

ACCREDITATION AS CARTELIZATION: APPLYING ANTITRUST PRINCIPLES TO HIGHER EDUCATION

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ABSTRACT

U.S. colleges and universities are a \$700 billion a year industry. Unlike other large industries, however, the state and non-profit entities that dominate higher education are not subject to the antitrust and consumer protection standards. Through accreditation requirements enforced by the U.S. Department of Education, colleges have successfully cartelized the industry, mandating practices such as the 120-credit hour degree requirement that raise costs for students without improving educational quality. The accreditation process enables colleges to coordinate behavior, enforce standards, and punish defectors—key functions needed for successful cartelization that would otherwise be illegal under antitrust law. This Article argues that applying standard antitrust principles to higher education would benefit students by enabling innovations in degree programs, reducing costs, and improving quality through enhanced competition. We demonstrate how accreditation serves cartel functions in markets requiring specialized degrees through analysis of its historical development and current operations. We propose reforms to introduce competition into higher education markets.

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INTRODUCTION

U.S. colleges and universities are a \$700 billion a year industry, comparable in size to petroleum refining, computer software sales, portfolio managers, and pharmacies.¹ Unlike these industries, however, the state and non-profit entities that dominate the industry are not subject to the consumer protection standards that apply to most of the economy.² Federal and state governments support or mandate measures that facilitate cartel-like behavior.³ Colleges and universities⁴ are market actors in an industry where sellers are repeat players with huge informational advantages. Their consumers are making one of the most substantial purchases of their lives, but regulatory authorities act as if higher education providers are magically transformed by application of the label “non-profit” or “state agency” into benevolent entities whose transactions with customers (students) do not deserve protection. Our contention in this Article is that they do not deserve special treatment and should be treated the same way other industries are treated.

Federal and state regulators oversee non-profits in other domains, treating them as capable of engaging in the same sort of proscribed behaviors that apply to for-profit firms.⁵ For

1. NAT'L CTR. FOR EDUC. STAT., POSTSECONDARY INSTITUTION EXPENSES 1 (2023) [hereinafter POSTSECONDARY EXPENSES], https://nces.ed.gov/programs/coe/pdf/2023/CUE_508c.pdf [<https://perma.cc/S5VX-BCB3>]; *The 10 Biggest Industries by Revenue in the United States*, IBISWORLD, <https://www.ibisworld.com/united-states/industry-trends/biggest-industries-by-revenue/> [<https://perma.cc/NX8L-75E2>] (last visited Mar. 9, 2026). Education spending was \$702 billion in 2020–21. POSTSECONDARY EXPENSES, *supra*, at 1. Almost 64% of the total expenses were spent at state universities, approximately 34% at private nonprofit schools, and 2% at private for-profit schools. *See id.* A fraction of that expenditure was for research, some of which is not related to student education. *Id.* at 6 n.11.

2. *See* LIBBY WEBSTER & ROBYN SMITH, EXAMINING THE STATES' ROLE IN PROTECTING ONLINE COLLEGE STUDENTS FROM PREDATORY PRACTICES 1–3 (2024) (listing government hearings on the lack of consumer protection).

3. Some legislators have addressed issues of high costs and lack of transparency. *See* Maria Carrasco, *Lawmakers Discuss Solutions for College Pricing Transparency*, NASFAA (Sept. 17, 2025), https://www.nasfaa.org/news-item/37258/Lawmakers_Discuss_Solutions_for_College_Pricing_Transparency [<https://perma.cc/L9LD-3DUZ>].

4. Hereafter, “colleges” refers to all degree granting postsecondary institutions.

5. Credit unions provide financial services in competition with banks but, unlike banks, are nonprofit. They are regulated much like banks. *See, e.g., Proposed Risk-Based Capital Rule Adds One-Year Delay, Exempts More Credit Unions*, NAT'L CREDIT UNION ADMIN. (Aug. 2, 2018),

example, colleges are regularly sued under civil rights laws for discriminating against protected groups in everything from admissions to faculty hiring.⁶ Title IX regulates the distribution of opportunities in sports at colleges,⁷ HIPAA treats their safeguarding of medical information the same way it treats non-college medical providers,⁸ colleges must report crimes committed on and near their facilities,⁹ and FERPA imposes detailed privacy requirements on colleges' handling of student information.¹⁰ Even the way colleges organize sports, especially football, has run afoul of antitrust law.¹¹ Yet with respect to the most fundamental of market behaviors—setting prices, designing products, and enticing customers to purchase their services—

<https://ncua.gov/newsroom/news/2018/proposed-risk-based-capital-rule-adds-one-year-delay-exempts-more-credit-unions> [<https://perma.cc/9GF9-JQVH>].

6. See e.g., Press Release, U.S. Dep't. of Just., *Justice Department Sues Yale University for Illegal Discrimination Practices in Undergraduate Admissions* (Feb. 5, 2025), <https://www.justice.gov/opa/pr/justice-department-sues-yale-university-illegal-discrimination-practices-undergraduate> [<https://perma.cc/5TDW-XREY>]; Kate McGee, *In Lawsuit, UT-Austin Professor Accuses Texas A&M Faculty Program of Discriminating Against White and Asian Men*, TEX. TRIB. (Sep. 12, 2022, at 16:38 CT), <https://www.texastribune.org/2022/09/12/texas-a-m-lawsuit-diversity-discrimination/> [<https://perma.cc/4CU2-67FZ>].

7. See generally U.S. DEP'T OF JUST., TITLE IX LEGAL MANUAL 1, 93–94 (2001), <https://feminist.org/wp-content/uploads/2020/06/ixlegalmanualDOJ.pdf> [<https://perma.cc/L4UZ-SJHR>] (providing an overview of the legal principles impacting Title IX enforcement); FEMINIST MAJORITY FOUND., *Winning Title IX Cases*, <https://feminist.org/our-work/education-equity/take-action/winning-title-ix-cases/> [<https://perma.cc/E8TM-S6TW>] (last visited Mar. 9, 2026) (identifying, with illustrative cases, alternative Title IX claims).

8. See e.g., UNIV. OF COLO. DENV. ANSCHUTZ MED. CAMPUS OFF. OF REGUL. COMPLIANCE, HIPAA POLICY 1.1 GENERAL RULE: USES AND DISCLOSURES OF INFORMATION 1 (2013), https://research.cuanschutz.edu/docs/librariesprovider178/hipaa-pages/chapter-1-docs/1-1-general-uses-and-disclosuresdb1936e5302864d9a5bfff0a001ce385.pdf?sfvrsn=4d3152b9_2 [<https://perma.cc/T2CV-S8JB>]; U.S. DEPT. OF HEALTH & HUM. SERVS. & U.S. DEPT. OF EDUC., JOINT GUIDANCE ON THE APPLICATION OF THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT OF 1996 (HIPAA) TO STUDENT HEALTH RECORDS 57 (2019) [hereinafter JOINT GUIDANCE ON FERPA AND HIPAA], <https://www.hhs.gov/sites/default/files/2019-hipaa-ferpa-joint-guidance-508.pdf> [<https://perma.cc/XFB6-DWVJ>] (detailing the requirements of covered entities under HIPAA).

9. See *The Jeanne Clery Act, Summary, Reporting Requirements, and Clery Center Resources*, CLERY CTR., <https://www.clerycenter.org/the-clery-act> [<https://perma.cc/WG8W-VAFL>] (last visited Mar. 9, 2026).

10. See JOINT GUIDANCE ON FERPA AND HIPAA, *supra* note 8, at 4–5, 7.

11. See Dan Murphy, *Answering the 10 Biggest Questions About the NCAA Antitrust Settlement*, ESPN (July 28, 2024, at 09:00 ET), https://www.espn.com/college-football/story/_/id/40658452/ncaa-lawsuit-settlement-paying-players [<https://perma.cc/NK9C-E9JB>] (detailing Title IX laws as they apply to NCAA athletes).

U.S. regulators have little to say about colleges' behavior. Instead, they encourage non-profit higher education institutions to cartelize, control output, and raise prices through accreditation and regulation,¹² thereby disadvantaging their customers. In this Article, we apply the economic theory of cartel behavior to show that the cartelization of higher education through accreditation harms students, and thereby the greater economy, by inflating the cost of degrees, and thus that the exemption of colleges from the normal "rules of the road" that apply to other businesses is problematic.¹³

The Article proceeds in four parts. In Part I, we describe how accreditors have facilitated the cartelization of American higher education for decades. In Part II, we discuss the economic analysis of cartels. In Part III, we examine how accreditation of colleges plays a major role in cartelizing professions, thereby limiting opportunities for students. Part IV concludes with recommendations on how to decartelize higher education.

I. ACCREDITATION AS A MEANS OF CARTELIZATION

Colleges compete in a mature industry, similar to the sellers of cars, food, medical care, and other major goods and services. Colleges operate like businesses, not entities involved in what is generally perceived as charitable work, such as the Salvation Army.¹⁴ Colleges, whether state or non-profit, act like competitive entities, paying competitive salaries and producing a costly service. They have escaped antitrust review, allowing them to engage in anticompetitive behavior, harming consumers (students). We begin by reviewing the evolution of accreditation into a key control factor in higher education.

12. See Exec. Order No. 14279, 90 Fed. Reg. 17529 (Apr. 23, 2025) (critiquing the accreditation system as cartel-like and advocating for market competition)

13. The details of antitrust law generally are beyond the scope of this Article, which focuses on the need for a consistent approach.

14. The Salvation Army is a religious organization that provides, among other things, shelter for homeless persons and thrift stores. See *About the Salvation Army*, THE SALVATION ARMY, <https://www.salvationarmyusa.org/about-us/> [<https://perma.cc/HXR2-N3RG>] (last visited Mar. 9, 2025).

A. Colleges Are Competitive Firms

Higher education is a large industry. The U.S. economic outlay is about \$2,100 per capita per year.¹⁵ The cost to students is higher than the direct outlay: while attending college, students lose income and work experience (their opportunity cost) that could have been earned had less time been spent in higher education. Of course, many costs of higher education are unavoidable but costs are often higher than necessary because the sellers of higher education can impose lofty time requirements through accreditation rules.¹⁶ These are compounded in some instances by rules imposed by existing practitioners of certain professions,¹⁷ as will be discussed below.

In general, accreditation rules focus on inputs (which become costs imposed on students) rather than outputs (measures of knowledge held by those wishing to achieve career or personal objectives).¹⁸ The accreditation process “is essentially the result of peer evaluation of educational institutions”¹⁹—a description that we suggest fits virtually every functioning cartel in human history. In prior work, we argue that colleges behave like for-profit firms and should be treated as such with respect to their sale of college programs, which are costly investments

15. The total expenditure for U.S. colleges was \$702 billion for 2020 to 2021. POSTSECONDARY EXPENSES, *supra* note 1, at 1. Dividing this by the total U.S. population at the end of 2021, 333,071,834 people, yields an economic outlay per capita of about \$2,107. *See id.*; U.S. and World Population Clock, U.S. CENSUS BUREAU (Nov. 24, 2025), <https://www.census.gov/popclock/> [<https://perma.cc/XS7P-BJMG>].

16. *See infra* Section I.B.

17. *See infra* Section II.

18. *See, e.g.*, William E. Troutt, *Regional Accreditation Evaluative Criteria and Quality Assurance*, 50 J. HIGHER EDUC. 199, 201, 206–08 (1979) (“Regional accreditation criteria assume that certain conditions and resources assure institutional quality. . . . [This approach] ignores the long history in higher education of the direct assessment of student achievement by faculty.”); *id.* at 202–03 (“Accrediting associations . . . appear to partially adopt an industrial model for higher education. Instead of checking on the quality of production outcomes, i.e., student achievement, criteria generally check on the quality of the assembly line, i.e., curricula, faculty, resources, etc. Criteria assume a direct relationship exists between the quality of the assembly line and the quality of the product.”).

19. Allan O. Pfnister, *Accrediting Made Clear, or Who’s Really on First?*, 50 J. HIGHER EDUC. 226, 229 (1979).

for buyers (students)²⁰ who are rarely provided accurate information about the likely value of their intended degrees.²¹ In this Article we turn to the application of otherwise generally applicable rules of competition.

Most students attend private nonprofit entities or state agencies called colleges.²² They compete to attract students and offer much the same services for a price. They are competitors in a mature industry²³ facing falling demographic demand so competition to attract students (customers) is intense.²⁴ Once revenue is obtained from students (or other sources such as donors), there is competition inside colleges to control their

20. See Preston Cooper, *Competitors or Cartel? The Anticompetitive Characteristics of Elite Higher Education*, AM. ENTER. INST. (June 4, 2025), <https://www.aei.org/research-products/testimony/competitors-or-cartel-the-anticompetitive-characteristics-of-elite-higher-education/> [perma.cc/H7KZ-JMBT] (reporting a student led antitrust lawsuit against seventeen elite universities).

21. Roger E. Meiners & Andrew P. Morriss, *Treating Higher Education as an Investment*, 61 SAN DIEGO L.R. 1, 2 (2024). There are, to be sure, some signals of value, such as the presumption that attending an elite school should, and can, produce above-normal returns to those who attend. Brand has significant value, as is true of most competitors in industries. In particular, we contended that the rules concerning truth in advertising should apply to colleges. *Id.* at 18. Employing FTC authority in that area would bring additional discipline to colleges as sellers of degrees. *Id.* at 23. Similarly, colleges could be required to provide prospective students with information about the full costs they are likely to incur in programs. *Id.* at 25–26. Colleges should also be required to disclose how previous graduates have fared financially, much like the Franchise Rule requires the sellers of franchises to provide financial information about average performance of the kinds of opportunities being sold to investors. *Id.* at 30.

22. For-profit colleges had about 1.6 percent of total college revenue in the 2020 school year, and are nearly irrelevant to the market. See NAT'L CTR. FOR EDUC. STATS., POSTSECONDARY INSTITUTION REVENUES 1 (2023) [hereinafter POSTSECONDARY REVENUES], https://nces.ed.gov/programs/coe/pdf/2023/CUD_508c.pdf [https://perma.cc/6H78-DJB5].

23. Mark J. Perry (@Mark_J_Perry), X (July 12, 2024, at 17:18 ET), https://x.com/Mark_J_Perry/status/1811872736064475635 [https://perma.cc/C8ZR-EGVX]. For the most recent version of the “Chart of the Century” with data through June 2025, see Mark J. Perry (@Mark_J_Perry), X (July 18, 2025, at 02:54 ET), https://x.com/Mark_J_Perry/status/1946282394740301925 [https://perma.cc/7A98-YL8H]. Mark Perry is a senior fellow at the American Enterprise Institute. *Mark J. Perry*, AMER. ENTER. INST., <https://www.aei.org/profile/mark-j-perry/> [https://perma.cc/LEF7-FXTE] (last visited Mar. 9, 2026).

24. There is a large body of professional literature by recruitment specialists. “Issues such as managing brand image, assessing advertising medium effectiveness and collecting market intelligence are common practice for higher education institutions.” Yvonne J. Moogan, *Can a Higher Education Institution’s Marketing Strategy Improve the Student-Institution Match?*, 25 INT’L J. EDUC. MGMT. 570, 570 (2011). The literature reads much the same as in the marketing of other consumer goods. See *id.*

revenue, which raises issues of governance.²⁵ While there is no explicit goal of net revenue maximization, as at for-profit firms, ever-expanding revenue is desired.²⁶ Despite the nonprofit “charitable” status of colleges, faculty and staff employees (like everyone else) want to make their lives better with nicer offices, higher income, more travel to conferences in desirable locations, less work, and other benefits that make life easier. Employee compensation is also affected by private sector alternatives.²⁷ As former managers in colleges, we observed that administrators are liked by the faculty more—which plays a role in retention and advancement in administrative positions—if they bring in additional resources and spend them on the faculty. Raising tuition is a key means to that end, and as Figure 1 shows, colleges seem to face fewer constraints in that regard, at least compared to competitors in other industries.²⁸ Hospitals, many of which are nonprofit and are subject to anti-trust laws,²⁹ and, as Figure 1 shows, are the only major service

25. See Andrew P. Morriss, *What If Universities Had Actual Trustees?*, 22 GEO. J.L. & PUB. POL’Y 745, 746 (2024).

26. Positive net revenue is desired—surplus funds are not called profits but are often put into accounts to cushion potential revenue shortfalls in the future or can be used to finance operations in new market areas. See *What Happens When a Nonprofit Makes Too Much Money?*, LEGALCLARITY (July 22, 2025), <https://legalclarity.org/what-happens-when-a-nonprofit-makes-too-much-money/> [https://perma.cc/VH9U-LULF].

27. See generally ROBERT K. TOUTKOUSIAN, A CLOSER LOOK AT FRINGE BENEFITS FOR FACULTY, ITAA INST. RSCH. PAPER SERIES, Feb. 2023, at 8–20, <https://www.tiaa.org/content/dam/tiaa/institute/pdf/research-dialogue/2023-02/tiaa-institute-a-closer-look-at-fringe-benefits-for-faculty-rd196-toutkousian-february-2023.pdf> [https://perma.cc/YYX8-C5WL] (reviewing employee benefits among public and private four-year universities). This is especially true for college staff who can easily move to other jobs. Faculty skills are usually less transferable. Some faculty members make the choice to not go another route, such as a law firm or government job, in favor of academic positions. Having done so ourselves, we are not aware of any charitable impulse in our decisions.

28. Private firms do not happily cut prices, but competition may force them to do so. That market discipline is missing in the case of colleges, where tuition and fees have been rising consistently. Figure 1 goes back to 2000, but the trend has gone on longer. See *infra* Figure 1. From 1980 to 2020, average tuition rose 200% while overall inflation was 236%. See Govind Bhutata, *The Rising Cost of College in the U.S.*, VISUAL CAP. (Feb. 3, 2021), <https://www.visualcapitalist.com/rising-cost-of-college-in-u-s/> [https://perma.cc/AX33-FR6T]. Room and board are distinct from tuition at most colleges; fees paid for those services tend to be competitive as off-campus alternatives are available to students. Food service also differs because it is usually provided by private firms at market prices.

29. *Health Care Competition*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/topics/competition-enforcement/health-care-competition> [https://perma.cc/XJ5L-LMDS] (last

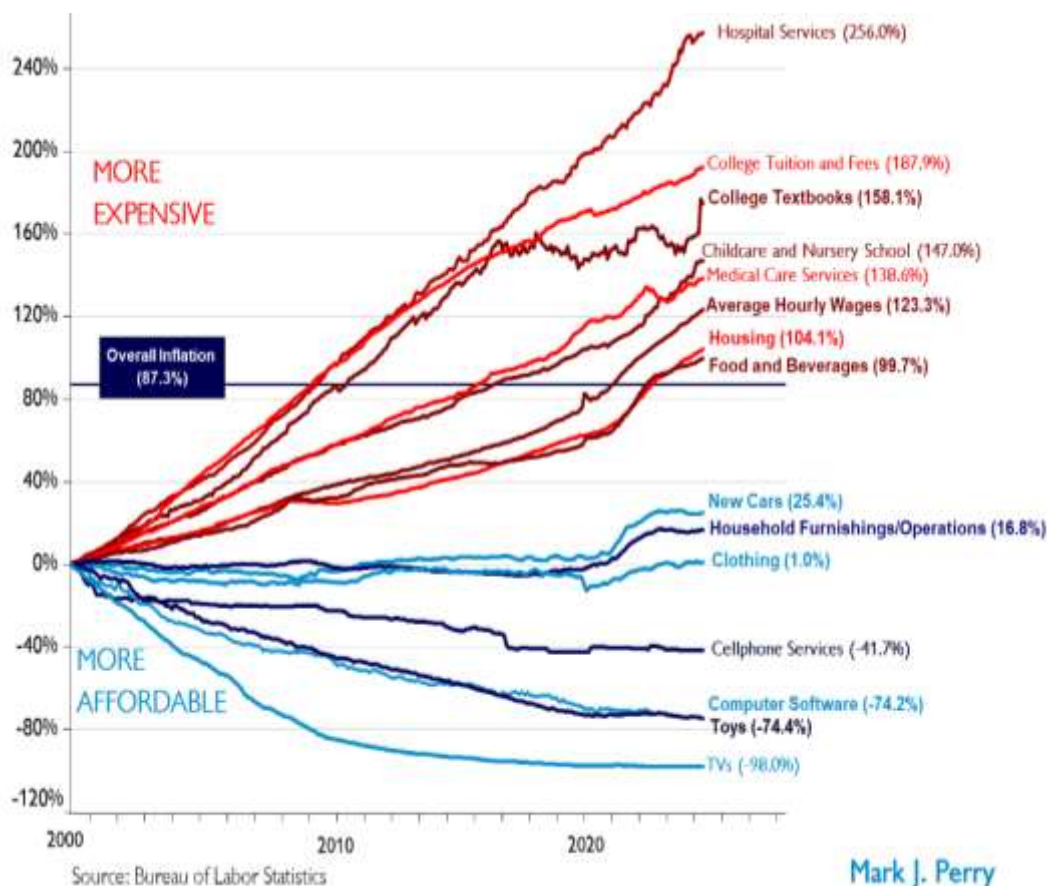
to rise in cost faster than colleges. However, hospitals provide costlier care over time with ever greater levels of technical inputs.³⁰ Colleges look and function today much like they did decades ago; hospitals do not.³¹ For example, in a highly competitive environment, we would not expect to see competitors all raising prices at about the same rate.³²

visited Mar. 9, 2026). Litigation is not uncommon. *See, e.g.*, Mike Scarcella, *HCA Healthcare Must Face Antitrust Case Over Health Costs, US Judge Says*, REUTERS (Feb. 22, 2024, at 11:18 ET), <https://www.reuters.com/legal/government/hca-healthcare-must-face-antitrust-case-over-health-costs-us-judge-says-2024-02-22/> [<https://perma.cc/X648-NA6C>].

30. We are not defending hospitals, but appreciate that, unlike college classrooms, the quality of hospital services has greatly improved over time. *See* Amal N. Trivedi, Wato Nsa, Leslie R.M. Hausmann, Jonathan S. Lee, Allen Ma, Dale W. Bratzler, Maria K. Mor, Kristie Baus, Fiona Larbi & Michael J. Fine, *Quality and Equity of Care in U.S. Hospitals*, 371 N. ENGL. J. MED. 2298, 2298 (2014) (finding improved acute critical care in hospitals from 2005 to 2010). College classrooms look much the same today as they did decades ago. *See infra* note 43. Science labs are no doubt more costly, but liberal arts, social sciences, business, law, and other disciplines that enroll most students have no major technical advances that greatly increase classroom costs. *See infra* note 43.

31. *See* Trivedi et al., *supra* note 30, at 2298; *infra* note 43.

32. When firms are in trouble, or simply face increased competition, price cutting is often observed. As Figure 1 shows, the relative prices of goods such as computer software have fallen consistently (despite quality generally increasing). *See infra* Figure 1. We have looked for evidence that some colleges with falling enrollment have cut tuition to attract students but cannot find examples of that. *See infra* note 43 and accompanying text.

FIGURE 1: AVERAGE PRICE INCREASES BY INDUSTRY³³

Colleges behave like competitive firms in most respects. They compete for customers and generally specialize in market niches. Just as Prada does not care about selling handbags through Walmart, elite colleges do not sell their wares to the masses.³⁴ Being at an elite college ensures employment outcomes are better than *average* as employers know the students,

33. Figure 1 is Mark J. Perry's "Chart of the Century" tracking price changes of fourteen items beginning in 2000 through 2024. The chart is updated annually to account for inflation rates. Mark J. Perry (@Mark_J_Perry), X (Mar. 4, 2025, at 17:28 ET), https://x.com/Mark_J_Perry/status/1897051650403225690 [<https://perma.cc/9GBX-8G7L>].

34. Haochen Sun, *Elite Universities as Luxury Brands*, in *ACADEMIC BRANDS: DISTINCTION IN GLOBAL HIGHER EDUCATION* 103, 108–10 (Mario Biagioli & Madhavi Sunder eds., 2022).

on *average*, are above *average*.³⁵ It would be foolish for Yale to sell slots to any high school graduate who could deliver the listed tuition.³⁶ That would raise more revenue today but destroy the value of the brand, which provides added returns on assets, so the incentive is to preserve its known quality and selectivity.³⁷ However, outside of the small number of elite schools, the vast majority of colleges admit most applicants, most of whom can get tuition covered by a loan if personal funds are not available.³⁸ Thus even though most colleges try to give a perception of being at least somewhat selective, many are not, and have near open-admission rates.³⁹

35. Students who go to higher ranked colleges have better employment outcomes. Liang Zhang, *Do Measures of College Quality Matter? The Effect of College Quality on Graduates' Earnings*, 28 REV. HIGHER EDUC. 571, 589 (2005) (“[N]o matter what measures of college quality are used, the effect of college quality on earnings is generally positive and significant.”). Another study found that “there is solid evidence of positive effects of college quality on college graduation and household income.” Mark C. Long, *College Quality and Early Adult Outcomes*, 27 ECON. EDUC. REV. 588, 588, 600–01 (2008). Indeed, some estimates of the benefit of “college quality likely underestimate the labor market effects of college quality.” Dan A. Black & Jeffrey A. Smith, *Estimating the Returns to College Quality with Multiple Proxies for Quality*, 24 U. CHI. J. LAB. ECON. 701, 724 (2006). Not all college degrees have the same market value. A few years ago, a new graduate in finance from West Texas A&M University, a non-selective college, earned an average of \$35,588; whereas a new graduate in finance from Texas A&M University (College Station), a more selective college, earned an average of \$61,541. Preston Cooper, *We Calculated Return on Investment for 30,000 Bachelor’s Degrees: Find Yours*, FOUND. FOR RSCH. ON EQUAL OPPORTUNITY (Oct. 26, 2021), <https://freopp.org/oppblog/we-calculated-return-on-investment-for-30-000-bachelors-degrees-find-yours/> [<https://perma.cc/TZ5C-FDVU>] (search the table for “Texas A&M University-College Station” and “West Texas University, then find “Finance and Financial Management Services” under “Major” and compare the “Earnings at Age 25”).

36. Currently \$69,900 per year. YALE UNIV., *Financial Aid Estimated Cost of Attendance 2025-26*, <https://finaid.yale.edu/coa> [<https://perma.cc/6SRW-KY6F>] (last visited Mar. 9, 2026).

37. Yale University is one of the most selective elite colleges, with an acceptance rate of about 4%. *Yale University*, U.S. NEWS (2025), <https://www.usnews.com/best-colleges/yale-university-1426> [<https://perma.cc/9484-82RC>]. We know from personal experience that colleges exaggerate their rejection rate—an application not completed may be counted as an application not accepted to increase the rejection rate and appear more selective, which is a quality signal. Such marketing tricks should not be expected of “charitable” institutions.

38. Texas Southern University has an acceptance rate of 97%. *See, e.g., Texas Southern University*, BIGFUTURE, <https://bigfuture.collegeboard.org/colleges/texas-southern-university/admissions> [<https://perma.cc/6SX9-EWSD>] (last visited Nov. 20, 2025). Colleges routinely help admitted students get loan money. For example, University of Texas - Arlington explains to students that it will “offer your maximum loan eligibility.” *Receiving a Federal Student Loan*, UNIV. OF TEX. AT ARLINGTON (2025), <https://www.uta.edu/administration/fao/loans> [<https://perma.cc/7MXJ-3NUL>].

39. Nationally, the “average selectivity rate” was 66.7% in 2017. Melissa Clinedinst, NAT’L ASS’N FOR COLL. ADMISSIONS COUNSELING, 2019 STATE OF COLLEGE ADMISSION 3 (2019),

Whatever their niche, colleges compete for students and use many strategies in a competitive market. For example, in one study, admissions personnel at 215 colleges ranked the order of importance of recruiting strategies as: emails, hosted campus visits, websites, high school visits, parents, high school counselors, direct mail, social media, college fairs, text messaging, online advertising, community-based organizations, test-optional policies, conditional or provisional admissions programs, and alumni.⁴⁰ Overall, colleges spend at least \$10 billion annually attracting customers.⁴¹ This behavior, targeted marketing, is similar to for-profit firms in competitive markets, like those selling cars and soap. Whereas state agencies or private nonprofits providing a service, such as licensing cars or helping the homeless, do not behave this way.⁴² Colleges compete on

<https://files.eric.ed.gov/fulltext/ED608329.pdf> [<https://perma.cc/4ABE-CVBZ>]. Only 19.2% of colleges admit fewer than 50% of their applicants. *Id.* at 8.

40. *Id.* at 11.

41. JEFFREY SELINGO, WHO GETS IN AND WHY: A YEAR INSIDE COLLEGE ADMISSIONS 21 (2020). Nearly \$10 billion was the estimate several years ago and competition has not waned, so the cost is likely at least that much. Colleges use “tactics not much different than those of credit card companies and clothing retailers.” *Id.* Selingo is a long-time reporter and was editor of *The Chronicle of Higher Education*. About Me, JEFFREY SELINGO, <https://jeffselingo.com/about-me> [<https://perma.cc/5TSX-XL3V>] (last visited Mar. 9, 2026). He spent a year in admissions offices at three universities to gather information (most colleges would not allow him to see admissions operations from the inside). *Id.* Colleges spend large sums on recruiting, from an average of hundreds of dollars per student at public colleges to several thousand dollars per student at private colleges. RUFFALO NOEL LEVITZ, 2022 COST OF RECRUITING AN UNDERGRADUATE STUDENT REPORT 3, 6 (2022), https://learn.ruffalonl.com/rs/395-EOG-977/images/RNL_2022_CostRecruiting_Report.pdf [<https://perma.cc/QRF3-7RBA>]. Colleges buy mailing lists from the providers of standardized exams, such as the SAT and ACT. Eric Hoover, *The ‘Student List’ Business Is Changing. Will That Make Student Recruitment Less Equitable?*, CHRON. HIGHER ED. (Sep. 27, 2022), <https://www.chronicle.com/article/the-student-list-business-is-changing-will-that-make-student-recruitment-less-equitable?sra=true> [<https://perma.cc/8MMR-284C>] (“The standardized-testing industry has long been the main middleman in recruitment. High-school students taking the ACT, SAT, and Advanced Placement exams can opt in to share their contact information with colleges, which purchase ‘student lists’ from the ACT Inc., and the College Board, both nonprofit organizations, as well as other vendors. [T]he College Board administers the SAT.[.]”). For public colleges, on average \$494 per student is spent recruiting; for private colleges, \$2,795 on average is spent on recruiting. Alejandra Sosa Pieroni, 3 *Key Takeaways from the Cost of Recruiting an Undergraduate Student Report*, RNL: EDUC. INSIGHTS BLOG (Apr. 8, 2022), <https://www.ruffalonl.com/blog/enrollment/3-key-takeaways-from-the-cost-of-recruiting-an-undergraduate-student-report/> [<https://perma.cc/LL8K-BXF4>]. Recruiting costs are only part of college advertising expenditures. *See id.*

42. *See* LEVITZ, *supra* note 41, at 3, 6.

many margins to attract more paying customers. They feature degree programs as the primary attraction, but they also offer costly non-academic amenities.⁴³ College football is maligned by critics,⁴⁴ but there is evidence that it helps recruit students and may have a positive impact on school revenue.⁴⁵ Such non-academic activities are sensible behavior by competitive firms rather than evidence of public-spirited provision of positive externalities that would suggest they are not competitive firms.⁴⁶

In addition, colleges, especially private schools, engage in complex price discrimination.⁴⁷ That is, different customers pay different prices for the same college services.⁴⁸ One study found “substantial . . . market power and, importantly, sizeable variation in this power along the college quality hierarchy and among students with different characteristics.”⁴⁹ First-degree price discrimination, in which a seller sets prices for each

43. For example, Louisiana State University was criticized for building a “lazy river” where students can float on tubes. See Naomi Schaefer Riley, *LSU’s ‘Lazy River’ and the Student-Fee Sham*, WALL ST. J. (Dec. 15, 2017, at 18:51 ET), <https://www.wsj.com/articles/lsus-lazy-river-and-the-student-fee-sham-1513381917> [<https://perma.cc/94LX-9DK4>].

44. As faculty members, we have long heard complaints from some faculty members about the cost of football. Evidence of its impact on academic performance seems limited. *But see* Rey Hernandez-Julian & Kurt W. Rotthoff, *The Impact of College Football on Academic Achievement*, 43 ECON. EDUC. REV. 141, 141 (2014) (“Using data from Clemson University, we . . . find that the football team’s winning percentage is negatively related to academic performance.”).

45. See D. Randall Smith, *College Football and Student Quality: An Advertising Effect or Culture and Tradition?*, 68 AM. J. ECON. & SOCIO. 553, 553–54 (2009). Empirical analysis shows “clear positive effects attributable to the football program.” *Id.* at 553. Further, state colleges with football programs get larger budgets and a winning program yields even more revenue. See Brad R. Humphreys, *The Relationship Between Big-Time College Football and State Appropriations to Higher Education*, 1 INT’L J. SPORT FIN. 1, 1 (2003).

46. See Humphreys, *supra* note 45, at 3.

47. State colleges often have tuition rules controlled by the legislature that impose some limits on prices charged and price discrimination. See, e.g., ALASKA STAT. ANN. § 14.40.170(b)(3) (West 2025) (setting out the Board of Regent’s authority to set tuition); ARIZ. REV. STAT. ANN. § 15-1626(A)(5) (West 2025) (“The [B]oard [of Regents] shall . . . [f]ix tuitions and fees to be charged and differentiate the tuitions and fees between institutions and between residents, non-residents, undergraduate students, graduate students, students from foreign countries and students who have earned credit hours in excess of the credit hour threshold.”); CONN. GEN. STAT. ANN. § 10a-6(a)(3) (West 2025) (“The Board of Regents for Higher Education shall . . . establish tuition and student fee policies for the Connecticut State University System[.]”).

48. Dennis Epple, Richard Romano, Sinan Sarpça, Holger Sieg & Melanie Zaber, *Market Power and Price Discrimination in the US Market for Higher Education*, 50 RAND J. ECON. 201, 201 (2019).

49. *Id.*

customer separately, is highly desirable from the sellers' standpoint but it is not common in most markets because it is difficult to execute.⁵⁰ "Yet, [such] price discrimination is common in the pricing of higher education," allowing revenue to be higher than would exist with uniform pricing.⁵¹

Daniel Golden received a Pulitzer Prize for articles in the *Wall Street Journal* in 2004 that showed how preferences in admission are given to the children of alumni and donors.⁵² He expanded the articles into a book documenting many cases of this practice at elite schools.⁵³ He provides a guide to the side payments (aka charitable donations) needed to get a child into various selective private colleges:

How much does it cost to buy your child's way into college? Educational consultants say a five-figure donation—as low as \$20,000—is enough to draw the attention of a liberal arts college with an endowment in the hundreds of millions. At an

50. See Joel Waldfogel, *First Degree Price Discrimination Goes to School*, 63 J. INDUS. ECON. 569, 569–70 (2015). Most consumer purchases are for relatively small sums, so sellers cannot invest in gathering information about each customer to discern how much they may be willing to pay. See *id.* Colleges are selling costly services and get full financial information voluntarily from their customers by the Free Application for Federal Student Aid ("FAFSA") form, which is used to determine student eligibility for federal aid and need-based scholarships. See Ian Fillmore, *Financial Aid Information Helps U.S. Colleges Price Discriminate*, CTR. FOR ECON. POL'Y RSCH. (Mar. 4, 2015), <https://cepr.org/voxeu/columns/financial-aid-information-helps-us-colleges-price-discriminate-0> [<https://perma.cc/MV7R-PSU7>]. Sellers in most markets can only dream of having such information about each prospective customer to allow individual pricing. See *id.*

51. Waldfogel, *supra* note 50, at 569.

52. Daniel Golden of *The Wall Street Journal*, PULITZER PRIZES, <https://www.pulitzer.org/winners/daniel-golden> [<https://perma.cc/26BH-C2NM>] (last visited Mar. 9, 2026). For Golden's recent work about how elite colleges favor children of big donors over deserving candidates, see Daniel Golden, PROPUBLICA, <https://www.propublica.org/people/daniel-golden> [<https://perma.cc/KN7R-2WXU>] (last visited Mar. 9, 2026). This is not surprising as basic economics instructs us that entities seek to maximize revenues over some time horizon.

53. DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* 4–5 (Broadway Books 2009 updated ed.) (ebook). No one is likely surprised by finding that children of the wealthy are more likely to get into elite colleges. For empirical confirmation, see Raj Chetty, David J. Deming & John N. Friedman, *Diversifying Society's Leaders? The Determinants and Causal Effects of Admission to Highly Selective Private Colleges* 1–2 (Nat'l Bureau of Econ. Rsch., Working Paper No. 31492, 2025). They found that the odds of getting into an elite college, academic background held equal, is double for students coming from families in the top 1% of the income distribution. See *id.* at 1–2.

exclusive college, it can take at least \$50,000 with some assurance that future donations will be even greater. At top-25 universities, a minimum of \$100,000 is required; for the top 10, at least \$250,000 and often seven figures.⁵⁴

Given that this data is twenty years old, these numbers are likely much higher today.⁵⁵

This is further evidence of successful price discrimination. While the tuition listed at a school may be \$60,000 a year, the price paid by wealthy parents in the form of tax-deductible “donations” raises the price paid substantially above the listed price. As higher education commentator Jeffrey Selingo explains, the Varsity Blues scandal is an example of something that has gone on, legally, for years.⁵⁶ Payments above posted tuition prices are used to ensure the children of high-income parents get into elite colleges.⁵⁷

Colleges are also strategic in their behavior of selling their services. Whether a state institution or non-profit, colleges behave like competitive enterprises, not passive state agencies or charities passing out benefits to various beneficiaries.⁵⁸ To increase the appearance of selectivity, colleges encourage

54. GOLDEN, *supra* note 53, at 59. He also finds that: “The preferences of privilege are non-partisan: they benefit the wealthy and powerful across the political and cultural spectrum” *Id.* at 4. As Selingo notes, beneficiaries of this practice included President Trump’s son-in-law, Jared Kushner, whose father donated \$2.5 million to Harvard prior to his admission. SELINGO, *supra* note 41 at 161.

55. Golden provides some updates in pieces he has published on ProPublica. *See* GOLDEN, *supra* note 53.

56. *See* SELINGO, *supra* note 41, at 161. What is the Varsity Blues scandal? Varsity Blues was a Department of Justice investigation of bribes paid by parents to college employees to get children admitted to elite schools. *See* L. Burke Files, Roger E. Meiners & Andrew P. Morriss, *Corruption in University Admissions and the Administrative Allocation of Scarce Goods*, 47 BYU L. REV. 1, 10 (2021). As explained in our article on Varsity Blues, the problem from the colleges’ standpoint was that corrupt employees got the cash to make admission happen, rather than let the college collect the money as a charitable donation so that the children of the wealthy donors could get preferential admissions treatment. *See id.* at 10–15.

57. *See* SELINGO, *supra* note 41, at 161 (detailing high-profile examples of this practice).

58. Selingo reports that some colleges would not allow him to study their admissions process because they were aware that “at some point they take an applicant’s ability to pay into account when deciding whether to accept them.” SELINGO, *supra* note 41, at 210. As colleges want solvent customers, they “tend to overbuy names of test takers from wealthy zip codes.” *Id.* at 30.

students to apply even if there is little chance of admission.⁵⁹ A former dean of admissions at Tulane explained: “Colleges are a business. . . . and admissions is its chief revenue source.”⁶⁰ Colleges track prospective students similar to the “algorithms that Amazon . . . or virtually any other online retailer uses to offer you other things you might like based on your past selections.”⁶¹ There is nothing surprising about these sales practices—when employed by for-profit firms. Their use by colleges is yet another way in which colleges behave as for-profit sellers that benefit from exploiting the power to discriminate in pricing.

Moreover, there is little theoretical reason to distinguish nominally non-profit colleges from other firms. The authors of pioneering works on the economic structure of firms were aware of the distinction between non-profit and for-profit entity status, but it plays little role in the economic function of an organization except to describe a few additional constraints imposed on certain entities.⁶²

This lack of theoretical distinction fits the observed behavior of non-profits generally. Non-profit firms often coexist with traditional for-profit firms in other industries, and little difference exists in non-profit operations.⁶³ The largest industry

59. *Id.* at 30–31.

60. *Id.* at 40.

61. *Id.* at 42.

62. Key foundational works on the theory of the firm include Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937); Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777 (1972); and Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976).

63. There are nonprofit entities sprinkled around various industries. Hershey, the chocolate company, is publicly held but is under voting control of a charitable trust; the German auto parts company Bosch is largely owned by a charity, IKEA is owned partly by non-profit entities, and the Associated Press is non-profit. See *Hershey’s Main Owner Rejects Mondelez’s Offer As Too Low*, *Bloomberg News Reports*, REUTERS (Dec. 11, 2024, at 11:48 ET), <https://www.reuters.com/markets/deals/hersheys-main-owner-rejects-mondelezs-offer-too-low-bloomberg-news-reports-2024-12-11/> [<https://perma.cc/2K9J-VTFR>]; *Acting as a Corporate Citizen*, BOSCH, <https://www.bosch.com/sustainability/society/> [<https://perma.cc/ZXA4-LHLD>] (last visited Mar. 9, 2026); *Inter IKEA Foundation, Owner of Inter IKEA Group*, IKEA, <https://www.inter.ikea.com/en/this-is-inter-ikea-group/about-our-owner> [<https://perma.cc/SS6V-URX9>] (last visited Mar. 9, 2026); *Associated Press*, ROPER CTR. FOR PUB. OP. RSCH., <https://ropercenter.cornell.edu/associated-press> [<https://perma.cc/RQ6L-2XTM>] (last visited Mar. 9, 2026). These firms

example comes from the health services provided by for-profit and non-profit hospitals.⁶⁴ Hospital services have risen rapidly in price in recent decades, like prices in higher education.⁶⁵ Hospital customers rarely think about the hospital's legal structure, which is irrelevant in most cases since nonprofit hospitals act like for-profit hospitals: "nonprofit hospitals are starting to look like for-profit entities: [r]evenues in the billions, executive salaries in the millions."⁶⁶ Like non-profit colleges, non-profit hospitals are exempt from taxes, can issue tax-free bonds, and receive government subsidies.⁶⁷ In return for these privileges, both hospitals and colleges are expected to provide public benefits.⁶⁸ A leading scholar in this area, Professor David Hyman, summarizing his work and that of others, concluded that for-profit hospitals give as much "charity" care as do non-profit hospitals, despite the non-profit hospitals having a legal obligation to do so, thereby raising the question of why non-profit hospitals get special benefits.⁶⁹ The answer is, of course, special tax treatment.⁷⁰

are not protected from possible discipline if they engage in dubious business practices that injure consumers and competition.

64. We focus on hospitals because they are a large industry but there are other examples, such as mutual savings banks. See Julia Kagan, *Mutual Savings Bank (MSB): Overview, History, Examples*, INVESTOPEDIA (Jul. 26, 2021), <https://www.investopedia.com/terms/m/mutual-savings-bank.asp> [<https://perma.cc/B776-CBQX>].

65. Hospital service prices and college tuition have risen more than any other major service. See *supra* Figure 1.

66. Joseph Bernstein, *Not the Last Word: Surprise Medical Bills Are Hardly Charitable*, 478 CLINICAL ORTHOPEDICS & RELATED RSCH. 2213, 2214 (2020).

67. Ge Bai, Hossein Zare & David A. Hyman, *Evaluation of Unreimbursed Medicaid Costs Among Nonprofit and For-Profit US Hospitals*, JAMA NETWORK OPEN, Feb. 14, 2022, at 1.

68. Meiners & Morriss, *Treating Higher Education as an Investment*, *supra* note 21, at 18. See Bai et al., *supra* note 67, at 1. An examination of thousands of for-profit and nonprofit hospitals shows that "the largest component of community benefit supposedly provided by nonprofit hospitals (ie, [sic] unreimbursed Medicaid costs, net of supplemental payments) is poorly aligned with the (effectively automatic) tax subsidy that these institutions receive. Prior research suggested similar results for the provision of charity care for nonprofit vs for-profit hospitals." *Id.* at 4. In approximately half the states, the study found that non-profit hospitals had lower unreimbursed cost to expense ratios than for-profit hospitals. See *id.* at 3.

69. Meiners & Morriss, *Treating Higher Education as an Investment*, *supra* note 21, at 18; see David A. Hyman, *Nonprofit and For-Profit Enterprise in Health Care: Birds of a Feather?*, in UNPROFITABLE SCHOOLING 251, 261 (Todd J. Zywicki & Neal P. McCluskey eds., 2018).

70. Hospitals may get protection from antitrust actions under state law as quasi-municipal corporations, for providing health benefits to residents of an area. See, e.g., DiCesare v.

B. Accreditation's Role

By reason of their exemption from antitrust regulation, colleges are sheltered from the legal and market disciplines that apply to vendors of goods and services and investment opportunities in most markets. As a result, some have argued that part of the reason for large increases in tuition over time is the lack of information among college students, leading many to invest in degrees of negligible or negative value.⁷¹ Such information is rarely shared with prospective students, who often incorrectly perceive the monetary payoff to a degree.⁷² Greater transparency in the competition among universities would reduce these problems, as the cost of some degrees could be reduced. We can think of no economic reason universities should not be subject to legal actions to protect those who purchase their services.⁷³ The primary way colleges are able to collude to the detriment of their consumers (students) is through accreditation.

Accreditation solves a fundamental problem of cartelization for colleges. Because explicit collusion is illegal—and when colleges engage in outright price-fixing they have run afoul of antitrust authorities in the past⁷⁴—compliance within a cartel must come “from within the cartel’s inner workings and from

Charlotte-Mecklenburg Hosp. Auth., 852 S.E.2d 146, 160–61 (N.C. 2020). However, the FTC has sued some medical providers (hospital anesthesia in this case) for monopolization. See *FTC v. U.S. Anesthesia Partners, Inc.*, No. 23-CV-03560, 2024 WL 2137649, at *1 (S.D. Tex. May 13, 2024).

71. See Gordon C. Winston, *Subsidies, Hierarchy and Peers: The Awkward Economics of Higher Education*, 13 J. ECON. PERSPS. 13, 23 (1999).

72. A detailed study of Kansas State University agriculture majors found that students consistently overestimated the value of multiple attributes (e.g., certain GPAs or leadership positions) compared to actual salaries paid. See F. Bailey Norwood & Shida Rastegari Henneberry, *Show Me the Money! The Value of College Graduate Attributes as Expressed by Employers and Perceived by Students*, 88 AM. J. AGR. ECON. 484, 484–85 (2006).

73. In a recent article we reviewed consumer protection steps, such as truth in advertising, that could be applied to colleges. See Meiners & Morriss, *Treating Higher Education as an Investment*, *supra* note 21, at 18–21.

74. See Press Release, U.S. Dep’t of Just., *Consent Decree Settles Charge of Conspiracy to Restrain Price Competition on Financial Aid Against Major Universities*, at 1–2 (May 22, 1991), https://www.justice.gov/archive/atr/public/press_releases/1991/325032.pdf [<https://perma.cc/98XF-QA4G>]; Mark J. Drozdowski, *First Ivies Settle in ‘568 Cartel’ Price-Fixing Case*, BEST COLLS. (Feb. 1, 2024) <https://www.bestcolleges.com/news/analysis/first-ivies-settle-in-568-cartel-case/> [<https://perma.cc/UK8L-42RX>].

each member's willingness to comply."⁷⁵ Colluding firms must coordinate their behavior, prevent secret deviations, and punish defectors.⁷⁶ The accreditation process solves all of these problems.

The essence of the accrediting process has not changed over many years. Colleges have long touted accreditation by a recognized association as a symbol of quality, and accreditors have successfully positioned themselves as guarantors of quality.⁷⁷ This collusion does not mean colleges are identical. They can differ in their structures as accreditation does not force colleges to produce identical programs.⁷⁸ The accrediting process largely focuses on colleges being able to deliver the substantive educational products they claim to deliver in standard numbers of hours.⁷⁹ Importantly, however, the existence of positive economic returns for students at a college is not considered in accreditation.⁸⁰

Accreditation is also valuable for most colleges because it enables students to transfer hours between colleges, makes graduates eligible for graduate and professional schools, facilitates students receiving loan money, and helps the college

75. ROBERT C. MARSHALL & LESLIE M. MARX, *THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS* 3 (2012).

76. *See id.* at 6–8, 20–21.

77. *See* Troutt, *supra* note 18; and M.E. Haggerty, *A New Plan for Accrediting*, 5 J. HIGHER EDUC. 233, 233 (1934) (discussing changes in accreditation standards for the North Central Association of Colleges and Secondary Schools). While the North Central Association of Colleges and Secondary Schools transitioned to the Higher Learning Commission (“HLC”) in 2014, it has covered the same region of nineteen states since 1895. *See About HLC*, HIGHER LEARNING COMM’N, <https://www.hlcommission.org/about-hlc/> [<https://perma.cc/BZ4A-QAVQ>] (last visited Mar. 9, 2026). The accreditation process of 90 years ago, discussed by Haggerty, seems much like those that now exist. *See Accreditation*, HIGHER LEARNING COMM’N [hereinafter HLC, *Accreditation*], <https://www.hlcommission.org/accreditation/> [<https://perma.cc/2HE3-4MXP>] (last visited Mar. 9, 2026). As discussed later, if accreditation was voluntary, then the fact of accreditation could become a true sign of quality.

78. *See, e.g.,* S. ASS’N OF COLLS. AND SCHS. COMM. ON COLLS., *THE PRINCIPLES OF ACCREDITATION: FOUNDATIONS FOR QUALITY ENHANCEMENT* 5 (2024 ed.) <https://sacscoc.org/app/uploads/2024/01/2024PrinciplesOfAccreditation.pdf> [<https://perma.cc/U62S-PENP>] (acknowledging the rights of colleges and universities to “institutional autonomy”). For further discussion, *see infra* Section II.

79. *See infra* Section II.

80. *See* S. ASS’N OF COLLS. AND SCHS. COMM. ON COLLS., *supra* note 78, at 5; *infra* Section II.

qualify for research support and other federal funds.⁸¹ States and the federal government were initially attracted to accreditation requirements in part to protect themselves from dubious degrees.⁸² Having colleges join an accrediting association provides a state some measure of quality control over degree offerings.⁸³

For almost a century, six regional accrediting associations have handled most college accreditation.⁸⁴ While there had been earlier consideration of federal intervention in the accreditation process, the first federal action came after World War II and then again after the Korean War.⁸⁵ In both instances, funding through the “G.I. Bill” provided tuition benefits for servicemen.⁸⁶ To ensure the government money did not go to fly-by-night institutions, the Veterans’ Readjustment Assistance Act of 1952 required publication of “a list of nationally recognized accrediting agencies and associations which [the Commission of Education, a predecessor of the U.S. Department of Health, Education and Welfare (HEW), later the Department of Education] determines to be reliable authority as to the quality of training offered by an education institution.”⁸⁷ The accrediting associations sought this role, which Congress was willing to cede to

81. See U.S. DEP’T OF EDUC., ACCREDITATION IN THE U.S. (Jan. 14, 2025), <https://www.ed.gov/laws-and-policy/higher-education-laws-and-policy/college-accreditation/accreditation-in-the-us> [<https://perma.cc/5PN7-4362>]. For an overview of an accrediting association, see S. ASS’N OF COLLS. AND SCHS. COMM. ON COLLS., *supra* note 78, at 21–22 (explaining the mission and methodology of SACSCOC accreditation). For an overview of its evolution, see generally Barbara Brittingham, *Accreditation in the United States: How Did We Get to Where We Are?*, 145 NEW DIRECTIONS FOR HIGHER EDUC. 7 (2009) (providing the chronological development of regional accreditation in the United States).

82. Brittingham, *supra* note 81 at 10.

83. See William A. Kaplin, *Judicial Review of Accreditation: The Parsons College Case*, 40 J. HIGHER EDUC. 543, 545–46 (1969).

84. For a history of accreditation prior to the regional associations, and about their evolution, see Judith Areen, *Accreditation Reconsidered*, 96 IOWA L. REV. 1471, 1478, 1485 (2011). Besides the regional accreditors, there are many program accrediting agencies, such as for law schools. See *id.* at 1478–79.

85. *Id.* at 1483.

86. *Id.*

87. Pub. L. No. 82-550, § 253(a)(4), 66 Stat. 663, 675. For further discussion of the history of accreditation, see Areen, *supra* note 84, at 1482.

calm “apprehension over federal intrusion into the postsecondary educational sphere.”⁸⁸

From the start, this provided only weak oversight. When Congress enacted the Korean War GI Bill in 1952, it considered giving oversight of accreditation (needed for receipt of GI Bill benefits when attending college) to a federal agency to prevent a repeat of education scams that occurred after World War II.⁸⁹ Accreditors successfully lobbied to keep the quality assurance role for themselves.⁹⁰ Further, the National Commission on Accrediting was allowed by the U.S. Office of Education to determine which accrediting agencies would be on the list relevant to the many federal agencies that require approved accreditors to be determinants of quality standards for colleges.⁹¹ Congress took a similar approach in the Public Health Service Act of 1963, again relying on accreditors as guarantors of quality.⁹² At least twenty statutes recognize the federal government’s creation of lists of approved accreditors.⁹³

One sign that accreditation largely benefited colleges is that the exercise of accreditors’ authority initially brought few legal challenges.⁹⁴ As William Kaplin, an attorney at HEW, explained, “the private regional and professional accrediting agencies that evaluate our educational institutions have generally functioned

88. Margaret M. Conway, *The Commissioner’s Authority to List Accrediting Agencies and Associations: Necessity for an Eligibility Issue*, 50 J. HIGHER EDUC. 158, 158 (1979).

89. See Luke R. Nelson, *Combating For-Profit Education’s Use of Erroneous, Deceptive, and Misleading Practices Against Veterans and the GI Bill*, 43 MITCHELL HAMLIN L. REV. 505, 537 (2017); Joshua Hall, *Higher-Education Accreditation: Market Regulation or Government Regulation?*, 17 INDEP. REV. 233, 236 (2012).

90. John R. Proffitt, *The Federal Connection for Accreditation*, 50 J. HIGHER EDUC. 145, 145 (1979). Proffitt was Director of the Division of Eligibility and Agency Evaluation at the U.S. Office of Education and was involved extensively in accreditation issues for years. U.S. DEP’T OF HEALTH, EDUC. & WELFARE, OFF. OF THE ASSISTANT SEC’Y FOR EDUC., *TOWARD A FEDERAL STRATEGY FOR PROTECTION OF THE CONSUMER OF EDUCATION* 5–6 (1975), <https://files.eric.ed.gov/fulltext/ED115173.pdf> [<https://perma.cc/MK68-2WPZ>]. He served as chair of an interagency committee on accreditation. *Id.*

91. Proffitt, *supra* note 90, at 145.

92. Public Health Service Act of 1963, Pub. L. No. 88-129, 77 Stat. 164, 164–65 (codified as amended at 42 U.S.C. §§ 292-292i); Conway, *supra* note 88, at 163–64.

93. Conway, *supra* note 88, at 167.

94. Kaplin, *Judicial Review*, *supra* note 83, at 543.

without judicial . . . interference.”⁹⁵ A key case in accreditation’s history is the 1967 decision in *Parsons College v. North Central Association of Colleges and Secondary Schools*, the first significant litigation by a college against an accreditor.⁹⁶ After years of consideration, North Central pulled Parsons College’s accreditation, prompting Parsons to sue the accreditor.⁹⁷ As Kaplin explains, although courts are chary about involvement in disputes within private associations, the court recognized that

accreditation is a kind of monopoly power which, as in other fields, carries great potential for concerted action but is also susceptible of abuse. Because an accrediting agency has this power, its decision to refuse or withdraw accreditation can have drastic consequences for the school and its students, faculty, and graduates.⁹⁸

The challenge failed, as the court deferred to the expertise of the accreditor and, finding that it had followed its procedures properly, held for the accreditor.⁹⁹ For many decades, accreditation also attracted little scholarly attention, with a Tennessee higher education official complaining in 1979 that “[e]ven criticisms of accreditation fail to offer any detailed information either about specific accreditation criteria or their overall character.”¹⁰⁰

This monopoly power came in part from accreditors being intertwined with the state and federal governments. Kaplin noted that the accrediting agencies

rely on the states to recognize an institution’s legal existence and degree-granting authority as a

95. *Id.*

96. 271 F. Supp. 65, 66 (N.D. Ill. 1967).

97. *Id.* This discussion draws upon Kaplin, *Judicial Review*, *supra* note 83, at 547 (noting that prior to the *Parsons* case, there was only one other federal court case, in 1938, regarding the authority of accreditors).

98. Kaplin, *Judicial Review*, *supra* note 83. The court in the *Parsons* case found that the accreditor followed its procedure properly and the court should defer to the expertise of the accreditor in its decision making. *Id.* at 546–47.

99. *Parsons*, 271 F. Supp. at 74.

100. Troutt, *supra* note 18, at 199.

prerequisite to accreditation. They also rely on states to recognize and protect their own legal status as corporations. And in a sense, many agencies rely on federal and state governments to indirectly lend the support of public sanction to accrediting determinations by their reliance upon them.¹⁰¹

Although the federal government does not directly regulate colleges, it does so indirectly through restrictions attached to the receipt of federal aid.¹⁰²

Accreditors recognized that their monopoly was valuable by competing for jurisdiction over particular programs. A dispute among rival accreditors of nursing programs (related to the Nurse Training Act of 1965) illustrated this:

Federal education and health officials, as well as congressional staff and members of Congress, were generally dismayed by the intensity of this intramural conflict. Individuals within both the legislative and executive branches of the federal government began to suspect that there were powerful contending forces, and monumental stakes involved, in the field of accreditation.¹⁰³

101. WILLIAM A. KAPLIN, RESPECTIVE ROLES OF FEDERAL GOVERNMENT, STATE GOVERNMENTS, AND PRIVATE ACCREDITING AGENCIES IN THE GOVERNANCE OF POSTSECONDARY EDUCATION, 15 (1975) [hereinafter KAPLIN, RESPECTIVE ROLES OF FEDERAL GOVERNMENT], <https://files.eric.ed.gov/fulltext/ED112816.pdf> [<https://perma.cc/U5DG-J25Y>] (now Council for Higher Education Accreditation). This work derives partly from William A. Kaplin & Hunter J. Philip, *Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation*, 52 CORN. L. REV. 104 (1966). More on the history of accreditation is in Camilla E. Watson, *Federal Financing of Higher Education at a Crossroads: The Evolution of the Student Loan Debt Crisis and the Reauthorization of the Higher Education Act of 1965*, 2019 MICH. ST. L. REV. 883 (2019).

102. See KAPLIN, RESPECTIVE ROLES OF FEDERAL GOVERNMENT, *supra* note 101, at 16–18. Colleges can evade such restrictions by refusing federal funds, a price that is too high for most to consider. *But see A List of Colleges That Don't Take Federal Money*, DEAN CLANCY (Dec. 2, 2017), <https://deanclancy.com/a-list-of-colleges-that-dont-take-federal-money/> [<https://perma.cc/5PxR-BV2x>]. The few colleges that refuse federal funding enroll a tiny number of students. See e.g., Institutional Facts and Reporting, BETHLEHEM COLLEGE & SEMINARY (last visited Mar. 9, 2026), <https://bcsmn.edu/about/institutional-facts/> [<https://perma.cc/8DKN-LZLF>].

103. See Proffitt, *supra* note 90, at 146.

The federal government stepped in to restrain competition among accreditors. In 1967, the U.S. Commission on Education determined that the Advisory Committee on Accreditation and Institutional Eligibility (an entity composed of accreditors) would be beneficial as it was “supported administratively by a permanent staff, which today reflects a high level of expertise in the field of accreditation in the United States.”¹⁰⁴ After further wrangling over who does which accreditation, in 1968, the Office of Education took steps to ensure the continuance of existing accreditors as validators of quality for schools to be eligible for funding from assorted agencies.¹⁰⁵ The Office of Education then enshrined the status of the six regional accreditors, plus a host of individual program accreditors (law, podiatry, etc.), into federal regulations in 1969.¹⁰⁶ Model state legislation concerning accrediting higher education was proposed, partly aimed at limiting cross-state competition.¹⁰⁷ When Proffitt wrote in 1979, he noted that federal agencies providing funding for colleges face an array of seventy two recognized accrediting associations.¹⁰⁸ Funders relied, as is the case today, on the accreditors

104. *Id.* at 147.

105. The scramble over who accredits was large, as billions in annual federal funding were at stake. For an overview, see, for example, Matthew D. Finkin, *Reforming the Federal Relationship to Educational Accreditation*, 57 N.C. L. REV. 379, 379–80 (1979).

106. 34 Fed. Reg. 643, 643–44 (Jan. 16, 1969) (listing nationally recognized accredited associations and agencies).

107. See Proffitt, *supra* note 90, at 148; Grace Belsches-Simmons, *Regulation of Postsecondary Institutions: Model Legislation*, in EDUCATION COMMISSION OF THE STATES ISSUEGRAMS 3 (1983), <https://files.eric.ed.gov/fulltext/ED234665.pdf> [<https://perma.cc/YF78-JF7W>]. The Education Commission of the States was founded in 1965. *About Us*, EDUC. COMM’N OF THE STATES, ecs.org/about-us/ [<https://perma.cc/XT35-EB7B>] (last visited Mar. 9, 2026). The effort to get such legislation passed seemed to have limited success; the Education Commission of the States now focuses on K-12 education. See EDUC. COMM’N OF THE STATES, 2024 ANNUAL REPORT, at 18 (2025), <https://www.ecs.org/wp-content/uploads/2024-ECS-Annual-Report.pdf> [<https://perma.cc/QL4B-EH7B>]. Proffitt notes that intense wrangling occurred continuously; the details are exhausting. See Proffitt, *supra* note 90, at 148. For an overview of some of the issues, see JOHN C. HONEY & TERRY W. HARTLE, FEDERAL-STATE-INSTITUTIONAL RELATIONS IN POSTSECONDARY EDUCATION 3 (1975), <https://files.eric.ed.gov/fulltext/ED105793.pdf> [<https://perma.cc/D3RW-FFDJ>]; HAROLD ORLANS, N. JEAN LEVIN, ELIZABETH K. BAUER & GEORGE E. ARNSTEIN, PRIVATE ACCREDITATION AND PUBLIC ELIGIBILITY, VOLUMES I, II (1974) [hereinafter ORLANS ET AL., PRIVATE ACCREDITATION AND PUBLIC ELIGIBILITY], <https://files.eric.ed.gov/fulltext/ED097858.pdf> [<https://perma.cc/DFR4-D3J5>].

108. Proffitt, *supra* note 90, at 152.

to certify colleges (and their students) as being qualified to receive funds.¹⁰⁹ Crucially, the federal government “accepts the decisions of accrediting agencies relative to individual institutions and programs. . . . There is no authority for [the Office of Education] to shape, question, or interfere with such decisions, nor can the office be viewed as an appellant body regarding accreditation decisions.”¹¹⁰

Of course, accrediting agencies do not have a complete free hand. They are private associations governed by their articles of incorporation and bylaws.¹¹¹ They must abide by federal and state rules regarding financing of colleges.¹¹² As explained by the court in an important early accreditation case:

Where membership in, or certification by, . . . [a private] association is a virtual prerequisite to the practice of a given profession, courts have scrutinized the standards and procedures employed by the association notwithstanding their recognition of the fact that professional societies possess a specialized competence in evaluating the qualifications of an individual to engage in professional activities. The standards set must be reasonable, applied with an even hand, and not in conflict with the public policy of the jurisdiction. Even where less than complete exclusion from practice is involved, deprivation of substantial economic or professional advantages will often be sufficient to warrant judicial action.¹¹³

109. See Harold Orlans, *The End of a Monopoly? On Accrediting and Eligibility*, 12 CHANGE 32, 32 (1980) [hereinafter Orlans, *The End of a Monopoly*]. It is difficult for a college not to be accredited. “[O]nly 64 of the 3,173 institutions in the 1978–79 *Education Directory* were unaccredited.” *Id.* at 33.

110. Proffitt, *supra* note 90, at 151. He notes that besides the six regional accreditors, there were sixty-six other programmatic agencies on the Office of Education list. *See id.* at 152.

111. See Richard A. Epstein, *The Role of Accreditation Commissions in Higher Education: The Troublesome Case of Dana College*, 79 U. CHI. L. REV. 83, 85–86 (2012).

112. The Office of Education gradually pushed accrediting associations “to change or modify certain practices in order to accommodate better the needs of the eligibility process.” Kenneth E. Young, *New Pressures on Accreditation*, 50 J. HIGHER EDUC. 132, 142 (1979).

113. *Marjorie Webster Jr. Coll. v. Middle States Ass’n*, 432 F.2d 650, 655 (D.C. Cir. 1970).

Hence, an accrediting entity operates in conjunction with the federal and state governments. It may not exceed the authority implicitly or explicitly granted to it by a government or the non-delegation doctrine comes into play.¹¹⁴

Proffitt catalogs “a major report” from an “interagency committee” in 1974, a contract for a two-year study “dealing with strategies for protecting the educational consumer,” the abolition and creation of nonprofits, congressional hearings, establishment of a task force, the convening of “a major conference” on federal relations with accrediting agencies, and another two-year study on validation of the criteria for recognizing accreditors.¹¹⁵ A review of the literature on accreditation in 1979 concluded that “accrediting agencies follow much the same pattern of assessment that obtained forty years ago.”¹¹⁶ This lengthy catalog contained little substantive change but must have employed many contractors and consultants along the way.

Nor did the status of accreditation change much in the following decades.¹¹⁷ In the 1990s, when it was finally recognized

114. KAPLIN, RESPECTIVE ROLES OF FEDERAL GOVERNMENT, *supra* note 101, at 24. Kaplin explains that accreditors, as private entities, are not bound by the Constitutional constraints that restrict government actions, but because they take actions on behalf of the state and federal governments, are subject to the state action doctrine, so are therefore not purely private actors. *Id.* at 27. Their processes and actions should not be arbitrary and capricious, and there should be fair procedures for colleges subject to their governance, as the accreditors act on behalf of state and federal governments in a quasi-governmental capacity. *Id.* at 27–28. This was enough of an issue that the HEW Office of General Counsel issued an opinion in 1970 that reliance by the federal government on the accrediting agencies does not violate the non-delegation doctrine because “the system ‘contains sufficient safeguards against . . . arbitrariness [sic] and abuse.’” *Id.* at 25.

115. Proffitt, *supra* note 90, at 148–50. Proffitt’s detailed account of the events of the mid-1970s reads like an episode of the satirical British political comedy, *Yes, Minister*, in which the wily civil servant, Sir Humphrey Appleby, regularly outwits his minister by holding inquiries and reviews and issuing reports. See YES, PRIME MINISTER (BBC TV series, released 1980–1984).

116. Pfnister, *supra* note 19, at 232.

117. However, regulatory reporting requirements for colleges have grown significantly over time. Given the billions in grants from multiple agencies, this is not surprising. More federal programs doling out more funds means substantial reporting expenditures by schools. See TASK FORCE ON FED. REGUL. OF HIGHER EDUC., RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES 7 (2015) [hereinafter RECALIBRATING REGULATION], https://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf [<https://perma.cc/AEQ9-2HN8>]. Vanderbilt University estimated that in 2013 it spent \$150 million, or 11% of its administrative expenditures, on compliance with federal mandates. *Id.* at 11.

that trends in student debt and student achievement were headed in undesirable directions, the Department of Education supported increased responsibility by the states, and Congress agreed.¹¹⁸ Under 1995 legislation, each state was required to establish a State Postsecondary Review Entity, but, facing pushback by the states, this was rescinded by Congress in 1998.¹¹⁹ Still, the Department of Education continued to press the states to assess student achievement.¹²⁰ The pressure backfired in 2008, when Congress “prohibited the Department of Education from regulating the manner in which accrediting agencies assess student achievement.”¹²¹ In a nod toward solving the problem, Congress established the National Advisory Committee on Institutional Quality and Integrity (NACIQI).¹²² Two-thirds of the members are appointed by members of Congress (an equal number by each party); one-third are appointed by the Secretary of Education.¹²³ As the NACIQI’s website indicates, over the years, its output has been meager: five short reports have been issued in 2012, 2015, 2018, 2021, and 2023 respectively, each of which contain little beyond vague platitudes about working together for quality and transparent accreditation processes.¹²⁴

This is likely part of the reason for the ever-expanding bureaucracies at colleges. The report is filled with stories of colleges facing Department of Education (or other agency) investigations sometimes more than a decade after an event in question. *Id.* at 15, 64. While colleges do not like the costly requirements, they can be used as a weapon by states to limit competition. *Id.* at 15. The state of North Carolina imposed such costly reporting requirements on Vanderbilt when it offered online courses to students anywhere, such that Vanderbilt quit enrolling students from North Carolina. *Id.* The Report cites Professor Cass Sunstein on the point that we often forget that well-intended regulations entail costs that are largely passed on to the consumers of the services involved. *Id.* at 12, n.17.

118. Areen, *supra* note 84 at 1484.

119. *Id.*

120. *Id.*

121. *Id.* While the Department of Education had its wings clipped by Congress in some ways, it “has increasingly used the process by which it ‘recognizes’ accrediting agencies as a lever to insert itself into the details of the accreditation process.” RECALIBRATING REGULATION, *supra* note 117, at 22.

122. Areen, *supra* note 84, at 1484.

123. *Id.*

124. See *Welcome*, NAT’L ADVISORY COMM. ON INSTITUTIONAL QUALITY AND INTEGRITY, U.S. DEP’T OF EDUC., <https://sites.ed.gov/naciqi/> [<https://perma.cc/WCK5-DD6J>] (last visited Mar. 9, 2026).

Higher education is competitive, in the sense of many colleges trying to attract students, but accreditation provides a way to limit competition.¹²⁵ Much as regulated airlines competed for customers with fancy meals and comfortable seats at high prices before deregulation, but shifted their business models after deregulation,¹²⁶ we suspect colleges would compete in different ways if they lost their ability to at least implicitly collude through accreditors. As noted above, accreditation does not focus on outputs—what students learned—but on inputs.¹²⁷ Colleges report numerous details such as how many faculty members have Ph.D.'s and how many students on average are in various courses.¹²⁸ The accreditation process, which for colleges occurs every ten years, is a time-consuming process that produces lengthy reports, requires many meetings, and leads to much administrative effort.¹²⁹

II. ACCREDITORS AS AGENTS OF CARTELIZATION

Cartels in industries with many competitors are difficult to manage.¹³⁰ There are many players with different and

125. Preston Cooper, *Why College Is Too Expensive — And How Competition Can Fix It*, FOUND. FOR RSCH. ON EQUAL OPPORTUNITY, <https://freopp.org/whitepapers/why-college-is-too-expensive-and-how-competition-can-fix-it/#:~:text=But%20gaining%20accreditation%20is%20a,task%20for%20policymakers%20going%20forward> [https://perma.cc/MF5X-G383] [hereinafter Cooper, *Why College Is Too Expensive*] (last visited Mar. 9, 2026).

126. For an overview of the history of airline industry deregulation, see GEORGE WILLIAMS, *THE AIRLINE INDUSTRY AND THE IMPACT OF DEREGULATION* 38–41 (Routledge, 2nd ed. 2017).

127. A commission appointed by former Secretary of Education Maragaret Spellings noted that there is “a remarkable absence of accountability mechanisms to ensure that colleges succeed in educating students.” SPELLINGS COMM’N, *A TEST OF LEADERSHIP: CHARTING THE FUTURE OF HIGHER EDUCATION*, at vii (2006), <https://files.eric.ed.gov/fulltext/ED493504.pdf> [https://perma.cc/AC88-SBM5].

128. Many colleges are happy to report faculty to student ratios (which are often irrelevant to actual classroom ratios) and colleges report how many faculty have Ph.Ds. *Faculty Composition*, COLL. TRANSITIONS (Nov. 2025), <https://www.collegetransitions.com/dataverse/full-time-faculty/> [https://perma.cc/6525-7BAL]. Useful information such as job placements of graduates and average income—outcomes—are difficult to find.

129. Alexandra Hegji, CONG. RSCH. SERV., R43826, *An Overview of Accreditation of Higher Education in the United States* 4–5 (2024), <https://www.congress.gov/crs-product/R43826> [https://perma.cc/4WJS-F4DZ].

130. Successful explicit collusion requires planning, investments in administration, clear thinking, and hard work. Marshall & Marx, *supra* note 75, at 7 (“In general, firms in an oligopolistic industry that successfully collude create: (1) pricing structures that enable them to

conflicting interests. Hence, to be successful a cartel must provide a benefit at relatively low cost and use clear metrics that are easy to measure and easy to enforce in order to assess compliance.¹³¹ Consider the many companies that, as their core business, sell hamburgers to the public. There are big players, such as McDonald's, and many little standalone competitors. All want to succeed financially. Standard economic theory suggests that, in the absence of the ability of the big players to control the market, all competitors could benefit by joining an industry association that creates and enforces financially mutually beneficial practices.¹³² Suppose "The American Hamburger Association" (AHA) promotes two basic propositions: (1) if you sell hamburgers, you must join the AHA, and, (2) if you want to be in the industry and the AHA, you must require every buyer of a burger to also take an order of fries and a drink (the Happy Meal). This is a good idea for the businesses—more revenue from every customer. You lose a few customers who are irritated that they cannot just buy a burger, but in net sellers are better off. To ensure compliance and prevent undercutting of the market, the AHA sends inspectors around every now and then to watch for chiselers who do not follow the Happy Meal rule. Obviously, this will not work without legal sanction, since any burger provider which defected from the rule would win business away from cartel members. As such, the AHA gets blessings from the federal and state governments based on the

implement price increases, (2) allocation structures that allow them to divide the collusive gain and reallocate resources among one another when things do not go as expected, and (3) enforcement structures that facilitate monitoring and establish the threat of punishment for nonconformant deviant behavior.").

131. Competitors have incentives to be in cartels, but they are difficult to hold together. See Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43, 44 (2006). For an overview of 167 international cartels, see John M. Connor, *Private International Cartels: Effectiveness, Welfare, and Anticartel Enforcement* (Purdue Univ. Dep't of Agric. Econ. Working Paper, Paper No. 03-12, 2003), <https://ageconsearch.umn.edu/record/28645?v=pdf> [<https://perma.cc/5BES-5WG3>]. Cartels without effective methods to deter cheating are not likely to survive long. *Id.* at 23–24.

132. This idea goes back to Adam Smith, who noted "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 130 (London, W. Strahan & T. Cadell 1776).

claim that the rule encourages a higher quality of burger meals for customers and protects them from bad operators, so it must be followed. In turn, the federal government enacts the “Burger Safety and Quality Enhancement Act,” and now every burger vendor must belong to the AHA and have a seal of approval from it.¹³³

For colleges, the equivalent to our hypothetical Happy Meal rule is the 120-hour undergraduate (BA, BS) degree requirement.¹³⁴ For one of the six regional accreditors, the Southern Association of Colleges and Schools Commission on Colleges (SACSCOC or SACS) the 120-hour rule says:

The institution offers one or more degree programs based on at least 60 semester credit hours or the equivalent at the associate level; at least 120 semester credit hours or the equivalent at the baccalaureate level; or at least 30 semester credit hours or the equivalent at the post-baccalaureate, graduate, or professional level.¹³⁵

The other standards are largely window dressing: 1) have integrity; 2) have a mission statement; 3) be approved by a government agency to offer degrees (this is useful as it keeps out some would-be competitors who might do things differently); 4) have a governing board; 5) have a CEO or equivalent; 6) have enough faculty to do the job; 7) plan for the future; 8) have measures of student success; 9) have educational programs (that must meet the 120-hour rule); 10) have internal policies; 11) have a library; 12) have student support services; 13) have sound finances; and 14) be transparent.¹³⁶

133. This is not as far-fetched as it sounds. Under the National Industrial Recovery Act, the federal government required businesses to join cartels with rules just about as ridiculous as our hypothetical Happy Meal rule. See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935) (striking the NIRA on non-delegation grounds as unconstitutional in a case where the cartel code prohibited customers from selecting the chicken they wanted from a butcher but required them to take the first chicken he could grab from a coop).

134. See S. ASS'N OF COLLS. AND SCHS. COMM'N ON COLLS., *supra* note 78, at 21.

135. *Id.*

136. *Id.* at 11–33. These things generally require real work, but do not provide revenue enhancements as does the 120-hour rule. See *id.*

If a college tries to “cheat” by offering baccalaureate degrees with fewer than 120 hours, they will not be accredited.¹³⁷ As such, their credit hours will not transfer to other schools and, as in Texas, they may also violate state law, as the Texas higher education agency adopted the 120-hour rule.¹³⁸ So if you want to sell “education burgers” in Texas, they must be sold as a “Happy Meal.”¹³⁹ Other than not running afoul of health laws, quality does not matter. Customers can take it or leave it, as is the case for colleges. Some have miserable outcomes if we use career success as a key metric, but the regional accreditors do not examine that factor.¹⁴⁰

Accreditation basically means a college is legally allowed to sell baccalaureate degrees. Unsurprisingly, it does almost nothing to protect the students from being sold a bill of goods. The benefits of degrees are not much discussed by colleges except in general terms, unless a particular degree program happens to have good results. Many do not. “Overall, 31[%] of students are enrolled in higher education programs that do not lead to a return on investment. In other words, ROI for these programs is negative: the earnings benefits of the degree are unlikely to fully compensate students for the cost and risk of pursuing

137. *Id.* at 21 (requiring “at least 120 semester credit hours” for baccalaureate degrees).

138. See TEX. EDUC. CODE § 61.0515(a) (West 2025). The primary agency is the Texas Higher Education Coordinating Board (THECB). *Board & Commissioner*, TEX. HIGHER EDUC. COORDINATING BD., <https://www.highered.texas.gov/about/board-commissioner/> [<https://perma.cc/Y4NY-HMNE>] (last visited Mar. 9, 2026); 19 TEX. ADMIN. CODE § 4.192(a) (West 2026) (regarding accrediting agencies).

139. In antitrust, this is usually referred to as a tie-in sale—if you want a burger you must buy the fries and drink. See *Tying the Sale of Two Products*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/tying-sale-two-products> [<https://perma.cc/9CN9-UAP4>] (last visited Mar. 3, 2026). Otherwise, the seller has no meaningful market power because consumers can go to other sellers, who do not all require the tie-in sale. *Id.*

140. This is being a bit simplistic. A common definition of success is the graduation rate of students in four and six years. See, e.g., *Student Achievement Data*, UNIV. OF TEX. AT ARLINGTON, <https://www.uta.edu/administration/ier/student-achievement-data> [<https://perma.cc/X23C-2XZL>] (last visited Mar. 9, 2026) (Student achievement data from the University of Texas at Arlington). If those numbers are low, a school promises to make efforts to improve them. Schools regularly report such metrics. See *id.* But whether one graduates in six or seven years says little about career success.

post-secondary education.”¹⁴¹ Further, “nearly half of master’s degree programs have no ROI, thanks to their high costs and often modest-earnings benefits.”¹⁴²

This means, of course, that even if we ignore the students who do not graduate, many college degrees lead to not-very-lucrative jobs, and also a lot of debt. Millions of students pile on debt when attending college.¹⁴³ Debt forgiveness by the Biden administration helped some graduates,¹⁴⁴ but at the time students took on the debt, most likely they had no idea that part or all of the debt might be waived. If they thought about it at all, they likely viewed it as an investment to be repaid by higher paying jobs at the other end. Debt relief helps but is not a panacea, as many college graduates are still behind where they might have been had they not gone to college at all.¹⁴⁵ The

141. Preston Cooper, *Does College Pay Off? A Comprehensive Return on Investment Analysis*, FOUND. FOR RSCH. ON EQUAL OPPORTUNITY, <https://freopp.org/whitepapers/does-college-pay-off-a-comprehensive-return-on-investment-analysis/> [<https://perma.cc/8BUH-JWT4>] (hereinafter Cooper, *Does College Pay Off?*) (last visited Mar. 9, 2026) (using Department of Education data on results for degrees from colleges). One can look up data by college or by degree. See *Is College Worth It?*, FOUND. FOR RSCH. ON EQUAL OPPORTUNITY, <https://freopp.org/roi-in-higher-education/roi-undergraduate/> [<https://perma.cc/B9E6-C4MR>] (last visited Mar. 9, 2026).

142. Cooper, *Does College Pay Off?*, *supra* note 141; see *Is College Worth It?*, *supra* note 141 (showing each college’s ROI).

143. About 43 million current and former students have federal loan debt. RITA R. ZOLA, CONG. RSCH. SERV., IF10158, A SNAPSHOT OF FEDERAL STUDENT LOAN DEBT 1 (2025), <https://www.congress.gov/crs-product/IF10158#> [<https://perma.cc/DDK6-PJB7>].

144. Dalton Zbierski, *President Biden Announces \$7.7 Billion More in Approved Student Debt Relief for 160,500 Borrowers*, FOX 61 (May 23, 2024, at 19:38 ET), <https://www.fox61.com/article/news/education/biden-announces-77-billion-more-in-approved-student-debt-relief-for-160500-borrowers/520-c9bea15a-9d81-4a61-9b82-08b05b0cc5ae> [<https://perma.cc/2MSX-VLLF>].

145. See Terrell Wright & Melissa Korn, *Their Student Debt Disappeared, But Their Financial Worries Persist*, WALL ST. J. (Aug. 17, 2025, at 21:00 ET), <https://www.wsj.com/personal-finance/their-student-debt-disappeared-but-their-financial-problems-didnt-65de0834> [<https://perma.cc/U7WL-ARZU>]. The problem is not only the debt, but the time spent in a losing educational attempt. Living expenses still occur and time that may have been spent earning income and developing job skills has been lost. The situation is not just bad for those who fall by the wayside in college; even successful graduates have paid higher prices than may be justified to get where they want to be. Want to go to medical school? You must have a four-year degree first, regardless of how bright or well-prepared you may be. *I Want to Be a Doctor! What Now?*, UT HEALTH, <https://uthscsa.edu/medicine/education/ume/outreach/become-doctor> [<https://perma.cc/TEQ9-RTFN>] (last visited Mar. 9, 2026). There appears to be growing concern about the value of higher education. See Jeffrey M. Jones, *U.S. Confidence in Higher Education Now Closely Divided*, GALLUP (July 8, 2024), <https://news.gallup.com/poll/646880/confidence-higher-education-closely-divided.aspx> [<https://perma.cc/R7F4-CR5R>] (showing a decline from

economic loss is not only incurred by those who likely should never have tried going to college, but many college graduates who have incurred greater costs in time and money than need be.¹⁴⁶ They likely would have had an even higher positive return on education had they not been required to incur the costs of taking many hours of costly coursework that were largely time killers.

We are not the first to notice that the 120-hour rule is economically wasteful. The progressive New America Foundation, now called New America,¹⁴⁷ issued a report in 2012 that the 120-hour rule was needlessly costly and injurious to many students.¹⁴⁸ The author notes that the standard college hours class measure goes back more than a century.¹⁴⁹ More importantly, for about a century serious questions have been raised about the relationship between classroom time and learning. A 1938 Carnegie Foundation study was dismissive of the focus on inputs (time spent in courses) rather than evidence of advances in knowledge.¹⁵⁰ Nevertheless, “[c]ollege degrees are still largely awarded based on ‘time served,’ rather than learning achieved,

2015 to 2025, from 57% to 36%, of respondents saying they have a great deal or quite a lot of confidence in college education).

146. Many college degrees have a negative rate of return. See, e.g., Cooper, *Does College Pay Off?*, *supra* note 141.

147. The foundation is referred to as “liberal” in its Wikipedia entry. *New America (organization)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/New_America_\(organization\)](https://en.wikipedia.org/wiki/New_America_(organization)) [<https://perma.cc/F3WH-J3KP>] (last visited Mar. 9, 2026).

148. See AMY LAITINEN, *CRACKING THE CREDIT HOUR* 6, 13 (2012), <https://files.eric.ed.gov/fulltext/ED540304.pdf> [<https://perma.cc/Z99Q-Y4VD>].

149. *Id.* at 5. Much to our horror, she notes that the standard teaching “load” for Cornell faculty a century ago was 12 hours per semester. *Id.* at 4–5. For tenured faculty at research-oriented schools today the norm is six hours. *Compare Statement on Faculty Workload with Interpretative Comments*, AM. ASS’N OF UNIV. PROFESSORS (1968), <https://www.aaup.org/reports-publications/aaup-policies-reports/policy-statements/statement-faculty-workload> [<https://perma.cc/X6Y7-BNCY>] (suggesting a maximum teaching load of six to nine hours per week is “preferred”), with UNIV. OF NORTH CAROLINA, *MONITORING FACULTY TEACHING WORKLOADS 2* (2001), <https://www.northcarolina.edu/apps/policy/doc.php?id=2469&type=pdf> [<https://perma.cc/3W4D-6PV2>] (stating that Research University I (RI) loads should be a minimum of 4 courses per year).

150. WILLIAM S. LEARNED & BEN D. WOOD, *THE STUDENT AND HIS KNOWLEDGE: REPORT TO THE CARNEGIE FOUNDATION ON THE RESULTS OF THE HIGH SCHOOL AND COLLEGE EXAMINATIONS OF 1928, 1930 AND 1932*, at vii, 10 (1938) (“Academic progress is to be governed by demonstrated achievement, rather than by the conventional time standards[.]” and we should focus “on the educational results achieved by students”).

despite recent research suggesting that shocking numbers of college students graduate having learned very little.”¹⁵¹ The author cites a more recent major study by two professors of sociology and education that 36% of college students “completing four years of college showed no statistically significant improvement over time on a test of critical thinking, complex reasoning, and communication skills.”¹⁵² The belief that college degrees payoff seems to be built into our political system as exemplified in Texas where the governor pushed the “60x30TX” plan, meaning by 2030, 60% of persons aged 25–34 will hold a certificate or college degree.¹⁵³ Throwing resources at postsecondary education could produce positive benefits if there were more ways to obtain advanced education than simply by offering more of the same.

III. EXTENDING CARTELS TO PROFESSIONS THROUGH COLLEGES

We care about cartels because they impose costs on consumers and society as a whole. Mario Monti, who was Competition Commissioner for the European Union (and later Prime Minister of Italy), explains that cartels “eliminate the pressure from competition to innovate and achieve cost efficiencies.”¹⁵⁴ How far antitrust law should extend, and in what direction, is

151. LAITINEN, *supra* note 148, at 5. Despite the evidence of little improvement in learning, college grades have been on the rise for years, regardless of evidence that students, on average, are studying less while in college. *Id.* at 7, 11.

152. LAITINEN, *supra* note 148, at 6 (citing RICHARD ARUM & JOSIPA ROSKA, *ACADEMICALLY ADRIFT: LIMITED LEARNING ON COLLEGE CAMPUSES* (2011)). Laitinen cites other studies, some sponsored by the U.S. Department of Education, that produce similar dismal results. *Id.* at 6 nn.10–12.

153. TEX. HIGHER EDUC. COORDINATING BD., 60X30TX, TEXAS HIGHER EDUCATION STRATEGIC PLAN (2015–2030), at v (2015), <https://tea.texas.gov/texas-schools/accountability/academic-accountability/performance-reporting/apac-111416-thecb-60x30-strategic-plan-print.pdf> [<https://perma.cc/538R-K9LV>].

154. Mario Monti, *Why Should We Be Concerned with Cartels and Collusive Behavior?*, in *FIGHTING CARTELS—WHY AND HOW?* 1–2 (2000); Asher Schechter, *Former Italian PM and European Competition Commissioner Mario Monti: Why Antitrust Enforcement Is “More Vigorous” in Europe Than in the US*, PROMARKET (Apr. 23, 2018), <https://www.promarket.org/2018/04/23/former-italian-pm-european-competition-commissioner-mario-monti-antitrust-enforcement-vigorous-europe-us/> [<https://perma.cc/52ME-3RJJ>].

in constant controversy.¹⁵⁵ We suggest there is low-hanging fruit for the FTC and Department of Justice to consider where application of basic antitrust principles would be beneficial. It consists of the layers of cartel activities found in higher education that impose costs by reducing employment opportunities and causing general economic damage. Cartelization of parts of the labor market is accomplished by professional organizations that influence state legislatures, by the accreditation process of colleges employed through the U.S. Department of Education, and by the many universities that implicitly collude through accreditation agencies to restrict competition, thereby keeping college education costs high. We argue that antitrust laws also should be brought to bear on the cartelization of professions, which rely on colleges to provide educational services and impose needlessly high educational input requirements on all would-be practitioners of various professions.

Cartelization is common among professions, providing a clear analogy for how higher education is cartelized. Benefits accrue to practicing members of cartelized professions. Would-be practitioners who suffer lower average incomes face a barrier to entry, especially in the early years of a career, while the public faces higher prices.¹⁵⁶ We begin by reviewing restrictions on the ability to be a Certified Public Accountant, then look at some requirements of the medical and legal professions. Such restrictions on entry into labor markets, and the costs they impose, are long known for reducing social welfare.¹⁵⁷ Although the FTC has limited jurisdiction over non-profit entities,¹⁵⁸ it

155. The FTC is investigating firms involved in commercial development of artificial intelligence. See *FTC Launches Inquiry into Generative AI Investments and Partnership*, FED. TRADE COMM'N (Jan. 25, 2024), <https://www.ftc.gov/news-events/news/press-releases/2024/01/ftc-launches-inquiry-generative-ai-investments-partnerships> [<https://perma.cc/45AQ-UUXK>]. This is just one of the actions of recent years that go beyond traditional activity. See *id.*

156. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1093, 1096–97 (2014).

157. For an overview of the economic costs to society and the output of physicians, see Reuben A. Kessel, *The A.M.A. and the Supply of Physicians*, 35 LAW & CONTEMP. PROBS. 267, 267 (1970) [hereinafter Kessel, *A.M.A.*].

158. Email from Edith Ramirez, FTC Chair, to Johann N. Schneider-Ammann, Fed. Councillor at 2 (Jan. 9, 2017), https://www.ftc.gov/system/files/documents/public_statements/1049563/ramirez_swiss_privacy_shield_letter.pdf [<https://perma.cc/8S56-9GZU>].

may proceed against industry accreditors that engage in unfair and deceptive practices under current statutory authority because, as an FTC Chair has stated, the agency has jurisdiction over non-profits that “in actuality operate for profit.”¹⁵⁹

A leading researcher on the economic impact of occupational restrictions, writing in 2000, noted that while the restrictions, and the fact that they cause economic damage is well known, the matter “has received relatively little recent attention, either from academics or the public policy press.”¹⁶⁰ Not much has changed in the quarter century since. Restrictions on competition are generally cloaked in professional “ethics.”¹⁶¹ In 2024, the Department of Justice intervened in successful litigation against the real estate professional organization and obtained a settlement with the National Association of Realtors.¹⁶² We suggest that such an action is in order in higher education.

A. Certified Public Accountants

Consider the barriers faced by someone wishing to become a Certified Public Accountant (CPA). A difficult exam must be passed.¹⁶³ The exam is a measure of educational output or ability—does a prospective CPA appear to have enough knowledge to serve credibly in that capacity?¹⁶⁴ Such exams are useful as

159. *Id.*

160. Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPS. 189, 189–90 (2000).

161. The realtor organizations in many states abided by the National Association of Realtors’s Code of Ethics. See *The Code of Ethics*, NAT’L ASS’N OF REALTORS, <https://www.nar.realtor/about-nar/governing-documents/the-code-of-ethics> [<https://perma.cc/FLF9-LFZT>] (last visited Mar. 9, 2026). The code did not set fees but discussed the standard industry practice. *Id.*

162. The FTC described restrictions in that industry. See *Real Estate Competition*, FED. TRADE COMM’N, <https://www.ftc.gov/news-events/topics/competition-enforcement/real-estate-competition> [<https://perma.cc/8CE2-2NT4>] (last visited Mar. 9, 2026). There had been private actions against realtors previously before the Department of Justice settled with the National Association of Realtors. See *Nat’l Ass’n of Realtors v. United States*, 97 F.4th 951, 953 (D.C. Cir. 2024).

163. The pass rate is about 44%. Carrie Thompson Mick, *How Hard Is the CPA Exam?*, BECKER (Sep. 2, 2025), <https://www.becker.com/blog/cpa-exam-pass-rates> [<https://perma.cc/3FHK-JJP2>].

164. The exam may be more difficult than is needed; we cannot comment on that. Those who are unable to pass the exam (multiple attempts are allowed) may still work in accounting, but not as a CPA. See *Can You Be an Accountant Without a CPA?*, ACCT. INSIGHTS (Aug. 1, 2024), <https://accountinginsights.org/can-you-be-an-accountant-without-a-cpa/> [<https://perma.cc/P572-Y5LB>].

they help certify that someone possesses a certain level of knowledge of accounting practices, and so are useful to prospective employers or to potential customers casting about to find a capable accountant.¹⁶⁵ However, to be able qualify to be a CPA, besides passing the exam, one must have 150 college hours completed at accredited colleges.¹⁶⁶ That means full-time students must go to college for five years rather than the traditional four-year 120-hour degree.¹⁶⁷ The 150-hour rule thus increases the cost of the credential by at least 25%.¹⁶⁸ A year of possible earnings from work and work experience is lost, as well as the cost of added tuition. Even this ignores the fact that much of the coursework in a four-year degree is not needed, and is just part of the cost of obtaining a college degree.¹⁶⁹ Most accounting degrees require 30 hours in accounting as part of a 120-hour curriculum.¹⁷⁰

165. Quality assurance has long been a concern. See, e.g., John L. Carey, *The Place of the CPA in Contemporary Society*, 106 J. ACCT. 27, 27, 29 (1958).

166. *The 150 Credit Hours CPA Requirement: What You Need To Know*, CPAEXAM.COM, <https://www.cpaexam.com/150-credit-hours-cpa/#ii-what-is-the-150-credit-hours-cpa-requirement> [<https://perma.cc/2RNU-EU8L>] (last visited Mar. 9, 2026). There are more than 600 accredited programs nationwide. Tyler Denton, *Accredited Accounting Schools and CPA Programs by State*, ACCOUNTINGEDU.ORG, <https://www.accountingedu.org/accounting-schools/> [<https://perma.cc/J5E8-S6DA>] (last visited Mar. 9, 2026).

167. Doug Wintermute & Juliann Scholl, *How to Become a Certified Public Accountant*, ACCOUNTING.COM (Oct. 10, 2025), <https://www.accounting.com/careers/cpa/how-to-become/> [<https://perma.cc/T2R4-FYRP>] (“It typically takes about 5-8 years to become a CPA, including four years for a bachelor’s degree,” possible 1-2 years for the extra credits, “and 1-2 years for the experience component.”).

168. See Blake Oliver, *The Cost of the 150 Hour Rule: \$2 Billion*, ACCT. TODAY (Mar. 2, 2023, at 09:00 ET), <https://www.accountingtoday.com/opinion/the-cost-of-the-150-hour-rule-2-billion> [<https://perma.cc/458W-J2DT>] (“To become a CPA in the United States, candidates must complete 150 semester credit hours of education, which is 30 credits beyond the typical 120 credit hours earned in a four-year undergraduate degree. As a result, most CPAs end up spending five years in college instead of four.”).

169. A capable student could likely obtain all needed knowledge for the CPA exam online. Excellent courses are provided at minimal cost, but such coursework generally does not count toward a degree. See, e.g., *Accounting*, COURSEERA, <https://www.coursera.org/courses?query=accounting> [<https://perma.cc/C7EQ-4RAH>] (last visited Mar. 9, 2026).

170. See, e.g., *Accounting - BBA*, TEX. A&M UNIV.: CATALOGS, <https://catalog.tamu.edu/undergraduate/business/accounting/bba/#programrequirements> [<https://perma.cc/NJE8-SDJZ>] (last visited Mar. 9, 2026) (listing degree requirements for a BB in Accounting at Texas A&M University). The other ninety hours are in American history, government, “creative arts,” communications, English, and assorted business classes. *Id.* Some states, such as Pennsylvania, require twenty-four hours of Accounting; New York requires thirty-three hours. See VILLANOVA

Florida was the first state to institute the 150-hour rule, effective in 1983.¹⁷¹ By 1988, the AICPA, the national CPA trade organization, required all new members to have 150 hours as of 2000.¹⁷² This costly barrier to entry into the profession benefited incumbents by restricting the inflow of new competitors, but it has created a shortage, driving up wages, so a change in the rule is under consideration.¹⁷³ The AICPA casts about for palatable ways around the 150-hour rule, such as suggesting a double major or taking cheaper classes at a community college.¹⁷⁴ Change is likely to be slow as vested interests (existing CPAs) benefit from the lower inflow of new CPAs caused by the 150-hour rule, although there is consideration given to reduce the requirement.¹⁷⁵

The CPA rule is just one example of a profession protecting itself from competition;¹⁷⁶ we review more below. The CPA

UNIV., BECOMING A CPA 14, 16, https://www1.villanova.edu/dam/villanova/VSB/undergrad/forms/CPA_Guide_Booklet.pdf [<https://perma.cc/36AD-UEL8>].

171. For historical perspective of how the matter was viewed at the time, see John Cumming & Larry J. Rankin, *150 Hours: A Look Back*, J. ACCT. (Apr. 1, 1999), <https://www.journalofaccountancy.com/issues/1999/apr/cumming.html> [<https://perma.cc/P4XZ-ERTB>]. Florida was the first state to adopt the 150 hour rule and faced a collapse in the number of new CPAs, forcing firms to recruit out of state to fill positions. *Id.*

172. Jill Edmonds, *Is 150 Too Many?*, VA. SOC'Y OF CPAs (May 5, 2023), <https://www.vscpa.com/news/b1d27ba8-ffaa-4bfc-b2e7-bd1db530c29f:is-150-too-many> [<https://perma.cc/5EEV-MKN9>].

173. *Id.* Justification for the 150 hours was the usual litany of polite reasons—maturity, ethics, and deeper knowledge of other areas such as information technology. *Id.* As students consider the cost of entering the profession, fewer enter than likely would if 120 hours was required. *Id.* In Virginia, the number of CPA candidates dropped by a third from 2020 to 2022. *Id.* The shortage has pushed up the wages that must be paid to new CPAs. *Id.* As an aside, we have spoken to an official from the AICPA which is seeking low-cost ways to get those who can pass the CPA exam an additional 30 hours of college at low, online rates. In many states, one need not have all 150 hours completed to sit for the exam, so some who have passed the exam are scrounging for coursework to fill up the hours requirement so they can then be granted CPA status. See also Steven Mintz, William F. Miller & Tara J. Shawver, *Rethinking the 150-Hour Requirement for CPA Licensure*, CPA J. (Nov. 2023), <https://www.cpajournal.com/2023/11/27/rethinking-the-150-hour-requirement-for-cpa-licensure/> [<https://perma.cc/58LG-MRH6>] (finding little evidence that the 150-hour rule has produced better prepared CPA candidates, which was the stated justification).

174. See Edmonds, *supra* note 172.

175. See Mintz et al., *supra* note 173.

176. John M. Barrios, *Occupational Licensing and Accountant Quality: Evidence from the 150-Hour Rule*, 60 J. ACCT. RSCH. 3, 4–5 (2022) (finding that the rule did not improve the average quality of accountants but actually discouraged entry into the profession).

example highlights why as a matter of policy antitrust law should be employed against such rules: competitors in a profession come together to restrict the inflow of new competitors. Existing CPAs have some control over entry into the profession as they have successfully lobbied state legislatures to mandate limitations.¹⁷⁷ Such self-interested restrictions are cloaked in a gloss of protecting the public by improving the quality of new CPAs.¹⁷⁸ No doubt more education has some value, but apparently not much. Reviewing the limited evidence on the issue, trivial benefits are uncovered.¹⁷⁹

When entry into a profession is limited by artificial barriers that benefit incumbents it is common to pose limited exceptions that still protect incumbents. Existing CPAs suggest working at a CPA firm while building up adequate hours.¹⁸⁰ This is a form of apprenticeship noted by Adam Smith in the quote above: make some would-be competitors work at a discount for

177. See H.R. 9065, 2005 Leg., Reg. Sess. (Fla. 2005) (recognizing that “in 1979, the [Florida Institute of CPAs] successfully supported legislation that, in 1983, enabled Florida to become the first major state to implement the 150-hour education requirement for CPA candidates”). However, would-be CPAs will not appear before the legislature. Special interest lobbying tends to go one direction. See Iskander De Bruycker, Joost Berkhout & Marcel Hanegraaff, *The Paradox of Collective Action: Linking Interest Aggregation and Interest Articulation in EU Legislative Lobbying*, 32 GOVERNANCE 295, 295–296 (2019) (citing MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 76, 81 (1965)) (explaining that “[t]he free-rider problem makes the organization of diffuse interests more difficult than the organization of concentrated interests”). The consumers of CPA services (or any other good subject to cartel restrictions) are unlikely to organize a lobby group because groups that benefit seem to organize, whereas groups that pay (i.e., consumers) do not. The benefits are concentrated, the costs are widely diffused. This is the essence of a part of public choice analysis pioneered by Nobel laureate James M. Buchanan and Gordon Tullock. See generally JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* (1962).

178. See Mintz et al., *supra* note 173. The New York CPA Association stated the additional 30 hours would enhance quality attributes of a CPA, such as “[t]he ability to think critically[,] [a] keen analytical sense; [e]ffective communication skills[,] . . . [and] [h]igh ethical standards.” *Id.* Now that the output of new CPA has become a problem to existing CPA firms, limited ways around the 150-hour rule are being explored. *Id.*

179. Some studies have discussed scattered evidence on the issue. See *id.* Others found no evidence of improved CPA quality. See Brian Meehan & E. Frank Stephenson, *Reducing a Barrier to Entry: The 120/150 CPA Licensing Rule*, 41 J. LAB. RES. 382, 384, (2020) (finding that that 150-hour requirement reduces the percentage of CPA candidates but has no measurable effect on exam pass rates or scores).

180. Mintz et al., *supra* note 173.

some time under the supervision of a qualified master.¹⁸¹ Firms sometimes hire would-be CPAs in lesser positions while they take coursework that the firms might pay for if there is satisfactory progress over some period of years.¹⁸² That is, limits to competition remain, and those wishing to join the CPA club must pay their dues. As in other cartelized industries, prices for services are higher than they would be in the absence of controls, thereby injuring the economy and imposing direct costs on the users of such services.

The costs of anticompetitive controls are numerous. Most obvious is that the price of cartelized services is higher than it would be otherwise. There is an income transfer from the buyers to the sellers. In some cartelized industries prices are much higher.¹⁸³ CPA incomes are likely higher on average than they would be in the absence of the 150-hour rule,¹⁸⁴ but how much is difficult to know. In 2008, the U.S. Department of the Treasury “called for Congress to pass a federal provision [allowing mobility] if state boards failed to (voluntar[il]y) adopt the mobility provisions” recommended by Treasury’s Advisory Committee on the Auditing Profession.¹⁸⁵ To help fend off that

181. No doubt even without the needless hours requirement, many new CPAs would work for existing CPAs. Established firms provide many benefits (as is true in law and other professions). See Hannah Pitstick, *Top Firms Dig Deeper to Retain Employees*, J. OF ACCT. (July 1, 2022), <https://www.journalofaccountancy.com/issues/2022/jul/top-firms-retain-employees/> [<https://perma.cc/ES98-TUZA>]. The new entrant works with experienced people and comes to understand many things about professional practice that are not learned in school, and unknown professionals find that hanging out one’s shingle may not bring in adequate business.

182. Mintz et al., *supra* note 173. The purpose to incumbents is to benefit from less costly employees, after all, and as the authors note, “research on the benefits of taking these [added 30-hours of] credits is inconclusive.” *Id.*

183. The sugar industry has long been subject to extensive controls in the United States, much to the benefit of a relatively small number of sugar growers. The controls are affected by tariffs and import limits so that the price of sugar has, for decades, been much higher than the world price. See Solin Grabow, *Candy-Coated Cartel: Time to Kill the U.S. Sugar Program*, CATO INST., Apr. 10, 2018, at 3–4.

184. This is difficult to measure as the impact occurs over time, but studies show that, in general, occupational licensing increases wages. See Morriss M. Kleiner & Evgeny Vorotnikov, *Analyzing Occupational Licensing Among the States*, 52 J. REG. ECON. 132, 133 (2017). For example, “the average increase in earnings due to licensing was approximately 11% nationally in 2013.” *Id.*

185. Stefano Cascino, Ane Tamayo & Felix Vetter, *Labor Market Effects of Spatial Licensing Requirements: Evidence from CPA Mobility*, 59 J. ACCT. RES. 111, 118 (2021).

threat, states have allowed easier CPA mobility.¹⁸⁶ The study reports an increase in mobility following the change and a 1.7% decline in pension plan audit fees.¹⁸⁷

The second cost of restrictions on output that causes prices to be higher is that fewer services are purchased due to the higher cost. That is, some would-be buyers of CPA services are deterred by the price, so they get by without the services, perhaps hiring non-CPAs to perform certain accounting services.¹⁸⁸ The sellers, licensed CPAs in this case, are aware of that effect, but the benefits of restriction on competition overcome the slight loss of business.¹⁸⁹

The third cost of restrictions on competition is the “deadweight loss” suffered by the economy from a reduction in beneficial transactions that would otherwise occur.¹⁹⁰ That is, the economy is smaller because of the loss of otherwise efficient, voluntary exchange. It is one reason why, on a larger scale, the most regulated economies tend to be smaller than those suffering under fewer inefficient regulations.¹⁹¹ Limiting the ability of capable would-be CPAs to engage their services wherever desired makes everyone a bit poorer. Such costs issues are common to any area in which labor entry is similarly restricted.¹⁹²

186. See Denise Dickins, Julia Higgs & Joseph Reid, *Understanding CPA Mobility: How to Abide by the Rules*, CPA J. (Feb. 2022), <https://www.cpajournal.com/2022/02/04/understanding-cpa-mobility/> [<https://perma.cc/5UWR-LWNN>].

187. See Cascino et al., *supra* note 185, at 147. The computations are complex, but the authors estimated that pension plan audit fees declined 2.2% for auditing done by local firms and found no evidence of a decline in the quality of work. *Id.*

188. That is one reason CPA firms hire less costly non-CPA accountants to do work. See William H. Sager, *Non-CPA Partners in CPA Firms*, THE NAT'L PUB. ACCT., Mar. 1, 1991, at 2.

189. This is a standard principles of economics issue. When monopoly restrictions on competition allow competitors to raise prices, the quantity purchased will decline and buyers will search for less costly options. See, e.g., ROGER LEROY MILLER, *ECONOMICS TODAY* 519, 533 (20th ed. 2021).

190. Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 WESTERN ECON. J. 224, 230–32 (1967).

191. Regulation breeds the opportunity for corruption. See Randall G. Holcombe & Christopher J. Boudreaux, *Regulation and Corruption*, 164 PUB. CHOICE 75, 81 (2015).

192. For an overview of the impact of occupational licensing, see Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPS. 189, 190–91 (2000). For example, when nurse practitioners have greater mobility, their wages rise and those of physicians fall. See Morris M. Kleiner, Allison Marier, Kyoung Won Park & Coady Wing, *Relaxing Occupational Licensing Requirements:*

B. Physicians

Cartels' exclusionary practices often injure the less powerful. For example, African Americans are underrepresented in medicine as in most professions that require lengthy, costly education.¹⁹³ Some causes of this problem are longstanding.¹⁹⁴ When higher education was largely segregated, there were few opportunities for African Americans.¹⁹⁵ African American communities created opportunities through Black medical colleges, just as they did earlier with historically Black colleges.¹⁹⁶

The medical establishment closed ranks against this threat. The *Flexner Report* on medical education, sponsored by the Carnegie Foundation, was issued in 1910.¹⁹⁷ The report advocated that only two Black medical colleges be allowed to continue in operation and recommended that thirteen be closed.¹⁹⁸ The

Analyzing Wages and Prices for Medical Services, 59 J.L. & ECON. 261, 261 (2016). When mobility rules are rigid, well-child visits are 3–16% more costly. *Id.*

193. See Jacqueline Howard, *Only 5.7% of US Doctors Are Black, and Experts Warn the Shortage Harms Public Health*, CNN (Feb. 21, 2023, at 7:01 ET), <https://www.cnn.com/2023/02/21/health/black-doctors-shortage-us> [<https://perma.cc/4YJF-KAZH>]. Only 2% of CPAs are African-American. Courtney Vien, *What We Can Do To Increase the Number of Black CPAs*, J. ACCT. (Apr. 12, 2021), <https://www.journalofaccountancy.com/podcast/increase-the-number-of-black-cpas.html> [<https://perma.cc/HG92-F2LB>].

194. See Howard, *supra* note 193 (“One reason why the percentage of US doctors who are Black remains far below that of the US population that is Black” derives from the fact that “Black people have been ‘historically excluded from medicine’” and the presence of “‘institutional and systemic racism in our society.’”).

195. See Benjamin E. Mays, *Segregation in Higher Education*, 10 PHYLON 401, 406 (1949). Benjamin E. Mays, a leading Black educator in the middle of the 20th century, provided an overview in this article. *Id.*

196. See *Historically Black Colleges and Universities*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=667> [<https://perma.cc/4YLD-GHBV>] (last visited Mar. 9, 2026); *HBCU Medical Schools: A Legacy of Success*, ROBERT F. SMITH (July 11, 2023), <https://robertsmith.com/blog/hbcu-medical-schools/> [<https://perma.cc/R9VB-YA3C>].

197. ABRAHAM FLEXNER, *MEDICAL EDUCATION IN THE UNITED STATES AND CANADA: A REPORT TO THE CARNEGIE FOUNDATION FOR THE ADVANCEMENT OF TEACHING* (1910).

198. *Id.* at 180–81. Had they continued operation, thousands more black physicians would have been trained and more care offered for African-Americans. See Kendall M. Campbell, Irma Corral, Jhojana L. Infante Linares & Dmitry Tumin, *Projecting Estimates of African American Medical Graduates of Closed Historically Black Medical Schools*, JAMA NETWORK OPEN, Aug. 20, 2020, at 1, 3, 6 (“13 historically Black medical schools [] are now closed.”). A few white schools were also closed. See *id.* at 6. See generally Elizabeth Hlavinka, *Racial Bias in Flexner Report Permeates Medical Education Today*, MEDPAGE TODAY (June 18, 2020), <https://www.medpagetoday.com/publichealthpolicy/medicaleducation/87171> [<https://perma.cc/TQ4Q-2SXZ>] (noting

primary advocates of a tightening of conditions on entry into the medical profession (i.e., new competitors) were existing physicians via the American Medical Association.¹⁹⁹ The report's connection with efforts to protect physicians can be seen from the author's lack of medical credentials: Flexner was not a physician or otherwise qualified to critique medical education.²⁰⁰ Despite this, his report was instrumental in obtaining certification authority for the AMA to set licensure rules for physicians.²⁰¹ The number of all medical colleges dropped from 162 in 1906 to 69 by 1944.²⁰² It is hard to avoid the conclusion that racism played a role in the forced closure of 71% of Black medical colleges.²⁰³ The Flexner Report argued that the crack-down was to protect the public from incompetent physicians, but, as the system has evolved, once a physician is granted a license to practice by graduating from an AMA-approved college, it is rare to lose a license for incompetence.²⁰⁴

Once medical education was standardized, it was straightforward to further raise barriers to entry.²⁰⁵ Unlike would-be

that due to the Flexner report's publishing, only 66 of 150 medical schools remained open, 2 of those schools being predominantly black, and the other 64 presumably white).

199. Kessel, *A.M.A.*, *supra* note 157, at 268.

200. Given Flexner's lack of science expertise (he had run a profitable preparatory school in Louisville), he would unlikely have been qualified to be an expert witness regarding medical education. *Id.* at 269. The AMA's Council on Medical Education provided Flexner its evaluations of medical schools. *Id.* at 268. Johns Hopkins was the model to be followed. *Id.* Many schools were forced to be closed, but disproportionately more black schools. Hlavinka, *supra* note 198.

201. Kessel, *A.M.A.*, *supra* note 157, at 268.

202. Reuben A. Kessel, *Price Discrimination in Medicine*, 1 J. LAW & ECON. 20, 28 (1958) [hereinafter Kessel, *Price Discrimination*]. The result was a small increase in medical school enrollment from 1910 to when Kessel was writing; despite the rising population and increases in wealth. *Id.* The interests of the AMA were served.

203. See Kessel, *A.M.A.*, *supra* note 157, at 270 (noting the number of black medical schools falling from seven to two). And black doctors should only be allowed to have black patients. *Id.* at 270. Kessel notes that medical opportunities for women and Jews were also more restricted. *Id.* at 270–71. More Americas began to study for medicine outside of the country. *Id.* at 272.

204. See Hlavinka, *supra* note 198. Restricted entry into the medical profession means higher average wages than would be earned in a more competitive market. Keith B. Leffler, *Physician Licensure: Competition and Monopoly in American Medicine*, 21 J. LAW & ECON. 165, 165 (1978). Various estimates of higher incomes due to the restrictions were reviewed in this journal. *Id.* at 184–85.

205. See Kessel, *A.M.A.*, *supra* note 157, at 274.

CPAs, who must pass a difficult national exam regardless of degree status, physicians need not pass standardized exams to demonstrate knowledge when graduating from medical school; usually they are automatically licensed to practice in the state in which they obtained their degree.²⁰⁶ However, most physicians obtain specialty certification by doing post-graduate work to become qualified to take board examinations in a specialized field.²⁰⁷ This means that to be a physician requires an undergraduate degree, four years of medical school, and more years in residencies for specialization.²⁰⁸ It is a costly process in time, lost wages, and economic cost.²⁰⁹ As with CPAs, who must take 150 hours of coursework, most of which need not be related to accounting, would-be physicians must have a 120-hour college degree, much of which has nothing to do with medicine, before going to medical school.²¹⁰ The lengthy completion time is

206. *Compare How to Become a CPA*, BECKER, <https://www.becker.com/cpa-review/how-to-become-a-cpa> [<https://perma.cc/EW6U-M5K2>] (last visited Mar. 2026) (advising that, to become a CPA, students must have a Bachelor's degree and "[p]ass all four sections of the CPA Exam"), with Kessel, *A.M.A.*, *supra* note 157 , at 275 ("There is no re-examination procedure for doctors. Once a doctor wins a license to practice, it is almost never revoked unless he is convicted of law-breaking."). That is, the AMA's rules concern inputs requirements to costly education rather than output tests of knowledge. Kessel, *A.M.A.*, *supra* note 157 , at 274. Since the time when Kessel, Leffler, and others were writing about anti-competitive restrictions in the production of medical degrees, some rules have changed. Requirements are set at the state level. Mobility is limited as states can require exams to be taken by physicians who did not obtain their medical degree in-state. See *Navigating State Medical Licensure*, AMA (Feb. 2, 2023), <https://www.ama-assn.org/medical-residents/transition-resident-attending/navigating-state-medical-licensure> [<https://perma.cc/M8FL-S62M>].

207. *About Physician Licensure*, FED'N OF STATE MED. BDS., <https://www.fsmb.org/u.s.-medical-regulatory-trends-and-actions/guide-to-medical-regulation-in-the-united-states/about-physician-licensure/> [<https://perma.cc/WKC7-GNTS>] (last visited Mar. 9, 2026).

208. Rebekah Bernard, *Match Day 2023 a Reminder of the Real Cause of the Physician Shortage: Not Enough Residency Positions*, MED. ECON. (Mar. 15, 2023), <https://www.medicaleconomics.com/view/match-day-2023-a-reminder-of-the-real-cause-of-the-physician-shortage-not-enough-residency-positions> [<https://perma.cc/757L-T2ZP>]. In general, medical school graduates must do one to three years of residency work. *Id.*; see also, Keren Landman, *Why Well-Qualified Medical School Graduates Can't Get Jobs — Despite Doctor Shortages*, VOX (Mar. 25, 2022, at 14:00 ET), <https://www.vox.com/22989930/residency-match-day-physician-doctor-shortage-pandemic-medical-school> [<https://perma.cc/ADK5-UQ2A>] (noting that the AMA has worked behind the scenes to limit medical school output).

209. See TJ Porter, *How Much Does It Cost to Become a Doctor?*, THE WHITE COAT INV. (Oct. 12, 2023), <https://www.whitecoatinvestor.com/average-cost-to-become-a-doctor/> [<https://perma.cc/H47D-TG3W>].

210. *Compare* Wintermute & Scholl, *supra* note 167 (stating that CPAs must complete 150 credit hours, with some states requiring a "concentration in accounting"), with Dmitry Zavlin,

largely peculiar to the United States.²¹¹ For example, in Germany, medical training is usually six years, not eight.²¹² Hence, AMA rules usually impose a higher educational cost on would-be physicians than is true in other countries. Such costs help deter entry into the profession. Anti-competitive behavior is cloaked in the guise of protecting the public.

One consequence of restrictions on the provision of medical services is illustrated by restrictions imposed on nurse practitioners (NPs) who are regulated, as are nurses, at the state level.²¹³ NPs usually need a formal “supervisory relationship with an MD in certain types of practice environments.”²¹⁴ A study of well-child visits, which are commonly performed by physicians and NPs, finds that where there are fewer restrictions on NPs, the competition is stronger as MD incomes fall by about 3%.²¹⁵ When NPs have a greater scope of practice,

Kevin T. Jubbal, Jonas G. Noé & Bernd Gansbacher, *A Comparison of Medical Education in Germany and the United States: From Applying to Medical School to the Beginnings of Residency*, 15 GER. MED. SCI. 1, 1, 3 (2017) (describing US undergraduate degree requirements and contrasting with German direct to medical training model).

211. Bridget C. O’Brien, Kirsty Forrest, Marjo Wijnen-Meijer & Olle ten Cate, *A Global View of Structures and Trends in Medical Education*, in UNDERSTANDING MEDICAL EDUCATION: EVIDENCE, THEORY, AND PRACTICE 7, 9 (Tim Swanwick, Kirsty Forrest & Bridget C. O’Brien eds., 3d ed. 2019) (comparing medical education requirements by country).

212. Zavlin et al., *supra* note 210, at 3. The same is true in Spain. See, e.g., *Study Medicine in Spain*, ERUDERA, <https://erudera.com/medicine/spain/> [<https://perma.cc/JW85-5733>] (last visited Mar. 2, 2026). Note also how low the tuition is there compared to tuitions in the United States. *Id.* Tuitions are higher in the UK, but the time required is shorter than in the United States. See, e.g., *Medicine Degrees*, STUDYIN, <https://www.studyin-uk.com/popular-courses/medicine/> [<https://perma.cc/SPY2-29N9>] (last visited Mar. 2, 2026). Medical degrees in Canada are similar to the UK. See Tess Campbell, *Comparing Medical Schools in Canada, the US, UK, and Caribbean: Which Option Is Best for You?*, SCHOOLFINDER (Oct. 12, 2023), <https://www.schoolfinder.com/Discover/Article/1/6579/Comparing-Medical-Schools-in-Canada,-the-US,-UK,-and-Caribbean-Which-Option-is-Best-for-You?> [<https://perma.cc/QS2S-LZC7>].

213. See *supra* notes 190–92 and discussion.

214. See Kleiner et al., *supra* note 192, at 264. The rules vary across states, so NPs who work in Illinois and Missouri, report on certain things that require MD approval in one state but not the other. *Id.* Restrictions on the ability to issue prescriptions are common and vary across states. See *id.*

215. *Id.* at 274. That is, presumably, the result of greater competition in the provision of medical services.

the price of well-child visits falls “by 3-16 percent.”²¹⁶ Competition matters.²¹⁷

C. Attorneys

In the nineteenth century going to law school was uncommon.²¹⁸ Most prospective lawyers, such as Abraham Lincoln, “read[] for the law.”²¹⁹ Many would-be attorneys worked under the supervision of an attorney who was a member of the bar.²²⁰ In the late nineteenth century, more would-be lawyers attended law school, but often only for a year or two.²²¹ Formal rules by state bar associations regarding school requirements and/or clerkship status prior to taking the bar examination evolved going into the twentieth century.²²² As Professor Samuel Estreicher explains, the New York bar gradually tightened the rules, increasing the number of years and/or clerkship time required; Franklin Roosevelt and Benjamin Cardozo took two years of law school before sitting for the bar.²²³ In 1911, the New York Court of Appeals decreed that college graduates must take three years of law school but did not need an internship in a law office.²²⁴ The rationale for

216. *Id.* at 286. Lower prices mean greater access to medical care and, as there is no increase in malpractice insurance rates where NPs have greater scope of practice, it is difficult to argue that patients obtain lower quality of care. *See id.* at 263. Similar educational rules and restrictions on practice are imposed on occupational therapists and physical therapists. *See* Jing Cai & Morris M. Kleiner, *The Labor Market Consequences of Regulating Similar Occupations: The Licensing of Occupational and Physical Therapists*, 41 J. LAB. RES. 352, 355 (2020).

217. Much of the same story can be told for dental education. *See* Peter C. Carstensen, *The Incoherent Justification for Naked Restraints of Competition: What the Dental Self-Regulation Cases Tell Us About the Cavities in Antitrust Law*, 51 LOY. U. CHI. L.J. 679, 681 (2020).

218. *See* Samuel Estreicher, *The Roosevelt-Cardozo Way: The Case for Bar Eligibility After Two Years of Law School*, 15 NYU J. LEGIS. & PUB. POL’Y. 599, 600 (2012).

219. *Id.*

220. *See* Mark E. Steiner, *Abraham Lincoln and the Rule of Law Books*, 93 MARQ. L. REV. 1283, 1296 (2010). Lincoln did not apprentice under a practicing attorney, as was common before the 20th century. *Id.* In 1850, only 400 students were in law schools. *Id.* Most read for the law and worked as apprentices who studied under the direction of a practicing lawyer. *Id.* Apprenticeships apparently were not always valuable. *See id.*

221. Estreicher, *supra* note 218, at 601.

222. *Id.* at 600.

223. *Id.* at 601.

224. *Id.*

the longer course requirement was “for the betterment of conditions at the Bar and are intended to raise the standards of intelligence and moral thereat.”²²⁵

Estreicher notes that it has long been known that the three-year rule, the norm for a century now across the states, is excessive.²²⁶ More than fifty years ago the presidents of Harvard and Chicago, both lawyers, and the law dean at Stanford, agreed that two years of law school was adequate.²²⁷ There was a serious effort in the 1970s to allow a two-year option, supported by Chief Justice Burger and the ABA president, but opposition was strong both from law schools and the bar, so there was no change.²²⁸ Estreicher highlights critiques of the three-year law school rule and, like many others who are critical of the costly three-year requirement, advocates a two-year option for those willing to risk the bar exam at that point.²²⁹

Like other professions with costly entry requirements, minorities with less than average income are not well represented.²³⁰ Despite 13.4% of the population being African American, only 5% of lawyers are; the situation is worse for Hispanics, who comprise 18.5% of the population but are only

225. *Id.* at 602. The rules in New York have changed little since then. See NY STATE BOARD OF LAW EXAMINERS, SUMMARY OF ELIGIBILITY REQUIREMENTS FOR FOREIGN-EDUCATED APPLICANTS TO THE NEW YORK BAR EXAMINATION 4 (2025), https://www.nybarexam.org/Foreign/NY%20Bar%20Exam%20Foreign%20Legal%20Education%20Handbook_10.30.2025.pdf [https://perma.cc/7URH-YKMP]. Approved law school students must take at least eighty-three hours of coursework, and no more than thirty of those hours may be in clinical classes or in external positions. *Id.* The bar accreditors went after night and part-time schools, “a confusing mixture of public interest, economic opportunism, and ethnic prejudice.” ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S 101 (1983).

226. Estreicher, *supra* note 218, at 603–04.

227. *Id.* Edward Levi, a lawyer and president of the University of Chicago, noted that the three-year requirement came from “cartelized rules of association and accreditation.” Edward Hirsch Levi, *The Place of Professional Education in the Life of the University*, 32 OHIO ST. L.J. 229, 238 (1972).

228. Estreicher, *supra* note 218, at 604–05.

229. *Id.* at 607. He advocates allowing one to sit for the bar after two years of law school to demonstrate adequate knowledge. *Id.* at 599.

230. See PATRICK McLAUGHLIN, MATTHEW D. MITCHELL & ANNE PHILPOT, THE EFFECTS OF OCCUPATIONAL LICENSURE ON COMPETITION, CONSUMERS, AND THE WORKPLACE 7 (2017) <https://www.mercatus.org/research/public-interest-comments/effects-occupational-licensure-competition-consumers-and> [https://perma.cc/524Y-67WW].

5% of lawyers, as of 2020.²³¹ The Department of Justice filed a civil antitrust suit against the ABA in 1995, alleging that the accreditation process restrained competition.²³²

D. Labor Monopolization through Education Cartelization

In the least regulated areas of employment, increased entry of new workers tends to suppress wages.²³³ That, of course, is why existing workers have incentives to band together to limit entry. In the classic cartel, competitors agree to restrict output to achieve higher prices and profits.²³⁴ To achieve cartel-like benefits, workers need restrictions on competition.²³⁵ Because there are usually large numbers of workers, whether employees or independent professionals, monitoring individual actions is nearly impossible, and likely ineffective, making an enforcement mechanism necessary.²³⁶ In professions, such as accounting, doctoring and lawyering, the benefits of a cartel are often affected by professional organizations (e.g., AICPA, AMA and

231. *Lawyers by Race & Ethnicity*, A.B.A., https://www.americanbar.org/groups/young_lawyers/about/initiatives/men-of-color/lawyer-demographics/ [<https://perma.cc/X2G6-G6JC>] (last visited Mar. 12, 2026). Blatantly racist restrictions on college and professional school entry were the norm a century ago, but they have eroded and might no longer be presumed to be a major cause of the low representation; affirmative action programs for some time have encouraged admission to many programs. See George B. Shepherd, *No African-American Lawyers Allowed: The Inefficient Racism of the ABA's Accreditation of Law Schools*, 53 J. LEGAL EDUC. 103, 103–04 (2003). We do not address such efforts but focus on anticompetitive rules, as in the professions just reviewed, that make education more costly to all wishing to have a chance at the higher income that generally accompanies advanced education.

232. See Areen, *supra* note 84, at 1487.

233. In markets where undocumented immigrants can be employed, incumbent documented workers suffer losses from the increased competition. See Christoph Albert, *The Labor Market Impact of Immigration: Job Creating versus Job Competition*, AM. ECON. J.: MACROECONOMICS, Jan. 2021, at 36.

234. For an overview, see Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LITERATURE 43, 79–81 (2006).

235. See *id.* at 79.

236. See generally James B. Bailey & Diana W. Thomas, *Regulating Away Competition: The Effect of Regulation on Entrepreneurship and Employment*, 52 J. REGUL. ECON. 237, 247 (2017) (“[R]egulation has a negative effect on new firm creation and employment growth for all firms in an industry.”). A large number of workers can band together in a union to obtain cartel-like benefits. See *id.* For a standard overview, see Morgan O. Reynolds, *Labor Unions*, ECONLIB, <https://www.econlib.org/library/Enc/LaborUnions.html> [<https://perma.cc/97FP-YCT9>] (last visited Mar. 11, 2026).

ABA) which obtain legal enforcement at the state level.²³⁷ Labor unions also can play that role, especially for government employees, as ever fewer private sector employees are union members.²³⁸ Unions have special exemptions from antitrust prosecution,²³⁹ so we will not consider their impact. We focus on professional associations and the impact of the accreditation of colleges. As reviewed above, professional organizations, when empowered by state legislatures, limit entry into professions by imposing educational requirements that are generally understood to be excessive.²⁴⁰ Such costs deter entry into professions.²⁴¹ Those special interests happen to be consistent with the interests of colleges that wish to attract students who are required to pay for more college than is often needed.

Special interests join together, sometimes in ways not planned or coordinated, to obtain legal cover for exploitation of market outcomes.²⁴² In higher education, colleges are the special interests that have incentives to bring in greater revenue by selling degrees that may require more coursework than is needed;²⁴³ those incentives are aligned with specific special interests advocated by professional organizations that can impose lengthy college degree requirements.²⁴⁴ However, colleges earn

237. See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1107–09 (2014) (arguing that state licensing boards, made up of members of professions, regulate and exclude competition).

238. About a third of government workers are union members, but only about six percent of private-sector workers are. See U.S. DEP'T OF LAB., BUREAU OF LAB. STAT., UNION MEMBERS—2024, at 1 (2025) <https://www.bls.gov/news.release/pdf/union2.pdf>, [<https://perma.cc/4RJX-QRXV>].

239. “The purposes of the antitrust and labor laws conflict. Whereas the antitrust laws promote competition, the labor laws encourage collective action. Whereas antitrust laws seek to prevent combinations of competitors, the labor laws encourage competing workers to combine to seek common goals.” Randall Marks, *Labor and Antitrust: Striking a Balance without Balancing*, 35 AM. U.L. REV. 699, 700 (1986). Marks reviews the protections provided by the Clayton Act and National Labor Relations Act. *Id.* at 701–02.

240. See discussion *supra* Sections III.A–C.

241. See MCLAUGHLIN ET AL., *supra* note 230, at 4.

242. Even opponents may join to seek government protection they desire. The classic example and exposition of the theory comes from Bruce Yandle, *Bootleggers and Baptists: The Education of a Regulatory Economist*, AEI J. GOV'T & SOC'Y 12, 15 (1983).

243. See discussion *supra* Part IV.

244. The special interest theory of regulation is generally credited to begin with George Stigler, a Nobel laureate, for his foundational work on special interests and the regulatory

limited increases in revenues from law, accounting, medicine, and other controlled professions, as those programs are a small part of enrollment.²⁴⁵ Much more important in scope of market exploitation by colleges are the cartel-like benefits that arise from accreditation directed by the Department of Education.

IV. DE-CARTELIZING HIGHER EDUCATION

The federal government could take a major step toward decartelizing higher education by scrapping the provisions in federal statutes that require accreditation by a federally approved accrediting agency.²⁴⁶ If it does not, however, we suggest a public interest group represent some students in a lawsuit against the accrediting agencies in antitrust, based on a consumer (college student) welfare standard.²⁴⁷ Just as consumers should be able to buy untainted burgers, but not be required to buy a Happy Meal, college students should be protected from fraud but free to buy degrees that require less than 120 hours.²⁴⁸ Bad or careless operators selling tainted meat should be punished or put out of business, but burger sellers should be free to experiment with their menus; so too should colleges be free to determine the necessary length of baccalaureate programs.²⁴⁹ They should not be in a lockstep 120-hour cartel requirement,

process. See George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGMT. SCI. 3, 3 (1971); see also George J. Stigler, NOBEL PRIZE, <https://www.nobelprize.org/prizes/economic-sciences/1982/stigler/facts/> [<https://perma.cc/ZC4X-G5X6>] (last visited Mar. 12, 2026) (showing that George Stigler won the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel in 1982).

245. While 22.2% of Americans over the age of 18 have a bachelor's degree, only 3.3% have a doctorate or professional degree. Melanie Hanson, *Education Attainment Statistics*, EDUC. DATA INITIATIVE, <https://educationdata.org/education-attainment-statistics#> [<https://perma.cc/VQE8-T7LC>] (last updated Jan. 14, 2025).

246. See Higher Education Act of 1965, 20 U.S.C. § 1001 (2025).

247. Working with the accrediting agencies, the U.S. Department of Education is coordinating a "contract, combination . . . or conspiracy, in restraint of trade." 15 U.S.C. § 1.

248. See Nicolas Costa, *The Deadweight Loss of College General Education Requirements*, MICH. J. ECON. (Apr. 19, 2022), <https://sites.lsa.umich.edu/mje/2022/04/19/the-deadweight-loss-of-college-general-education-requirements/> [<https://perma.cc/3EUA-PP23>].

249. See *id.*

whether a degree is in art or physics at any college.²⁵⁰ In 1979, Troutt wrote that accreditation standards had a “frail empirical basis,” and they have not gotten any stronger in the ensuing decades.²⁵¹

Going after the economic waste in the higher education market (and, thereby, the labor market) that arises from the cartel structure created by accreditors under the protection of the Department of Education would be consistent with the view of former FTC Chair Timothy Muris that antitrust laws can be used to attack public restraints that serve to cartelize markets.²⁵² Muris explains that FTC competition policy should

1. “play an active role in promoting competition as a basic principle of economic organization through strong enforcement and focused advocacy;
2. focus antitrust enforcement resources on conduct that poses the greatest threat to consumer welfare;
3. make full use of the agency’s distinctive institutional capabilities by applying the entire range of policy instruments to solve competition policy problems; and

250. While our focus is on college accreditation, the same antitrust assault should be made on accreditors of individual programs, such as for would-be CPAs, MDs, and lawyers as discussed earlier. *See supra* Part III.

251. Troutt, *supra* note 18, at 209.

252. Muris explains how the best of all worlds for private firms is to obtain public protection for anticompetitive activities. Timothy J. Muris, Chairman, Fed. Trade Comm’n, Remarks at the Fordham Annual Conference on International Antitrust Law & Policy: State Intervention/State Action – A U.S. Perspective 2 (Oct. 24, 2023), <https://www.ftc.gov/news-events/news/speeches/state-interventionstate-action-us-perspective> [<https://perma.cc/UPD7-EEWG>] (“If you create a system in which private price fixing results in a jail sentence, but accomplishing the same objective through government regulation is always legal, you have not completely addressed the competitive problem. You have simply dictated the form that it will take.”).

4. attach a high priority to improving the institutions and processes by which antitrust policy is formulated and applied.”²⁵³

He notes that the traditional focus of antitrust enforcement has been on restraints in the private sector; restraints in the public sector have not been addressed much.²⁵⁴ Hence, it is important to devote “substantial resources to opposing public restraints.”²⁵⁵

When cartels are legal explicitly or implicitly, as has been the case with the Happy Meal college cartel, they are more likely to succeed.²⁵⁶ Even when cartels are not legal, they may prosper.²⁵⁷ “A cartel can survive by policing the members’ behavior, and threatening believable and punitive retaliation against cheating.”²⁵⁸ Accrediting associations should not be prohibited, but they should not be allowed to impose conditions, such as the 120-hour rule, that imposes a Happy Meal on every student.²⁵⁹ Some just want a burger.

If colleges wish to voluntarily join accrediting associations because they serve as a quality signal, that is fine.²⁶⁰ If a college

253. *Id.* at 1 (citing Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2003 COLUM. BUS. L. REV. 359, 363 (2003)).

254. *Id.* at 1–2.

255. *Id.* at 2. He explains that it has been common for private interests to use public restraints, as it often provides a successful shield against antitrust action. *See id.* at 3.

256. *See* Andrew R. Dick, *When Are Cartels Stable Contracts?*, 39 J.L. & ECON. 241, 244–45 (1996). For a summary of the economics literature, see generally Margaret C. Levenstein & Valerie Y. Suslow, *What Determines Cartel Success?*, 44 J. ECON. LIT. 43 (2006) (discussing factors that are indicative of cartel success).

257. *See id.*

258. Daniel Orr & Paul W. MacAvoy, *Price Strategies to Promote Cartel Stability*, 32 ECONOMICA 186, 186 (1965).

259. *See* S. ASS’N OF COLL. & SCH. COMM’N ON COLL., *supra* note 78, at 21.

260. The State of Florida sued the U.S. Department of Education in 2023 for allowing higher education to be cartelized through accrediting entities, such as the Southern Association of Colleges and Schools Commission (SACS), which accredits colleges in Florida and other southern states. Complaint for Declaratory and Injunctive Relief at 38, *Florida v. Cardona*, 752 F. Supp. 3d 1320 (S.D. Fla. 2024) (No. 0:23-cv-61188). Florida argued that such accreditation, required of colleges for their students to be eligible for federal loan money and for colleges to receive various federal funds, violates the private non-delegation doctrine, the appointments clause, and the spending clause of the U.S. Constitution. *Id.* at 5–6. A federal trial court dismissed the case in October 2024, rejecting those claims. *Florida v. Cardona*, 752 F. Supp. 3d 1320, 1345 (S.D. Fla. 2024). Our argument is for a different approach. We suggest that the Department of Justice or

wishes to request to join an accreditor that requires the equivalent of Happy Meals—all undergraduate degrees are 120 hours—that is fine. As it is, the Department of Education opposes allowing colleges to pick accrediting associations, claiming that competition will lead to a “race to the bottom.”²⁶¹ Every college must produce 120-hour degrees.²⁶² This bogus argument can be applied to food, clothing, transportation, housing, medical services, and so forth. Where else are consumers—in this case mostly young adults looking to invest in knowledge that will assist in career preparation—under the thumb of a national cartel controlling what kind of clothing is worn, what kind of vehicle must be used for transportation, how large a house must be, how much medical care must be purchased, etc.? As Marshall and Marx note, “Without rivalry, buyers have little defense against the informational advantage of sellers. Buyers need rivalry, as expressed through competitive processes, to protect themselves against sellers who are informationally advantaged.”²⁶³

If our proposals are enacted, colleges will compete more than they do now and, critically, will have incentives to provide evidence to their clients that the education has beneficial outcomes, rather than focus on inputs in the process as currently dictated.²⁶⁴ Collusion “subverts the use of competitive processes to police the marketplace.”²⁶⁵ We cannot predict precisely what will emerge. When airline deregulation was kicked off in the Carter administration, no one was sure less costly travel would

FTC should sue SACS, and other accrediting associations for cartelizing higher education in violation of the antitrust statutes by injuring consumers of college education. *See id.* at 1343. There is also huge damage to the taxpayers who have borne the cost of the trillion-dollar-plus college loan forgiveness, as well as provided large subsidies to state universities, but we focus on college students. *See Watson, supra* note 101, at 975–77.

261. *See* Antoinette Flores, *Postsecondary Accreditation Cannot Become a Race to the Bottom*, U.S. DEPT. OF EDUC. (July 20, 2022), <https://www.proquest.com/wire-feeds/education-dept-postsecondary-accreditation-cannot/docview/2691785122/se-2> [<https://perma.cc/FK28-DR3Z>].

262. *See* S. ASS’N OF COLL. & SCH., COMM’N ON COLL., *supra* note 78, at 21.

263. *See* Marshall & Marx, *supra* note 75, at 84.

264. Marshall and Marx note that collusion can involve “decreasing the quantity, quality, or some other attribute” of a good. *Id.* at 86 (citations omitted).

265. *Id.* at 87.

greatly expand—some existing airlines could not compete, new ones were created and prices came down.²⁶⁶ When the AT&T monopoly over telephone services was ended, no one could predict with precision that prices of long-distance calls would crash and a wave of new mobile technology would emerge.²⁶⁷ When competition is allowed, new technology and products will emerge as innovators will not be prevented from trying to compete.²⁶⁸

In the college market, we suspect the elite colleges would remain much as they are now. They serve a small number of clients who can afford the time costs of traditional degrees.²⁶⁹ Their primary market is graduate education and research.²⁷⁰ Some colleges will be largely residential centers for young adults going through the half-way house to adult life, enjoying Greek life, parties and football games, while dabbling in a bit of education. But some students will likely opt for more focused coursework that allows them to demonstrate to employers that they have certain skills desired by employers. There would be an increased focus on educational outcomes, not inputs. Will there be college shills peddling nonsense degrees? Of course, but we are not far from that now with many accredited colleges going through the motions—we pretend to teach; you pretend

266. See WILLIAMS, *supra* note 126, at 38–40.

267. See Eli M. Noam, *Assessing the Impacts of Divestiture and Deregulation in Telecommunications*, 59 S. ECON. ASS'N J. 438, 439–40 (1993).

268. Marshall & Marx, *supra* note 75, at 84.

269. “[S]tudents from families in the top 1 percent of earners were 77 times more likely to attend an Ivy League-level school than students from families making \$30,000 a year or less. Many elite schools draw more students from the top 1 percent than the bottom 60.” David Brooks, *How The Ivy League Broke America*, THE ATLANTIC (Dec. 13, 2024, at 12:00 ET), <https://www.theatlantic.com/magazine/archive/2024/12/meritocracy-college-admissions-social-economic-segregation/680392/> [https://perma.cc/2Q5Z-UQ89].

270. Harvard’s budget was \$6.4 billion in 2024, and its endowment is about \$53 billion. Jonathan Shaw & John S. Rosenberg, *Harvard’s Finances in a Challenging Year*, HARV. MAGAZINE (Oct. 17, 2024), <https://www.harvardmagazine.com/university-news/financial-report-fiscal-2024> [https://perma.cc/VZ82-HXJ7]. It now charges no tuition for students from families with incomes under \$200,000, which could benefit about 86% of U.S. households. Tom Jones & Millie Giles, *Harvard Is Cutting Tuition Fees for a Lot of Students as Federal Funding Questions Loom*, SHERWOOD NEWS (Apr. 11, 2025, at 9:33 ET), <https://sherwood.news/culture/harvard-is-cutting-tuition-fees-for-a-lot-of-students-as-federal-funding/> [https://perma.cc/4SNL-RC5Q].

to learn—as they crank out degrees of low value for students using loan money they hope will be forgiven.

Shortly before leaving office as Secretary of Health, Education and Welfare in the Carter Administration, HEW Secretary Joseph Califano recommended in testimony before Congress that federal oversight of college accreditation be scrapped.²⁷¹ Califano said that the accreditation process “misleads students and their parents into believing that the Federal government vouches for the quality” of a college.²⁷² No such thing happened, of course, and, decades later, the costs of protecting the financial interests of existing colleges grows ever more costly to society. As former FTC Chair Muris notes, “[p]ublic restraints harm consumer welfare just as much as private restraints, and the harmful effects of public restraints often last much longer.”²⁷³ Unleashing the forces of competition on higher education is a straightforward way to improve a \$700 billion-a-year industry that touches the lives of millions of Americans. Applying the same rules to this industry as others is both fair and efficient. Marshall and Marx’s survey of collusion opened by expressing their professional appreciation for successful cartels: “The successful suppression of competition is a thing of economic beauty.”²⁷⁴ Higher education has long insulated itself from competition.²⁷⁵ It is time to relegate such complex anti-competitive behavior to textbooks and focus on improving the lives of the millions of students in America’s colleges.

CONCLUSION

The accreditation system in American higher education operates as a government-sanctioned cartel that imposes substantial costs on students and society. Through the enforcement of requirements such as the 120-credit hour rule for baccalaureate degrees, accreditors function as coordinating mechanisms that

271. Orlans, *The End of a Monopoly*, *supra* note 109, at 32.

272. *Id.*

273. Muris, *supra* note 252, at 4.

274. Marshall & Marx, *supra* note 75, at ix.

275. *See* Muris, *supra* note 252, at 4.

prevent competition, restrict innovation, and maintain artificially high costs across the \$700 billion higher education industry.²⁷⁶ This cartelization extends beyond colleges themselves to professional certifications, where organizations like the AICPA, AMA, and ABA leverage accreditation requirements to restrict entry into their professions through excessive educational mandates.²⁷⁷

The economic harm from this system is threefold. First, students pay inflated prices for degrees that could be delivered more efficiently—the equivalent of being forced to buy a “Happy Meal” when they only want a burger.²⁷⁸ Second, artificial barriers deter capable individuals from entering professions, reducing the supply of services and raising prices for consumers. Third, the economy suffers deadweight losses from transactions that never occur due to these restrictions. The human cost is equally significant: minorities and lower-income individuals face disproportionate barriers to professional careers, while millions of students accumulate debt for degrees with negative returns on investment.²⁷⁹

Reform requires treating higher education like any other industry.²⁸⁰ The Department of Education should eliminate requirements that colleges be accredited by federally-approved agencies to participate in federal programs. If legislative action proves unlikely, the FTC or Department of Justice should pursue antitrust actions against accrediting agencies for restraining trade and harming consumer welfare.²⁸¹ Individual states should also reconsider their reliance on accreditation for authorizing degree-granting institutions.

Competition would not lead to a “race to the bottom” as defenders claim—no more than competition in medicine, technology, or other industries has done so.²⁸² Elite institutions

276. See POSTSECONDARY EXPENSES, *supra* note 1, at 1.

277. See Pfnister, *supra* note 19, at 229.

278. See Costa, *supra* note 248.

279. See MCLAUGHLIN ET AL., *supra* note 230, at 7.

280. *Id.* 2–4.

281. *Id.* 30–31.

282. See Flores, *supra* note 261.

would likely maintain their traditional approaches, serving students who value prestige and can afford extended education. But innovation would flourish elsewhere as colleges might offer accelerated programs for motivated students, others might focus on demonstrable skills rather than seat time, and new models we cannot yet imagine would emerge.²⁸³ The key change would be a shift from measuring inputs (credit hours) to outputs (actual learning and career readiness).²⁸⁴

Breaking the accreditation cartel will face fierce resistance from incumbent institutions and professional organizations that benefit from restricted competition. But the stakes are too high to maintain the status quo. Americans hold massive student debt, much of it for credentials that fail to deliver promised returns. Applying basic principles of competition law to higher education is not radical—it is simply holding this industry to the same standards we apply everywhere else.²⁸⁵ The “economic beauty” of successful cartelization that Marshall and Marx describe may impress economists studying market manipulation, but it represents an ugly reality for millions of Americans whose educational opportunities and career prospects are needlessly constrained.²⁸⁶ It is time to end higher education’s exemption from the competitive forces that drive innovation and efficiency throughout the economy.

283. This has led to unexpected benefits in other industries. *See, e.g., WILLIAMS, supra* note 126, at 38–40 (citing airlines as an example); Noam, *supra* note 267, at 439 (citing the telephone as an example).

284. *See* Troutt, *supra* note 18, at 206–08.

285. *See supra* notes 4–10 and accompanying text.

286. *See* Marshall & Marx, *supra* note 75, at ix.