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## Private Publics, Public Privates: An Essay on Convergence in Higher Education

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# PRIVATE PUBLICS, PUBLIC PRIVATES: AN ESSAY ON CONVERGENCE IN HIGHER EDUCATION

*Richard A. Matasar\**

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Once upon a time, not too long ago, we understood social organization. Parents ran their families. The principal governed the local school with an iron fist and a velvet glove; the school board controlled the principal. People turned to religious leaders for guidance and respected their views. We knew that the President had a private life, but did not find it necessary to read daily press speculations about that life. Greedy bosses exploited professional athletes, studios extracted life-time servitude from performers, and the *three* television networks controlled access to popular information and entertain-

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ment. Every social institution discriminated against women and minorities with impunity, and no one even noticed when older citizens or disabled people were treated badly. The United States fought communism everywhere on the globe. And, public universities served one function; private universities served another.

That was then; this is now. People question the hierarchy of every institution and demand greater equality in governance, creating new instability where once there was brutal certainty. We hold parents, religious leaders, politicians, and all public figures to high standards, subject them to daily scrutiny, and place them on lofty pedestals, only to bring them down. We expose social and political institutions to harsh criticism for their foibles, making them accountable, but pander to our culture's taste for the sensational. Greedy athletes join their bosses, much to the disdain of the common fan who can no longer afford to attend sporting events. Studios buy talent with the highest bid, and now "we've got one hundred channels, but nothing on." Society empowers women, minorities, senior citizens, and the disabled, permits and even encourages them to challenge inequality, yet continues to allow their suffering and mistreatment. Worse yet, every move toward greater equality seems to spur a new orthodoxy and raise the specter of political backlash. The free world vanquished communism, only to replace it with ethnic and regional hostility. And, these days, publics are private and privates are public.

While being a social critic is fun, and being a pundit is even better, I will forego commenting on our emerging social structure, other than to say: "Michael Jordan is worth every penny he can extract!" No, this essay has a much narrower focus: identifying the distinctions that remain between public and private higher education as the lines between the two blur and differences disappear. First, I explore stereotypes of public and private education, focusing on both economic and social factors that seem to characterize them. Next, I argue that these factors are converging: publics look and feel private, while privates grow more public daily. Finally, I address the remaining essential attributes of public education in a privatizing world, concluding that public education has a unique, legitimate, and special role that must be sensitive to the market, the search for excellence, and the maintenance of the state's mission.

#### I. REFLECTING ON STEREOTYPES: IF IT QUACKS LIKE A DUCK, FLIES LIKE A DUCK, AND TASTES LIKE A DUCK, IT MUST BE A DUCK

Conjure up some imagery. Some time ago, the fateful high school day arrived: meeting with the guidance counselor. Perhaps it was during the junior year. Students had just received SAT scores and believed their fates were sealed. Only one question loomed ahead: where to go to college?

After pulling out the catalogues of every school from here to the North Pole, students addressed a number of tough questions. Big or small? Cheap or expensive? Liberal arts, professional, or scientific? Urban or rural? Near or far away? Easy to get into or highly selective? Public or private? To address these questions they investigated differences and similarities among schools, the most salient of which concerned economic value and social atmosphere. On reflection, the greatest differences seemed to be between public and private schools.

Here was how a student's internal evaluation session might have sounded:

*Public School* — Good old State U; what a solid place. It's been around forever — well at least 100 years. Sure, they used to be just agriculture and teacher education, but look at them now. They are a comprehensive research institution (whatever that means), with programs in every field. They have famous faculty members, although I hear that they never teach undergrads. The school is modestly priced. That should leave me with money in the pocket, or at least lower debt. I know that the state subsidizes them, but why not. My family has been paying taxes here for years. We're entitled to an inexpensive, good education; it's our birthright as citizens. I love the Gators [or insert your favorite symbol of college debauchery].

I'm glad our State U. serves every citizen, regardless of wealth, gender, ethnicity, or race. I like the focus on local organizations and the attempt to educate citizens of all backgrounds. It's true that I'll have some classes on television or with teaching assistants, or even in giant lecture halls with hundreds of other people. But, that seems a small price to pay for a decent education at a reasonable price. The only thing that gives me pause is the bureaucracy. I can't seem to get anyone on the phone. The application arrived late. They process things in ten different places, and no one seems to care if I complain. I guess you get what you pay for.

At least I won't have to worry about them asking for money every year. Thank goodness state dollars pay for the school. My obligation ends at graduation. I know that they seem to struggle to hold on to their best faculty, that the equipment is outmoded, and that they never seem to be able to offer enough courses to let anyone graduate on time. But, all of their students — rich and poor, white and black, fraternity members and independents (well, let's not get carried away!) — seem to struggle together. It is a great place with a democratic and powerful student government, where the faculty have a say in the governance of the institution, where there are open meetings, public documents, and sunshine in its affairs. People seem to get along great; there are some killer parties, and the tailgating is the best. I know if I want to stay in the state after graduation, being a Gator [or insert other appropriate symbol] means a lot. Who wants cutthroat competition? We're already the best in the state.

*Private School* — Good old Whattsamatta U. It's the top. They go back in this country since before there was a country. I know that they used to have quotas against my kind of people, but that was ages ago. Now they're open to anyone. It's a meritocracy — good grades, good SAT, good greenbacks, then I'm in.

They claim to be a liberal arts school (whatever that is). But, it's clear what they really do: they produce professionals, business people, PhDs, and the well-connected, "old-boy" job network. I guess being "one of the boys" sets you for life. They have a bunch of famous professors too. Apparently you can take classes with them, but only if you are at the top of the class. It costs a lot, but I guess it's worth it. They tell me that in virtually every city, corporation, or school you find their graduates — dominating the local scene. I know that they have no real athletic program, but their college-bowl and debate teams are stars.

Not everyone can get into the school. Their admissions criteria are daunting, especially if you have to go through financial aid. They seem pretty uninterested in state and local matters, as their consistent battles over urban renewal demonstrate. But, they have programs throughout the world, graduates everywhere, and networking possibilities galore. I like it that their faculty members serve on advisory panels all over the place.

They claim small classes, personal service, television rooms, and gourmet food service. I hear that they have registration hot-lines, personal career service officers, computer hook-ups for everyone, and independent study classes that can be customized for your own schedule. They better have that stuff, given the prices that they charge. I can't believe that anyone can afford the place. But, at least they make it easy to borrow. They figure you'll make so much with one of their degrees or the connections that you can make that you can pay it back in the end. They sure have an efficient admissions office. They write me every week. They return their e-mail and letters pretty quickly. I love their local receptions and welcoming open houses. They even seem to want me badly enough to offer me a scholarship, although I hear it's just like the discounts they run at department stores: high sticker prices that no one really pays.

It's funny, but they already seem interested in my money as a donor. They wrote my parents about a support fund, and they told me in my scholarship award that they expect me to pay it back when I'm able. Maybe I will; they're working for me, and I hope I can repay them in the future. After all, that seems to be how they can afford all the equipment, faculty, and fancy labs.

They say that the place is run by a bunch of old white guys who seem to pass power to each other. They aren't interested in sharing too much information about cost or their organization. I suppose that all the secrecy about salaries and other costs is just their way of saying, "None of your

business.” That’s o.k. with me so long as I get what I’m paying for. Given their aspirations to be the best school in the country, I guess that I can tolerate some of their arrogance. It is cool that their faculty and president travel all over the world, are always on television talk shows, and are quoted in the *New York Times*. I know that once I become a Preppie, I’ll have it made throughout the country or even the world!

Envision a summary of these scenarios put on a master chart. It might look something like the following:

COMPARISON OF PUBLIC AND PRIVATE EDUCATION STEREOTYPES I HAVE KNOWN		
Variables	Public	Private
<i>Economic Factors</i>		
Cost	Inexpensive	Expensive
Pricing	Subsidized	Market-based
Purpose	Nonprofit, Service	Commercial, Selfish
Product	Generic	Name Brand
Services	Bureaucratic	Customer-driven
Resources	Struggling	Wealthy
<i>Social Factors</i>		
World View	Egalitarian	Elitist
Accountability	Open, Democratic	Closed, Authoritarian
Focus	Local, Regional	National, International
Work Style	Laid-back, Complacent	Intense, Driven
Atmosphere	Social	Careerist

As my colleague George Dawson says, “Who’d want to go to either type of place?”

Of course, as with most stereotypes, this list of characteristics grossly misstates the complexities of the real world. There are elite, expensive public schools, and there are inexpensive, egalitarian private schools. There are public schools that cater to their customers and private schools that are grotesque bureaucracies. Nonetheless, the archetypes described above do capture the essence of traditional differences between public and private education. But these fundamental differences are now eroding. There is a growing convergence between all public and private institutions.

## II. CONVERGENCE

A short review of the economic and social factors listed above suggests that differences between public and private education are eroding.

### A. *Economic Factors*

#### 1. Cost

Whether public or private, education is expensive.<sup>1</sup> Good faculty members demand market salaries. Laboratory equipment must be purchased. New buildings must be built, and old buildings must be maintained. Technology must be purchased, upgraded, and replaced with the cycle continually repeating. Libraries need equipment, personnel, and even books. Students need dorm rooms, sports facilities, parking lots, and other amenities. In short, the university is a small community with increasing demands for service and ever-increasing costs.

Dealing with costs is the preoccupation of every university. Both public and private universities have had simple formulae for meeting costs. For private schools, the formula usually has been: (# of students) *times* (tuition charge and fees) *minus* (discounts) *plus* (fundraising) *plus* (grants) = gross income. The pressure on private schools continually to add programs, facilities, and services in order to compete for students has led to substantial yearly price increases over the last two decades.<sup>2</sup> And, because students have been able to borrow much of the cost of their education, these price increases have not prevented them from attending these schools.<sup>3</sup>

Public schools have used a similar formula, (# of students) *times* (price) *plus* (fundraising) *plus* (grants), but have the added income provided by state subsidy. Unlike private schools, however, state universities have been able to shield students from substantial price increases.<sup>4</sup> First, given their substantial price advantage, many state universities have deferred increasing

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1. THE COLLEGE BOARD, *TRENDS IN COLLEGE PRICING* 5 (1998). On average, first-year students entering an in-state four-year public institution in Fall 1998 expected to spend \$10,458 for their first year. Their private school counterparts expected to spend \$22,533 for the first year.

2. See R. Paul Guerre, *Financial Aid in Higher Education: What's Wrong, Who's Being Hurt, What's Being Done*, 17 J.C. & U.L. 483, 486-87 (1991); Richard A. Matasar, *The MacCrata Report from the Dean's Perspective*, 1 CLINICAL L. REV. 457, 466 (1994).

3. See David L. Chambers, *The Burdens of Educational Loans: The Impacts on Job Choice and Standards of Living of Students at Nine American Law Schools*, 42 J. LEGAL EDUC. 187 (1992); Richard A. Matasar, *A Commercialist Manifesto: Entrepreneurs, Academics, and Purity of the Heart and Soul*, 48 FLA. L. REV. 781, 787 (1996).

4. THE COLLEGE BOARD, *supra* note 1, at 4. Tuition, fees, and room and board for the 1998-99 school year are, on average, only 4% higher than the previous year. See *id.*

programs, facilities, and services, relying instead on price advantage alone to keep their share of students coming in the door. Second, in those instances in which growth was critical, many state universities kept their prices down by effectively arguing for and receiving incremental additions to state subsidies.<sup>5</sup>

Today this system is spinning. At many private universities, price is now becoming an impediment to attracting students, who are increasingly unwilling to establish mountains of debt to finance their educations without some hope of employment that will be sufficiently remunerative to service that debt.<sup>6</sup> State legislatures no longer believe that their state universities carry automatic entitlements for more resources. Consequently, public universities are becoming more deeply involved in private fundraising and are beginning to raise their prices — following the same model previously used by private schools to finance their expansions. The result is plain: cost increases at private schools are slowing;<sup>7</sup> cost increases at public schools are growing;<sup>8</sup> and the differential between them is narrowing.

## 2. Pricing

Armed with a new strategy of price increases to fuel the expansion of their programs, public schools will be less dependent on state subsidies. As the percentage of a public school's budget coming from state subsidy decreases, the school's reliance on this subsidy shifts. In some ways, the subsidy is treated more like income from an endowment — a part of the budget, but not the primary basis for making expenditures. Once this point is reached, the public university must operate in the market, making pricing decisions that relate to demand for its particular product, without the aid of a substantial state discount. Looking forward, therefore, the public university is increasingly likely to face market pressures similar to those of the private school.

The shift in costs at public universities also may alter public perceptions about the role of the state in supporting private education. First, private education already is deeply subsidized by state and federal dollars. State funded scholarships may be used in private schools, federally subsidized grants and loans are used for both public and private education, and grants

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5. See Matasar, *supra* note 3, at 787.

6. See Guerre, *supra* note 2, at 504-05. See generally Chambers, *supra* note 3.

7. THE COLLEGE BOARD, *supra* note 1, at 3. During the 10-year period ending with 1998-99, tuition and fees at private four-year institutions have grown only 35% in constant dollars. *Id.* Since 1980-81, tuition and fees at those institutions have grown 100%. *Id.*

8. *Id.* During the 10-year period ending with 1998-99, tuition and fees at four-year public institutions have grown 53% in constant dollars. *Id.* Since 1980-81, tuition and fees at those institutions have grown by more than 100%. *Id.*



are made to researchers at both types of schools. Moreover, we are entering the era of the educational voucher and tax credit. Citizens see very little reason to pay for public education through taxes, while they do not have the opportunity as consumers to choose the best product in education. The pressure, therefore, is to give citizens education credits that can be used to purchase either public or private education. Looking forward, this trend is likely to further blur pricing distinctions between public and private schools, as public schools look to increase prices and rely on a better product to attract customers, and private schools look for state subsidies, implicit and explicit, to reduce the price differential between themselves and public competitors.

### 3. Purpose

Both public and private education qualify for nonprofit status under IRS regulations.<sup>9</sup> Nonetheless, their approaches to commercial activity and mission have traditionally differed. Public schools have operated close to the margin — spending about what they have received in income. They have tied their mission to being low cost educational providers and have not sought to maximize the income potential of their captive student market. Private schools have operated to generate surpluses (profits in the private sector) in order to grow their quasi-endowments. They treat their students as customers, exploiting their willingness to pay fees for services like recreation, computing, and sporting events. Accordingly, private schools sometimes have been seen as selfish marketeers, while public schools have been seen as providing a public service.

Whatever may have been the case in the past is certainly not the case today. Public schools are now engaged in the same commercial activities as their private counterparts. Both run auxiliary enterprises to profit from students. Each extracts whatever user fees the market will permit. Each engages in licensing agreements and joint ventures with private industry. Each runs sports programs that generate ancillary revenue (and sometimes profits). The consequence is that in both public and private schools, there is a strong incentive to generate surplus that can be used to increase the schools' endowments or support their programs.

### 4. Product

Traditional state universities can be compared to generic products. They have a mix of programs that look similar to each other. They have a local feel, focused on state or sometimes regional affairs, and they are relatively

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9. I.R.C. § 501(c)(a)(3) (1994).

unknown outside of a narrow geographic area. They try to be good at most things and rarely invest to be the best at anything. They do not have substantial outreach programs that use public relations or media campaigns to foster a positive image for the school. They rarely seek students from distant places.

In contrast, private schools constantly attempt to create brand name identities for themselves. In the competitive markets, they need a special niche or strong quality assurance in order to distinguish themselves from the hundreds of other competitors. They have no natural constituency or state subsidy. Thus, they market, trademark, and recruit.

Anyone who has seen the hysteria of big-time state university athletics knows that the days of the generic State U. are over. State universities sign national contracts to have their merchandise sold throughout the country, fueled by weekly television shows pumping demand for their logo and symbols. Moreover, such exposure is the opportunity to differentiate the university not just because of its athletic success, but for its academic distinction. The promotional pieces aired during sporting events inevitably speak to academic quality and distinctiveness. Each state university, much as its private counterpart, now competes with others. First, within the state, it must distinguish itself from other state institutions. Seminole and Gator jokes have a point to them — each related to certain brand name distinctions between the two. Second, schools increasingly must compete nationally for research grants and philanthropy. Neither sponsored projects nor private philanthropy will come to generic programs. Resources flow to programs of distinction.

The future of both public and private education seems clear: create distinction or fail.

## 5. Services

In some lumbering traditional state universities, there is a sense that the system is the only thing that matters. Administrators have been in place since prehistory. They have rules that must be obeyed, forms that must be filled out, and scheduled breaks that cannot be interrupted. They are frequently joined by faculty colleagues who have closed doors, refuse to review exams, and rarely socialize with their students. In short, many traditional public schools have been dominated by the following attitude: (1) We're cheap; (2) Yet, we provide the courses and services of big, expensive places; (3) But, we don't have all of the resources of the fancy places; (4) We're paid less; (5) We don't get all the benefits; (6) We know when they leave here they'll never give us back a penny, even when they have the resources to do so; (7) They're lucky to be here; and (8) They owe us!

This attitude is not a stranger to private education. Nonetheless, in recent

years as the pressure to recruit, retain, and receive income from students has increased, private schools have taken on a more “consumerist” hue. Such schools cater to student wishes, adding services, functions, personnel, courses, and amenities to service student demands. Staff members train to give good service. Students and other university “customers” fill out satisfaction surveys that university administrators read and act on. The registrar customizes schedules and moves exams to accommodate student conflicts. Faculty members open their doors, join in student events, help in recruiting, and become involved in student satisfaction. In such private schools, the attitude differs substantially from traditional state universities: (1) We’re very expensive; (2) Other places are cheaper; (3) Students pay our salaries and keep the place afloat; (4) If we are unresponsive to their demands, they will go elsewhere; (5) If they do, we will lose the good life — decent salaries, nice offices, and good perks; (6) We know that our future depends on their giving, generously, throughout their adult lives; (7) Therefore, we better treat them well; and (8) We owe them!

Most universities today fall somewhere between these extremes. Each student has a high expectation that she or he will receive excellent service. State legislatures that receive consumer complaints can be very tough on an unresponsive public school. Every school now measures the productivity of administrators and their responsiveness to customers. Drawing upon service models from the private sector, schools engage in strategic planning, utilize total quality management techniques, streamline their processes, encourage open and friendly atmospheres, and try to build for the future of their fundraising development efforts. Failure to do so threatens future resources for the institution, for the margin of survival at every school will depend on philanthropy.

## 6. Resources

Public education — struggling to meet budget, unsupported by tax dollars, charging low tuition rates, laying off personnel, deferring maintenance, using old equipment, borrowing books, and “nickel-and-dime” the performance of basic services — has traditionally been conducted with relatively spartan resources. This situation should come as no shock given the nature of most public services. First, they are funded by all citizens through taxes, revenue appropriations, lottery funds, and other general state resources. Yet, state universities provide services to relatively few (privileged) individuals. Against this educational need are the needs of public education (kindergarten through the twelfth grade), prisons, the welfare system, public works, and myriad other state projects. Second, state universities are parts of larger state bureaucracies. They have statutory duties to provide, for example, offering free services, charging low rates, following

complicated rules, and constraining expenses. In short, they have little control over their own budgets, whether income or expenses. Third, their employees are treated the same as other state employees. They are bound by many of the same rules that restrict their outside activities, limit their earnings, and tie them to formulas in their teaching loads and productivity demands. Fourth, they are a part of larger systems in which their ability to differentiate their school from other state institutions is constrained, in which they are forced to provide duplicative and wasteful programs, and in which they are prevented from competing in the territories of other state programs, thereby limiting their ability to expand their customer base. As opposed to other state governmental priorities, state universities are supported sufficiently to stay in business and provide a decent quality of teaching and service, but they are constrained, both by resources and by state anticompetitive measures, in their attempts to improve their quality and status.

Private schools have few of these limitations. They have been able to charge prices that the market will bear. They can compete with any institution they choose, in whatever location they choose. They create their own bureaucracies, but can undo them by internal rule changes. Accordingly, private schools have set themselves on their own course. They have accumulated wealth and utilized it to try to improve. When resources are needed, they either increase their price, or increase the number of students they enroll. In short, because they run like a business and not like a state agency, they have the ability to generate resources, subject only to the vicissitudes of the market.

These traditional roles are fast changing. State universities have joined the ranks of institutions seeking market solutions to their problems. While state legislatures and others are unsympathetic to the demand for additional state resources, especially those funded by tax dollars, they are much more receptive to an argument from a state university for user fees. These fees can add resources to a school. By charging for services that once were provided for free, and by charging market rates for housing, food, books, and other products, which once might have been subsidized by the state, the public university may have some room to move in the market. State universities also have begun to charge supplementary tuition for improvements to the schools — charges borne only by students enrolled in the school, not by state taxpayers at large.<sup>10</sup> Added to this are hidden state subsidies like scholarship support, matching funds for construction, profitable athletic programs, licensing fees, and patent, trademark, and copyright royalties. State universities are therefore in the enviable position of having their cake and eating it too. State subsidies, even if they are not rapidly increasing, provide

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10. Matasar, *supra* note 2, at 467.

a base level of support that allows state universities to increase their tuition, reap the benefit of substantial marginal revenue increases, and still severely undercut the market price for education offered by private schools that lack a state subsidy.

At the same time, private schools are reaching the point where they can no longer continue to increase their price or to increase the number of enrolled students. There is only so much "value added" that a school might claim. Is a private school education worth two times, three times, or four times the cost of public education, especially at a time when public education is raising its price at a higher rate of increase, but lower absolute cost?<sup>11</sup> Moreover, as schools that have been engaged in private fundraising for years, private schools may have fewer untapped nontuition resources. Thus, while many of the most elite private schools may continue with large price differentials between their product and that of the state university across the street, and while they may continue to raise substantial private revenue, the prognosis is simple: for many private schools, the future is one of diminishing relative resources.

## B. *Social Factors*

### 1. World View

Education in the United States is a powerful tool for equalizing differences among social classes, races, and genders. We have a national ethos of equal access that is underscored by a commitment to public education. From grade school, to high school, to community college, to public universities, citizens of every state come to expect that all of their sons and daughters will study together. This enduring ethos gives a strong egalitarian hue to public higher education.

Of course, reality has always been significantly more complicated. Given our segregated housing patterns, neighborhoods stratified by social class and income, significant tax base and expenditure differences among public schools, and the exit strategy of many citizens to private schools, public education has never quite fulfilled its egalitarian promise. Nonetheless, the image of public education as an equal opportunity device remains strongly embedded in our consciousness.

Consequently, we tend to conceive of public education as educating the average person. This might suggest that admissions criteria should be within

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11. THE COLLEGE BOARD, *supra* note 1, at 9. Since 1990, tuition and fees have grown 39% at four-year institutions, compared with a growth of 27% at four-year private institutions. *Id.* However, growth in private institution costs has outstripped that in public institutions each year since 1995-96. *See id.*

the reach of the average high school graduate, that work loads should be manageable in school, that classes should be taught to the average student, that teaching should be the focus of the program, and that preparation for citizenship in the state polity should be the most desirable outcome. Creating an enjoyable social atmosphere would become critical as a means to create life-long relationships between classmates, who ultimately will join each other in the local workforce. For the very best students, there might be an honors program. For the students geared to research, there might be a special “presidential scholars” program. But, for the average student, there should be a system to get them through school with relatively little resistance.

Stereotypical private education is quite different than this model. Students are recruited from the highest social classes; often they are the children of parents who have attended the school or one of its competitors. There is pressure to admit only those with the highest test scores. When test scores are ignored, the schools focus on customized admission, for example, of the most talented musicians or actors for the fine arts programs, or of children of foreign dignitaries, or young high school inventors. The “average” student is rejected; the elite or the unusual exalted.

The consequences of this system are straightforward: the school focuses on individual development. It stresses personal achievement, production of research or other outputs, and attention-grabbing educational projects. These schools encourage independent study, preparation for entrepreneurial behavior, and loyalty to the school above other social ties. Classmates cultivate friendships that will turn into life-long networking connections. Because this education is very expensive, it is limited to those with resources or to brilliant students from lower economic classes who will receive scholarships and loans that will allow them to associate with their peers from the “right” side of the tracks.

In today’s higher education market, the line between egalitarian and elite has blurred. Every school seeks diversity among its students. Every school also seeks the best and brightest students. The University of Florida boasts about its Bright Futures Scholarships for students with outstanding SAT scores and high school grades. It recruits National Merit Scholars as if they would help bring the school a National Football Championship. Public universities compete with each other and private schools to become AAU schools, Carnegie Research I Institutions, and winners of academic competitions. Deans at public universities hear daily from alumni whose children can no longer get in because admissions criteria have been raised to the point that the public school is as hard to get into as the private school down the road. The children of the wealthy discover that private education is expensive and that public education leaves more resources in their pockets to purchase cars or apartments, or to dine out. And, given the shift in focus of the public school to academic achievement, there may be little loss of

prestige in the move.

By the same token, private schools have begun to scramble for students. They need to lower their wholesale price through tuition discounts. They need to build their sports programs to establish market presence. They look locally for philanthropic support and become involved in the local political process. They may ease their strict admissions standards in order to bring in sufficient numbers of students to keep the school financially secure. They begin to create wonderful occasions for students to socialize with each other and “enjoy” education.

In short, public and private schools share a market in which an elite image is desirable, but in which equal access is also cherished. Private schools tout their “need blind” admissions policies as much as public schools advertise their competitive admissions criteria. In the end, institutions of both types strive for students who are elite in the sense that they are as bright as they can be and strive to create atmospheres that are egalitarian in the sense that any smart, aggressive, and ambitious student can join their community.

## 2. Accountability

In recent years, all universities, public and private, have come under intense scrutiny by the government, press, students, and general public. The popular press regularly reports on the latest outrages in higher education — the high cost, goofy research projects, improper use of funds provided by grants or donors, athletic program excesses, or even internal personnel matters. Accordingly, calls have been made for higher education to be “accountable” to students, who pay for their education, to donors, who fund various university projects, to grantors, who fund research, to the agencies, who fund financial aid, and in public education, to the state, which ostensibly controls the university.

Many states require their universities, as state agencies, to operate in the sunshine<sup>12</sup> by having open public meetings and opening their documents for public review and reprinting in the press. The universities require their faculties to control the institution’s governance. Moreover, the state Boards of Regents or Control have oversight of even the smallest details of the school — with especially close review of all financial decisions. The legislature may create serious restrictions on some expenditures, such as social events, alcohol, or travel. Salaries become matters of public knowledge and sometimes are even printed in the local newspaper for public

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12. See Teresa Dale Pupillo, *The Changing Weather Forecast: Government in the Sunshine in the 1990's — An Analysis of State Sunshine Laws*, 71 WASH. U. L.Q. 1165 (1993).

consumption (and as a boon to life insurance sales people and securities dealers, who make a living cold-calling prospects). Hiring decisions, especially of university officials, deans, and presidents are highly visible and politically sensitive. Proposed new curricula must be approved by multiple layers of bureaucrats. Change comes slowly and almost always with public debate.

Private universities rarely face the intense public scrutiny that public universities face. Their meetings are not public; their documents need not be viewed; and their decisions can be made more quickly with fewer layers of red tape to cut through. Governing Boards frequently select private school presidents, provosts, and deans in secret meetings. When in power, these leaders operate out of the sunshine. Their financial decisions are often secret. Budgets are closely guarded. Salary information is secret, often known only by the deans, university officials, and the IRS.

However, even in the area of accountability, there is convergence between public and private schools. Public universities create private support foundations that may operate with greater flexibility in expenditures than those departments using only state funding. Donors may make gifts that allow reimbursement for expenses that are not allowed when state money is used. Some meetings, especially those concerning personnel, are exempt from oversight.<sup>13</sup> In addition, the leadership of the university may meet infrequently, delegate decisionmaking to administrative processes outside of the sunshine, and outsource some services to private companies not subject to oversight. By the same token, private universities increasingly face financial review by their funders. The press seems as relentless in its pursuit of stories concerning excesses in private education, as it does in its pursuit of public education. Moreover, the faculties and students of private universities seek to exercise as much control over their institutions as do their counterparts in public schools. In short, higher education in the future is likely to be subjected to scrutiny, but with enough "wobble room" to be able to operate in sensible ways.

### 3. Focus

Public universities frequently focus on being "*The State University*" because their students come from a relatively narrow geographic area, funding is primarily through state dollars, graduates take local jobs, and donors remain close to home after graduation. In contrast, private universities often must compete across a wider geographic area in order to draw sufficient numbers of students to survive economically. Their competition for students is national. Their students take jobs across the country, and

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13. Pupillo, *supra* note 12, at 1172-73.



hence their donors are dispersed. Accordingly, many private schools focus on maintaining national or even international stature.

These foci are changing. Many state universities have become national powerhouses — from those whose sports teams are followed nationally to those whose faculty members win the Nobel or Pulitzer prizes or become Fulbright scholars to those whose students become Rhodes scholars. These nationally successful programs begin to draw students from around the country. Moreover, given their relatively lower prices — even for non-resident students — these schools become powerful competitors to private schools. But, as these nationally competitive public universities begin to raise their prices, and the gap between their tuition and that of private schools narrows, they must further shift their mission to greater national service or risk losing students to private competitors that may offer more bang for the buck. Furthermore, given the increasing capability of distance-learning technology, national private brand-name universities can compete for local students who never need to leave home to receive their education. Thus, the public university may be forced into the national market, even if it desires to stay locally focused.

Curiously, many private schools have shifted their focus as well. It is difficult and expensive to compete with other schools throughout the country. Local students often need incentives to leave home. Some aspiring national private schools have few natural advantages over more local private or public schools in either job placement of students or in academic programs. Thus, in order to draw students from afar, these private schools need to offer discounts to close the price gap with public schools or scholarships to offset the expense of leaving home. Private schools also must engage in costly marketing campaigns, publications, and fancy web sites. They also risk the enmity of local communities that feel spurned or ignored by the college. Accordingly, many private schools have reenergized their local presence and focus.

#### 4. Work Style

It is sometimes fashionable to speak about individual work styles by type: Type A personalities are driven, ambitious, workaholics, rarely satisfied with their current status, searching for the elusive pot-of-gold at the end of the rainbow; while Type B personalities have more balance, are capable of leisure activities, and are fairly satisfied with their lot in life. In the world of universities, the private university has been Type A, and the public university has been Type B (at least outside its athletic program). This difference in work style has had some profound consequences in the archetypal private and public universities:

- *Tenure and Promotion Standards.* Private schools have hired with the expectation that many faculty members would not be promoted or tenured, that in order to improve, every tenure decision would require a better than the average productive faculty member, and that research, teaching, and service should all be excellent. Public schools have followed similar standards, but have erred in favor of getting along, presuming in favor of the faculty member, and preferring teaching and sometimes service to research.
- *Admissions and Grading.* Private schools have recruited nationally, required very competitive test scores and excellent high school grades, and have sought to increase customized excellence in every aspect of their programs. Public schools have recruited locally, offered more universal admissions, and sought places for all citizens. On the other hand, once in school, students in the private school have been nurtured, coddled, and given the “Gentle Person’s C (now a B),” while the public school students have been weeded out and graded harshly for their poor work.
- *Service and Focus.* Private schools have provided customized service and attempted to expand their impact widely. Public schools have provided generic service and focused locally.

As discussed above, the convergence of public and private education on most other factors has greatly diminished the difference in work style. Given the pervasive influence of ratings and other “objective” criteria, both public and private institutions are pushing themselves to “improve.” Given the greater accountability of public and private education, laid-back work styles are diminishing. Legislatures and donors alike call for greater productivity in education — in teaching, scholarship, and service. Students and parents demand high levels of service, good educational reputation, renowned faculty, and prestige. In such schools, tolerance for unproductive institutional behavior is quite low, whereas tolerance for weaker students is high, demanding even more investment in the “customer.” Thus, Type B institutions may in fact exist, but only as special niches, marketed explicitly for their “social atmosphere” and their comfort. Most schools are moving to the fast track, trying to get there faster than their competitors, and fearful that if they fail, their institution will be left at the station.

## 5. Atmosphere

There is a stereotypic image of students at large public universities having weekend-long parties, which culminate in binge-drinking excesses. This is coupled with pictures of a powerful Greek system, complicated student networks connected to local political structures, ritual athletic

celebrations, and homecoming celebrations costing tens of thousands of dollars. In contrast, private schools carry the image of “Nerd U.” — the place at which pocket protectors, scotch-taped glasses, white socks, and all-night study sessions unconnected to exams are the norms. Traditionally, public school students grow as people first and as students later; whereas, private school students progress academically and later worry about being social misfits. Public school students bear down at the end and eventually find career paths; the private students immediately start on a career path, varying only when they take organic chemistry — moving then from the medical school to the law school path.

Whatever stereotypes may have existed surely are eroding today. All schools offer tremendous social opportunities for students. Even where fraternities and sororities are absent, private schools have their “eating clubs” and other places for socialization. All schools struggle with binge drinking, share athletic celebrations, and create rituals to bring big-wigs and students together. Moreover, students in both public and private school have become significantly more career oriented. Whether worried about downward mobility, pessimistic about the future, or deeply focused on a substantive interest, students must find themselves sooner, declare majors earlier, and direct their energy toward a discipline. Furthermore, as the cost of education has escalated, parents, legislators, regulators, and schools themselves have moved rapidly toward measuring “outcomes” as a way of assessing their success. “Outcomes” means placement of students, donation rates by alumni, average salaries of graduates, and influence held by alumni. Every institution seeks improvement of its reputation, which in turn depends on the success of graduates. Hence, all schools encourage students to treat school seriously and keep their social lives in balance.

### III. PUBLIC EDUCATION IN A PRIVATIZING WORLD

If public and private education are converging, will they be indistinguishable in the future? Or, will new stratifications arise, in which premier schools, public and private, compete with each other, leaving less elite missions for remaining public and private schools? Is there any special mission that remains for public education?

Although this essay has the tone of prognostication, I am no prophet. I do believe, however, that no matter what changes might occur bringing public and private colleges and universities closer together, the differences between them will never disappear. Rather, even in a privatizing world, public education will maintain its clear difference in price, mission, and accountability.

### A. *Price*

I have no doubt that public schools will increase their price substantially in the next several years. Further, I have no doubt that private schools will slow their rate of price increase, probably at no greater rate than the increase in the cost of living. In relative terms, public educational cost, especially for those schools adopting an elite, national mission, will increase at a significantly higher rate than private schools. The increased price will create new revenue for public schools that they will invest to improve their quality in the following ways:

*Faculty* — Public schools will significantly increase the size of their faculties and thereby reduce their student-to-faculty ratio. The new faculty will fit into niches of the curriculum in which the schools specialize in order to create unique markets for their product. In addition, new revenues will be used to increase salaries for faculty stars — either by releasing private funds for salary supplements or as direct increases to some salary lines.

*Facilities* — Public schools will enhance their physical plant and amenities for students. They will wire classrooms to accommodate information technology. They will create lounges, study spaces, comfortable housing, and elaborate student centers. These investments will be made to attract students.

*Information Technology* — Public schools will provide expanded library, computer, and audio-visual capabilities to their students and faculty. Libraries will invest in databases and other on-line resources to add capabilities for students. They will scan materials from public sources to create computer accessible materials. They may charge outsiders to use these services. Schools also will build distance-learning studios, video-conference centers, and state-of-the-art on-line products to expand their educational reach.

*Entrepreneurial Activity* — New funds will allow public schools to create venture-capital funds to invest in activities that will bring in even further revenue. They will build technology transfer projects, fund research and take licensing rights in return, engage in consulting, create electronic materials, and establish joint ventures with private entities.

*Create Programs* — Public schools will enhance and develop certain programs in order to establish special identities. To create brand names, they may engage in university-wide initiatives in specific areas, such as, ethics and professionalism, biotechnology, and computers, thereby giving each school an identifiable market niche.

*Student Services* — Schools will expand their recruitment and admissions offices, hire new counselors, broaden their academic support offices, and expand their career services offices. They will create simpler systems for registration, discipline, and grade reporting. They will also engage in “Robin Hood” type admissions — charging wealthy students full price in order to fund scholarships for needy students.

This list does not exhaust all investment possibilities, but suggests the path that public schools will choose to customize, upgrade, and enhance the quality of their programs. Yet, even with these investments and the need for ever-increasing revenue, the public university should not try to achieve price parity with private schools. Simply put: there is an upper-limit on the price a public school should charge.

In my view, public education must remain affordable — an elusive limit, but one that must be sought. Affordable in this context is a relative term — relative to peer public schools, relative to private schools, and relative to the prospective employment market. Thus, public schools should look to the comparable price of their public competitors and stay within a reasonable range of their average charges, adjusted for cost-of-living. They also should look to private school competitors and stay at a price no more than half to three-quarters of the private school rate; this rate should ensure a continued price advantage. By charging more, most schools will risk losing any competitive advantage and therefore undermine the public school’s special place for state citizens. Finally, public schools should charge an amount that will not cripple their students with unmanageable debt after graduation. Tuition charges should not exceed an amount at which the average debt load of the average graduate can be supported adequately by the average salary of those employed after graduation.

These guideposts reflect responsible stewardship of the public school mission — affordable, high quality education for state citizens. Thus, price increases — even quite large ones — must occur to improve education, programs, faculty, and services, but must not exceed a reasonable amount.

### B. *Mission*

Public schools increasingly will look beyond their borders to recruit students and to expand their influence. One can imagine a not too distant future in which brand name products will dominate every field, including higher education. Nike, Reebok, and Converse will control athletic shoes. Motorola and AT&T will own telecommunications. Sony will dominate consumer electronics. Microsoft will rule (the world?). In such a future, only a few schools will dominate public perception. Harvard, Yale, Oxford, Cambridge, the University of Paris, or other internationally renowned

university programs will have special value in the market. In this world, generic state-supported education may leave graduates with lower-tier status.

Moreover, the natural geographic advantages of public universities may disappear in the face of on-line, video-to-desk top, and high quality, real-time internet education. High prestige, brand name universities can open programs at will anywhere in the world, in virtually any subject. Where their own faculties or schools lack a particular expertise, these universities can obtain expertise from others through a joint venture, partnership, or acquisition. In essence, the prestige school can reach the world.

In this environment, the public universities will be forced to choose whether to service a purely local market, continue price discounting, and hope for "loyalty," or to expand, improve, and compete. I believe that most states will invest in at least one local public school as a "flagship." This school will be given freedom to recruit the best students, create significant outreach programs, hire and retain the best faculty, and venture forth in the international arena to compete. Such a strategy already is practiced by a handful of internationally well-known public schools. In the next few years, others will join.

However, the choice to engage in a brand name strategy will not force these public schools to deviate greatly from their unique missions. As creatures of state law, the schools' missions will be tied to those of their states. A public school located in a state that promotes tourism may be encouraged to create niche programming for the hospitality industry. In a state with an elderly population, the public university may expand its medical complex or its law school's estate tax program. Universities will be drawn into the strategic plans of their states. They will market programs to enhance strong state industries or create new initiatives consistent with long-term state goals. In this way, the state university will become an integral part of larger state priorities.

### C. *Accountability*

Public schools, no matter how national their mission or how significantly funded by tuition or private support are still beholden to state policy. Every university employee owes a duty of accountability to state supporters. Consequently, the public university must be accountable for its actions in every facet of its operation: financial, personnel, and programmatic.

*Financial* — Although state subsidy will decrease, it will still occupy a significant part of the university's financial support. Moreover, even private support, grants, and tuition revenue must flow through the state treasury. Thus, all expenditures will require state oversight. Universities will adopt measures of productivity in

all units — academic, support, and service — to assess their effectiveness.

*Faculty* — The days of tenure and absolute freedom thereafter are over. First, tenure will be granted only to those whose performance warrants a prediction of future success. Second, once tenured, faculty members will be reviewed periodically and will be expected to engage in life-long productive careers. Third, salary increases will be productivity-based. They may be given as bonuses or only as periodic increases based on multiple years of productivity. Fourth, sabbaticals and leaves will require productivity *quid pro quos*.

*Programs* — Universities will begin to review both new and traditional programs. Where a program does not attract students, or cannot attract resources sufficient to pay its costs, it may not survive. Universities will have to evaluate each program for its value to the whole. Those losing money may be retained for prestige, as loss leaders, or to fill out the product line. But where they serve no function, they may be cut. Successful programs will be expanded and given premier visibility.

In short, public universities will be under severe scrutiny. They cannot succeed without satisfying the policy that they justify their cost and fulfill a mission keyed to state interests.

#### IV. CONCLUSION

It does not take a sage to predict that higher education is entering a new era. Old stereotypes of public and private universities still are powerful, but are eroding as schools converge in style, mission, and cost. Moreover, the ground in the middle is solid: it invites high ambition by schools, public and private, and allows the market to dictate quality. It seeks better service and quality. It demands accountability. In the newly converging world of public and private education there will still be a unique place for the great public school. Such schools will increase resources to fulfill unique missions tied to state priorities and will withstand the searching scrutiny of those who will hold them accountable as beacons of higher education.