b)(2). The mandate to "prominently provide the information required" refers to the home page of a program's website. *Id.*

68 Program Integrity: Gainful Employment, 84 Fed. Reg. at 31,392 ("This regulatory action rescinds the GE regulations and removes and reserves subpart Q of the Student Assistance General Provisions in 34 CFR part 668. This regulatory action also rescinds subpart R of the Student Assistance and General Provisions in 34 CFR part 668.").

institutions as well as private, for-profit ones.[69] The Scorecard provides basic information on graduation rates and salaries for federal loan borrowers.[70]

As a practical matter, institutional disclosures unsurprisingly remain difficult to find. For the University of Phoenix, America's most recognized proprietary institution, the process is labyrinthine, involving obscure links and buried information in voluminous guides.[71] Transparency thus becomes an ironic source of confusion. The shortcomings also parallel problems that arose after similar disclosure mandates nearly a decade ago.[72]

Information regulation also combats misrepresentation. In one regulatory effort affecting all programs, the DOE expanded the definition of *"misrepresentation"* to include "any statement that has the likelihood or tendency to deceive or confuse."[73] While the D.C. Circuit approved expanding the definition of misrepresentation to include truths with the likelihood to *deceive*, it found that the DOE had no authority to prohibit truths with the likelihood to *confuse*.[74] However, in doing so, the court shed little light on the statutory limits of the agency's authority, noting only that, constitutionally, the First

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69 *Id*. at 31,422 ("The Department continues to believe that the best way to create a transparency and market-based accountability system that serves all students is by expanding the College Scorecard to include program-level outcomes data for all categories (GE and non-GE) of title IV participating programs, so that students can make informed decisions regardless of which programs or institutions they are considering.").

70 *See Glossary*, U.S. Dep't of Educ.: C. Scorecard, https://collegescorecard.ed.gov/data/glossary/ [https://perma.cc/WJ67-M8GA] (demonstrating that the dataset includes information on earnings and graduation rates).

71 Univ. of Phoenix, https://www.phoenix.edu/ [https://perma.cc/P6PZ-3RLZ]. One must travel to the home page, look in the bottom right corner for "Regulatory Information." *Id.* Then one must click on "Consumer Information Guide" which leads to a 134-page information guide aggregating all mandated disclosures, including safety, vaccination, and privacy policies. Program-specific disclosures were available, though many programs were exempt from disclosing key statistics, such as job placement rates. *See* Univ. of Phoenix, 2020–2021 Consumer Information Guide (2020), https://www.phoenix.edu/content/dam/altcloud/doc/about_uopx/Consumer-Information-Guide.pdf [https://perma.cc/J4RA-BLJJ].

72 An earlier investigation found that the majority of four-year colleges and universities, while being in compliance with the letter of the law, were in noncompliance with the 2008 Higher Education Act reauthorization amendments regarding disclosure, because "the law itself allows so much variation in compliance as to render much of the information all but useless for students and parents choosing colleges." Kevin Carey & Andrew P. Kelly, Educ. Sector, The Truth Behind Higher Education Disclosure Laws 3–4 (2011); Higher Education Opportunity Act, Pub. L. No. 110-315, 122 Stat. 3078 (2008).

73 34 C.F.R. § 668.71(c) (2019).

74 Ass'n of Private Sector Colls. & Univs. v. Duncan (*APSCU I*), 681 F.3d 427, 452–53 (D.C. Cir. 2012).

Amendment permits a ban on "misleading" commercial speech.[75] Misrepresentation enforcement remains difficult,[76] given unsuccessful efforts to strengthen penalties.[77] Beyond the DOE, the Federal Trade Commission ("FTC") has issued regulations that further clarify which institutional practices constitute deception under its statutory authority and that elaborate upon the DOE regulations.[78]

In sum, multiple agencies pursue more complete and accurate information for higher education consumers. While disclosure and performance-based regulations targeting GE programs were short-lived, misrepresentation and broader disclosure requirements persist. Legal scholars have nonetheless neglected how this administration of consumer protection must overcome the administration of consumer expectations, to which this Article now turns.

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75 *See id.* at 457; *see also* Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 153 ("The Court has not to date, however, articulated a new or additional rationale to justify the constitutional protection of commercial speech or explained how commercial speaker autonomy, or even quasi-autonomy, can be squared with the modern regulatory state with its pervasive disclosure requirements and restrictions on false and misleading commercial speech.").

76 As the For-Profit Higher Education Report noted, the "for-profit education business model" and the sector's "extreme growth" have generally strained the capacity of federal regulators. FOR-PROFIT HIGHER EDUCATION REPORT, *supra* note 51, at 18.

77 For example, efforts were made to penalize provisionally certified institutions under Title IV by immediately revoking eligibility as a consequence of substantial misrepresentation. *See APSCU I*, 681 F.3d at 439–40. The threat of immediate action was in contrast to the "initiate a proceeding" language in the earlier regulations. *Id.* at 449. Yet the APSCU alleged that the textual ambiguity, particularly the lack of explicit mention of provisionally certified institutions as the target of the new regulations, meant that the regulations' "immediate revocation" language could be used against fully certified institutions, thereby circumventing the "hearing and notice" statutory mandate detailed in the regulations. *Id.* at 449–50. Again, this regulatory effort was successfully challenged in the courts, leading the DOE to amend the misrepresentation enforcement rules. *See* 34 C.F.R. § 668.71 (2019).

78 By statute, the FTC combats "unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45(a)(1) (2018); *see also* 16 C.F.R. § 254.3(c) (2019) ("It is deceptive for an Industry Member to use testimonials or endorsements that do not accurately reflect current practices of the school or current conditions or employment opportunities in the industry or occupation for which students are being trained."). While the FTC and other consumer protection agencies have prosecuted some deception cases, such ad hoc litigation has its limits in addressing endemic problems. *See* Maura Dundon, *Students or Consumers? For-Profit Colleges and the Practical and Theoretical Role of Consumer Protection*, 9 HARV. L. & POL'Y REV. 375, 390–92 (2015) ("In general, consumer protection agencies favor deception cases [for which misrepresentation is but one component] . . . . In contrast, an unfairness claim [for the FTC or CFPB] is much more complex . . . [and] requires a showing of substantial injury that is unavoidable by a reasonable consumer, plus a cost-benefit analysis demonstrating that the challenged practice does not have 'countervailing benefits.'").

3. The History and Administration of Consumer Expectations

Institutional disclosure mandates operate against a consumer expectation that regards higher education as privately valuable.[79] This Article focuses on three facets of this expectation: its contemporary persistence despite growing cost concerns, its resonance among racial minorities, and its dynamic inclusion of proprietary institutions. The discussion then moves to the administration of these expectations in higher education, from both a contemporary and historical perspective.

The public perceives higher education as imperative and expensive.[80] People largely believe that a college education "is necessary for a person to be successful in today's work world,"[81] but they also express a growing skepticism of affordability.[82] Financial pressures in-

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79 *See, e.g.*, Kim Parker, *The Growing Partisan Divide in View of Higher Education*, PEW RESEARCH CTR. (Aug. 19, 2019), https://www.pewsocialtrends.org/essay/the-growing-partisan-divide-in-views-of-higher-education/ [https://perma.cc/8UVZ-FRR6] ("Americans see value in higher education—whether they graduated from college or not. Most say a college degree is important, if not essential . . . .").

80 *See* Kate Sablosky Elengold, *The Investment Imperative*, 57 HOUS. L. REV. 1, 3 (2019) (describing "the widely-held belief that higher education is necessary to increase one's financial prosperity and social standing in America"); Tamara Hiler & Lanae Erickson, *Beyond Free College and Free Markets: Voters Want Greater Accountability in Higher Ed*, THIRD WAY (June 17, 2019), https://www.thirdway.org/polling/beyond-free-college-and-free-markets-voters-want-greater-accountability-in-higher-ed [https://perma.cc/ALT2-BGXN] (summarizing survey of likely 2020 voters by concluding that "[d]espite a recent deluge of negative news coverage surrounding institutions of higher education, Americans continue to view the overall system favorably"); Parker, *supra* note 79 ("Despite the public's increasingly negative views about higher education and its role in society, most Americans say a college education is important—if not essential—in helping a young person succeed in the world today.").

81 JOHN IMMERWAHR ET AL., PUB. AGENDA & NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., SQUEEZE PLAY 2010: CONTINUED PUBLIC ANXIETY ON COST, HARSHER JUDGMENTS ON HOW COLLEGES ARE RUN 10 (2010). The survey-report found that the percentage of people who believe that a college education "is absolutely necessary for success" increased from 31% to 55% of all respondents. *Id.* at 3–4; *see also* Valerie J. Calderon & Susan Sorenson, *Americans Say College Degree Leads to a Better Life*, GALLUP (Apr. 7, 2014), http://www.gallup.com/poll/168386/americans-say-college-degree-leads-better-life.aspx [https://perma.cc/R2VF-ZA5K] (finding that Americans continue to believe in the importance of postsecondary education, with "94%[ ] saying a postsecondary . . . credential is at least somewhat important and 70% saying that it is very important").

82 This echoes recent graduates' increasing willingness to cast doubt on the value of their college degree. IMMERWAHR ET AL., *supra* note 81, at 4; Calderon & Sorenson, *supra* note 81 (finding that 89% of respondents believe that "higher education institutions need to change to better serve the needs of today's students," while only 49% have seen evidence of this change). In particular, respondents note a need for "redesigning higher education to make it more affordable and accessible." Calderon & Sorenson, *supra* note 81; *see also* Ronald Brownstein & Nat'l Journal, *Why Minorities Are More Optimistic About the Value of College*, ATLANTIC (Nov. 7, 2013) https://www.theatlantic.com/politics/archive/2013/11/why-minorities-are-more-optimistic-

duce a "trad[ing] down" phenomenon, as aspirations switch from private to public institutions and from four-year institutions to community colleges.[83] Despite the burden, "the conviction that attending college is the key to a secure economic future remains steadfast . . . ."[84] Traditionally underrepresented groups accord even higher value to postsecondary education,[85] even as they disproportionately attend less desirable and valuable institutions.[86]

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about-the-value-of-college/430347/ [https://perma.cc/T3JT-GMJH], (reporting that roughly two-thirds of people surveyed said that it was "unfair" that states were cutting back support for public colleges, contributing to a rapid increase in the price of higher education); Brandon Busteed, *Is College Worth It? That Depends*, GALLUP (Apr. 8, 2015), https://www.gallup.com/education/237278/college-worth-depends.aspx [https://perma.cc/HF5U-FDWH] ("[I]t's still true that a college degree is worth its weight in gold, but only for those graduates (and their alma maters) who made the most of their higher education experience as students.").

Nonetheless, a majority of parents of high-school aged children continue to believe that their children will pursue postsecondary education and cite the availability of loans and scholarships to facilitate that goal. *See* IMMERWAHR ET AL., *supra* note 81, at 5, 7; Russell Heimlich, *Most Parents Expect Their Children to Attend College*, PEW RESEARCH CTR. (Feb. 27, 2012) https://www.pewresearch.org/fact-tank/2012/02/27/most-parents-expect-their-children-to-attend-college/ [https://perma.cc/M26L-VKBM].

83 IMMERWAHR ET AL., *supra* note 81, at 5.

84 *Id.* at 7. A Pew Research Center report echoes this exact tension between the cited unaffordability and inefficiency of higher education on the one hand and its perceived indispensability on the other. *See generally* PAUL TAYLOR ET AL., PEW RESEARCH CTR., IS COLLEGE WORTH IT? 34, 50 (2011) ("[T]he percentage agreeing that 'most people can afford to pay for a college education' has fallen significantly over time. . . . [Although] 74% [of subjects] agree[ ] that in order to get ahead in life these days, it's necessary to get a college education[,] . . . the higher education system as a whole gets relatively low ratings . . . [for] providing value for the money spent by students . . . . A majority gives the higher education system only a fair (42%) or a poor (15%) rating. . . . [Nonetheless, a]ccording to most adults, to succeed in the world today, a young person needs a college education.").

85 *See generally* Brownstein & Nat'l Journal, *supra* note 82 (discussing a poll finding that minorities are more optimistic about the benefits of postsecondary education). Compared to white parents, Black and Hispanic parents were more likely to choose a college education as the "one thing that can most help a person succeed in the world today." JOHN IMMERWAHR & TONY FOLENO, PUB. AGENDA, GREAT EXPECTATIONS: HOW THE PUBLIC AND PARENTS—WHITE, AFRICAN AMERICAN AND HISPANIC—VIEW HIGHER EDUCATION 2 (2000), http://www.highereducation.org/reports/expectations/expectationstable3.shtml [https://perma.cc/H6PB-WRBU]. It should be noted that college was not explicitly defined as four-year. *Id.* at 2–3; *see also* Fawn Johnson & Nat'l Journal, *Minorities Haven't Given Up Hope on Higher Ed*, ATLANTIC (Oct. 11, 2012), https://www.theatlantic.com/politics/archive/2012/10/minorities-havent-given-up-hope-on-higher-ed/429051/ [https://perma.cc/H6QA-RQL6] (discussing a poll finding Blacks and Hispanics more likely than whites to believe a four-year degree is essential to success). In a survey of parents with children in higher education, Black and Hispanic parents were more likely than white parents to strongly agree that they viewed colleges as an investment for the future and were willing to stretch themselves financially for higher education, affirming their view that a "college education is part of the American Dream." SALLIE MAE, HOW AMERICA PAYS FOR COLLEGE 2012, at 40–41 tbls.22, 24 (2012).

86 *See infra* notes 113–17 and accompanying text.

These expectations reflect an administration of consumer expectations. The DOE has long summed up this national ethos in explicit terms: "Here's a simple equation: a college or career school education = more money, more job options, and more freedom."[87] Without qualification, the DOE states: "as you get more education, you make more money."[88] The Obama administration elaborated: "[C]ollege education is no longer just a privilege for some, but rather a prerequisite for all."[89]

The goal of higher education has transcended administrations, at both the agency and presidential levels. In his final three State of the Union addresses, President Obama reiterated that, "every hardworking kid [should] go to college,"[90] "Americans are priced out of the [higher] education they need,"[91] and college should be a reality for "every American."[92] Republican presidents, past and present, have struck a similar note.[93]

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87 *Prepare for College*, FED. STUDENT AID, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/sa/prepare-for-college [https://perma.cc/J5DA-BB53]. If the author's memory serves, this "equation" has been displayed on the portal since at least 2013.

88 *Id.*

89 Press Release, Office of the Press Secretary, President Obama's Blueprint for Keeping College Affordable and Within Reach for All Americans (Jan. 27, 2012), https://obamawhitehouse.archives.gov/the-press-office/2012/01/27/fact-sheet-president-obama-s-blueprint-keeping-college-affordable-and-wi [https://perma.cc/6TBC-DQEB]. In a 2013 speech to the Congressional Hispanic Caucus Institute, DOE Secretary Duncan noted more generally that "postsecondary schooling is essential" and "higher education is what folks need." Arne Duncan, U.S. Sec'y of Educ., Remarks of U.S. Secretary of Education Arne Duncan to the Congressional Hispanic Caucus Institute (Sept. 30, 2013), http://www.ed.gov/news/speeches/remarks-us-secretary-education-arne-duncan-congressional-caucus-hispanic-institute [https://perma.cc/UBA8-Z3S9].

90 President Barack Obama, State of the Union Address (Jan. 28, 2014), http://www.whitehouse.gov/the-press-office/2014/01/28/president-barack-obamas-state-union-address [https://perma.cc/74J7-YL2Y].

91 President Barack Obama, State of the Union Address (Jan. 20, 2015), https://www.whitehouse.gov/the-press-office/2015/01/20/remarks-president-state-union-address-january-20-2015 [https://perma.cc/4CRM-YAY3].

92 President Barack Obama, State of the Union Address (Jan. 12, 2016), https://www.whitehouse.gov/the-press-office/2016/01/12/remarks-president-barack-obama-–-prepared-delivery-state-union-address [https://perma.cc/8PAV-PBUA].

93 For example, although the preamble to the Spellings Commission report on higher education, named for President George W. Bush's Secretary of Education, disagreed with the current White House's conviction of college for everyone, the Commission nonetheless noted that "everyone needs a postsecondary education." COMM'N ON THE FUTURE OF HIGHER EDUC., U.S. DEP'T OF EDUC., A TEST OF LEADERSHIP, at x (2006), https://www2.ed.gov/about/bdscomm/list/hiedfuture/reports/final-report.pdf [https://perma.cc/6594-N369]. Concerning higher education, President Trump lamented the rise of student debt, which he declared should no longer be an "albatross" precluding meaningful access. Donald Trump, Presidential Candidate, Speech at

Historically, the Higher Education Act ("HEA")[94] included proprietary institutions within this higher education imperative.[95] The HEA made such institutions eligible for both grants and subsidized loans through Title IV—yet successive administrations have inconsistently embraced their presence.[96]

The election of the once-embattled founder of Trump University sparked soaring share prices among for-profit higher education companies.[97] Many such companies expected a resurgence under the current Republican administration, with for-profit education advocate Secretary Betsy DeVos at its educational helm.[98] The new administration may not only celebrate universal higher education, but also celebrate, in particular, universal *for-profit* higher education and encourage consumers accordingly.[99]

Campaign Event in Columbus, Ohio (Oct. 13, 2016), https://www.c-span.org/video/?c4625005/trump-higher-ed [https://perma.cc/88VS-KGBB].

94 Higher Education Act of 1965, 20 U.S.C. §§ 1001–1161 (2018).

95 In 1965, at HEA's passing, Congress remained skeptical of allowing for-profit vocational institutions to be eligible for federal higher education funding due to a rash of "fly-by-night" institutions after World War II, but favorable expert testimony led to the ultimate inclusion of such vocational institutions. Ass'n of Private Sector Colls. & Univs. v. Duncan (*APSCU II*), 870 F. Supp. 2d 133, 139–40 (D.D.C. 2012).

96 In 1984, the Comptroller General's investigation of the Pell Grant program revealed common for-profit misrepresentations, including of job placement rates and "scholarships." David Whitman, *The Reagan Administration's Campaign to Rein in Predatory For-Profit Colleges*, CENTURY FOUND. (Feb. 13, 2017), https://tcf.org/content/report/reagan-administrations-campaign-rein-predatory-profit-colleges/?agreed=1 [https://perma.cc/5L22-WFE3].

To prevent such behavior, since 1992, HEA has prohibited institutions receiving Title IV funding from providing employees with any incentive payment based on success in securing enrollments or financial aid. 20 U.S.C. § 1094. A decade later, the DOE seemed to soften its prohibition by publishing safe harbor regulations permitting a broad array of compensation schemes. *See* Federal Student Aid Programs, 67 Fed. Reg. 67,048, 67,072–73 (Nov. 1, 2002) (to be codified at 34 C.F.R. pt. 668). A 2017 Congressional bill attempted to expand the ability for the proprietary sector to receive federal funds by legislatively repealing the "gainful employment" rules and eliminating other requirements. *See* Promoting Real Opportunity, Success, and Prosperity through Education Reform (PROSPER) Act, H.R. 4508, 115th Cong. (as reported by H. Comm. on Educ. & the Workforce, Feb. 8, 2018).

97 *See* Collin Binkley, *With Founder of Trump University in Charge, For-Profit Colleges Expect Fortunes to Improve*, ST. LOUIS POST-DISPATCH (Nov. 29, 2016), https://www.stltoday.com/business/local/with-founder-of-trump-university-in-charge-for-profit-colleges/article_962acc71-50db-5ce5-a6a8-c6bc655899ff.html [https://perma.cc/SUJ3-YU38].

98 *See id.*

99 *See* Press Release, U.S. Dep't of Educ., DeVos Presses Pause on Burdensome Gainful Employment Regulations (June 30, 2017), https://www.ed.gov/news/press-releases/devos-presses-pause-burdensome-gainful-employment-regulations [https://perma.cc/MDQ9-EXPR]; *see also* H.R. 4508 § 104(a)(1)(B) (proposing removing former restrictions on providing aid to for-profit institutions).

4. *The Basis for the Expectation*

The administration of consumer expectations in higher education handicaps already unwieldy information regulation. Individual biases as well as social externalities offer only partial explanations for governmental efforts to instill a universal expectation that higher education will provide economic benefits to graduates. Rather, the expectation's intrinsic value as an ideology of mobility and equality explains its public persistence.

Eliminating other rationales for the expectation requires consulting the substantial literature on the pecuniary returns to higher education.[100] Researchers seem to agree on three facets of the private, pecuniary returns to higher education.[101] First, education correlates with lower unemployment and higher wages.[102] Second, wage differentials cannot be solely attributed to positive self-selection based on per-

100 *See* GALLUP & LUMINA FOUND., AMERICA'S CALL FOR HIGHER EDUCATION REDESIGN 4 (2013). For this discussion, this Article focuses on individual monetary gains, because they comprise a large, although not exclusive, focus of the higher education imperative. This Article also focuses primarily on personal income, because income facilitates the repayment of growing, higher education debt. *See* CONSUMER FIN. PROT. BUREAU, *supra* note 41, at 32–37. Rich literatures on both social and nonpecuniary returns have identified effects of higher education on health, marriage, job satisfaction, smoking, *see* Philip Oreopoulos & Kjell G. Salvanes, *Priceless: The Nonpecuniary Benefits of Schooling*, J. ECON. PERSP., Winter 2011, at 159, 160, and others' wage levels. *See* Enrico Moretti, *Estimating the Social Return to Higher Education: Evidence from Longitudinal and Repeated Cross-Sectional Data*, 121 J. ECONOMETRICS 175, 176 (2004) (finding that a rise in college graduates raises the wages of high school dropouts and high school graduates); *see also* GALLUP & LUMINA FOUND., *supra* at 4 (finding that nearly two-thirds of respondents say that earning more money is a "very important" reason for pursuing education beyond high school).

101 The exact methodology by which to calculate private, pecuniary returns varies among empirical studies. *See* George Psacharopoulos, *The Economic Returns to Higher Education in Twenty-Five Countries*, 1 HIGHER EDUC. 141, 145–46 (1972) (distinguishing between the private and social rate of returns to education); George Psacharopoulos & Harry Anthony Patrinos, *Returns to Investment in Education: A Decennial Review of the Global Literature*, 26 EDUC. ECON. 445, 447–51 (2018) (same).

For a sample definition, see GEORGE PSACHAROPOULOS, HIGHER EDUC. FUNDING REFORM PROJECT, EUROPEAN COMM'N, RETURNS TO INVESTMENT IN HIGHER EDUCATION 3–4 (2009) ("Private returns are based on the costs and benefits of education, as those are realized by the individual student . . . relative to a control group of secondary school graduates who did not pursue tertiary education studies.").

102 As of September 2019, for example, full-time workers with some college education, an associate degree, and a bachelor's degree earned, respectively, 12%, 19%, and 67% more than workers with only a high school diploma. *Unemployment Rates and Earnings by Educational Attainment*, BUREAU OF LAB. STAT. (Sept. 4, 2019), https://www.bls.gov/emp/chart-unemployment-earnings-education.htm [https://perma.cc/ND8M-PWB8]. Data from the Current Population Survey is for persons aged 25 and over. Similarly, unemployment rates were monotonically decreasing with the individual's education level. *Id.*

sonal traits such as innate ability.[103] And third, private pecuniary rates of return to education are often positive.[104]

The heterogeneity of private returns renders a universal expectation misleading.[105] The returns to education vary both with the indi-

103 Estimates that attempt to control for such unobservables still indicate high positive returns, and negative selection hypotheses are gaining increasing empirical traction. *See* MICHAEL GREENSTONE & ADAM LOONEY, THE HAMILTON PROJECT, WHERE IS THE BEST PLACE TO INVEST $102,000–IN STOCKS, BONDS, OR A COLLEGE DEGREE? 5 (2011) ("[F]actors [such as aptitude and ambition] don't drive the impressive return to college; instead the increased earning power of college graduates appears to be caused by their educational investments."); David Card, *Estimating the Return to Schooling: Progress on Some Persistent Economic Problems*, 69 ECONOMETRICA 1127, 1127 (2001) (summarizing how econometrically sophisticated research with instrumental variables suggests that simple correlations underestimate the returns to schooling); *see also* Jennie E. Brand & Yu Xie, *Who Benefits Most From College? Evidence for Negative Selection in Heterogeneous Economic Returns to Higher Education*, 75 AM. SOC. REV. 273, 293 (2010) (using propensity score strata and longitudinal, administrative datasets to "suggest[ ] negative selection: individuals most likely to benefit from a college education are the *least* likely to obtain one" (emphasis in original)).

104 *See* GREENSTONE & LOONEY, *supra* note 103, at 1, 4 (estimating returns on higher educational investment of 15% for four-year college graduates and 20% for associate degree holders).

105 *See* Pedro Carneiro, Heterogeneity in the Returns to Schooling: Implications for Policy Evaluation: Dissertation Summary 12 (Jan. 1, 2004) (unpublished dissertation, University of Chicago), https://research.upjohn.org/cgi/viewcontent.cgi?article=1019&context=dissertation_awards [https://perma.cc/PAS4-6UVD] ("This suggests that heterogeneity is important and needs to be accounted for in [higher education] policy analysis."); *see, e.g.*, Lesley J. Turner, *The Returns to Higher Education for Marginal Students: Evidence from Colorado Welfare Recipients*, 51 ECON. EDUC. REV. 169, 170, 181–82 (2016) (distinguishing "between earnings gains due to credit completion and those driven by credential receipt" in community college matriculants and finding significant private returns to community college credential receipt among Colorado single mothers who received welfare).

Studies often rely on what are called "instrumental variables" ("IV"), of which natural experiments constitute a subset, to infer causal effects of higher education. *See, e.g.*, Guido Imbens & Joshua Angrist, *Identification and Estimation of Local Average Treatment Effects*, 62 ECONOMETRICA 467, 468 (1994) (providing technical exposition). These studies yield estimates on those marginal, "local" students induced to enroll by the particular program, and these "local" students may differ from those induced to attend by a different, prospective policy. *See id.*

Because those individuals induced to enroll by the experimental program might differ from those affected by a particular policy expansion, local average treatments effects may be very different from "policy relevant treatment effects" ("PRTEs"). *See* Pedro Carneiro et al., *Estimating Marginal Returns to Education*, 101 AM. ECON. REV. 2754, 2755 (2011). *See generally* James J. Heckman & Edward Vytlacil, *Policy-Relevant Treatment Effects*, 91 AM. ECON. REV. 107 (2001) (providing another short, technical exposition).

PRTEs account for the differences between the local, experimental populations and the policy relevant populations in their responsiveness to treatment. For example, researchers might exploit the plausible exogeneity of household geographic proximity to colleges to identify strong causal returns to higher education; yet a policy of opening new institutions will attract different students than those currently enrolled. Where the returns of these two groups differ, the conventional estimates may greatly overstate the adjusted policy estimate, such as when an educational policy induces, from a financial standpoint, "students who should not attend college to attend it."

vidual and the educational institution.[106] Consumers' cognitive biases—namely pessimism bias—could partially justify perpetuating the universal expectation. However, high schoolers' subjective perceptions of the wage returns to higher education appear to exceed both objective realities and their subjective expectations for the "typical" individual.[107] These overestimates may reflect optimism bias.[108] Given that much of rising American income inequality occurs within, rather than between, professions, overconfidence in becoming a high-earning "star" in one's low-median earnings profession reflects a form of optimism bias distinctly affecting higher education.[109]

The engagement of minority students with higher education reflects a unique disparity—few minority high school graduates enroll at the selective institutions where they might disproportionately benefit.[110] In fact, the majority of these students may not even take the

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Carneiro et al., *supra*, at 2755. Nobel Laureate James Heckman and co-authors relax the assumption of symmetric populations and find that traditional IV methods produce estimates of returns to education of nearly 10%, more than six times as high as the 1.5% estimate of the adjusted marginal return to a policy that uniformly increases the probability of attendance across students. *Id.*

106 *See generally* GREENSTONE & LOONEY, *supra* note 103, at 3–4 (estimating returns on higher educational investment of 15% for four-year college graduates and 20% for associate degree holders).

107 *See, e.g.*, Nick Huntington-Klein, *Subjective and Projected Returns to Education*, 117 J. ECON. BEHAV. & ORG. 10, 13–14 (2015) (explaining that in a survey of Washington youth, subjective expectations of salary are high relative to both current observed levels and subjective expectations for the "typical person").

108 *See generally* THALER & SUNSTEIN, *supra* note 32, at 31–33 (discussing how optimism bias generally refers to how a large majority of individuals in a group believes that they will perform better than the group average).

109 Intraoccupational inequality has risen in the past decades. *See* ChangHwan Kim & Arthur Sakamoto, *The Rise of Intra-Occupational Wage Inequality in the United States, 1983 to 2002*, 73 AM. SOC. REV. 129, 129 (2008); *see also* Gueorgui Kambourov & Iourii Manovskii, *Occupational Mobility and Wage Inequality*, 76 REV. ECON. STUD. 731, 731 (2009) ("Most of the increase in wage inequality was due to rising inequality within narrowly defined age-education subgroups.").

110 *Minority Enrollment: Black and Hispanic Students Underrepresented at Highly Selective Colleges, Stanford Study Finds*, HUFFINGTON POST (July 17, 2012, 8:07 PM), https://www.huffpost.com/entry/stanford-study-finds-blac_n_1681136?utm_hp_ref=college&ir=college [https://perma.cc/B8EK-NGCP]. Stacy Dale and Alan Krueger found that, after controlling for applications and admission to universities, there was no earnings effect of actual matriculation to more selective colleges, relative to matriculation at a less selective college. Stacy B. Dale & Alan B. Krueger, *Estimating the Effects of College Characteristics over the Career Using Administrative Earnings Data*, 49 J. HUM. RESOURCES 323, 325–26 (2014). However, attending a selective college did lead to returns for Blacks and Hispanics as well as students whose parents had less educational attainment, potentially because selective colleges provide disadvantaged students access to social networks. *Id.* at 326.

At Florida's least selective four-year state university, those "marginally admitted" into the state university system do benefit from such attendance, but the wage benefits are concentrated

SAT, which is conveniently not required for the open admission institutions prevalent in the proprietary sector.[111] Even as more minorities enter higher education overall, their lower SAT testing rates, and scores among those tested,[112] combined with the increased availability of open admission proprietary options, contribute to their declining population share at selective institutions.[113]

The scholarly focus on traditional higher education sidelines the unique problems and returns arising from programs of nontraditional length and content—those that produce cosmetologists rather than chemists.[114] The presumption that higher education refers to four-year

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among whites. *See* Seth D. Zimmerman, *The Returns to College Admission for Academically Marginal Students*, 32 J. LAB. ECON. 711, 731–36 (2014). The SAT scores of those studied, around the admissions cutoff, averaged 839, a benchmark more closely aligned to at least those minorities who take the SAT. *Id.* at 714. The Florida study finds large wage returns for men—compared to counterparts just below the threshold, who were far more likely to matriculate at non-four-year institutions. *See id.* at 736, tbl.6. However, the earnings gain for Black students is statistically indistinguishable from zero and the gain for Hispanics is just over half the magnitude of men generally and only marginally statistically significant. *See id.*

111 MARY E.M. MCKILLIP & PHILIP E. MACKEY, THE COLL. BD., COLLEGE ACCESS AND SUCCESS AMONG HIGH SCHOOL GRADUATES TAKING THE SAT: AFRICAN AMERICAN STUDENTS 5 (2013) (estimating that 41% of African American graduates took the SAT); MARY E.M. MCKILLIP & PHILIP E. MACKEY, THE COLL. BD., COLLEGE ACCESS AND SUCCESS AMONG HIGH SCHOOL GRADUATES TAKING THE SAT: LATINO STUDENTS 5 (2013) (estimating that 39% of Latino graduates took the SAT); MARY E.M. MCKILLIP & PHILIP E. MACKEY, THE COLL. BD., COLLEGE ACCESS AND SUCCESS AMONG HIGH SCHOOL GRADUATES TAKING THE SAT: NATIVE AMERICAN STUDENTS 5 (2013) (estimating that 26% of Native American graduates took the SAT). These estimates rely on 2010 data despite being from reports published in 2013. Notably, in 2020, the University of California "approved the suspension of the standardized test requirement (ACT/SAT) for all California freshman applicants until fall 2024," raising the possibility of the test's gradual abandonment by other major research universities. Press Release, Univ. of Cal., University of California Board of Regents unanimously approved changes to standardized testing requirement for undergraduates (May 21, 2020), https://www.universityofcalifornia.edu/press-room/university-california-board-regents-approves-changes-standardized-testing-requirement [https://perma.cc/BFE5-UMND].

112 The approximate average combined reading and math SAT scores for White, Black, Latino, and Native American students who do take the SAT are, respectively, 1063, 860, 910, and 967. *See* THE COLL. BD., 2014 COLLEGE-BOUND SENIORS: TOTAL GROUP PROFILE REPORT 3 (2014), https://secure-media.collegeboard.org/digitalServices/pdf/sat/TotalGroup-2014.pdf [https://perma.cc/4HVT-9CLM]. As a point of reference, the marginally admitted students in the aforementioned Florida State University System study scored around 839 on the SAT. Zimmerman, *supra* note 110, at 714.

113 *See* ANTHONY P. CARNEVALE & JEFF STROHL, CTR. ON EDUC. & WORKFORCE, GEORGETOWN PUB. POLICY INST., SEPARATE & UNEQUAL 8 (2013), https://cew.georgetown.edu/wp-content/uploads/SeparateUnequal.FR_.pdf [https://perma.cc/HQ3S-GAQW].

114 Community college education, including both certificate and associate's degrees programs, has attracted some scholarly attention. *See, e.g.*, Dave E. Marcotte, *The Returns to Education at Community Colleges: New Evidence from the Education Longitudinal Survey*, 14 EDUC. FIN. & POL'Y 523, 527 (2018) (summarizing "recent literature on the earnings effects of commu-

degrees overshadows how proprietary institutions disproportionately offer, and racial minorities disproportionately enroll in, short-term certificate programs.[115] This Article specifies enrollment, as opposed to graduation, since short-term program matriculants often fail to complete their course of study,[116] and even those who earn their certificates appear to experience only marginal labor market returns.[117]

Positive social externalities also do not justify the higher education imperative.[118] Theory suggests that better educated people might generate positive social benefits, including improved social cohesion, reduced criminal activity, productivity growth and spillovers, higher tax revenue, and assorted forms of civic engagement, but the evidence remains mixed.[119] The "diverse" "empirical evidence of the scale and

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nity college education," which often distinguishes matriculation from completion and certificates from associate's degrees).

115 These programs, whether at proprietary or nonproprietary institutions, are subject to "gainful employment" regulation. *See* 20 U.S.C. §§ 1002(b)(1)(A)(i), 1002(c)(1)(A), 1088(b)(1)(A)(i) (2018). The majority of degrees awarded by for-profit institutions continue to be certificates below the associate degree benchmark: these institutions award twice as many of such certificates as associate degrees, whereas public institutions award more associate degrees than such certificates. NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, tbl.318.40 (2014), http://nces.ed.gov/programs/digest/d14/tables/dt14_318.40.asp?current=yes [https://perma.cc/E7HF-NHRQ]. To see how Blacks and Hispanics are much better represented among those to whom certificates are conferred and decreasingly represented among those to whom, respectively, associate, bachelor's, and postgraduate degrees are conferred, see NAT'L CTR. FOR EDUC. STATISTICS, DIGEST OF EDUCATION STATISTICS, tbls.320.20, 321.20, 322.20, 323.20, 324.20 (2014), http://nces.ed.gov/programs/digest/2014menu_tables.asp [https://perma.cc/V744-J329].

116 *See* Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 64,906 (Oct. 31, 2014) (to be codified at 34 C.F.R. pt. 600, 668); *supra* text accompanying note 53.

117 A recent study of administrative data from Kentucky found that, even after controlling for student characteristics including precollege earnings and aspirations, associate degrees yield higher employment outcomes, while certificates do not have the same effect. Christopher Jepsen et al., *The Labor-Market Returns to Community College Degrees, Diplomas, and Certificates*, 32 J. LAB. ECON. 95, 100, 113 tbl.5 (2014). Moreover, associate degrees yield an estimated income increase of thousands of dollars per quarter, compared to only hundreds of dollars for certificates. *Id.* at 117 tbl.6.

118 For an overview of externalities in higher education, see WALTER W. MCMAHON, HIGHER LEARNING, GREATER GOOD 193 (2009). *See generally* James J. Heckman & Ganesh Karapakula, *Intergenerational and Intragenerational Externalities of the Perry Preschool Project* (Nat'l Bureau of Econ. Research, Working Paper No. 25889, 2019) (discussing both intragenerational and intergenerational externalities meaning, respectively, the effects of treatment on siblings and children).

119 *See generally* Thomas S. Dee, *Are There Civic Returns to Education?* 88 J. PUB. ECON. 1697, 1697 (2004) ("The results suggest that educational attainment has large and statistically significant effects on subsequent voter participation and support for free speech . . . [and] the quality of civic knowledge as measured by the frequency of newspaper readership."); T.S. Dee, *Education and Civic Engagement* 103–08, *in* THE ECONOMICS OF EDUCATION (Steve Bradley & Colin Green eds., 2d ed. 2020) (noting how "recently, the putative civic benefits of investments

scope of externalities" cautions against generalizability.[120] For example, those who attend poor-quality institutions and fare poorly financially may be disproportionately concentrated in certain communities, leading to negative social externalities.[121] This idea of both individual- and community-level effects from the administration of consumer expectations raises multiple questions of redistribution, some of which are discussed in Part III.[122] Even those economists focused on social externalities from higher education have argued for greater public investment in secondary rather than higher education.[123]

The case for convincing consumers to privately finance higher education for the sake of social benefits is tenuous. The real rationale for the higher education imperative may be its intrinsic value as an ideology. That ideology claims that higher education not only can lead to economic opportunity and mobility, but that it *is* economic opportunity and mobility.

Equal opportunity is an aspirational precept in American law.[124] Western welfare states invest in higher education, often as a tradeoff against other social welfare programs.[125] The American emphasis on

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in education have motivated arguments for private-school vouchers as well as for the Great Society investments in higher education"); Enrico Moretti, *Workers' Education, Spillovers, and Productivity: Evidence from Plant-Level Production Functions*, 94 AM. ECON. REV. 656 (2004) (finding that the presence of productivity spillovers cannot be rejected empirically, but the magnitude is unlikely to be substantial).

120 DANIEL MÜNICH & GEORGE PSACHAROPOULOS, EUROPEAN EXPERT NETWORK ON ECON. OF EDUC., EDUCATION EXTERNALITIES—WHAT THEY ARE AND WHAT WE KNOW, 7–8 (2018).

121 *See* Andrew F. Haughwout et al., *Just Released: Racial Disparities in Student Loan Outcomes*, FED. RESERVE BANK N.Y.: LIBERTY STREET ECON. (Nov. 13, 2019), https://libertystreeteconomics.newyorkfed.org/2019/11/just-released-racial-disparities-in-student-loan-outcomes.html [https://perma.cc/643A-3KJQ] (using Equifax credit report data, which includes individual race data, combined with American Community Survey data, to show that since 2010 "the balances of borrowers in black-majority zip codes began diverging from those in white-majority zip codes and have since continued to trend higher," and that, currently, the default rate is significantly higher in black-majority areas than white-majority areas).

122 *See infra* Section III.A (discussing regressivity).

123 *See* Claudia Goldin & Lawrence F. Katz, *The Race Between Education and Technology: The Evolution of U.S. Educational Wage Differentials, 1890 to 2005*, at 26–29 (Nat'l Bureau of Econ. Research, Working Paper No. 12984, 2007), https://www.nber.org/papers/w12984.pdf [https://perma.cc/MR9A-8EXX].

124 Joshua E. Weishart, *Transcending Equality* Versus *Adequacy*, 66 STAN. L. REV. 477, 485–89 (2014) (summarizing the basic tenets of equal opportunity as nondiscrimination, meritocracy, and equal life chances, and noting its prevalence in paradigmatic statutes such as the Americans with Disabilities Act and the Civil Rights Act).

125 *Id.* at 488 (noting how Rawls viewed equality of opportunity, including nondiscrimination and meritocracy, as insufficient for substantive equality). *See generally* Arthur J. Altmeyer, *Social Welfare in the United States*, SOC. SECURITY ADMIN., http://www.ssa.gov/history/

equality of opportunity manifests in numerous postsecondary choices. This lies in contrast to peer European countries, where one's secondary education track formally dictates postsecondary paths. The decentralized American market, replete with both private proprietary and nonprofit institutions preserves "the possibility of *some* kind of postsecondary education for all."[126]

Higher education has not always been perceived as synonymous with economic opportunity and advancement—in fact it was once orthogonal. Chronicling the development of "the conviction that America's colleges and universities have become central to the contemporary pursuit of the American dream,"[127] Jerome Karabel noted that differentiation and diversification within higher education emerged in response to the need for "ladders of ascent."[128] In the aftermath of the Industrial Revolution, 19th-century colleges facilitated the passage of rural men into the modern, urban economy, though even the most elite schools could not prepare poor students for the exclusive world of business.[129] At the dawn of the 20th century, American men, including successful businessmen, had little more than an elementary school education, and there was minimal sequence to the educational system—professional schools did not require completing college, and college did not require completing high school. Higher education provided mobility, but only to a limited degree. By some measures, "getting ahead . . . remained a matter of skill in the marketplace, not in the classroom."[130]

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aja964.html [https://perma.cc/7F6P-9QMH] (noting that some countries view education as a social welfare program, given the relatively recent development of education in those countries). These archives, authored by the mid-20th century Commissioner for Social Security, Arthur Altmeyer, evaluate the public's perceived distinction between publicly funded education and social insurance. *See id.*

126 David Karen, *Changes in Access to Higher Education in the United States: 1980–1992*, 75 Soc. Educ. 191, 192 (2002) (emphasis added).

127 Steven Brint & Jerome Karabel, The Diverted Dream, at v–vi (1991).

128 *Id.* at 4.

129 Michael B. Katz, *The Role of American Colleges in the Nineteenth Century*, 23 Hist. Educ. Q. 215, 217 (1983) (reviewing Colin B. Burke, American Collegiate Populations (1982) and Peter Dobkin Hall, The Organization of American Culture, 1700-1900 (1982)) ("These small colleges . . . eased the passage of young men from rural to urban life. . . . 'It was the small institutions that, in conjunction with contemporary professional forces, moved students from old to new cultures and environments.'" (quoting Peter Dobkin Hall, The Organization of American Culture, 1700-1900, at 97 (1982))). "Certainly, the elite Eastern schools by and large did not prepare poor young men for business careers." *Id.* at 218.

130 Brint & Karabel, *supra* note 127, at 4 ("As late as 1900, 84 percent of the prominent businessmen listed in *Who's Who in America* had not been educated beyond high school.").

The beginning of the twentieth century reflected a "democratization of . . . education," whereby marginalized groups including Jewish people, women, and racial minorities became more visible in American higher education.[131] Higher education grew during the mid-20th century as technological change increased the demand for cognitively skilled workers.[132] But enrollment became increasingly concentrated in the public sector from the 1930s to the 1990s, and particularly concentrated in community colleges.[133] The rise of community colleges, and therefore accessibility, in the late-20th century was also marked by two shifts away from the university model:[134] the loss of traditional liberal arts students and the rise of remedial and professional education.[135]

The recent century has forged higher education's links to beliefs in equal opportunity and social mobility.[136] The evidence, however, does not comport with these subjective beliefs. The United States,

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131 CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION 205 (1994).

132 NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., 120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT 66 (Thomas D. Snyder ed., 1993) ("The 1950s and 1960s marked two major developments. First, large numbers of young people entered college and second, public colleges expanded dramatically to meet the demand."); Claudia Goldin & Lawrence F. Katz, *The Future of Inequality*, MILKEN INST. REV., Third Quarter 2009, at 26, 30 ("[T]echnological change, measured in a variety of ways, was just as rapid and just as likely to increase the demand for high-skilled workers at the start of the 20th century as it has been in the recent past.").

133 NAT'L CTR. FOR EDUC. STATISTICS, *supra* note 132, at 66 fig.15.

134 *See* BRINT & KARABEL, *supra* note 127, at v (examining the "American junior college . . . [including] its transformation in recent years from an institution oriented to the provision of college-level transfer courses into one that is predominantly vocational in character"). This transformation may not be limited to community colleges, however. *See* Vicki L. Baker et al., *Where Are They Now? Revisiting Breneman's Study of Liberal Arts Colleges*, LIBERAL EDUC., Summer 2012, http://www.aacu.org/liberaleducation/le-su12/bakerbaldwinmakker.cfm [https://perma.cc/3R3A-PER2] (finding that the number of liberal arts colleges has further declined, reflecting an "historical trend toward more professional education and less study of traditional liberal arts fields").

135 BRINT & KARABEL, *supra* note 127, at 128–29, 131. The state fiscal crises of the 1970s led to states catering to industrial demands for more skilled service workers and further vocationalization of community colleges. David R. Howell & Edward N. Wolff, *Trends in the Growth and Distribution of Skills in the U.S. Workplace, 1960–1985*, 44 INDUS. & LAB. REL. REV. 486, 486 (1991) (documenting the decline in demand for motor skills and the concurrent rise in demand for cognitive skills).

136 *See* JULIA B. ISAACS, BROOKINGS INST., INTERNATIONAL COMPARISONS OF ECONOMIC MOBILITY 1 (2008), https://www.brookings.edu/wp-content/uploads/2016/07/02_economic_mobility_sawhill_ch3.pdf [https://perma.cc/W5SW-VMDF] ("Americans have more faith than do people in other countries that they will receive economic rewards for individual effort, intelligence, and skills. About two-thirds of Americans (69 percent) agree with the statement that 'people are rewarded for intelligence and skill,' the highest percentage across 27 countries participating in an international survey of social attitudes conducted between 1998 and 2001.").

among other countries, suffers from comparatively limited mobility,[137] and a heralded study suggests that American intergenerational mobility has not changed much over the past few decades.[138] United States social mobility lags behind industrialized peers, including most Western European countries.[139] Horatio Alger stories are few and far between.[140]

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137 Orsetta Causa & Åsa Johansson, *Intergenerational Social Mobility in OECD Countries*, 2010 OECD J.: Econ. Stud. 33, 35 ("Low mobility across generations, as measured by a close link between parents' and children's earnings, is particularly pronounced in the United Kingdom, Italy, the United States and France, while mobility is higher in the Nordic countries, Australia and Canada."); *see also* Miles Corak, *Do Poor Children Become Poor Adults? Lessons from a Cross Country Comparison of Generational Earnings Mobility* 1–2 (Inst. for the Study of Labor (IZA), Discussion Paper No. 1993, 2006), http://ftp.iza.org/dp1993.pdf [https://perma.cc/BE5W-V942] (noting higher generational earnings mobility in Canada and the Nordic countries than in the United Kingdom and United States). There may be, however, some difficulty in objective, international comparisons of mobility due to data differences and limitations.

138 *See* Raj Chetty et al., *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 19844, 2014) ("We find that all of these rank-based measures of intergenerational mobility have not changed significantly over time.").

139 For example, the Organisation for Economic Co-operation and Development ("OECD") notes that on one particular metric—the percentage of young people with higher education but without parents who finished high school—the United States ranks among the least mobile of industrialized nations. *See* Org. for Econ. Co-operation & Dev., *United States*, *in* Education at a Glance, at 1 (2012), https://www.oecd-ilibrary.org/docserver/eag-2012-56-en.pdf?expires=1589344421&id=id&accname=guest&checksum=DC0FD02682822B63F26F5DA73A1EF376 [https://perma.cc/SRT4-J85C]; Org. for Econ. Co-operation & Dev., Education at a Glance, at 218 fig.B5.a (2019), https://www.oecd-ilibrary.org/docserver/f8d7880d-en.pdf?expires=1589344645&id=id&accname=guest&checksum=63DBEB8369F0EDB554E3F5EC327B4581 [https://perma.cc/JDW5-UV8Y].

The empirical study of social mobility, and its counterpart, persistence, centers around a key statistic: the intergenerational elasticity of earnings. The intergenerational elasticity measures the relationship between a parent's earnings and his child's later earnings. Miles Corak, *Inequality From Generation to Generation: The United States in Comparison* 1–2 (Inst. for the Study of Labor (IZA), Discussion Paper No. 9929, 2016), http://nws-sa.com/rr/Inequality/inequality-from-generation-to-generation-the-united-states-in-comparison-v3.pdf [https://perma.cc/U8RN-T8J9] ("For some decades there has also been a focus on earnings and income as the outcomes of interest. This has naturally led to the most often used statistic in this literature, namely, the 'intergenerational elasticity in earnings . . . .' ").

Societies with greater income inequality, as measured by the Gini coefficient, also tend to have less mobility, as shown by the so-called Gatsby curve. Miles Corak, *Income Inequality, Equality of Opportunity, and Intergenerational Mobility*, J. Econ. Persp., Summer 2013, at 79, 80–81. By these metrics, the United States is both more unequal and more immobile than France, Canada, and Germany. *Id.* at 82 fig.1. The United States is also more unequal, though more mobile, than Italy and the United Kingdom. *Id.*

140 Horatio Alger was an author in the late 19th century who wrote stories about perseverance and morality as a means of overcoming adversity. *About Us: Who We Are*, Horatio Alger Ass'n of Distinguished Ams., Inc., https://horatioalger.org/about-us/history-of-horatio-alger-association/ [https://perma.cc/Q2H8-XDCY]. An American son born to a father in the lowest quintile of the income distribution is less likely to rise to the top quintile than a similar low-

Americans' faith in higher education as embodying equality and mobility is nonetheless resistant to these realities. While some surveys document the decline of subjective economic optimism in recent years, even that research acknowledges that the majority of Americans still believe that America is a land of "plenty of opportunity," a "basically fair" economic system, and a place where "all Americans have an equal opportunity to succeed."[141] Within this persistent belief in mobility, "[h]aving a college degree has long been viewed as one of the most promising ways to climb the economic ladder," which is representative of the centrality of expectations in higher education's value.[142]

In sum, the state has a long history of perpetuating an expectation that higher education will lead to pecuniary success for graduates. This expectation overshadows prior regulatory efforts at information regulation, particularly at for-profit institutions that often fail to live up to that promise. In turn, as Part III explores, the expectations may have produced avoidable private economic disappointment, with impacts on public economic inequality. Even aside from these distributional questions, the administration of a consumer expectation in higher education undermines consumer protection for the sake of an ideology.

B. *Homeownership*

The administrations of consumer expectation and of consumer protection in homeownership differ from higher education. Admittedly, segments of both markets have been labeled "subprime"[143] and

quintile son in peer countries. *See* Markus Jäntti et al., *American Exceptionalism in a New Light: A Comparison of Intergenerational Earnings Mobility in the Nordic Countries, the United Kingdom and the United States* 17–20 (Inst. for the Study of Labor (IZA), Discussion Paper No. 1938, 2006). The quintile measurements reveal that Blacks face particular disadvantages: they are more likely than not to remain in the bottom quintile if born there, and they are particularly susceptible to dropping out of the middle quintiles. Edward Rodrigue & Richard V. Reeves, *Five Bleak Facts on Black Opportunity*, BROOKINGS INST. (Jan. 15, 2015), http://www.brookings.edu/blogs/social-mobility-memos/posts/2015/01/15-mlk-black-opportunity-reeves [https://perma.cc/S3EZ-4VX5].

141 *See, e.g.*, Andrew Dugan & Frank Newport, *In U.S., Fewer Believe "Plenty of Opportunity" to Get Ahead*, GALLUP (Oct. 25, 2013), http://www.gallup.com/poll/165584/fewer-believe-plenty-opportunity-ahead.aspx [https://perma.cc/KZ7A-LWDB].

142 PEW CHARITABLE TRUST, PURSUING THE AMERICAN DREAM 23 (2012), https://www.pewtrusts.org/~/media/legacy/uploadedfiles/wwwpewtrustsorg/reports/economic_mobility/pursuingamericandreampdf.pdf [https://perma.cc/YG38-A43T].

143 *See* Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 447 (2012). The term subprime usually refers to credit risk. *See id.* at 477–80.

have grappled with the tradeoff between increased access for marginalized groups and predatory behavior. However, although the higher education imperative reflects at least superficial commitments to equality, however, the administrative state's promotion of private homeownership emerged in opposition to equalizing, collectivist aims.[144] More recently, the administration of homeowner consumer protection has been particularly complicated because of how subprime mortgages became enmeshed in the broader financial system through securitization and derivatives.[145] And the CFPB, which plays a key role in regulating the housing market, has had no shortage of constitutional challenges and administrative reorientations.[146] Amidst these changes, consumer expectations in the housing market persist, and by one measure recently peaked.[147]

1. The Market and the Problem

While the federal government and the public continue to prize homeownership,[148] homebuyers over the past decades largely have been left with disappointed expectations.[149] Financial economists increasingly worry that another housing crisis may be just around the

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144 *See infra* notes 199–201 and accompanying text.

145 *See* SEAN M. HOSKINS, CONG. RESEARCH SERV., R43081, THE ABILITY-TO-REPAY RULE: POSSIBLE EFFECTS OF THE QUALIFIED MORTGAGE DEFINITION ON CREDIT AVAILABILITY AND OTHER SELECTED ISSUES 5–8 (2014).

146 *See, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75 (D.C. Cir. 2018) (representing a constitutional challenge to the CFPB); PHH Corp. v. Consumer Fin. Prot. Bureau, 839 F.3d 1 (D.C. Cir. 2016) (same).

147 *See* Matthew Classick, *Consumer Confidence in Housing Hits All-Time High*, FANNIE MAE (Mar. 7, 2017), http://www.fanniemae.com/portal/media/corporate-news/2017/february-home-purchase-sentiment-index-6527.html [https://perma.cc/4HRN-CTDX]; Matthew Classick, *Housing Confidence Dips Slightly, Remains Near Survey High on Improved Mortgage Rate Expectations*, FANNIE MAE (July 8, 2019), https://www.fanniemae.com/portal/research-insights/surveys/national-housing-survey.html [https://perma.cc/US8B-DWAD].

148 Edward L. Glaeser, *Rethinking the Federal Bias Toward Homeownership*, 13 CITYSCAPE, no. 2, 2011, at 5, 5–7, 28 (exploring the federal "bias" toward homeownership and arguing that "even with a belief in subsidizing homeownership, the current system still seems poorly targeted, highly regressive, and excessively engineered to encourage borrowing money and buying big homes"); Laurie S. Goodman & Christopher Mayer, *Homeownership and the American Dream*, J. ECON. PERSP., Winter 2018, at 31, 42 (marshalling survey evidence to conclude that "[h]omeownership clearly remains an aspiration for the vast majority of households").

149 *See* Robert J. Shiller, *Understanding Recent Trends in House Prices and Home Ownership* 44 (Yale Univ. Econ. Dep't Working Paper No. 28, 2007) (noting that in real terms, returns from American housing investment from 1890 to 1990 trailed that of other countries); *S&P/Case-Shiller U.S. National Home Price Index*, FED. RES. BANK ST. LOUIS, https://fred.stlouisfed.org/series/CSUSHPINSA [https://perma.cc/V5ZD-9MPU] (demonstrating that the national home price index took a decade to recover after pre-financial crisis peak).

corner.[150] Home mortgages constitute the single largest market for consumer financial products, with outstanding loans valued at approximately $16 trillion.[151] The now-infamous subprime mortgages refer to the extension of housing credit to a broader pool of borrowers beyond the standard (prime) market.[152] Because the prime market often excludes such borrowers based on poor credit histories, which correlate with delinquency and default, subprime mortgage borrowers face much higher interest rates.[153] Securitization of these mortgages, innovated by government-sponsored enterprises, led to derivative financial instruments and transactions, intertwining the housing and financial markets.[154] The post–financial crisis fall in housing prices resulted in an aggregate household wealth loss of $7 trillion,[155] disproportionately affecting racial minorities[156] who, even after the crisis, remained overrepresented in the nonconventional, high-interest mortgage sector.[157]

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150 *See, e.g.*, Robert J. Shiller, *How Tales of 'Flippers' Led to a Housing Bubble*, N.Y. TIMES (May 18, 2017), https://www.nytimes.com/2017/05/18/upshot/how-tales-of-flippers-led-to-a-housing-bubble.html [https://perma.cc/7SRA-F924] ("[R]estraint is tenuous with the election as president of a real estate promoter intent on reducing regulators' power. These narratives are still potent and could easily spur further spirals in the housing market.").

151 CHERYL R. COOPER, CONG. RESEARCH SERV., R45813, AN OVERVIEW OF CONSUMER FINANCE AND POLICY ISSUES 1 (2019); *Mortgage Debt Outstanding*, BOARD GOVERNORS FED. RES. https://www.federalreserve.gov/data/mortoutstand/current.htm [https://perma.cc/3A5T-QJWR].

152 Souphala Chomsisengphet & Anthony Pennington-Cross, *The Evolution of the Subprime Mortgage Market*, 14 FED. RES. BANK ST. LOUIS REV. 31, 31–32 (2006); *see also* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, Summer 2007, https://democracyjournal.org/magazine/5/unsafe-at-any-rate/ [https://perma.cc/4LTR-HPNZ] (describing how subprime mortgages were often extended to those who would have qualified for prime-rate loans).

153 Even in 2002, prior to the financial crisis, subprime loans were associated with a probability of default 5 to 10 times higher than prime loans. Chomsisengphet & Pennington-Cross, *supra* note 152, at 32.

154 Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79,730, 79,733 (Dec. 31, 2013) (to be codified at 12 C.F.R. pts. 1024, 1026).

155 BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE U.S. HOUSING MARKET: CURRENT CONDITIONS AND POLICY CONSIDERATIONS 3 (2012), http://www.federalreserve.gov/publications/other-reports/files/housing-white-paper-20120104.pdf [https://perma.cc/6H5G-2F34]. The fall in housing prices is measured from the 2006 peak to the 2009 trough. *Id.*

156 DEBBIE GRUENSTEIN BOCIAN & ROBERTO G. QUERCIA, CTR. FOR RESPONSIBLE LENDING, LOST GROUND, 2011: DISPARITIES IN MORTGAGE LENDING AND FORECLOSURES 5 (2011). The study found that African American and Latino borrowers were twice as likely to lose their homes as white counterparts, even after controlling for income. *Id.* The disparity is largely due to their higher probability of receiving high-risk loan products, even after controlling for income. *Id.*

157 KSENIYA BENDERSKAYA, FED. RESERVE BANK OF BOS., MORTGAGE LENDING IN NEW ENGLAND 1 (2014), http://www.bostonfed.org/commdev/issue-briefs/2014/cdbrief22014.pdf [https://perma.cc/MR9F-QG9T] ("A more detailed analysis of the region's home-purchase and refinance lending dynamics for 2012 highlights significantly higher rates of denial for black and

Congress responded to housing market concerns by allocating relevant authority to the CFPB. Prior to the financial crisis, scholars concerned with "predatory lending" in the mortgage market advocated for regulatory reform.[158] After the financial crisis, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"),[159] which created the CFPB in an effort to avoid the past's regulatory failures.[160] Its independent funding structure shielded it from the politics of Congressional appropriations,[161] though its independence has only narrowly survived constitutional challenge.[162]

Information problems pervade the housing market. In promulgating regulations, the CFPB emphasized consumer knowledge deficiencies as one of three major consensus factors related to the housing and financial crisis.[163] Economists have characterized the mortgage market as a paradigmatic example of information asymmetries, when consumers interact with savvy and better-informed sellers.[164] While well-designed disclosures at the point of sale may help, evidence on federal disclosure mandates has been underwhelming.[165]

Latino borrowers than for white or Asian borrowers at every income level."); *id.* at 18 ("Non-conventional loans were far more prevalent among LMI individuals, blacks, and Latinos than among higher-income borrowers and white applicants.").

158 *See* Kathleen C. Engel & Patricia A. McCoy, *A Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255, 1258 (2002) (arguing for state intervention to curb lending abuses). *See generally* Warren, *supra* note 152 (advocating for government regulation "focused . . . on consumer safety rather than corporate profitability").

159 Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

160 Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 336 (2013).

161 *Id.* at 368.

162 *See, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 93, 110 (D.C. Cir. 2018) (holding that statutory constraints on presidential removal power of a single director of CFPB did not violate Article II's grant of president's executive powers).

163 Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 79,730, 79,733 (Dec. 31, 2013) (to be codified at 12 C.F.R. pts. 1024, 1026). The other two were the expansion of credit through subprime mortgages and the lack of regulatory coordination in consumer protection laws. *Id.*

164 *See, e.g.*, Susan E. Woodward & Robert E. Hall, *Diagnosing Consumer Confusion and Sub-Optimal Shopping Effort: Theory and Mortgage-Market Evidence*, 102 AM. ECON. REV. 3249, 3249 (2012) ("Mortgage loans are leading examples of transactions where experts on one side of the market take advantage of consumers' lack of knowledge and experience.").

165 *See* James M. Lacko & Janis K. Pappalardo, *The Failure and Promise of Mandated Consumer Mortgage Disclosures: Evidence from Qualitative Interviews and a Controlled Experiment with Mortgage Borrowers*, 100 AM. ECON. REV. 516, 516, 518–19 (2010); *cf.* Michael King & Anuj Pratap Singh, *Conned by a Cashback? Disclosure, Nudges and Consumer Rationality in*

The CFPB, in both its public outreach and enforcement campaign, has emphasized the model of the informed consumer. Consumers are portrayed as the "first line of defense,"[166] and the CFPB hopes to arm people with "information" and "tools" "to make smart financial decisions."[167] While Congress conceived the CFPB as the central watchdog with considerable authority, information regulation is still one of the CFPB's core functions, particularly as Congress invokes the Congressional Review Act ("CRA")[168] to extinguish more substantive rulemaking.[169]

2. *Information Regulation*

The CFPB has protected homebuyers by simplifying and enforcing disclosures, continuing on a well-trodden regulatory path. Dodd-Frank authorized the CFPB to issue new rules surrounding mortgage-related disclosures, building upon mid-20th century mandates in the Truth in Lending Act ("TILA")[170] and the Real Estate Settlement Procedures Act ("RESPA").[171] The CFPB, alongside the FTC, enforces related misrepresentation regulation against mortgage lenders and brokers.[172]

The foreclosure crisis also brought substantive changes to the lending process. Beyond establishing the CFPB and delegating con-

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Mortgage Choice 4–5, 40 (Trinity Econ. Papers, Working Paper No. 1118, 2018) https://www.tcd.ie/Economics/TEP/2018/tep1118.pdf [https://perma.cc/AQ28-GTPE] (noting success of certain types of disclosures in impacting the Irish mortgage market).

166 Corp. for Enter. Dev., Youth Employment Success (YES) Briefing Packet 2, https://www.newyorkfed.org/medialibrary/media/outreach-and-education/cra/DOL-CFED-YES-Initiative-Briefing-Packet.pdf [https://perma.cc/A3SG-M8VX] ("An informed consumer is the first line of defense against abusive practices.").

167 About Us: The Bureau, Consumer Fin. Prot. Bureau, http://www.consumerfinance.gov/the-bureau/ [https://perma.cc/8GU6-SP4U].

168 5 U.S.C. §§ 801–808 (2018).

169 *See, e.g.*, Final Rule: Arbitration Agreements, Consumer Fin. Prot. Bureau, https://www.consumerfinance.gov/policy-compliance/rulemaking/final-rules/arbitration-agreements/ [https://perma.cc/L83R-LV5Y] (posting notice that final rule has been removed from the Code of Federal Regulation based on Congressional passage of joint resolution "disapproving the Arbitration Agreements Rule").

170 15 U.S.C. §§ 1601–1693(r) (2018).

171 12 U.S.C. §§ 2601–2617 (2018).

172 *See* Enforcement, Consumer Fin. Prot. Bureau. https://www.consumerfinance.gov/policy-compliance/enforcement/ [https://perma.cc/FS4Z-Z7L7]; *see also* Anthony Alexis, *You Have the Right to a Fair Financial Marketplace*, Consumer Fin. Prot. Bureau (Jul. 21, 2015) https://www.consumerfinance.gov/about-us/blog/you-have-the-right-to-a-fair-financial-marketplace/ [https://perma.cc/XP8L-A5JP] (describing "actions against mortgage servicing companies for failing to tell borrowers when their loan modification applications were incomplete, denying loan modifications to qualified borrowers, failing to honor modifications for loans transferred from other servicers, and illegal foreclosure practices").

sumer protection authority, Congress has directly modified the statutory requirements governing mortgage practices: Dodd-Frank established new standards regarding creditors' evaluations of consumers' ability to repay loans,[173] new compensation mechanisms for mortgage originators and servicing,[174] and new standards for "qualified mortgages."[175]

Yet disclosure remains a focus. The CFPB touted new consolidated disclosure forms, which contain clearer language, warnings regarding undesirable features, and highlight information that "has proven to be most important" for informing consumers.[176] Empirical evidence suggests that these disclosure forms are subject to confirmation bias, whereby borrowers simply skim the forms searching for orally conveyed terms but do not search for contrary evidence.[177] Nonetheless, the CFPB's simplified disclosure form was hailed by former President Obama for its comprehensibility and for its role in restoring integrity to the homebuying process.[178]

3. *The History and Administration of Consumer Expectations*

In the words of a recent Gallup poll, the "American Dream of owning a home continues to be alive and well."[179] This dream all but

173 The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1411, 124 Stat. 1376, 2142 (2010) (codified at 15 U.S.C. § 1639c (2018)).

174 *Id.* § 1402, at 2139 (codified at 15 U.S.C. § 1639b (2018)).

175 *See* HOSKINS, *supra* note 145, at 5–8.

176 CONSUMER FIN. PROT. BUREAU, WHAT THE NEW SIMPLIFIED MORTGAGE DISCLOSURES MEAN FOR CONSUMERS 2 (2013), http://files.consumerfinance.gov/f/201311_cfpb_tila-respa_what-it-means-for-consumers.pdf [https://perma.cc/N2Y9-456J]; *see also* Press Release, Office of the Press Sec'y, Fact Sheet: Making Homeownership More Accessible and Sustainable (Jan. 07, 2015), https://www.whitehouse.gov/the-press-office/2015/01/07/fact-sheet-making-home-ownership-more-accessible-and-sustainable [https://perma.cc/46WG-GVGV] ("[T]he Consumer Financial Protection Bureau has pioneered new, streamlined mortgage forms to make [it] simpler and easier for families to buy a house . . . [amidst a] broader effort to expand responsible lending to creditworthy borrowers").

177 *See* Debra Pogrund Stark et al., *Ineffective in Any Form: How Confirmation Bias and Distractions Undermine Improved Home-Loan Disclosures*, 122 YALE L.J. ONLINE 377, 399 (2013).

178 *See* Remarks at Desert Vista High School in Phoenix, Arizona, 2 PUB. PAPERS 884, 889 (Aug. 6, 2013) ("So we've got a Consumer Finance Protection Bureau that we created . . . laying down new rules of the road that everybody can count on when they're shopping for a mortgage. They're designing a new, simple mortgage form that will be in plain English . . . .").

179 Frank Newport, *American Dream of Owning Home Lives On, Even for Young*, GALLUP (Apr. 19, 2013), http://www.gallup.com/poll/161975/american-dream-owning-home-lives-even-young.aspx [https://perma.cc/F8TP-W35R] ("The majority of Americans who own a home plan on continuing to do so in the future, and most of those who don't own a home plan on buying one."). *But see* Art Swift, *In U.S., Fewer Non-Homeowners Expect to Buy Home*, GALLUP (Apr. 27, 2015), http://www.gallup.com/poll/182897/fewer-non-homeowners-expect-buy-home.aspx

necessitates the distinctly American modal financing mechanism—the self-amortizing, 30-year mortgage and government-sponsored securitization.[180]

After the 2008 crash, financial experts were quick to argue that America was becoming a "Rentership Society"[181] and noted the "end of [home] ownership as a national ambition."[182] Social surveys suggest otherwise—despite the housing crisis and homeownership decline,[183] with a systematic review echoing the persistence of the homeownership aspiration, including among young adults.[184] In sum, a majority of Americans seem to continue to believe that it is a good time to buy a home.[185]

These sentiments are unsurprising; presidential administrations since that of Herbert Hoover have promoted homeownership.[186]

[https://perma.cc/8BE2-V29Y] ("The current Gallup poll shows little movement in Americans' opinions since 2013, except in the sentiment that those who do not own a home say they won't buy one in the foreseeable future. These results come in the same poll that finds a drop in the percentage of all Americans who say it is a good time to buy a house.").

180 *See* Integrated Mortgage Disclosures Under the Real Estate Settlement Procedures Act (Regulation X) and the Truth In Lending Act (Regulation Z), 78 Fed. Reg. 79,730, 79,733 (Dec. 31, 2013) (to be codified at 12 C.F.R. pts. 1024, 1026); U.S. DEP'T OF TREASURY & U.S. DEP'T OF HOUS. & URBAN DEV., REFORMING AMERICA'S HOUSING FINANCE MARKET 25 (2011) ("Like the U.S., several countries have government-supported entities that guarantee or hold mortgages . . . [but] [t]he U.S. is also the only high-income country in which securitization plays a major role in housing finance . . . [and] one of the only countries in the world where the majority of mortgages are pre-payable, 30-year fixed-rate mortgages.").

181 OLIVER CHANG ET AL., MORGAN STANLEY, HOUSING MARKET INSIGHTS 2 (2011).

182 Derek Thompson, *'We Wish Like Hell We Had Never Bought': Voices from the Housing Crisis*, ATLANTIC (Mar. 2, 2012), https://www.theatlantic.com/business/archive/2012/03/we-wish-like-hell-we-had-never-bought-voices-from-the-housing-crisis/253888/ [https://perma.cc/654K-8TMF].

183 U.S. CENSUS BUREAU, HOUSING VACANCIES AND HOMEOWNERSHIP (CPS/HVS) tbls.14, 14a, http://www.census.gov/housing/hvs/data/histtabs.html [https://perma.cc/29P2-AYDY] (documenting a steady decline in homeownership rates since 2007 through 2014).

184 *See* Eric S. Belsky, *The Dream Lives On: The Future of Homeownership in America* 4–5 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. W13-1, 2013); *cf.* William M. Rohe & Mark Lindblad, *Reexamining the Social Benefits of Homeownership after the Housing Crisis* 12 (Joint Ctr. for Hous. Studies of Harvard Univ., Working Paper No. HBTL-04, 2013) ("In sum, the available evidence suggests that people's perceptions of homeownership as a good investment were impacted by the housing crisis. The percentage of people holding those views certainly dropped during the early stages of the housing crisis, but they seem to have rebounded relatively quickly."). While arguing that there was a dip, Rohe and Lindblad note not only the speedy recovery, but that, per Fannie Mae's National Housing Survey, "[n]otwithstanding this drop, almost three-quarters of the respondents believed housing was a good investment." Rohe & Lindblad, *supra,* at 10–11.

185 *See Housing*, GALLUP (2020), https://news.gallup.com/poll/162752/housing.aspx [https://perma.cc/7DMK-ELPZ].

186 Stephanie M. Stern, *Reassessing the Citizen Virtues of Homeownership*, 111 COLUM. L.

Franklin D. Roosevelt argued that a "nation of homeowners is unconquerable," and former Secretary of the Department of Housing and Urban Development ("HUD") Jack Kemp declared: "Democracy can't work without the component that goes to the heart of what freedom is all about—the chance to own a piece of property."[187]

Modern agency heads continue the tradition. While acknowledging the recent housing and financial crisis, a recently retired HUD Secretary, in remarks entitled "Promoting the American Dream of Homeownership," urged the nation to feel "confident and secure when they borrow money to purchase their own home."[188] His bipartisan successors similarly affirmed homeownership's place as a "cornerstone" of American life and a representation of the opportunity for further upward mobility.[189] These pronouncements echo many public proclamations of the 20th-century homeownership ideal, which President Trump, and President Obama before him, also perpetuated.[190]

Homeownership has become a core agency mission for HUD, even as its authorizing statute takes a pluralist view to housing provision. In recounting its history from its 1965 beginnings, the agency makes special note of both record high homeownership rates and the passage of federal legislation encouraging homeownership.[191] In establishing HUD, Congress tasked the agency with stimulating private homebuilding and the mortgage industry.[192] The end of the century illustrated the bipartisanship of America's homeownership expectations: HUD administered the American Dream Downpayment Initia-

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REV. 890, 896–97 (2011) (summarizing statements and policies of subsequent presidential administrations).

187 Richard K. Green & Michelle J. White, *Measuring the Benefits of Homeowning: Effects on Children*, 41 J. URB. ECON. 441, 441–42 (1997) (listing numerous policymakers' pro-homeownership positions throughout American history).

188 Shaun Donovan, Sec'y, U.S. Dep't of Hous. & Urban Dev., Remarks on Promoting the American Dream of Homeownership (Aug. 6, 2013).

189 *See* Ben Carson, Sec'y, U.S. Dep't of Hous. & Urban Dev., Remarks at The Housing Forum for Homeownership Month (June 1, 2017) ("The importance of homeownership is apparent to all of us."); Julián Castro, Sec'y, U.S. Dep't of Hous. & Urban Dev., Remarks at the National Press Club: 2015: A Year of Housing Opportunity (Jan. 13, 2015).

190 *See President Donald J. Trump Proclaims June 2017 as National Homeownership Month*, WHITE HOUSE (May 31, 2017), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-proclaims-june-2017-national-homeownership-month/ [https://perma.cc/W322-ZX8X]; President Obama, *supra* note 90 (emphasizing homeownership for all); President Obama, *supra* note 91 (same); President Obama, *supra* note 92 (same).

191 *See HUD History*, U.S. DEP'T OF HOUS. & URBAN DEV., http://portal.hud.gov/hudportal/HUD?src=/about/hud_history [https://perma.cc/2G9U-A3YV].

192 Department of Housing and Urban Development Act, Pub. L. No. 89-174, 79 Stat. 667 (1965) (establishing HUD "to encourage the maximum contributions that may be made by vigorous private homebuilding and mortgage lending industries").

tive under an approving President George W. Bush,[193] and it implemented the National Homeownership Strategy to increase American homeownership rates under President Bill Clinton.[194]

The very way that agencies calculate homeownership statistics reflects the homeownership ideal: the general homeownership rates cited by HUD refer to the Census Bureau's calculations that simply "divid[e] the number of owner-occupied housing units by the number of occupied housing units or households."[195] These official statistics do not consider mortgages but rather equate property title with "ownership" and thus disregard how indebtedness attenuates property rights.[196] Because HUD's underlying statute—the Department of Housing and Urban Development Act[197]—incorporates rental housing into its vision of American housing,[198] the pro-homeownership framings are not statutorily predetermined.

4. *The Basis for the Expectation*

The early 20th-century administrative effort "to instill an ideologically grounded belief in the moral value of the owned home" shaped the following century,[199] including the adoption of explicit quantitative homeownership targets.[200] When Herbert Hoover served as Secretary of Commerce in the early 20th century, his administration promoted homeownership as a post-World War I protection against Soviet-style collectives; homeownership served as a symbol of "moral muscle," and a way to put the "man back in manhood."[201] This promotion did

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193 OFFICE OF AFFORDABLE HOUS. PROGRAMS, U.S. DEP'T OF HOUS. & URBAN DEV., AMERICAN DREAM DOWNPAYMENT INITIATIVE, https://www.hud.gov/sites/documents/20604_BROCHURE.PDF [https://perma.cc/FT6B-E6XF].

194 U.S. DEP'T OF HOUS. & URBAN DEV., URBAN POLICY BRIEF NO. 2: HOMEOWNERSHIP AND ITS BENEFITS (1995), https://www.huduser.gov/portal//Publications/txt/hdbrf2.txt [https://perma.cc/2D77-EX5R].

195 *Owner-occupied Housing Unit Rate*, U.S. DEP'T OF COMMERCE, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/note/US/HSG445218 [https://perma.cc/YB3Z-6GDP].

196 *Id.*

197 Pub. L. No. 89-174, 79 Stat. 667 (1965).

198 *See* Department of Housing and Urban Development Act § 2 (establishing HUD "to provide for full and appropriate consideration, at the national level, of the needs and interests of the Nation's communities and of the people who live and work in them"); *see also* Charles L. Edson, *Affordable Housing—An Intimate History*, 20 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 193, 200–01 (2011) (explaining how the Department of Housing and Urban Development Act laid the foundations for the broader role of rental housing in federal housing policy, including Section 8).

199 Vale, *supra* note 25, at 15.

200 *See* Stephen Slivinski, *House Bias: The Economic Consequences of Subsidizing Homeownership*, REGION FOCUS, Fall 2008, at 12.

201 Vale, *supra* note 25, at 19, 26 (emphasis omitted).

not reflect economic fundamentals. By Hoover's own admission, incongruous wage levels and housing costs meant there was "'utterly no hope' of working-class families[ ] buying their own homes."[202]

Homeownership's ideology is thus one of morality, masculinity, and freedom.[203] The early invoked "benefits" of homeownership were these specific ideals, yet the particular dynamics of masculinity and freedom evolved. Historians have noted the replacement of the detached fathers and labor outsourcers of Victorian America with the 20th-century trope of suburban do it yourself ("DIY") "Mr. Fixits," because "single home ownership was a *sine qua non* for [DIY] activit[ies]."[204] Homes and homeownership comprised sites of self-reliance, and foreclosure therefore reflected the collapse of that self.[205]

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202 *Id.* at 34 (quoting President Herbert Hoover).

203 Walt Whitman remarked in the mid-19th century that "a man is not a whole and complete man unless he *owns* a house and the ground it stands on." Walt Whitman, *New York Dissected*, 2 LIFE ILLUSTRATED, 85, 93 (1856) https://whitmanarchive.org/published/periodical/journalism/tei/per.00270.html [https://perma.cc/DL27-9DZ4] ("Men are created owners of the earth. Each was intended to possess his piece of it . . . indicated by the universal instinctive desire for landed property, and by the fuller sense of independent manhood which comes from the possession of it."); *see also* Margarethe Kusenbach, *"Look at My House!" Home and Mobile Home Ownership Among Latino/a Immigrants in Florida*, 32 J. HOUSING & BUILT ENV'T 29, 30 (2017). (summarizing sociological literature to describe how homes carry "a 'meaning premium'—which can be understood as a combination of cultural worth, the value of personal relationships and invested labor, and degrees of perceived 'independence,' 'freedom,' and 'privacy'" (quoting Lindsay Owens, The Meaning Premium: Reexamining Theories of Strategic Default in Residential Real Estate Markets (2014) (unpublished manuscript), then Elizabeth Strom & Susan Greenbaum, *Still the "American Dream"? Views of Home Ownership in the Wake of the Foreclosure Crisis, in* HOME: INTERNATIONAL PERSPECTIVES ON CULTURE, IDENTITY, AND BELONGING (Margarethe Kusenbach et al. eds., 2013))).

However, one person's idea of what qualifies as a "home" may not be another's. Kusenbach describes how interviewees in owner-occupied mobile homes in land-lease communities viewed their housing as "homes," even if the laws did not. Kusenbach, *supra*, at 34, 37–40. Some interviewees viewed themselves as having attained the American dream and as having reached an endpoint in their housing trajectory. *Id.* at 39–40.

204 *See, e.g.*, Steven M. Gelber, *Do-It-Yourself: Constructing, Repairing and Maintaining Domestic Masculinity*, 49 AM. Q. 66, 66–68 (1997).

205 *See, e.g.*, Tawfiq Ammari et al., *The Crafting of DIY Fatherhood*, *in* CSCW '17: PROCEEDINGS OF THE 2017 ACM CONFERENCE ON COMPUTER SUPPORTED COOPERATIVE WORK AND SOCIAL COMPUTING 1109, 1110 (2017) ("[D]omestic masculinity gained credence by the 1950's with mainstream media outlets playing a major role in proliferating ideals of self-reliance and entrepreneurial practice in the home."); Susan Saegert et al., *Deflating the Dream: Radical Risk and the Neoliberalization of Homeownership*, 31 J. URB. AFF. 297, 298 (2009) ("The rhetoric of the expansion of homeownership turned on the much older notion of homeownership as the American Dream, the ultimate achievement of autonomy, a better life for the next generation and full citizenship, a discourse that defines selfhood . . . [so] [t]he threat of mortgage foreclosure calls into question homeowners' selfhood.").

While the public continues to value homeownership, private pecuniary returns to homeownership are highly variable.[206] Some social scientists have identified a range of nonpecuniary private and social returns to homeownership, from individual cognitive benefits, children's outcomes, individual and community political participation, and even aesthetics.[207] Systematic reviews and studies using richer datasets and more sophisticated econometric methods have cast doubt on these earlier correlative findings.[208] As a result of emerging research and the most recent housing crisis, the academic conversation now includes a concern for excessive homeownership and its implication for underinvestment in other forms of capital.[209]

Although there are arguably private and societal benefits from homeownership, the historical record and uncertainty of those benefits show that ideology was the true reason that the government promoted an expectation that homeownership is the ideal form of housing provision. Presidents and agencies in the 20th century created a moral homeowner imperative that their successors kept alive. Those

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206 *See supra* note 149 and accompanying text; *see also* Goodman & Mayer, *supra* note 148, at 32, 50 ("[T]he ability to build wealth through homeownership is dependent on holding on to the home during downturns; lower-income and minority borrowers are less likely to maintain homeownership through the cycle, and thus benefit less from homeownership. [Nonetheless,] [o]ur overall conclusion [is that] homeownership is a valuable institution. . . . [Still,] in all these markets, had a homeowner purchased in 2007, the returns would have been much lower than comparable stock market returns. Unless homebuyers can time the market (and choose the 'right' city) with some foresight, purchasing a home is certainly not a guarantee of higher returns than renting."); Shiller, *supra* note 149, at 2, 10 (arguing that optimistic psychological "bubbles" and not fundamental factors have caused the recent booming prices).

207 Gary V. Engelhardt et al., *What Are the Social Benefits of Homeownership? Experimental Evidence for Low-Income Households*, 67 J. URB. ECON. 249, 249 (2010) (explaining that while the "literature has concluded that homeowners generate both local amenities and social capital[, a] recurring issue . . . is the extent to which studies have successfully addressed the potential biases created by unobserved correlation among individual characteristics that encourage homeownership and those that lead to provision of social capital"); Grace W. Bucchianeri, The American Dream or The American Delusion? The Private and External Benefits of Homeownership 3–4 (2011) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstractid=1877163 [https://perma.cc/5VRQ-QNBC] (noting claims of positive private returns on outcomes, including social capital, children, and psychosocial well-being, but arguing that these studies have poor causal identification).

208 Bucchianeri, *supra* note 207, at 3–4; *see also* Goodman & Mayer, *supra* note 148, at 50, 54 (arguing that evidence of lock-in and decreased mobility effects is mixed and that "[a]ttempts to disentangle correlation and causality between homeownership and household wealth are difficult"); Rohe & Lindblad, *supra* note 184, at 14–42 (discussing social and community-oriented outcomes, including civic participation).

209 It is important to note that administratively-fostered confidence and legal benefits prioritizing homeownership may not only influence the extensive margin—whether or not to own a home—but also the intensive margin—the quality and the quantity of the home being purchased. *See* Glaeser, *supra* note 148, at 5.

successors did so even as they grappled with a 21st-century housing crash and Congress's call for new consumer protections.

C. Retirement Savings

For decades, governmental actors have promoted positive consumer expectations in the higher education and homeownership markets based on ideological commitments. In contrast, governmentally induced expectations regarding retirement savings are much newer and primarily promote pragmatic financial goals.

Saving for retirement is necessary for most Americans.[210] Dollars saved today in conventional low-risk, low-return mutual funds translate into future dollars, without the larger concerns of risky financing and losses implicated in the homeownership and higher education markets.[211] The shift away from sufficient public benefits, namely Social Security, to private employer-sponsored investment accounts has compelled the need for such savings. Conditional on that shift, government entities counteract cognitive biases and promote private benefit by encouraging savings.

1. The Market and the Problem

Americans are simply unprepared for retirement. Their professed concern for retirement[212] has not led to financial preparation, despite the tax code's incentives.[213] While many Americans know abstractly that they should be saving more than they do,[214] a long-running retire-

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210 *See* Alana Semuels, *This Is What Life Without Retirement Savings Looks Like*, ATLANTIC (Feb. 22, 2018), https://www.theatlantic.com/business/archive/2018/02/pensions-safety-net-california/553970/ [https://perma.cc/G66J-T8CQ].

211 *See* discussion *supra* Sections II.A.1, II.B.1.

212 Andrew Dugan, *Retirement Remains Americans' Top Financial Worry*, GALLUP (Apr. 22, 2014), http://news.gallup.com/poll/168626/retirement-remains-americans-top-financial-worry.aspx [https://perma.cc/85X5-FVCT] ("A majority of Americans have reported being 'very' or 'moderately' worried about retirement savings every year since 2001 . . . ."); Justin McCarthy, *Americans' Financial Worries Edge Up in 2016*, GALLUP (Apr. 28, 2016), http://news.gallup.com/poll/191174/americans-financial-worries-edge-2016.aspx [https://perma.cc/LP7D-ASLH] ("Americans continue to be most worried about not having enough money for retirement, with 64% saying they are 'very worried' or 'moderately worried' about this.").

213 *See generally* ALICIA H. MUNNELL ET AL., CTR. FOR RET. RESEARCH AT BOS. COLL., THE NATIONAL RETIREMENT RISK INDEX: AN UPDATE (2012) (noting changes in the marketplace that impact retirement savings accounts and finding that Americans are not saving enough to maintain their standard of living in retirement).

214 For a discussion of how Americans state preferences to save more for retirement than they currently do, a form of procrastination, see James J. Choi et al., *Saving for Retirement on the Path of Least Resistance*, *in* BEHAVIORAL PUBLIC FINANCE 304 (Edward J. McCaffery & Joel Slemrod eds., 2006) [hereinafter Choi et al., *Saving for Retirement*]; Jeffrey Brown et al., *Social Security and Financial Security at Older Ages*, 80 SOC. SEC. BULL., no. 1, 2020, at 31, 36, and

ment survey suggests the majority of Americans have not calculated a goal for how much to save or a plan for retirement,[215] both of which correlate with higher savings and more retirement confidence.[216]

Employer-sponsored plans have not solved the problem of Americans' lack of preparation. Section 401(k) of the Internal Revenue Code[217] creates tax advantages for employers and employees to contribute to certain employer-sponsored plans, up to an inflation-adjusted limit.[218] In contrast to defined benefit pensions, these are called defined contribution plans.[219]

While over 55 million workers actively participate in 401(k) plans, containing trillions of dollars of assets,[220] eligible employees underutilize these plans. Although lower income workers rely primarily on Social Security, the majority of workers eligible for employer-sponsored retirement plans rely on those employer-sponsored programs as a primary income source in retirement.[221] Therefore, facilitating contributions to employer-sponsored retirement plans is a central part of addressing the broader retirement savings problem.[222] Evidence suggests that these plans increasingly offer matching employer contributions, often immediately on an employee's first contributed dollar.[223] Yet the majority of employees possess insufficient 401(k) savings bal-

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James J. Choi et al., *Defined Contribution Pensions: Plan Rules, Participant Choices, and the Path of Least Resistance*, 16 Tax Pol'y & Econ. 67, 70 (2002) [hereinafter Choi et al., *Defined Contribution Pensions*].

215 Emp. Benefit Research Inst., 2019 Retirement Confidence Survey Summary Report 13 (2019), https://www.ebri.org/docs/default-source/rcs/2019-rcs/2019-rcs-short-report.pdf [https://perma.cc/87T3-WWTN].

216 *Id.* at 3.

217 I.R.C. § 401(k) (2018).

218 *See* I.R.S. Notice 2019-59, 2019-47 I.R.B. 1091.

219 *See id.* (distinguishing between the two types when setting limits).

220 Jack VanDerhei et al., Emp. Benefit Research Inst., 401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2016 7 (2018), https://www.ebri.org/docs/default-source/ebri-issue-brief/ebri_ib_458_k-update-10sept18.pdf?sfvrsn=bca4302f_6 [https://perma.cc/ANZ4-XJF6].

221 VanDerhei et al., *supra* note 220, at 44 n.28 ("Social Security replaces a much higher fraction of pre-retirement earnings for lower-income workers.").

222 *See, e.g.*, Greg Chojnacki, et al., Single Email Prompts Individuals to Increase Retirement Savings (2016).

223 *See* Deloitte, 2019 Defined Contribution Benchmarking Survey Report 14 (2019), https://www2.deloitte.com/content/dam/Deloitte/us/Documents/human-capital/us-2019-defined-contribution-benchmarking.pdf [https://perma.cc/N8WZ-W8ME].

ances,[224] reflecting minimal demonstrated interest and ability to make investment decisions.[225]

Beyond the lack of sufficient assets, these retirement accounts often carry opaque fees and expenses. Third-party plan service providers charge these fees and expenses and, using various calculation methods, obscure the aggregate amounts paid by plan sponsors and participants.[226] Compound interest and the decades-long lifespan of retirement accounts mean that recurring fees and expenses can have large impacts on net portfolio returns.[227]

Concerns for fees and expenses affect not only participants but also plan sponsors with fiduciary responsibilities.[228] An Employment and Retirement Security Insurance Act ("ERISA")[229] advisory report noted participants and plan sponsors' general confusion about fees.[230] While aware of "extrinsic" fees deducted *after* calculating investment earnings, plan sponsors appear unaware of "intrinsic fees," which reduce investment earnings.[231] Plan sponsors, and consequently participants, are thus uneducated about major categories of plan expenses

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224 *See id.* at 7 (explaining that levels of participation increased modestly to 84%, compared to 80% in 2017, and average account balances grew to $116,244, compared to $97,040 in 2017); *see also* DELOITTE, ANNUAL 401(K) BENCHMARKING SURVEY 6 (2012), https://www.iscebs.org/Resources/Surveys/Documents/401kbenchmarkingsurvey2012.pdf [https://perma.cc/ZDB3-FNNJ] ("[T]he average account balance reported among plan sponsors in 2012 was just over $85,000 . . . . [I]t would be difficult for anyone to remain financially viable in retirement on $85,000, especially with the questionable promise of Social Security in the future.").

225 *See* THALER & SUNSTEIN, *supra* note 32, at 111–12 (noting how financial literacy interventions demonstrated limited gains reflected in a low baseline knowledge that did not improve); Susan J. Stabile, *Freedom to Choose Unwisely: Congress' Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*, 11 CORNELL J.L. & PUB. POL'Y 361, 376 (2002) (noting how rarely employees change their investment allocation in defined contribution plans).

226 As an early Department of Labor ("DOL") report found, 401(k) fees and expenses can be classified according to a number of services, including set-up, conversion, communications, recurring administrative costs (including trustee services and record keeping), investment management (the largest charges), distribution, and mortality and expense risk; these can be charged as asset-based, census-based (charge on a per-capita participant basis), or itemized fees. PENSION & WELFARE BENEFITS ADMIN., STUDY OF 401(K) PLAN FEES AND EXPENSES 26–30 (1998), https://www.dol.gov/sites/dolgov/files/EBSA/researchers/analysis/retirement/study-of-401k-plan-fees-and-expenses.pdf [https://perma.cc/89PD-3L6N].

227 *See, e.g.*, ADVISORY COUNCIL ON EMP. WELFARE & PENSION BENEFIT PLANS, REPORT OF THE WORKING GROUP ON PLAN FEES AND REPORTING ON FORM 5500, at 12 (2004) [hereinafter ADVISORY COUNCIL REPORT] (briefly noting that fees "reduce investment earnings").

228 *Id.* at 7 ("The lack of transparency in this area has led to an inefficient market where it is extremely difficult for the plan sponsor to determine either the absolute level of fees, or the flow of fees, i.e., who is getting paid what. The latter point is particularly important for a plan fiduciary selecting various investment options . . . .").

229 29 U.S.C. §§ 1001–1461 (2018).

230 ADVISORY COUNCIL REPORT, *supra* note 227, at 7.

231 *Id.* at 12.

and report being unaware of federal education and outreach initiatives.[232] While failing to react to fees and expenses, consumer plan choices may react to meaningless changes, such as "hot" names.[233] Despite their relevance to 401(k) plan-related investment decisions, fees and expenses impact consumers without necessarily affecting their decisions or beliefs.[234]

2. *Information Regulation*

To improve 401(k) plan-related investment decisions, the Department of Labor ("DOL") imposed disclosure requirements.[235] An employer can automatically enroll employees in 401(k) accounts and designate a low-risk, low-return qualified default investment alternative ("QDIA") where retirement contributions will be invested, unless the employee chose an alternate investment vehicle.[236] The employer's fiduciary liability further requires it to notify employees of the QDIA's details and fees as well as investment alternatives.[237]

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232 U.S. Gov't Accountability Office, GAO-12-325, 401(k) Plans: Increased Educational Outreach and Broader Oversight May Help Reduce Plan Fees 17–18, 39 (2012); *see also* Jill E. Fisch & Tess Wilkinson-Ryan, *Why Do Retail Investors Make Costly Mistakes? An Experiment on Mutual Fund Choice*, 162 U. Pa. L. Rev. 605, 616–17 (2014) ("Commentators have debated what these [sponsor] fiduciary obligations mean . . . [and] the extent to which sponsors effectively minimize investment costs").

233 Michael J. Cooper et al., *Changing Names with Style: Mutual Fund Name Changes and Their Effects on Fund Flows*, 60 J. Fin. 2825, 2851 (2005) (finding that funds that change their names to reflect current "hot," investing trends experience large flow increases, despite a lack of performance improvement).

234 Fee disclosures may be difficult to understand for even highly educated employees and plan administrators. James J. Choi et al., *Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds*, 23 Rev. Fin. Stud. 1405, 1407–08 (2010) (finding that subjects, modally well-educated, overwhelmingly fail to minimize fees).

235 Arguably, the primary legal remedy to the contribution shortfall has been the statutory and regulatory incentives and protections for employers who create default contributions. These are outlined in the Pension Protection Act of 2006 ("PPA"). Pub. L. No. 109-280, 120 Stat. 780 (codified as amended in scattered sections of 26 and 29 U.S.C.); *see also* Choi et al., *Saving for Retirement*, *supra* note 214, at 304 ("Although the government places some limits on how companies can structure the plans, employers nonetheless have broad discretion in their design.").

236 29 U.S.C. § 1104(c)(5) (2018); 29 C.F.R. § 2550.404c-5 (2019). While many have celebrated the PPA as successfully translating behavioral law and economics into choice-preserving legislation, critics have argued that the default rules neither go far enough in addressing the problem nor preserve choice in a meaningful way. Ryan Bubb & Richard H. Pildes, *How Behavioral Economics Trims Its Sails and Why*, 127 Harv. L. Rev. 1593, 1615–25 (2014).

237 29 C.F.R. § 2550.404c–5(d) (2019). Title 29 U.S.C. § 1104(c)(5) (2018) shields employers from fiduciary liability for certain plans that automatically enroll employees, and § 29 C.F.R. 2550.404c-5 lays out the elements of a qualifying default plan, such as notice requirements, minimum contribution percentages, and minimum diversification requirements. The statutory and regulatory provisions surrounding QDIAs have been credited with encouraging and reorienting

ERISA, and its implementing regulations, impose two other notable disclosure requirements related to expenses and fees.[238] First, plan administrators must notify plan sponsors and participants of relevant fees and expenses.[239] To this end, the DOL established uniform, basic disclosures for 401(k) plans,[240] requiring disclosures of general, plan-wide administrative expenses and other expenses charged against individual accounts.[241] Second, disclosure requirements address arrangements where plan administrators and sponsors face financial incentives to steer business towards plan service providers in "revenue sharing" agreements.[242] Under such agreements, mutual funds may have plan-level fees serviced against individual accounts that offset what the plan sponsor might otherwise pay for the 401(k), leading to a tension between plan sponsors' and participants' interests.[243] The

plan sponsor investment strategies toward long-term growth potential. *See* Amy B. Monahan, *An Affordable Care Act for Retirement Plans?*, 20 CONN. INS. L.J. 459, 468–69 (2014).

238 Jill E. Fisch, Tess Wilkinson-Ryan, & Kristin Firth, among others, have, in the retirement savings context, questioned "whether disclosure is useful to investors who do not understand the task at hand or the material they must evaluate" and accordingly used empirical evidence, admittedly from small, self-selecting samples, to highlight "the need for regulators to be sensitive to the knowledge gap in weighing the costs of heightened regulation against the value of reducing possible conflicts of interest." Jill E. Fisch et. al., *The Knowledge Gap in Workplace Retirement Investing and the Role of Professional Advisors*, 66 DUKE L.J. 633, 635–38 (2016).

239 Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. 64,910, 64,911 (Oct. 20, 2010) (to be codified at 29 C.F.R. pt. 2550). Generally speaking, plan participants—employees—enroll in 401(k)s through plan sponsors—employers—who often also serve as plan administrators, and are therefore fiduciaries. These administrators delegate plan management to plan service providers (third parties). *See* Anne Tucker, *Retirement Revolution: Unmitigated Risks in the Defined Contribution Society*, 51 HOUS. L. REV. 153, 207–09 (2013) (discussing participants' fee litigation against plan fiduciaries, including for excessive fees).

240 Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 75 Fed. Reg. at 64,912; *see also* U.S. DEP'T OF LABOR, 401(K) PLAN DISCLOSURE FORM, https://www.dol.gov/sites/dolgov/files/EBSA/employers-and-advisers/plan-administration-and-compliance/fiduciary-responsibilities/401k-plan-fee-disclosure-tool.pdf [https://perma.cc/H2G6-QRR5] (providing model disclosure forms for fees and other expenses).

241 29 C.F.R. § 2550.404a–5(c) (2019).

242 Dana M. Muir, *Revenue Sharing in 401(k) Plans: Employers As Monitors?*, 20 CONN. INS. L.J. 485, 490–92 (2014) (discussing DOL's 21st-century introduction of revenue sharing disclosure mandates and noting different definitions of "revenue sharing" across legal domains, including that the employee benefits community usually defines the term broadly, beyond the 12b-1 fees paid out of mutual fund assets on which securities law traditionally focuses); *see* Bearing of Distribution Expenses by Mutual Funds, 45 Fed. Reg. 73,898, 73,905 (Nov. 7, 1980) (to be codified at 17 C.F.R. pt. 270) (promulgating Rule 12b-1, allowing broker fees to be paid out of mutual fund assets).

243 Tucker, *supra* note 239, at 208–09 (discussing participants' fee litigation against plan fiduciaries, including for revenue sharing); *see also* Ian Ayres & Quinn Curtis, *Beyond Diversification: The Pervasive Problem of Excessive Fees and "Dominated Funds" in 401(k) Plans*, 124

DOL strengthened regulations regarding mandated fee disclosures in order for a contract for plan services to meet ERISA's "reasonable" requirement.[244] Such disclosure regulations were meant to prevent harmful conflicts of interest[245] and help plan sponsors fulfill their fiduciary obligations.[246]

3. *The History and Administration of Consumer Expectations*

Despite concerns about high fees and expenses and low contribution rates, Americans rely on their retirement savings. Americans approaching retirement expect 401(k) and other savings accounts, as opposed to Social Security, to be their major source of retirement savings.[247] This expectation rebounded after the Great Recession, during which contributors saw their account balances decline.[248] The newly central role of 401(k)s in retirement planning differs from the percep-

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YALE L.J. 1476, 1513 (2015) (arguing that neither courts nor commentators have fully "acknowledged that revenue sharing amounts to a cross-subsidization of sophisticated investors by unsophisticated investors").

244 29 C.F.R. § 2550.408b–2(c)(iv) (2019) (outlining the information that a "covered service provider must disclose . . . to a responsible plan fiduciary"); *see also* Dominique C. Badoer et al., *I Can See Clearly Now: The Impact of Disclosure Requirements on 401(k) Fees*, 136 J. FIN. ECON. 471 (2020) (analyzing these regulatory disclosure mandates and using empirical data from hundreds of plans to suggest a "shift away from indirect compensation and towards direct compensation for plan services across all plan sizes after 2012").

245 "The Department believes that mandatory proactive disclosure will reduce plan sponsor information costs, discourage harmful conflicts, and enhance service value." Reasonable Contract or Arrangement Under Section 408(b)(2)–Fee Disclosure, 77 Fed. Reg. 5,632, 5,633 (Feb. 3, 2012) (to be codified at 29 C.F.R. pt. 2550).

246 *Id.* at 5,632. As others have noted, the governing statutory framework for retirement savings accounts, ERISA, may be a deficient mechanism through which to address financial illiteracy and asymmetric information. Colleen E. Medill, *Transforming the Role of the Social Security Administration*, 92 CORNELL L. REV. 323, 338 (2007) (noting that employers are not required to, and often do not, provide investment educational materials to 401(k) plan participants); Tucker, *supra* note 239, at 189 ("ERISA . . . is ill-equipped to address financial literacy . . . .").

247 Lydia Saad, *401(k) Regaining Importance as Future Income Source*, GALLUP (May 3, 2017), https://news.gallup.com/poll/209579/401-regaining-importance-future-income-source.aspx [https://perma.cc/XQ9N-LSMX]. Fidelity Investments, one of the largest providers of retirement investment accounts, recently noted that average 401(k) balances reached a record high of over $112,000, with the number of people with $1 million or more in their 401(k)s also reaching a record of 233,000 people. *See* Press Release, Fidelity Invs., Fidelity Q4 2019 Retirement Analysis: Increased Savings Rates, Enhancements to Employer Savings Plans and Positive Market Performance Help Drive Account Balances to Record Levels 1–2 (Feb. 13, 2020), https://www.fidelity.com/bin-public/060_www_fidelity_com/documents/press-release/quarterly-retirement-trends-021320.pdf [https://perma.cc/Z8YD-NLBF].

248 Press Release, Fidelity Invs., *supra* note 247, at 1 (noting doubling of retirement account balances since 2009); Rebecca Riffkin, *Fewer Will Rely on 401(k) in Retirement Than Pre-Recession*, GALLUP (May 2, 2014), http://www.gallup.com/poll/168824/fewer-rely-401-retirement-pre-recession.aspx [https://perma.cc/KC8M-LXER].

tions held in the 1980s by early contributors, who viewed these accounts as a supplement to, rather than a replacement for, Social Security funds.[249]

Despite the aforementioned inadequacies, survey evidence suggests that a majority of eligible American employees are satisfied with their employer-sponsored plans, a sentiment not shared by employees in peer countries.[250] Additionally, American employees aspire to dedicate more of their income to their 401(k) plan than they currently do.[251] Despite employees' concern regarding the quantity of their 401(k) savings, they appear confident that these plans constitute quality investment vehicles.[252] This confidence in retirement savings persists despite broader concern about plan fees and expenses.

The public embrace and mass availability of individualized retirement savings has occurred much more recently than the similar processes for homeownership and higher education.[253] For many years, Social Security was the quintessential old-age insurance, with some employers providing additional defined benefit pensions.[254] Economic changes in the late-20th century harkened a shift: the rise of 401(k)s and other defined contribution plans in the 1980s and the decline of defined benefit plans.[255] IRS rulings in the 1990s, 2000, and the Pension Protection Act of 2006 ("PPA"),[256] which attracted bipartisan

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249 *See* BD. OF GOVERNORS OF THE FED. RESERVE SYS., REPORT ON THE ECONOMIC WELL-BEING OF U.S. HOUSEHOLDS IN 2013, at 27–28 (2014). Younger, nonretirees expect to rely on Social Security far less than preceding cohorts. *Id.* at 28; *see also* Timothy W. Martin, *The Champions of the 401(k) Lament the Revolution They Started*, WALL STREET J. (Jan. 2, 2017, 1:39 PM), https://www.wsj.com/articles/the-champions-of-the-401-k-lament-the-revolution-they-started-1483382348 [https://perma.cc/A5NL-LEKX] (arguing that "Herbert Whitehouse [a former Johnson & Johnson executive] was one of the first in the U.S. to suggest workers use a 401(k)" and that his 1981 hope that the "retirement-savings plan would supplement a company pension that guaranteed payouts for life" has left him with deep "misgivings" about the modern reality of retirement insecurity); Medill, *supra* note 246, at 327 ("[T]he 401(k) plan shifts responsibility for retirement income security from employers to employees.").

250 STATE ST. GLOB. ADVISORS, RETIREMENT CONFIDENCE MONITOR 5 (2016), https://www.ssga.com/dc/2017/dc-global-retirement-survey.pdf [https://perma.cc/US5K-FD7Z].

251 For a discussion of how Americans state preferences to save more for retirement than they currently do, see Choi et al., *Defined Contribution Pensions*, *supra* note 214, at 70; Choi et al., *Saving for Retirement*, *supra* note 214, at 304.

252 STATE ST. GLOB. ADVISORS, *supra* note 250, at 5–7.

253 *See* Lisa Beyer, *The Rise and Fall of Employer-Sponsored Pension Plans*, WORKFORCE, (Jan. 24, 2012), https://www.workforce.com/news/the-rise-and-fall-of-employer-sponsored-pension-plans [https://perma.cc/EZJ6-YZ62].

254 *See id.*

255 *See id.*; *supra* note 249.

256 Pub. L. No. 109-280, 120 Stat. 780 (2006) (codified as amended in scattered sections of 26 and 29 U.S.C.).

support, allayed employer concerns about the liability risk of default investments and further expanded use of defined contribution vehicles for retirement savings.[257]

Presidents and agencies have correctly fostered this focus on, and faith in, 401(k) plans. In a "retirement toolkit" cooperatively authored by the Social Security Administration, the DOL, and the Centers for Medicare and Medicaid Services, that message is clear: "Your employer's retirement savings plan is an essential part of your future financial security. If you have a 401(k) or other retirement savings plan at work, sign up and contribute all you can."[258] Standing alongside his Treasury secretary, Democratic President Obama publicly emphasized these accounts, termed "myRAs," as a solution to America's retirement concerns.[259] The President then issued a presidential memorandum tasking his Treasury secretary with expanding the availability of portable private savings accounts with employer-deducted contributions for oft-excluded low-wage workers through myRAs.[260]

Republican presidents have similarly "promised" to refrain from reductions to 401(k) contribution caps, emphasizing bipartisan support for 401(k)s, and fulfilling this promise when significant tax reform passed.[261] President Trump also ominously leveraged the centrality of Americans' 401(k)s on the campaign trail: "You have no choice but to

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257 *See* Choi et al., *Saving for Retirement*, *supra* note 214, at 304, 309.

258 U.S. DEP'T OF LABOR ET AL., RETIREMENT TOOLKIT 3, https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/retirement-toolkit.pdf [https://perma.cc/Q67Q-ZMSU].

259 Remarks at the United States Steel Corporation Mon Valley Works—Irvin Plant in West Mifflin, Pennsylvania, 2014 DAILY COMP. PRES. DOC. 3 (Jan. 29, 2014) ("And while the stock market has doubled over the last 5 years, that doesn't help somebody if you don't have a 401(k) . . . [a]nd we need to give every American access to an automatic IRA on the job, so they can save at work."). President Obama reiterated his belief in the promise of these accounts months later at a political fundraiser. Remarks at a Democratic Senatorial Campaign Committee Dinner in New York City, 1 PUB. PAPERS 237, 238 (Mar. 11, 2014) ("Now, obviously, anybody who has got a 401(k) has benefited from the stock market recovering, but a lot of people don't have 401(k)s, don't have any kind of retirement accounts at all."). *But see infra* note 273 (discussing the ultimate demise of the myRA idea).

260 *See* Memorandum on Retirement Savings Security, 2014 DAILY COMP. PRES. DOC. 2 (Jan. 29, 2014) ("Unfortunately, only about half of all American workers have access to employer-sponsored retirement savings accounts. It is clear that we cannot continue on this course. The Department of the Treasury has worked diligently to develop a new tool that can make long-term savings a reality for more working Americans.").

261 *See, e.g.*, Eileen Sullivan & Jim Tankersley, *Trump Promises 'No Change to Your 401(k)' as Congress Considers a Contribution Cap*, N.Y. TIMES (Oct. 23, 2017), https://www.nytimes.com/2017/10/23/us/politics/trump-401-k-tax-budget.html [https://perma.cc/NCE9-FEMP].

vote for me because your 401(k), everything is going to be down the tubes."[262]

Admittedly, the DOL has not suggested that 401(k)s are completely invincible from consumer issues. In addition to information regulation surrounding fees and expenses, the DOL released a list of warning signals to help participants monitor for outright misappropriation of funds.[263] In light of participants' low levels of financial literacy, attention, and usage of DOL resources, however, the warning list is a nominal caveat rather than a substantive correction to the overall faith that DOL acts to instill in 401(k) accounts. The DOL's focus on the worst actors may also induce consumer complacency about the more pervasive, but less drastic, harms from commissions and fees.

4. *The Basis for the Expectation*

Consumer expectations of 401(k)s reflect a shifting public role in, and desire for, retirement security. The administrative state promotes investment into 401(k)s despite persistent fee and expense concerns and disclosure's limited ability to rectify them.[264] One study of 401(k)s disaggregates the costs due to poor menu choices by plan administrators and poor investment choices by plan participants.[265] The study describes an unsettling facet of excessive fees in retirement savings: Consumers' choice of inferior products and the prospects that some investments yield *negative* returns.[266] For young investors, such losses may exceed any gains from the tax-advantaged status of 401(k)s.[267]

But as important as opaque fees and expenses are, they remain a secondary issue.[268] The first-order desire to address private myopic savings behavior is the most compelling justification for instilling a simplistically positive consumer expectation. In Bayesian terms, these general expectations anchor consumers and limit disclosure's ability to forge their posterior beliefs. As such, it makes sense to cultivate a

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262 Maggie Haberman & Peter Baker, *Citing Economy, Trump Says That 'You Have No Choice but to Vote for Me,'* N.Y. TIMES (Aug. 15, 2019) https://www.nytimes.com/2019/08/15/us/politics/trump-rally.html [https://perma.cc/Y3MU-4752] (quoting President Donald Trump, Remarks at a Presidential Campaign Rally in Manchester, New Hampshire (Aug. 15, 2019)).

263 EMP. BENEFITS SEC. ADMIN., U.S. DEP'T OF LABOR, TEN WARNING SIGNS THAT YOUR 401(K) CONTRIBUTIONS ARE BEING MISUSED, https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/ten-warning-signs-that-your-401k-contributions-are-being-misused.pdf [https://perma.cc/R7PS-CWNT].

264 *See* discussion *supra* Sections II.C.1–.2.

265 Ayres & Curtis, *supra* note 243, at 1496–97.

266 *Id.* at 1504.

267 *Id.* at 1501, 1531–32.

268 *See id.* at 1522 n.163.

consumer expectation that private retirement savings—incentivized through public tax law—will yield significant benefits.

In part, the positive consumer expectation comports with the preference for a greater role for individual savings and the private sector in retirement in lieu of Social Security.[269] Some dissident scholars, motivated by the failures of the 401(k) marketplace and the arguably regressive effects of its tax advantaged status, have called for a government-run system of individual accounts[270] and a shift towards more invasive paternalism.[271] Others prefer to maintain the existing 401(k) architecture while expanding the reach of retirement accounts to lower income workers through the administrative state,[272] including through the now-defunct myRA efforts by the DOL.[273] Nonetheless, the administration of the consumer expectation regarding 401(k)s primarily corrects cognitive biases. The more contemporary and instrumental origins of the retirement savings consumer expectation contrast with those for higher education and homeownership.

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269 *But see* Theodore R. Marmor & Jerry L. Mashaw, *Understanding Social Insurance: Fairness, Affordability, and the 'Modernization' of Social Security and Medicare*, 25 HEALTH AFF. W114 (2006), https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.25.w114 [https://perma.cc/UK62-UT26] (canvassing, and responding to, such arguments).

270 *See* TERESA GHILARDUCCI, WHEN I'M SIXTY-FOUR: THE PLOT AGAINST PENSIONS AND THE PLAN TO SAVE THEM 260–65 (2008) (arguing for "Guaranteed Retirement Accounts" to be run similarly to the Thrift Savings Plan ("TSP"), a defined contribution retirement savings plan for Federal employees); Jeff Schwartz, *Rethinking 401(k)s*, 49 HARV. J. LEGIS. 53, 74–78 (2012).

271 Jacob Hale Russell, *The Separation of Intelligence and Control: Retirement Savings and the Limits of Soft Paternalism*, 6 WM. & MARY BUS. L. REV 35, 84 (2015) (encouraging "paternalism-shy" regulators to look beyond "soft" solutions).

272 *See* Dana M. Muir, *Choice Architecture and the Locus of Fiduciary Obligation in Defined Contribution Plans*, 99 IOWA L. REV. 1, 49 (2013) (criticizing assignment of responsibility to employers for selection and oversight of plan investment options); *see also* Raj Chetty & Amy Finkelstein, *Social Insurance: Connecting Theory to Data*, *in* 5 HANDBOOK OF PUBLIC ECONOMICS 112, 145 (Alan J. Auerbach et al. eds., 2013) ("Unlike other social insurance programs, the evidence on social security has not been integrated as tightly with theoretical models to make quantitative statements about welfare and optimal policy . . . [creating] a fertile area for future research.").

273 President Obama instructed the Secretary of Treasury to prepare a "new retirement savings security that can be made available through employers to their employees" by December 31, 2014. Memorandum on Retirement Savings Security, 2014 DAILY COMP. PRES. DOC. 2 (Jan. 29, 2014). The "myRA" was to be a Roth IRA with no minimum balance, no employer contribution, and, like bonds, backed by the U.S. government. Katie Lobosco, *Treasury Ends the myRA, Obama's Retirement Savings Program*, CNN (July 28, 2017, 6:13 PM), https://money.cnn.com/2017/07/28/retirement/treasury-myra-retirement-account/index.html [https://perma.cc/993L-FJ4U]. The Treasury Department under the Trump administration announced that it was abandoning the program. Press Release, U.S. Dep't of Treasury, Treasury Announces Steps to Wind Down myRA Program (July 28, 2017), https://www.treasury.gov/press-center/press-releases/Pages/sm0135.aspx [https://perma.cc/8XCU-AUZ9].

In sum, the administration of consumer expectations has defined all three markets, limiting the impact of traditional consumer protection interventions like disclosure. Yet the justifications for these expectations vary. Concepts of property as masculinity and freedom undergird the homeownership market, while the idea that pursuing higher education—broadly defined—increases equality motivates that market. These ideologies play a more significant role than traditional theories of correcting cognitive biases and capturing social externalities might suggest. In retirement savings, however, ideology cedes its centrality to these more practical rationales, demonstrating ideology's varying role across consumer markets.

III. Secondary Dynamics

So far, this Article has identified the administration of consumer expectations as an important way that governmental actors affect consumer behavior, alongside the more traditionally examined efforts at information regulation. It has also addressed why the federal government may have supported these consumer expectations—finding that they are often best understood as supporting ideological ends.

This Part moves past establishing the phenomenon of the administration of consumer expectations and begins to address specific facets of those expectations' operations. Across the different markets, this Part focuses on three main dynamics—regressivity; consonance and dissonance; and reshaping expectations.

A. *Regressivity*

State-generated or -influenced consumer expectations may be economically or racially regressive. Regressivity captures when the poor or marginalized face a disproportionately greater burden than the rich or powerful.[274] The concept is particularly relevant to higher education's consumer expectations, given the expectation's premise of equal opportunity but its plausible result of further inequality.[275] The higher education imperative influences prospective poor and minority students to matriculate and indebt themselves, a potentially regressive

274 *See* Thomas Piketty & Emmanuel Saez, *How Progressive Is the U.S. Federal Tax System? A Historical and International Perspective*, J. Econ. Persp., Winter 2007, at 3, 4–5 ("[A] regressive tax is one in which the share of income paid in taxes falls with income."); *see also* Camille Gear Rich, *Making the Modern Family: Interracial Intimacy and the Social Production of Whiteness*, 127 Harv. L. Rev. 1341, 1346 (2014) (reviewing Angela Onwuachi-Willig, According to Our Hearts (2013)) (using "racially regressive" to mean "reinstantiat[ing] existing racial status hierarchy").

275 *See supra* Section II.A.3.

effect if postgraduate income prospects do not increase correspondingly.[276] To that end, the growing surge in higher education has been deemed "separate and unequal": white students disproportionately enroll in elite universities with few racial minorities, while students of color end up largely at open admission institutions.[277] These minorities' share of top university enrollment may have decreased over time despite their increasing representation in higher education generally.[278]

As explained earlier, the institutions at which racial minorities matriculate—often proprietary schools—perform poorly in both absolute and comparative terms.[279] Shareholders win at the expense of a demographically distinct subset of students. In other words, while the expectation can be nominally progressive when measured only by enrollment in higher education, it can be substantively regressive if measured by postgraduate employment and financial outcomes.[280]

Regarding the homeownership imperative, the recent foreclosure crisis demonstrated the potentially racially regressive effects. Expansions in mortgage lending prior to the crisis were structured to lead to greater numbers of foreclosures for racial minorities.[281] One study found that Black and Latino borrowers were twice as likely to lose their homes as white counterparts, even after controlling for income.[282] The disparity is largely due to their higher probability of receiving high-risk loan products, even after controlling for income.[283]

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276 One reason for rising debt is the redirection of state resources allocated to higher education. Elengold, *supra* note 80, at 10 (describing laws that give rise to "higher education as a private, rather than a public, good"); *supra* text accompanying note 40. Consequently, student tuition, as opposed to federal, state, and local aid, has become an increasingly important part of institutional revenue over the last decade. CollegeBoard, Trends in College Pricing 2012, at 23–24, 24 figs.14B, 14C (2012). The only category exempted from this trend is private doctoral institutions. *Id.* Over the same time period, the inflation-adjusted incomes of families across the income distribution, from the bottom quintile to the top quintile, have decreased. *Id*. at 28 fig.18A (righthand chart).

277 The share of those students at the top 500 universities has actually decreased over the past two decades. Carnevale & Strohl, *supra* note 113, at 8.

278 *Id.* at 8–10.

279 *See* discussion *supra* notes 42–44 and accompanying text. Such problems can be even worse under income-driven repayment. Brooks, *supra* note 41, at 266 (describing how the student loan program Income-Based Repayment might exacerbate moral hazard and misallocation vis-à-vis for-profit problems).

280 *See* discussion *supra* notes 51–54 and accompanying text.

281 *See* discussion *supra* Section II.B.1.

282 *See* discussion *supra* note 156 and accompanying text.

283 *See id.*

Troublingly, the ideological motivations for both the higher education and homeownership imperatives could overpower such regressive effects. Some actors may heavily value the homeownership imperative's focus on private property and its associations with freedom or the higher education imperative's associations with equality. Such associations may be so valuable that even if the actual consumer choices for homeownership or higher education yield negative returns for those worse off ex ante, the regressive financial consequences are a worthwhile sacrifice for the already poor to make in pursuit of these ideals.[284] Such an ideological extremism could justify the administration of even a deeply financially regressive consumer expectation.

B. Consonance and Dissonance

Thus far, this Article has largely treated the governmental administration of expectations as consistent and univocal. But federalism means that states act in arenas also regulated by federal agencies.[285] Preemption may limit state efforts to legislate consumer protection, but it may have less ability to affect states' roles in influencing consumer expectations. Within the federal administrative state itself, multiple agencies may be involved in the same market.[286] Multiple actors can thus generate consonance and dissonance in the administration of expectations as well as in the administration of consumer protection.

1. Federalism

One axis for consonance and dissonance is the state-federal divide. State consumer protection may exceed, and inspire, the federal administration of consumer protection. In the context of higher education, states have effectively regulated ineffective institutions, even as federal efforts stalled. For example, California passed performance standards modeled upon, but exceeding, the federal rules,[287] and

284 *See* A. Mechele Dickerson, *The Myth of Home Ownership and Why Home Ownership Is Not Always A Good Thing*, 84 IND. L.J. 189, 232 (2009) (arguing that regulatory responses to the foreclosure crisis avoided "the underlying problem (an irrational obsession with attaining the status of homeowner)" and summarizing that "as long as this country continues to tell consumers that [homeownership is the best long-term investment] and continues to encourage people *to do whatever it takes* to achieve the home ownership dream, renters and existing homeowners will continue to make unwise housing investment decisions" (emphasis added)).

285 *See, e.g.*, 12 U.S.C. § 5495 (2018) ("The [Consumer Financial Protection] Bureau shall coordinate with . . . other Federal agencies and State regulators, as appropriate, to promote consistent regulatory treatment of consumer financial and investment products and services.").

286 Daphna Renan, *Pooling Powers*, 115 COLUM. L. REV. 211, 215 & n.9 (2015) (canvassing the "budding literature today [that] explores the interactions between agencies").

287 *See* MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, THE 2012–13 BUDGET: CALIFOR-

nearly all institutions that failed to meet benchmarks and subsequently lost eligibility for state aid were proprietary.[288] Following these changes, Kamala Harris, the then–California Attorney General, joined other state attorneys general in investigating a large proprietary institution for fraud and misrepresentation.[289] The federal DOE too began to address the institution's endemic misrepresentation through enforcement actions,[290] including against peer institutions.[291] The state enforcement actions thus spurred further federal enforcement action.

State administration of consumer protection, however, may also be dissonant with federal administration of consumer expectations. The role of these attorneys general in publicly pursuing enforcement may have gone beyond heightened disclosure to shifting consumer expectations toward caveat emptor, not only in proprietary education, but also higher education more generally.[292] These are model lawsuits, meant to prod other jurisdictions, prospective students, and potential offenders; as such, they may challenge the more sanguine federal administration of consumer expectations. It is likely no coincidence that the state that hosts a venerable public higher education landscape, including the University of California, is concerned with its residents' expectations of often-poorly performing proprietary competitors.[293] In

NIA SPENDING PLAN 22 (2012), https://lao.ca.gov/reports/2012/bud/spending_plan/spending-plan-091312.pdf [https://perma.cc/8S85-DN3E] (mandating a federal institutional cohort default rate of less than 15.5% and a graduation rate of greater than 30%).

288 *See Cal Grant Eligible School Lists*, CAL. STUDENT AID COMM'N, https://www.csac.ca.gov/post/cal-grant-eligible-school-list-0 [https://perma.cc/NUC7-THZW] (posting school ineligibility lists by year, most relevantly in 2017–2018, 2018–2019, and 2019–2020).

289 *Information for Former Corinthian Colleges Students*, STATE OF CAL. DEP'T OF JUSTICE (Oct. 24, 2018), https://oag.ca.gov/Corinthian [https://perma.cc/MY2S-CELN].

290 Press Release, U.S. Dep't of Educ., Education Department Names Seasoned Team to Monitor Corinthian Colleges (July 18, 2014), https://www.ed.gov/news/press-releases/education-department-names-seasoned-team-monitor-corinthian-colleges [https://perma.cc/PVH6-Q6TC].

291 *See, e.g.*, Complaint for Injunctive Relief and Damages ¶¶ 1–2, Consumer Fin. Protect. Bureau v. ITT Educ. Servs., Inc., 219 F. Supp. 3d 878 (S.D. Ind. 2015) (No. 1:14-cv-00292) (alleging that a for-profit, publicly traded university employed illegal practices under the Consumer Protection Act).

292 A coalition of the attorneys general, apart from their interactions with federal regulators, called directly upon Congress to pass the Protecting Financial Aid for Students and Taxpayers Act, S. 1908, 114th Congress (2015). *See* Letter from Jack Conway, Attorney Gen., Commonwealth of Ky. et al., to Chairmen and Ranking Members of Senate Comms. on Veterans' Affairs & Health, Educ., Labor, & Pensions (Mar. 11, 2013). For a survey of media around the action and underlying statute, see *Media Coverage*, PROTECT STUDENTS & TAXPAYERS, http://www.protectstudentsandtaxpayers.org/media-coverage/ [https://perma.cc/2AJA-5JBG].

293 Even as those competitors shutter their doors, formerly enrolled students give rise to new legal concerns, including transfer credits, tuition refunds, and the prospect of other poorly-performing proprietary institutions enrolling these students. For example, Senator Richard

other words, states and the federal government battle not only over legal matters—remedies, regulation, and preemption—but also over consumer minds.

The housing market has witnessed federal preemption in consumer protection, but the dynamics of consumer expectations are less clear. In the years preceding the subprime mortgage crisis, state regulators attempted to monitor lending activities by subsidiaries of national banks.[294] Yet the Office of the Comptroller of the Currency ("OCC") promulgated preemption rules rejecting states' efforts to create heightened disclosure standards.[295] The conflict with federal regulators at OCC reached the Supreme Court twice, which partially upheld federal preemption with respect to nationally chartered bank subsidiaries in *Watters v. Wachovia Bank, N.A.*,[296] while allowing some state intervention in *Cuomo v. Clearing House Ass'n, LLC*.[297] Federal preemption may limit some state-mandated disclosures in the housing market, but it may not limit a state's ability to shape expectations.[298]

2. *Interagency and Judicial Dissonance*

Even within the federal government, not all government actors speak as one. Dissonance can arise between agencies and the judicial branch.[299]

Durbin was outspoken about his ongoing concerns for Illinois students. Press Release, Sen. Richard Durbin, Durbin Enlists Illinois High School Educators to Sound the Alarm on For-Profit College (Apr. 23, 2018), https://www.durbin.senate.gov/newsroom/press-releases/durbin-enlists-illinois-high-school-educators-to-sound-the-alarm-on-for-profit-colleges [https://perma.cc/DP2X-G7YQ]; Press Release, Sen. Richard Durbin, Durbin Issues Warning to Illinois Students: Stop Enrolling at Everest Campuses (July 9, 2014), https://www.durbin.senate.gov/newsroom/press-releases/durbin-issues-warning-to-illinois-students-stop-enrolling-at-everest-campuses [https://perma.cc/6YXH-5NBY].

294 Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1,904, 1,908 (Jan. 13, 2004) (to be codified at 12 C.F.R. pts. 7, 34) ("Commenters noted that the variety of state and local laws that have been enacted in recent years—including laws regulating . . . disclosures . . . have created higher costs and increased operational challenges. Other commenters noted the proliferation of state and local anti-predatory lending laws and the impact that those laws are having on lending in the affected jurisdictions.").

295 *See id.*

296 550 U.S. 1 (2007).

297 557 U.S. 519 (2009).

298 Aside from conflicts in expectations, the federal and state authorities often cooperate, especially in regulation. Consider the joint state-federal settlement with the nation's largest mortgage servicers, touted as the largest such settlement in history. *State Attorneys General, Feds Reach $25 Billion Settlement with Five Largest Mortgage Servicers on Foreclosure Wrongs*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/naag/media/naag-news/state-attorneys-general-feds-reach-25-billion-settlement-with-five-largest-mortgage-servicers-on-foreclosure-wrongs.php [https://perma.cc/EPV9-9MWY].

299 Administrative law scholars have acknowledged that agencies can be adversaries and

Interagency dissonance reflects executive branch disunity.[300] In the homeownership context, Sheila Bair, former chairwoman of the Federal Deposit Insurance Corporation ("FDIC"), has been a visible counterweight to administrative voices in support of universal homeownership. In public remarks while chairwoman, Bair articulated a more skeptical perspective on homeownership as a universal goal for all low-income Americans.[301] The FDIC, as an independent agency where the president possesses limited powers of removal,[302] may more easily challenge other agencies' administration of consumer expectations.

Judges have described the landscape of higher education distinctly from presidents and agencies. In contrast to presidents' and agencies' rhetorical equalization of all of American higher education,[303] the Supreme Court has recognized its fundamentally hierarchical nature.[304] The Court has consistently intervened in debates on the role of race in admissions to elite institutions, including in *Fisher v. University of Texas at Austin*[305] and *Schuette v. Coalition to Defend Affirmative Action*.[306] Affirmative action jurisprudence explicitly acknowledges the "prize" reaped from elite institutional attendance.[307]

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the potential benefits of conflict between administrative actors. *See, e.g.*, Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CALIF. L. REV. 1375, 1375–76 (2017).

300 *See, e.g.*, John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 925–26, 1005 (2015) (noting "interagency disagreement" in financial regulation); Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 DUKE L.J. 1677, 1679–80 (2017) (defining "the political branches" to include Congress and the executive and noting that "the political branches do not always speak with one voice").

301 Sheila C. Barr, Chairwoman, Fed. Deposit Ins. Corp., Remarks to the Housing Association of Non-Profit Developers Annual Meeting; Tysons Corner, Virginia (June 7, 2010) ("Sustainable home ownership is a worthy national goal. But it should not be pursued to excess when there are other, equally worthy solutions that help meet the needs of people for whom homeownership may NOT be the right answer.").

302 *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600–01 (2010).

303 *See supra* notes 87–93 and accompanying text.

304 This recognition of hierarchy may reflect the justices' pedigrees from atop it. *See* Mitchell F. Crusto, *Empathic Dialogue: From Formalism to Value Principles*, 65 SMU L. Rev. 845, 858–59 (2012) (discussing the Supreme Court Justices' homogeneity, including their shared Ivy League backgrounds).

305 136 S. Ct. 2198 (2016) (holding the university's admissions program, which considers race, lawful).

306 572 U.S. 291 (2014) (upholding the constitutionality of Michigan's state constitutional ban on race-conscious admissions).

307 In *Fisher*'s first appearance before the Court, the Court noted that "the University is one of the leading institutions of higher education in the Nation. Admission is prized and competitive." Fisher v. Univ. of Tex. at Austin, 570 U.S. 297, 304 (2013).

Yet at times, justices and scholars have universalized higher education's returns. In describing the need for demographic inclusion in *Grutter v. Bollinger*,[308] Justice O'Connor wrote that "[n]owhere is the importance of such openness more acute than in the context of higher education,"[309] failing to appreciate how the proprietary sector may have opened their doors too wide to students' detriment. In commenting on *Grutter*, one prominent scholar asserted that higher education writ large "grants upward social mobility" and "offers heightened opportunity," while acknowledging the particular status and benefits accruing from elite higher education.[310] Seemingly more cautious than presidents and agencies, the Supreme Court and its commentators have nonetheless shared in questionable generalizations about higher education's value. Yet the literal words of the Supreme Court, as opposed to its holdings, may have little effect on the broader public.[311]

In sum, consumer expectations are both challenged and reinforced by state actors, federal agencies, and the judiciary. While independent agencies are particularly well suited to provide caveats to broader expectations or challenge them in their entirety,[312] they are only several among many institutional actors.

C. *Reshaping*

A final question is whether general consumer expectations can be reshaped administratively and how such reshaping would work. The earlier sections of this Article have demonstrated consumer expectations' historical and administrative origins and trajectories. Yet the ability of the modern state to reshape such embedded priors is not obvious: past efforts may have created overwhelming momentum.

308 539 U.S. 306 (2003).

309 *Id.* at 332 (alteration in original) (quoting Brief for United States as Amicus Curiae Supporting Petitioner, Grutter v. Bollinger, 539 U.S. 306 (2003) (No. 02-241)).

310 Lani Guinier, Comment, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 138–39 (2003).

311 *See, e.g.*, Keith Cunningham-Parmeter, *Alien Language: Immigration Metaphors and the Jurisprudence of Otherness*, 79 FORDHAM L. REV. 1545, 1588–90 (2011) (discussing "the Supreme Court's discursive influence" in the context of immigration); G. Edward White, *The Supreme Court's Public and the Public's Supreme Court*, 52 VA. Q. REV. 370, 380–81 (1976) (describing Brown v. Board of Education, 347 U.S. 483 (1954), from a public communication perspective, as "a decision deliberately intended to reach beyond the professional audience of the Court" and therefore as an "exceptional Supreme Court decision rather than the ordinary one").

312 The desirability of such distinct levers in consumer confidence as a check on herding and hysteria support scholarly arguments as to why presidents may not want complete control over regulatory entities. *See* Bressman & Thompson, *supra* note 302, at 603.

The role of expectations may have differing half-lives for different groups. For example, low-income prospective students, often geographically isolated and with limited guidance, behave differently than their high-income, high-achieving counterparts.[313] Broad information interventions can potentially nudge low-income student towards high-income student behavior.[314] Similarly, low- and high-income homebuyers may differentially rely on public information resources such as housing counseling agencies.[315] Those consumers whose expectations are less likely to be affected by the administrative state often live largely outside it—consider how high-income individuals are less likely to interact with government programs such as educational aid through the DOE or homebuying incentives through HUD.

Executive and agency messaging may have an effect on expectations without being the proximate cause of those expectations. Some aforementioned sources, such as the Federal Student Aid website, are a significant resource and portal for their respective constituencies, and homebuyers may directly rely on heuristics from the government's administrative apparatus.[316] Yet few would argue that prospective homebuyers, much less students, are scrutinizing cabinet member speeches, Federal Register language, and agency documents. More heavily politicized and publicized events, like State of the Union addresses, may be the exception.[317] Governmental efforts to shape expectations may also affect consumers indirectly. Local organizations, authority figures including adult teachers and financial officers, and

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313 In part, this is because they have access to expert guidance on the college admissions and matriculation process. Caroline M. Hoxby & Christopher Avery, *The Missing "One-Offs": The Hidden Supply of High-Achieving, Low Income Students* 16–17 (Nat'l Bureau of Econ. Research, Working Paper No. 18586, 2012).

314 Caroline Hoxby & Sarah Turner, *Expanding College Opportunities for High-Achieving, Low Income Students* 23–24 (Stanford Inst. for Econ. Policy Research, Discussion Paper No. 12-014, 2013).

315 OFFICE OF POLICY DEV. & RESEARCH, U.S. DEP'T OF HOUS. & URBAN DEV., THE STATE OF THE HOUSING COUNSELING INDUSTRY, at xiv (2008) ("Most clients that receive counseling services from HUD-approved agencies are very-low income or low-income."). These "counseling services" include group sessions and classes that do not necessarily deal with individualized circumstances. *Id.* at 7.

316 *See* LIZABETH COHEN, A CONSUMERS' REPUBLIC 73–74 (2004) (connecting mass suburban home construction to government propaganda, including brochures and certificates from the Office of Civilian Defense, and describing surveys in the 1940s that captured how Americans did in fact "buy into the promise of [building and] improving their postwar homes").

317 *See 33.3 Million Tune in to Watch Pres. Obama's State of the Union Address*, NIELSEN CO. (Jan. 29, 2014), http://www.nielsen.com/us/en/insights/news/2014/33-3-million-tune-in-to-watch-pres-obamas-state-of-the-union-address.html [https://perma.cc/5Q8D-FUF5].

the media may be more likely to read and adopt governmental perspectives, and then pass that advice to individual consumers.[318]

Lastly, difficult empirical questions remain regarding these expectations' elasticities, and these elasticities likely differ across aforementioned axes, including geography, gender, income, and race. An elasticity of zero would foreclose the prospects of "reshaping" expectations in the measured area, but generalized information interventions suggest that people's beliefs are rarely fixed.[319] Larger elasticities would imply greater ability to shape these prior beliefs.

Reshaping would not require encouraging wholesale avoidance of a product market altogether. Rather, reshaping would entail an end to the promotion of sanguine consumer expectations that affect choice, especially when those consumers bear considerable downside risk. With prior expectations reshaped, institutional disclosure mandates could play a larger role in parallel with direct institutional regulation.

Conclusion

Even as the state mandates disclosure and misrepresentation rules to combat misleading consumer expectations, it also perpetuates those very expectations. This administration of consumer expectations may provide political benefits to some and impose costs on others. When public actors fail to internalize those expectations' collateral costs, less powerful constituents may suffer, deepening inequality. Scholars and regulators must fully grapple with the state's role in generalized consumer expectations for consumer financial markets to be "fair, transparent, and competitive."[320] In sum, it is not simply Congress, the Constitution, and shifts in regulatory priorities that con-

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318 *See, e.g.*, Bd. of Governors of the Fed. Reserve Sys., Report on the Economic Well-Being of U.S. Households in 2016, at 48 tbl.26 (2017). Table 26 captures only responses from matriculants regarding the "people" who influenced their decision to pursue higher education and their choice of institution, but Table 28 provides reasoning—though not sources of information—for higher education nonmatriculants and noncompleters. *Id.* at 48 tbl.26, 49 tbl.28.

319 *See* Rebecca Dizon-Ross, *Parents' Beliefs about Their Children's Academic Ability: Implications for Educational Investments*, 109 Am. Econ. Rev. 2728, 2729 (2019) (providing experimental "evidence on a link between information barriers and poverty, showing that poorer, less-educated parents have less accurate baseline beliefs than richer parents, and that their beliefs and certain of their [educational] investments respond more to information [about their children's academic performance]"); Robert Jensen, *The (Perceived) Returns to Education and the Demand for Schooling*, 125 Q. J. Econ. 515, 515 (2003) (finding that information disclosures on local wage premiums for high school completion increase schooling persistence by a third of a year).

320 12 U.S.C. § 5511(a) (2018).

strain consumer protection law. It is also the state of great expectations.

Appendix I: Bayesian Approach

Consumers' expectations, or *prior* beliefs, limit the effect of any new information on consumers' decisions. New evidence is incorporated to form *posterior* updated beliefs from these prior beliefs. Bayes' Theorem stipulates three essential components: prior belief, posterior belief, and information incorporation:[321]

Equation 1.

$$\boldsymbol{P(\hat{A}_I|B_I) = \frac{P(B_I|\hat{A}_I)}{P(B_I)} * P(\hat{A}_I)}$$

or, more simply

Posterior Belief = Information Incorporation * Prior Belief

Here I define:

i. $\boldsymbol{\hat{A}_I, A^I}$ as the event that $\boldsymbol{\hat{E}_I, E_I > r}$
   a) $\boldsymbol{\hat{E}_I}$ and $\boldsymbol{E_I}$ are the perceived and objective net returns from attending institution (or procuring product) $\boldsymbol{I}$
   b) $\boldsymbol{r}$ is a reservation value that is not institution- or product-specific

ii. $\boldsymbol{\hat{A}}$ as the event that $\boldsymbol{\hat{E} > r}$
   a) $\boldsymbol{\hat{E}}$ is the perceived net return from market participation

iii. $\boldsymbol{B_I}$ as the institution- or product-specific disclosure of performance metrics and

I assume:

a. $\boldsymbol{P(\hat{A}_I) = P(\hat{A})}$ ["prior as heuristic" condition]

b. $\boldsymbol{P(\hat{A}_I) = P(\hat{A}) > P(A_I)}$ [institutional overestimation]

$P(\hat{A}_I)$ represents the probability that an individual's perception of the net return from attending institution "*I*" (or purchasing home "*I*" or choosing retirement savings product "*I*") exceeds his/her person-specific reservation value. $P(\hat{A}_I)$ thus denotes the probability of matriculation at institution "*I*" (or purchasing home "*I*" or choosing retirement savings product "*I*"), where the perceived net benefit exceeds the reservation value. Before approaching a specific institution/product purveyor, a prospective consumer has some existing belief regarding the net return of market participation generally. These general, as opposed to institution- or product-specific, beliefs can be expressed as a nonsubscripted $P(\hat{A})$. The stronger these general beliefs, the higher the value of $P(\hat{A})$. As denoted in Assumption (a)

321 *See supra* Section I.A.

above, I assume that the student uses the prior as a heuristic for institution- or product-specific decision-making, i.e., $P(\hat{A}_I) = P(\hat{A})$. Assumption (b) simply posits that for the hypothetical institution or product, the perception of net returns exceeds the objective, cost-inclusive, institution- or product-specific returns. I use the circumflex to distinguish the perceived returns, $\hat{A}_I$, from the objective returns, A_I. Assumption (b) does not imply that the prior belief in net returns necessarily overestimates the general, or average, net returns from market participation, even though it does overestimate the institution- or product-specific net returns.

This prior, $P(\hat{A})$, the general probability of participation, reflects messaging from the state and society, including the president, Cabinet members, and administrative agencies. The prospective student then approaches an institution, which provides specific information regarding its programs and products. The event B_I is the disclosure; this disclosure provides institution- or product-specific information regarding some set of outcome metrics, which might include degree completion, relevant employment, contractual terms, and financial wellbeing. The "posterior," or prospective consumer's conditional probability of participation, is the updated likelihood of attending institution (or procuring product) "I" given the disclosure, B_I, i.e., $P(\hat{A}_I \mid B_I)$. Equation 1 specifies how stronger predisclosure beliefs, $P(\hat{A}_I)$, create stronger postdisclosure beliefs and thus shows how strong prior beliefs undermine the efficacy of disclosure.