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## COMMENT

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### THE AMORPHOUS STUDENT–UNIVERSITY CONTRACT: ORIGINS, DEVELOPMENT, AND THE NEED FOR STATE OVERSIGHT

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#### INTRODUCTION

Let’s make a deal. You pay me \$200,000 for a four-year experience with no guarantee you will enjoy it or profit from it. During those four years, you are bound by the rules I write—and I may change them unilaterally and without notice. This deal must be accepted as is; there shall be no negotiating terms. If you don’t make this deal, you will likely be consigned to minimum wage work. Should you challenge in court any action I take, a judge will apply existing case law that instructs him or her to defer to my specialized judgment and my interpretation of the agreement. Do we have a deal?

As this Comment will demonstrate, those are roughly the terms that govern students’ relationships with their universities, though it is doubtful

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that American high school students understand this reality as they search for the college of their dreams. One might argue this lack of understanding is of no consequence: perhaps few students who ultimately attend college ever seriously consider not attending college. After all, universities are seen as playing an absolutely critical role in modern society: they “educate our young people and create the skilled workforce that we need to compete with other countries”; they “train future doctors, nurses, teachers, engineers, and scientists”; they “build the technology and develop the business leaders that will create a better tomorrow”; they “lead the way in searching for cures to cancer” and other diseases; and they “play a key role in expanding opportunity and reducing income inequality for those who have been left out and left behind for too long.”<sup>1</sup> Indeed, as of 2014, the earnings of a college graduate were over sixty percent higher than those of a worker who attained only a high school diploma.<sup>2</sup> And perhaps most significantly, higher education is thought to operate as a “multiplier, enhancing the enjoyment of all individual rights and freedoms.”<sup>3</sup> Can any institution which provides so many benefits not just to its students but to society at large—can any institution so revered—actually give students a raw deal?

While universities in general provide a net benefit for society, they—like any institution—have at times abused their power. In the disciplinary context, universities have suspended or expelled students for, among other things, eating their meals in a forbidden place,<sup>4</sup> smoking cigarettes,<sup>5</sup> engaging in premarital sex,<sup>6</sup> improperly using legal knowledge acquired in law school,<sup>7</sup> making unpatriotic statements,<sup>8</sup> espousing atheistic views,<sup>9</sup> joining forbidden secret societies,<sup>10</sup> exhibiting a lack of good manners,<sup>11</sup> disclosing pedophilic urges,<sup>12</sup> and protesting racial segregation.<sup>13</sup> Outside the disciplinary context, some universities have quadrupled tuition over a three-year period with no

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<sup>1</sup> *The Rising Costs of Higher Education and Tax Policy: Hearing Before the Subcomm. on Oversight of the H. Comm. on Ways and Means*, 114th Cong. 5 (2015) [hereinafter *House Hearing*] (statement of Rep. John Lewis, Member, H. Comm. on Ways and Means).

<sup>2</sup> *Id.*

<sup>3</sup> JANE KOTZMANN, *THE HUMAN RIGHTS-BASED APPROACH TO HIGHER EDUCATION: WHY HUMAN RIGHTS NORMS SHOULD GUIDE HIGHER EDUCATION LAW AND POLICY* 2 (2018) (internal quotations omitted).

<sup>4</sup> *Gott v. Berea Coll.*, 161 S.W. 204, 205 (Ky. Ct. App. 1913).

<sup>5</sup> *Tanton v. McKenney*, 197 N.W. 510, 511 (Mich. 1924).

<sup>6</sup> *Hall v. Lee Coll., Inc.*, 932 F. Supp. 1027, 1028 (E.D. Tenn. 1996).

<sup>7</sup> *White v. Portia Law Sch.*, 174 N.E. 187, 188 (Mass. 1931).

<sup>8</sup> *People ex rel. Goldenkoff v. Albany Law Sch.*, 191 N.Y.S. 349, 350-51 (App. Div. 1921).

<sup>9</sup> *Robinson v. Univ. of Miami*, 100 So. 2d 442, 443 (Fla. Dist. Ct. App. 1958).

<sup>10</sup> *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186, 186-87 (1866).

<sup>11</sup> *Steier v. N.Y. State Educ. Comm’r*, 271 F.2d 13, 13-14 (2d Cir. 1959).

<sup>12</sup> *Gibson v. Walden Univ., LLC*, 66 F. Supp. 3d 1322, 1324 (D. Or. 2014).

<sup>13</sup> *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 153 (5th Cir. 1961).

notice prior to enrollment,<sup>14</sup> deceived students into taking out private loans that were more expensive than advertised,<sup>15</sup> charged increasingly large fees on top of tuition in an apparent attempt to obscure the rising cost of college,<sup>16</sup> grossly misrepresented job placement rates,<sup>17</sup> and shut down unexpectedly and left thousands of students with significant student loan debt and no degrees.<sup>18</sup>

Historically, little recourse has existed for students subjected to such treatment. Students who attend public universities may bring a constitutional challenge and try to state a claim that meets the high burden required to show deficiency in process under the Due Process Clause.<sup>19</sup> However, because private universities are not always considered state actors bound by the same restrictions of the United States Constitution, students at private universities often must utilize other causes of action to challenge their treatment: most commonly, their claims are framed as contractual disputes alleging breach of contract or breach of the implied covenant of good faith and fair dealing.<sup>20</sup> The assertion of such contractual rights is seen as imposing on private

<sup>14</sup> *Basch v. George Washington Univ.*, 370 A.2d 1364, 1365-67 (D.C. 1977).

<sup>15</sup> See Paul Fain, *CFPB Penalizes Bridgepoint over Private Loans*, INSIDE HIGHER ED (Sept. 13, 2016), <https://www.insidehighered.com/quicktakes/2016/09/13/cfbp-penalizes-bridgepoint-over-private-loans> [<https://perma.cc/3DMC-XTVA>] (noting that the owner of Ashford University was ordered to pay an \$8 million fine and make restitution of \$23.5 million to over 1,200 defrauded students).

<sup>16</sup> See Jon Marcus, *Graduate Students are Mounting Degrees of Protest over 'Hidden Fees,'* WASH. POST (Aug. 2, 2019), [https://www.washingtonpost.com/local/education/graduate-students-mounting-degrees-of-protest-over-hidden-fees/2019/08/02/a7f19f3c-b3c8-11e9-8949-5f36ff92706e\\_story.html](https://www.washingtonpost.com/local/education/graduate-students-mounting-degrees-of-protest-over-hidden-fees/2019/08/02/a7f19f3c-b3c8-11e9-8949-5f36ff92706e_story.html) [<https://perma.cc/2BDT-HAUH>] (reporting that the total amount of fees charged by colleges has more than doubled between 2002 and 2017 and that one department at Baruch College charges students an \$8,000 “academic excellence fee” for reasons it was reluctant to divulge).

<sup>17</sup> Michael Stratford, *Corinthian Closes for Good*, INSIDE HIGHER ED (Apr. 27, 2015), <https://www.insidehighered.com/news/2015/04/27/corinthian-ends-operations-remaining-campuses-affecting-16000-students> [<https://perma.cc/J4S7-8278>].

<sup>18</sup> *Id.*

<sup>19</sup> See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 217 (1985) (alleging “a property interest in his continued enrollment” in medical school and arguing that “his dismissal was arbitrary and capricious, violat[ed] his ‘substantive due process rights’ guaranteed by the Fourteenth Amendment, and entitl[ed] him to relief under 42 U.S.C. § 1983”); see also *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 79-80 (1978) (stating a cause of action under 42 U.S.C. § 1983 and “alleging, among other constitutional violations, that petitioners had not accorded [the student] procedural due process prior to her dismissal”).

<sup>20</sup> See, e.g., *Hubbard v. Howard Univ.*, No. 17-2262(RDM), 2018 WL 4539704, at \*1 (D.D.C. Sept. 21, 2018) (stating that plaintiff “Elyssa Hubbard brings this action for breach of contract and breach of the covenant of good faith and fair dealing against Defendant Howard University, alleging that the university failed to provide adequate instruction . . .; denied ‘her right to initiate’ and to pursue ‘a grade dispute pursuant to’ established grievance procedures; and deprived her of a meaningful opportunity to challenge her academic suspension”); *Alden v. Georgetown Univ.*, 734 A.2d 1103, 1107 (D.C. 1999) (noting that the student “also argues that Georgetown breached the implied covenant of good faith and fair dealing by failing to evaluate his academic performance in good faith and on the merits, rather than based on factors unrelated to academic performance”).

universities by way of the common law the same or similar requirements as are imposed on public universities by the Due Process Clause.<sup>21</sup>

This Comment argues that the increasing complexity and heightened significance of the student-university relationship demands a more effective adjudicatory mechanism for student-university disputes than the old contract-law model. In light of the rapid increase in the cost and importance of a college education, Congress should condition the receipt of federally guaranteed student loans, as well as other financing provided under the Higher Education Act, upon the provision of satisfactory state administrative oversight. If states are enlisted to help the federal government protect students' constitutional rights, universities may be less likely to engage in arbitrary and highly detrimental action.

This Comment aims to examine how contracts came to be the dominant cause of action for students to sue their universities and to propose a new model of state oversight that would more appropriately strike a balance between the rights and interests of students and their universities. Part I examines the historical precedent that led to the development of the current contract-law model; Part II explores the rapid evolution in the dynamics of the student-university relationship and argues that the contract-law model no longer serves as a reasonable check on university power; and Part III argues that state administrative oversight would relieve courts of the burden of dealing with lawsuits in which they cannot reasonably provide relief while also better protecting the rights of students.

## I. HISTORY OF THE STUDENT-UNIVERSITY RELATIONSHIP & ASCENSION OF THE CONTRACT-LAW MODEL

The student-university relationship has evolved in tandem with the system of higher education, both of which have come a long way from their roots in early American history. Higher education in the American colonies began as a mostly private enterprise, often sponsored by the church.<sup>22</sup> In the colonial era, universities were also chartered by the British Crown and by the colonies; after the Revolution, the state and the federal government chartered their own universities.<sup>23</sup> By the middle of the nineteenth century, this patchwork of colleges offering training in the classics began to appear

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<sup>21</sup> See *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 113 (Minn. 1977) (declaring that "[t]he requirements imposed by the common law [of contracts] on private universities parallel those imposed by the due process clause on public universities").

<sup>22</sup> Sally M. Furay, Note, *Legal Relationship Between the Student and the Private College or University*, 7 SAN DIEGO L. REV. 244, 247 (1970).

<sup>23</sup> See *id.* (citing as examples Columbia University, chartered by the Crown; Harvard University, chartered by a colony; and George Washington University, chartered by Congress).

inadequate to meet the needs of an evolving nation. Amidst struggles to assimilate unprecedented numbers of immigrants into a rapidly industrializing economic landscape, calls for a revolution in higher education rang out.

The loudest of those voices to call out for modernization was Charles Eliot, the President of Harvard University. In 1869, with the Civil War past and the project of nation-building back at the center of American life, Eliot published an article in *The Atlantic* calling for a “New Education” that was to be more practical: A father today, he wrote, “will not believe that the same methods which trained some boys well for the life of fifty or one hundred years ago are applicable to his son” because “the kind of man which he wants his son to make did not exist in all the world fifty years ago.”<sup>24</sup> Many clamored for a more vocationally-focused education, one designed to prepare students for the realities of the emerging American economy.<sup>25</sup> In response, Eliot proposed a system of education based upon “the pure and applied sciences, the living European languages, and mathematics” rather than upon the dead classical languages that had previously been emphasized.<sup>26</sup> This, he believed, would ultimately make students “good engineers, manufacturers, architects, chemists, merchants, teachers of science, or directors of mines and industrial works.”<sup>27</sup>

Even as Eliot worked to transform and modernize the curricula at Harvard and its peer institutions, most colleges in the nineteenth century continued to entertain relatively modest and transactional relationships with their students. To enroll at the University of Michigan, for instance, one had only to present a certificate of good character and pay tuition; to graduate and receive a degree, one had only to attend “certain courses of lectures through two terms of six months each.”<sup>28</sup> Indeed, until the middle of the nineteenth century, the major universities had no standardized written examinations for admission, nor did they require prior knowledge of anything other than Greek, Latin, and arithmetic in order to matriculate.<sup>29</sup>

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<sup>24</sup> Charles W. Eliot, *The New Education*, THE ATLANTIC, (Feb. 1869), <https://www.theatlantic.com/magazine/archive/1869/02/the-new-education/309049/> [<https://perma.cc/H4YZ-9SPM>].

<sup>25</sup> See generally Joseph F. Kett, “Theory Run Mad”: John Dewey and “Real” Vocational Education, 16 J. GILDED AGE & PROGRESSIVE ERA 500, 501-05 (2017) (describing the intellectual development of the vocational movement, and John Dewey’s attempt to meld vocational education with general education).

<sup>26</sup> Eliot, *supra* note 24.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* (noting that Yale’s Chemistry Department required no real exam for admission); see also EDWIN CORNELIUS BROOME, A HISTORICAL AND CRITICAL DISCUSSION OF COLLEGE ADMISSIONS REQUIREMENTS 30, 46, 126 (1903) (noting that “no mathematics beyond vulgar arithmetic was required for admission to any college” and that not until the end of the nineteenth century did Latin, Greek, and arithmetic cease to be the sole requirements for entrance).

It was during this period of modernization that the student-university relationship was shoehorned into the contract-law model. At its core, this was a logical development, since “the elements of a traditional contract are present in the implied contract between a college and a student . . . .”<sup>30</sup> The student’s submission of an application may be seen as an offer; the student’s admission may be seen as acceptance by the university; and the payment of a deposit or tuition may be seen as valuable consideration.<sup>31</sup> Further, the relationship between a student and a university was often expressly stated in a written, albeit sparse, enrollment contract. Resembling a money-for-services agreement, the mutual promises between a university and a student naturally seemed to fit into a contract-law model.<sup>32</sup>

The relatively unsophisticated, transactional student-university relationship of the nineteenth century thus provided the foundation for the contract-law model. Unsurprisingly, then, most early suits between students and their universities were filed by universities to recover unpaid tuition or by students for a tuition refund or to compel conferral of a degree.<sup>33</sup> Outside of such disputes over tuition payments, which naturally brought to mind notions of contract law, universities were considered virtually immune from lawsuits; as a former General Counsel for the University of California system once noted, the university up until the 1960s was “a citadel where administrators governed students virtually unfettered by legal constraints.”<sup>34</sup> By some accounts, the contract-law model was a reasonable fit in an era in which the relationship between a student and university was often “expressly

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<sup>30</sup> Audrey Wolfson Latourette & Robert D. King, *Judicial Intervention in the Student-University Relationship: Due Process and Contract Theories*, 65 U. DET. L. REV. 199, 236 (1988).

<sup>31</sup> *Id.*

<sup>32</sup> See Jonathan Flagg Buchter, *Contract Law and the Student-University Relationship*, 48 IND. L.J. 253, 253 (1973) (stating that “[u]ntil the early 1900’s, the relationship between the student and the institution was expressly stated in a written enrollment contract, which was essentially a business agreement between the parent of the student and the institution”).

<sup>33</sup> See Victoria J. Dodd, *Non-Contractual Nature of the Student-University Contractual Relationship*, 33 U. KAN. L. REV. 701, 702-03 (1985) (finding that “[m]ost of the earliest American school cases utilizing a contract theory arose in limited situations in which a school was suing for unpaid tuition, or a student, for a tuition refund”); see also *Tr. of Howard Coll. v. Turner*, 71 Ala. 429, 430 (1882) (action for the recovery of damages from alleged breach of agreement to provide scholarship assistance); *Blumer Coll. of Natureopathy v. Nelson*, 114 A. 115, 115 (Conn. 1921) (action by college to compel tuition payment after student attended one class and left the college dissatisfied); *Balt. Univ. v. Colton*, 57 A. 14, 15 (Md. 1904) (action for writ of mandamus to compel award of law degree on student who had completed all coursework); *Niedermeyer v. Curators of Univ. of Mo.*, 61 Mo. App. 654, 656-57 (Ct. App. 1895) (suit for recovery of \$10 in excess tuition charged to and paid by a law student).

<sup>34</sup> SCOTT M. GELBER, *COURTROOMS AND CLASSROOMS: A LEGAL HISTORY OF COLLEGE ACCESS, 1860-1960*, at 1-2 (2016).

stated in a written enrollment contract.”<sup>35</sup> In particular, contract law was seen as providing to students at private universities some of the same due process protections that would eventually be recognized for students at state-sponsored universities.<sup>36</sup>

Indeed, the contract-law model was successful in the limited role it was called on to play. Specifically, it has helped students to avoid arbitrary and capricious university action in some egregious cases—including some cases in the modern era. The case of *Johnson v. Lincoln Christian College* provides an illustrative example. During Gregory Johnson’s last semester at Lincoln Christian College in Lincoln, Illinois, another student informed school administrators that Johnson “might be homosexual.”<sup>37</sup> As a result, the College required Johnson to attend private counseling sessions, which Johnson believed would be confidential.<sup>38</sup> However, the contents of these sessions were ultimately disclosed to college administrators.<sup>39</sup> The administrators subsequently called Johnson’s mother to inform her that her son was being dismissed on account of allegations of homosexuality.<sup>40</sup> Furthermore, despite the fact that Johnson had completed all of his coursework satisfactorily, they threatened to stamp the reason for Johnson’s dismissal on his transcript and then refused to issue him his diploma.<sup>41</sup> The court held that on the basis of those facts, Johnson had stated a claim for relief based on a breach of the implied contract inherent in every student-university relationship.<sup>42</sup>

The case of *Russell v. Salve Regina College* also demonstrates the success of the contract-law model in curbing the most egregious university actions. Sharon Russell was well on her way to a nursing degree at Salve Regina College in Newport, Rhode Island when she began to suffer numerous indignities and slights as an obese person.<sup>43</sup> There was the “agonizing search for uniforms and scrub gowns that would fit a woman of Russell’s girth” as

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<sup>35</sup> Buchter, *supra* note 32, at 253. *But see* Latourette & King, *supra* note 30, at 231-32 (arguing that over time “the contract theory in student-university disputes has not afforded students significant protection of individual rights” because suits relying on the contract theory “almost uniformly resulted in affirmation of the university action”).

<sup>36</sup> *See* Latourette & King, *supra* note 30, at 230-31 (stating that students at private universities “rely on . . . contract law to challenge university actions perceived as abusive of institutional discretion” by utilizing the “vehicle of contract law” to “achieve many of the same due process concepts and protections afforded their state counterparts”).

<sup>37</sup> *Johnson v. Lincoln Christian Coll.*, 501 N.E.2d 1380, 1382 (Ill. App. Ct. 1986).

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 1383.

<sup>40</sup> *Id.* at 1382.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 1384 (concluding that “Johnson’s complaint states a valid cause of action for breach of an implied contract between Johnson and LCC, and the trial court erred in dismissing count I of the complaint”).

<sup>43</sup> *Russell v. Salve Regina Coll.*, 649 F. Supp. 391, 395 (D.R.I. 1986).

well as “a tendency on the part of faculty members to employ Russell . . . to model hospital procedures incident to the care of obese patients” and “prolonged lectures and discussions about the desirability of weight loss.”<sup>44</sup> Ultimately, she was dismissed from Salve Regina College’s nursing program because, in her words, she didn’t conform to the “Salve image.”<sup>45</sup> Even more humiliating, the Court seemed to delight in mocking the situation. “The problems presented by this lawsuit are weighty in every sense of the word,” wrote the Court.<sup>46</sup> More cringeworthy puns followed: “[C]ontagion was not legitimately at issue—after all, there is no allegation of communicable corpulence here” and “evidence . . . tends to show that Russell’s girth did not reduce her proficiency.”<sup>47</sup> Ultimately, though, the Court sided with Russell, allowing her claim to move past the summary judgment stage: “Faced with contrary opinions from qualified health care professionals and particularized allegations of personal animosity born of obesophobic obsession, this issue, viewed in the manner most hospitable to the plaintiff’s case, survives [summary judgment].”<sup>48</sup>

Successful lawsuits like Russell’s and Johnson’s, which seemed to suggest courts were willing to act as a check on arbitrary university action, are proof that students may at times prevail under the contract-law model.<sup>49</sup> However, despite the fact that students seldom obtain relief from suits sounding in contract, the language of contracts nevertheless has aided litigants by allowing them to frame issues in a manner that gradually became “familiar to the court”; in doing so, litigants can “cloak[]” their actions “in the mantle of precedent.”<sup>50</sup> Further, some scholars argued that the judiciary was and remains uniquely well suited to use the language of contracts—particularly the implied covenant of good faith and fair dealing—to appropriately balance rights and develop constitutional standards; in turn, it was suggested, the university would benefit from the “gentle guidance of the courts to evolve clearer standards of procedures and more codified concepts of academic custom and usage.”<sup>51</sup> Unfortunately, history shows that no such standards ever

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at 406 (internal quotations omitted).

<sup>46</sup> *Id.* at 407.

<sup>47</sup> *Id.* at 405-06.

<sup>48</sup> *Id.* at 406-07.

<sup>49</sup> Indeed, it has always been technically possible for students to prevail in contract disputes with their universities. *See, e.g.*, *Balt. Univ. v. Colton*, 57 A. 14, 17 (Md. 1904) (holding that a law student could seek a writ of mandamus compelling his university to confer a degree on him after he was arbitrarily denied one). The issue is rather whether the scales of justice are properly balanced such that a meritorious case can typically succeed.

<sup>50</sup> Robert Faulkner, *Judicial Deference to University Decisions Not to Grant Degrees, Certificates, and Credit—the Fiduciary Alternative*, 40 SYRACUSE L. REV. 837, 851 (1989).

<sup>51</sup> Virginia Davis Nordin, *The Contract to Educate: Toward a More Workable Theory of the Student-University Relationship*, 8 J.C. & U.L. 141, 148 (1981).

evolved out of judges' application of the contract-law model, and it remains very difficult for students to prevail against their universities.

## II. CHANGING CIRCUMSTANCES & CALL FOR REFORM

While a handful of cases like *Russell* and *Johnson* seem to suggest that the contract-law model is an appropriate scale on which to balance the rights of students and their universities, seismic social and economic changes in the second half of twentieth century vastly altered the landscape of American higher education, triggering an explosion of new lawsuits and leaving successful plaintiffs like Sharon Russell and Gregory Johnson the exception rather than the norm.

To understand how this occurred, it is necessary to trace the rapid evolution of the educational landscape over the last century. At the conclusion of World War II, with Europe in ruins, the United States stood atop the world in economic and military power. The United States at that time produced two times more petroleum than the rest of the world combined, had a near global monopoly on the burgeoning aerospace and electronics industries, and retained two-thirds of the world's gold and half of all its monetary reserves.<sup>52</sup> Over the next twenty-five years, the American economy generated over twenty million new jobs and the size of the middle class doubled—an “unprecedented achievement[ ] for any modern society.”<sup>53</sup>

This economic miracle led to what one historian has called the “most significant development in the history of American education.”<sup>54</sup> Specifically, the extraordinary postwar economic expansion, along with the GI Bill, propelled the development of the modern university and boosted enrollment: more than twice the number of Americans received college degrees in 1950 than had received degrees just ten years earlier.<sup>55</sup> Colleges ceased to be “villages with priests” and became “impersonal and bureaucratic ‘multi-versities.’”<sup>56</sup> By 1948, ten universities had enrolled at least 20,000 students.<sup>57</sup> Then, between 1961 and 1991, as the Baby Boomers came of age, the number of college students increased from “just over’ 4.1 million . . . to almost 14.2

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<sup>52</sup> DAVID M. KENNEDY, *FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929–1945*, at 856–57 (1999).

<sup>53</sup> *Id.* at 857.

<sup>54</sup> JAMES T. PATTERSON, *GRAND EXPECTATIONS: THE UNITED STATES, 1945–1974*, at 68–69 (1996).

<sup>55</sup> *See id.* (noting that in 1940, only 216,500 Americans received college degrees, but that in 1950, approximately 497,000 of them did).

<sup>56</sup> *Id.* at 69; *see also House Hearing, supra* note 1, at 32 (statement of Mary Frances McCourt) (noting that the Indiana University system enrolls over 100,000 students and has an annual operating budget that exceeds \$3.3 billion).

<sup>57</sup> PATTERSON, *supra* note 54, at 69.

million,” while the number of colleges and universities in the United States between 1960 and 1990 increased by more than 50% in response to the increased demand for higher education.<sup>58</sup> However, a 50% increase in the number of colleges by 1990 was unable to keep pace with the 346% increase in the number of college students by 1991.

Such profound changes in the demand for higher education transformed the educational marketplace, resulting in skyrocketing tuition fees, the rapid growth of endowments and operating budgets, and the marketing of college as an experience rather than just an educational opportunity. First, tuition rose drastically in the second half of the twentieth century and into the twenty-first century, climbing by some estimates 1,200% over the last forty years.<sup>59</sup> Today, sticker prices for many private colleges regularly exceed \$50,000 a year, and are approaching \$70,000 in some cases.<sup>60</sup> For many American families, one of “the biggest financial challenges in modern life . . . is[] figuring out how to pay for the cost of college.”<sup>61</sup> To compete for students willing to pay such fees, colleges over the last thirty years dramatically increased the size of their administrative staff and “engaged in an ‘arms race’ with each other to build things like movie theaters and luxury gyms.”<sup>62</sup> While steep increases in college tuition might suggest that universities are struggling to cover their increased expenditures, this appears

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<sup>58</sup> Hazel Glenn Beh, *Student versus University: The University's Implied Obligations of Good Faith and Fair Dealing*, 59 MD. L. REV. 183, 187 (2000).

<sup>59</sup> See *House Hearing*, *supra* note 1, at 3 (statement of Chairman Peter Roskam) (stating that the 1,200% increase in tuition over the last forty years eclipses even the breathtaking pace of inflation in healthcare costs). *But see* Nick Anderson, *Attention, College Shoppers. These Schools are Slashing their Prices*, WASH. POST (Jan. 21, 2019), [https://www.washingtonpost.com/local/education/attention-college-shoppers-these-schools-are-slashing-their-prices/2019/01/21/e384eca0-12bc-11e9-90a8-136fa44b8oba\\_story.html?utm\\_term=.aof48dad6a76](https://www.washingtonpost.com/local/education/attention-college-shoppers-these-schools-are-slashing-their-prices/2019/01/21/e384eca0-12bc-11e9-90a8-136fa44b8oba_story.html?utm_term=.aof48dad6a76) [<https://perma.cc/QCS9-L8A5>] (suggesting that tuition increases may have plateaued, as some colleges are now reducing tuition to attract students in a more competitive marketplace).

<sup>60</sup> See *Average Published Undergraduate Charges by Sector and by Carnegie Classification, 2018-19*, COLLEGE BD., <https://trends.collegeboard.org/college-pricing/figures-tables/average-published-undergraduate-charges-sector-2018-19> [<https://perma.cc/7GUW-NB35>] (showing that the average yearly cost of a four-year private college is \$48,510); Farran Powell & Emma Kerr, *See the Average College Tuition in 2019-2020*, U.S. NEWS & WORLD REP. (Sept. 9, 2019), <https://www.usnews.com/education/best-colleges/paying-for-college/articles/paying-for-college-infographic> [<https://perma.cc/L8BB-LE28>] (reporting that more than 100 private colleges in the United States charge more than \$50,000 a year); Ron Lieber, *Why It's So Hard to Calculate What You'll Pay for College*, N.Y. TIMES (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/your-money/paying-for-college.html> [<https://perma.cc/BC4H-PBNQ>] (noting that among elite private schools in New England, such as Smith, Wellesley, and Mount Holyoke, the list price of a year of tuition approaches \$70,000).

<sup>61</sup> *House Hearing*, *supra* note 1, at 3 (statement of Chairman Peter Roskam).

<sup>62</sup> *Id.* at 4; *see also* Beh, *supra* note 58, at 187 (claiming that “[t]he proliferation of colleges means that . . . colleges must actively market themselves to stand apart and can no longer simply wait for student applications.”).

not to be the case: as of 2013, more than 90 colleges and universities had endowments valued above one billion dollars and more than 40 college presidents were being paid more than a million dollars a year—largely to conduct fundraising to grow their endowments even further.<sup>63</sup>

Accompanying these rapid shifts in the economic landscape of American higher education was an uptick in the gatekeeping role of universities. In the decades following World War II, the United States economy shifted its focus from manufacturing to services, from blue collar work to white collar work. At the same time, people increasingly turned to colleges and universities to provide the training necessary to gain access to the new jobs in the American economy.<sup>64</sup> Today, according to the Bureau of Labor Statistics, workers with bachelor's degrees make almost twice what workers with only a high school diploma make; and workers with professional degrees make almost three times what their counterparts with only a high school diploma make.<sup>65</sup> Education, as one journalist has noted, “is the best way to cross class barriers,” but given the high cost of college, “in many cases, education seems to *be* the barrier.”<sup>66</sup> As the Fifth Circuit pointed out, “[i]t requires no argument to demonstrate that education is vital” to ensure that citizens would be able “to earn an adequate livelihood, to enjoy life to the fullest, [and] to fulfill as completely as possible the duties and responsibilities of good citizens.”<sup>67</sup>

In light of the increasing cost and significance of a college education, it is not surprising that lawsuits seeking to vindicate student rights proliferated in the latter half of the twentieth century. The increase in litigation was aided by the landmark decision of the Fifth Circuit in *Dixon v. Alabama State Board of Education*, which was brought following the dismissal of African-American students for disciplinary reasons—subsequently revealed to be a request for service at a whites-only lunch counter on campus.<sup>68</sup> The Circuit, noting that it

<sup>63</sup> *House Hearing, supra* note 1, at 4 (statement of Chairman Peter Roskam). *See also* Greeley Myers, *University Presidents and the Role of Fundraising at Private Liberal Arts Universities at 1* (May 2016) (unpublished Ph.D. dissertation, Walden University) (on file with author) (finding that “many university presidents view fundraising as a primary responsibility in their jobs” and “many struggle to balance fundraising with other challenging demands”).

<sup>64</sup> Faulkner, *supra* note 50, at 845 (noting that like banks and insurance companies, “colleges offer a service without which the student could not accomplish certain important goals” and from which the modern student expects “a substantial return, usually in the form of knowledge, prestige, and employment”).

<sup>65</sup> *See* Elka Torpey, *Measuring the Value of Education*, U.S. BUREAU OF LAB. STAT. (Apr. 2018), <https://www.bls.gov/careeroutlook/2018/data-on-display/education-pays.htm> [<https://perma.cc/G5MF-ZQDY>] (demonstrating that in a work week a person can expect to earn \$712 with a high school diploma, \$1,173 with a bachelor's degree, and \$1,836 with a professional degree).

<sup>66</sup> *This American Life: Three Miles*, CHICAGO PUBLIC RADIO (Mar. 13, 2015), available online at <https://www.thisamericanlife.org/550/transcript> [<https://perma.cc/ZP7E-3HW5>] (emphasis added).

<sup>67</sup> *Dixon v. Ala. State Bd. of Ed.*, 294 F.2d 150, 157 (5th Cir. 1961).

<sup>68</sup> *Id.* at 152-53, n.3 (5th Cir. 1961).

was unconscionable to deny to students “the protection[s] given to a pickpocket,” held that state universities are an arm of the state and that public school students therefore must be afforded the protections of procedural due process.<sup>69</sup>

The surge in legal disputes following *Dixon* can be seen as a natural outgrowth of the rights consciousness of the era. During the 1960s, the African-American Civil Rights Movement, the Women’s Movement, the Gay Rights Movement, and the Anti-War Movement catalyzed a revolution in individual rights pushed both from the bottom-up by student groups and from the top-down by lawmakers. These battles, fought largely in the courts and in the legislatures, were replicated by students seeking greater accountability and more protection.<sup>70</sup> Indeed, according to one survey, over 90% of college suits reported prior to the year 2010 were brought after 1969, in the wake of *Dixon* and at the height of the era of rights-consciousness.<sup>71</sup> This change goes to show that students who invest significant sums of money may reasonably expect accountability. Consequently, they have asked courts to hold their universities responsible for providing inaccurate information about degree requirements,<sup>72</sup> for cancelling courses,<sup>73</sup> for cancelling programs of study,<sup>74</sup> for arbitrary admissions policies,<sup>75</sup> for unpredictably large increases in tuition,<sup>76</sup> and for bait-and-switch tactics in which universities reneged on promises not to raise fees for the duration of study.<sup>77</sup>

As lawsuits brought by students against their universities proliferated in the midst of the revolution in rights-consciousness and in the wake of *Dixon*,

<sup>69</sup> *Id.* at 158 (noting that it is shocking that “officials of a state educational institution” do not “understand the elementary principles of fair play” and holding that “fundamental constitutional principle[s] support [its] holding that due process requires notice and some opportunity for hearing before a student at a tax-supported college is expelled for misconduct”).

<sup>70</sup> See PATTERSON, *supra* note 54, at 568 (arguing that a “major trend[] of the era” was “the rise of rights-consciousness,” which was imbued with “special urgency” by the civil rights movement, and which culminated in a “near-irresistible” drive for the expansion of individual rights); see also Elizabeth L. Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decision-Making in American Universities*, 23 J.C. & U.L. 829, 834 (1997) (noting that “[i]ndividual rights were fast becoming a major issue for society-at-large, and students on U.S. college and university campuses sought expansion of their rights through actions on campus and in courts of law”).

<sup>71</sup> GELBER, *supra* note 34, at 2.

<sup>72</sup> *Olsson v. Bd. of Higher Educ.*, 402 N.E.2d 1150, 1152 (N.Y. 1980).

<sup>73</sup> *Zumbrun v. Univ. of S. Cal.*, 101 Cal. Rptr. 499, 502 (Ct. App. 1972).

<sup>74</sup> *Eden v. State*, 103 Misc. 2d 461, 462-63 (N.Y. Ct. Cl. 1980).

<sup>75</sup> *Steinberg v. Chicago Med. Sch.*, 371 N.E.2d 634, 638-39 (Ill. 1977).

<sup>76</sup> *Basch v. George Washington Univ.*, 370 A.2d 1364, 1365-66 (D.C. 1977); see also Kevin Stone, *Brnovich Wants Arizona Supreme Court to Hear Tuition Case Appeal*, KTAR NEWS (Jan. 29, 2019, 4:34 PM), <http://ktar.com/story/2417554/brnovich-wants-arizona-supreme-court-to-hear-tuition-case-appeal/> [<https://perma.cc/44AU-JL42>] (describing a suit brought by Arizona’s Attorney General alleging the 300% increase in state university tuition over a 15-year period violated Arizona’s constitution).

<sup>77</sup> *Kashmiri v. Regents of Univ. of Cal.*, 67 Cal. Rptr. 3d 635, 638-39 (Ct. App. 2007).

scholars, courts, and students began to confront contract law's inability to provide meaningful relief in the context of the student-university relationship.

First, while contract principles were “developed to adjudicate disputes between commercial interests,” by the late 1960s this characterization no longer accurately described the student-university relationship.<sup>78</sup> Indeed, it is not clear that students today understand they are even creating a contract by enrolling in college, which makes it difficult to bargain for terms or to understand fully the reasonable expectations that each party should have of the other.<sup>79</sup>

Second, student-university contracts are contracts of adhesion, which at their worst can be deceptive and oppressive.<sup>80</sup> More problematic, many courts are unwilling to treat the student-university contract as unconscionable contracts of adhesion,<sup>81</sup> which would require them to, among other things, scrutinize the contract with more rigor and construe ambiguous terms against the party that drafted the terms.<sup>82</sup>

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<sup>78</sup> Buchter, *supra* note 32, at 262.

<sup>79</sup> *See id.* at 263 (noting that courts have upheld waiver clauses and other catalogue provisions despite “no finding that [such clauses or provisions] had been read or understood as binding by a reasonable student”); *see also* Dodd, *supra* note 33, at 714 (stating that many universities, failing to understand that their brochures and bulletins will constitute contractual language in the event that litigation ensues, enlist university administrators rather than lawyers to draft their materials). This problem is exacerbated by the fact that the universities can change their bulletins and brochures yearly and without notice. *See id.* at 714-15, 728 (noting that this creates even more uncertainty in the student-university relationship).

<sup>80</sup> *See, e.g.*, Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 575-76 (Ky. 2012) (stating that adhesion contracts are not “*per se* improper” because they can “significantly reduc[e] transaction costs in many situations,” but noting that they can also be “one-sided, oppressive and unfairly surprising contracts”); *see also* Ilan v. Shearson/Am. Express Inc., 632 F. Supp. 886, 891 (S.D.N.Y. 1985) (noting that courts will not enforce contracts of adhesion that are “unduly oppressive, unconscionable, or against public policy”).

<sup>81</sup> *See, e.g.*, Wagner v. Holtzapple, 101 F. Supp. 3d 462, 477 n.4 (M.D. Pa. 2015) (rejecting “counsel’s argument that the [university] handbook amounts to a contract of adhesion” since “[a]ttending a university and agreeing to a reasonable code of conduct as outlined by its handbook is not what the doctrine of adhesion contracts had contemplated”); Eisele v. Ayers, 381 N.E.2d 21, 24-25, 27 (Ill. App. Ct. 1978) (rejecting plaintiffs’ claim that their contracts with Northwestern University were contracts of adhesion, even though the university unilaterally imposed a 57.6% year-to-year tuition increase—an increase seven times larger than the past average tuition increases—and left the students with no ability to negotiate or contest the increase); Newland v. AEC S. Ohio Coll. L.L.C., 47 N.E.3d 231, 232 (Ohio Ct. App. 2016) (overruling trial court’s determination that a student-university contract containing an arbitration clause was unconscionable).

<sup>82</sup> *See* Thompson v. Lithia ND Acquisition Corp. #1, 896 N.W.2d 230, 236 (N.D. 2017) (stating that courts must examine a contract of adhesion “with special scrutiny to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting”) (quoting Strand v. U.S. Bank Nat’l Ass’n, 693 N.W.2d 918, 924 (N.D. 2005)); Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 228 (W. Va. 2012) (noting that “[a] contract of adhesion should receive greater scrutiny than a contract with bargained-for terms to determine if it imposes terms that are oppressive, unconscionable or beyond the reasonable expectations of an ordinary person.”); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981) (stating that “[i]n choosing among the reasonable meanings of a promise or agreement or a term thereof, that meaning

Third, contracts exist to provide security to private parties that neither will commit a material breach of an agreement, but in practice courts construe the student-university contract to forbid only egregious or outrageous breach as opposed to material breach.<sup>83</sup> For example, when Sung Park was dismissed from the Indiana University School of Dentistry, Park brought suit alleging that the school violated the student-university contract by failing to follow the dismissal procedures outlined in the school's own handbooks.<sup>84</sup> The Seventh Circuit concluded that even if the school did fail to follow its own procedures, that would not automatically lead to a finding of breach since "Indiana courts have taken a flexible approach to the scope of contractual promises between students and universities" in which "hornbook rules cannot be applied mechanically where the principal is an educational institution."<sup>85</sup>

Finally, such contracts are frequently governed by the doctrine of academic deference, under which the judiciary exhibits a reluctance to interfere in the affairs of private institutions of higher education.<sup>86</sup> As one court explained, academic deference is desirable because judicial interference would cause colleges to become too standardized and would undermine the "special aura" that "distinguishes" one college from the next—which often is the very reason a certain college is "selected by parents and students."<sup>87</sup> One doubts, however, that the "special aura" of a university includes any of the following decisions in which courts have refused to scrutinize university decision-making: when degree requirements are changed after satisfactory completion of a program of study;<sup>88</sup> when a comprehensive exam is administered improperly;<sup>89</sup> when the school's catalog is silent or ambiguous

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is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds").

<sup>83</sup> See 23 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 63:3 (4th ed. 2007) (stating that courts define "breach of contract" as a 'material failure of performance' of a duty arising under or imposed by an agreement"); see also Dodd, *supra* note 33, at 708 (arguing that education cases "set a very high standard for a breach of contract, higher than in other contexts").

<sup>84</sup> Sung Park v. Ind. Univ. Sch. of Dentistry, 692 F.3d 828, 831 (7th Cir. 2012).

<sup>85</sup> *Id.* (internal quotations omitted).

<sup>86</sup> See, e.g., Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978) (stating that "[l]ike the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking" and declining "to further enlarge the judicial presence in the academic community").

<sup>87</sup> Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 581-82 (Pa. Super. Ct. 1990) (quoting Schulman v. Franklin and Marshall Coll., 538 A.2d 49, 52 (Pa. Super. Ct. 1988)).

<sup>88</sup> Mahavongsanan v. Hall, 401 F. Supp. 381, 382-83 (N.D. Ga. 1975), *rev'd*, 529 F.2d 448 (5th Cir. 1976).

<sup>89</sup> Tanner v. Bd. of Tr. of the Univ. of Ill., 459 N.E.2d 324, 325-27 (Ill. App. Ct. 1984).

about degree requirements;<sup>90</sup> or when a student is expelled for having mental health problems<sup>91</sup> or for being gay.<sup>92</sup> As a result, students who may have invested tens of thousands of dollars may be left unable to graduate or secure employment in the field of their choice. Academic deference thus compounds the difficulty of securing relief following a material breach of a university's non-administrative decisions; indeed, it makes it nearly impossible for students to prevail against their universities in court.<sup>93</sup> While courts remain free to suggest more procedural protections for students—such as, in the context of disciplinary proceedings, the use of an impartial decisionmaker, the provision of notice of allegations, or the requirement of an opportunity to be heard—they seldom impose such protections.<sup>94</sup>

Aside from overarching doctrinal limitations, there are also practical limitations to using the law of contracts as a cause of action. First, unlike in the early twentieth century, in today's student-university suits there is seldom a single written instrument that contains all the terms of a contract.<sup>95</sup> As a result, courts are placed in the unfortunate position of assuming the terms of a contract rather than requiring the parties to prove the terms of the contract.<sup>96</sup> More problematically, courts accept that any of the publications of a university or college may contain the express—though not the exclusive—terms of a contract between the student and the university.<sup>97</sup> It is doubtful, as

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<sup>90</sup> *Blank v. Bd. of Higher Educ.*, 273 N.Y.S.2d 796, 801-03 (Spec. Term 1966).

<sup>91</sup> *See Aronson v. N. Park Coll.*, 418 N.E.2d 776, 777-78, 782 (Ill. App. Ct. 1981) (reversing a jury award of \$22,321.60 for a student dismissed at the end of her first semester of college after she was deemed to be a chronic paranoid).

<sup>92</sup> *Lexington Theological Seminary, Inc. v. Vance*, 596 S.W.2d 11, 11-12 (Ky. Ct. App. 1979) (regarding a student who was dismissed after conclusion of all studies required for graduation because his admission of homosexuality was found to have violated the student handbook's desirable personality traits clause).

<sup>93</sup> *Nordin*, *supra* note 51, at 168 (arguing that “[t]he judicial attitude which states its diffidence in deciding academic matters is in strong contrast to the judicial attitude which weighs complex fact situations in medical malpractice, anti-trust, patent or tax cases”).

<sup>94</sup> *See, e.g., A. v. C. Coll.*, 863 F. Supp. 156, 159 (S.D.N.Y. 1994) (identifying procedures that would help to minimize the need for judicial intervention in disciplinary matters without requiring their adoption).

<sup>95</sup> *See, e.g., Guckenberger v. Bos. Univ.*, 974 F. Supp. 106, 150 (D. Mass. 1997) (“Under Massachusetts law, the promise, offer, or commitment that forms the basis of a valid contract can be derived from statements in handbooks, policy manuals, brochures, catalogs, advertisements, and other promotional materials”); *see also* Scott R. Sinson, *Judicial Intervention of Private University Expulsions: Traditional Remedies and a Solution Sounding in Tort*, 46 *DRAKE L. REV.* 195, 208-09 (1997) (stating that the terms of the student-university contract can be derived from “catalogues and manuals, bulletins, registration forms and other institutional documents”).

<sup>96</sup> *See, e.g., Tedeschi v. Wagner Coll.*, 404 N.E.2d 1302, 1305 (N.Y. 1980) (stating that “[c]ontract theory is not wholly satisfactory, however, because the essentially fictional nature of the contract results in its generally being assumed rather than proved . . .”).

<sup>97</sup> *See, e.g., Jansen v. Emory Univ.*, 440 F. Supp. 1060, 1062 (N.D. Ga. 1977) (accepting that the bulletins and catalogue of the university contained the terms of the student-university contract).

some judges have noted, that students understand that publications or marketing materials like college catalogs and bulletins are binding and can be used to construe the terms of a contract.<sup>98</sup> Even if students did understand the binding power of these documents, it is even more doubtful that they would have any power to bargain their way out of what are essentially contracts of adhesion. Finally, because contracts are matters of state law, students that apply to universities in multiple states are unlikely to comprehend how their rights or their obligations might differ from state-to-state.<sup>99</sup>

### III. AN ALTERNATIVE PROPOSAL IN ADMINISTRATIVE OVERSIGHT

Under a contract-law model that allows students to file a claim but seldom permits them to obtain relief, universities have little incentive to reform themselves. If change is to occur, it must occur due to outside pressures.<sup>100</sup> Though the pressures of the market might eventually lead to change, government oversight provides a more intentional path forward. Further, oversight would not be a new phenomenon in higher education; in fact, since at least the 1960s, the federal government has recognized the need for congressional oversight of higher education.<sup>101</sup> Historically, both Republican and Democratic administrations and Congresses have enacted regulations to protect taxpayer investments in higher education and to prevent the arbitrary or even “predatory” behavior of universities receiving federal funds or federal support.<sup>102</sup> In a recent Senate hearing, members of both major political parties recognized the need for reform. Senator Patty Murray, a Democrat representing Washington, argued for more oversight to require that colleges disclose, among other data points, employment outcomes and average student debt.<sup>103</sup> On the other side of the aisle, Senator Lamar Alexander, a Republican

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<sup>98</sup> See, e.g., *Ryan v. Hofstra Univ.*, 324 N.Y.S.2d 964, 973-74 (Spec. Term 1971) (noting the difficulty of proving that students or their parents understood catalogs and other university publications as contractual terms).

<sup>99</sup> See, e.g., *Hux v. S. Methodist Univ.*, 819 F.3d 776, 781-82 (5th Cir. 2016) (noting that some states, such as Texas, don't recognize a “contractual duty of good faith and fair dealing” in the student-university relationship, which leaves students at some private universities without the full range of protections typically afforded by the due process clause and contract law).

<sup>100</sup> See *House Hearing*, *supra* note 1 (statement of Chairman Peter Roskam) (submitting “that higher education is not likely to reform itself” without external pressures).

<sup>101</sup> See Beh, *supra* note 58, at 194 (arguing that the Student Right To Know Provisions of the Higher Education Act demonstrate “congressional recognition that higher education is both a product and a relationship that begs for external review”).

<sup>102</sup> Spiros Protopsaltis & Libby Masiuk, *Protecting Students and Taxpayers: Why the Trump Administration Should Heed History of Bipartisan Efforts*, CTR. ON BUDGET AND POL'Y PRIORITIES, at 1 (Dec. 1, 2017).

<sup>103</sup> *Recalibrating Regulation of Colleges and Universities: A Report from the Task Force on Government Regulation of Higher Education: Hearing Before the S. Comm. On Health, Education, Labor, and Pensions*, 114th Cong. 5 (2015) [hereinafter *Senate Hearing*] (statement of Sen. Patty Murray) (contending that

representing Tennessee and a former United States Secretary of Education, agreed that taxpayers deserved better regulations and argued that “neither colleges nor students” were “well served by the jungle” of regulations that then existed.<sup>104</sup> While there is a history of bipartisanship in this area, it is also clear that the current state of oversight is bleak and only getting bleaker as the Trump Administration seeks to dismantle what is left of the federal regulatory functions of the United States Department of Education that aim to hold universities accountable.<sup>105</sup>

While education has historically been a matter of state policy, the federal government has been increasingly involved in education, and particularly in higher education. The Higher Education Act of 1965, which governs the federal regulatory scheme for universities, is almost 1,000 pages long, and there are more than 1,000 more pages in the Code of Federal Regulations that work in tandem with the Act.<sup>106</sup> Today, federal aid programs provide credit for about 90% of all student loans in the United States and the federal government invests \$241.3 billion annually into financial aid for higher education.<sup>107</sup> The disbursement of such immense financial support by the federal government arguably provides both the legal and moral justification for additional oversight. Thankfully, Congress need not start from scratch in crafting a more effective regulatory scheme, as some models for effective oversight already exist.

The most promising of all prior oversight mechanisms were the State Postsecondary Review Entities (SPREs) established as part of the 1992 reauthorization of the Higher Education Act. Under the reauthorization, each state was required to create an SPRE to improve consumer protection with stronger oversight and investigatory functions.<sup>108</sup> The animating feature of the SPREs was to be the strengthening of the so-called “triad” of higher

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“[w]hen students are deciding where to attend, they should have the tools to find out if their college or university will give them a good return on their investment and hard work.”).

<sup>104</sup> *Id.* (statement of Sen. Lamar Alexander, Chairman, S. Comm. On Health, Education, Labor, and Pensions).

<sup>105</sup> See Protopsaltis & Masiuk, *supra* note 102, at 2 (critiquing the Trump Administration’s 2017 plan to undermine two Obama Administration rules that allowed the Secretary of Education to “discharge the loans of borrowers who were . . . mistreated by their schools” and required universities to disclose college performance data to help college applicants decide which college to attend).

<sup>106</sup> *Senate Hearing*, *supra* note 103 (statement of Sen. Lamar Alexander).

<sup>107</sup> *House Hearing*, *supra* note 1 (statement of David Lucca); see also COLLEGE BD., TRENDS IN STUDENT AID 2018 9, 16, <https://research.collegeboard.org/pdf/trends-student-aid-2018-full-report.pdf> [<https://perma.cc/L5GN-YPWT>] (noting that in the 2017-18 academic year, students received over \$200 billion in financial aid from the federal government through Pell Grants, federal student loans, the GI Bill, tax benefits, and other mechanisms).

<sup>108</sup> Protopsaltis & Masiuk, *supra* note 102, at 5.

education oversight.<sup>109</sup> The higher education regulatory triad is composed of state agencies, which are responsible for protecting consumers; accreditors, which are responsible for ensuring the quality of education; and the federal government, which is responsible for providing the financial aid to boost access to higher education.<sup>110</sup> By requiring states to create new oversight agencies, the 1992 revisions to the Higher Education Act sought to leverage the power of the states to complement the federal government's efforts and the work of the educational accrediting agencies.<sup>111</sup> Under this new model, SPREs would be responsible for establishing stricter requirements to ensure accountability, transparency, and adequate performance. Unfortunately, the SPREs were never fully implemented, as Newt Gingrich's Congress quickly moved to trim the regulatory state after Republicans won the House in the 1994 midterm elections and implemented their Contract with America.<sup>112</sup> Only two states were able to actually create new regulatory bodies to provide oversight before Congress, in an effort to eradicate programs that were "poorly focused and overly burdensome," eliminated federal funding.<sup>113</sup>

While the political zeitgeist largely accounts for the failure of SPREs to materialize, there were also structural concerns voiced at the time that hold lessons for today's reformers who seek to create more accountability, less waste, and more effective education for American students. The SPREs were sold to state governors and legislatures as a new partnership between state and federal government on higher education. Despite this promise, the federal government in reality dominated the regulatory scheme. By essentially dictating to each state the criteria that would trigger review, the federal government left little room for states to maneuver to account for the great variance in the quality and kind of higher education offered in different states across the nation.<sup>114</sup> As a result, the program ceased to function as a precise tool that could curtail specific kinds of problematic behavior and instead became a blunt tool that regulated all of higher education in a

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<sup>109</sup> Terese Rainwater, *The Rise and Fall of SPRE: A Look at Failed Efforts to Regulate Postsecondary Education in the 1990s*, 2 AM. ACAD. 107, 108 (2006) (noting that SPREs were created in the context of a "weak" triad, with the goal of strengthening state oversight in partnership with federal regulators).

<sup>110</sup> Paul Fain, *Obama Administration Leans on State Agencies to Tighten Up Oversight of For-Profits*, INSIDE HIGHER ED (Mar. 4, 2016, 3:00 AM), <https://www.insidehighered.com/news/2016/03/04/obama-administration-leans-state-agencies-tighten-oversight-profits> [<https://perma.cc/99QH-GZ9R>].

<sup>111</sup> Rainwater, *supra* note 109, at 108.

<sup>112</sup> *Id.* at 111-12; see Dan Balz, *This Midterm Election is Like No Other in a Generation*, WASH. POST (Nov. 4, 2018, 3:03 PM), [https://www.washingtonpost.com/politics/this-midterm-election-is-like-no-other-in-a-generation/2018/11/04/dd92e236-df9d-11e8-85df-7a6b4d25cfbb\\_story.html](https://www.washingtonpost.com/politics/this-midterm-election-is-like-no-other-in-a-generation/2018/11/04/dd92e236-df9d-11e8-85df-7a6b4d25cfbb_story.html) [<https://perma.cc/K5LT-QARX>] ("In 1994. . . [a]fter 40 years of Democratic rule in the House, Republicans led by soon-to-be-speaker Newt Gingrich swept to power on a tide of anti-government sentiment.").

<sup>113</sup> H.R. REP. NO. 104-120, at 75 (1995).

<sup>114</sup> Rainwater, *supra* note 109, at 111-113.

standardized, top-down manner. Choices about how to structure agencies have important consequences, as scholar Terry M. Moe has said, “for the content and direction of policy.”<sup>115</sup> To “make choices about structure, [political actors] are implicitly making choices about policy.”<sup>116</sup> In choosing to retain a dominant position for itself and to exhaustively enumerate by statute the kinds of university decisions that would trigger state review, Congress dictated the precise policy of oversight, which made the program unpopular with states and universities, leaving it open to political attack, which soon followed.<sup>117</sup>

Nevertheless, SPREs as a model held great promise, and with some modifications could serve as an ideal path forward. Congress could, as it did before, require that states create a review entity like the old SPREs in exchange for federal financing. However, rather than impose strict, one-size-fits-all requirements on states, Congress could allow each state to provide oversight in a manner that is customized to the needs of the state but that meets a few baseline requirements. In other words, it may be preferable to provide broad legislation that allows states to hire experts who can “fill in the details” and make changes in light of their experience.<sup>118</sup>

Specifically, each state should be required to act in an enforcement capacity and a benchmarking capacity. State agencies could promulgate standards for the universities in their jurisdiction, and encourage enforcement under either a private attorney general model or, if funding allows, a public enforcement model. Each state should also be required to provide a performance-based and outcome-based system that is transparent, publicly accountable, and benchmarked. Such a system would help prospective students learn how a school performs across educational metrics and to learn how a school’s students perform in the job market after graduation. This information, if made transparent and benchmarked, would allow students to more accurately assess whether the value of a given institution merits the cost of enrollment. Further, this system would allow students and their parents to see how each university is different, and to allow each state to see how it compares to other states in educational outcomes and the handling of grievances. Such a system could help to curb both the abuses

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<sup>115</sup> Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN?* 267, 268 (John E. Chubb & Paul E. Peterson, eds., 1989).

<sup>116</sup> *Id.*

<sup>117</sup> Jim Zook, *Officials Eye Plan to Curtail State Oversight Boards*, *CHRON. HIGHER EDUC.* (Feb. 17, 1995), <https://www.chronicle.com/article/Officials-Eye-Plan-to-Curtail/84864> [<https://perma.cc/3ZXX-YU2D>] (noting that college leaders have heavily criticized SPREs); Scott Jaschik, *Congress Moves to Eliminate Aid-Monitoring Agencies*, *CHRON. HIGHER EDUC.* (May 26, 1995) <https://www.chronicle.com/article/Congress-Moves-to-Eliminate/85843> [<https://perma.cc/9ZF8-9WY7>] (reporting that college officials distressed by the federal intrusion into higher education policy met with politicians to advocate for dismantling the system).

<sup>118</sup> Moe, *supra* note 115, at 270-71.

that currently end up being adjudicated in court under due process or contract theories and the systemic problems with for-profit proprietary universities that have defrauded thousands of students in recent years.<sup>119</sup>

While regulated institutions typically balk at additional regulation, a new regulatory scheme at least would not impose additional burdens on the courts. New state agencies could quickly accrue expertise in handling enforcement actions and overseeing adjudication, and courts could then safely be required to defer to the agency's reasonable interpretation of any new regulations or requirements that might be imposed. Such an arrangement would likely be well received by the courts, as it would help to control their dockets as much as the doctrine of academic deference has in the past, but with the added benefit of giving more students a better chance of vindicating their rights.

There are of course some problems with allowing such customization at the state level. As is often true in a federalist system, some states may not wish to provide much meaningful oversight, leaving students in those states with a less robust system. Further, since students often apply to colleges in many states, it may make it difficult for students to really shop for colleges across state lines and easily compare the performance and culture of, say, a university in Louisiana with the performance and culture of a university in Montana. While a state-by-state system is certainly not a panacea for all the ills of higher education, it still would go some way toward smoothing out the differences that currently exist in the judge-made realm of contract law.

However, such a tapestry of divergent state practices can also be a benefit, as states may operate as laboratories of democracy to innovate and find more cost-effective and efficient mechanisms for oversight. Additionally, as Heather Gerken points out, “[s]tate and local governments have become sites of empowerment for racial minorities and dissenters” who “can wield more electoral power at the local level than they do at the national.”<sup>120</sup> Thus, incorporating state oversight can add a progressive bent to federalist structures. Further, promoting an actual partnership between state and federal government would allow the United States Department of Education to continue its oversight capacities while also providing many more sets of watchful eyes at the state level to complement federal oversight.

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<sup>119</sup> See, e.g., Press Release, U.S. Dep't of Justice, For-Profit College Company to Pay \$95.5 Million to Settle Claims of Illegal Recruiting, Consumer Fraud and Other Violations (Nov. 16, 2015), <https://www.justice.gov/opa/pr/profit-college-company-pay-955-million-settle-claims-illegal-recruiting-consumer-fraud-and> [<https://perma.cc/D9VC-MPYN>] (disclosing that Education Management Corporation falsely certified that it was in compliance with Title VI of the HEA in violation of the False Claims Act, and that it unlawfully recruited students “by running a high pressure boiler room where admissions personnel were paid based purely on the number of students they enrolled.”).

<sup>120</sup> Heather Gerken, *A New Progressive Federalism*, DEMOCRACY, Spring 2012, <https://democracyjournal.org/magazine/24/a-new-progressive-federalism/> [<https://perma.cc/M5PT-KLW7>].

Thus, despite the drawbacks, there is much to be gained from requiring states to create oversight mechanisms and from allowing states to do this important work in individually tailored ways.

#### CONCLUSION

Students have been suing their universities for well over a century under different causes of action. Appropriately, in an era when higher education was typically seen as a market transaction in which tuition was exchanged for access to lectures and conferral of a degree, the law of contracts came to be the primary vehicle for such lawsuits. Since that time, the nature of the student-university relationship has changed significantly. As a degree from a university has increasingly become a prerequisite for access to the American labor market, and as tuition has skyrocketed, universities have become powerful institutions in American life on which students are dependent and against which students are relatively powerless. As a result, scholars and observers have called for a more robust use of contract law to level the playing field between students and universities when legal disputes arise.

Scholars are right to note that the common law has been too slow to adapt to the rapidly changing landscape that provides the context for the student-university relationship. However, even if student-university contracts began to be treated as the contracts of adhesion that they most represent, or even if courts began to recognize that the duty of good faith and fair dealing requires them to create and abide by clear and fair codes of conduct, contract law would still be ill-suited to the modern student-university relationship. The sheer weight of precedent in contract law suggests it would take much time and much creative litigation to turn the doctrine toward a more rigorous form of judicial review. Thus, what is needed is administrative oversight to promulgate a uniform set of rules to clearly lay out a university's minimum standards of conduct and to provide students an alternative mechanism to redress grievances. This would also reduce the burden on the state and federal courts in dealing with aggrieved students for whom the courts can realistically provide no remedy except in cases of extraordinarily capricious action. And, more importantly, it would serve to enhance the educational experience of students and increase the public's faith in these increasingly important and expensive institutions.

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