Student Debt is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform

Dalié Jiménez & Jonathan D. Glater†*

For an ever-growing number of students aspiring to higher education, borrowing is essential. Yet the burdens of indebtedness disproportionally harm Black and Latinx students. Debt also undermines the meaning and effect of higher education access, enabling many who borrow to reach the middle class but still limiting possibilities relative to students who do not need to borrow or who borrow less—students who are more likely to enjoy relative privilege. This Article identifies ways in which student indebtedness works systematically to disadvantage those students who belong to groups historically subordinated on the basis of race, and thus provides more concrete historical and empirical grounding for reforms that would improve accessibility of higher education. The Article develops proposals for reform, including debt forgiveness and elimination of public institution tuition, to promote greater equity in access.

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* Professor of Law, University of California, Irvine.

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INTRODUCTION

Student debt[1] plays an increasingly significant role in perpetuating the subordination of Black and Latinx people in the United States.[2] For students of color, who are disproportionately likely to lack financial resources, the burden of debt undermines opportunity, deters some from pursuing higher education entirely, and punishes those who pursue it. Black students are disproportionately likely to borrow,[3] to borrow larger amounts,[4] to take out student loans to attend for-profit schools[5] with worse career outcomes,[6] and to

[1] Today, nearly 45 million Americans owe more than $1.6 trillion in student loan debt. *See* Michael Stratford, *Warren Promises To Cancel Student Debt Using Executive Powers*, POLITICO (Jan. 14, 2020), https://www.politico.com/news/2020/01/14/elizabeth-warren-cancel-student-debt-executive-powers-098623. It is a growing crisis; the effects, discussed *infra*, include delaying buying a home, getting married, or having children.

[2] We focus our argument on Black and Latinx students because that is where the most comprehensive, empirical evidence is available. There is every reason to think that American Indian, Alaska Native, and some Asian American communities also suffer from the phenomena we identify. One study that examined Asian communities in Los Angeles found that the median net worth of people of Korean descent was less than 4% of that of people of Japanese descent, for example. *See* Charmaine Runes, *What's Behind the Wealth Gap in Asian American and Pacific Islander Communities?*, URB. INST.: URB. WIRE (May 10, 2018), https://www.urban.org/urban-wire/whats-behind-wealth-gap-asian-american-and-pacific-islander-communities, *archived at* https://perma.cc/NA59-Y6HU; *see also* Faircloth et al., *Use of Large-Scale Data Sets to Study Educational Pathways of American Indian and Alaska Native Students*, *in* NEW SCHOLARSHIP IN CRITICAL QUANTITATIVE RESEARCH, PT. 2 (Ryan S. Wells & Frances K. Stage eds., 2015) (identifying and analyzing issues in using datasets to study educational outcomes for Native peoples).

[3] *See* Brandon A. Jackson & John R. Reynolds, *The Price of Opportunity: Race, Student Loan Debt, and College Achievement*, 83 SOC. INQUIRY 335, 345, 351 (2013). A recent analysis found that Black students are more likely to borrow federal loans relative to White students and that the odds of borrowing have increased over time. *See* Monica Chan et al., *Indebted Over Time: Racial Differences in Student Borrowing*, 20 EDUC. RESEARCHER 558, 559 (2019) (finding that Black students were 1.3 times more likely to borrow than White students in 2000 but that the odds had increased to 1.59 times higher by 2016). Latinx students show the opposite trend. *See id.* ("[I]n 2000, Hispanic students had .83 odds of borrowing compared to White students (1.2 times less likely). By 2016, this difference had grown to .67, with Hispanic students 1.49 less likely than White students to borrow.")

[4] *See* Jackson & Reynolds, *supra* note 3, at 351.

[5] These students disproportionately attend for-profit providers of postsecondary education. *See* Sandra Staklis et al., Students Attending For-Profit Postsecondary Institutions: Demographics, Enrollment Characteristics, and Six-Year Outcomes 6 tbl.1 (2011), https://nces.ed.gov/pubs2012/2012173.pdf, *archived at* https://perma.cc/Y3KP-54RB. For-profit insti-

default on their loans relative to their White peers.[7] Latinx students are less likely to borrow than White students[8] but when they do, they borrow nearly as much,[9] and like Black students are more likely to attend a for-profit institution[10] and more likely to default than White students.[11] Both Black and Latinx students are less likely to complete a course of study than are White students,[12] which significantly impacts their ability to repay loans. Unscrupulous for-profit institutions disproportionately target these communities of color—historically excluded from higher education opportunities—and scoop up an outsized share of federal student aid dollars.[13] The combination

tutions have worse outcomes. *See, e.g.*, David J. Deming et al., *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. Econ. Persp. 139, 152–60 (2012) (analyzing higher student loan default rates at for-profit institutions, the lower likelihood of achieving a bachelor's degree at such schools, and the heavier debt burdens borne by students who attend them).

[6] *See* Stephanie Riegg Cellini & Latika Chaudhary, *The Labor Market Returns to a For-Profit College Education* 4–5 (Nat'l Bureau of Econ. Research, Working Paper No. 18343, 2012), www.nber.org/papers/w18343.pdf, *archived at* https://perma.cc/H7MK-C4RB (finding that earnings for students of for-profit postsecondary colleges lag behind those estimated for students of public community colleges and traditional four-year colleges).

[7] *See* J. Fredericks Volkwein et al., Factors Associated with Student Loan Default Among Different Racial and Ethnic Groups, 69 J. Higher Educ. 206, 215 (1998).

[8] Chan et al., *supra* note 3, at 559. One reason for the lower rate of borrowing among Latinx students may be that students who would need to borrow are deterred by the prospect of taking on debt from pursuing higher education; a separate study of aversion to borrowing found evidence that Latinx students and their families are more averse to borrowing than are, for example, White or Black students, based on borrowing rates among students who had at least $2,000 in outstanding need. *See* Alisa F. Cunningham & Deborah A. Santiago, Institute for Higher Education Policy and *Excelencia* in Education, Student Aversion to Borrowing: Who Borrows and Who Doesn't 23 fig.5 (2008), http://www.ihep.org/sites/default/files/uploads/docs/pubs/studentaversiontoborrowing.pdf, *archived at* https://perma.cc/9LJH-L84Y. Professor Kate Elengold Sablosky recently launched a project exploring "the relationship between debt, achievement and equity in higher education" among Latinx students. *See UNC School of Law Receives $374,000 Grant from Lumina Foundation to Study Higher Education Equity*, UNC Sch. L., (Oct. 3, 2019), https://law.unc.edu/news/2019/10/unc-school-of-law-receives-374000-grant-from-lumina-foundation-to-study-higher-education-equity/, *archived at* https://perma.cc/2ZZS-ECV7.

[9] *See* Chan et al., *supra* note 3, at 560 tbl.1.

[10] *See* U.S. Dep't of Educ., *Table 306.40*, Nat'l Ctr. Ed. Stat., (June 2018), https://nces.ed.gov/programs/digest/d17/tables/dt17_306.40.asp?current=yes, *archived at* https://perma.cc/KR9S-232D.

[11] *See* Judith Scott-Clayton, *The Looming Student Loan Default Crisis is Worse than We Thought*, Evidence Speaks Rep., Jan. 10, 2018, at 7 fig.3, https://www.brookings.edu/wp-content/uploads/2018/01/scott-clayton-report.pdf, *archived at* https://perma.cc/35LF-GCUK.

[12] *See* U.S. Dep't of Educ., *Table 326.10,* Nat'l Ctr. Ed. Stat., (June 2018), https://nces.ed.gov/programs/digest/d18/tables/dt18_326.10.asp?current=yes, *archived at* https://perma.cc/V6YM-DEPA.

[13] *See, e.g.*, U.S. Gov't Accountability Off., GAO-11-4, For-Profit Schools: Large Schools and Schools that Specialize in Healthcare Are More Likely to Rely Heavily on Federal Student Aid 7, 16 (2010); Anna S. Chung, *Choice of For-Profit College*, 31 Econ. Educ. Rev. 1084, 1096 (2012) (finding that even when geographical location is held fixed, the for-profit student population has a higher concentration of Black students); Deming, *supra* note 5, at 148 ("The Title IV—eligible, for-profit sector receives the majority of its revenues from federal financial aid programs in the form of loans and grants to their students."); Gregory Gilpin & Christiana Stoddard, *Does Regulating For-Profit Colleges Improve Educational Outcomes? What We Know, What We Don't Know, and What We Need to Find Out*, 36 J. Pol'y Analysis & Mgmt.

of congressional action and inaction[14] that permitted student loans to become the dominant federal intervention in higher education finance has proven an ill-advised choice and one that has had a disparate, negative impact on students who belong to racial and ethnic groups that have historically suffered racial oppression.[15] On the other hand, in deciding to heavily subsidize higher education through the tax code, Congress chose to disproportionally benefit already advantaged groups.[16]

Student lending is now the centerpiece of higher education financing—but that was not the intention expressed by the lawmakers who wrote the Higher Education Act of 1965 (the "HEA"), which established today's student aid regime.[17] When lawmakers drafted the HEA and increased availability of federal student loans, they spoke providing students with the opportunity to pursue higher education,[18] to achieve their full potential regardless of poverty, and to contribute to the wider national community.[19] If

942, 943 (2017) (reporting that, inter alia, "62 percent of for-profit two-year students had federal loans, compared to only 17 percent of public community college students"); Stephanie Riegg Cellini & Rajeev Darolia, *The For-Profit Student Debt Dilemma*, Brookings (June 23, 2016), https://www.brookings.edu/blog/brown-center-chalkboard/2016/06/23/the-for-profit-student-debt-dilemma, *archived at* https://perma.cc/5P3F-CTVU.

[14] The legislative history of the Higher Education Act of 1965 does not suggest that lawmakers intended this result. *See infra B. How We Got Here and Why We Need to Get Out* I.B. However, decades of failure to increase the purchasing power of federal grants to needy students all but ensured that they would have to borrow to keep up with rising tuition. *See id.*

[15] *See* MARK HUELSMAN, DEMOS, THE DEBT DIVIDE: THE RACIAL AND CLASS BIAS BEHIND THE "NEW NORMAL" OF STUDENT BORROWING 24–25 (2015), https://www.demos.org/sites/default/files/publications/Mark-Debt%20divide%20Final%20(SF).pdf, *archived at* https://perma.cc/NFL8-6REX ("[I]t seems clear from the data that the burden of paying off student debt is taking away a sizeable portion of the ability to accumulate meaningful assets as workers enter their prime earning years.")

[16] *See* Gabriel R. Serna, Reassessing the Role of Federal Aid Policy in Financing 21st Century Higher Education for Underserved Groups: Recent Trends, Contemporary Problems, and New Proposals, 48 J. STUDENT FIN. AID 1, 5 (2019) (finding that "tax expenditures (valued as tax offsets that presumably cost the government money) have risen tremendously and 'remain an important mechanism for providing aid to higher income families'"). "In 2009, the generosity of and eligibility for the [higher education] tax credits expanded enormously so that their 2011 cost was $25 billion." George B. Bulman & Caroline M. Hoxby, The Returns to the Federal Tax Credits for Higher Education, 29 TAX POL'Y & ECON. 13, 13 (2015); *see also* MARGOT L. CRANDALL-HOLLICK, CONG. RESEARCH SERV., THE AMERICAN OPPORTUNITY TAX CREDIT: OVERVIEW, ANALYSIS, AND POLICY OPTIONS. 11 tbl. 2 (2018) (finding that slightly more than half of the tax credits used in 2015 went to families with income between $50,00 to $200,000 while families making under $50,000 captured 49.2% of the credits).

[17] Pub. L. 89-329, 79 Stat. 1219 (1965).

[18] *See, e.g.*, 147 CONG. REC. 21933 (1965) (statement of Rep. Brademas) ("[The Act's] purpose is precisely what its name implies: a grant to provide an opportunity for an education to those students who without such assistance would not be able to go on to college. . . . The results of the Project Talent survey show that 130,000 low income young people in the United States were not able to get admission to a college or university because they lacked the money to do so. It seems to me this Nation cannot afford the loss of any talent represented by the failure of otherwise qualified young people to obtain a college education.")

[19] *See, e.g.*, 111 CONG. REC. 27607 (1965) (statement of Sen. Morse) ("It is a most significant forward step in opening the door to talent of young people whose economic circumstances are such that without this aid they might never be able to attain their full potential of service to our society.")

we take the drafters of the HEA at their word, they did not intend to perpetuate racial and socioeconomic inequality through imposition of injurious debt.

But student loans are merely an inadequate attempt to promote access to higher education, made late in a history of outright exclusion.[20] From the perspective of indebted students of color, it matters little that the federal student loan regime was not motivated by discriminatory animus.[21] The obligation to repay student loans exacerbates racial inequality.[22]

The data paints a stark picture of the student loans crisis. Twelve years after enrolling, the typical Black student borrower owes more on their federal student loans than they initially borrowed, whether or not they graduated.[23] And not just a little more: the typical Black borrower owes 13% more than what they borrowed *more than a decade earlier*; the typical Latinx borrower owes 83% of what they initially borrowed.[24] In contrast, the typical White student owes just 60% of their initial loan.[25] Some students simply cannot repay their education loans: studies have consistently found that students of color default at higher rates than White students and Black undergraduates who borrow default most often.[26] Default can be financially

[20] When lawmakers designed federal student aid programs, they did not emphasize the goal of achieving racial equity. The focus was on putting higher education within reach of poorer students. *See, e.g.*, 1965 CONG. REG. 21,880 (1965) (statement of Rep. Powell) (supporting the Higher Education Act as a means to address "the most acute problem we currently face . . . [which is] devising a way for the financially weak to hurdle the fiscal barriers to obtaining a degree").

[21] Regardless of motive, all persons should have equal access to higher education. In the Civil Rights Act of 1964, lawmakers mandated that "no person . . . shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. 42 U.S.C. §2000d (2018).

[22] *See* LAURA SULLIVAN ET AL., STALLING DREAMS: HOW STUDENT DEBT IS DISRUPTING LIFE CHANCES AND WIDENING THE RACIAL WEALTH GAP 4 (Sept. 2019), https://heller.brandeis.edu/iasp/pdfs/stallingdreams-how-student-debt-is-disrupting-lifechances.pdf, *archived at* https://perma.cc/6JJE-8U9X (noting that twenty years after beginning their degrees, "the median Black student borrower has $18,500 in loans remaining, while the median White borrower holds just $1,000 in loans"); LAURA SULLIVAN ET AL., DEMOS & IASP, LESS DEBT, MORE EQUITY: LOWERING STUDENT DEBT WHILE CLOSING THE BLACK-WHITE WEALTH GAP 3 (2015), https://www.demos.org/sites/default/files/publications/Less%20Debt_More%20Equity.pdf, *archived at* https://perma.cc/3U63-TPGD (finding that "[e]liminating student debt among those making $50,000 or below reduces the Black-White wealth disparity by nearly 37 percent among low-wealth households, and a policy that eliminates debt among those making $25,000 or less reduces the Black-White wealth gap by over 50 percent.")

[23] *See* Ben Miller, *New Federal Data Show a Student Loan Crisis for African American Borrowers*, CTR. FOR AM. PROGRESS (Oct. 16, 2017), https://www.americanprogress.org/issues/education-postsecondary/news/2017/10/16/440711/new-federal-data-showstudent-loan-crisis-african-american-borrowers, *archived at* https://perma.cc/V3RG-VYPT.

[24] *See id.* (emphasis added).

[25] These numbers have worsened for all racial groups. Twelve years later, Black students who entered college in the 1995–96 school year owed 101% of what they borrowed. *See id.* Latinx and White borrowers owed 72% and 60%, respectively. *See id.*

[26] Thirty-two percent of Black borrowers who entered college in the 2011–12 academic year and had entered repayment in 2017 defaulted on at least one federal student loan; the default rates for Latinx and White students were 20% and 13% respectively. *See* Ben Miller, *The Continued Student Loan Crisis for Black Borrowers*, CTR. FOR AM. PROGRESS (Dec. 2,

devastating and the effects linger, leading to the imposition of sizable collection fees,[27] wage garnishment,[28] interception of tax refunds, and getting in the way of future efforts to use credit to advance in life.[29] In an economic downturn the most heavily indebted students will suffer more—and they are disproportionately Black and Latinx. Thus, while loans help many students overcome financial barriers to access higher education, they are also millstones around the necks of others, especially people of color.[30]

Student debt contributes to racial subordination more subtly than outright exclusion. Sociologists Louise Seamster and Raphaël Charron-Chénier coined the term "predatory inclusion" to describe this kind of "process whereby members of a marginalized group are provided with access to a good, service, or opportunity from which they have historically been excluded *but under conditions that jeopardize the benefits of access*."[31] Their article presents student debt as a paradigmatic example of predatory inclusion.[32] Federal student loans dangle the opportunity of access to higher education, but the ensuing debt undermines the benefits such education is supposed to provide.[33] The size of the racial wealth[34] and wage[35] gaps in the United States means that more Black students and families must borrow, and

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2019), https://www.americanprogress.org/issues/education-postsecondary/reports/2019/12/02/477929/continued-student-loan-crisis-black-borrowers/, *archived at* https://perma.cc/Z2M4-N8QX; *see also* Jacob P. K. Gross et al., *What Matters in Student Loan Default: A Review of the Research Literature*, 39 J. Student Fin. Aid 19, 21-22 (2009); Jackson & Reynolds, *supra* note 3, at 351 (analyzing data from the Education Department's Beginning Postsecondary Student survey and finding that "[n]ot only do black students face a much higher joint risk of defaulting with no degree, they also encumber higher debt in every category").

[27] *See infra* note 116 and accompanying text.

[28] This method of collection is authorized by statute. *See* 20 U.S.C. §1095a(a) (2009).

[29] U.S. Dept. of Educ., *What Are the Consequences of Default*, J. Fed. Student Aid, https://studentaid.ed.gov/sa/repay-loans/default#consequences, *archived at* https://perma.cc/6A3D-FUSE (last visited Oct. 26, 2019) (describing consequences including reporting of default to credit bureaus and loss of future eligibility for federal student aid to pursue or continue education).

[30] Not least because repayment is often more difficult for students of color, who typically earn less than White students. Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress,* Pew Res. Center (July 1, 2016), https://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress, *archived at* https://perma.cc/N7P6-SLJ3.

[31] Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 Soc. Currents 199, 199–200 (2017) (emphasis added).

[32] *Id.*

[33] Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 Cal. L. Rev. 1561, 1588 n.126 (2015). And as Professor Abbye Atkinson has noted, debt can "becom[e] a means of reverse interpersonal redistribution in which wealth is funneled out of already vulnerable economic spaces and into the coffers of lenders, their investors, and the various other third parties in the secondary debt market whose fortunes rest on the misfortune of these borrowers." Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 Stan. L. Rev. 1093, 1104 (2019).

[34] *See* Courtney E. Martin, *Closing the Racial Wealth Gap*, N.Y. Times (Apr. 23, 2019), https://www.nytimes.com/2019/04/23/opinion/closing-the-racial-wealth-gap.html, *archived at* https://perma.cc/X6U5-W8A6.

[35] *See* Patten, *supra* note 30.

borrow more, to pay for higher education.[36] This problem has worsened in the last few decades, as tuition and fees have increased,[37] but neither grant aid[38] nor family incomes[39] have kept pace. To ignore these differences in socioeconomic circumstances is to do exactly what Lyndon Johnson warned would be an inadequate measure to address inequity: to "take a person who, for years, has been hobbled by chains, bring him up to the starting line of a race and then say, 'you are free to compete with all the others,' and still justly believe that you have been completely fair."[40] In fact, the failure to account for economic inequality along lines of race has meant that those once hobbled by chains are in fact a long way behind the starting line when the race begins.

The phenomenon of racial oppression by debt is not new.[41] In the United States, debt has been used to oppress Black people in particular throughout the nation's history.[42] The fight against debt and economic ine-

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[36] *See* Chan et al., *supra* note 3 at 560, tbl.1.

[37] *See* Coll. Bd., Trends in College Pricing 2018 12 (2018), https://research.collegeboard.org/pdf/trends-college-pricing-2018-full-report.pdf, *archived at* https://perma.cc/T234-MZKV.

[38] Suzanne Mettler, Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream 52 (2014) ("In the 1970s, soon after Pell grants were established as part of the [Higher Education Act of 1965], the value of the average grant actually surpassed that of tuition at a four-year public university, providing enough to assist with room and board").

[39] Coll. Bd, *supra* note 37; s*ee also* Atkinson, *supra* note 33, at 1100.

[40] President Lyndon B. Johnson, Commencement Address at Howard University (June 4, 1965) (transcript available in the Lyndon B. Johnson Presidential Library), http://lbjlibrary.net/collections/selected-speeches/1965/06-04-1965.html, *archived at* https://perma.cc/6WAV-L8C3. President Johnson's full quote is as follows:

> You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person who, for years, has been hobbled by chains and liberate him, bring him up to the starting line of a race and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity. All our citizens must have the ability to walk through those gates.

[41] *See* David Graeber, Debt: The First 5,000 Years 351–52 (2011) (describing the relationship between wage labor, slavery, and sovereign debt).

[42] Lenders have historically refused to extend credit to Black people. See Charles Nier, The Shadow of Credit: The Historical Origins of Facial Predatory Lending and Its Impact Upon African American Wealth Accumulation, 11 Univ. Penn. J. of L. & Soc. Change 131 (2007). This practice, known as "redlining," has its origins in New Deal programs that discriminated against African Americans explicitly. Id. at 175-85. In later years, redlining prompted federal lawmakers to act on more than one occasion. The Equal Credit Opportunity Act, Pub. L. 93-495 § 501 et seq. (1974), initially prohibited discrimination by creditors on the basis of sex or marital status and was amended two years later to extend the prohibition to apply to race, color, religion, national origin, or age. Pub. L. 94-239 § 701(a) (1976). The Community Reinvestment Act required financial institutions to extend credit in local communities in which they were chartered to operate. Housing and Community Development Act, Pub. L. 95-128 §§ 801, 802(b) et seq. (1977). Lenders have also charged Black people higher interest rates. See, e.g., Ping Cheng et al., Racial Discrepancy in Mortgage Interest Rates, 51 J. Real Est. Fin. & Econ. 101, 118 (2015) (discussing interest rate disparity for home loans); Kerwin Kofi Charles et al., Rates for Vehicle Loans: Race and Loan Source, 98 Am. Econ. Rev. 315, 315–19 (2008) (discussing interest rate disparity for auto loans); Mark A. Cohen,

quality has deep—but often erased or ignored—roots in the struggle for racial justice.[43] The financial position of Black Americans is the product of a lengthy history that implicates government action at almost every turn, beginning with slavery. Mortgages and collateralized bonds were created as a way for slave owners to generate capital.[44] After the Civil War ended, employers paid low wages and governments imposed high taxes that disproportionately affected Black workers, forcing them into labor relationships of debt bondage.[45] As W.E.B. Du Bois put it in his history of the Reconstruction era, "[i]t was the policy of the state to keep the Negro laborer poor, to confine him as far as possible to menial occupations, to make him a surplus labor reservoir and to force him into peonage and unpaid toil."[46] After Reconstruction, the government excluded Black citizens from holding property and land grants,[47] originating the practice of "redlining" in housing markets to keep Black and Latinx citizens in poorer, racially isolated neighbor-

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Imperfect Competition in Auto Lending: Subjective Markup, Racial Disparity, and Class Action Litigation, 8 Rev. L. & Econ. 21, 31–33 (2012) (discussing interest rate disparity for auto loans); Devin G. Pope & Justin R. Sydnor, What's in a Picture? Evidence of Discrimination from Prosper.com, 46 J. Hum. Resources 53, 53–55 (2011) (finding that Black applicants were 25–35% less likely to receive funding and were charged interest rates sixty to eighty basis points higher than White applicants with similar profiles); Chad Bray, U.S. Sues N.Y. Mortgage Firm Over Predatory Practices, Wall St. J. (Apr. 2, 2012), https://www.wsj.com/articles/SB10001424052702304750404577320211217666588, *archived at* https://perma.cc/89YB-8EXE (discussing interest rate disparity for mortgage loans).

More recently, race discrimination lawsuits filed by the federal Department of Justice in the wake of the financial crisis that began in 2008 resulted in multimillion-dollar settlements by large financial institutions that the Department accused of charging Black and Latino home loan borrowers higher interest rates than comparably placed White borrowers. *See* Michael Corkery, *J.P. Morgan to Pay $55 Million to Settle Mortgage Discrimination Complaint*, N.Y. Times, Jan. 18, 2017, at B3; Charlie Savage, *Countrywide Will Settle a Bias Suit*, N.Y. Times, Dec. 22, 2011, at B1; Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charges*, N.Y. Times, July 13, 2012, at B3.

[43] The Rev. Martin Luther King, Jr. came to champion economic justice through fighting racial oppression; indeed, the march he was organizing when he was gunned down in Memphis, Tennessee, challenged poverty and economic rights. *See* Taylor Branch, At Canaan's Edge: America In the King Years, 1965—1968, 689 (2006); Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., the American Dream, and the Challenge of Socio-Economic Inequality*, 57 Vill. L. Rev. 339, 341 (2012).

[44] *See* Bonnie Martin, *Slavery's Invisible Engine: Mortgaging Human Property*, 76 J. S. Legal Hist. 817, 818 (2010); Louise Seamster, *Black Debt, White Debt*, 18 Contexts 30, 31 (2019) ("Mortgages, after all, were first created to subsidize the slave trade."); Edward E. Baptist & Louis Hyman, *American finance grew on the back of slaves*, El Imperio de Calibán (Mar. 7, 2014), https://norbertobarreto.blog/2014/03/14/american-finance-grew-on-the-back-of-slaves, *archived at* https://perma.cc/5WU3-XXHM; Eric Herschthal, *How Slavery Gave Capitalism Its Start*, Daily Beast (Apr. 24, 2015), https://www.thedailybeast.com/articles/2015/04/24/how-slavery-gave-capitalism-its-start, *archived at* https://perma.cc/6RVW-7A9Z.

[45] *See* W.E.B. Du Bois, Black Reconstruction in America: An Essay Toward a History of the Part Which Black Folk Played in the Attempt to Reconstruct Democracy in America, 1860–1880 570 (2007); *see also* Richard Rothstein, The Color of Law: A Forgotten History of How our Government Segregated America 154 (2017) (describing a "sharecropping system of indentured servitude [that] perpetuated aspects of the slave system").

[46] Du Bois, *supra* note 45, at 570.

[47] *See* Mehrsa Baradaran, The Color of Money: Black Banks and the Racial Wealth Gap 16–18 (2017).

hoods.[48] Discrimination in a litany of other government programs hindered access to home ownership and the related benefit of wealth accumulation.[49]

We believe that we write at a moment of potential opportunity. The burden of student indebtedness and the folly of pushing the cost of higher education onto students who struggle to bear it garnered increasing popular attention as outstanding student debt increased in the new millennium. As we write this, candidates vying for the Democratic Party presidential nomination are staking out bold positions on higher education finance, addressing both the vast pool of outstanding debt and the need to support current and future students.[50] While the prospects of these proposals for federal reform are poor if the Democratic Party does not seize control of Congress and uncertain even if they do, individual states are also taking steps to reduce or eliminate the cost of higher education.[51] Whatever the fate of any particular initiative, the popular support of proposals that materialized over less than a decade is evidence of a dramatic change in attitude toward higher education finance.

In this Article, we marshal research undertaken by regulators, economists, and legal scholars who have studied the impact of debt to illustrate why education debt is so pernicious. In Part I, we lay the groundwork for our argument that student debt is an instrument of racial oppression. We catalog the ways in which the present system of funding higher education hinders resource-poor students, analyzing the false "choices" presented to students of color in particular. Part I provides historical background, explaining how

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[48] *See* Rothstein, *supra* note 45, at 154–55.

[49] *Id.* at 58–67.

[50] *See* Senators Elizabeth Warren (D-MA) and Bernie Sanders (I-VT) have both proposed plans that would eliminate tuition at public universities and cancel all or at least a substantial amount of student loan debt. *College for All and Cancel All Student Debt*, BERNIESANDERS.COM, https://berniesanders.com/issues/college-for-all/, *archived at* https://perma.cc/ZPH5-9WTL (last visited Oct. 26, 2019); Elizabeth Warren, *I'm calling for something truly transformational: Universal free public college and cancellation of student loan debt*, MEDIUM (Apr. 22, 2019), https://medium.com/@teamwarren/im-calling-for-something-truly-transformational-universal-free-public-college-and-cancellation-of-a246cd0f910f, *archived at* https://perma.cc/S2UQ-NQFU.

[51] *See, e.g.*, David W. Chen, *Free Tuition? Tennessee Could Tutor New York*, N.Y. TIMES, May 14, 2017, at A1 (describing Tennessee's Promise program that seeks to fill the gap between federal students aides and the tuition at community colleges or colleges of applied technology); Lisa W. Foderaro, *Free Tuition in New York Adds Powerful Pull at Decision Deadline*, N.Y. TIMES, Apr. 30, 2017, at A1 (describing New York State's Excelsior Scholarship program, which offers free tuition at a state's two- and four-year publicly funded schools); John Myers, *California Gov. Gavin Newsom Has Signed His First Budget. Here's Where the $215 Billion Will Go*, L.A. TIMES, June 27, 2019, at A4 (explaining that the new California state budget will enable lower tuition costs and competitive Cal Grant awards for more students and provide additional help for low-income families and students with children); Simon Romero & Dana Goldstein, *New Mexico Announces Plan for Free College for State Residents*, N.Y. TIMES, Sept. 18, 2019, at A14; Emily S. Rueb, *Washington State Moves Toward Free and Reduced College Tuition, With Businesses Footing the Bill*, N.Y. TIMES, May 10, 2019, at B4 (describing Washington's 2019 Workforce Education Investment Act which aims to provide free or reduced tuition for lower- and middle-income students attending community colleges and public institutions).

the current federal student aid system came into being and analyzing how federal interventions in higher education finance have disparate, negative effects on members of historically excluded and currently underrepresented populations in or seeking higher education. This discussion also highlights the special role of education in a democracy and the importance of ensuring that this societal resource is equitably available.

In Part II, we propose possible solutions to the deepening crisis of student borrowing and debt. We first explore the possibilities and limits of recourse to a traditional civil rights model focused explicitly on racial equity and identify the ways that the promise of this path has been undermined in law and doctrine. We then develop an alternative road map to broad, sweeping, socioeconomically egalitarian reforms that are facially race-neutral, but would disproportionately benefit members of historically subordinated groups—either through expanded public support of state colleges and universities or through vastly increased, means-tested aid. Either of these paths would ensure the availability of higher education opportunity without imposing potentially crippling repayment burdens on students and would disproportionately benefit Black and Latinx students. Finally, we address more modest reforms based on a consumer protection paradigm, including making bankruptcy relief more available to struggling borrowers, expanding loan forgiveness programs for graduates who pursue public interest careers, and making other, specific changes to existing laws and regulations.[52]

Our hope is that by diagnosing the problems student borrowing creates and by describing these possible paths forward, we will prompt and inform discussions among lawmakers who wish to fight education debt for current and future generations of students. We hope to serve of the larger goal of equitable access to higher education opportunity—to make "the myth of higher education for all into vivid, democratic reality."[53]

I. Education Access and Racial Justice

Education is often touted as the "gateway to the middle class."[54] For centuries, that gate was closed to African American and Latinx students.[55]

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[52] We are indebted to Professor Elengold for this frame. Kate Sablosky Elengold, *Consumer Remedies for Civil Rights*, 99 B.U. L. Rev. 587, 593 (2019) (discussing the extent to which consumer protection doctrine provides a remedy for certain forms of discrimination).

[53] 1965 Cong. Rec 21,880 (1965) (statement of Rep. Powell).

[54] John Immerwahr & Tony Foleno, Great Expectations: How the Public and Parents—White, African American, and Hispanic—View Higher Education, Public Agenda et al. 10 (2000), https://files.eric.ed.gov/fulltext/ED444405.pdf, *archived at* https://perma.cc/YSE7-5HLQ ("[H]igher education has replaced the high school diploma as the gateway to the middle class.")

[55] *See, e.g.*, William Darity Jr. et al., Samuel DuBois Cook Center on Social Equity, What We Get Wrong About Closing The Racial Wealth Gap 6 (2018) https://insightcced.org/wp-content/uploads/2018/07/Where-We-Went-Wrong-COMPLETE-REPORT-July-2018.pdf, *archived at*https://perma.cc/W97R-59RV; Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 Mich. J. Race & L. 1, 1–5 (2010); Darrick Hamilton & William A.

Today, on paper, the law promises students of color equal access to education—yet many students of color find that, in practice, the harsh realities of higher education financing shut them out of opportunity.[56]

Today, debt and access to higher education—two historically significant tools of societal exclusion—are closely intertwined. While debt puts higher education within reach, it also limits opportunities for members of subordinated groups, effectively restricting access to higher education by discouraging and burdening borrowers. The necessity of borrowing shuts marginalized people out of both the opportunity to learn and opportunity to secure the benefits of higher-earning jobs, prestige, the possibility of wealth accumulation to the benefit of their children, and the greater likelihood of assuming a leadership role in society.

This Part analyzes the disparate impact of current federal policy in higher education finance, analyzing the false choices available to aspiring students. It then provides historical context for these disparities to argue that the disparate harms of student debt constitute a matter of great civil rights concern because education plays a special role in our democracy. As we argue in section B, this disparate effect of student debt ought to be addressed by law.[57]

A. *Higher Education Policy Choices Have Put Students of Color Further Behind*

In the United States, economic inequality is inextricably tied to, shaped by, and maintained through racial subordination.[58] People of color, especially Black and Latinx students and their families, disproportionately lack

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Darity, Jr., *The Political Economy of Education, Financial Literacy, and the Racial Wealth Gap*, 99 Fed. Res. Bank of St. Louis Rev. 59, 60 (2017), https://files.stlouisfed.org/files/htdocs/publications/review/2017-02-15/the-political-economy-of-education-financial-literacy-and-the-racial-wealth-gap.pdf, *archived at* https://perma.cc/HJ26-GGH7; Jackson & Reynolds, *supra* note 3, at 335–368; Seamster, *supra* note 44, at 35; Raj Chetty et al., *Mobility Report Cards: The Role of Colleges in Intergenerational Mobility* 1–3 (Nat'l Bureau of Econ. Research, Working Paper No. 23618, 2017), http://www.nber.org/papers/w23618.pdf, *archived at* https://perma.cc/C3KY-5PNG.

[56] Unfortunately, only imperfect data is available because the Department of Education does not regularly collect race data on borrowers "except in irregular sample surveys conducted by its quasi-independent statistical arm." Miller, *supra* note 23; *see also* Stella Min & Miles G. Taylor, *Racial and Ethnic Variation in the Relationship Between Student Loan Debt and the Transition to First Birth*, 55 Demography 165, 167 (2018) (noting that the ED "does not regularly collect information concerning race on administrative forms"). Nevertheless, independent researchers have extensively delved into this issue and their research paints a grim picture. *See* Part I.A., *infra.*

[57] See *infra* Part II.0. *Cf.* Wade Henderson, *The Student Loan Debt Crisis is a Civil Rights Issue*, Amsterdam News (Mar. 7, 2018), www.amsterdamnews.com/news/2018/mar/07/student-loan-debt-crisis-civil-rights-issue/, *archived at* https://perma.cc/X9N7-2YYQ.

[58] *See* Monica Prasad, The Land of Too Much: American Abundance and the Paradox of Poverty 42 (2012) (describing how race "as economic interests" shaped political institutions which, in turn, affected economic opportunities); *see also* Rothstein, *supra* note 45, at 178–79 (describing how denial of equal access to housing and labor markets perpetuated racial inequality across generations); discussion *supra* I.B.2.

the financial resources of White and some Asian American people, so the necessity of borrowing disproportionately burdens them.[59] In addition, lax oversight from the Department of Education has enabled wrongful conduct by for-profit colleges that deceptively target poor communities and communities of color, offering them educational services of poor quality[60] in exchange for federal dollars that students borrow and then must repay. Student loans may not be directly predatory, but they enable predation.

The likelihood that Black students will borrow has increased relative to White students since at least the year 2000. Repayment burdens disproportionately hamper Black students,[61] frustrating progress towards ending the racial wealth gap. In the same time period, the likelihood that Latinx students will borrow has fallen relative to White students.[62] It's possible that this difference is because more Latinx students who would need to borrow are instead choosing to forgo higher education. Trends like these make clear that student debt undermines the effectiveness of higher education as an engine of socioeconomic mobility and driver of greater racial equity in the distribution of life opportunities.[63]

1. Wealth and the "Choice" to Borrow

Students need to borrow for college when they are unable to meet the cost of attendance at their selected school with either grants, income, or personal or family wealth. More than half of all students attending 2- and 4-year higher education institutions borrow federal student loans at some point

[59] In 2013, more than 59% of White families and 51% of Asian families had accumulated wealth above the nationwide median, but only 23% of Black and 25% of Latinx families were similarly situated. *See* RAY BOSHARA ET AL., CTR. FOR HOUSEHOLD FIN. STABILITY, THE DEMOGRAPHICS OF WEALTH: HOW AGE, EDUCATION AND RACE SEPARATE THRIVERS FROM STRUGGLERS IN TODAY'S ECONOMY 6 (2015), https://www.stlouisfed.org/~/media/files/pdfs/hfs/essays/hfs-essay-1-2015-race-ethnicity-and-wealth.pdf, *archived at* https://perma.cc/7EC5-NJMY. The absolute numbers are important too. The median wealth in the country was $81,456 in 2013, but White median wealth was more than 1.5 times that, at $134,008. *See id.* Black median wealth was just $11,184. *See id.* These aggregate figures obscure considerable diversity: many White families are not wealthy, of course, and within the broad category of "Asian" there is considerable diversity. One study that examined Asian communities in Los Angeles found that the median net worth of people of Korean descent was less than 4% of that of people of Japanese descent, for example. *See* Runes, *supra* note 2.

[60] By low quality, we refer to low rates of student graduation than those at nonprofit and public institutions and higher rates of student loan default than at those other institutions. *See generally* Deming et al., *supra* note 5, at 142–43.

[61] *See, e.g.*, Chan et al., *supra* note 3, at 563 ("Given that high levels of student loan debt may affect student degree completion, family formation, and other long-term outcomes, the evidence that Black students are both more likely to borrow and borrow more than their White peers suggests that the current loan-based financial aid system is likely to have disproportionate consequences for Black borrowers both during and after college").

[62] *See id.* at 561 tbl.1. Latinx students who do borrow tend to borrow smaller amounts than Black borrowers (and more similar to White borrowers). *See id.*

[63] *See, e.g.*, id. at 5.

in their studies.[64] Borrowing has become ever more necessary in recent years as federal and state governments slashed financial support for higher education, shifting costs onto students and families,[65] and as socioeconomic inequality has increased.[66]

Because there is such a sizable and persistent racial wealth gap[67] in the United States,[68] debt has racially disproportionate effects and is unavoidable

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[64] To be more precise, 55.2% of these students took out federal loans in 2015-16. David Radwin et al., Nat'l Ctr for Educ. Statistics, 2015–2016 National Postsecondary Student Aid Study 18 tbl. 7 (2018) https://nces.ed.gov/pubs2018/2018466.pdf, *archived at* https://perma.cc/V8QB-P9NX.

[65] *See* Barb Rosewicz et al., *'Lost Decade' Casts a Post-Recession Shadow on State Finances*, Pew Charitable Tr. (June 4, 2019), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/06/lost-decade-casts-a-post-recession-shadow-on-state-finances, *archived at* https://perma.cc/QXN2-FQ6Y (explaining the recent decline in state spending); *see also* Mettler, *supra* note 38, at 66–67 (arguing that "policy drift" permitted the decline in federal support); Glater, *supra* note 33, at 1577 (stating, "beginning in the late 1970s and then for several decades thereafter, federal grant aid to students, which at one point covered nearly 80 percent of the cost of attending a public university, languished").

[66] The difference between the top and the bottom of the wealth distribution in the United States is vast: Bill Gates, Jeff Bezos, and Warren Buffet collectively own more wealth than the poorest half of Americans put together. *See* Chuck Collins & Josh Hoxie, Inst. for Policy Studies, Billionaire Bonanza 2018, at 3 (2018), https://ips-dc.org/wp-content/uploads/2018/11/Billionaire-Bonanza-2018-Report-October-2018-1.pdf, *archived at* https://perma.cc/J59A-GT3N. More broadly, 24% of all U.S. families owned 67% of the economy's wealth in 2013. *See* Boshara et al., *supra* note 59, at 3. These numbers are likely undercounting the wealth gap since they are based on data from the Survey of Consumer Finances. The remaining families are more likely to be Black or Latinx, less educated, and younger. *See id.* They are also likely to earn less income. *See* Rakesh Kochhar & Richard Fry, *Wealth Inequality Has Widened Along Racial, Ethnic Lines Since End of Great Recession*, Pew Res. Ctr. (Dec. 12, 2014), https://www.pewresearch.org/fact-tank/2014/12/12/racial-wealth-gaps-great-recession, *archived at* https://perma.cc/5WHV-U9KG (finding that the median wealth of White households ($141,000) was thirteen times the median wealth of Black households ($11,000) in 2013); *see also* Thomas Shapiro et al., Inst. on Assets & Soc. Policy, The Roots of the Widening Racial Wealth Gap: Explaining the Black-White Economic Divide 1 (2013) (finding that tracing the same households over twenty-five years showed that the total wealth gap between White and Black families nearly tripled); Max Roser & Esteban Ortiz-Ospina, *Income Inequality*, Our World in Data, https://ourworldindata.org/income-inequality, *archived at* https://perma.cc/2HQW-H74A (last updated Oct. 2016) (showing that inequality is growing in English-speaking countries and decreasing in continental Europe and Japan). Wealth concentration has spiked in recent decades. *See Wealth Inequality in the United States*, Inequality.org, https://inequality.org/facts/wealth-inequality, *archived at* https://perma.cc/4WH4-TH3C.

[67] *See* Laura Sullivan et al., Demos, The Racial Wealth Gap 1 (2015), https://www.demos.org/sites/default/files/publications/RacialWealthGap_1.pdf, *archived at* https://perma.cc/8YMU-37E8; *see also* Darity Jr. et al., *supra* note 55, at 6; Amy Traub et al., Demos, The Asset Value of Whiteness: Understanding the Racial Wealth Gap 1–2 (2017), https://www.demos.org/research/asset-value-whiteness-understanding-racial-wealth-gap, *archived at* https://perma.cc/49SP-26H6.

[68] The wealth gap persists among White and Black households, regardless of education levels. "White households with a bachelor's degree or post-graduate education (such as with a Ph.D., MD, and JD) are more than three times as wealthy as black households with the same degree attainment." Darity Jr. et al., *supra* note 55, at 6. Even more dramatically, "on average, a black household with a college-educated head has less wealth than a white family whose head did not even obtain a high school diploma." *Id.*; *see also* Judith Scott-Clayton & Jing Li, *Black-White Disparity in Student Loan Debt More Than Triples After Graduation*, Brookings (Oct. 20, 2016), https://www.brookings.edu/research/black-white-disparity-in-stu-

for more members of historically subordinated groups.[69] Black students borrow at much higher rates than White students, and by the time they are in their fourth year of study, 90% of Black and 72% of Latinx undergraduate students have student loan debt, as compared to 66% of White students.[70]

For many students, and disproportionately Black and Latinx students, borrowing to finance their education is thus not a choice but a necessity. Greater indebtedness in turn correlates with delays in major spending and life decisions, from buying a home, to getting married, to having children.[71]

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dent-loan-debt-more-than-triples-after-graduatio, *archived at* https://perma.cc/A39N-KGG3. In fact, "[i]t takes a post-graduate education for a black family to have comparable levels of wealth to a white household with *some* college education or an associate's degree." *Id.*

[69] In 2012–13, 29.3% of White undergraduate students were able to cover their full cost of attendance with their expected family contribution and grant aid whereas only 12.4% of Black students and 18.1% of Latinx students could do likewise. *See Datalab*, NAT'L CTR.FOR EDUC. STAT., https://nces.ed.gov/datalab/index.aspx?ps_x=cfgbmdc3, *archived at* https://perma.cc/U5ZW-EAL8. Students can also work to try to meet their financial needs (and indeed 43% of full-time undergraduate students and 81% of part-time students report being employed while at school). *See* SARA GOLDRICK-RAB, PAYING THE PRICE: COLLEGE COSTS, FINANCIAL AID, AND THE BETRAYAL OF THE AMERICAN DREAM 1 (2016); *see also* ANTHONY P. CARNEVALE ET AL., GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, LEARNING WHILE EARNING: THE NEW NORMAL 1 (2015), https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Working-Learners-Report.pdf, *archived at* https://perma.cc/CJ3A-KAHM (estimating that a consistent 70%—80% of college students are active in both the labor market and education); NAT'L CTR. FOR EDUC. STAT., THE CONDITION OF EDUCATION 2019, at 1–4 (2019), https://nces.ed.gov/programs/coe/pdf/coe_ssa.pdf, *archived at* https://perma.cc/C79B-L9ZA. For students who work, every hour worked is an hour that the student cannot dedicate to their studies, however. It is thus unsurprising that a higher workload is associated with lower grades. *See* Faye C. Huie et al., *Employment and First-Year College Achievement: The Role of Self-Regulation and Motivation*, 27 J. EDUC. & WORK 110, 111 (2014) (finding that the number of hours worked was negatively associated with performance); *see also* Michael Wenz &Wei-Choun Yu, *Term-Time Employment and the Academic Performance of Undergraduates*, 35 J. EDUC. FIN. 358, 358 (finding that a grade point average dropped by 0.0007 points per work hour); Meredith Kolodner, *6 Reasons You May Not Graduate on Time (and What to Do About It)*, N.Y. TIMES (Apr. 6, 2017), https://www.nytimes.com/2017/04/06/education/edlife/6-reasons-you-may-not-graduate-on-time.html?login=email&auth=login-email, *archived at* https://perma.cc/55RN-RKD7 (concerning longer time in school).

[70] *See* Aissa Canchola & Seth Frotman, *The Significant Impact of Student Debt on Communities of Color*, CONSUMER FIN. PROTECTION BUREAU (Sept. 15, 2016) https://www.consumerfinance.gov/about-us/blog/significant-impact-student-debt-communities-color, *archived at* https://perma.cc/Z7JA-XA5A. These numbers were based on 2011–12 NPSAS data, which undercounted the total debt load. *See* DEP'T OF EDUC., 2015–16 NATIONAL POSTSECONDARY STUDENT AID STUDY (NPSAS:16) STUDENT FINANCIAL AID ESTIMATES FOR 2015–16 FIRST LOOK, at B-29 (2018). Another study found that "[f]our years after earning a bachelor's degree, black graduates in the 2008 cohort held $24,720 more student loan debt than white graduates ($52,726 versus $28,006), on average." Scott-Clayton & Li, *supra* note 68, at 3.

[71] *See* AM. STUDENT ASSISTANCE, LIFE DELAYED: THE IMPACT OF STUDENT DEBT ON THE DAILY LIVES OF YOUNG AMERICANS 1 (2015), https://file.asa.org/wp-content/uploads/2019/01/28203317/Life-Delayed-2015.pdf, *archived at* https://perma.cc/V2G8-ATT5 (arguing that student loans affect people's ability to make major purchases and life decisions such as starting a business, getting married, and starting a career in their choice of field); *see also* IRENE LEW, HARVARD UNIV. JOINT CTR. FOR HOUS. STUDIES, STUDENT LOAN DEBT AND THE HOUSING DECISIONS OF YOUNG HOUSEHOLDS 1 (2015) (concluding that the growth of student loan debt will impact young households' homeownership and saving outcomes); ALVARO MEZZA ET AL., FED. RESERVE BD., ON THE EFFECT OF STUDENT LOANS ON ACCESS TO HOMEOWNERSHIP 32 (2016) (finding that a 10% increase in student loan debt causes a 1%—2% point drop in the homeownership rate for student loan borrowers during the first five years after exiting school).

For students of color, who disproportionately go on to earn lower incomes and carry heavier debt burdens, disparities have even more severe consequences, including longer time to repayment[72] and greater likelihood of default,[73] both of which strongly imply lesser or slower accumulation of wealth.[74] But "credit is beneficial only to the extent that a borrower can expect to have future cash flow to service the resulting debt."[75] As discussed below,[76] borrowers of color face a variety of structural challenges that make a sufficient future cash flow a less likely proposition.[77]

2. *Predatory Schools and the "Choice" of Post-Secondary Institution*

Not only are Black and Latinx students more likely to need to borrow, they disproportionately attend for-profit institutions that do not confer the hoped-for income boost higher education is intended to provide. Student outcomes—graduation and employment rates—are worse than at comparable institutions.[78] The overwhelming evidence indicates that attending for-profit schools sets many students back.[79] Yet over the last decade, for-profit institutions of poor quality have captured greater shares of total student enrollment through aggressive and often deceptive marketing.[80]

For-profit colleges aggressively market to Black and Latinx students,[81] as well as other marginalized groups like women, single parents, immi-

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[72] *See* Miller, *supra* note 23 (discussing greater debt for Black borrowers twelve years after graduation than initially borrowed).

[73] *See* Volkwein et al., *supra* note 7, at 215.

[74] *See* Huelsman, *supra* note 15, at 24–25 (noting that "the burden of paying off student debt is taking away a sizeable portion of the ability to accumulate meaningful assets as workers enter their prime earning years").

[75] Atkinson, *supra* note 33, at 1104.

[76] *See infra* Section I.A.3.

[77] *Cf.* Atkinson, *supra* note 33, at 1101 (describing the access to credit debate as, at best, showing optimism bias, and at worst, a way to avoid difficult conversations).

[78] *S*ee Adam Looney & Constantine Yannelis, *A Crisis in Student Loans?,* 53 fig.4 (Brookings Papers on Econ. Activity, Sept. 2015).

[79] *See* Cellini & Chaudhary, *supra* note 6, at 126 (estimating labor market returns to a for-profit education that "fall below the returns needed to offset the private and social costs of for-pro?t associate's degree attendance" and suggesting that for-pro?ts may not be worthwhile for the average student); Patrick Denice, *Does it Pay to Attend a For-profit College? Vertical and Horizontal Stratification in Higher Education*, 52 Soc. Sci. Res. 161–178 (2015) (finding "that for-profit associate's degree holders encounter lower hourly earnings than associate's degree holders educated at public or private, nonprofit colleges, and earnings that are not significantly different than high school graduates.")

Senator Elizabeth Warren has proposed banning for-profit schools from receiving federal dollars as part of her presidential campaign. Warren, *supra* note 50 ("After an appropriate transition period, ban for-profit colleges from receiving any federal dollars (including military benefits and federal student loans), so they can no longer use taxpayer dollars to enrich themselves while targeting lower-income students, servicemembers, and students of color and leaving them saddled with debt.").

[80] Deming et al., *supra* note 5, at 141–42.

[81] A 2012 Senate investigation revealed many for-profit recruiting practices that were little more than racial dog whistles." Mark Huelsman, *Betrayers of the Dream*, The American

grants, formerly incarcerated people, and military veterans.[82] While Black and Latinx students make up less than one-third of all college students, they represent nearly half of all those attending for-profit institutions.[83] Fifteen percent of Black students attended private for-profit institutions: more than students of any other race or ethnicity.[84] For-profit colleges are generally far more expensive than their public and nonprofit counterparts.[85] The typical business model relies on federal student loan dollars for revenue and profit.[86] Because for-profit schools charge higher tuition and enroll a disproportionate share of poor students, they receive a disproportionate share of federal student aid dollars.[87] The for-profit business model relies so heavily on federal money that lawmakers amended the HEA to require for-profits to get less than 100% of their funding from federal student aid.[88] However, the restriction is modest. Lawmakers curtailed the maximum federal share of for-profit institutions' revenue first to 85%, in 1992, and a few years later adjusted that figure upward to 90%.[89] Notably, military and veteran's benefits are excluded from the 90% threshold, which obscures the fact that an estimated 200 for-profit schools were at one point receiving more than 90% of their revenue from federal dollars.[90]

PROSPECT (July 12, 2015), https://prospect.org/labor/betrayers-dream/, *archived at* https://perma.cc/WL52-AGM8.

[82] *See* Alia Wong, *'Dollar Signs in Uniform': Why For-Profit Colleges Target Veterans*, The ATLANTIC (June 24, 2019), https://www.theatlantic.com/education/archive/2015/06/for-profit-college-veterans-loophole/396731/, *archived at* https://perma.cc/A3MA-9BS4. *See generally* TRESSIE MCMILLAN COTTOM, LOWER ED: THE TROUBLING RISE OF FOR-PROFIT COLLEGES IN THE NEW ECONOMY (2018).

[83] *See* Genevieve Bonadies et al., *For-Profit Schools' Predatory Practices and Students of Color: A Mission to Enroll Rather Than Educate*, HARV. L. REV. BLOG (July 30, 2018), https://blog.harvardlawreview.org/for-profit-schools-predatory-practices-and-students-of-color-a-mission-to-enroll-rather-than-educate, *archived at* https://perma.cc/Q9ZP-JE82.

[84] *See Status and Trends in the Education of Racial and Ethnic Minorities,* Nat'l Ctr. For Educ. Stat. (2010), https://nces.ed.gov/pubs2010/2010015/indicator6_24.asp, *archived at* https://perma.cc/5EQ7-7V9V; *see also* Chung, *supra* note 13, at 1084–1101.

[85] *See* Deming et al., *supra* note 5, at 159 ("For-profit students face higher sticker-price tuition and pay higher net tuition (tuition plus fees minus grants) than comparable students.")

[86] *See* GAO-11-4, *supra* note 13, at 8; Rebecca R. Skinner, Cong. Research Serv., RL 32182, Institutional Eligibility and the Higher Education Act: Legislative History of the 90/10 Rule and its Current Status 1 (2007); Deming et al., *supra* note 5, at 150 (noting that "[f]ederal student financial aid is the lifeblood of for-profit higher education").

[87] *See* Seamster & Charron-Chénier, *supra* note 31, at 204 ("In 2009–2010, for example, for-profit institutions took in approximately a fifth of all Pell Grants for low-income students, which were used by about 60 percent of black students in 2011. For-profits also captured $1.7 billion in GI benefits in 2012–2013 alone.") (internal citations omitted).

[88] *See* SKINNER, *supra* note 86, at 4 (describing the history of the 85/15 and 90/10 rules).

[89] *See* Robert Kelchen, *How Much Do For-Profit Colleges Rely on Federal Funds?*, BROOKINGS: BROWN CTR. CHALKBOARD (Jan. 11, 2017), https://www.brookings.edu/blog/brown-center-chalkboard/2017/01/11/how-much-do-for-profit-colleges-rely-on-federal-funds/, archived at https://perma.cc/43SF-WDJR. The restriction is generally referred to as the "90-10 rule." Tamar Lewin, *Obama Signs Order to Limit Aggressive College Recruiting of Veterans*, N.Y. TIMES, Apr. 28, 2012, at A11.

[90] *See Lewin*, *supra* note 89 (noting that a little over 10% of the approximately 2800 for-profit schools would exceed the 90-10 rule if military and veteran's benefits are included).

Students at for-profit institutions pay more, are more likely to borrow,[91] and borrow larger amounts than those attending a non-profit or public school. In fact, "[a]ssociate's degree recipients at for-profit schools borrow almost the same amount (only $956 less) than bachelor's degree recipients at public colleges."[92] This, despite the fact that a typical bachelor's degree requires twice as many courses as an associate's degree.

Despite paying more tuition and taking out more debt, students at for-profit institutions do not experience better educational or labor market outcomes. For-profit institutions have worse graduation rates than all other types of institutions.[93] In 2008, "only 22 percent of the first-time, full-time bachelor's degree students at for-profit colleges overall graduate within six years, compared with 55 percent at public institutions and 65 percent at private nonprofit colleges."[94] At some for-profit schools, the graduation rates are even worse. The University of Phoenix, for example, currently reports a 17% graduation rate within 6 years for an undergraduate program of study.[95] For-profit borrowers also tend to have higher levels of unemployment and lower median earnings than those who attend other types of institutions.[96] These numbers have only gotten worse over time.[97]

A significant number of for-profit colleges have shuttered amidst lawsuits and investigations into financial mismanagement, and allegations that their practices predatory, abusive, and illegal.[98] Most notoriously, Corinthian

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[91] Far more students who attend a private for-profit institution borrow federal loans (89%) than those who attended a public two-year (48%), public four-year (62%), or private nonprofit four-year (68%) institution. Miller, *supra* note 23, at tbl.1. Ninety-five of African Americans who attended a for-profit school took out federal loans. *See id.* The numbers for whites (90%) and Latinx (84%) groups were also very high. *See id.* The variation between African American and Latinx students is consistent with research showing that some groups, including Latinx students, are more hesitant to borrow student loans. *See* Serna, *supra* note 16 at 10 (describing studies finding that "some students and families, especially those from low-income, first-generation, and underrepresented backgrounds, are debt averse.")

[92] Huelsman, *supra* note 15, at 10.

[93] Looney & Yannelis, *supra* note 78, at 35, 53.

[94] *See* Tamar Lewin, *Report Finds Low Graduation Rates at For-Profit Schools*, N.Y. Times (Nov. 23, 2010), https://www.nytimes.com/2010/11/24/education/24colleges.html, *archived at* https://perma.cc/WLR9-PFMS.

[95] Univ. of Phoenix, 2019–2020 Consumer Information Guide 6 (2019), https://www.phoenix.edu/content/dam/altcloud/doc/about_uopx/Consumer-Information-Guide.pdf, *archived at* https://perma.cc/3S95-B6XX.

[96] *See* Looney & Yannelis, *supra* note 78, at 38.

[97] See id.

[98] *See For-Profit Colleges Linked to Almost All Loan Fraud Claims*, CBS News (Nov. 9, 2017), https://www.cbsnews.com/news/study-most-student-loan-fraud-claims-involve-for-profits, *archived at* https://perma.cc/6AVS-WBER. *See, e.g.*, People v. Heald Coll., LLC, No. CGC-13-534793, 2016 Cal. Super. LEXIS 13746, at *18–19 (Cal. Super. Ct. Mar. 23, 2016) (finding Corinthian Colleges liable for misrepresenting job placement rates to students and investors, running ads stating falsely that the colleges offered programs that were not offered, unlawfully using military seals in advertising, inserting unlawful clauses in enrollment agreements, and engaging in unlawful collection activities, among other practices); Stacy Cowley & Erica L. Green, *A College Chain Crumbles, and Millions in Student Loan Cash Disappears*, N.Y. Times (Mar. 7, 2019), https://www.nytimes.com/2019/03/07/business/argosy-college-art-insititutes-south-university.html?module=inline, *archived at* https://perma.cc/Z4RC-9ELK;

Colleges, Inc. collapsed in 2015 in a wave of investigations and allegations of fraud.[99] The attorney general of California sued Corinthian and won a $1.1 billion judgment against the company.[100] The judge in the case found that Corinthian had misled prospective students about the courses of study offered,[101] used insignia of various branches of the United States military in recruiting materials without permission or approval,[102] engaged in unlawful debt collection practices on loans to Corinthian students,[103] and misled students about the ease of transferring credits earned at Corinthian institutions to other institutions.[104] These practices, together, persuaded students to enroll[105] and undermined their subsequent opportunities.[106]

The frequency of fraud, misrepresentation, and closures among for-profit schools is striking.[107] This almost certainly contributes to the drop-out rate and the difficulties that even students with a degree might have in the labor market.[108] Closures, which obviously hamper completion of students'

Press Release, Federal Trade Commission, DeVry University Agrees to $100 Million Settlement with FTC (Dec. 15, 2016), https://www.ftc.gov/news-events/press-releases/2016/12/devry-university-agrees-100-million-settlement-ftc, *archived at* https://perma.cc/4LMQ-FZZJ.

[99] *See* Erica L. Green, For Students Swindled by Predatory Colleges, Relief May Only Be Partial, N.Y. Times, Dec. 21, 2017, at A17.

[100] *See People v. Heald*, 2016 Cal. Super. LEXIS 13746.

[101] *See id.* at *10–11.

[102] *See id.* at *11–12.

[103] *See id.* *14.

[104] *See id.* *16.

[105] *See, e.g.*, Andrew Kreighbaum, *Long Wait for Loan Forgiveness*, Inside Higher Ed (Sep. 14, 2017), https://www.insidehighered.com/news/2017/09/14/students-waiting-borrower-defense-claims-face-challenges-credit-obstacles-education, *archived at* https://perma.cc/WM7P-9ABL (describing students who believed misrepresentations from for-profit institution).

[106] *See id.* (describing students coping with ruined credit and other consequences of indebtedness).

[107] *See, e.g.*, Danielle Douglas-Gabriel, *Argosy University Closes its Doors; Students Scramble to Transfer*, Wash. Post (Mar. 10, 2019), https://www.washingtonpost.com/education/2019/03/09/argosy-university-closes-its-doors-students-scramble-transfer/?utm_term=.f9c98272c93e, *archived at* https://perma.cc/67BY-7U8C; Michael Vasquez, *FastTrain College owner convicted of theft, conspiracy*, Miami Herald (Nov. 24, 2015 2:39 PM), https://www.miamiherald.com/news/local/education/article46253760.html, *archived at* https://perma.cc/K9GE-QCDC; Jennifer Smola, *Deal Forgives $12 Million of Debt for 4,800 For-Profit College Students in Ohio*, Columbus Dispatch (Jan. 3, 2019), https://www.dispatch.com/news/20190103/deal-forgives-12-million-of-debt-for-4800-for-profit-college-students-in-ohio, *archived at* https://perma.cc/GKP4-J9PT; Press Release, Office of Public Affairs, Dep't of Justice, School Owner Pleads Guilty to $2 Million Bribery Scheme Involving VA Program for Disabled Military Veterans, Apr. 16, 2018, https://www.justice.gov/opa/pr/school-owner-pleads-guilty-2-million-bribery-scheme-involving-va-program-disabled-military, *archived at* https://perma.cc/5EYM-2X93; Press Release, State of California Dep't of Justice, Attorney General Xavier Becerra Sues For-Profit Ashford University For Defrauding and Deceiving Students, Nov. 29, 2017, https://oag.ca.gov/news/press-releases/attorney-general-xavier-becerra-sues-profit-ashford-university-defrauding-and, *archived at* https://perma.cc/H6X4-8EP6; Press Release, U.S. Attorney's Office, Western District of Tex., Dep't of Justice, For-Profit College Kaplan To Refund Federal Financial Aid Under Settlement With United States, Jan. 5, 2015, https://www.justice.gov/usao-wdtx/pr/profit-college-kaplan-refund-federal-financial-aid-under-settlement-united-states, *archived at* https://perma.cc/XX3F-8KXQ.

[108] *See* Scott-Clayton, *supra* note 11, at 4.

courses of study, provide a plausible explanation[109] of the higher default rate of Black graduates.[110]

3. Wealth, Racism, and the "Choice" to Repay

A borrower's ability to repay a debt depends on two critical factors: the periodic payment amount and the borrower's income or wealth. For federal student loans, the payment amount depends on how much was borrowed and what repayment plan a borrower enrolls in. Income depends on many factors, including the borrower's education, the state of the economy, the borrower's social capital, and the effects of discrimination in the labor market. Typical Black and Latinx students face several challenges to repaying their student loan debt. First, the typical student is less likely to have completed their studies. Second, they are less likely to be placed in an income-driven repayment plan. Third, when they graduate they face pernicious labor market discrimination and reduced income. Fourth, if they experience any trouble repaying, they have less wealth from which to draw upon to overcome any shocks.[111]

When a student is unable to pay back their loans, they face disastrous consequences. A borrower "defaults" on a federal student loan if they fail to make payments for nine months.[112] Defaulting on any financial product can impact a borrower's credit score—and in turn increase the price of credit and insurance,[113] make it more difficult to rent an apartment,[114] and make it more

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[109] *See e.g.*, Jillian Berman, *Students Grapple With Fine Print on Student-Debt Forgiveness After Their College Closes*, MARKETWATCH (Mar. 16, 2019), https://www.marketwatch.com/story/students-grapple-with-fine-print-on-student-debt-forgiveness-after-their-college-closes-2019-03-15, *archived at* https://perma.cc/S2UM-DGFK (explaining that students face limited choices and financial challenges after Argosy University closed).

[110] *See* Scott-Clayton, *supra* note 11, at 2.

[111] *See* Fenaba R. Addo, et al., *Young, Black, and (Still) in the Red: Parental Wealth, Race, and Student Loan Debt*, 8 RACE & SOC. PROBLEMS 64, 1 (2016) (arguing that "student loan debt may be a new mechanism by which racial economic disparities are inherited across generations"); Jason N. Houle & Fenaba R. Addo, *Racial Disparities in Student Debt and the Reproduction of the Fragile Black Middle Class*, 5 SOC. RACE & ETHNICITY 4, 10 (2019) (finding that "racial inequalities in student debt account for a substantial minority of the black-white wealth gap in early adulthood"); *id.* at 1 (concluding that "debt trajectories are more informative than point-in-time estimates and that student debt may be a new mechanism of wealth inequality that creates fragility in the next generation of the black middle class"); *supra* note 68 and accompanying text (starting with "The wealth gap persists").

[112] *See* Margaret Mattes & Persis Yu, Nat'l Consumer Law Ctr., Inequitable Judgments: Examining Race and Federal Student Loan Collection Lawsuits 4 (2019), https://www.nclc.org/images/pdf/student_loans/report-inequitable-judgments-april2019.pdf (explaining that borrowers technically default after 270 days but are officially in default after 360 days), *archived at* https://perma.cc/3LVY-QQUE; U.S. Dep't of Educ., *Don't Ignore Your Student Loan Payments or You'll Risk Going into Default*, Federal Student Aid, https://studentaid.ed.gov/sa/repay-loans/default#default, *archived at* https://perma.cc/24N5-HD59 (last visited Nov. 5, 2019).

[113] *See* SHAWN FREMSTAD & AMY TRAUB, DEMOS, DISCREDITING AMERICA 4 (2011), https://www.demos.org/sites/default/files/publications/Discrediting_America_Demos.pdf, *archived at* https://perma.cc/HK36-Y4RS.

[114] See id.

difficult to get or hold a job.[115] The consequences of defaulting on federal student loans are even more severe: after default, private loan servicers tack on collection fees that can add many years to the loan repayment.[116] In addition, the federal government has the power to garnish wages or seize Social Security payments and tax refunds.[117] Because federal student loans have no statute of limitations, borrowers may face such collection methods until death.[118] In a number of states, student loan borrowers who default on their student loans may be unable to get a copy of their transcript[119] and may even lose their professional license.[120] To top it off, borrowers face exceptional hurdles to discharging their student loans in bankruptcy.[121] The Bankruptcy Code permits discharge only if a borrower can establish that repayment of the loan would result in an "undue hardship,"[122] a standard that is undefined in legislation and harshly interpreted by courts.[123]

Predictably, students who drop out of a post-secondary program are more likely to default on their loans than those who complete.[124] Within the population of students who did not complete, Black and Latinx students dis-

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[115] *See id.* at 2.

[116] Fees vary by type of loan. *See Collection Charges*, FinAid, https://www.finaid.org/loans/collectioncharges.phtml, *archived at* https://perma.cc/JGN8-LU5P. (collecting statutes and regulations regarding collection costs). *See also Collection Fees*, Nat'l Consumer Law Ctr.: Student Loan Borrower Assistance, https://www.studentloanborrowerassistance.org/collections/consequences-of-default-federal/collection-fees/, *archived at* https://perma.cc/ZCV8-8B69.

[117] *See* Jillian Berman, *Lawsuit Alleges the Government is Illegally Garnishing Tax Refunds of Student-loan Borrowers*, MarketWatch (Jun. 23, 2019), https://www.marketwatch.com/story/lawsuit-alleges-the-government-is-illegally-garnishing-tax-refunds-of-student-loan-borrowers-2019-06-19, *archived at* https://perma.cc/XF5U-QK86.

[118] 20 U.S.C. § 1091a(a) (2008).

[119] *See* Dave Lindorff, *Holding Transcripts Hostage*, L.A. Times (May 2, 2012), https://www.latimes.com/opinion/la-xpm-2012-may-02-la-oe-lindorff-student-loan-default-20120502-story.html, *archived at* https://perma.cc/C6EZ-6QWB.

[120] *See* Courtney Nagler, *Student Loan Debt Could Affect Your Job in 13 States,* U.S. News & World Rep. (Apr. 10, 2019), https://www.usnews.com/education/blogs/student-loan-ranger/articles/2019-04-10/these-states-could-revoke-your-professional-license-over-student-loan-debt, *archived at* https://perma.cc/EXB7-T7NR; Andrew Wagner, *License Suspension for Student Loan Defaulters*, Nat'l Conf. of State Legis. (Oct. 1, 2018) http://www.ncsl.org/research/labor-and-employment/license-suspension-for-student-loan-defaulters.aspx, *archived at* https://perma.cc/9EXD-LEV9.

[121] *See infra* Part II.C.1 (describing exceptional treatment of student loans by the Bankruptcy Code).

[122] However, students may assert a "defense to repayment" if the borrower can show "any act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law," 34 C.F.R. § 685.206(c) (2016), or if the borrower can show a judgment has been issued against the school, the school has violated the terms of a contract with the student, or the school committed a "substantial misrepresentation" to the student," 34 C.F.R. § 685.222(b)—(d) (2016). As noted in Part II.C.2 *infra*, the Department recently modified these rules.

[123] *See* infra Part II.C.1.

[124] *See* Mike Brown, *College Dropouts and Student Debt*, LendEDU (Nov. 2, 2017), https://lendedu.com/blog/college-dropouts-student-loan-debt, *archived at* https://perma.cc/6KJ5-4JCS (finding that average college dropout leaves campus with over $10,000 in student loan debt and more than half of college dropouts are not making payments toward their student loan

proportionately default on their loans.[125] Sixty-five percent of Black students and 48% of Latinx students who borrowed federal loans but did not complete their undergraduate program defaulted on those loans twelve years after borrowing,[126] while only 38% of White students did.[127] Students who fail to complete a for-profit program default even more often. While 50% of White students who dropped out of a for-profit institution defaulted on their federal loans within twelve years of starting their education,[128] similarly situated Black and Latinx students defaulted at the staggering rate of 75% and 63% respectively.[129] Tragically, these patterns reinforce stereotypes that Black and Latinx people are unable to take advantage of educational opportunities when provided, when in fact, they illustrate just how great an obstacle racial inequality, manifest in disparities in wealth, income, and other opportunities, is for these students.

Even completing a course of study does not protect all students equally. Twenty-three percent of Black students in the 2003-04 graduating cohort defaulted on their loans over the course of 12 years, compared to 6% of White students.[130] Professor Abbye Atkinson's bankruptcy research finds that Black college graduates are just as likely to file bankruptcy as Black people without a degree, but the same is not true for White students.[131] She concludes that "while a college diploma may help to insulate college graduates in general and White graduates specifically from financial challenges as represented by bankruptcy filings, for African Americans, a college diploma provides little economic insulation."[132] Higher education does not confer the same benefits on all students, at least in part because higher education does not erase hundreds of years of racist and exclusionary policies, the non-

debt). Unfortunately, college completion does not seem to help Black graduates in bankruptcy. *See infra* notes 131-132 and accompanying text.

[125] We've known at least since 1992 that African American borrowers have a higher chance of defaulting on their student loans than other groups. Laura Greene Knapp & Terry G. Seaks, *An Analysis of the Probability of Default on Federally Guaranteed Student Loans*, 74 REV. ECON. & STAT. 404, 408 (1992) (finding that "[a] black borrower has a higher probability of default than a non-black borrower by about ten percentage points"). Annual student borrowing reached $110 billion USD in 2012-2013. *Growth of Annual Student Borrowing Outpaces Growth in Students,* PEW RESEARCH CTR. (Oct. 6, 2014), https://www.pewsocialtrends.org/2014/10/07/the-changing-profile-of-student-borrowers/st-2014-10-07-student-debtors-03, *archived at* https://perma.cc/7S8L-ZTMY.

[126] See id.

[127] *See* Miller, *supra* note 23, at tbl.4.

[128] *See id.* at tbls.4–5.

[129] *See id.* at tbl.5. The default rates for Black non-completers are high across the board (about two thirds for those who attended 4-year public and private non-profit four-year institutions, and 54% for two-year publics). *Id.* By comparison, the default rate of White non-completers was about one-third at any of those types of institutions. *Id.*

[130] *See id.* at tbl.4.

[131] *See* Atkinson, *supra* note 55, at 12.

[132] *Id.*

economic effects of those policies,[133] and the impact of current discrimination in the labor market.[134]

Even with all of these difficulties, default should in theory be avoidable, because Congress has approved several income-driven repayment and forgiveness plans to limit the negative effects of suffocating student loan debt.[135] The default repayment plan for federal student loans requires a fixed monthly payment amortized over a ten-year period.[136] This presents a problem for many students, since the returns to their education do not necessarily accrue at the time loans are due.[137] Almost every federal student loan borrower is currently eligible to enroll in an income-driven repayment (IDR) plan.[138] Students who enroll in IDR are able to limit monthly payments to 10-15% of their income each month.[139] If a borrower remains current on

[133] *See, e.g.*, Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 245 (2012); Coramae Richey Mann, Unequal Justice: A Question of Color 129–219 (1993); Paul Butler*, Stop and Frisk and Torture Lite*, 12 J. Crim. L. 57, 67, 68 (placing policing in context of slave codes and describing "subtle use of law enforcement as the mechanism of racial subordination that connects stop and frisk to a lineage of racial subordination tactics"); Paul Butler, *100 Years of Race and Crime*, 100 J. Crim. L. & Criminology 1043, 1045–46 (2010) ("If we look at black-white racial disparities in education, housing, health care, employment, the ratio is usually 2:1 or 3:1."); Devon Carbado, *From Stopping Black People to Killing Black People: The Fourth Amendment Pathways to Police Violence*, 105 Cal. L. Rev. 125, 128 (2017) (observing that "[a]cross the United States, police officers routinely force interactions with African Americans;" that may culminate in violence; and arguing that the Supreme Court "enables and sometimes expressly authorizes racial profiling" by police); David Cole, *The Paradox of Race and Crime: A Comment on Randall Kennedy's Politics of Distinction*, 83 Geo. L.J. 2547, 2556 (1995) (citing statistics on disproportionate involvement in the criminal justice system); Lucy A. Jewel, *The Biology of Inequality*, 95 Denv. L. Rev. 609, 669 (2018) (applying new biological findings to the problem of inequality and arguing that history and environment contribute to biological and neurological changes that produce negative health and cognitive outcomes).

[134] Lincoln Quillian, et al., *Meta-analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring Over Time*, 114 Proc. Nat'l Acad. Sci. 10870, 10870 (2017) (finding little has changed since 1989, when "whites receive[d] on average 36% more callbacks than African Americans, and 24% more callbacks than Latinos . . . Accounting for applicant education, applicant gender, study method, occupational groups, and local labor market conditions does little to alter this result.")

[135] *See infra* Part II.C.2 for an expanded discussion of IDR and forgiveness programs.

[136] The greater the total debt, the higher the monthly payment. *See* U.S. Dept. of Educ., *Standard Plan*, Federal Student Aid, https://studentaid.ed.gov/sa/repay-loans/understand/plans/standard*, archived at* https://perma.cc/749X-GTZC (last visited Nov. 6, 2019). There are also "graduated" repayment plans, not linked to a borrower's income, under which payments gradually increase over the repayment term, on the theory that the borrower's earning power rises over time. *See* 34 C.F.R. § 685.208(f).

[137] *See* Susan Dynarski, *An Economist's Perspective on Student Loans in the United States* 16 (Working Paper, 2014), https://www.brookings.edu/wp-content/uploads/2016/06/economist_perspective_student_loans_dynarski.pdf, *archived at* https://perma.cc/Y9JD-KZE9 (noting the "mismatch between the timing of the costs and benefits of education").

[138] *Income-Driven Repaymen Plans,* Educ. Dep't, https://studentaid.gov/manage-loans/repayment/plans/income-driven, *archived at* https://perma.cc/89NJ-4W6Y. IDR plans function as "insurance to borrowers against default and poor labor market outcomes."

[139] *See* U.S. Dept. of Educ., *Income-Driven Plans*, Federal Student Aid, https://studentaid.ed.gov/sa/repay-loans/understand/plans/income-driven, *archived at* https://perma.cc/PJG5-UJNR (last visited Nov. 6, 2019). These plans are listed at 34 C.F.R. §685.208(a)(1) (2016). The specified fraction is defined with respect to the poverty line and considers the size

payments for 20 or 25 years, depending on the IDR plan, the balance of the loan is forgiven.[140] In IDR, the required monthly payment may be less than the monthly interest due, or even $0, depending on a borrower's income and family size. IDR thus promises to enable those who encounter financial hardship to remain current on their loans, although they may need to repay for a very long time.[141] In theory, the availability of IDR should ensure very low levels of defaults among student borrowers. But, in practice, these interventions have failed disastrously.[142] More than one million borrowers defaulted on their student loans in 2018.[143] That's two borrowers defaulting every minute of every day.[144]

Students may not take advantage of the various repayment plans because they do not know about them.[145] But there is another, more disturbing possibility: the companies that service student loans for the Department of Education may not provide needed information to borrowers.[146] Student loan servicers are firms hired by the Department to provide loan servicing and collection[147] on its $1.5 trillion portfolio of student loans.[148] These servicers

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of the borrower's family. *See, e.g.*, 34 C.F.R. §685.209(a) (2016) (describing one of the income-linked repayment plans, dubbed "Pay As You Earn").

[140] These income-linked repayment plans operate in conjunction with Public Service Loan Forgiveness, described *infra* in Part II.C.2.b.

[141] Stretching out the repayment period to 20 or 25 years provides more time to satisfy the obligation, but the borrower will end up paying much more in interest over that extended period. In fact, for many debtors the obligation will grow to astronomical amounts because of negative amortization. *See* John Patrick Hunt, *Help or Hardship: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 Geo. L. J. 1287, 1309, 1313 (2017).

[142] *See* Consumer Fin. Protection Bureau, Student Loan Servicing: Analysis of Public Input and Recommendations for Reform 10 (2015) https://files.consumerfinance.gov/f/201509_cfpb_student-loan-servicing-report.pdf, *archived at* https://perma.cc/BP5D-94WT.

[143] 1,080,300 Direct Loan borrowers defaulted in 2018. *See* U.S. Dept. of Educ., *Direct Loans Entering Default*, Federal Student Aid, https://studentaid.ed.gov/sa/sites/default/files/fsawg/datacenter/library/DLEnteringDefaults.xls, *archived at* https://perma.cc/T6DT-HKGK (last visited Nov. 6, 2019).

[144] $24.4 billion of Direct Loans entered default in 2018; $23.31 billion went into default in the first three quarters of 2019. *See id.* For 2018, this averages to $22,615 per borrower, although the average hides a great deal of heterogeneity. *See id.*

[145] *Increasing IDR Applications Among Delinquent Student Borrowers,* Off. Evaluation Sci., https://oes.gsa.gov/projects/increasing-IDR-applications, *archived at* https://perma.cc/4427-T2CH (last visited Nov. 5, 2019) (finding that 0.23% of a random sample of delinquent borrowers enrolled in an IDR plan as opposed to 1.02% who were sent an email about IDR).

[146] *See* Press Release, Consumer Fin. Protection Bureau, CFPB Sues Nation's Largest Student Loan Company Navient for Failing Borrowers at Every Stage of Repayment (Jan. 18, 2017), https://www.consumerfinance.gov/about-us/newsroom/cfpb-sues-nations-largest-student-loan-company-navient-failing-borrowers-every-stage-repayment, *archived at* https://perma.cc/NE8A-UPJR (alleging that "Navient provided bad information in writing and over the phone, processed payments incorrectly, and failed to act when borrowers complained about problems").

[147] *See* U.S. Dept. of Educ., *Loan Servicers*, Federal Student Aid https://studentloans.gov/myDirectLoan/additionalInformation.action, *archived at* https://perma.cc/U2CM-KPW7 (last visited Nov. 6, 2019).

[148] This includes loans reinsured by the federal government and issued under the Federal Family Education Loan (FFEL) Program, which ended on June 30, 2010. *See* U.S. Dept. of Educ., *Federal Family Loan Program Lender and Guaranty Agency Reports*, Federal Stu-

and debt collectors are subject to consumer protection laws, such as the Equal Credit Opportunity Act,[149] the Fair Debt Collection Practices Act,[150] and the Consumer Financial Protection Act's[151] prohibition against unfair, deceptive, or abusive acts or practices.[152] Despite this, there are widespread servicing failures.[153] These federal laws do not specifically address the forms of harm inflicted by student loan servicers, and the servicers have fought fiercely against the potential application of state consumer protection laws to their businesses.[154]

There is also good reason to believe that these failures disproportionally harm communities of color. Due primarily to the Department of Education's failure to collect data on race, the evidence of disparate impact is incomplete. Nonetheless, there is some evidence that borrowers of color enroll in IDR at lower rates than White borrowers.[155] While the reasons for under-representation in these programs are unclear, the pattern is all too familiar.[156] The National Consumer Law Center has found that student loan servicers

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DENT AID, https://studentaid.ed.gov/sa/about/data-center/lender-guaranty, *archived at* https://perma.cc/2C5F-PBDS (last visited Nov. 6, 2019).

[149] 15 U.S.C. §§ 1691 (2012).

[150] 15 U.S.C. § 1692(p) (2010).

[151] Pub L. No. 111-203, 124 Stat. 1376 (codified at 12 U.S.C. § 5301 (2012)).

[152] *See id.* at § 1061.

[153] *See, e.g.*, Dan M. Clark, *Student Loan Servicer Settles with NY for $9M Over Deceptive Practices*, N.Y.L. J. (Jan. 4, 2019), https://www.law.com/newyorklawjournal/2019/01/04/student-loan-servicer-settles-with-ny-for-9m-over-deceptive-practices-claim/?slreturn=20190508123924, *archived at* https://perma.cc/SZ9K-P23D; Danielle Douglas-Gabriel, *Student Loan Servicer Navient Hit with Three Government Lawsuits in One Day*, WASH. POST (Jan. 18, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/student-loan-servicer-navient-hit-with-three-government-lawsuits-in-one-day/?utm_term=.baa5d2c4a441, *archived at* https://perma.cc/6MPN-G9XR; Don Thompson, *California Sues Nation's Largest Student Loan Servicer*, U.S. NEWS (June 28, 2018), https://www.usnews.com/news/best-states/california/articles/2018-06-28/california-sues-nations-largest-student-loan-servicer, *archived at* https://perma.cc/AK52-3RV3.

[154] Department of Education servicers have repeatedly tried to use preemption as a shield again the application of state consumer protection statutes. *See, e.g.*, *Nelson v. Great Lakes Educ. Loan Servs., Inc.*, 928 F.3d 639 (7th Cir. 2019); *Pennsylvania v. Navient Corp.*, 354 F. Supp. 3d 529, 548–553 (M.D. Pa. 2018); *Student Loan Servicing All. v. District of Columbia*, 351 F. Supp. 3d 26, 46–72 (D.D.C. 2018). The Department of Education currently supports efforts by servicers to avoid regulation. Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10, 619 (Mar. 12, 2018).

[155] Data from the 2016 Survey of Consumer Finances suggests that less than 10% of Black borrower households and less than 5% of Hispanic households use income-driven repayment plans, while more than 15% of White borrowers do. *See* Kristin Blagg, *The Demographics of Income-Driven Student Loan Repayment*, URB. INST.: URB. WIRE (Feb. 25, 2018), https://www.urban.org/urban-wire/demographics-income-driven-student-loan-repayment, *archived at* https://perma.cc/B543-FE27. However, recently released data from the Department of Education's Beginning Postsecondary Students Longitudinal Study (BPS) tracking students who entered college in 2011–12 through 2017 suggests that Black borrowers with college degrees are enrolling in IDR plans at rates higher than any other racial or ethnic group. *See* Miller, *supra* note 26.

[156] *See, e.g.,* Seamster, *supra* note 44, at 30–35 ("The historical precedents for Black debt show that Black people have been systematically excluded from the processes that allow one to convert debt to an asset.")

chose to sue defaulted borrowers at higher rates in communities that have a higher proportion of people of color.[157] Almost 60% of these cases result in a default judgment.[158] Given that communities with higher numbers of people of color generally have less wealth, the pattern of lawsuits makes little economic sense.

The weight of student indebtedness will have a devastating effect on borrowers in a future economic contraction. Beforehand, the obligation to repay leaves less income available to build savings that could assist in weathering a downturn. Once a downturn hits, the obligation to repay persists. If a borrower's income falls (for example, as a result of unemployment) the consequences are much greater. These effects will ripple through the economy, as struggling students cut back on spending and default on other debts.

B. How We Got Here and Why We Need to Get Out

In the Civil Rights Era, lawmakers took steps to increase access to American institutions. To enable equal access to the franchise, Congress prohibited poll taxes[159] and restricted the use of literacy tests.[160] To enable equal enjoyment of the right to travel, Congress prohibited discrimination in the provision of accommodations.[161] To provide equal access to K-12 public education, lawmakers prohibited discrimination on the basis of race in school assignments.[162] However, Congress took a different approach to increasing access to higher education. First, to help returning World War II soldiers readjust to civilian life, lawmakers provided veterans grant aid.[163] After the launch of Sputnik, Congress expanded the availability of grant aid to people who did not serve and established a modest student loan program to enable the United States to compete more effectively in science and technology research.[164] In the HEA, Congress further expanded grant and loan programs more generally, but did not explicitly address racial exclusion.[165] But perhaps

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[157] *See* Mattes & Yu, *supra* note 112, at 1.

[158] *See id.*

[159] *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 10, 79 Stat. 437, 442 (1965) (codified as 52 U.S.C. § 10306 (2012)).

[160] *See id.* § 4, 79 Stat. at 438–440.

[161] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 201, 78 Stat. 241, 243–44 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1982)).

[162] *See id.* §§ 401(b), 407, 78 Stat. at 246, 248. However, section 401(b) specified that " 'desegregation' shall not mean the assignment of student . . . to overcome racial imbalance." *Id.*

[163] The law passed to achieve this was the Servicemen's Readjustment Act, better known as the "G.I. Bill." *See* Pub. L. No. 78-346, § 400, 58 Stat. 284, 289 (1944) (codified at 38 U.S.C. § 3011).

[164] For a more complete description of this history, *see* Glater, *supra* note 33, at 1575–79 (describing federal laws enacted over time to promote higher education access in pursuit of changing goals).

[165] Indeed, federal legislation included provisions that specifically allowed forms of racial exclusion to persist, permitting fraternities and sororities to continue to discriminate on the

inadvertently, lawmakers also created a regressive system that perpetuates and exacerbates racial inequality. The federal government now uses two major tools to promote access: student loans[166] and tax benefits.[167] However, both simultaneously enable access and increase existing socioeconomic inequality.[168] Student loans impose a repayment burden and thereby undermine the opportunity that education is intended to afford. Tax credits reward those who earn more or have greater wealth to begin with.

1. Student Debt Crisis as a Case of Policy Drift

The dominance of loans in federal student aid reflects not a failure of foresight or explicit malevolence so much as a failure of political will in the face of rhetoric of private gain from higher education and the effective lobbying of industry groups that benefitted from the loan programs of the HEA. Professor Suzanne Mettler has identified this as an instance of policy "drift."[169] However, the motives for allowing debt to expand were almost certainly venal, rather than innocent. Over time, as tuition rose, "student aid policies no longer functioned as effectively as they had in the 1970s."[170] At the same time, student lending became too prized by lenders[171] and too essential for students and their families[172] for lawmakers to risk alienating them. The availability of student loans benefitted powerful institutions: for-

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basis of race. *See* Civil Rights Act, § 504, 78 Stat. at 251 (prohibiting the then-Commission of Education from investigating the membership practices of college fraternities and sororities).

[166] *See supra* Part I.B. Tax incentives to save for college, created after the HEA, are known as "§ 529 plans," after the relevant portion of the Internal Revenue Code. 26 U.S.C.S. § 529. These savings plans, which provide favorable tax treatment, are regressive in that families saving for college expenses must use after-tax dollars; the more a family earns, the more that family can save. Thus, these savings vehicles favor those who are wealthy and/or high-income. *See generally* Michael A. Olivas, *State College Savings and Prepaid Tuition Plans: A Reappraisal and Review*, 32 J. L. & EDUC. 475 (2003) (analyzing the plans, describing their growing use, and warning of equity consequences of their design).

[167] "In 2014, the federal government and society spent $23 billion on [education] tax credits, an increase of about $15 billion or 177% since 2008 (in real dollars)." Bulman & Hoxby, *supra* note 16, at 78; *see also* Jonathan D. Glater, *To the Rich Go the Spoils: Merit, Money, and Access to Higher Education*, 43 J.C. & U.L. 195, 215 (2018).

[168] *See* PRASAD, *supra* note 58, at 228–29 (arguing that the availability of home equity loans "and the larger regime of private welfare in general" help improve life opportunities but that access to credit do not achieve the same poverty reduction as that the policies of a welfare state would); Atkinson, *supra* note 33, at 1093 (describing and criticizing adoption of access to credit as a valid government social intervention).

[169] METTLER, *supra* note 38, at 67.

[170] *Id.*

[171] *See, e.g.*, Jonathan D. Glater & Karen W. Arenson, *Lenders Sought Edge Against U.S. in Student Loans*, N.Y. TIMES, Apr. 15, 2007, at A1 (describing student loan companies' efforts to protect their lucrative student lending business against the federal government's direct loan program).

[172] According to the College Board, more than 20 million students took out federal student loans in from 2017 to 2018. *See* SAUNDY BAUM ET AL., COLL. BD., TRENDS IN STUDENT AID 2018 at 16 fig.7 (2018), https://research.collegeboard.org/pdf/trends-student-aid-2018-full-report.pdf, *archived at* https://perma.cc/9DBT-FTU8.

profit education providers[173] and private lenders.[174] Because students could rely on credit and still enroll, for years they did not try to pressure lawmakers to act. But in the years leading up to and after the 2008 financial crisis, borrowers have become much more vocal as costs and debt burdens increased.

The legislative history of the Higher Education Act suggests that members of Congress did not intend student loans to be the central federal intervention to promote more access to higher education.[175] When President Johnson signed the HEA[176] into law, creating the federal student aid regime that has survived at least until this writing, he spoke not of loans but of opportunity: the law "mean[t] that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States [sic] and not be turned away because his [sic] family is poor."[177]

The critical component of the HEA was the creation of "educational opportunity grants," scholarships available to students who needed the money in order to enroll.[178] The law also expanded the infrastructure for the loan program,[179] along with campus work-study.[180] It is unlikely that any lawmakers foresaw that student debt would undermine the very students that federal loans aimed to help. Rather, the record suggests that they viewed these policy tools—grants, loans, and work study—as complementary. It is hard to concoct a narrative in which intentions at this historical moment

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[173] For-profit education institutions derive the lion's share of revenue from taxpayers. An investigation of fifteen for-profit institutions by staff of the Senate Committee on Health, Education, Labor and Pensions found that 86% of revenue came from federal programs. *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 25 (Comm. Print 2012), https://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf, *archived at* https://perma.cc/3NQU-5TWT. Not surprisingly, over the past decade the for-profit education sector has spent millions on campaign contributions. *See For-Profit Education*, OPENSECRETS, https://www.opensecrets.org/lobby/induscode.php?id=H5300&year=2019, *archived at* https://perma.cc/RD5F-AQ8S.

[174] The profitability of the guaranteed loan program, under which banks and other lenders provided loans on terms set by Congress and guaranteed by the federal government, led "banks to engage in rent-seeking behavior, mobilizing to protect the student loan system" rather than students. METTLER, *supra* note 38, at 54. Thus, financial institutions actively lobbied against transferring the loan program to the government, where it resides now, by making the remarkable claim that it was cheaper to pay lenders to make loans than to make the loans directly. *See, e.g.*, Kevin Bruns, *The Hidden Costs of Direct Loans*, CHRON. HIGHER EDUC. (June 22, 2007), https://www.chronicle.com/article/The-Hidden-Costs-of-Direct/17649, *archived at* https://perma.cc/FVC5-RLND (citing a study by the lenders' trade group that claimed "guaranteed loans cost taxpayers $2.16 less per $100 lent than direct loans").

[175] *See supra* notes 18—19 and accompanying text.

[176] Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified at 20 U.S.C. §§ 1001–07 (2012).

[177] President Lyndon B. Johnson, Remarks on Signing the Higher Education Act of 1965 (Nov. 8, 1965) https://digital.library.txstate.edu/handle/10877/5412*, archived at* https://perma.cc/ZWX6-UL82.

[178] HEA, § 401, 79 Stat. at 1232.

[179] *See* HEA, §§ 421-428, 79 Stat. at 1236–1243.

[180] *See* HEA, §§ 441-442, 79 Stat. at 1249–1251; METTLER, supra note 38, at 58.

were anything other than benign, but unintended and negative consequences have appeared over time.[181]

If the HEA had provided funds to public universities to absorb more students, the for-profit sector would not have had such ready access to federal money. But students can borrow to attend any kind of institution, including for-profit schools. The incentives confronting these for-profit entities were clear: the less spent on educational programming for the given level of tuition charged, the greater the profits earned and shared with investors. If the education provided did not live up to student borrower expectations or to the company's promises, the student was still indebted, the company was still enriched, and the path to pursuing a claim of fraud was difficult.

For decades, the availability of student loans has masked an insidious and dramatic increase in socioeconomic inequality, because by borrowing, students of lesser means can still obtain higher education. As loan amounts have grown, the underlying differences in wealth and income across the United States have become impossible to hide.

Borrowing by students has increased because the purchasing power of federal grant aid has fallen[182] for decades, even as tuition has continued to rise.[183] From the early 1970s through the mid-1980s, federal Pell grants kept pace or even exceeded tuition at public, four-year colleges and universities; but later, tuition grew faster than basic federal grant aid.[184] The purchasing power of the Pell grants declined, covering a smaller share of public university tuition and fees.[185] Household wages stagnated even as tuition rose at a dramatic pace, making students and their families less able to bear the cost of higher education[186] and more reliant on credit.[187] Loans have filled in the gap as an ever-larger share of the cost of higher education shifted from the federal and state governments to individual students and their families.

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[181] This is not a new problem. *See generally* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action*, 1 Am. Soc. Rev. 894 (1936).

[182] This trend is well-established and has been the case for decades. *See, e.g.*, Mettler, *supra* note 38, at 53; Susan B. Hannah, *The Higher Education Act of 1992: Skills, Constraints, and the Politics of Higher Education*, 67 J. Higher Educ. 498, 507 (1996).

[183] *See* Mettler, *supra* note 38, at 53 fig.2.1.

[184] *See id*. Under the Obama administration, the maximum Pell grant increased, but even so, the purchasing power has not recovered sufficiently to cover the full need of most students. *See* Aboozar Hadavand, *Educational Aid Policy and Inequality: The Case for Merit- and Need-Based Aid*, 76 Rev. Soc. Econ. 535, 540 (2018).

[185] *See* Hadavand, *supra* note 184, at 541 fig.3.

[186] *See, e.g.*, U.S. Gen. Accounting Office, Higher Education: Tuition Increasing Faster Than Household Income and Public Colleges' Cost 19 fig.2.1 (1996), https://www.gao.gov/assets/160/155555.pdf, *archived at* https://perma.cc/DFB8-NPAH (noting that as of 1995, "paying for tuition now takes about twice the proportion of household income as it did in 1980").

[187] *Cf.* Atkinson, *supra* note 33, at 1156-57 (noting that government policies have "encouraged middle-class borrowers to look to credit to finance their well-being" and that "the middle class has come to rely on credit to meet daily needs and as a means of filling in the gaps left by the lack of satisfactory social insurance").

2. *Student Debt: A Threat to Democracy*

For decades now, the public debate has framed the decision to attend college as a choice by an individual to pursue personal, private benefit.[188] The neoliberal perspective has emphasized the returns to the average graduate: better jobs, higher pay, and greater likelihood of upward class mobility.[189] But these benefits do not hold for many who entered the labor market in the last two decades. Since at least the turn of the century, the wage premium from higher education "has been sustained solely because of *falling* wages for lower levels of education,"[190] according to Julie Margetta Morgan and Marshall Steinbaum. Their research, which used data from 2000-2017, suggests that declining worker power has led employers to demand more education for a given job.[191] Other economic research suggests that in many areas of the economy, employers are exercising monopsony power to depress wages.[192] These are structural, political issues. The research findings highlight the importance of policies that complement expanded investment in higher education access. The policy proposals we offer below[193] would ensure that more students from historically excluded groups can matriculate and graduate, but such reforms should be implemented in the context of a broader, progressive effort to combat both racism and inequality. While this Article addresses higher education finance, the inequities perpetuated by student debt cannot be fully addressed in isolation.

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[188] *See* David F. Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 AM. EDUC. RES. J. 39, 59 (1997) (describing the ascendance of the goal of "social mobility," justifying the pursuit of education for its role in private accumulation of wealth, in the United States).

[189] *See, e.g.*, PAUL TAYLOR ET AL., PEW RESEARCH CTR., THE RISING COST OF *Not* Going to College 29 (2014), https://www.pewresearch.org/wp-content/uploads/sites/3/2014/02/SDT-higher-ed-FINAL-02-11-2014.pdf, *archived at* https://perma.cc/D8WJ-86M6 (discussing the value of college education in its ability to help students get a better career). *See generally* Douglas A. Webber, *Are College Costs Worth It? How Individual Ability, Major Choice, and Debt Affect Optimal Schooling Decisions*, 53 TEMP. U. ECON. EDUC. REV. 296 (2015) (assessing the value of education by analyzing yearly and lifetime earnings); Joanna Venator & Richard V. Reeves, *Three Reasons College Matters for Social Mobility*, BROOKINGS (Feb. 6, 2015), https://www.brookings.edu/blog/social-mobility-memos/2015/02/06/three-reasons-college-matters-for-social-mobility, *archived at* https://perma.cc/XGL3-DR8R (illustrating the impact of college education on individual's social mobility).

[190] Julie Margetta Morgan & Marshall Steinbaum, Roosevelt Inst., The Student Debt Crisis, Labor Market Credentialization, and Racial Inequality: How the Current Student Debt Debate Gets the Economics Wrong 12 (2008), https://rooseveltinstitute.org/wp-content/uploads/2018/10/The-Student-Debt-Crisis-and-Labor-Market-Credentialization-final-1.pdf, *archived at* https://perma.cc/TXT3-T5HQ (emphasis added) (noting that "the experience for average Americans is one of running in place rather than getting ahead, as they are forced to pursue additional education to achieve the same earnings that previous generations would get with lower levels of credential").

[191] This phenomenon is termed "credentialization." *Id.* at 4.

[192] *See* Suresh Naidu, Eric A. Posner & Glen Weyl, *Antitrust Remedies for Labor Market Power*, 132 HARV. L. REV. 536, 537-38 (2018).

[193] *See infra* Part II.

The narrow neoliberal focus on individual, private economic returns (and individual responsibility) also ignores the importance of an educated public to our society at large. Education plays a critical role in a democracy: "[d]emocratic politics puts a high premium on citizens being both knowledgeable and articulate."[194] We ignore the communal advantages of education, and the risk if it becomes scarce, at our peril.

Lawmakers have long seen education as a means of enhancing democracy and protecting desirable characteristics of the polity.[195] The Supreme Court has also acknowledged that education is special,[196] although the justices have declined to recognize it as a fundamental right.[197] Yet the case for greater access to advanced learning is greater now than it has ever been, as the world's challenges, knowledge, and technology grow ever more complex. Education also implicates other rights that the Court has recognized as fundamental, such as the right to vote[198] and the right to speak.[199]

If we take the shared, social returns to higher education into account, the United States is underinvesting in advanced learning.[200] Those with more education enjoy better health,[201] are less likely to be implicated in the criminal law enforcement regime,[202] pay more toward the common good in the form of higher income taxes,[203] are more engaged in political and civic

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[194] Amy Gutmann, Democratic Education 285 (1987).

[195] *See, e.g.*, Thomas Jefferson, *Preamble to a Bill for the More General Diffusion of Knowledge (1778), in* 2 The Papers of Thomas Jefferson 526-27 (Julian P. Boyd ed., 1950) (extolling education as the means of preventing the rise of a tyrannical government).

[196] Brown v. Board of Educ., 347 U.S. 483, 493 (1954) ("Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.").

[197] San Antonio v. Rodriguez, 411 U.S. 1, 37 (1973).

[198] Harper v. Virginia Bd. of Elections, 383 U.S. 663, 670 (1966). *But see* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 Cornell J. L. & Pub. Pol'y 143, 200 (2008) (noting divergent doctrinal treatment of the right to vote in different cases).

[199] Protected by the First Amendment, the right to freedom of speech is explicitly fundamental, U.S. Const. amend. I, and informed debate is critical to informed voting. Derek W. Black, *The Constitutional Compromise to Guarantee Education*, 70 Stan. L. Rev. 735, 741 (2018) ("[C]itizenship require[s] education . . . ."). For this and other reasons, the right to equitable access to education should be defended as such. Courts may recognize other principles — and other statutes, as Professor Elengold has argued — as bases for protecting civil rights and we applaud such efforts, but we are reluctant to cede the fundamental and direct demand for equity. *See* Elengold, *supra* note 52, at 639 (demonstrating that consumer protection law affords a viable avenue for vindication of certain civil rights).

[200] *See, e.g.*, Linda Darling-Hammond, The Flat World and Education 8 (2015) (arguing that the United States has lost ground relative to other nations and needs to move more decisively than it has in the last few decades to establish a purposeful, equitable education system).

[201] Walter W. McMahon, Higher Learning, Greater Good: The Private & Social Benefits of Higher Education 133-36 (2009). But note that higher debt is associated with worse health. Chris Fitch et al., *The Relationship Between Personal Debt and Mental Health: A Systematic Review*, 16 Mental Health Rev. J. 153, 164 (2011); Thomas Richardson et al., *The Relationship Between Personal Unsecured Debt and Mental and Physical Health: A Systematic Review and Meta-analysis*, 33 Clinical Psychol. Rev. 1148, 1154 (2013).

[202] McMahon, *supra note* 201, at 217-20.

[203] *Id.* at 206-07.

life,[204] and report higher levels of satisfaction and happiness in their lives.[205] Such benefits should be equally available to any who seek them.

Equal access to education opportunity *is* a civil right.[206] Thus, unequal access to this critical path to empowerment in politics, culture, business, or other leadership positions in our society should be understood as a civil rights issue.[207] Unfortunately, members of groups in the past excluded by law from educational opportunity still labor under the burden of past inequity in the form of lesser wealth and present inequity in the form of lower wages in labor markets. Together, these trends leave them with fewer financial resources to pay the ever-increasing cost of college.

In concluding that education is less than a fundamental right and thus accepting inequality in all these dimensions of life, the Supreme Court committed a grave error.[208] Fortunately, the Court's constrained view need not constrain lawmakers. The kinds of proposals pushed by the more progressive candidates seeking the Democratic presidential nomination in 2020, such as reducing or eliminating tuition at public colleges and universities, do not confront constitutional obstacles—only political ones.

II. Paths Forward

The disproportionate and harmful effects of student debt on Black and Latinx students demand a response.[209] In this Part we describe targets and consequences of possible policy interventions. We also make clear the societal benefits of decreasing the adverse impact of student borrowing. The first section identifies the intuitively obvious solution to racial subordination: a race-conscious remedy aimed at alleviating the adverse impact on Black and

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[204] *Id.* at 206-09.

[205] *Id.* at 223-24.

[206] *See* Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, § 601, 78 Stat. 252 (commonly known as Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in all federally-funded programs, including higher education).

[207] *See id*. Unfortunately, the Supreme Court has declined to recognize education as a fundamental right enshrined in the Constitution. San Antonio v. Rodriguez, 411 U.S. 1, 37 (1973).

[208] There is a new, historically grounded argument that *Rodriguez* was wrongly decided, because at the time of the adoption of the Fourteenth Amendment lawmakers believed "the twin pillars of state citizenship . . . [were] education and voting" — and if the Amendment guaranteed citizenship, citizenship meant voting, and voting required education. Black, *supra* note 199, at 741 (arguing that "the original intent behind the Fourteenth Amendment included a commitment to guarantee education as a core aspect of state citizenship" and so the Court should recognize education as a fundamental right).

[209] This is not an argument that the federal government should stop making student loans; that would not solve the problem of debt-financed access to higher education and outstanding debt. Other lenders would happily step in to fill the gap, charging higher interest rates than the federal government does. The terms of such private education loans were one reason that Congress created a federal loan program in the first place. *See* Jonathan D. Glater, *Student Debt and the Siren Song of Systemic Risk*, 53 Harv. J. on Legis. 99, 113 (2016) (noting that terms of commercial loans were a reason the federal legislature expanded federal student lending).

Latinx students. This section develops the argument for such a remedy, then identifies the challenges faced by such an effort under existing law and doctrine. The second section steps back to consider more broadly available, facially race-neutral reforms implementing an anti-inequality paradigm to eliminate the problem of student debt for all who currently owe and for all who will pursue higher education in the future. The third section suggests a set of incremental, carefully targeted policy reforms, all adopting a consumer protection paradigm, that would help to resolve some of the more egregious ill-effects of debt.

A. *Hobbled Civil Rights Paradigm*

If civil rights law and doctrine had developed differently, it might provide an effective, straightforward remedy for racial disparity in access to education.[210] In speaking of civil rights, we adopt an expansive concept derived from the Supreme Court's assertion in *Brown v. Board of Education* that "the opportunity of an education . . . where the state has undertaken to provide it, is a right which must be made available to all on equal terms."[211] Violations of civil rights, then, prevent full and meaningful access to and participation in society. In this view, past laws that have prohibited discrimination on the basis of race in, for example, credit or public accommodations protect civil rights.[212] This is so even though there is neither a fundamental right to borrow nor to stay in a hotel, and even though the government does not provide the service in question. The Civil Rights Act of 1964 includes a prohibition on discrimination on the basis of race, applicable to recipients of federal funds,[213] although the HEA does not.

The structural obstacle of student debt does not operate by discriminating explicitly on the basis of race. The terms of federal student loans do not vary with the racial, ethnic, or other identity markers of individual borrowers, nor are borrowers of particular racial or ethnic backgrounds denied access to credit for education loans. Students are free to use their loans in a variety of institutions. Further, every student who takes out the same type of

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[210] This is not meant to concede that there are no cognizable, viable claims that could be made about the disproportionate and adverse effects of student indebtedness. For example, there is some evidence that practices by student loan servicers might violate federal and state consumer protection laws. *See supra* Part II.C.2. Such claims would aim to achieve remedies narrower than higher education finance reform. In arguing that student debt implicates civil rights, this Article contends also that access to higher education is not only a consumer protection issue. *But see* Elengold, *supra* note 52, at 639–40 (arguing that if civil rights law doesn't provide an appropriate remedy, consumer protection laws provide a viable avenue for vindication of certain civil rights).

[211] 347 U.S. 483, 493 (1954).

[212] *See, e.g.*, Equal Credit Opportunity Act 15 U.S.C. § 1691(a) (1974) (prohibiting discrimination on the basis of race and other identity characteristics).

[213] Civil Rights Act of 1964, supra note 206.

federal student loan faces essentially the same terms.[214] This distinguishes the harm of student lending from, for example, that of discriminatory mortgage lending. Each borrower's socioeconomic context, which has been shaped by a history of overt, *de jure* racial discrimination and continuing *de facto* discriminatory treatment results in the disparate impact of student loan debt on (primarily) Black and Latinx borrowers.[215] Importantly, this disparate impact is a direct result of the government's choice to provide access to higher education primarily through student debt.

A proper remedy for this harm would be broader than student aid. It would include payment of reparations for the initial, catastrophic wrong of race slavery: money payments to the descendants of slaves,[216] or perhaps "baby bonds" to address the racial wealth gap.[217] But it would also necessitate dramatic, structural changes in housing, criminal justice, employment law, voting rights, and many other pieces of the economy. A proper remedy for this harm would be specifically targeted to redress past (and ongoing) wrongs incurred because of racism.

But even if Congress were inclined to engage in such race-conscious legislation, any of these remedies would likely encounter a hostile reception in the Supreme Court.[218] A majority of the Court has adopted an understanding of discrimination as an individual phenomenon: the product of individual, intentional acts.[219] Efforts to remedy broader, structural disparities — those not obviously related to the conduct and malevolent intent of an indi-

[214] The sole exception is that low-income students receive interest rate subsidies for some of their loans while they are in school and for six months after graduation. *See* U.S. Dept. of Ed., *What's the difference between Direct Subsidized Loans and Direct Unsubsidized Loans*, https://studentaid.ed.gov/sa/types/loans/subsidized-unsubsidized#subsidized-vs-unsubsidized, *archived at* https://perma.cc/9QR7-TL5N.

[215] As noted earlier, we limit our argument to Black and Latinx students because the data on other minority groups is unavailable.

[216] The authors also note the difficulty inherent in deciding who is entitled to such reparations; certainly other groups have been victims of *de jure* discrimination in the history of the United States, and members of these groups continue to labor under a greater burden as a result. *See, e.g.*, Graham Hughes, *Reparations for Blacks?*, 43 N.Y.U. L. Rev. 1063, 1064 (1968). In this Article we do not wish to engage in a game of "misery poker," arguing that any one group's suffering is unique and so exceptionally deserving of remedy; *see, e.g.*, Carrie Griffin Basas, *The New Boys: Women with Disabilities in the Legal Profession*, 25 Berkeley J. Gender, Law, & Justice 32, n.372 (2010) (defining misery poker). Rather, we suggest that a first step toward greater equity in higher education access is recognition of the special obstacles history has placed on subordinated groups—and the logical next step is structuring a remedy that *promotes* access. The just response to racism in the past is antiracism in the present. Ibram X. Kendi, How to Be an Antiracist 20 (2019) ("[T]here is no such thing as a not-racist idea, only racist ideas and antiracist ideas . . . .").

[217] *See generally* Darrick Hamilton & William Darity, Jr., Can 'Baby Bonds' Eliminate the Racial Wealth Gap in Putative Post-Racial America?, 37 Rev. Black Pol. Econ. 207 (2010).

[218] *See, e.g.*, Ian Haney López, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779, 1781–84 (2012) (describing the Court's formalistic approach to explicit consideration of race in government policy aimed at helping members of groups subject to discrimination).

[219] *See* Reva Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111, 1113 (1997).

vidual defendant — have received hostile treatment.[220] For example, a majority of the justices have shown considerable skepticism toward race-based affirmative action.[221] If legislation is to offer a viable way forward, we need a Court with a different understanding of discrimination and a national legislature with a different perception of the government's obligation to combat it.

Because the prevailing civil rights paradigm, as implemented and interpreted, does not easily lend itself to addressing the structural barrier of student loans, there is a mismatch between the problem we have identified and the solutions that we offer in the next two sections. Our critique rests on the observation that student loans contribute to the perpetuation of racial inequality, but the remedies in the next two sections do not explicitly take race into account. They are race-neutral, though they would disproportionately benefit borrowers who are Black and Latinx. A disproportionate benefit, however, does not constitute recognition of a historical and continuing wrong. The demand for government intervention to promote accessibility of higher education to those historically excluded rests on what Professor Graham Hughes called, back in 1968, the "moral claims of justice."[222] The particular racial inequity analyzed in Part I amounts to just such a claim, and Congress (and the Court) should provide a remedy.[223]

Any race-conscious remedy would create challenges even as it would promote equity. For example, Black Americans are not the only group that has a valid claim for special consideration in a higher education finance regime. Race-conscious remedies could fuel a politics of resentment, as

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[220] *See* Kevin Brown & Darrell D. Jackson, *The History and Conceptual Elements of Critical Race Theory*, *in* HANDBOOK OF CRITICAL RACE THEORY IN EDUCATION 9, 15 (Marvin Lynn & Adrienne D. Dixson eds., 2013) (describing the Court's adoption of the view that government "actions motivated by racially neutral justifications which, nevertheless, generate a disproportionately negative impact upon racial minorities are not considered to be discriminatory").

[221] *See* Yuvrav Joshi, *Affirmative Action Is About to Face a Judicial Assault*, SLATE (Feb. 12, 2019), https://slate.com/news-and-politics/2019/02/affirmative-action-sffa-harvard-supreme-court.html, *archived at* https://perma.cc/HU8E-TLE5.

[222] Hughes, *supra* note 216, at 1066.

[223] The mismatch, between the moral wrong and remedies based on a paradigm focused either on equity or on consumer protection, matters because there are obstacles in addition to disparate, relative poverty that undermine higher education access for members of historically subordinated groups. *See, e.g.*, Jewel, *supra* note 133, at 658 (describing the "new science [that] indicates that persons living in poverty . . . become saddled with persistent disabilities, as the ill effects of deprived material environments seep into the body and mind and get passed on, through biology") and accompanying text. In higher education alone, a variety of institutional policies and practices also hamper access and success for Black and Latinx students. For example, criteria that disproportionately screen out these students in selective admissions processes, inadequate academic support for them once enrolled, and lack of faculty mentors and role models undermine prospects for success. These other barriers to Black and Latinx students are beyond the scope of this Article, but we recognize that racial justice would require attention to such obstacles and that the law should not only permit, but require, these steps.

race-based affirmative action has.[224] As a practical matter a race-conscious remedy would certainly provoke powerful resistance. We make the argument because the racial justice claim is overwhelming. Providing additional financial assistance in whatever form for members of historically excluded groups, especially Black people, is a move toward equity. This is not a claim about enhancing efficiency, promoting innovation, or even improving the quality of education, although these would certainly be results. This is simply a claim about fairness.[225]

B. Bold—and Essential—Solutions

As the discussion above makes clear, achieving equity in access to higher education implicates broader and deeper questions of racial and social justice, and possible solutions very quickly expand beyond education to encompass re-engineering the national economy. That is far more than we could hope to accomplish in a law review article. However, we do wish to emphasize how profoundly linked educational inequity in the United States is to wealth and income inequality along the lines of race. The practical challenges of crafting a race-conscious remedy do not justify abandoning the effort. But we also recognize opportunities in the current political moment for remedies that will at least disproportionately benefit members of historically excluded groups.[226]

The critical role of education in our society justifies bold thinking and far-reaching reforms to improve access to higher education, rather than cautious incrementalism aimed at addressing each of the myriad flaws of the current, debt-centric system. The possibility of structural reform to promote access to higher education has energized progressive advocates and academ-

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[224] *See* Ian F. Haney López, *"A Nation of Minorities": Race, Ethnicity, and Reactionary Colorblindness*, 59 Stan. L. Rev. 985, 990 (2007) (describing the development of the perception that "preferential treatment for non-whites amounted to invidious discrimination").

[225] As Louise Seamster puts it:

> And what if we let ourselves imagine what Black debt and White debt could mean? Black debt could mean the unpaid debts owed to Black Americans—not only from slavery, but the cumulative effects of redlining; wage theft and undervalued work; discrimination in hiring, schools, and housing; programs and the massive destruction of urban renewal; convict leasing and mass incarceration; and the uneven economic fallout of the Recession. White debt could mean the debt owed for living on serially stolen land and accruing generations of other stolen luxuries, large and small.

Seamster, *supra* note 44, at 35.

[226] And also benefit poor and middle-class White students who face the prospect of borrowing for higher education. The possibility of "interest convergence," as identified by Derrick Bell decades ago, Derrick A. Bell, Jr., Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 Harv. L. Rev. 518, 523 (1980), improves the odds of any reform that increases accessibility of higher education. Recent research by Professor Haney López suggests the possibility of creating interest convergence. *See* Ian Haney López, Merge Left: Fusing Race and Class, Winning Elections, and Saving America xxi (2019) (summarizing research that found that "merging race and class builds energy and excitement between core constituencies indispensable to a resurgent Left" (sic)).

ics.[227] Two contenders for the Democratic presidential nomination in 2020 have proposed both mass debt forgiveness and virtual elimination of tuition at public colleges and universities, two steps that would radically reduce the barriers to higher education. In this section we briefly discuss the plans offered by Senators Bernie Sanders and Elizabeth Warren, respond to actual and potential criticisms of such an expanded investment in access, and offer an argument based on racial justice, which is too often left aside in favor of pragmatic claims about individual cost and benefit of debt and degrees,[228] in favor of comprehensive federal intervention in higher education finance. We conclude with a proposal for revitalizing the government's role in financing higher education.

1. *Debt Forgiveness*

For current borrowers,[229] cancelling student loan obligations outright is the most far-reaching and effective potential policy intervention.[230] Cancellation would provide immediate relief from the harms of debt because borrowers simply would not have to repay their loans.[231] This revolutionary policy solution would benefit the over 43 million Americans who collectively owe more than $1.6 trillion in student debt.[232]

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[227] *See, e.g.*, Adolph Reed, Jr. & Sharon Szymanski, *Free Higher Education*, 90 ACADEME 39, 43 (2004); Preston H. Smith II & Sharon Szymanski, *Why Political Scientists Should Support Free Public Higher Education*, 36 POL. SCI. & POL. 699, 702 (2003).

[228] *See, e.g.*, Astead W. Herndon, *Warren Proposal Would Erase Student Loan Debt for Many*, N.Y. TIMES, Apr. 23, 2019, at A16 ("[S]cholars and education advocates said Ms. Warren's policy would improve the financial futures of a debt-burdened generation of young people, and help reduce the racial wealth gap between white people and racial minorities, who have been disproportionately burdened by student loans.").

[229] For prospective students, of course, forgiveness alone will do little. That leads to the discussion below. *See infra* Part II.B.2.

[230] Activists and scholars have been calling for a debt jubilee. *See, e.g.*, Sarah Jaffe, Opinion, *The People Power Behind Sanders's Debt Cancellation Plan*, WASH. POST (Jun. 26, 2019), https://www.washingtonpost.com/opinions/2019/06/26/people-power-behind-sanderss-debt-cancellation-plan, *archived at* https://perma.cc/FF39-C33B; *About Us*, STUDENT DEBT CRISIS, https://studentdebtcrisis.org/about, *archived at* https://perma.cc/9K2M-QCXJ (last visited Oct. 22, 2019) (describing itself as an "organization dedicated to fundamentally reforming student debt and higher education loan policies"); Luke Herrine, *The Law and Political Economy of a Student Debt Jubilee*, 68 BUFF. L. REV. (forthcoming 2020) (manuscript at 25-26) (making the case for a student debt jubilee).

[231] *See* SCOTT FULLWILER ET AL., THE MACROECONOMIC EFFECTS OF STUDENT DEBT CANCELLATION 19 (2018), http://www.levyinstitute.org/pubs/rpr_2_6.pdf, *archived at* https://perma.cc/D3KP-4RPW (modeling a proposal whereby the federal government would "either purchase and then cancel, or, equivalently, take over the payments on student debt currently held by the private sector"). "[I]t is time to undertake a real labor market policy, and to overcome squeamishness about acknowledging the failures of the status quo. This includes acknowledging that student debt accumulated to date might not be economically feasible for debtors to carry and, eventually, pay off." *Id.* at 16.

[232] *See* Stratford, *supra* note 1. One recent paper used a "natural experiment" to estimate the effects of debt relief. It found that borrowers reduced their debt by 26% were 11% less likely to default on other accounts, enjoyed increased geographic mobility, and their income increased $3,000 over a three-year period. *See* Marco Di Maggio et al., *Second Chance: Life*

Two leading presidential candidates for the upcoming election have proposed plans to cancel varying amounts of student loan debt.[233] Senator Elizabeth Warren announced a "transformational" plan to cancel student loan debt for more than 95% of Americans with student loans and to provide tuition-free public college nationwide through increased federal financial support.[234] Her proposal would cancel up to $50,000 in student loan debt for borrowers in households with annual incomes of less than $100,000, and provide a decreasing amount of forgiveness for those in households earning between $100,000 and $250,000.[235] Under the proposal, the forgiven debt would not count as income for tax purposes.[236] And the proposal would pay for forgiveness through a tax imposed on "ultra-millionaires," the 75,000 families in the United States whose fortunes total at least $50 million.[237]

Senator Sanders' plan would forgive all student debt for all borrowers, regardless of income.[238] His proposal would tax financial transactions rather than the wealthiest households but, collecting $0.50 for every $100 traded, 0.1% of every bond trade, and 0.005% on every derivative transaction.[239] Thus, while this proposal would benefit more borrowers, it would take less direct aim at economic inequality. In advocating for their respective proposals, Senator Sanders and Senator Warren emphasize the harm of debt and the benefit of its cancellation.[240] To be sure, if either plan is implemented, most of the negative effects and implications of student borrowing and existing debt would be eliminated at once.[241] But there is a stronger argument to be

Without Student Debt 3-4, 14, 17 (Nat'l Bureau of Econ. Research, Working Paper No. 25810, 2019).

[233] Luke Herrine has argued that under current law, a president could enact a debt cancellation plan wiping out most (or even all) federal student loan debt by asking her Secretary of Education to use her prosecutorial discretion. *See* Herrine, *supra* note 230, at 39 (arguing that the Department of Education "has absolute discretion to determine when to stop collections, when to collect less than the full amount, and when to release claims debtors' *in toto*"). With a compliant Secretary of the Treasury, a president could even tackle the problem of taxation on cancellation of indebtedness "income." *Id.* at 66-74.

[234] Warren, *supra* note 50.

[235] See id.

[236] See id.

[237] *See id.* This last provision is important to recognize in weighing the concern over regressivity, because it adopts a direct method of addressing the effects of wealth and income inequality through the Internal Revenue Code.

[238] *See* BERNIESANDERS.COM, *supra* note 50.

[239] Id.

[240] *See* Warren, *supra* note 50 ("[S]tudent loan debt [is] . . . crushing millions of families and acting as an anchor on our economy. It's reducing home ownership rates. It's leading fewer people to start businesses. It's forcing students to drop out of school before getting a degree. It's a problem for all of us."); BERNIESANDERS.COM, *supra* note 50 ("[Cancellation of debt would] boost[ ] the economy by $1 trillion over the next ten years, and creat[e] up to 1.5 million new jobs every year. By canceling student debt, we will save the average student loan borrower around $3,000 a year in student loan payments. That money will be freed up to spend on everything from housing to starting a business . . . .").

[241] For example, eliminating student borrowers' repayment obligations would free them to make life choices that would be less constrained. One more subtle implication might be a reduction in pressure on professors to inflate student grades. *See* R. Todd Jewell et al., *Whose Fault Is It? Assigning Blame for Grade Inflation in Higher Education*, 45 APPLIED ECON.

made, a claim that hearkens back to the ambition and idealism of the architects of the federal interventions in higher education finance of years past. Public higher education represents a shared aspiration that higher education should be available to all members of the public who wish to pursue it. The argument is bolstered when placed in historical context of racial exclusion and discrimination. When entire segments of the national community have been unfairly and unjustly stopped at the campus gate, that in itself creates an ethical obligation to ensure that access in the future is allocated in a fair and just fashion. To be clear, then, restricting meaningful access as we currently do,[242] based on wealth and income, is unjust.

Greater access to higher education should help to close gaps in wealth and income that track race. These gaps are the legacy of the same history of unjust exclusion and discrimination, not just in education but in the labor market.[243] Yet the imposition of debt undermines the capacity of education to bolster earnings,[244] making it more likely that borrowers who belong to historically excluded groups will be unable to enjoy the socioeconomic boost higher education should provide and that their children will operate at a disadvantage, too. Racial, socioeconomic inequality is a durable phenomenon and overcoming it demands willingness to invest our shared, public resources.[245]

The monetary cost of a debt forgiveness program depends on the program's structure and scope. For example, debt forgiveness could be limited

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1185, 1199 (2013) (suggesting that at the institutional level, grade inflation may "result from national or regional trends in competition for students and public funding formulas or other policies that may encourage universities to add students"). In the absence of such a plan, borrowers will continue to face financial risk, the danger of default, and the prospect of collection methods that include garnishment of wages and even Social Security benefits decades after taking out a federal education loan in the first place. *See supra* note 128 and accompanying text.

[242] By "meaningful" here, we refer to access that results in comparable outcomes; indebted students face constraints after completion or dropping out that are materially worse than students who do not need to borrow, and as a result, higher educational opportunity for students who must borrow is less likely to achieve the goals higher education is intended to achieve—it is less meaningful. *See* Jonathan D. Glater, *Debt, Merit, and Equity in Higher Education Access*, 79 L. & Contemp. Probs. 89, 91 (2016).

[243] Marshall Steinbaum, Jain Family Inst., Student Debt and Racial Wealth Inequality 31-32 (2019), https://phenomenalworld.org/content/2-higher-education-finance/1-student-debt-racial-wealth-inequality/student_debt_and_racial_wealth_inequality_final_7-19-19.pdf, *archived at* https://perma.cc/9LJY-BN4J ("[L]abor market discrimination means that black students have to obtain more degrees, and go into more debt, to obtain the same jobs with the same salaries that white people can obtain with fewer degrees and less debt.").

[244] The effect is compounded by differences in wages, as alluded to above, *see supra* Part I.A.3, because the income effect of a given level of education is smaller for Black people relative to White people. *See* Sandy Baum, Jennifer Ma, & Kathleen Payea, Education Pays: The Benefits of Higher Education for Individuals and Society 14 fig.1.4 (2013).

[245] Kendi, *supra* note 216, at 218 (2019) ("The story of our generation will be based on what we are willing to do. Are we willing to endure the grueling fight against racist power and policy?"). Neither forgiveness of student debt nor elimination of tuition at public institutions of higher education would constitute reparations for the historic and catastrophic impact of slavery on Black people. That does not weaken the moral argument for taking these steps, which represent an effort to create the kind of republic we want to inhabit.

according to borrower income, as Senator Warren proposed,[246] or based on other characteristics such as whether the student obtained a degree, which she did not propose. Forgiveness could also be limited to undergraduate borrowers, an approach that neither Senators Sanders nor Warren took.[247] A loan forgiveness program would cost less if fewer borrowers were eligible, whether because of higher income or the nature of the degree. For example, a debt cancellation program would cost less if the income eligibility cap was $100,000 rather than $250,000, or if it covered only undergraduate debt. More restrictive income eligibility caps would leave more borrowers with lingering student debt. Similarly, excluding graduate and professional students might limit their career options after completion or dropping out.[248] In this Article we do not make an argument for forgiveness based on cost,[249] but instead make the normative case for wiping out as large a share of outstanding student debt as possible.[250]

Critics charge that widespread student debt cancellation is regressive.[251] First, critics note that college graduates generally earn more than those who have not achieved a degree, suggesting that student debt forgiveness benefits

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[246] Warren, *supra* note 50.

[247] Graduate and professional school students account for 17% of federal student loan borrowers, but 38% of federal education loans. *See* SANDY BAUM & PATRICIA STEELE, GRADUATE AND PROFESSIONAL SCHOOL DEBT: HOW MUCH STUDENTS BORROW 4 (2018), https://www.urban.org/sites/default/files/publication/95626/graduate-and-professional-school-debt_0.pdf, *archived at* https://perma.cc/W4N8-HWVW.

[248] *See* Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 AM. ECON. J.: APPLIED ECON. 1, 15 (2009) (finding that law students who received aid in the form of grants were "over one third (36 percent) more likely to enter public interest law after two years" post-graduation).

[249] *Cf.* Zach Friedman, *Bernie Sanders: I Will Cancel All $1.6 Trillion of Your Student Loan Debt,* FORBES (June 24, 2019), https://www.forbes.com/sites/zackfriedman/2019/06/24/student-loans-bernie-sanders/#3d23a6843fc2, *archived at* https://perma.cc/4SM3-FYHM (discussing Sanders' proposal to raise more than $2 trillion over the next 10 years to fund the loan forgiveness plan); Michael Stratford, *How Elizabeth Warren Would Cancel Student Loan Debt*, POLITICO (July 24, 2019), https://www.politico.com/story/2019/07/24/elizabeth-warren-2020-student-loan-debt-1428361, *archived at* https://perma.cc/BPS8-KMY6 (stating that while the Congressional Budget Office has not determined how much Warren's program would cost, Warren has suggested funding it with 2% "wealth tax" on individuals with a net worth above $50 million).

[250] As Professor Martha McCluskey notes, "[t]o solve problems of inequality and insecurity, we need to advance universal human economic rights, not just increase discretionary targeted redistributive spending." Frank Pasquale et al., *Eleven Things They Don't Tell You about Law & Economics: An Informal Introduction to Political Economy and Law*, 37 L. & INEQ. 97, 105 (2019).

[251] *See, e.g.*, Prachi Bhardwaj, *Student Loan Showdown: Let's Compare How Elizabeth Warren and Bernie Sanders Would Make You Debt Free*, MONEY (June 26, 2019), http://money.com/money/5647971/elizabeth-warren-bernie-sanders-student-loan-debt, *archived at* https://perma.cc/2G5D-LVEF (describing the criticism that Sanders' and Warren's plans are expensive and ill-advised since they cater to higher-income Americans and cover loans taken out for tuition at private schools); Clare Lombardo, *Student Debt Forgiveness Sounds Good. What Might Happen If the Government Did It?*, NPR (July 10, 2019), https://www.npr.org/2019/07/10/738506646/student-debt-forgiveness-sounds-good-what-might-happen-if-the-government-did-it, *archived at* https://perma.cc/Q3PJ-8FNR.

people less in need of government aid than those without college degrees.[252] Second, critics characterize the decision to pursue higher education as a personal, individual investment in a future income stream, and argue that there is no good reason to subsidize higher education access because borrowers will earn a hefty return on their investment.[253]

These criticisms are misguided.[254] First, they do not consider the public benefit of adding a debt-free, productive, educated person to the community. The liberated borrower may pay more in taxes,[255] through their consumption support commerce and employment, and produce goods and services of value to the economy. Those with higher education impose fewer costs on government by requiring less spending on health[256] and other benefits.[257] The benefits hold for borrowers who take out loans to pay for graduate and professional education as well, because they may earn more—and will also pay correspondingly more in taxes, assume leadership positions in society, and otherwise generate shared good. Higher education is not a purely private

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[252] Adam Looney, *How Progressive is Senator Elizabeth Warren's Loan Forgiveness Proposal?*, BROOKINGS (Apr. 24, 2019), https://www.brookings.edu/blog/up-front/2019/04/24/how-progressive-is-senator-elizabeth-warrens-loan-forgiveness-proposal/, *archived at* https://perma.cc/AY2N-CWVB.

[253] *See, e.g.*, Herndon, *supra* note 228, at A16 (quoting various critics, including Beth Akers of the Manhattan Institute, concerned by the prospect of a windfall to high-earning borrowers: "It's hard for me to stomach the idea of billing the masses—about two thirds of whom don't benefit from the earnings power afforded by a college degree—so that college graduates can enjoy the fruits of their education without the hindrance of having to pay for it"). Although it should be noted that taxpayers do not actually need to be "billed" to enable government to spend how it wishes. *See* Peter Coy et al., *Warren Buffett Hates It. AOC Is for It. A Beginner's Guide to Modern Monetary Theory*, BLOOMBERG (Mar. 21, 2019), https://www.bloomberg.com/news/features/2019-03-21/modern-monetary-theory-beginner-s-guide, *archived at* https://perma.cc/9MVK-9NAP.

[254] This concern over regressivity also proves too much: federal student aid overall is regressive. The federal government does pay the interest on some loans to students with financial need while they are enrolled in school and for the first six months after graduation, but it otherwise offers federal student loans at the same rates to all borrowers, conferring a subsidy on those with greater financial resources who could afford to pay more. U.S. DEPT. OF ED., *What's the difference between Direct Subsidized Loans and Direct Unsubsidized Loans*, https://studentaid.ed.gov/sa/types/loans/subsidized-unsubsidized#subsidized-vs-unsubsidized, *archived at* https://perma.cc/9QR7-TL5N. Public support of public universities means that higher income and wealthier students benefit from lower tuition than they could pay. If critics truly wish to correct for these income disparities through student aid and taxpayer funding of colleges and universities, there should be considerably more variation in pricing than there already is. *See* COLL. BD., *supra* note 37, at 3 (reporting the differences in growth rates of average reported tuition and average, actual, net price paid by students).

[255] HENRY LEVIN ET AL., THE COSTS AND BENEFITS OF AN EXCELLENT EDUCATION FOR ALL OF AMERICA'S CHILDREN 9 (2007), https://academiccommons.columbia.edu/doi/10.7916/D8FJ2RDT/download, *archived at* https://perma.cc/XN9G-E6LR; *see also* D.E. Bloom, M. Hartley, & H. Rosovsky, *Beyond Private Gain: The Public Benefits of Higher Education*, *in* INTERNATIONAL HANDBOOK OF HIGHER EDUCATION 296 (James J. F. Forest & Philip G. Altbach eds., 2007).

[256] Jennifer Ma, Matea Pender, & Meredith Welch, Education Pays 2016: The Benefits of Higher Education for Individuals and Society 36-38 (finding that individuals with more education are less likely to smoke, less likely to be obese, and more likely to exercise).

[257] *Id.* at 35 (explaining that individuals with more education are less likely to live in households receiving public assistance).

good and neither is forgiveness, and to the extent that we wish to recapture some of the private, economic gain received through public subsidy, the tax code offers a more direct solution.

Second, if implemented well it is possible that forgiveness could contribute to the narrowing of the racial wealth gap, calculated as a ratio of Black to White wealth.[258] On the other hand, if implemented poorly, forgiveness could contribute to a widening of the gap in absolute dollar terms.[259] While Senator Warren's proposal does not specify the mechanism, presumably the gap would narrow because Black and Latinx students disproportionately need to borrow and so would disproportionately benefit if that need vanished.[260] However, it is also the case that if White students disproportionately pursue graduate and professional study, borrow, and subsequently earn correspondingly larger amounts, debt forgiveness might not narrow the gap. Alternatively, forgiveness might not narrow the wealth gap as much, though the elimination of the need to borrow might in turn encourage more Black and Latinx students to pursue graduate and professional education. Prediction is a tricky business.

Debt does not operate in a vacuum but in the context of other life events of borrowers: particular borrowers, especially Black borrowers, disproportionately borrow, and particular borrowers, especially Black and Latinx borrowers, disproportionately fail to complete and disproportionately default. Forgiveness disproportionately benefits those borrowers, reducing the harm of failure to complete. Because after graduation Black and Latinx students earn lower wages than White students, forgiveness also disproportionately benefits them. Because Senator Warren has also proposed raising revenue to pay for forgiveness by taxing the nation's wealthiest families, the proposal is overall progressive.[261]

Debt forgiveness is important, but a one-time student loan forgiveness program does little for future students facing the prospect of debt. Congress must end the debt financing model of education altogether.[262]

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[258] Senator Warren argues that her proposal would help close the racial wealth gap. *See* Warren, *supra* note 50.

[259] For a full discussion of the challenge of choosing the proper measure of the wealth gap, *see* Louise Seamster, *How Should We Measure the Racial Wealth Gap? Relative vs. Absolute Gaps in the Student Debt Forgiveness Debate*, SCATTERPLOT (July 27, 2019), https://scatter.wordpress.com/2019/07/27/how-should-we-measure-the-racial-wealth-gap-relative-vs-absolute-gaps-in-the-student-debt-forgiveness-debate, *archived at* https://perma.cc/HB6H-WUZL.

[260] *See* STEINBAUM, *supra* note 243, at 19 (analyzing the Warren and Sanders proposals) ("[T]he major effect of cancellation is to push disproportionately many black households into positive net wealth territory, which significantly reduces racial wealth inequality.").

[261] *See* Warren, *supra* note 50.

[262] As Professor Abbye Atkinson has noted, "[c]redit, as currently conceived, cannot work for everyone," and especially those in already precarious circumstances. Atkinson, *supra* note 33, at 1105. We agree with her that "it is time to redirect our energies toward the more important issues of worsening economic instability and inequality that plague not only low-income families but middle-class families as well." *Id.* It is to a piece of that task that the next section turns.

2. *Revitalizing the Government's Role in Higher Education*

Public higher education should be accessible to the public, regardless of wealth or income.[263] In the nation that has more wealth than any other and a greater abundance of higher education resources than any other, every aspiring student should have an equal opportunity to learn. A nation with a history of racially discrimination bears the obligation to enable access to opportunity in a fair and equitable manner to all students. Public discussion of free higher education represents an opportunity to revive the 1960s-era vision of a higher education finance regime that does not perpetuate unjust disparities.

Senators Warren and Sanders have each proposed reducing tuition at public colleges and universities to zero.[264] Under Senator Warren's plan, the "federal government w[ould] partner with states to split the costs of tuition and fees and ensure that states maintain their current levels of funding on need-based financial aid and academic instruction."[265] To cover additional costs of room and board, Senator Warren would also expand need-based grant aid that could be used for expenses other than tuition and fees.[266] Senator Sanders, in turn, proposed legislation "to provide at least $48 billion per year to eliminate tuition and fees at four-year public colleges and universities, tribal colleges, community colleges, trade schools, and apprenticeship programs."[267] The proposed legislation adopts the current definition of "costs of attendance" in the U.S. Code[268] and provides that room, board, and other miscellaneous costs[269] would be covered for the neediest students.[270]

The subsections that follow outline two broad possibilities, each of which has percolated in policy discussions for years.[271] First, we develop a

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[263] For a sampling of scholars who have made this argument before us, *see* CHARLIE EATON, DESIGNING FINANCIAL AID FOR CALIFORNIA'S FUTURE 22, https://ticas.org/files/pub_files/designing_financial_aid_for_californias_future.pdf, *archived at* https://perma.cc/GQ8E-KEGM (making recommendations about how much Californian students could pay in out of pocket costs to remain debt-free); MCMAHON, *supra* note 202; David Deming, *Tuition-Free College Could Cost Less Than You Think*, N.Y. TIMES (July 19, 2019), https://www.nytimes.com/2019/07/19/business/tuition-free-college.html, *archived at* https://perma.cc/FSW2-LR8P.

[264] *See* BERNIESANDERS.COM, *supra* note 50 (identifying the proposals of Senator Sanders); Warren, *supra* note 50 (identifying the proposals of Senator Warren).

[265] Warren, *supra* note 50.

[266] *See* Warren, *supra* note 50. Specifically, Senator Warren would "invest an additional $100 billion over the next ten years in over the next ten years in Pell Grants—and expand who is eligible for a Grant—to make sure lower-income and middle-class students have a better chance of graduating without debt." *Id.*

[267] BERNIESANDERS.COM, *supra* note 50.

[268] *See* College for All Act of 2019, S. 1947, 116th Cong. § 901(a)(3), citing 20 U.S.C. § 1087ll (2010).

[269] This includes, for example, the cost of textbooks. *See id.*

[270] That is, those who are eligible for Pell grants. *See* College for All Act, S. 1947 *supra* note 269 at § 901(d)(8).

[271] *See, e.g.*, GUTMANN, *supra* note 194, at 226 (observing that the reform "with the greatest merits from the standpoint of nondiscrimination is eliminating tuitions almost entirely and subsidizing higher education so heavily as to insure equal access to all qualified students").

model for a sharp expansion of public funding from both the federal and individual state governments. This system, which we regard as the ideal step to enable fair access to higher education opportunity, would shift costs from students and their families back[272] to the national community.[273] Second, we explore a more modest proposal to change the existing student aid structure.[274] This alternative would use drastically increased, more effectively targeted means-tested aid to students as individuals instead of funding directed to the institutions they attend.[275] This, too, would reallocate the cost of higher education away from students. Either reform would increase equity of access, but the consequences and political perils differ, not always in obvious ways.

(a) Federal Aid to the States

Achieving the goal of free public college requires substantial state and federal action. The effort would go a long way toward promoting fairness in access by eliminating the financial barriers that disproportionately undermine the ambitions of aspiring Black and Latinx students, whose families have less wealth and earn lower incomes than do those of White and some Asian students. The benefits would extend beyond college enrollment, because students would complete programs of study unburdened by debt. Students who otherwise might have had to borrow might be more likely to pursue careers that benefit the public, now that they lack the burden of debt — or in gratitude for the public investment that enabled their education.[276]

Direct financial support from the federal government to public colleges and universities would best serve the goal of equal educational opportunity for all.[277] Public colleges and universities still receive significant revenue from state governments.[278] The federal government can directly support pub-

[272] "Back" because the burden on students and families grew in the 1980s and more quickly in the 1990s and 2000s; in the 1970s, federal grant aid was sufficient to cover all or nearly all the cost of attending a public, state university. Professor Mettler has carefully analyzed the decline in public support and consequences for students. *See* METTLER, *supra* note 38, at 52.

[273] Again, Senator Warren's proposal would use revenue generated by a tax on the wealthiest families in the nation to cover the cost. Warren, *supra* note 50. But for our purposes, the relevant point is that collectively, the community would have determined that the cost should not be borne by the individual student and that student's family, but by collective action — under the Warren proposal, the act of taxing those with the greatest wealth. *See id.*

[274] *See infra* Part II.B.2.b.

[275] *Id.*

[276] *See, e.g.*, Field, *supra* note 248 (finding that when grant aid replaced loans, law student recipients were more likely to pursue public interest careers).

[277] Public institutions educate 14.5 million of the nearly 20 million postsecondary students in the United States. U.S. DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS tbl.303.25, https://nces.ed.gov/programs/digest/d18/tables/dt18_303.25.asp?current=yes, *archived at* https://perma.cc/KYE8-GDSA.

[278] STATE HIGHER EDUC. EXEC. OFFICERS ASS'N, STATE HIGHER EDUCATION FINANCE: FY 2018 15 (2019), https://sheeo.org/wp-content/uploads/2019/04/SHEEO_SHEF_FY18_Report.pdf, *archived at* https://perma.cc/SLX9-TN9P ("Over the last 25 years, total state and local

lic colleges and incentivize state legislatures to increase their levels of funding with carefully structured grants contingent on state commitment to keeping tuition at zero, but either structure entails tradeoffs. The former approach has the benefit of avoiding potential resistance from state legislatures opposed to increased spending on higher education but is predicated in a different and perhaps larger federal involvement in higher education. The latter has the advantage of encouraging states to contribute to the cost of eliminating tuition and fees but runs the risk of inconsistency of access across the different states and may carry the risk that states will use the money to pursue other, less progressive goals.

Increased federal support could operate in several different ways. The simplest and most straightforward[279] policy is "block grants" to states for higher education funding, contingent on state institutions maintaining tuition at zero.[280] Senator Sanders' proposal would require states to pay one-third of the cost of reducing tuition to zero, with the balance covered by a federal grant to the state.[281] This structure would reduce financial barriers to higher education that disproportionately hinder Black and Latinx students.

In the absence of federal intervention, states could still choose to dedicate revenue to reducing or eliminating the cost to students. Some states, like New Mexico, California, Tennessee, Washington, and New York, are moving in this direction. New York created the Excelsior Scholarship in 2017, providing free tuition at the state's public colleges and universities for students whose families earn no more than $125,000 per year.[282] In Tennessee, a

support for public higher education grew 127.5 percent in unadjusted terms, from $42.3 billion in 1993 to $96.1 billion in 2018. After adjusting for inflation, state and local funding in 1993 was $80.7 billion, meaning that in constant dollars, funding increased 19.1 percent over the last 25 years. Incorporating changes in FTE enrollment, state and local funding decreased 4.2 percent since 1993.").

[279] If federal funds were distributed directly to institutions, reducing the risk that different state legislatures might be more or less receptive to the goal of increasing higher education access, then institutions would have to apply for funds. After all, grant recipients do not always comply with grant terms. *See* Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 274 (2014) (identifying a typology of forms of noncompliance).

[280] Under this scenario, states would have the option to join the new institutional-aid regime; the existing federal student aid system could be wound down. In this way, the direct institutional-aid program would not run into the problem identified by the Supreme Court in *National Federation of Independent Business v. Sebelius*, in which a majority of the justices invalidated Medicaid expansion imposed upon states under penalty of losing all federal Medicaid money. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 585 (2012) ("What Congress is not free to do is to penalize States that choose not to participate in that new program by taking away their existing Medicaid funding."). It is perhaps a closer call if current Title IV aid under the HEA were to be shut down at the same time, making participation in a new program potentially less of a choice.

[281] College for All Act of 2019, S. 1947, 116th Cong. § 901(b)(2) (2019), https://www.govinfo.gov/content/pkg/BILLS-116s1947is/pdf/BILLS-116s1947is.pdf, *archived at* https://perma.cc/5ZZ5-UJ4G.

[282] Press Release, Office of Gov. Andrew M. Cuomo, Governor Cuomo Signs Legislation Enacting First-in-the-Nation Excelsior Scholarship Program to Provide Tuition-Free College to Middle Class Families (Apr. 12, 2017), https://www.governor.ny.gov/news/governor-cuomo-

state that pioneered free community college, the interim president of the state's university system announced in 2019 the creation of a free tuition program for students whose families earn less than $50,000 annually.[283] The Washington legislature in 2019 passed a law that will cover tuition and fees for students whose families[284] earn about $50,000 a year or less, paid for by a "surcharge" on companies that employ highly skilled workers.[285] In California, lawmakers in 2017 expanded funding for community colleges to eliminate the state equivalent of tuition and fees.[286]

Anything less than a national initiative, however, will ensure that opportunities remain tied to geography, preserving inequalities that correlate directly with location and indirectly with race.[287]

(b) Direct Federal Aid to Public Institutions

An alternative pathway for institutional support could be requiring public colleges and universities to apply directly for federal funding. This approach avoids the challenge of incentivizing states to maintain their own financial support of these institutions and prevents the exploitation by the states of the fungibility of funds. However, it also increases the role of the federal government in college and university operations, because through any application process, the federal government could influence or even direct applicant institutions to, for example, offer particular courses of study, methods of teaching, techniques of student assessment, standards for faculty, or compensation of faculty and staff.[288] This risk is always present, even under the current system, because institutions receive funds from the federal

signs-legislation-enacting-first-nation-excelsior-scholarship-program-provide, *archived at* https://perma.cc/F3LR-TCKG.

[283] Jason Gonzales, *University of Tennessee to launch free college program that mirrors successful Promise, Reconnect programs*, NASHVILLE TENNESSEAN (Mar. 14, 2019), https://www.tennessean.com/story/news/education/2019/03/14/university-of-tennessee-launching-free-college-tuition-program/3139831002, *archived at* https://perma.cc/4GLE-Z4R6.

[284] The figures are for a family of four. Rueb, *supra* note 51.

[285] *Id.*

[286] CAL. EDUC. CODE §76396.1 (2018); *see also* Legislative Analyst's Office, CREATING A DEBT FREE COLLEGE PROGRAM 3 (2017), https://lao.ca.gov/reports/2017/3540/Debt-Free-College-013117.pdf, *archived at* https://perma.cc/V8U6-23EV (directing, in a report called for by the California legislature, the legislative analyst's office to "provide the Legislature with options for creating a new state financial aid program intended to eliminate the need for students to take on college debt").

[287] In states that do not expand funding for public higher education institutions, those who disproportionately cannot afford to enroll or will be discouraged from doing so will disproportionately belong to the same populations historically excluded from educational opportunity. For an analogous example, *see* Samantha Artiga et al., *The Impact of the Coverage Gap for Adults in States not Expanding Medicaid by Race and Ethnicity*, KAISER FAMILY FOUNDATION (Oct. 26, 2015), https://www.kff.org/disparities-policy/issue-brief/the-impact-of-the-coverage-gap-in-states-not-expanding-medicaid-by-race-and-ethnicity, *archived at* https://perma.cc/NX25-8LQ6.

[288] Professor Derek Black has argued that the Education Department effectively has already done this. Derek W. Black, *Federalizing Education by Waiver?*, 68 VAND. L. REV. 607, 613 (2015) (describing use of the power to waive compliance with federal law as a tool to impose other requirements on schools).

government for myriad purposes other than funding student aid.[289] The federal government could leverage control over funds to influence what colleges and universities teach and has indeed threatened to do so.[290] Still, an executive who actually ignores the norm may not receive a friendly reception in the courts.[291]

Reducing the cost of all public higher education, either through aid to states or to individual institutions, is not means-tested. It would confer a considerable financial benefit on students from wealthy and high-income families. Yet the benefits to most students, who do not hail from such privileged families, greatly outweigh this consideration.[292] Opening the doors of opportunity through free public college would disproportionately benefit Black and Latinx students. Any windfall to the wealthy must be balanced against the benefit to students from groups historically excluded from educational and economic opportunity, and thus against the value of vindicating rights too long recognized on paper but not in practice. The value of access to those long denied it far exceeds what the families of wealthy students might pay in tuition.

We imagine the provision of free public college would be coupled with progressive reforms to the federal tax code that would generate additional revenue. Revenue from higher taxes on the wealthy could be directed to supporting public colleges and universities in either of the ways that we have suggested. Though beyond the scope of this Article, we believe that tax reform — not tuition pricing and financial aid — provides the most direct path to correcting wealth and income inequality.[293] The two approaches described

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[289] In fact, the Trump Administration did weigh in on the substance of an academic program funded by a federal grant, and went so far as to demand changes. Erica L. Green, *U.S. Orders Duke and U.N.C. to Recast Tone in Mideast Studies*, N.Y. Times, Sep. 20, 2019, at A1. But the Administration did not attempt to use student aid funds as leverage; the grant money at issue was authorized under a different provision of the HEA, not Title IV. *Id.*

[290] President Donald Trump notoriously threatened to cut federal funding of specific public universities in response to actions he viewed as inconsistent with the obligation to preserve freedom of speech. Thomas Fuller & Christopher Mele, *Berkeley Cancels Milo Yiannopoulos Speech, and Donald Trump Tweets Outrage*, N.Y. Times (Feb. 1, 2017), https://www.nytimes.com/2017/02/01/us/uc-berkeley-milo-yiannopoulos-protest.html, *archived at* https://perma.cc/24L9-LMYV. Similarly, the Trump Administration threatened to deprive two universities of federal HEA funds because the Education Department found course materials to be biased. Green, *supra* note 290, at A1.

[291] The Supreme Court for decades has recognized the importance of independence and freedom in the context of higher education, both in what is said on public university campuses and—more relevant for present purposes—in their governance. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (warning that "impos[ing] any straitjacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation").

[292] Sara Goldrick-Rab et al., Reducing Income Inequality in Educational Attainment: Experimental Evidence on the Impact of Financial Aid on College Completion, 121 Am. J. of Soc. 1762, 1762 (2016) (reporting results from a randomized control trial of grants to students from low-income families and finding that "offering students additional grant aid increases the odds of bachelor's degree attainment over four years, helping to diminish income inequality in higher education").

[293] Glenn Hubbard, former chair of the Council of Economic Advisers under President George W. Bush, made this point eloquently in an op-ed. Glenn Hubbard, *Tax Reform is the*

above are the best ways to expand higher education access and solve the problems created by the current system. It is difficult to overstate the benefits this overhaul would bring to students who pursue higher education, to their families, and to public providers of higher education.[294] Students and their families would avoid the costs and risks of taking on life-altering debt to cover tuition. Reducing tuition to zero would ensure that willing and capable students apply and enroll. Students would face less pressure to work while enrolled, freeing them to take full advantage of their postsecondary education experience. And poorer students would face less pressure to pursue only courses of study and career pathways that they anticipate will result in higher incomes, providing greater freedom to choose diverse opportunities in public service.

While enrolled, students incur expenses other than tuition and fees, and those costs can be considerable.[295] Financial support of institutions does not reduce the cost of attending a particular college, university, or other program to zero because students must pay for housing, food, books, and the technology that is ever more essential to functioning in a contemporary higher education environment. Some students suffer food insecurity or outright hunger while enrolled; others struggle to find affordable housing.[296] In some high-cost areas, the burden can be acute, forcing some students to live in cars or on the street.[297] There is a tradeoff between borrowing and working: borrowing frees up more time for students to study, but to incur debt is to incur risk. Some students no doubt elect to work longer hours while enrolled than they otherwise would, taking valuable time from their studies and thereby in-

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Best Way to Tackle Income Inequality, WASH. POST (Jan. 10, 2014), https://www.washingtonpost.com/opinions/tax-reform-is-the-best-way-to-tackle-income-inequality/2014/01/10/112710ea-68ca-11e3-a0b9-249bbb34602c_story.html, *archived at* https://perma.cc/A6X9-LZA4.

[294] *But see* Tressie McMillan Cottom, *Why Free College is Necessary*, DISSENT MAGAZINE (Fall 2015), https://www.dissentmagazine.org/article/tressie-mcmillan-cottom-why-free-college-necessary, *archived at* https://perma.cc/UG6J-UZZE (arguing that "free college would likely benefit only an outlying group of students who are currently shut out of higher education because of cost—students with the ability and/or some cultural capital but without wealth").

[295] *See, e.g.*, COLLEGEBOARD, TRENDS IN COLLEGE PRICING 3 (2019), https://research.collegeboard.org/pdf/trends-college-pricing-2019-full-report.pdf, *archived at* https://perma.cc/CQ59-6APN.

[296] *See, e.g.*, HOPE CTR. FOR COLL., CMTY. AND JUSTICE AT TEMPLE UNIV., 2018 #REALCOLLEGE SURVEY REPORT: DENVER (2019), https://hope4college.com/wp-content/uploads/2019/09/RC2018_Denver_Report_20190906.pdf, *archived at* https://perma.cc/X8D4-98AZ (reporting that 40% of survey respondents experienced food insecurity in the last 30 days and 18% experienced homelessness in the previous year); GABRIEL PETEK, THE 2019-2020 BUDGET: STUDENT FOOD AND HOUSING INSECURITY AT THE UNIVERSITY OF CALIFORNIA 2 (2019), https://lao.ca.gov/reports/2019/4014/student-food-housing-uc-042519.pdf, *archived at* https://perma.cc/76HZ-3K34 (warning of a "notable proportion" of students at the University of California reported both housing and food insecurity).

[297] *See, e.g.*, RASHIDA CRUTCHFIELD ET AL., SERVING DISPLACED AND FOOD INSECURE STUDENTS IN THE CSU 6 (2016), https://presspage-production-content.s3.amazonaws.com/uploads/1487/cohomelessstudy.pdf?10000, *archived at* https://perma.cc/FAP4-J247 (describing survey responses from California State University officials who indicated their belief that more than 8% of students were homeless).

creasing the risk of dropping out or of performing poorly in class.[298] Requiring poorer students to work longer hours while pursuing their studies adversely affects their ability to have meaningful interactions with their classmates and teachers, and increases the risk that they will drop out.[299] If students are to pursue higher education on an equal footing, compelling some students — disproportionately those who are Black and Latinx — to work while enrolled is counterproductive.

To address costs of higher education beyond tuition and fees, then, the federal government should provide need-based *grant* aid, either directly or through colleges and universities, so that students can graduate debt-free.[300] Only a combination of zero tuition and provision of adequate living stipends can eliminate the pernicious effects of debt.

C. Helpful but Insufficient Fixes: A Consumer Protection Paradigm

The proposals in this section address the problem of current outstanding debt. The most ambitious reforms aim to erase the burden of repayment for those suffering the most, automatically placing borrowers on flexible repayment plans and easing the path to cancellation of repayment obligations in bankruptcy. The more modest reforms aim to curb abusive practices that can make managing a loan next to impossible, including stronger oversight of loan servicers and providing borrowers with more options to protect themselves from education providers that defraud them. None of these proposed reforms are sufficient to "fix" the problem of student debt in its entirety, but they are absolutely necessary in a world of incremental change.

This section first describes necessary changes in how student loans are treated in bankruptcy proceedings to make it easier for borrowers to eliminate or discharge their obligations. The next section advocates for changes in repayment plan structure, expanded forgiveness for borrowers who take public interest jobs, tougher regulation of for-profit higher education providers,

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[298] Indeed, one study of student borrowing found that the likelihood of completing courses of study was higher for students who took out loans. Benjamin M. Marx & Lesley J. Turner, *Student Loan Nudges: Experimental Evidence on Borrowing and Educational Attainment*, 11 AM. ECON J. 108, 131 (2019). This is not to suggest that student loans are an absolute good but a relative one: currently existing alternatives are worse. Dynarski, *supra* note 138, at BU8.

[299] L. W. PERNA ET AL., IMPROVING EDUCATIONAL OPPORTUNITIES FOR STUDENTS WHO WORK 22-23 (2007), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1313&context=gse_pubs, *archived at* https://perma.cc/9ADX-EG25.

[300] Maintaining availability of low-cost loans could also help students cover their living expenses while enrolled. *See* Alana Semuels, *Free Tuition is Not Enough*, THE ATLANTIC (Oct. 15, 2015), https://www.theatlantic.com/business/archive/2015/10/free-tuition/410626/, *archived at* https://perma.cc/9MQ8-SGKJ (describing costs of books and living expenses even when attending a tuition-free program of study). The preservation of federal work-study funding would also help poorer students defray living expenses. While we prefer enabling students to graduate debt-free because of the pernicious effects of carrying debt, we recognize that, as a practical matter, keeping these forms of student financial support would avoid the need to wind down the vast student aid public and private infrastructure.

and a more robust process allowing students to cancel their debts if their education provider defrauded them.

1. Bankruptcy Reform

Americans turn to bankruptcy as the last line of protection from financial ruin. Bankruptcy provides debtors with a "fresh start" by permitting them to discharge their debts, canceling the obligation to repay.[301] In turn, debtors must liquidate their nonexempt assets or agree to pay a modest amount to creditors over a three- or five-year period.[302] The primary path to a fresh start is through bankruptcy discharge, a procedure that "renders the debt uncollectible from the individual and protects the debtor from future attempts at collection, making it a violation of a court order to do so."[303] People declaring bankruptcy can discharge almost all consumer debts,[304] including credit card debt, medical bills, tort or contract liabilities, and mortgage or auto loan deficiencies.[305]

But student debtors do not face the same path to relief available to others in bankruptcy. The only category of consumer debt that is not automatically discharged in bankruptcy is student loans.[306] Under section 523(a)(8) of the Bankruptcy Code, federal or private student loans are only dischargeable in bankruptcy if debtors meet an exceptionally high "undue hardship" standard. But the statute doesn't define "undue hardship," and

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[301] Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1397 (1985) (describing forms of protection of human capital and certain exempt property from creditors); *but see* Katherine Porter & Dr. Deborah Thorne, *The Failure of Bankruptcy's Fresh Start,* 92 CORNELL L. REV. 67, 83-93 (2006) (presenting empirical evidence that many debtors who received a discharge still struggle to repay bills).

[302] *Chapter 7 — Bankruptcy Basics: How Chapter 7 Works*, U.S. COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics, *archived at* https://perma.cc/9ZY3-TNX2; *Chapter 13 — Bankruptcy Basics: How Chapter 13 Works*, U.S. COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-13-bankruptcy-basics, *archived at* https://perma.cc/YW9Z-2ARY.

[303] Dalié Jiménez, *Ending Perpetual Debts*, 55 HOUS. L. REV. 609, 611-12 (2018); *see also* 11 U.S.C. § 524(a) (2019); Taggart v. Lorenzen, 139 S. Ct. 1795, 1799 (2019) (holding that a creditor may be held in "civil contempt for violating a discharge order where there is not a 'fair ground of doubt' as to whether the creditor's conduct might be lawful under the discharge order").

[304] Consumer debts are generally defined as an "obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance or services which are the subject of the transaction are primarily for personal, family, or household purposes." 15 U.S.C. § 1692a(5) (2012); *cf.* Jiménez, *supra* note 306, at 644 n.226.

[305] For the different sections of the federal bankruptcy statutes describing the scope of the bankruptcy discharge depending on the type of bankruptcy filed, *see* 11 U.S.C. § 1328 (2005) and 11 U.S.C. § 1141 (2010),.

[306] The relevant statute, 11 U.S.C. § 523(a)(8) (2010), does not use the phrase "student loans" and instead lists three categories of educational obligations. Most courts that have considered the question recently have held that there are some loans, such as bar loans, that one might colloquially refer to as "student loans" but that do not qualify for exceptional treatment under the Bankruptcy Code. *See* Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L. J. 277, 305 (2019).

scholars have found a great deal of variation in how courts apply the tests that have been developed to assess whether debtor hardship is undue.[307]

This section discusses two tools judges can use to discharge student loan debt in bankruptcy court, despite the challenging standards. Our first proposal is informed by the evidence we described in Part I. Our goal is to have bankruptcy courts make more informed decisions when adjudicating student loan cases by considering the value of the education the student received. Under current tests, courts evaluate whether a debtor's current inability to repay their loans will continue in the future.[308] Few courts consider the value of the education received by the student.[309] This is inconsistent with the original legislative purpose underlying the exceptional treatment of student debt under the Bankruptcy Code.

It wasn't always this way. Before 1976, student loans were treated like other consumer debts — that is, freely dischargeable so long as the debtor did not obtain them through fraud.[310] Congress has since amended this section of the Bankruptcy Code five times, on each occasion further restricting the availability of discharge to student loan debtors.[311] The last change, in

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[307] *See, e.g.*, Note, Forgive and forget: Bankruptcy reform in the context of for-profit colleges, 128 HARV. L. REV. 2018, 2039 (2015); Daniel A. Austin, The Indentured Generation: Bankruptcy and Student Loan Debt, 53 SANTA CLARA L. REV. 329, 372 (2013); Jason Iuliano, An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard, 86 AM. BANKR. L. J. 495 (2012); Rafael I. Pardo & Michelle R. Lacey, The Real Student-Loan Scandal: Undue Hardship Discharge Litigation, 83 AM. BANKR. L.J. 179 (2009); Rafael L. Pardo & Michelle R Lacey, Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt, 74 U. CINCINNATI L. REV. 405, 529 (2005); Christian A. Pereyda, Is Undue Hardship an Undue Burden?, 35 AM. BANKR. INST. J. 40, 41, 59-61 (2016); Ben Wallen, One Standard to Rule Them All: An Argument for Consistency in Education Debt Discharge in Bankruptcy Proceedings, 16 HOUSING BUS. & TAX L. J. 232, 251 (2016) (arguing that all courts should adopt a modified standard of the totality of the circumstances).

[308] *Brunner* directs a court to consider whether the current state of affairs "is likely to persist for a significant portion of the repayment period of the student loans" while the totality test speaks about this in terms of the debtor's "reliable future financial resources." *See infra* notes 341-42 and accompanying text. Courts vary as to what is the appropriate future period for consideration. Is it the original term of the loans? A longer term if the loans could be refinanced? Forever? *See In re* Price, 573 B.R. 579, 602–06 (Bankr. E.D. Pa. 2017), rev'd sub nom. DeVos v. Price, 583 B.R. 850 (E.D. Pa. 2018).

[309] "The court [in *Brunner*] stated that consideration of educational benefit was improper because it made the federal government an insurer of educational value. The court rejected the view that discharging loans serves as a form of punishment for schools with unsatisfactory educational programs. Discharge does not impact the schools, but rather hurts the taxpayers who foot the bill for unpaid student loans." Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans*, 71 TUL. L. REV. 139, 160–61 (1996).

[310] *See* 11 U.S.C. § 35(a) (1976) (repealed 1978); 11 U.S.C. § 523(a)(2) (2019) (exempting from discharge most debts that were "obtained by false pretenses, a false representation, or actual fraud"). "There are nineteen enumerated exceptions to the bankruptcy discharge. Most have to do with debts owed to the federal or state governments[,] fraud or defalcation, certain kinds of injuries caused to persons or property, . . . or debts in connection with a divorce or separation agreement." Jiménez, *supra* note 306, at 630–31.

[311] The Higher Education Amendments of 1976 (section 439A) made student loans presumptively nondischargeable for five years, unless the debtor could prove undue hardship or if

2005, presumptively barred discharge of private student loans — those neither made nor guaranteed by the federal government — from financial firms that had already priced the risk of default into the loan price.[312] The law benefited private financial firms, which issued loans with interest rates as high as 20%, and those firms lobbied in favor of the bill.[313] To the extent that legislators claimed this change would help make loans available to more students,[314] it failed to do so.[315] The legislation had no long-term effect on loan availability,[316] the cost of the loans *increased* by an average of 0.35%, and *more* students were required to borrow with a co-borrower.[317]

Concerned about fraud and abuse, Congress opted to treat student loan borrowers more harshly than other consumer debtors.[318] Lawmakers were particularly worried that recent graduates would dump debts in bankruptcy and go on to highly lucrative careers.[319] This concern motivated the passage

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they filed a Chapter 13 case. In 1990, Congress extended the period of presumptive nondischargeability to seven years and included cases filed under Chapter 13. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4865 (1990); *see also* Salvin, *supra* note 309, at 148. In 1998, most publicly funded or guaranteed student loans became presumptively nondischargeable irrespective of how long they had been in repayment. Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (1998). The last amendment was enacted in 2005, when Congress added private student loans to that list. Alexei Alexandrov & Dalié Jiménez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 Harv. L. & Pol'y Rev. 175, 178 (2017).

312 *See* Consumer Fin. Prot. Bureau, Private Student Loans 13-16 (2012), https://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf, *archived at* https://perma.cc/VN2L-SXA6.

313 *Id.* at 97 app. fig.2 (showing original private student loan interest rates that vary from nearly 0% to almost 20%). Most private student loan interest rates are variable rates; that is, fixed to an index which can increase over time. *Id.* at 28 and accompanying text, 97 app. fig.1.

314 The sole explanation found in the Congressional Record for granting private lenders the same treatment as federal loans came from then-Representative Lindsey Graham, who argued that the change "would make sure that the loan volume necessary to take care of college expenses are [sic] available for students." 145 Cong. Rec. H2711 (daily ed. May 5, 1999) (statement of Rep. Graham); *see also* Xiaoling Ang & Dalié Jiménez, Private Student Loans and Bankruptcy: Did Four-Year Undergraduates Benefit from the Increased Collectability of Student Loans?, Student Loans and the Dynamics of Debt 175, 211 (Brad Hershbein & Kevin M. Hollenbeck eds., W.E. Upjohn Inst., 2014).

315 *Written Testimony Before the H. Judiciary Subcomm. on Antitrust, Commercial, and Admin. Law*, 116th Cong. 14 (2019) (statement of Dalié Jiménez, Professor of Law), http://docs.house.gov/meetings/JU/JU05/20190625/109657/HHRG-116-JU05-Wstate-JimnezD-20190625.pdf, *archived at* https://perma.cc/T7HX-9RX5 (arguing that "making private student loans nondischargeable harmed students").

316 *Id.* (noting that private student loan "originations increased after 2005 from 6.6 billion to 7.8 billion in 2006 and a height of 10.1 billion in 2008 and after the recession, volumes leveled out at pre-2005 levels (5.6 and 5.7 billion in 2010 and 2011, respectively)").

317 *Id.* at 14-15 (citing Ang & Jiménez, *supra* note 314, at 179 (estimating the causal effect of the law change one year later)).

318 "[I]t is dangerous to enact a law that is almost specifically designed to encourage fraud." Pereyda, *supra* note 307, at 419–32 (citing the Congressional Record and describing "the stereotype of the abusive student loan debtor" and the genesis of the student loan exception to discharge).

319 Pereyda, *supra* note 310, at 426 n.111-15 and accompanying text (noting that while Congress was initially concerned with recent graduates, courts focused in on attorneys and doctors); *see also* U.S. H. Comm. on the Judiciary, 116th Cong., Oversight of Bankruptcy Law and Legislative Proposals 1hr:40mins (June 25, 2019) (statement of Rep.

of the 1976 law, but because there was no empirical evidence to support it, Congress prevented the law from taking effect for a year, and two members of Congress asked the General Accounting Office (GAO)[320] to investigate historical cases of abuse in the interim.[321] The subsequent GAO report found that in most of the bankruptcy cases they studied, student loan claims constituted less than 60% of all debts.[322] In addition, bankruptcy claims involved less than one percent of the total federal student loans issued to date.[323] This led Representative Don Edwards to conclude that "the number of abusive bankruptcies is a small minority of the whole,"[324] and to refer to the treatment of student loans in bankruptcy as a "discriminatory remedy for a 'scandal' which exists primarily in the imagination."[325] Nevertheless, efforts to amend the law over the years have not succeeded.

Subsequent studies have also found no evidence of systematic or widespread abuse.[326] The bankruptcy rate for student loan borrowers has remained at less than two percent in all the studies available.[327] The most recent study on the topic examined private student loan borrowers before

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Sensenbrenner), https://judiciary.house.gov/legislation/hearings/oversight-bankruptcy-law-and-legislative-proposals, *archived at* https://perma.cc/8LH7-BZPY.

[320] In 2004, the General Accounting Office was renamed the Government Accountability Office. GAO Human Capital Reform Act of 2004, Pub. L. No. 108–271, 118 Stat. 811 (2004).

[321] H.R. Rep. No. 95-595, at 132 (1977) (describing the order of events).

[322] Robert P. Keller, Guaranteed Student Loan Program Bankruptcies, H.R. Doc. No. 77-83, at 24 (1977), http://archive.gao.gov/f1102a/101903.pdf, *archived at* https://perma.cc/T4AS-K9FG (hereinafter "1977 GAO Report"). Median income in 1976 was $12,690. U.S. Census Bureau, Household Money Income in 1976 and Selected Social and Economic Characteristics of Households 1 (Jan. 1978), https://www2.census.gov/prod2/popscan/p60-109.pdf, *archived at* https://perma.cc/L4YQ-KNE8. The report's finding is not surprising, given the stigma attached to a bankruptcy filing and the lingering, adverse effects for debtors who subsequently wish to borrow. 15 U.S.C. § 1681c(a)(1) (bankruptcy remains on a credit report up to 10 years); *see also* Michael D. Sousa, *The Persistence of Bankruptcy Stigma*, 26 Am. Bankr. Inst. L. Rev. 217 (2018) (finding that "the stigma surrounding personal bankruptcy has actually increased over time, rather than decreased, and this trend paradoxically tracks the number of consumer bankruptcy filings each year").

[323] Individual Views of Chairman James G. O'Hara, H.R. Rep. No. 95-595, *supra* note 320, at 148.

[324] Letter from Representative Don Edwards to Ronald J. Iverson, State of Vermont Student Assistance Corporation, H.R. Rep. No. 95-595, at 155 (referring to the 1977 GAO Report).

[325] *Id.* at 134 (also noting that "it is inappropriate to view the program as social legislation when granting the loans, but strictly as business when attempting to collect"). After considering the GAO report, Chairman O'Hara's subcommittee "unanimously agreed . . . that educational loans should be treated the same as all other loans in bankruptcy." *Id.* at 132. Unfortunately, the House Judiciary Committee rejected such an amendment. *Id.*

[326] Brady C. Williamson, Nat'l Bankr. Rev. Comm'n, Bankruptcy: The Next Twenty Years 213 (1997), https://govinfo.library.unt.edu/nbrc/report/07consum.pdf, *archived at* https://perma.cc/WMS9-NVP8 (finding that "the available evidence does not support the notion that the bankruptcy system was systematically abused when student loans were more easily dischargeable" and recommending the abolishment of section 523(a)(8)).

[327] *See, e.g.*, Report of the Commission on the Bankruptcy Laws of the U.S., Part 1 at 179 (1973) (finding that the bankruptcy rate for student loans was 0.23% in 1972); Individual Views of Chairman James G. O'Hara, H.R. Rep. No. 95-595, at 152 (1977); Consumer Fin. Prot. Bureau, *supra* note 312, at 64 (reporting a 0.2 to 1.1% bankruptcy rate for private student loans).

and after the 2005 change in the law and failed to find strategic behavior of this kind by private student loan borrowers.[328]

To discharge student loans, debtors must convince a judge that repaying the loan "would impose an undue hardship" on them and their dependents.[329] This process generates a number of concerns. To obtain a hardship exception, debtors must first file what is in essence a federal lawsuit,[330] which raises access to justice concerns.[331] "Undue hardship" is not defined.[332] The case law has developed very unevenly, leading one consumer protection attorney to describe the standard as "an empty vessel, susceptible to being filled with whatever policy objectives courts deem appropriate."[333] Federal circuit courts have adopted two different undue hardship tests: the *Brunner* test, which is used by the most of the circuits,[334] and a "totality of the circumstances" test adopted by the Eighth Circuit[335] and used by most First Circuit[336] bankruptcy courts.[337]

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[328] Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform*, EDUC. FIN. & POL'Y 28 (Jan. 2019) (finding no evidence "that the moral hazard associated with [private student loan] dischargeability [before the law changed] appreciably affected the behavior of student loan borrowers systematically").

[329] 11 U.S.C. § 523(a)(8) (2010).

[330] In bankruptcy parlance, the debtor must file an "adversary proceeding" seeking a determination of dischargeability. Fed. R. Bankr. Proc. 7001(6) (2010). "Adversary proceedings resemble other federal lawsuits insofar as Part VII of the Bankruptcy Rules governing such proceedings virtually incorporates (with occasional modification) the Federal Rules of Civil Procedure." Pardo & Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, *supra* note 307, at 187 n.39.

[331] *Compare* Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1155 (2016) (reporting on an empirical study finding that self-represented student loan debtors had much greater difficulty in getting their loans discharged than if they had an attorney), *with* Jason Iuliano, *Student Loans and Surmountable Access-to-Justice Barriers*, 68 FLA. L. REV. 377, 388 (2016) (finding, based on a different study, that self-represented student borrowers achieved slightly better results, discharging slightly more debt, than those represented by a lawyer).

[332] Undue hardship isn't defined in the nondischargeability section of the Bankruptcy Code, section 523, but the same term is used in the next section, 524. *See* 11 U.S.C. § 524(m) (2010). This section, which wasn't added until 2008, states that "it shall be presumed that such agreement is an *undue hardship* on the debtor if the debtor's monthly income less the debtor's monthly expenses . . . is less than the scheduled payments on the reaffirmed debt." *Id.* (emphasis added); *see also* Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, *supra* note 307, at 511-12 (arguing that now that Congress has defined "undue hardship" somewhere else in the Code, courts should look to this definition when interpreting "undue hardship" in the nondischargeability context).

[333] Salvin, *supra* note 309, at 170.

[334] Elizabeth K. Lamphier, *Are Student Loans No Longer the "Third Rail" of Bankruptcy?*, 37 AM. BANKR. INST. J., 1 n.4 (2018), https://insolvencyintel.abi.org/i/931745-are-student-loans-no-longer-the-third-rail-of-bankruptcy/1?, *archived at* https://perma.cc/REN8-MBP4 (listing circuit opinions adopting *Brunner*).

[335] *In re* Long, 322 F.3d 549, 554 (8th Cir. 2003) (announcing and adopting the totality of circumstances test).

[336] *In re* Schatz, 602 B.R. 411, 417, 420 (B.A.P. 1st Cir. 2019) (noting that "the U.S. Court of Appeals for the First Circuit . . . has not yet adopted a specific test" and remanding the case to the bankruptcy court for a "proper application of the totality of the circumstances test").

The *Brunner* test requires debtors to show they (1) "cannot maintain, based on current income and expenses, a 'minimal standard' of living" for themselves and dependents if required to repay their loans; (2) that "additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans," and (3) that they have made "good faith efforts to repay the loans."[338] The totality test directs courts to evaluate "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and [their] dependent's reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case."[339]

Both judicial glosses[340] have received a great deal of criticism[341] due to their oftentimes harsh results.[342] For example, in a recent Fifth Circuit case,

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[337] Despite the different language in the tests, note that it is not clear that they produce significantly divergent results. Pardo, *supra* note 331, at 1141 (reporting that "debtors experienced litigation success 38.8% of the time in *Brunner* jurisdictions and 40.6% of the time in totality jurisdictions," a difference that is not statistically significant); *see also* Pardo & Lacey, *Undue Hardship in the Bankruptcy Courts*, *supra* note 310, at 486-509 (arguing that the best way to explain the substantive outcome was "differing judicial perceptions of how the same standard applies to similarly situated debtors").

[338] *See U.S. Dept. of Educ. v. Gerhardt (In re* Gerhardt), 348 F.3d 89, 91 (5th Cir. 2003) (citing *Brunner v. N.Y. Higher Educ. Servs. Corp.* (*In re* Brunner), 831 F.2d 395, 396 (2d Cir. 1987)).

[339] *Long*, 322 F.3d at 554 (citing *Andrews v. South Dakota Student Loan Assistance Corp.* (*In re* Andrews), 661 F.2d 702, 704 (8th Cir. 1981) and *Andresen v. Nebraska Student Loan Program, Inc.* (*In re* Andresen), 232 B.R. 127, 132 (B.A.P. 8th Cir. 1999)).

[340] *See In re* Krieger, 713 F.3d 882, 884 (7th Cir. 2013) ("It is important not to allow judicial glosses, such as the language in *Roberson* and *Brunner*, to supersede the statute itself."); *In re Price*, 573 B.R. at 603 ("While the *Brunner* test has developed a talismanic quality over the years, it is merely a judicial gloss on the statutory standard of 'undue hardship.'").

[341] *See, e.g.*, Douglass G. Boshkoff, *Limited, Conditional, and Suspended Discharges in Anglo-American Bankruptcy Proceedings*, 131 U. PA. L. REV. 69, 118 (1982) (observing that "[i]t is absolutely clear that rules of condition which do not use a fixed level of payment to determine eligibility for discharge inevitably cause the judge to become an arbiter of the debtor's lifestyle"); Rebekah Keller, *The "Undue Hardship" Test: The Dangers of a Subjective Test in Determining the Dischargeability of Student Loan Debt in Bankruptcy*, 82 MO. L. REV. 211, 239 (2017); John A.E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L. J. 245, 268 (2006) ("Judges use the undue hardship test to back-end income-contingency into the American system - albeit in an unpredictable and expensive way"); William L. Ryan, *U.S. Higher Education Financing Has Significantly Changed, So Too Should Seventh Circuit Student Loan Discharge Law*, 38 N. ILL. U. L. REV. 436, 465 (2018); Salvin, *supra* note 309, at 139-202; Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 236 (2012).

[342] *See, e.g.*, Salvin, *supra* note 309, at 142-43 (describing a case in which the debtor "will remain liable on her student loan until she is seventy-five years old, ten years after the age at which it would be customary for her to retire" and noting that the court issued the decision without discussing the debtor's retirement savings). Some courts go so far as to require that the debtor prove "a certainty of hopelessness," regardless of whether they use *Brunner* or a totality test. *Compare Oyler v. Educational Credit Mgt. Corp.* (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005) (using the "certainty of hopelessness" formulation in a *Brunner* jurisdiction), with *Mulherin v. Sallie Mae Servicing Corp.* (*In re* Mulherin), 297 B.R. 559, 566 (Bankr. N.D.

Judge Edith Jones denied a discharge to an unemployed 63-year old borrower suffering from diabetic neuropathy who owed almost $8,000 in loans from community college.[343] The court declined to find that it would be an undue hardship for this borrower to repay her loans, notwithstanding the fact the debtor was nearing retirement age and had a history of needing to quit jobs because her medical condition prevented her from standing for long periods of time.[344]

The best way to fix this system is simple: undo the special treatment of student loans in bankruptcy through legislation.[345] Several House and Senate bills in the 2019 legislative session aim to do just that.[346] But even without Congressional action, judges already have tools at their disposal to improve the current system. Indeed, some judges have begun using their discretion to forgive student loan debt.[347] As one bankruptcy court put it, a student loan is an investment made with a view toward increased economic productivity skills — that is, the chance of better employment.

> Because it is an investment . . . and because the expectation can reasonably be said to be increased income for the student after the schooling terminates, then it is reasonable to say that the person who made the investment is entitled to repayment, even in the face of bankruptcy.[348]

Iowa 2003) (using the "certainty of hopelessness" formulation in a totality of the circumstances jurisdiction).

[343] *In re* Thomas 931 F.3d 449, 449 (5th Cir. 2019).

[344] According to the court, which applied the *Brunner* standard, "[t]he plain meaning of the words chosen by Congress is that student loans are not to be discharged unless requiring repayment would impose intolerable difficulties on the debtor." *Id.* at 452. "How one set of ambiguous words—'undue hardship'—can have a plain meaning but need to be explained through another set of ambiguous words—'intolerable difficulties'—was not explained." Bob Lawless, *The Fifth Circuit Finds a Way to Make it Even Harder to Discharge Loans in Bankruptcy*, CREDIT SLIPS BLOG (Aug. 2, 2019, 5:39 PM), https://www.creditslips.org/creditslips/2019/08/the-fifth-circuit-finds-a-way-to-make-it-even-harder-to-discharge-student-loans-in-bankruptcy.html, *archived at* https://perma.cc/3QRS-YFC3.

[345] Many have called for such a reform, including the 1978 Commission on Consumer Bankruptcy. WILLIAMSON, NAT'L BANKR. REV. COMM'N, *supra* note 326, at § 1.4.5, at 207-17.

[346] *See, e.g.*, Student Borrower Bankruptcy Relief Act, H.R. 2648, 116th Cong. § 1 (2019); Discharge Student Loan in Bankruptcy Act, H.R. 770, 116th Cong. § 1 (2019). Another bill would focus only on privately originated student loans. Private Student Loan Bankruptcy Fairness Act, H.R. 885, 116th Cong. § 1 (2019).

[347] *See* Katy Stech Ferek, *Judges Wouldn't Consider Forgiving Crippling Student Loans—Until Now*, WALL ST. J. (June 14, 2018), https://www.wsj.com/articles/judges-wouldnt-consider-forgiving-crippling-student-loans-until-now-1528974001, *archived at* https://perma.cc/LS3P-CUTH (listing some of the ways that judges are looking for "wiggle room"). *But see In re Thomas*, 931 F.3d at 449.

[348] *In re* Powelson, 25 B.R. 274, 275-76 (Bankr. D. Neb. 1982) ("The most obvious example would be the doctor who, while in medical school, borrows money to increase his economic potential, becomes a doctor and enjoys a significantly higher amount of income. It seems reasonable in that case generally to say that he should be obligated to repay that loan because it made him the doctor that he is."). However, note that this rationale is also applicable to many kinds of loans that are dischargeable — for example, medical debts or car loans, which do not receive exceptional treatment under the Bankruptcy Code. *See* Atkinson, *supra* note 55, at 16-17 n.57.

But what if the borrower did not graduate? Or attended a for-profit school that provided only questionable credentials?[349] The discharge exception contains, as one attorney put it, "a rebuttable presumption that education increases a person's economic opportunities and ability to repay,"[350] but if the person can show that their future prospects are not improved as a result of the education received, a court should take that into account. In the case of for-profit schools and certificate programs, this is a likely scenario, as discussed above.[351] For-profit students receive modest or no salary bumps even when they graduate, and no bump at all if they fail to complete a course of study. As we also discussed in Part I.A.3 above, Black and Latinx borrowers routinely encounter labor market discrimination in hiring and wages, leading to decreased earning potential. Bankruptcy judges should weigh these factors when deciding whether the borrower's current financial situation is likely to improve in the future to enable repayment. Bankruptcy judges "themselves must guard against falling victim to the same cognitive flaws that lead debtors to underestimate risks."[352]

Second, judges examining dischargeability under a totality of the circumstances test can appropriately consider the possibility of exploitative misconduct by the servicer or by the institution attended as among the "other relevant facts and circumstances surrounding each particular bankruptcy case."[353] Exploitative misconduct is a salient factor that is relevant to an "undue hardship" determination. Judges should therefore examine whether, for example, the school or servicer was found to have engaged in predatory practices. To use the question posed by one judge as an example of what a court might consider under a "totality" regime: "Was the student inveigled into obtaining the loan and taking particular courses in college when the college authorities should have known that upon graduation from college the student had little chance of obtaining employment in that field?"[354]

A few courts have considered these factors, but as an affirmative argument it has not received much traction. In 1989, for example, a bankruptcy judge in Pennsylvania noted that "far too many school operators are exploiting America's neediest people and their dreams for a new start in life. They promise education and jobs which students never receive, leaving them deep

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[349] As noted below, the Department of Education has a "Borrower Defense Rule" that permits a discharge of federal student loans under certain circumstances. 34 C.F.R. §685.206. We discuss some of the current issues with the rule below, *see infra* Part II.C.2.e, but at this point, suffice it to say that if a borrower is in bankruptcy and seeking a discharge of their student loans, it is wholly inefficient to send them to deal with the Department of Education.

[350] Salvin, *supra* note 309, at 196.

[351] *See supra* Part I.A.

[352] Salvin, *supra* note 309, at 197.

[353] *In re* Long, 322 F.3d 549, 554 (8th Cir. 2003)

[354] *In re* Littell, 6 B.R. 85, 88 (Bankr. D. Or. 1980).

in debt."[355] The debtor in that case had obtained a "Doctor of Motors" degree, but "did not possess the necessary qualifications and skills to obtain employment upon completion of this program."[356] Similarly, a Florida bankruptcy court noted its awareness "of many scams where profit-hungry solicitors enroll people into educational programs which provide nothing of practical value to the student and from which the 'graduates' are able to achieve little if anything."[357] Without deciding whether the debtor's $7,250 medical technician training was such a program, the court looked to other facts that led it to conclude that "it appears doubtful . . . that she will ever obtain work as a medical technician."[358] Considering the likely earnings premium a borrower received from their education and taking into account questionable or outright fraudulent practices by the institution are steps entirely consistent with the reasoning underlying the exceptional treatment of student loans in bankruptcy.

These are modest suggestions. Like those in the next section, they would move the needle in the right direction, but only for a small subset of the population in need. Congress should take up the much bolder reforms described above, but until that happens, bankruptcy judges can do their small part. Given the context of systemic inequality described in Part I, if bankruptcy judges do follow these recommendations, they will at least reduce the racially disparate impact of student indebtedness.[359]

2. *Other Reforms*

There are several incremental reforms that Congress or the Department of Education could implement to reduce the harmful effects of student loans, particularly for students of color. This section collects and briefly describes proposals for such reform. The discussion below provides a starting point for addressing the issues; we do not attempt a comprehensive treatment.

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[355] *In re* Correll, 105 B.R. 302, 307 (Bankr. W.D. Pa. 1989) (discharging the debt and stating that "[t]he abuse which Congress sought to prevent does not appear in this case. We do not have a highly-educated debtor filing for bankruptcy relief to avoid his student loan obligations").

[356] *Id.* at 307.

[357] *In re* Vazquez, 194 B.R. 677, 680 (Bankr. S.D. Fla. 1996).

[358] *Id.* at 679.

[359] *See generally* Paul Kiel & Hannah Fresques, *Data Analysis: Bankruptcy and Race in America*, PROPUBLICA (Sept. 27, 2017), https://projects.propublica.org/graphics/bankruptcy-data-analysis, *archived at* https://perma.cc/K779-9FAR (discussing racial patterns in bankruptcy filings and outcomes); Jean Braucher et al., *Race, Attorney Influence, and Bankruptcy Chapter Choice*, 9 J. EMPIRICAL LEGAL STUD. 393, 419 (2012) (reporting on two studies, including an experimental vignette study, suggesting that bankruptcy attorneys are part of the reason for the racial disparities in bankruptcy chapters); Mechele Dickerson, *Racial Steering in Bankruptcy*, 20 AM. BANKR. INST. L. REV. 623, 623 (2012) (reviewing previous study and noting that "race matters, has always mattered, and will always matter in bankruptcy").

(a) Streamlined and Reformed Income-Driven Repayment Plans

Congress has enacted a panoply of income-driven repayment (IDR) plans which allow borrowers to limit their monthly payments to 10 or 15% of their income, as discussed previously.[360] Tying the monthly payment obligation to borrower income is theoretically a good solution for those having trouble repaying, but the execution has left much to be desired.

The Problems: First, many borrowers remain unaware that these plans exist.[361] Even if people know about the plans, they are extremely complicated. There are multiple versions, with differing eligibility criteria: Income-Contingent Repayment, Income-Based Repayment, Pay As You Earn Repayment, and Revised Pay As You Earn Repayment.[362] These different versions have different eligibility criteria, repayment terms, and impose different limits on the maximum monthly payment.[363] They require annual recertification—a process that does not go smoothly for over half of borrowers enrolled in IDR.[364] This complexity rewards borrowers who have the time and expertise to navigate these options, and penalizes those who do not.[365] Because the Department of Education requires borrowers to go through their loan servicers for assistance in selecting a repayment plan,[366] borrowers are vulnerable to deception by servicers seeking to maximize profits rather than minimize repayment burden.[367] And when

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[360] *See supra* Part I.A.3.

[361] *See supra* note 145 and accompanying text.

[362] *See* U.S. Dep't of Educ., *supra* note 139 (describing various income-linked repayment plans).

[363] Ann Carns, *Revised Program Will Reduce Student Loan Repayments*, N.Y. TIMES (Aug. 14, 2015), https://www.nytimes.com/2015/08/15/your-money/revised-program-will-reduce-student-loan-repayments.html, *archived at* https://perma.cc/QTP3-TU5C (describing a "confusing menu of income-related repayment options, all with varying criteria").

[364] Diane Cheng & Jessica Thompson, The Inst. for Coll. Access & Success, Make It Simple, Keep It Fair: A Proposal to Streamline and Improve Income-Driven Repayment of Federal Student Loans 3 (2017), https://files.eric.ed.gov/fulltext/ED588517.pdf, *archived at* https://perma.cc/5ZY2-G4FY.

[365] Resource-poor students, who are disproportionately Black and Latinx, are less likely to succeed in navigating this complex system. *See, e.g.*, Anandi Mani et al., *Poverty Impedes Cognitive Function*, 341 SCIENCE 976, 980 (2013).

[366] *See* U.S. Dep't of Educ., *Who Is My Loan Servicer?*, FED. STUDENT AID, https://studentaidhelp.ed.gov/app/answers/detail/a_id/196/~/who-is-my-loan-servicer%3F, *archived at* https://perma.cc/32BJ-8TNS ("Why pay for help with your federal student loans when your loan servicer will help you for FREE [sic]? Contact your servicer to apply for income-driven repayment plans, student loan forgiveness, and more.").

[367] In a lawsuit against one large servicer, the California Attorney General alleged precisely this form of misconduct. First Amended Complaint at 7-14, People v. Navient Corp., No. CGC-18-567732 (Cal. Super. Ct. Oct. 16, 2018), https://oag.ca.gov/system/files/attachments/press_releases/CA%20AG%20First%20Amended%20Complaint%20-%20Navient.pdf, *archived at* https://perma.cc/8PQF-M6Z8; *see also* Zack Friedman, *How This New Navient Memo Affects Your Student Loans*, FORBES (Sept. 30, 2019, 8:30 AM), https://www.forbes.com/sites/zackfriedman/2019/09/30/student-loans-navient-student-loan-repayment/, *archived at* https://perma.cc/8KHQ-LFQM (describing internal Navient memo that stated, "Our battle cry remains 'forbear them, forbear them, make them relinquish the ball'").

the balance of the loan is forgiven, the borrower may face a large tax liability.[368]

Solutions: Proposals to improve IDR abound.[369] At a minimum, a single, streamlined repayment plan tied to income should be the default for all borrowers,[370] with automatic annual recertification.[371] This plan should have a short time horizon, perhaps as little as ten years, to enable students to engage more quickly in productive spending and borrowing. The cost of loan forgiveness under this more generous conception of income-linked repayment would rise. But it is nevertheless good policy, as it would effectively increase federal subsidies to low-income students pursuing higher education.

Why this isn't enough: Providing more time to repay likely would reduce the likelihood of default or financial calamity. However, extended repayment would do little for the borrower who encounters a sudden life challenge, such as sudden illness in the family, a car accident, or other event. The extended repayment obligation also hampers wealth accumulation,[372]

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[368] See Cheng & Thompson, supra note 367. See generally Gregory Crespi, Should We Defuse the Tax Bomb Facing Lawyers Who Are Enrolled in Income-Based Student Loan Repayment Plans?, 68 S. C. L. REV. 117 (2016).

[369] *See, e.g.*, John R. Brooks, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. 229, 229–90 (2015) (conceptualizing IDR payments as tax payments and making recommendations accordingly). Some proposals call for the federal government to opt in automatically borrowers to a system of automatic paycheck withdrawal. *See, e.g.*, COMM. FOR ECON. DEV., AUTOMATIC FOR THE BORROWER: HOW REPAYMENT BASED ON INCOME CAN REDUCE LOAN DEFAULTS AND MANAGE RISK 2–41 (2014), https://files.eric.ed.gov/fulltext/ED558514.pdf, *archived at* https://perma.cc/3VDR-7E7S.

[370] The Trump administration has also proposed a single IDR plan. *See Proposals to Reform the Higher Education Act*, WHITE HOUSE (Mar. 18, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/03/HEA-Principles.pdf, *archived at* https://perma.cc/MV5D-WPXR; *see also* ALEXANDRA HEGJI ET AL., CONG. RESEARCH SERV., R43571, FEDERAL STUDENT LOAN FORGIVENESS AND LOAN REPAYMENT PROGRAMS at 32 (2018) (questioning whether multiple repayment programs should continue to exist and suggesting that Congress evaluate programs that overlap).

For empirical support for how changing the default plan would benefit borrowers and lower defaults, *see* James Cox et al., *Designed to Fail: Effects of the Default Option and Information Complexity on Student Loan Repayment* 1 (Nat'l Bureau of Econ. Research, Working Paper No. w25258, 2018), http://www.nber.org/papers/w25258.pdf, *archived at* https://perma.cc/4WTX-N5HT (describing an experiment that finds that the majority of borrowers choose, or are defaulted into, a sub-optimal plan and that "the default option is a driver of this phenomenon, suggesting the government has an easy policy lever to lower default rates—change the default plan").

[371] Cheng & Thompson, *supra* note 367, at 14.

[372] *See* ROBERT HILTONSMITH, DEMOS, AT WHAT COST? HOW STUDENT DEBT REDUCES LIFETIME WEALTH 1 (2013), https://www.demos.org/sites/default/files/publications/AtWhatCost.pdf, *archived at* https://perma.cc/FX9K-PDVP (describing a model and predicting that the then-outstanding $1 trillion in student loan debt "will lead to a total lifetime wealth loss of $4 trillion for indebted households"); William Elliott & Melinda Lewis, *Student Debt Effects on Financial Well-Being: Research and Policy Implications*, 29 J. ECON. SURVEYS 614, 614–36 (2015), https://onlinelibrary.wiley.com/doi/abs/10.1111/joes.12124, *archived at* https://perma.cc/LQ9G-7AKM ("Indebted college graduates have lower net worth, less home equity, and compromised ability to accumulate assets, as compared to their peers with the same level of education but no student debt."); Min Zhan & Xiaoling Xiang, *Education Loans and Asset Building Among Black and Hispanic Young Adults*, 91 CHILD. & YOUTH SERVS. REV. 91, 121–27 (2018).

thereby exacerbating the gap in wealth between relatively privileged White people and less well-resourced Black and Latinx people, even those who have invested in higher education.[373] Flexibility in repayment can reduce the impact of financial hardship, to be sure, but much more is needed.

(b) Expanded—and Guaranteed—Public Service Loan Forgiveness

The federal Public Service Loan Forgiveness program ("PSLF") is intended to incentivize and reward those student borrowers who pursued careers in public service.[374] It forgives any federal student loan balance remaining after ten years if a borrower both works in public service and remains current on payments.[375]

The Problem: As of this writing, the Education Department has approved only one percent of PSLF applications.[376] Specifically, of the 28,000 borrowers who applied for PSLF during the program's first year, a mere 96 received it; further, a Government Accountability Office report found that it had been poorly administered and that the Education Department had provided poor guidance on the steps borrowers must take to ensure eligibility.[377] A number of borrowers and at least one state attorney general have filed lawsuits against the Department.[378] The program is also politically vulnerable: the Trump administration has proposed abolishing it entirely.[379]

The Solution: At a minimum, legislation or regulation should set deadlines for the Education Department's PSLF application processing; explicitly

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[373] Student debt also carries indirect but significant consequences on major life choices, such as the decision whether to have a child. *See* Michael Nau et al., *Can't Afford a Baby? Debt and Young Americans*, 42 Res. Soc. Stratification & Mobility 114, 114 (2015).

[374] *See* 34 C.F.R. § 685.219 (2013).

[375] *See id.*; Ian Foss, *How to Qualify for Public Service Loan Forgiveness*, U.S. Dep't. of Educ.: Homeroom (June 16, 2016), https://blog.ed.gov/2016/06/qualify-public-service-loan-forgiveness, *archived at* https://perma.cc/WF9R-66NX.

[376] *See* Danielle Douglas-Gabriel, *Education Dept. Rejects Vast Majority of Applicants for Temporary Student Loan Forgiveness Program*, Wash. Post (April 2, 2019), https://www.washingtonpost.com/education/2019/04/03/education-dept-rejects-vast-majority-applicants-temporary-student-loan-forgiveness-program, *archived at* https://perma.cc/Y35X-QCZF.

[377] *See* Stacy Cowley, *28,000 Public Servants Sought Student Loan Forgiveness. 96 Got It*, N.Y. Times (Sep. 28, 2018), https://www.nytimes.com/2018/09/27/business/student-loan-forgiveness.html, *archived at* https://perma.cc/L4GG-STX9.

[378] *See id.*; *see also* Zack Friedman, *Teacher to Betsy Devos: 'Why Didn't You Forgive My Student Loans?'*, Forbes (July 15, 2019), https://www.forbes.com/sites/zackfriedman/2019/07/15/punlic-service-loan-forgiveness-lawsuit/#b355b7132aba, *archived at* https://perma.cc/B4RS-RGZR (describing a lawsuit filed by the American Federation of Teachers against the U.S. Department of Education alleging that PSLF is grossly mismanaged and violates the Due Process Clause of the Fifth Amendment); Annie Nova, *She Was Denied Public Service Loan Forgiveness, So She Filed a Lawsuit,* CNBC (Dec. 18, 2018), https://www.cnbc.com/2018/12/18/borrowers-denied-public-service-loan-forgiveness-file-lawsuits.html, *archived at* https://perma.cc/64A3-NWTQ (stating that many people who have been financially derailed by PSLF are turning to lawsuits for redress).

[379] *See* Jonathan D. Glater, *Public Service Loan Program in the Administration's Crosshairs*, L. Prof Blog: Educ. L. Prof Blog (May 24, 2017), https://lawprofessors.typepad.com/education_law/2017/05/public-service-loan-forgiveness-in-the-administrations-crosshairs-by-jonathan-d-glater.html, *archived at* https://perma.cc/52S5-NJM.

guarantee that loan payments made after the end of the ten-year period will be repaid to borrowers; and assure borrowers that any future curtailments to the program will affect only future borrowers.[380]

Why it's not enough: PSLF covers only those who work in public service, which typically pays less than private-sector employers.[381] The poor administration of the program compounds this challenge, discouraging students from pursuing careers in the public interest. Any uncertainty over the availability of forgiveness disincentivizes students from becoming, for instance, librarians, firefighters, nurses, or teachers.

(c) Student Loan Servicer Oversight and Contract Reform

The Department of Education manages the federal student loan portfolio, but it contracts out the servicing and collection of loans to a small number of companies that keep track of balances and payments.[382] These servicers are the entities that actually deal with borrowers. They track where borrowers live, bill them, maintain records of what they still owe, and implement any changes to repayment plans.

The Problem: There is now a mountain of evidence that many of these Department contractors fail to protect borrowers.[383] The Department's own Inspector General recently produced a scathing report finding that the Office of Federal Student Aid of the Department of Education "did not have reasonable assurance that servicers were complying with Federal loan servicing requirements when handling borrowers' inquiries," that borrowers might not have been protected from poor services, and taxpayers might not have been protected from improper payments," and that they "rarely used available contract accountability provisions to hold servicers accountable for instances of noncompliance."[384] Similarly, state attorneys general have brought law-

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[380] *See* Ryann Liebenthal, *The Incredible, Rage-Inducing Inside Story of America's Student Debt Machine*, MOTHER JONES (Sept. 2018), https://www.motherjones.com/politics/2018/08/debt-student-loan-forgiveness-betsy-devos-education-department-fedloan, *archived at* https://perma.cc/N5FT-CYQT.

[381] Andrea Orr, *Public-Sector Workers Earn Less*, ECON. POL'Y INST. (Jan. 5, 2011), https://www.epi.org/publication/public_sector_workers_earn_less, *archived at* https://perma.cc/2FJT-TL6C.

[382] U.S. Dep't of Educ., *Loan Servicers*, FED. STUDENT AID (last visited Oct. 26, 2019) https://studentaid.ed.gov/sa/repay-loans/understand/servicers, *archived at* https://perma.cc/G76M-ZGCQ.

[383] *See* Memorandum from the Office of the Inspector Gen., U.S. Dep't of Educ., Federal Student Aid's Oversight and Monitoring of Guaranty Agencies, Lenders, and Servicers Needs Improvement (Apr. 29, 2009), http://www2.ed.gov/about/offices/list/oig/auditreports/fy2009/a20i0001.pdf, *archived at* https://perma.cc/HPU6-Q2F5. *See generally* Office of the Inspector Gen., U.S. Dep't of Educ., Federal Student Aid: Additional Actions Needed to Mitigate the Risk of Servicer Noncompliance with Requirements for Servicing Federally Held Student Loans (2019), https://www2.ed.gov/about/offices/list/oig/auditreports/fy2019/a05q0008.pdf, *archived at* https://perma.cc/GDH2-5ESA.

[384] *See* Office of the Inspector Gen., U.S. Dep't of Educ., *supra* note 383, at 2, 4 (finding that 23% of the call reports reviewed "disclosed instances of servicers not correctly calculating borrowers' repayment amounts").

suits against servicers charging that they failed to keep accurate records of borrowers' obligations and payments and failed to advise students accurately on choosing the most favorable of the repayment plans available to them.[385] The need for enforcement by state officials alleging violations of state law only highlights the gap left by the lack of enforcement at the federal level, and servicers are fighting those states tooth and nail.[386]

Solutions: The Department of Education already has the authority to fix many of these issues.[387] It should start by holding servicers accountable under their contracts with the Department, as recommended by multiple Inspector General reports.[388] It should also revise its contracts to incentivize behavior that puts borrowers (and taxpayers) first.[389]

But the Department is not an enforcement agency. Borrowers need a cop on the beat. The Consumer Financial Protection Bureau could assume this role. The Bureau supervises student loan servicers, whether they manage federal or private student loans.[390] And the CFPB already has an outstanding lawsuit against Navient alleging violations in servicing federal student loans.[391] However, the sharp curtailment of enforcement efforts by the Bu-

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[385] *See* Nelson, 928 F.3d at 652 (holding that a student loan servicer could potentially be found liable for misleading students about repayment options); Complaint, *supra* note 370, at 2 (alleging that the student loan debt collector failed to steer borrowers to their best repayment options).

[386] But there have been federal oversight efforts. *See, e.g.,* Complaint for Permanent Injunction and Other Relief, Consumer Fin. Prot. Bureau v. Navient Corp. et. al., 3:17-cv-00101-RDM (M.D. Pa. Jan. 18, 2017) (forwarding similar allegations as the California case, among others).

[387] For a list of recommendations for how to improve student loan servicing, *see* Consumer Fin. Prot. Bureau, Student Loan Servicing, *supra* note 142, at 133–45.

[388] *See* Office of the Inspector Gen., U.S. Dep't of Educ., *supra* note 383; Office of Inspector Gen., U.S. Dep't of Educ., The U.S. Department of Education's Administration of Student Loan Debt and Repayment: Final Audit Report 18 (2014), http://www2.ed.gov/about/offices/list/oig/auditreports/fy2015/a09n0011.pdf, *archived at* https://perma.cc/AFA8-NFTE (criticizing the Department's failure to specify steps servicers must take to try to prevent borrower default).

[389] "The current compensation structure for debt collectors [incentivizes] collectors to rehabilitate loans [which is worse for borrowers than consolidation and IDR]—in some cases, collectors earn nearly $40 in compensation for every $1 in cash recovered through certain rehabilitations. Collectors earn this compensation irrespective of borrower performance over the months or years following a completed rehabilitation, ensuring that collectors have no 'skin in the game' when a borrower defaults again." Seth Frotman, Consumer Fin. Prot. Bureau, Annual report of the CFPB Student Loan Ombudsman 5 (2016), https://files.consumerfinance.gov/f/documents/102016_cfpb_Transmittal_DFA_1035_Student_Loan_Ombudsman_Report.pdf, *archived at* https://perma.cc/S78A-6DQH; *see also* William J. Cox, *The Student Borrower: Slave to the Servicer*, 27 Loy. Consumer L. Rev. 189, 189–237 (2014) (detailing issues with current servicer compensation).

[390] 12 CFR § 1090.106 (2013).

[391] Complaint for Permanent Injunction and Other Relief, Consumer Fin. Protect. Bureau v. Navient Corp. et. al., 3:17-CV-101, 2017 WL 3380530, at *1 (M.D. Pa. Aug. 4, 2017) (similar allegations as the California case, among others); *see also* Consumer Fin. Prot. Bureau, Navient Corporation, Navient Solutions, Inc. and Pioneer Credit Recovery, Inc., (last visited Oct. 26, 2019), https://www.consumerfinance.gov/policy-compliance/enforcement/actions/navient-corporation-navient-solutions-inc-and-pioneer-credit-recovery-inc, *archived at* https://perma.cc/FTC7-FGCF.

reau under the Trump Administration has shown that it is vulnerable to partisan politics and changes in ideology, resulting in weaker protection of students.[392]

Borrower protection should not depend entirely on an agency that, depending on the administration, may not be interested in helping them.[393] Borrowers need explicit rights to basic servicing functions, such as receiving a response from a servicer in a timely manner or obtaining a loan payment history, to be enshrined in federal law.[394] Borrowers also need a clear private right of action against servicers.[395] Existing federal consumer protection laws are not sufficiently effective in the student loan arena; the troubling practices there go unaddressed by, for example, the Equal Credit Opportunity Act.[396]

Reforms have been enacted by or proposed in multiple states, including Connecticut,[397] Massachusetts,[398] New Jersey,[399] California,[400] Rhode Is-

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[392] *See* Glenn Thrush & Stacy Cowley, *Mulvaney Downgrades Student Loan Unit in Consumer Bureau Reshuffle*, N.Y. TIMES, at B4 (May 10, 2018) (describing an "effort by [interim director and Trump appointee Mick] Mulvaney to refocus the agency away from its consumer finance enforcement and rule-writing mission and more toward providing consumers with information about their legal rights"). A year after the pre-Trump Student Loan Ombudsman left the Bureau, the CFPB's new director filled the position with an industry executive from the embattled Pennsylvania Higher Education Assistance Agency. Stacey Cowley, *Student Loan Watchdog Job Given to an Industry Executive*, N.Y. TIMES, at B3 (Aug. 17, 2019).

[393] *See* Danielle Douglas-Gabriel, *Consumer Watchdog Signals Hands-off Approach on Federal Student Loans*, WASH. POST (Aug. 16, 2019), https://www.washingtonpost.com/education/2019/08/17/consumer-watchdog-signals-hands-off-approach-federal-student-loans, *archived at* https://perma.cc/3BVF-4QE8; *see also CFPB Chief Says Education Department is Blocking Student Loan Oversight*, NPR (May 16, 2019), https://www.npr.org/2019/05/16/723568597/cfpb-chief-says-education-department-is-blocking-student-loan-oversight, *archived at* https://perma.cc/UEV3-SGR5.

[394] Persis Yu, *Student Loan Forgiveness Cannot Work Without a Right to a Payment History*, STUDENT BORROWER PROT. CTR. (May 22, 2019), https://protectborrowers.org/qualifying-payments, *archived at* https://perma.cc/GH7P-PM5K.

[395] Allowing such litigation would empower borrowers to serve as private attorneys general—that is, as litigants pursuing both public and private interests. *Cf.* William B. Rubenstein, *On What a Private Attorney General Is—and Why It Matters*, 57 VAND. L. REV. 2129, 2130 (2004) (describing role and possible legislative creation of private attorneys general). Preferably, legislation enabling such litigation would include a fee-shifting provision. Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 237 (Winter 1984) (describing importance of fee shifting provisions to enable public interest litigation).

[396] After all, the problem of federal student loans is not the result of discriminatory loan pricing or racial exclusion; the loans are widely accessible to students and applicants for the dominant form of this type of credit need not worry about a lender's demanding underwriting standards. *See* 34 C.F.R. §668.32 (describing criteria an applicant for a federal direct student loan must meet, a list in which credit history is not included).

[397] Jillian Berman, *Inside One State's Effort to Tackle the Student Debt Crisis*, MARKETWATCH (Jan. 10, 2016), https://www.marketwatch.com/story/inside-one-states-effort-to-tackle-the-student-debt-crisis-2016-01-07, *archived at* https://perma.cc/47J8-KCWB.

[398] Matt Stout, *State Lawmakers Propose to Regulate Student Loans—All but Inviting a Lawsuit*, BOSTON GLOBE (Feb. 5, 2019), https://www.bostonglobe.com/metro/2019/02/05/state-lawmakers-propose-regulate-student-loans-all-but-inviting-lawsuit/fmPiJDaWi74JhnGsEDcRzO/story.html, *archived at* https://perma.cc/HXB2-R9DW.

[399] Bob Jaworski, *New Jersey Passes New Law to Help Student Loan Borrowers: Servicers Should Take Note*, HOLLAND & KNIGHT (last visited Oct. 26, 2019) https://www.hklaw.com/en/

land,[401] and Maine.[402] Typically characterized as a "student borrower bill of rights,"[403] most of these state reform proposals create affirmative consumer protections for student borrowers, and often establish a private right of action. The states' legislative efforts take various approaches, including regulating the conduct of the companies that service loans for the federal Department of Education and creating new positions, such as a state ombudsman's office, to assist borrowers.[404]

An additional component of enhanced oversight of servicers would be an explicit acknowledgment, in federal legislation, of the applicability of state consumer protection laws that favor student borrowers.[405] Congress should also amend the Higher Education Act to make clear that any provisions of the law on the conduct of servicers create a floor for the protection of student borrowers, not a ceiling.[406] And, as discussed in more detail below, student borrowers harmed by servicer misconduct should be able to raise their mistreatment as an affirmative defense to repayment.[407]

(d) Bolster the "Gainful Employment" Requirement

In the wake of revelations of misconduct by for-profit providers of higher education, the Obama-era Education Department promulgated rules aimed at denying higher education institutions access to Title IV funds if their graduates did not find "gainful employment" from federal student aid programs.[408] Because these for-profit institutions rely heavily on federal

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insights/publications/2019/08/new-jersey-passes-new-law-to-help-student-loan-borrowers, *archived at* https://perma.cc/9ACD-CQD6.

[400] Nicholas Ibarra, *State Legislation Proposes 'Bill of Rights' for Student Loan Borrowers*, SANTA CRUZ SENTINEL (Mar. 29, 2019), https://www.santacruzsentinel.com/2019/03/29/state-legislation-proposes-bill-of-rights-for-student-loan-borrowers, *archived at* https://perma.cc/ARM5-UR24.

[401] Steph Machado, *Treasurer, AG Push for Student Loan Protections in Rhode Island*, WPRI.COM (Mar. 28, 2019), https://www.wpri.com/news/education/state-officials-launch-push-for-a-student-bill-of-rights/1883165959, *archived at* https://perma.cc/RGY6-U7PS.

[402] Jody Harris, *Maine Needs a Student Loan Bill of Rights*, LEWISTON SUN J. (May 26, 2019), https://www.sunjournal.com/2019/05/26/jody-harris-maine-needs-a-student-loan-bill-of-rights, *archived at* https://perma.cc/NU3Z-5EMV.

[403] *See, e.g.*, A.B. 376, 2019 Leg., Reg. Sess. (Cal. 2019).

[404] *Id.* at §§ 1788.101, 1788.104 (prohibiting "abusive acts or practices when servicing a student loan in this state" and creating a "California Student Borrower Advocate" to "provide timely assistance to any student loan borrower with any student loan").

[405] The Department of Education has purported to interpret the Higher Education Act as preempting state action against its student loan servicers. Federal Preemption and State Regulation of the Department of Education's Federal Student Loan Programs and Federal Student Loan Servicers, 83 Fed. Reg. 10619 (Mar. 12, 2018).

[406] This approach would prevent the course taken by the Education Department under the Trump Administration, which has asserted that federal law is a ceiling and that efforts by states to provide more protection to their consumers are preempted by (less protective) federal law. *Id.*

[407] *See infra* Part II.C.2.e (discussion on the "true borrower defense to repayment").

[408] Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75926 (Nov. 1,

aid,[409] their exclusion from the program virtually guarantees their shutdown. These rules determine indirectly whether a student is gainfully employed by assessing multiple data points, including the ratio of students' debt to income[410] and the pace of students' progress in repaying student loans.[411]

The Problem: The Trump Education Department criticized the gainful employment rules—and then rescinded them altogether.[412]

Solution: At a minimum, the Obama-era rule ought to be reinstated. The rule mandated exclusion from federal student aid programs (including federal student loans) only if an institution failed to meet all of the specified benchmarks for three out of four years.[413] But such sparing deployment of the sole available penalty, however draconian, is unlikely to deter misconduct—not least because the consequences do not extend to individual people within the institution whose decisions may have contributed to poor student outcomes.

A more effective regulatory regime would implement a range of penalties along a sliding scale, with more extreme penalties imposed if poor outcomes are reported more often. The time period during which an institution's graduates may fail to meet the benchmarks should be shorter, perhaps as little as two years out of any four. And, perhaps most importantly, a school's failure to satisfy this bolstered gainful employment rule should afford students some degree of protection from repayment obligations similar to protections provided in cases of fraud, as discussed below. For example, the rule could be redrafted to allow a portion of a student borrower's debt to be forgiven, if that student individually does not satisfy the debt-to-income ratio specified in the regulation, once the institution has failed to comply. Thus, students would effectively be required to allocate only the fraction of their

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2016) (describing new "borrower defense regulations . . . to protect student loan borrowers from misleading, deceitful, and predatory practices of, and failures to fulfill contractual promises by, institutions participating in the Department's student aid programs").

[409] *See* Press Release, Senator Dick Durbin, For-Profit Colleges and Federal Student Aid: Preventing Financial Abuses (June 30, 2010), http://www.durbin.senate.gov/newsroom/press-releases/for-profit-colleges-and-federal-student-aid-preventing-financial-abuses, *archived at* https://perma.cc/2VXS-GBQT ("On average, [for-profit colleges] get three-quarters of their revenues from federal grants and loans . . . ").

[410] 34 C.F.R. § 668.7(a) (2014).

[411] 34 C.F.R. § 668.7(b) (2014).

[412] *See* Arne Duncan & James Kvaal, *Career Training Regulations Protect Students, Taxpayers. But Administration is Abolishing Them*, THE SEATTLE TIMES (July 1, 2019), https://www.seattletimes.com/opinion/for-profit-colleges-should-be-held-accountable-for-leaving-students-worse-off-than-they-were-before, *archived at* https://perma.cc/U8T6-5CHJ; Daniel Moore, *After Lobbying by for-Profit Colleges, Trump Administration Scraps Rule on 'Gainful Employment,'* PITTSBURGH POST-GAZETTE (July 2, 2019), https://www.post-gazette.com/business/career-workplace/2019/07/02/For-profit-colleges-Trump-DeVos-EDMC-Dream-Center-Art-Institute-gainful-employment/stories/201907020085, *archived at* https://perma.cc/6U47-92R5. In announcing the new rules, the Education Department expressed "agree[ment] with commenters who expressed concern that the GE regulations established policies that unfairly target career and technical education programs." U.S. DEP'T OF EDUC., PROGRAM INTEGRITY: GAINFUL EMPLOYMENT, FED. REG. 2019-13703, June 30, 2019, https://beta.regulations.gov/document/ED-2018-OPE-0042-13925, *archived at* https://perma.cc/EC3C-P8EK.

[413] 34 C.F.R. § 668.7(i) (2014).

income specified in the rule toward repayment of their student loans. The balance would be forgiven, although the government could try to recover the cost of any forgiveness from the institution.[414]

(e) True Borrower Defense to Repayment

In response to findings of fraud at Corinthian College, a for-profit chain that collapsed in 2016, the Department of Education promulgated another set of rules, this time intended to create a pathway to elimination of repayment obligations for students who could establish that they were victims of fraud. The rules expanded on a general requirement imposed by Congress that the Department "specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student] loan."[415]

The Problem: The process established by the rules was complex and, significantly, did not include an avenue for borrower appeal beyond the Department. To obtain loan forgiveness, a student borrower had to persuade a Department hearing officer that the school attended had not provided the educational services promised, thus breaching an agreement,[416] or else made a "substantial misrepresentation" to the student borrower and the borrower had reasonably relied on the misrepresentation.[417] A borrower could make this argument in an application, including any supporting evidence, and submit it to the Secretary of Education.[418] The Secretary designated a Department official to engage in factfinding regarding the defense claim.[419] The designated official was to produce a written decision denying or allowing the defense to repayment in whole or in part.[420] If the Department official denied the application in whole or in part, the borrower could request review by the Secretary; no further appeal process was contemplated by the regulation.[421]

Further, under the Trump Administration, the Department moved very slowly in processing claims by borrowers asserting that they were defrauded. Indeed, the California attorney general filed a lawsuit against the Department over its failure to grant discharges to repayment obligations under the defense to repayment rules, arguing that its failure to act on the rules constituted a violation of the Administrative Procedure Act.[422] By late 2018, more

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[414] Another alternative would be to require institutions to begin placing a fraction of revenue in escrow to cover the costs of such forgiveness as soon as the institution ceases to comply with the rule's requirements.

[415] 20 U.S.C. §1087e(h).

[416] 34 C.F.R. § 685.222(c) (2019).

[417] *See* 34 C.F.R. § 685.222(d) (2019).

[418] *See* 34 C.F.R. § 685.222(e) (2019).

[419] *Id.*

[420] *Id.*

[421] 34 C.F.R. § 685.222(e)(5)(i).

[422] *See* Complaint, California v. Dept. of Education, 3:17-CV-07106 (N.D. Cal. Dec. 14, 2017), at ¶¶5-11, https://oag.ca.gov/system/files/attachments/press_releases/California%20v.

than 100,000 students had tried to assert the defense, but the Department had processed less than one-fifth of their applications.[423]

A Further Problem: The Department recently modified these rules for federal loans first disbursed after July 1, 2020; the Obama-era rules remain in effect for loans disbursed before that date.[424] The Trump administration's new rules require that a student borrower demonstrate reasonable reliance on a misrepresentation of a material fact by the institution attended.[425] Student borrowers also may seek discharge if the school they attended closed before they could complete a course of study.[426] As with the previous set of rules, the forms of relief depend on a determination by the Education Department.[427]

The Solution: This process requires an overhaul in any number of ways. Here, we only focus on a few. First, the factfinder and adjudicator should not be the same person, and the factfinder should work with the borrower to the extent that the borrower is willing and able to assist. Second, borrowers alleging misconduct by an institution should enjoy the benefit of a presumption in their favor if the institution failed to meet the gainful employment rule or engaged in impropriety within a specified time period. Third, Congress should provide for appeal outside the Department if the designated adjudicative official decides against granting relief to the borrower, whether in whole or in part. These three changes would make the investigation more manageable for the borrower and provide an additional layer of review, thereby also bolstering the legitimacy and efficacy of the entire process.

A Further Solution: The "gainful employment" and "borrower defense" rules are poor *ex post* fixes. They do not address sufficiently the problem of poorer outcomes at for-profit providers of higher education described above. The best approach to regulating these schools, which consume a disproportionate share of federal student aid resources, is to exclude them from Title IV programs overall.[428]

Conclusion

Every student, regardless of race, deserves an equal opportunity to learn. In this Article, we have outlined myriad ways that the current system of higher education finance undermines equal educational access, dispropor-

%20U.S.%20Dept.%20of%20Educ.,%20First%20Amended%20Complaint%20(N.D.%20Cal.%2017-07106).pdf, *archived at* https://perma.cc/BF9D-LG2Z.

[423] See Stacy Cowley, Borrowers Face Hazy Path as Program to Forgive Student Loans Stalls Under Betsy DeVos, N.Y. Times, Nov. 12, 2018, at B1.

[424] *See* 84 Fed. Reg. 49788 (Sept. 23, 2019) (to be codified at 34 C.F.R. pt. 668, 34 C.F.R. pt. 682, and 34 C.F.R. pt. 685) .

[425] *See* 84 Fed. Reg. 49926 (Sept. 23, 2019) (text of new provision implementing borrower defense to repayment, 34 C.F.R. §685.206(e)(2) (2019)).

[426] *See* 34 C.F.R. §685.214(c) (2019).

[427] *See id.*; 34 C.F.R. §685.222(e)(5) (2019).

[428] Senator Warren's proposal includes banning for-profits from receiving Title IV funds. *See* Warren, *supra* note 50.

tionately burdening poor students and especially those who are Black and Latinx. We have offered a blueprint for a revitalized role for the federal government in financing higher education, a radical experiment in expanded access never attempted on a national scale. We have also identified a series of more modest changes that would at least mitigate some of the racially disparate harms of student indebtedness.

We must start by acknowledging that debt was the wrong tool to fund higher education access.[429] We should correct that mistake by forgiving all—or at least most—student loan debt. And we must forge a path forward where we put our money where it matters: in ensuring we enable all our citizens to fulfill their potential.

It is our hope that firmly grounding our concerns over the impact of student loans in the context of the ongoing struggle for racial justice will both encourage and inform efforts to make higher education more accessible for all students who aspire to pursue it.

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[429] *See, e.g.*, Morgan, *supra* note 190, at 32 (2018) ("The student debt crisis is a profound policy failure for everyone, but denying its existence is a particular injustice to racial minorities who have borne the brunt of that failure, as they previously did of the housing bubble and its deflation in the 2000s.").