

Better Information for Better Regulation: How Experimentalism Can Improve the Gainful Employment Rule

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In June 2011, the Department of Education (the Department) promulgated a gainful employment rule, seeking to deny Title IV federal student aid to for-profit education programs whose students struggled to repay loans. The Department wanted to rein in the for-profit higher education industry, which depends heavily on its students' ability to apply for federal funding. In June 2012, a federal court struck down the entire rule on the basis that one of its penalty thresholds was arbitrary and capricious. The regulatory landscape in the case of gainful employment is complex and presents many uncertainties. As such, the current command-and-control model of rule-making is not suited to crafting a well-tailored, non-arbitrary rule. Instead, the gainful employment rule should follow a legislative or administrative experimentalist approach. Experimentalism is a regulatory framework that encourages regulator and regulated entities to cooperate in the production of data and fine-tuning of complex regulation through constant monitoring. Thus, the Department would establish a default regulatory scheme through the rule, but incorporate a waiver mechanism that would allow greater cooperation between regulator and regulated entities. The Department could thus monitor and learn from the regulated entities in an effort to craft a better rule with penalty thresholds that do not set arbitrary standards for the for-profit schools to meet.

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I. INTRODUCTION

In 2010, the Department of Education (the Department) promulgated the gainful employment rule in an effort to regulate for-profit higher education institutions.¹ The rule intended to link students' employment outcomes with their training or academic program, with failing programs losing their eligibility for federal financial aid programs.² Two tests formed the backbone of the gainful employment rule: the Debt-to-Income Test (DIT) and the Debt Repayment Test (DRT).³ Since the latter test was invalidated upon judicial review,⁴ this Note focuses on the DRT and the district court's opinion. The DRT required calculating the loan repayment rate for each of a for-profit institution's programs.⁵ A for-profit institution would have failed this test if less than 35 percent of its former students were in repayment status.⁶ The Department chose 35 percent because this figure corresponded with the bottom quartile of for-profit institutions.⁷

In June of 2012, the United States District Court for the District of Columbia held that the DRT was arbitrary and capricious.⁸ It found that each individual part of the rule could not function independently of the DRT and struck down the entire gainful employment rule, including the DIT.⁹ The court faulted the Department for choosing a penalty threshold based on regulatory impact analysis, instead of an objective recommendation from an expert study or an independent standard.¹⁰ On April 16, 2013, the Department opted not to appeal the decision and instead initiated a new round of rulemaking.¹¹ The draft regulato-

1. See Program Integrity: Gainful Employment Final Rule, 76 Fed. Reg. 34,386 (June 13, 2011) [hereinafter Final Rule] ("These final regulations reflect the Department's policy determination that students are not adequately protected by the Department's current regulatory framework . . .").

2. See, e.g., *Ass'n of Private Coll.'s and Univ.'s v. Duncan*, 870 F. Supp. 2d 133, 141 (D.D.C. 2012) (quoting 34 C.F.R. § 668.7(a)); Tamar Lewin, *Flurry of Data as Rules Near for Commercial Colleges*, N.Y. TIMES (Feb. 4, 2011), <http://www.nytimes.com/2011/02/04/education/04colleges.html>.

3. See 34 C.F.R. § 668.7(a)(2)(ii).

4. *Ass'n of Private Colls. and Univs.*, 870 F. Supp. 2d at 133.

5. See 34 C.F.R. § 668.7(a).

6. See *id.*

7. See Final Rule, *supra* note 1, at 34,397.

8. See *Ass'n of Private Coll.'s and Univs.*, 870 F. Supp. 2d at 158.

9. See *id.*

10. See *id.* at 153.

11. See Negotiated Rulemaking Committee; Public Hearings, 78 Fed. Reg. 22,467 (Apr. 16, 2013).

ry language for the new gainful employment rule suggests that the Department is still considering a test based on debt default rates at the program level.¹²

The Department is currently employing command-and-control rulemaking, a common style of crafting regulation whereby the regulator sets the optimal standards that regulated entities must meet.¹³ The judiciary then reviews the regulation using arbitrary and capricious review, probing for a “rational connection between the facts found and the choices made.”¹⁴ In its new round of rulemaking, the Department still faces the problem that there is no objective data tying students’ default rates to the ability of an educational program or vocational training to provide gainful employment to these students. No one, including the agency, the court, and the regulated parties, knows where the line should be drawn. Thus, even if the Department’s new measure can withstand judicial scrutiny, it may ultimately still penalize for-profit institutions in an arbitrary fashion.

This Note examines the shortcomings of applying the common command-and-control regulatory regime to solve the abusive practices of the for-profit higher education industry and argues that Congress should instead enact a default regulatory framework for gainful employment, including the valuable debt repayment measure, along with a waiver mechanism. Part II provides a brief overview of the need for increased regulation of the for-profit higher education industry and for the gainful employment rule, as well as the history and statutory basis for the rule. Part III describes the debt measures, the DIT and DRT, which were the two core provisions of the original gainful employment rule. Part III also examines the reasoning of the district court in striking down the DRT. Part IV identifies the two problems confronted by the Department in its attempt to promulgate a new debt repayment or debt default measure in the second gainful employment rule. First, the command-and-control style of rulemaking hinders agencies in their attempt to enact important regulation when the regulatory landscape is complex. Second, if the

12. See DEPT. OF EDUC., CLEAN VERSION OF DRAFT REGULATIONS FOR SESSION 3, 24 (Dec. 11, 2013) [hereinafter Session 3 Draft Regulations], available at http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/s3-draft-regs-for_distribution121113.pdf.

13. See Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L. J. 53, 53 (2011).

14. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

regulation withstands judicial scrutiny, command-and-control rulemaking discourages agencies from seeking to improve the first rule. Part V suggests that the solution to this problem lies in abandoning the command-and-control framework in favor of a legislative or administrative experimentalist approach by adopting a “big waiver” within the second gainful employment rule.

II. THE REGULATORY LANDSCAPE OF FOR-PROFIT INSTITUTIONS

First, this section explores the for-profit higher education industry’s reliance on Federal Student Aid and the need to hold the industry accountable for the quality of training or education that it provides. Second, this section describes the regulation that currently applies to the eligibility of for-profit higher education institutions for Title IV funding, the existing rules’ effectiveness in curbing the industry’s dependence on federal education loans, and the statutory authority for the gainful employment rule.

A. THE FOR-PROFIT HIGHER EDUCATION INDUSTRY

The for-profit higher education industry has provoked much academic and political debate in the last few years.¹⁵ Supporters view for-profit colleges and universities as the most promising forums to absorb the growing demand for higher education in the United States, particularly from non-traditional students, and to foster innovative pedagogical methods.¹⁶ Critics of these for-profit institutions highlight the abusive practices, low retention and graduation rates, reliance on federal funding, and rising student debt as signs that for-profit institutions are not being held

15. In early March, as the Department prepared to issue a final gainful employment rule for the second time, supporters and critics of for-profit schools took to the Opinion pages of the New York Times to wage their debate. Over the course of one week, the New York Times published four separate pieces. See Eduardo Porter, *The Bane and the Boon of For-Profit Colleges*, N.Y. TIMES (Feb. 25, 2014), <http://www.nytimes.com/2014/02/26/business/economy/the-bane-and-the-boon-of-for-profit-colleges.html>; Eduardo Porter, *Why College Supply Matters*, N.Y. TIMES (Feb. 25, 2014), <http://economix.blogs.nytimes.com/2014/02/27/why-college-supply-matters/?smid=tw-share>; Brent Staples, *The Robber Barons of the For-Profit Sector*, N.Y. TIMES (Feb. 27, 2014), <http://takingnote.blogs.nytimes.com/2014/02/27/the-robber-barons-of-the-for-profit-college-sector/>; Suzanne Mettler, *College, the Great Unleveler*, N.Y. TIMES (Mar. 1, 2014), <http://opinionator.blogs.nytimes.com/2014/03/01/college-the-great-unleveler/>.

16. See Final Rule, *supra* note 1, at 34,386.

accountable for the quality of education or training that their students receive.¹⁷ The divide over for-profit institutions tends to follow political party lines; Republicans see for-profit institutions as a “healthy free-market alternative” to community colleges and non-profit institutions while Democrats argue for greater regulation.¹⁸

No pronouncement shed more light on the problems within the for-profit higher education industry than the 2012 report from the U.S. Senate Health, Education, Labor and Pensions (HELP) Committee, which undertook an exhaustive study of the for-profit industry over the course of two years.¹⁹ From 2010 to 2012, the HELP Committee evaluated thirty for-profit companies, including the largest one, the Apollo Group,²⁰ the parent company of the University of Phoenix.²¹ Although supporters of the for-profit industry were critical of the report’s methodology and questioned the objectivity of its narrative,²² the report’s findings were nevertheless quite damning.

Financially, for-profit institutions increasingly depend on the availability of Federal Student Aid and their enrollment numbers.²³ The Senate HELP Committee’s report noted that, taking into account all thirty companies that participated in the survey,

17. *See id.*

18. *See, e.g.*, Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. TIMES (Jul. 29, 2012) <http://www.nytimes.com/2012/07/30/education/harkin-report-condemns-for-profit-colleges.html>; Michael Stratford, *Democratic Platform Advocates More Higher Education and Attacks Romney on For-Profits*, CHRON. HIGHER EDUC. (Sept. 4, 2012), <http://chronicle.com/blogs/decision2012/2012/09/04/democratic-platform-advocates-more-higher-ed-and-attacks-romney-on-for-profits/>.

19. *See* STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS PART I (July 30, 2012) [hereinafter Senate HELP Report], available at http://www.help.senate.gov/imo/media/for_profit_report/PartI.pdf.

20. *See* STAFF OF S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS PART II (July 30, 2012), available at http://www.help.senate.gov/imo/media/for_profit_report/PartII.pdf.

21. Valerie Strauss, *Largest For-Profit U.S. University Expects to Be Put on Probation by Accreditor*, WASH. POST (Feb. 26, 2013), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2013/02/26/largest-for-profit-u-s-university-expects-to-be-put-on-probation-by-accreditor/>.

22. *See, e.g.*, Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. TIMES (Jul. 29, 2012), <http://www.nytimes.com/2012/07/30/education/harkin-report-condemns-for-profit-colleges.html>; Gretchen Gavett, *Senate Committee Comes Down Hard on For-Profit Colleges*, PUB. BROAD. SERV. (July 31, 2012, 11:11am), <http://www.pbs.org/wgbh/pages/frontline/education/college-inc/senate-committee-comes-down-hard-on-for-profit-colleges/>.

23. *See* Senate HELP Report, *supra* note 19, at 2–3.

the percentage of revenues received from the Department's Federal Student Aid programs was 79.2 percent in 2010.²⁴ At the fifteen publicly traded companies, the percentage of revenues received from all sources of federal taxpayer-funded programs, including veterans' benefits, was 86 percent.²⁵ Furthermore, "investors' demand for revenue growth is satisfied by enrolling a steady stream of new student enrollees or 'starts.'"²⁶ This has led to aggressive, deceptive, and misleading recruiting tactics, including pressuring students to enroll,²⁷ obfuscating the availability and obligations of federal aid, and refusing to disclose graduation and job placement rates.²⁸ In 2010, the thirty companies in the report spent \$4.2 billion—the equivalent of 22.7 percent of their combined total revenue—on marketing and recruiting, compared with \$3.2 billion—or 17.2 percent of total revenue—on instruction.²⁹ For every career services employee, the for-profit companies employed ten recruiters.³⁰

For-profit institutions respond to market forces in higher education.³¹ Community colleges and non-profit public and private post-secondary institutions cannot meet the current demand for higher education in the United States.³² This demand is driven in part by the increase in non-traditional students—students who delayed college, who attend part-time or work full-time while enrolled, who are independent of their parents, or who have dependents other than a spouse.³³ Supporters of for-profit colleges argue that these schools provide traditionally underserved populations with access to higher education, while critics contend that for-profit institutions target the most vulnerable populations,

24. *See id.* at 2.

25. *See id.* at 3.

26. *Id.*

27. *See id.* at 64.

28. *For-Profit Schools: The Student Recruitment Experience, Hearings: Hearing Before the S. Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 7 (2010) (statement of Gregory Kutz, Managing Dir., Office of Forensic Audits and Special Investigations, U.S. Gov't Accountability Office), available at <http://www.gao.gov/new.items/d10948t.pdf>.

29. *See* Senate HELP Report, *supra* note 19, at 6.

30. *See id.* at 2 ("In 2010, the for-profit colleges examined employed 35,202 recruiters compared with 3,512 career services staff . . .").

31. Omari Scott Simmons, *For-Profits and the Market Paradox*, 48 WAKE FOREST L. REV. 333, 333 (2013).

32. *See* Senate HELP Report, *supra* note 19, at 1.

33. *See id.*

subjecting them to unacceptable degrees of market volatility and risk.³⁴

The statistics gathered by the Senate HELP Committee validate the critics and suggest that attending a for-profit institution is a risky proposition. For-profit institutions tend to charge higher tuition for their programs than non-profit institutions. As a result, students at for-profit institutions assume more debt on average than their peers at non-profit institutions.³⁵ And the likelihood of walking away from a for-profit college or university with a degree is low: “more than half a million students who enrolled in 2008–9 left without a degree or Certificate by mid-2010.”³⁶ As the Senate HELP Committee’s report concluded, “[f]ederal law and regulations currently do not align the incentives of for-profit colleges so that the colleges succeed financially when students succeed.”³⁷

Since 2009, when the Obama administration began voicing concerns about student debt and the affordability of higher education, the federal government has demonstrated a renewed interest in reforming the for-profit higher education sector.³⁸ The most concrete and visible step in this direction was the 2010 promulgation of the gainful employment rule.³⁹ During the 2012 presidential election campaign, President Obama included reform of the for-profit higher education industry in his platform.⁴⁰ He also signed an executive order in April 2012 to protect military families and veterans from the aggressive recruiting practices of for-profit institutions.⁴¹ In November 2013, the Federal Trade

34. Simmons, *supra* note 31, at 335.

35. See, e.g., Final Rule, *supra* note 1, at 34,386; Senate HELP Report, *supra* note 19, at 3. This debt can only rarely be discharged, even in bankruptcy. See Senate HELP Report, *supra* note 19, at 168; see also Natalie Kitroeff, *Loan Monitor Is Accused of Ruthless Tactics on Student Debt*, N.Y. TIMES (Jan. 1, 2014), <http://www.nytimes.com/2014/01/02/us/loan-monitor-is-accused-of-ruthless-tactics-on-student-debt.html>.

36. Senate HELP Report, *supra* note 19, at 2.

37. *Id.* at 1.

38. See Chadwick Matlin, *The Reform of For-Profit Colleges: Can They Give Up Their Predatory Ways?*, THE ATLANTIC (Sep. 20, 2013, 11:51am), <http://www.theatlantic.com/business/archive/2013/09/the-reform-of-for-profit-colleges-can-they-give-up-their-predatory-ways/279850/>.

39. See *infra* Part II.B.

40. Stratford, *supra* note 18.

41. See Exec. Order No. 13,607, Fed. Reg. 285,861 (April 27, 2012), available at <http://www.gpo.gov/fdsys/pkg/FR-2012-05-02/pdf/2012-10715.pdf>; see also Tamar Lewin, *Obama Signs Order to Limit Aggressive College Recruiting of Veterans*, N.Y. TIMES (Apr. 27, 2012), <http://www.nytimes.com/2012/04/28/education/obama-signs-order-to-protect-veterans-from-college-recruiters.html>.

Commission updated its Vocational School Guidelines to warn students of misrepresentations when enrolling at for-profit institutions.⁴² There is currently significant pressure on the Department to develop meaningful regulation of the for-profit higher education sector.

B. HISTORY AND STATUTORY BASIS FOR THE GAINFUL EMPLOYMENT RULE

For-profit institutions, like their non-profit counterparts, are currently eligible for federal financial aid through the Higher Education Act of 1965 (HEA),⁴³ which authorizes most of the federal financial aid programs for all institutions of higher education in the United States.⁴⁴ When federal financial aid was initially established, for-profit and non-profit institutions were treated differently. The National Vocational Student Loan Insurance Act of 1965 determined the eligibility of for-profit institutions,⁴⁵ whereas the HEA determined the eligibility of public and other non-profit institutions.⁴⁶ But in 1968, based on the fact that vocational students were repaying their loans in promising numbers,⁴⁷ Congress merged the two student loan insurance programs under the reauthorized HEA.⁴⁸ However, Congress has always retained separate definitions of for-profit and non-profit institutions.⁴⁹

42. FTC Guides for Private Vocational and Distance Education Schools, 16 C.F.R. § 254 (2013), available at http://www.ftc.gov/sites/default/files/documents/federal_register_notices/2013/11/131118vocationalschools.pdf.

43. Higher Education Act of 1965 § 102(a)(1), 20 U.S.C. § 1002(a)(1) (2012) (“[T]he term ‘institution of higher education’ for purposes of Title IV includes . . . (A) a proprietary institution of higher education . . . ; (B) a postsecondary vocational institution . . .”).

44. Mark L. Pelesh, *Markets, Regulation, and Performance in Higher Education*, in FOR-PROFIT COLLEGES AND UNIVERSITIES: THEIR MARKETS, REGULATION, PERFORMANCE, AND PLACE IN HIGHER EDUCATION 91 (Guilbert C. Hentschke et al. eds., 2010).

45. National Vocational Student Loan Insurance Act of 1965 [NVSLIA], 1020, Pub. L. 89-287, 79 Stat. 1037 (1965) (repealed 1968).

46. See *Ass’n of Private Colls. and Univ.*, 870 F. Supp. 2d at 138.

47. See, e.g., H.R. REP. NO. 89-308, at 4–5 (1965) (expert testifies that “over 95 percent of those [students] who sought employment found it”); S. REP. NO. 89-758, at 8 (1965) (“[A]ll data . . . support the reasonableness of making loan funds available to students attending trade, technical, and business schools.” There is “no reason to believe that such funds . . . would represent a poor financial risk.”).

48. Higher Education Amendments of 1968, § 116(a), (c), Pub. L. 90-575, 82 Stat. 1014 (1968) (amending HEA § 435, 20 U.S.C. § 1085, and repealing the NVSLIA). The actual statutory language is slightly more complex. Section 435 of the HEA did not itself contain separate definitions for “for-profit” or “nonprofit.” Section 435(b) used the language “institution of higher education,” which required the institution to be “a public or other nonprofit institution.” A separate section, § 435(c), defined the term “vocational

These separate definitions allow the Department to regulate the for-profit industry. When disbursing federal student aid to an applicant, the Department cannot discriminate on the basis of whether a student attends a for-profit or non-profit institution, assuming that institution is eligible for financial aid.⁵⁰ However, the Department can establish different accreditation and eligibility requirements for the two types of schools.⁵¹ In 1989 and 1990, Congress took the first steps toward reining in abusive practices of the for-profit industry.⁵² The Omnibus Budget Reconciliation Act of 1989 established the Cohort Default Rate, and the Omnibus Budget Reconciliation Act of 1990 expanded the applicability of this new measure.⁵³ Additional amendments to the HEA, passed in 1992, provided the other principal regulatory mechanisms in use today, though deregulation has since severely weakened their effectiveness.⁵⁴

First, the Cohort Default Rate (CDR) denies Title IV eligibility to institutions⁵⁵—whether for-profit or non-profit—if a certain percentage of their students who enter repayment during a fiscal year default before the end of the following fiscal year. The CDR

school” by transferring the definition of that term from § 17 of the NVSLIA. An institution that met either definition qualified as an “eligible institution” under § 435(a), for purposes of the loan program. In turn, section 1201(c) of the HEA defined “nonprofit,” as it applied to § 435. *See also* 20 U.S.C. § 1141.

49. *See* 20 U.S.C. § 1141.

50. *See* Daniel L. Bennett et al., CTR. FOR COLL. AFFORDABILITY AND PRODUCTIVITY, FOR-PROFIT HIGHER EDUCATION GROWTH, INNOVATION AND REGULATION, 38 (2010), *available at* http://www.centerforcollegeaffordability.org/uploads/ForProfit_HigherEd.pdf.

51. *See* REBECCA R. SKINNER, CONG. RESEARCH SERV., RL32182, INSTITUTIONAL ELIGIBILITY AND THE HIGHER EDUCATION ACT: LEGISLATIVE HISTORY OF THE 90/10 RULE AND ITS CURRENT STATUS 4 (2005) [hereinafter CRS Report] (for-profit institutions are governed by a regulatory “triad,” consisting of accreditation, licensure by state agency, and eligibility/certification).

52. Simmons, *supra* note 31, at 340–41.

53. *See* Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, §§ 2003(a)(1)(C), and (a)(2), Dec. 19, 1989; 103 Stat. 2106, 2113 (1989) (barring loans under the Supplemental Loans for Students program to students at an institution with a cohort default rate at or above 30 percent and adding a definition of “cohort default rate”); Higher Education Act [HEA] §§ 428A(a)(2), (m); 20 U.S.C. §§ 1085(a)(2), (m) (1990), Pub. L. 101-508, 104 Stat. 1388-26–1388-27 (barring loans under any Title IV-B program to students at institutions with cohort default rates of 35 percent or higher for fiscal years 1991 and 1992 and 30 percent thereafter). *See also* HEA § 435(a)(3)(B), 20 U.S.C. § 1088(a)(3)(B).

54. *See* sources cited *supra* note 53.

55. Title IV federal student aid refers to the programs authorized by Title IV of the Higher Education Act. These programs include Federal Family Education Loan Program, Federal Stafford Student Loan (subsidized and un-subsidized), Federal Perkins Student Loan, Federal Parent Loan for Undergraduate Students, Federal Supplemental Loan for Students, Federal Supplemental Education Opportunity Grant, and the Federal Pell Grant Program. *See* Higher Education Act of 1965, 20 U.S.C. §§ 1070-1099d (2012).

evaluated the aggregate, institution-wide default rate. The Omnibus Budget Reconciliation Act of 1990 specified penalty thresholds—the point at which an institution loses eligibility—of 35 percent for 1991 and 1992, followed by 30 percent for subsequent years.⁵⁶ The CDR is still in place today, and its latest updated penalty threshold is 30 percent for any fiscal year after 2012.⁵⁷

Second, Congress enacted the “85-15 rule,” which removed Title IV eligibility if more than 85 percent of a for-profit school’s revenues consisted of federal student aid.⁵⁸ The purpose of this rule was to require for-profit institutions to have some “skin in the game,” so that they would not be entirely dependent on federal sources of income.⁵⁹ Congress also hoped to incentivize institutions to improve the quality of their programs in the hopes of attracting students or private entities that would be willing to contribute their own money. However, this measure has been largely eviscerated. In 1998, the limit on Title IV revenues was raised from 85 to 90 percent.⁶⁰ The Department tried to tighten the measure, now known as the “90-10 rule,” by changing the definitions of various types of revenue and methods of calculation.⁶¹ However, the regulations could not touch some important loopholes, including the fact that Post-9/11 G.I. Bill benefits, which are administered through an entirely different code,⁶² do not count toward federal revenue. In 2008, the “90-10 rule” became even more lenient: an institution could only lose eligibility for Title IV funding if it violated the 90-10 ratio in two consecutive fiscal years, as opposed to one.⁶³

Third, Congress limited certain practices at institutions of all sectors. The “50 percent rule” limited the eligibility of institutions that offered more than 50 percent of their programs as dis-

56. See Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508 § 3004(a) (amending the text of § 435(a) of the HEA to establish “ineligibility based on high default rates”).

57. Higher Education Opportunity Act of 2008, Pub. L. 110-315 § 436(a)(1)(A)(ii)(II); 122 Stat. 3523 (amending the text of § 435(a) of the HEA).

58. Higher Education Amendments of 1992, Pub. L. No. 89-329 § 487(a)(24) (amended 1998).

59. Senate HELP Report, *supra* note 19, at 133.

60. CRS Report, *supra* note 51, at 7.

61. *See id.*

62. 38 U.S.C. §§ 3301-3305 (2012); Sarah Childress, *Bill Tries, Again, to Curb For-Profit Colleges’ Share of GI Cash*, FRONTLINE (Nov. 14, 2013), <http://www.pbs.org/wgbh/pages/frontline/education/educating-sergeant-pantzke/bill-tries-again-to-curb-for-profit-colleges-share-of-gi-cash/>.

63. Higher Education Opportunity Act of 2008, 20 U.S.C. § 1094(d)(2)(A) (2012).

tance education, as opposed to on-campus education. However, the Deficit Reduction Act eliminated this rule in 2006 in order to provide distance education to victims of Hurricane Katrina.⁶⁴ Congress also banned incentive compensation for college recruiters.⁶⁵ However, the Bush administration created twelve safe harbors, which tolerated the practice so long as the number of enrollments was not the sole criterion for the incentive compensation.⁶⁶

Until the promulgation of the gainful employment rule, the only two meaningful regulations remained the Cohort Default Rate and the 90-10 rule.⁶⁷ The gainful employment rule sought to improve upon them by narrowing the perspective. Rather than looking at the financial conditions of the whole institution, as the CDR and 90-10 rule do, the gainful employment rule evaluated each training or academic program at for-profit institutions.⁶⁸ This was sorely needed as for-profit schools had become adept at evading the CDR and 90-10 rule. Programs with default rates higher than 30 percent might be masked by better performing programs.⁶⁹ Tactics also included “stopping the flow of funds to [high-90-10 programs], maximizing cash collected from students, creating scholarship programs, increasing tuition, establishing roadblocks for living expense stipends, utilizing institutional loan programs, pursuing military benefits, and converting from for-profit to non-profit status.”⁷⁰

The gainful employment rule also finds its statutory basis in the 1992 amendments to the Higher Education Act. These amendments redefined “eligible program” for purposes of the HEA as “a program of training to prepare students for gainful employment in a recognized profession.”⁷¹ These definitions have remained unchanged since 1992.⁷² It was not until the Department began to conduct public hearings in 2009,⁷³ however, that the statutory language was given shape for the first time.⁷⁴

64. See Senate HELP Report, *supra* note 19, at 134.

65. See *id.*

66. 34 C.F.R. § 668.14(b)(22) (2002).

67. See Senate HELP Report, *supra* note 19, at 136.

68. See Final Rule, *supra* note 1, at 34,386–7.

69. See *id.*

70. Senate HELP Report, *supra* note 19, at 137.

71. 20 U.S.C. § 1088(b)(1)(A)(i) (1994).

72. *Ass'n of Private Colls. and Univs.*, 870 F. Supp. 2d at 140.

73. See Final Rule, *supra* note 1, at 34,387.

74. See Senate HELP Report, *supra* note 19, at 136.

The history of the gainful employment rule's promulgation followed correct administrative procedures. In 2009, the Department announced its intention "to develop proposed regulations to maintain or improve program integrity in the Title IV, HEA programs, relating to topics such as . . . [g]ainful employment in a recognized occupation."⁷⁵ As prescribed by statute, the Department initiated the regulatory process through negotiated rulemaking.⁷⁶ The negotiated rulemaking committees failed to reach a consensus, however, allowing the Department to proceed with its own proposal on June 18, 2010, and publish a final regulation a year later.⁷⁷ This new rule would prove short-lived, as the lobbying group for non-profit colleges and universities, the Association of Private Colleges and Universities, mounted a legal challenge against it that ultimately proved successful.

III. JUDICIAL REVIEW OF THE GAINFUL EMPLOYMENT RULE

This section of the Note focuses on the first gainful employment rule. Part III.A explores in detail each of the two debt measures, the DIT and DRT, and how each measure was meant to impart important information on the financial risk of attending any given educational or training program. Part III.B analyzes the judicial reasoning in *Ass'n of Private Colleges and Universities v. Duncan*, which struck down the first gainful employment rule.

A. HOW THE GAINFUL EMPLOYMENT RULE WORKED

The gainful employment rule, as promulgated in 2011, consisted of five discrete measures: (1) the Debt-to-Income Test (DIT); (2) the Debt Repayment Test (DRT); (3) a program approval measure; (4) a reporting requirement; and (5) a disclosure requirement.⁷⁸ The DIT and DRT, collectively known as the debt measures, formed the backbone of the regulation.⁷⁹ The debt measures explicitly linked the economic success of a program's former students with the adequacy of preparation that the stu-

75. Negotiated Rulemaking Committees, 74 Fed. Reg. 24,728 (May 26, 2009).

76. Higher Education Act, 20 U.S.C. § 1098(l)(4)(A) (1965).

77. See Final Rule, *supra* note 1, at 34,388.

78. See *Ass'n of Private Colls. and Univ.*, 870 F. Supp. 2d at 143.

79. 34 C.F.R. § 668.7(a)(2)(ii).

dent received at the programmatic level, rather than at the institutional level.⁸⁰ The two measures, however, differed in their purposes, perspectives, and formulations (see Chart 1).

The Debt-to-Income Test (DIT) sought to measure the debt burden of program completers. The DIT looked only at students who completed the program, and consisted of two formulae with their own accompanying penalty thresholds.⁸¹ A program passed the DIT if the annual debt service payments of program completers exceeded (a) 12 percent of their annual earnings, and (b) 30 percent of their discretionary income in excess of 150 percent of the poverty guideline, as established by the U.S. Department of Health and Human Services.⁸²

The Debt Repayment Test (DRT), also known as the loan repayment rate,⁸³ sought to measure the likelihood of both harm to students resulting from “enrolling in a specific program that leaves them with high education debts and limited job opportunities” and loss to taxpayers from loan defaults.⁸⁴ Unlike the DIT, the DRT focused on all enrollees, not just program completers.⁸⁵ The DRT corresponded to the percentage of loans that had been repaid in full, or where students were making progress on repayment.⁸⁶ To pass the DRT, a program was required to have at least 35 percent of its student borrowers making some progress towards repaying their education loans. Chart I below provides a summary of each debt measure.

80. See *Ass'n of Private Colls. and Univs.*, 870 F. Supp. 2d at 146.

81. 34 C.F.R. §§ 668.7(a)(1)(ii), (c)(1), (c)(2)(i)(A).

82. *Id.* §§ 668.7(a)(1)(ii), (c)(1).

83. *Id.* § 668.7(a)(1)(i).

84. See Final Rule, *supra* note 1, at 34,386.

85. 34 C.F.R. § 668.7(b).

86. See *id.*

Chart 1. The Gainful Employment Rule's Debt Measures.

	Debt-to-Income Test (DIT)	Debt Repayment Test (DRT)
Measure of	Debt burden on students	Likelihood of harm due to enrolling in program and of loss to taxpayers
Students	Completers only	Completers and non-completers
Formula	(1) Annual earnings: $\frac{\text{annual debt service payments}}{\text{annual earnings}}$ (2) Discretionary income: $\frac{\text{annual debt service payments guideline}}{\text{annual earnings} - 1.5 \times \text{poverty}}$	$\frac{\text{Loans paid in full} + \text{loans w payments made}}{\text{Original outstanding balance}}$
Failure thresholds	(1) Annual earnings ratio > 12% (2) Discretionary income ratio > 30%	Debt repayment ratio ≤ 35%

The DRT's value lies in the fact that it provides an assessment of the program-by-program financial risk to the regulators, the for-profit institutions, students, and taxpayers. Although its perspective is narrower, the purpose of the DRT is similar to that of the Cohort Default Rate (CDR).⁸⁷ The CDR evaluates the number of students in default across the entire for-profit institution, and the for-profit schools can mask the harm to students who are enrolled in a few bad programs.⁸⁸ The Department addressed this issue in the notice of proposed rulemaking (NPRM), explaining that the CDR and DRT are not redundant: "Institutional measures of eligibility often fail to reveal the effects of providing bad outcomes to students *in the particular program* that they offer."⁸⁹ The DRT yields important information to prospective students about the risks of attending a particular program.

Since the failure thresholds operated conjunctively, a "failing program" was one that failed both the DIT and the DRT.⁹⁰ Failure also did not trigger immediate loss of eligibility for Title IV HEA funding. The first year after failure, the for-profit institution would be required to disclose the failure, either in writing or

87. See *supra* Part II.B; see *infra* Part V.

88. Final Rule, *supra* note 1, at 34,387.

89. *Id.* at 34,386–87.

90. Final Rule, *supra* note 1, at 34,448. Section 668.7(a) of the regulations finds that a program leads to gainful employment if either of the two debt measures is met. 34 C.F.R. § 668.7(a).

orally, to all enrolled and prospective students.⁹¹ If a program failed the debt measures within two of three consecutive years, the for-profit institution would be required to disclose its failure in writing and provide more detailed information to all enrolled and prospective students.⁹² Finally, the for-profit institution's program would lose eligibility for Title IV funding only if the program failed the debt measures in three out of four consecutive years.⁹³

However, compared to the Department's original proposed rule of July 2010, the final rule built in several features that provided some leeway for the regulated entities.⁹⁴ These features reflected the for-profit industry's intense lobbying of Congress, the White House, and the Department.⁹⁵ Indeed, the rule had such strong detractors in Congress that the House of Representatives voted 289 to 136 to amend a spending bill, H.R. 1, to include a limitation rider on the Department's ability to use congressional appropriations to enforce the gainful employment rule.⁹⁶ The amendment was later defeated in the Senate.⁹⁷

First, the DIT reflected an increase of 50 percent in the penalty thresholds over the numbers that expert studies suggested.⁹⁸ This was done to "provide a tolerance" to account for "former students who completed the program but who may have left the workforce or are working part-time."⁹⁹ The expert recommendations, discussed in greater detail in Part III.B,¹⁰⁰ suggested the

91. Final Rule, *supra* note 1, at 34,452 (codified at C.F.R. § 668.7(j)(1)).

92. *Id.* at 34,452 (codified at 34 C.F.R. § 668.7(j)(2)).

93. *Id.* (codified at 34 C.F.R. § 668.7(i)).

94. Libby A. Nelson, *Your Guide to 'Gainful Employment,'* INSIDE HIGHER ED (June 3, 2011), http://www.insidehighered.com/news/2011/06/03/list_looking_at_gainful_employment_changes.

95. See, e.g., Eric Lichtblau, *With Lobbying Blitz, For-Profit Colleges Diluted New Rules*, N.Y. TIMES (December 9, 2011), <http://www.nytimes.com/2011/12/10/us/politics/for-profit-college-rules-scaled-back-after-lobbying.html?pagewanted=all>; Kelly Field, *For-Profit Colleges Win Major Concessions in Final 'Gainful Employment' Rule*, CHRON. HIGHER EDUC. (June 2, 2011), <http://chronicle.com/article/For-Profit-Colleges-Win-Major/127744/>.

96. H. Amdt. 94 to H.R. 1, 112th Cong. (2011) ("[prohibiting] the use of funds by the Department of Education to implement and enforce the gainful employment rule, which would prohibit college programs from receiving Federal student loans unless new complicated loan repayment criteria are met.").

97. See Field, *supra* note 95.

98. Final Rule, *supra* note 1, at 34,400.

99. See *id.*

100. See *infra* Part III.B.

less forgiving penalty thresholds of 8 percent of annual earnings and 20 percent of discretionary income.¹⁰¹

Second, the Department lessened the trigger, immediacy, and severity of failing the debt measures. In its proposed rule of July 2010, the Department had considered an automatic loss of eligibility to Title IV funding for a program's new students if the program "[did] not satisfy at least one of the debt thresholds."¹⁰² Thus, each of the three debt ratios functioned disjunctively, so that a program that failed to satisfy any of the debt thresholds would also fail the entire rule. Compared to the final rule, which required failure of all three debt thresholds, the trigger for failure was much more severe in the proposed rule. The final rule also introduced more graduated consequences for failure. Under the final rule, a program could lose Title IV funding only after failing three out of four consecutive years, giving schools a four-year buffer to change its course. The proposed rule contemplated an immediate loss of funding. Under the final rule, before those four years elapsed, the struggling program would face gradually tougher penalties, from oral warnings to detailed written disclosures about risks and educational alternatives.

Despite these generous provisions, which commentators aptly termed "concessions" to the for-profit industry,¹⁰³ a consortium of for-profit institutions considered a legal challenge to the gainful employment rule even before its finalization.¹⁰⁴ The consortium's president, Harris N. Miller, viewed the gainful employment rule as "the most serious issue that the sector has faced in 20 years."¹⁰⁵ On July 20, 2011, less than a month after the final rule was published in the Federal Register, the Association of Private Colleges and Universities sued the Department on behalf of the for-profit college industry in federal district court.¹⁰⁶

101. See Final Rule, *supra* note 1, at 34,399.

102. Program Integrity: Gainful Employment Proposed Rule, 75 Fed. Reg. 43,623 (July 26, 2010).

103. See, e.g., Field, *supra* note 95; Ben Miller, *The Ed Dept.'s New Proposed Language for Gainful Employment is Out. Here's What You Need to Know*, HIGHER ED WATCH (Aug. 30 2013), http://higheredwatch.newamerica.net/blogposts/2013/the_ed_dept_just_released_its_new_plan_for_gainful_employment_heres_what_you_need_to_ (calling these features "concessions given to the industry the first go around").

104. See Field, *supra* note 95.

105. *Id.*

106. See Tom Schoenberg, *For-Profit Colleges Sue US to Block 'Gainful Employment Rule'*, BLOOMBERG (July 20, 2011), <http://www.bloomberg.com/news/2011-07-20/for-profit-colleges-sue-u-s-to-block-gainful-employment-regulations.html>.

B. THE GAINFUL EMPLOYMENT RULE IS STRUCK DOWN

On June 30, 2012, in an opinion written by Judge Rudolph Contreras, the District Court for the District of Columbia held that all parts of the gainful employment rule, except for the disclosure requirement, were invalid. The principal flaw in the gainful employment rule was the DRT, and the court concluded that the DRT could not be severed from the DIT, the reporting requirement, or the new program approval rule.

The court found no problems with the Department's decision-making in establishing the failure thresholds for the DIT. The DIT's thresholds of 12 percent of annual earnings and 30 percent of discretionary income were loosely based on recommendations in a study by the College Board (the company that administers the SAT college-entrance exam and builds net price calculators for colleges).¹⁰⁷ Although the College Board study specifically discouraged using the 8-percent threshold, 8 percent is a standard used in many industries, including the mortgage industry.¹⁰⁸ Nevertheless, the Department adopted an 8 percent figure because it was proposed during negotiated rulemaking.¹⁰⁹ The College Board study conducted in 2006 by economists Sandy Baum and Saul Schwartz, suggested a stricter threshold of 20 percent for discretionary income.¹¹⁰ However, the Department justified a departure from the expert recommendation and industry standard—an increase of 50 percent for both thresholds that benefited the for-profit industry—stating:

By adopting the more lenient thresholds for the debt-to-earnings ratios, we provide a tolerance of 50 percent over the baseline amounts to identify the lowest performing programs, as well as account for former students who complet-

107. See *Ass'n of Private Colls. and Univs.*, 870 F. Supp. 2d at 141.

108. See SANDY BAUM AND SAUL SCHWARTZ, COLLEGE BOARD, HOW MUCH DEBT IS TOO MUCH? DEFINING BENCHMARKS FOR MANAGEABLE STUDENT DEBT 2-3 (2006) [hereinafter College Board Study], available at <http://research.collegeboard.org/publications/content/2012/05/how-much-debt-too-much-defining-benchmarks-manageable-student-debt/>.

109. Program Integrity: Gainful Employment Proposed Rule, *supra* note 102, at 43,620.

110. See College Board Study, *supra* note 108, at 12.

ed a program but who may have left the workforce voluntarily or are working part-time.¹¹¹

The district court found this measure to be reasonable.¹¹² It should be noted that in quoting the above passage to explain the departure from expert recommendations, Judge Contreras omitted the phrase regarding the “[identification of] the lowest performing programs,” suggesting that the court frowned upon this type of line drawing.¹¹³ Indeed, this sort of reasoning proved to be the fundamental flaw in the DRT.

The Department arrived at the DRT’s 35 percent threshold in a different way. There was no industry standard to suggest a measure to link the success of educational debt repayment with a particular program’s adequacy in preparing its students for employment.¹¹⁴ Should the government, taxpayers, or students consider a for-profit institution’s program a failure if less than half of its students are able to repay their education loans? It remains unclear what percentage of students unable to repay their loans is required before a program is deemed a failure.

Instead of considering these questions, the Department selected its penalty threshold of 35 percent based on regulatory impact data—specifically, an analysis of the number of programs that would be negatively affected by the new rule.¹¹⁵ The Department conducted an extensive survey of existing programs and published its findings in the Federal Register, along with the final rule.¹¹⁶ The Department then explained:

In developing the lower limit of the repayment rate in the July 26, 2010 NPRM, we attempted to define a relatively small subset of programs that could potentially lose eligibility. At the same time, we balanced that concern against the need to make the measure a meaningful performance standard. The programs within the lower boundary are, by definition, the worst performing when measured against

111. Final Rule, *supra* note 1, at 34,400.

112. See *Ass’n of Private Colls. and Univs.*, 870 F. Supp. 2d at 153.

113. *Id.*

114. *Id.* This fact is implied from the case, and the publication of the final rule in the Federal Register. See also Final Rule, *supra* note 1, at 34,386–539. Unfortunately, no commentary exists yet on the gainful employment rule directly supporting this assertion.

115. See Final Rule, *supra* note 1, at 34,397.

116. See *id.*

both the repayment rate and debt-to-earnings ratios. Setting the threshold for eligibility at 35 percent identified approximately the lowest-performing quarter of programs.¹¹⁷

And the figure of 35 percent corresponded conveniently to the bottom quartile of programs (see Chart 2).¹¹⁸ The district court found this rationale unacceptable: “[T]he rate chosen disqualified the percentage of programs that it was intended to disqualify, and to have disqualified fewer would have made the test too lenient while disqualifying more would have made the requirement too stringent. This is not reasoned decisionmaking.”¹¹⁹ Thus, the district court concluded that the DRT did not reflect a “rational connection between the facts found and the choices made,”¹²⁰ and that the Department chose the figure arbitrarily.

117. *Id.*

118. Final Rule, *supra* note 1, at 34,396 (reproduced from Table A: Cumulative Distribution of Estimated Large Gainful Employment Programs by Repayment Rate Category and Sector).

119. *See Ass’n of Private Colls. and Univs.*, 870 F. Supp. 2d at 154.

120. *See id.* at 153 (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Chart 2. Cumulative Distribution of Estimated Large Gainful Employment Programs by Repayment Rate Category and Sector.

Repayment Rate (0% to...)	4-year Institutions			2-year Institutions			Less-than-2-Year Institutions			All Institutions
	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	Public	Private Nonprofit	Private For-profit	
5%	0.0%	0.0%	0.0%	1.1%	0.0%	0.0%	0.0%	0.0%	0.1%	1.3%
10%	0.0%	0.0%	0.0%	1.2%	0.0%	0.1%	0.0%	0.0%	0.2%	1.5%
15%	0.0%	0.0%	0.1%	1.3%	0.0%	0.2%	0.0%	0.1%	0.4%	2.2%
20%	0.0%	0.0%	0.8%	1.5%	0.0%	1.2%	0.0%	0.1%	0.7%	4.4%
25%	0.0%	0.1%	1.5%	2.1%	0.0%	2.6%	0.0%	0.1%	1.5%	8.0%
30%	0.3%	0.2%	2.7%	4.6%	0.0%	4.2%	0.1%	0.1%	2.8%	14.9%
35%	0.7%	0.3%	4.0%	9.2%	0.1%	6.2%	0.2%	0.2%	4.5%	25.5%
ELIGIBILITY THRESHOLD										
40%	1.0%	0.4%	5.7%	14.9%	0.1%	7.9%	0.3%	0.2%	5.6%	36.0%
45%	1.4%	0.6%	7.6%	20.3%	0.1%	9.4%	0.7%	0.3%	6.7%	47.1%
50%	2.0%	0.9%	9.3%	25.0%	0.2%	10.8%	1.0%	0.3%	7.8%	57.2%
55%	3.0%	1.1%	10.1%	27.9%	0.2%	11.3%	1.3%	0.3%	8.6%	63.8%
60%	3.7%	1.6%	10.5%	30.8%	0.3%	11.8%	1.4%	0.4%	9.3%	69.8%
65%	4.3%	2.0%	10.7%	32.2%	0.3%	12.3%	1.6%	0.4%	9.6%	73.6%
70%	5.3%	2.5%	10.8%	33.3%	0.4%	12.5%	1.7%	0.5%	10.1%	77.2%
75%	5.7%	3.2%	10.8%	33.7%	0.5%	12.7%	1.8%	0.5%	10.3%	79.2%
80%	6.0%	3.7%	10.8%	34.0%	0.6%	12.7%	1.8%	0.5%	10.4%	80.6%
85%	6.0%	3.9%	10.8%	34.0%	0.6%	12.8%	1.8%	0.5%	10.5%	81.0%
90%	6.0%	4.0%	10.8%	34.1%	0.6%	12.8%	1.8%	0.5%	10.5%	81.2%
95%	6.0%	4.0%	10.8%	34.1%	0.7%	12.8%	1.8%	0.5%	10.5%	81.3%
100%	6.0%	4.0%	10.8%	34.3%	0.7%	12.8%	1.9%	0.5%	10.6%	81.7%
Sector Total**	6.2%	4.0%	11.1%	45.4%	1.0%	13.4%	4.9%	0.8%	13.2%	100.0%

*Large program defined as having more than 30 borrowers entering repayment or completers in the 4YP.

**Sector total percentages include institutions with repayment rates that are unavailable.

Source: U.S. Department of Education analysis of data from the National Student Loan Data System and the Integrated Postsecondary Education Data System

In reaching his conclusion, the district court applied a particularly searching form of arbitrary-and-capricious review, emphasizing the objectivity of the selected measure. Of the DIT, Judge Contreras wrote: “The debt-to-income standards were based upon expert studies and industry practice—objective criteria upon which the Department could reasonably rely.”¹²¹ The DIT figures seemed less discriminatory since the figures corresponded to the outer limits of reasonable debt burden. The Department did not define these outer limits at its own discretion. In contrast, the DRT “disqualified the percentage of programs that it was intended to disqualify In setting the debt repayment rate, the Department picked a palatable figure.” The court faulted the De-

121. *Id.*

partment for crafting this measure solely on the basis of giving the rule some teeth, but not too many.¹²² The Department de-

122. There is some case law illuminating whether an agency should be able to pick thresholds for regulatory action solely based on creating a measure that is not too lenient or too strict. This case law favors permitting agencies to draw lines based on this rationale. See *In WJG Tel. Co. v. F.C.C.*, 675 F.2d 386 (D.C. Cir. 1982). A public coast station operator challenged the FCC's requirement that any proposed inland waterways communications system operator serve a minimum of 60% percent of one or more navigable waterways. The FCC had chosen the 60% percent as the threshold in trying to balance two competing interests: encouraging operators to provide continuous, river-wide services, while fostering competition. The Court of Appeals for the D.C. Circuit, whose opinions should be controlling in the gainful employment case, *Ass'n of Private Colls. and Univs.*, stated:

It is true that an agency may not pluck a number out of thin air when it promulgates rules in which percentage terms play a critical role. When a line has to be drawn, however, the Commission is authorized to make a 'rational legislative-type judgment,' *F.C.C. v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 814, 98 S.Ct. 2096, 2121-2122, 56 L.Ed.2d 697 (1978). If the figure selected by the agency reflects its informed discretion, and is neither patently unreasonable nor 'a dictate of unbridled whim,' then the agency's decision adequately satisfies the [arbitrary and capricious] standard of review.

WJG Tel. Co., at 388–89. In a more recent case, decided after *Ass'n of Private Colls. and Univs.*, the District Court for the District of Columbia considered whether it was arbitrary and capricious for the Commodity Futures Trading Commission (CFTC) to define commodity pool operators (CPOs), which are subject to CFTC regulation, as entities that commit more than 5 percent of their assets to commodity interest trading. In upholding the five percent threshold, the District Court maintained:

While, an agency "may not pluck a number out of thin air," the Court recognizes that "a line has to be drawn" and so the agency's threshold will be upheld unless it is "patently unreasonable" or "a dictate of unbridled whim." While some commenters had argued that the five percent threshold was too strict, the CFTC noted in the final rule that the commenters provided no "data . . . to support this assertion." Thus, there was nothing to contradict the CFTC's reasoning that five percent remained the correct level for the trading threshold.

Inv. Co. Inst. v. C.F.T.C., 891 F. Supp. 2d 162, 211 (D.D.C. 2012), *as amended* (Jan. 2, 2013), *aff'd sub nom.* *Inv. Co. Inst. v. C.F.T.C.*, 720 F.3d 370 (D.C. Cir. 2013) (internal citations omitted).

Another case from the District of Minnesota District Court, *St. Cloud Hosp. v. Sullivan*, is particularly on point, though only of persuasive weight, since the agency selected a threshold based solely on impact data and on the rationale of finding a threshold that would not be too lenient or too strict. 813 F. Supp. 685 (D. Minn. 1993). The Medicare Act allowed a hospital to seek reimbursements using a wage index different than the one in its actual location. After a year, the Secretary of Health and Human Services determined that too many hospitals had been reclassified, so the agency promulgated a 108-percent rule, whereby "significantly disadvantaged" meant that "[the hospital's] average hourly wage is at least 108 percent of the average hourly wage of hospitals paid in the area in which the hospital is located." *Id.* at 689. The Secretary had also considered 100 percent, but upon considering impact data, found that figure too lenient. He also considered 115 percent, but found that figure too stringent. The Secretary ultimately settled on 108 percent. Of this decision-making process, the court concluded "that the Secretary sufficiently

finer “worst performing” on its own, rather than based on outside opinion about best practices, and pinpointed the bottom quartile of programs using the metric of debt repayment numbers when the Department could have just as freely and subjectively chosen the bottom decile, quintile, or any other percentage. There was no independent or objective basis for the chosen quartile mark.

IV. THE PROBLEM WITH BAD DATA OR NO DATA IN COMMAND-AND-CONTROL RULEMAKING

The Department has chosen to undergo a new round of rulemaking,¹²³ and the inclusion of a valuable measure, a debt repayment ratio at the program level, is uncertain.¹²⁴ As of this Note’s publication, the Department is still considering promulgating a measure that links eligibility of programs to their students’ ability to enter into debt repayment.¹²⁵ The draft regulations used for the third and final session of negotiated rulemaking replaced the DRT with a measure called the Program Cohort Default Rate (pCDR).¹²⁶ These two formulae differ in their calculations, but not in what they seek to measure. The DRT was calculated based on the number of loans in repayment, whereas the pCDR is calculated based on the number of students who are in default.¹²⁷ Both formulae seek to provide information to students, taxpayers, and the Department regarding the financial risk of pursuing a particular training or educational program.

explained his reasons for employing the 108 percent threshold and that his decision was reasonable.” *Id.* at 698. Even if the gainful employment rule should have been upheld under this case law, from a normative perspective, Judge Contreras’ insistence on data and objectivity in rational decision-making is not necessarily misplaced.

123. Negotiated Rulemaking Comm., Public Hearings, 78 Fed. Reg. 22,467 (Apr. 16, 2013).

124. See DEP’T OF EDUC., DRAFT REGULATORY LANGUAGE FOR SESSION 1 (Aug. 23, 2013), available at <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/2013-draft.pdf> (last visited Jan. 9, 2014) (The first draft of the new gainful employment rule did not contain a debt repayment ratio, but retained the DRT); Session 3 Draft Regulations, *supra* note 12. As of publication, the Department seems to have abandoned the DRT and replaced it with the Program Cohort Default Rate (pCDR). The inspiration for the pCDR is likely the Cohort Default Rate (CDR), which was established in the Omnibus Budget Reconciliation Act of 1990 and is defined as the institution-wide percentage of borrowers who are in default. The Cohort Default Rate differs from the proposed pCDR in one important way: the basis for the Cohort Default Rate is statutory. Congress does not face the same standard of review in line drawing, as well as linking regulatory action to data, as does an agency.

125. See *id.*

126. See *id.*

127. See *id.*; Final Rule, *supra* note 1, at 34,449.

It is likely that the pCDR will withstand judicial scrutiny, including the demanding standard that Judge Contreras applied. The pCDR, with its proposed penalty threshold of 30 percent,¹²⁸ is a modification of the Cohort Default Rate (CDR), a measure that is a creature of Congress. Congress enacted the CDR as part of the Omnibus Budget Reconciliation Act of 1990.¹²⁹ The Act specified penalty thresholds of 35 percent for 1991 and 1992, followed by 30 percent for subsequent years.¹³⁰ Since then, Congress has updated these numbers. The latest adjustment was enacted during the Higher Education Opportunity Act of 2008, through which Congress specified a penalty threshold for the CDR of 25 percent for fiscal years 1994 through 2011, and 30 percent in 2012 and thereafter.¹³¹ It is no coincidence that the pCDR's 30 percent penalty threshold mirrors the CDR's current statutory penalty threshold of 30 percent. The link between the proposed regulatory pCDR and the statutory CDR is clear: in the third and final draft of proposed regulation during negotiated rulemaking, the rule read, "For each fiscal year, the Secretary determines the pCDR of a GE program using the same methodology the Secretary uses to calculate the institutional cohort default rate (CDR) pursuant to section 435 of the HEA."¹³²

Whether the Department specifically considered the pCDR's greater ability to withstand judicial scrutiny will only be confirmed when the final rule is published in the Federal Register, where the Department will provide its reasoning for the pCDR. Still, the working group during negotiated rulemaking did acknowledge "the limited legal risk to the Department of such an approach."¹³³

Though this penalty threshold may withstand judicial scrutiny and the gainful employment rule will be allowed to stand, it would still not avoid the judicial concern that the Department is regulating the for-profit industry based on arbitrary numbers. There is a difference between promulgating a rule that will pass

128. Session 3 Draft Regulations, *supra* note 12.

129. Omnibus Budget Reconciliation Act of 1990, Pub. L. 101-508 § 3004(a) (amending the text of § 435(a) of the HEA to establish "ineligibility based on high default rates").

130. *Id.*

131. Higher Education Opportunity Act of 2008, Pub. L. 110-315 § 436 (amending the text of § 435(a) of the HEA).

132. Session 3 Draft Regulations, *supra* note 12; 34 C.F.R., § 668.407.

133. DEPT OF EDUC., DRAFT CDR METRIC PROPOSAL (Sep. 30, 2013), *available at* <http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/20brianjones-cdr-metric93013.pdf>.

muster with the courts and promulgating a rule that does not rest on arbitrary line drawing by an agency or Congress. Congress may not have enacted a good rule either when it chose default rates to penalize the for-profit industry that had little to do with the economic reality of students and schools or educational goals.¹³⁴

Much-needed political pressure and the recognition that regulation is essential in the for-profit sector are driving the Department to renew its efforts at promulgating a rule¹³⁵ that on the second attempt may still be premised on the same data—or lack of it—that buttressed the first gainful employment rule. This is because the Department is currently pursuing the traditional route of command-and-control rulemaking. This regulatory framework is a common one in the modern administrative state.¹³⁶ The regulator “[calculates incentives] to induce compliance with specific conduct the regulator has determined to be optimal.”¹³⁷ But a top-down, command-and-control approach will not lead to a non-arbitrary gainful employment rule when no one, including the Department, is entirely certain what conduct is optimal, let alone acceptable or reasonable.

134. The author could not find legislative history explaining why Congress chose the penalty thresholds of 35 percent in the Omnibus Budget Reconciliation Act. The House of Representatives, the Senate, or the conference reports readily available online offer details on these numbers. The author’s contact at the U.S. Department of Education suggests that the numbers may have been drawn up in committee pursuant to the usual budget reconciliation process. Various committees attempt to reconcile the authorizing statutes, such as the HEA, with dollar targets established in reconciliation directives. In essence, the committees are tasked with finding a set dollar level of savings and rely on analyses from the Congressional Budget Office to hit their mandatory targets. Thus, it is possible that committee responsible for drafting the Cohort Default Rate set the penalty thresholds at those specific default rates because those thresholds would achieve their savings target. See E-mail from Paul Riddle, Assistant Gen. Counsel, U.S. Dep’t of Educ., to Anne Xu (Feb. 28, 2014, 17:43 EST) (on file with author); ROBERT KEITH & BILL HENIFF JR., CONG. RESEARCH SERV., RL33030, THE BUDGET RECONCILIATION PROCESS: HOUSE AND SENATE PROCEDURES 1, 13 (2005), available at http://assets.opencrs.com/rpts/RL33030_20050810.pdf. If this assumption is correct, then Congress drew its lines based on reasons other than what would be good for students.

135. See David Halperin, *Gainful Employment Rule for For-Profit Colleges: Eminently Fixable, Eminently Necessary*, HUFFINGTON POST (Apr. 15, 2013), http://www.huffingtonpost.com/davidhalperin/gainful-employment-rule-f_b_3084580.html; Letter from Organizations Representing Students and College Access, Consumers, and Veterans to U.S. President Barack Obama (Apr. 15, 2013), available at http://www.republicreport.org/wp-content/uploads/2013/04/GE-coalition-ltr-to-POTUS-April_15_2013.pdf.

136. See Sabel & Simon, *supra* note 13, at 53.

137. *Id.* at 81.

Thus, the more fundamental problem is whether or not the command-and-control framework is suited to a regulatory landscape that presents complex problems, and where recommendations for best practice are unavailable. Moreover, under the command-and-control framework, the agency is not encouraged to adapt and change its rules when new or better data becomes available.¹³⁸

The traditional command-and-control regulatory approach may come at the cost of important and valuable regulatory measures. This model requires the regulator to proscribe the specific conduct of regulated entities.¹³⁹ “Commands are enforced through orders, injunctions, civil penalties, and criminal fines.”¹⁴⁰ Moreover, the command-and-control model “freeze[s]” the regulator and regulated entities into “adversarial roles.”¹⁴¹ Since command-and-control is but a form of notice-and-comment rulemaking, this model must meet the requirements of notice-and-comment rulemaking. One of these requirements is that the agency must gather or develop the factual bases for its rule upfront, rather than after promulgation, when seeking to establish the optimal range of conduct of the regulated entities.¹⁴²

Promulgating a measure like the DRT under the command-and-control framework is difficult for two reasons. First, there is a lack of data linking debt repayment, education, and gainful employment. There are no studies and reports suggesting what the optimal, reasonable, or excessive levels of student debt repayment are to assist a regulator in evaluating the merit of a vocational or academic program.¹⁴³ Without this information, the

138. Robert J. Klee, *Enabling Environmental Sustainability in the United States: The Case for A Comprehensive Material Flow Inventory*, 23 STAN. ENVTL. L.J. 131, 166 (2004) (“command-and-control mode, which more readily causes regulatory ossification by creating nearly permanent regulatory structures”).

139. Richard B. Stewart, *Regulation, Innovation, and Administrative Law: A Conceptual Framework*, 69 CALIF. L. REV. 1256, 1264 (1981).

140. *Id.*

141. Edgar Cahn & Cynthia Robbins, *An Offer They Can't Refuse: Racial Disparity in Juvenile Justice and Deliberate Indifference Meet Alternatives That Work*, 13 UDC/DCS L. REV. 71, 104 (2010).

142. See *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (“In applying that standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.”).

143. There are many reasons why recommendations for best practice or industry-wide standards are scarce in the education industry. Education loans differ from all other types of loans in important ways. First, the federal government does not respond solely to market forces, which drive the formulation of industry standards in other lending sectors, including mortgages. For example, the interest rate and maximum amount of the loan

decision-maker in a top-down, command-and-control regulatory regime must engage in a legislative-type line drawing that penalizes the regulated entity in a manner that appears arbitrary. Second, the development of well-suited regulatory measures, specifically penalty thresholds for the DRT, may only be possible after the regulated entities are compelled to disclose data and are closely monitored. These two aspects render the command-and-control regulatory model ill-suited to the gainful employment rule.

The criticism that notice-and-comment rulemaking leads to regulatory rigidity and ossification¹⁴⁴ applies equally to the command-and-control regulatory model. This type of rulemaking does not encourage agencies to create dynamic rules that respond to diversity in the regulated entities, changed circumstances (e.g.

reflects careful political considerations in education loans, whereas private lenders depend mainly on analysis of loan histories, and calculating default probabilities. See Karen Weise, *Why Your Student Loan Interest Rate Is So High*, BLOOMBERG BUS. WEEK (Apr. 4, 2013), <http://www.businessweek.com/articles/2013-04-04/why-your-student-loan-interest-rate-is-so-high>. Second, the federal government is by far the biggest lender. The federal government guarantees about 86 percent of all educational loans. See CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS: REPORT TO THE S. COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, THE S. COMM. ON HEALTH, EDUC., LABOR, AND PENSIONS, THE H. COMM. ON FIN. SERV. AND THE H. COMM. ON EDUC. AND THE WORKFORCE (2013), available at http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf.

As of the end of calendar year 2013, the total outstanding debt for Federal Student Aid (FSA) was \$1,051 billion. See DEP'T OF EDUC., FED. STUDENT AID PORTFOLIO SUMMARY (accessed Sep. 14, 2014, at 8:44 p.m.), available at <http://studentaid.ed.gov/about/data-center/student/portfolio> (due to the federal calendar operating from October 1 to September 30, the author used the figure for the first quarter of 2014, which ended December 31, 2013). Interestingly, if the Department were considered a private depository institution, it would have more outstanding loans of any kind (not just educational) than the largest commercial bank, Bank of America, which had loans and leases totaling \$928 billion at the end of calendar year 2013. See BANK OF AM. CORP., 2013 ANNUAL REPORT 16 (Mar. 2014). The federal government drives educational lending practices, so there is less of an incentive for a private lender to develop industry standards or suggest best practices. Third, industry standards for other lending sectors, such as the mortgage or car loans, may not be an ideal fit for the education sector. For example, the risk premium is higher for educational loans than for mortgages or car loans, partly due to lenders' ability to recover physical collateral in the event of default. College graduates take out loans not to buy a physical asset, but to build intellectual capital that has the potential to lead to higher income. Thus, students arguably should be able to shoulder a higher debt burden since homeowners or car owners are assessed based on their present income, whereas students are assessed based on future income. These meaningful differences between the various lending industries may justify Judge Contreras' insistence on objective data tailored to debt in the education context.

144. See David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 270 (2013); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1387-92 (1992).

the regulated entities' adaptation to regulation), or the collection of new and better data. Making adjustments to regulation through notice-and-comment is a difficult and slow process.¹⁴⁵ Had the original gainful employment rule withstood the legal challenge in *Ass'n of Private Colleges and Universities v. Duncan*, the Department would have had little incentive in the future to reconsider the 35 percent threshold, even if better recommendations became available.

V. ADOPTING AN EXPERIMENTALIST APPROACH TO GAINFUL EMPLOYMENT

The command-and-control regime that the Department used for the first gainful employment rule may not be able to deliver a rule that reflects the realities of the for-profit industry. The Department does not have the facts supporting best practices for the for-profit industry. Without these factual bases, the Department seems to have settled on adopting the same penalty threshold as the one Congress established for the Cohort Default Rate. The Department should consider an alternative that would allow it to gather the information it needs to design a rule that does not regulate the for-profit institutions arbitrarily. The gainful employment rule should incorporate an appeals or exemption mechanism to allow the Department to collect data and learn from exempted for-profit institutions so that it can craft appropriate penalty thresholds. Such a statute would capture the benefits of a legislative experimentalist approach.¹⁴⁶ There are two avenues for accomplishing this: (1) the Department could incorporate an appeal or exemption provision within the gainful employment rule; and (2) Congress could enact a detailed regulatory scheme resembling the gainful employment rule and a waiver.

Experimentalism is an alternative to the command-and-control model of public intervention.¹⁴⁷ Hallmarks of the experimentalist model are the pursuit of broadly-stated goals through cooperation between regulator and regulated entities,¹⁴⁸ disclo-

145. See Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 958-59 (2008) (In a survey of ten agencies, the average duration of rulemaking lasts 243.74 days to 760.93 days).

146. See Sabel & Simon, *supra* note 13, at 53.

147. See *id.* at 55.

148. See *id.*

sure of data to permit close monitoring by the regulator, and an emphasis on problem solving through continuous institutional learning.¹⁴⁹ In the experimentalist model, the regulator establishes a default rule¹⁵⁰ and a federal agency uses its waiver authority to allow regulated entities to depart from the rule.¹⁵¹ In seeking such a waiver, the regulated party must provide an explanation¹⁵² or a plan detailing how it will meet the goals of the regulation.¹⁵³ The federal agency evaluates the initial plan, pools information that the regulated entity continuously discloses for monitoring purposes, and creates pressures for continuous change and progress toward the regulatory goal.¹⁵⁴ Most importantly, the exempted actor is motivated to comply in good faith to avoid reversion to the default rule.¹⁵⁵ If the federal regulator deems an actor's effort in the experimentalist process unsatisfactory, the actor reverts to regulation under the default regime.¹⁵⁶

The experimentalist approach can be a powerful way to mitigate all manners of risks and harms and to regulate through the acquisition of information. For example, the Hazards Analysis and Critical Control Points (HACCP) program for meat and poultry at the Department of Agriculture addressed risks that were diffuse, just as high default rates on student loans affect a large population.¹⁵⁷ Experimentalism provided the Food and Drug Administration an opportunity to explore a wide range of workable regulation and to develop the criteria for optimal conduct by monitoring regulated entities and forcing those that were doing less well to meet the model of those that were doing better.¹⁵⁸ Likewise, the Massachusetts Toxics Use Reduction Act (TURA) is a promising example of how acquisition of information is an effective tool of regulation.¹⁵⁹ TURA forces "Large Quantity Toxic Users" to file inventories of their chemicals and processes, and to

149. See Martin A. Kurzweil, *Disciplined Devolution and the New Education Federalism 1* (Sep. 25, 2013) (unpublished manuscript) (on file with author).

150. See Sabel & Simon, *supra* note 13, at 82.

151. See Kurzweil, *supra* note 149, at 3 (identifying big waiver as an experimentalist device).

152. See *id.* at 80.

153. See Barron & Rakoff, *supra* note 144, at 279–82.

154. See Sabel & Simon, *supra* note 13, at 55.

155. See Kurzweil, *supra* note 149, at 24.

156. See *id.*

157. See Sabel & Simon, *supra* note 13, at 83.

158. See *id.* at 85.

159. Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 354 (2001).

develop toxic use reduction plans with state officials. The Act set a goal of 50 percent reduction in toxic waste generation. After implementation of TURA, Massachusetts officials pointed to a 73 percent reduction in toxic waste generation.¹⁶⁰

These examples demonstrate the promise that an experimentalist approach could have for regulation of the for-profit higher education industry. Experimentalism has succeeded in mitigating harms that are widely shared and caused by a large number of actors, as with the HACCP program. Moreover, forcing the regulated entities to disclose information is an important step toward more effective regulation. Since information is what the promulgation of a non-arbitrary gainful employment rule lacks, the experimental approach can also help the Department develop good benchmarks to regulate the for-profit higher education industry.

The circumstances surrounding the promulgation of the gainful employment rule are also ideally suited to the experimentalist model. Professors Sabel and Simon wrote:

[E]xperimentalist regimes are especially well suited for circumstances in which effective public intervention requires local variation and adaptation to changing circumstances. The central characteristic of these circumstances is “uncertainty” in Frank Knight’s sense—contingency that cannot be known or calculated actuarially or with formal rigor but can only be estimated impressionistically. In the realm of uncertainty, policy aims cannot be extensively defined in advance of implementation; they have to be discovered in the course of problem solving.¹⁶¹

This is certainly the case with the gainful employment rule. The official decision-maker, the Department, does not know what the “correct specific norm is”¹⁶² since objective measures, industry standards, or suggestions of best practice are currently unavailable.¹⁶³ The for-profit higher education industry has also argued that the gainful employment rule accounts for neither the diversi-

160. *See id.* at 355.

161. Sabel & Simon, *supra* note 13, at 56.

162. Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization As A Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265, 1266 (2012).

163. *See supra* Part III.

ty of academic and vocational programs, nor the racial and economic diversity of the population that the industry serves.¹⁶⁴ Professors Sabel and Simon have also identified variance “across a broad range of local contexts” as a situation ill suited to command-and-control.¹⁶⁵ The best way to acquire the data and develop non-arbitrary industry standards is through an experimentalist model, in which the Department and for-profit colleges work together to create a fuller picture of the industry, including the identification of for-profit schools that fail the default regulatory regime but have other markers of success.

There are two ways that the gainful employment rule could adopt an experimentalist approach. At its core, the gainful employment rule must have a default regulatory scheme. The regulated entity will only be encouraged to cooperate with the agency if it knows that non-compliance or bad faith in implementing its own waiver proposal will result in reversion to the default gainful employment regulation. Then, the scheme should include a waiver that can exempt the entity from part or all of the regulations so long as the Department approves the entity’s proposal and progress in implementation. Experimentalist regulation can take many forms, and waiver is one possible mechanism.¹⁶⁶ Either the Department or Congress could establish this experimentalist model for the gainful employment rule, with differing sets of advantages and challenges.

An agency is permitted to exempt a regulated entity from its own rules, allowing the agency and the regulated entity to deviate from the rule.¹⁶⁷ These waivers or exceptions can stem from an agency’s own regulations, not just from its enabling act.¹⁶⁸ The question of the agency’s authority for exempting regulated entities from its own regulation is explored in the example of the Federal Energy Regulatory Commission (FERC). FERC derived its authority to waive its own regulations, promulgated under the Federal Power Act and Public Utility Regulatory Policies Act, from three sources. First, although the two acts did not explicitly

164. See *supra* Part II.A.

165. Sabel & Simon, *supra* note 162, at 1266–67.

166. See Kurzweil, *supra* note 149, at 3 (identifying big waiver as an experimentalist device).

167. Mark Seidenfeld, *Bending the Rules: Flexible Regulation and Constraints on Agency Discretion*, 51 ADMIN. L. REV. 429, 441 (1999).

168. Jim Rossi, *Making Policy through the Waiver of Regulations at the Federal Energy Regulatory Commission*, 47 ADMIN. L. REV. 255, 259 (1995).

address regulatory exceptions, the waiver was implied because the statutory language did not require the agency to regulate. Rather, the statute gave some discretion to the agency.¹⁶⁹ Likewise, Congress did not require the Department of Education to regulate based on the “gainful employment” statutory language in the HEA. In fact, the language existed for seventeen years before the Department decided to expand upon it.¹⁷⁰ Second, the D.C. Circuit has also found an implied authority to grant exceptions within the general authority of agencies to regulate in the public interest.¹⁷¹ In *WAIT Radio v. F.C.C.*, the D.C. Circuit wrote:

The Commission is charged with administration in the “public interest.” That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the “public interest” for a broad range of situations, does not relieve it of an obligation to seek out the “public interest” in particular, individualized cases. A general rule implies that a commission need not re-study the entire problem de novo and reconsider policy every time it receives an application for waiver of the rule. On the other hand, a general rule, deemed valid because its overall objectives are in the public interest, may not be in the “public interest” if extended to an applicant who proposes a new service that will not undermine the policy, served by the rule, that has been adjudged in the public interest.

Lastly, the language of the FERC’s regulations provided for a waiver “for good cause.” The Department should be able to justify its decision to grant a waiver to a for-profit institution by demonstrating that an exemption would be in the “public interest” and for “good cause.” Generally, waiver mechanisms are broadly used in the administrative state.¹⁷²

169. *See id.* at 262 (18 U.S.C. § 825h stipulated that FERC “*may* classify persons and matters within its jurisdiction”) (emphasis added). Just as with the words “gainful employment” in the Higher Education Act, FERC’s regulation was triggered by two words, “public utility,” in Section 201(e) of the FPA. *See id.* at 263.

170. *See supra* Part II.B.

171. *See* *WAIT Radio v. F.C.C.*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

172. *See* Rossi, *supra* note 168, at 278.

This avenue is open to the gainful employment rule: the Department could include an appeals or waiver provision in the new gainful employment rule. The Department will establish the default regulatory scheme and the processes or criteria for exception or waiver.¹⁷³ Since it depends only on the Department's willingness and implementation, this option has the advantage of being more feasible than the second option, which calls for congressional action. Thus, this may be the more satisfying solution for the Department and for supporters of the gainful employment rule, who may view the agency as the more sympathetic forum and the more efficient actor with regards to regulating the for-profit industry.

Congress is slated to reauthorize the Higher Education Act, which expired in December 2013, and could enact the gainful employment standards along with a "big waiver."¹⁷⁴ Professors Barron and Rakoff, who first wrote about the big waiver, defined it as a statutory provision that gives the agency the power to waive requirements that Congress itself passed, or "to unmake statutory provisions."¹⁷⁵ Big waivers are featured in two recent, major pieces of legislation: the No Child Left Behind Act and the Patient Protection and Affordable Care Act.¹⁷⁶ Big waivers give Congress an opportunity to craft its own schemes, knowing that its legislative creature, if based on little information other than regulatory impact data, will be able to respond to new information or changed circumstances. Congress would also free the Department from the information burden "in determining initial levels of acceptable performance."¹⁷⁷

173. *See id.* at 259.

174. AM. COUNCIL ON EDUC., SENATE, HOUSE HOLD HEA REAUTHORIZATION HEARINGS, (Sep. 20, 2013), <http://www.acenet.edu/news-room/Pages/Senate-House-Hold-HEA-Reauthorization-Hearings.aspx>.

175. *See* Barron & Rakoff, *supra* note 144, at 265. The term is new, and there is some confusion as to the exact definition of "big waiver." In the introductory part of their paper, Barron and Rakoff emphasized that the waiver provision must be a creature of Congress; later in the paper, they contrasted "big waiver" with "little waiver," suggesting that the difference lies in the extent to which the default scheme has been suspended. A little waiver "merely modif[ies] . . . or tinker[s] with the statute," whereas the big waiver envisions that "the heart of the statutory framework . . . will be subject to administrative veto." *Id.* at 277 (internal quotation marks omitted). The discussion in the latter part still focuses on congressional intent and desires, suggesting that a big waiver must be crafted by Congress.

176. *See id.* at 265.

177. Sabel & Simon, *supra* note 13, at 88.

There are many obvious barriers to relying on Congress to regulate the for-profit higher education industry. First, we can be skeptical that Congress would be inclined to enact a gainful employment measure with both a DRT, or pCDR, and a waiver. While it may be debatable whether the current state of divided government leads to increased or decreased legislative productivity,¹⁷⁸ the 113th Congress, in session in 2013, has been widely labeled “underachieving,”¹⁷⁹ “the least productive ever,”¹⁸⁰ and “the do-nothing Congress.”¹⁸¹ Moreover, Republicans in the House of Representatives have not been supportive of the Department’s effort to regulate the for-profit higher education industry.¹⁸²

But there are some positive signs that Congress may be willing to reauthorize the HEA and enact a gainful employment provision along with the renewal. Senator Tom Harkin, Chairman of the Senate HELP Committee, began the process of HEA reauthorization by holding a series of hearings on the matter.¹⁸³ Of note, the first hearing concerned the regulatory “triad.”¹⁸⁴ The “triad” is a term used to describe the multi-layered system that the federal government uses to oversee colleges and universities

178. See William Howell, Scott Adler, Charles Cameron & Charles Riemann, *Divided Government and the Legislative Productivity of Congress, 1945-94*, 25 LEGIS. STUD. Q. 285 (2000) (finding that periods of divided government between 1945 to 1994 led to a 30% decrease in the enactment of landmark legislation, but a rise in passing of trivial laws).

179. Jonathan Weisman, *Underachieving Congress Appears in No Hurry to Change Things Now*, N.Y. TIMES (Dec. 2, 2013), <http://www.nytimes.com/2013/12/03/us/politics/least-productive-congress-on-record-appears-in-no-hurry-to-produce.html>.

180. Paul Kane, *113th Congress, Going Down in History for Its Inaction, Has a Critical December To-Do List*, WASH. POST (Dec. 1, 2013), http://www.washingtonpost.com/politics/113th-congress-going-down-in-history-for-its-inaction-has-a-critical-december-to-do-list/2013/12/01/cf2b4808-57a0-11e3-8304-caf30787c0a9_story.html.

181. CNN Political Unit, *Poll: This is a “Do-Nothing” Congress*, CNN (Dec. 27, 2013), <http://www.cnn.com/2013/12/04/politics/do-nothing-congress/>.

182. See, e.g., Tyler Kingkade, *Eric Cantor Promotes For-Profit Colleges in GOP ‘Re-branding’ Speech*, HUFFINGTON POST (Feb. 6, 2013), http://www.huffingtonpost.com/2013/02/06/eric-cantor-for-profit-colleges_n_2632013.html; Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. TIMES (July 29, 2012), <http://www.nytimes.com/2012/07/30/education/harkin-report-condemns-for-profit-colleges.html>; Lewin, *supra* note 18.

183. See, e.g., Press Release, S. HELP Comm., Senate Education Committee Leaders Launch Higher Education Act Reauthorization Hearings, (Sep. 17, 2013), available at <http://www.help.senate.gov/newsroom/press/release?id=9a543412-b1d6-46aa-968c-bfd9195a4252>; Michael Stratford, *Senate Kicks Off Reauthorization*, INSIDE HIGHER ED (Sep. 20, 2013), <http://www.insidehighered.com/news/2013/09/20/senate-education-committee-begins-process-reauthorization-higher-education-act>.

184. *The Triad: Promoting a System of Shared Responsibility. Issues for Reauthorization of the Higher Education Act. Full Comm.: Hearing Before the S. Comm. on Health, Educ., Labor and Pensions*, 113th Cong., (2013), available at <http://www.help.senate.gov/hearings/hearing?id=bced8932-5056-a032-5249-e04bdd2eea5b>.

receiving federal student aid, and refers to (1) accreditation, (2) licensure by state agency, and (3) eligibility or certification.¹⁸⁵ As a rule seeking to define eligibility for Title IV funding, the gainful employment rule belongs in the third prong. Senator Harkin's report noted both the value of the gainful employment rule, calling it a "first step towards ensuring that students attending for-profit schools are getting a valuable education that serves them well in the job market," and the successful legal challenge of the rule in the district court.¹⁸⁶ The Committee is certainly aware of the gainful employment rule and appears to prioritize a review of eligibility criteria for federal student loans, both promising indicia that Congress intends to act on the issue of Federal Student Aid

Congress also seems more willing to use broad waiver mechanisms.¹⁸⁷ David J. Barron and Todd D. Rakoff suggest that waiver mechanisms may foster agreement in times of divided government.¹⁸⁸ The waiver mechanism may appeal particularly to a Republican House because it encourages the government to cooperate with the businesses and promulgate regulation that is more fine-tuned to the needs of individual businesses. As Marshall J. Breger pointed out,

Many in the Republican-controlled Congress have sought to shift from an adversary or enforcement paradigm for regulation to a cooperative partnership with the regulated community. This "new" learning is motivated by the premise that cooperation between business and government is more likely to lead to greater compliance by the regulated community than the traditional adversarial relationship between the two.¹⁸⁹

185. See *supra* Part II.B and note 45.

186. Senate HELP Report, *supra* note 19, at 136 (quoting extensively from the opinion in *Ass'n of Private Colls. and Univs.*, 870 F. Supp. 2d 133 (D.D.C. 2012)).

187. See, e.g., Barron & Rakoff, *supra* note 144, at 271 ("Absent a dramatic shift in political dynamics at the national level, big waiver . . . is likely to be an increasingly important administrative technique in the years to come."); Kurzweil, *supra* note 152, at 10 (examining the basis for Barron and Rakoff's beliefs that big waiver will remain a popular tool).

188. See Barron & Rakoff, *supra* note 144, at 307.

189. Marshall J. Breger, *Regulatory Flexibility and the Administrative State*, 32 TULSA L. J. 325, 325 (1996).

However, Breger's last point does raise legitimate concerns about the wisdom and workability of implementing the experimentalist model for gainful employment regulation. These concerns attach to experimentalism in any context, but are particularly heightened with regard to the for-profit higher education industry. The waiver may prove to be too difficult or costly to administer considering the number of for-profit institutions that will likely seek an exemption.

First, the experimentalist model requires that both regulator and regulated actor collaborate closely and continuously so that monitoring and learning can be meaningful. As Martin A. Kurzweil wrote: "[E]xperimentalism requires significant effort by the participant—it is a far more active and mentally taxing form of governance than bureaucracy."¹⁹⁰ The for-profit industry has a strong incentive to cooperate with the Department, which has shown its willingness to strong-arm even the biggest for-profit institutions. The most notable recent example was the bankruptcy of Corinthian Colleges, which enrolled 72,000 students and received about \$1.4 billion in federal financial aid every year.¹⁹¹ Because the for-profit company failed to respond to five letters requesting data and documents since January 2014, the Department delayed Corinthian Colleges' ability to access its requested federal funds for 21 days.¹⁹² The company faced bankruptcy, which in and of itself causes revocation of eligibility for federal student aid, because federal funding comprised 80 percent of its total revenue and private lenders refused to provide bridge financing.¹⁹³ Under such circumstances, for-profit institutions have no choice but to cooperate with the Department in negotiations for relief or a controlled shutdown of its operations.¹⁹⁴ Thus, for-profit institutions have every incentive to work with the Department on the front end to create tailored regulation and a good gainful employment rule that is reflective of students' true economic circumstances, rather than fight the agency on the back

190. Kurzweil, *supra* note 149, at 19.

191. Stephanie Gleason and Josh Mitchell, *Corinthian Colleges Warns of Possible Shutdown*, WALL ST. J. (June 19, 2014), <http://online.wsj.com/articles/corinthian-colleges-faces-liquidity-shortage-after-u-s-delays-aid-1403185543>.

192. *Id.*

193. *Id.*

194. Paul Fain, *Corinthian's Cloudy Future*, INSIDE HIGHER ED (June 20, 2014), <http://www.insidehighered.com/news/2014/06/20/major-profit-chain-faces-bankruptcy-feds-turn-heat#sthash.9MRYESKz.dpbs>.

end when the institutions fail the planned one-size-fits-all gainful employment rule.

Second, the experimentalist model requires a manageable number of exempted entities if the agency is to work closely with the entities and delve deeply into the data that is produced and into the issues that are raised. In this instance, the Department could face exemption requests from thousands of schools.¹⁹⁵ This task is vastly more daunting than affording a waiver to fifty state education systems, plus one for the District of Columbia, as with the No Child Left Behind waivers. However, the number of exempted entities may be kept manageable if Congress or the Department sets stringent criteria for waiver, or the Department delegates the monitoring function to another regulator, such as a state or an accreditation board.

Third, experimentalism also calls into question the transparency of the decision-making process and the accountability of regulators “who are empowered to selectively unmake law.”¹⁹⁶ This concern attaches to all experimentalist regimes, as it is inherent in the nature of a regulatory model that requires agencies to work closely with its regulated entities. It is difficult to address fully and satisfyingly the public’s concerns about agency capture and unfettered administrative actions. However, the Department can be held accountable through disclosure, as mandated by the Freedom of Information Act, and through the political process.

Concerns that the waiver provision may not yield its intended benefits are real and justified; however, there are few negative consequences if the Department or the for-profit schools fail to cooperate effectively in implementing waiver plans. For example, it is possible that the Department may be wary of the administrative challenges posed by the waiver, and will demur from exercising the provision. Or perhaps a for-profit college will not implement its proposal in good faith, and use the waiver as a way to bypass the gainful employment rule entirely. These scenarios are realistic, but not prohibitive: default regulation of the for-profit

195. As of writing, the Association of Private Sector Colleges and Universities lists 1,300 member schools on its website. See *APSCU Member School Listing*, ASS’N OF PRIVATE SECTOR COLL. AND UNIVS., *APSCU Member School Listing*, <http://www.career.org/membership/apscu-member-companies/educational-members/> (accessed July 2, 2014 at 12:23 p.m.).

196. Kurzweil, *supra* note 149, at 19.

industry is in place, and failure on the part of either regulator or regulated entity will simply trigger a reversion to the default framework. In the worst case scenario, the waiver mechanism may lead to careless, undisciplined deregulation of the for-profit industry, nullifying the gainful employment statute. This outcome would merely return the for-profit industry to the state in which it operates today. But the potential benefit to the Department and the regulated entities may be just enough to encourage for-profit institutions to put a good faith effort into making the experimentalist model work. After all, the alternative is for the Department to continue promulgating debt measures that are premised on the Department's view—however restrictive or generous—of what constitutes an unacceptable for-profit program.

VI. CONCLUSION

The gainful employment rule is a promising measure for holding for-profit higher education institutions accountable for the training and education that they provide their students and our society. One of its core provisions, the DRT, sought to gauge whether individual programs, vocational or academic, present a financial risk to their students and to taxpayers by looking at the percentage of loans in repayment. However, the DRT was deemed fatally flawed when the gainful employment rule was challenged in court. The district court insisted that the DRT's penalty threshold be based on objective expert recommendations or industry practice, rather than regulatory impact data. Without an appeal and without new data, the Department's second attempt at rulemaking may fall to the same exacting "arbitrary and capricious" review. The best opportunity for the Department to collect data and create a fair—and even a good—rule, one that will not arbitrarily target for-profit schools, lies in the experimentalist regulatory model. Armed with default regulation and the ability to waive that regulation, the Department would be empowered to evaluate waiver proposals and closely monitor the regulated entities. The Department could then adopt best practices that it learned through longitudinal studies and experimentation. The for-profit institutions, in turn, would have the chance to demonstrate over a longer period of time than is afforded through command-and-control rulemaking how their individual circumstances should factor into defining the success of their pro-

grams. Despite the potential pitfalls, an experimentalist regulatory model is a promising way to encourage the Department to collect better data in order to create a better gainful employment rule.