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The Other Big Test: Why Congress Should Allow College Students to Borrow More through Financial Aid Programs

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THE OTHER BIG TEST: WHY CONGRESS SHOULD ALLOW COLLEGE STUDENTS TO BORROW MORE THROUGH FEDERAL AID PROGRAMS

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INTRODUCTION

> The test should not be whether he or his parents have the ability to finance his education. The test should be whether he has the brain-power and the desire to go ahead and better himself and make himself a better person.[1]

Without access to credit, tens of thousands of aspiring college, graduate, and professional school students would be unable to finance their education.[2] Finding a way to pay for college has become as much of a challenge for some students as scoring well enough on exams like the SAT to gain admission in the first place. The amounts students borrow have increased too, as have the debt burdens students carry at graduation.

Congress has taken steps to set student loans apart from other consumer loans. For example, lawmakers have given education loans

1. 111 CONG. REC. 22,704 (1965) (statement of Sen. Hartke). In 1965, Senator Rupert Vance Hartke, an Indiana Democrat who served in the Senate from 1959 to 1977, sought to raise the maximum amounts students could borrow through the federal student loan program, which was included in the Higher Education Act passed later that year. He feared that an "economic test"—that is, a test of aspiring college students' ability to find a way to pay for their education—would become an ever greater obstacle to higher education as rising prices made paying for college more challenging.

2. According to the College Board, in the 2008–09 academic year, half of full-time undergraduate students took out a federal loan to help pay for college. COLLEGE BOARD, TRENDS IN STUDENT AID 2 (2009), http://trends.collegeboard.org/downloads/archives/SA_2009.pdf [hereinafter TRENDS IN STUDENT AID 2009]. Graduate and undergraduate students borrowed more than $95 billion from various sources to help pay for higher education. *Id.* at 6. That figure does not include other types of loans, like home equity loans taken out by parents to help pay for their children's education.

special treatment in bankruptcy proceedings,[3] made repayment tax deductible,[4] and set the terms of loans made or guaranteed by the federal government.[5]

For various reasons, lawmakers may view education loans as distinct from other types of debt. Higher education generates unique returns. It produces a citizenry better able to make enlightened judgments and resist tyranny,[6] and it develops wiser leaders. To promote education and generate these benefits, the government has intervened in credit markets, making student loans widely available. Unfortunately, the amount of money available through federal programs has not kept pace with college costs.[7] As a result, the government's effort to promote access to higher education has been inadequate. The limited nature of the federal aid effort undermines the goals aid programs try to achieve.

Lawmakers' modifications of the law governing federal aid have not made it possible for students to finance their higher education drawing solely on federal loan sources. As a result, a crisis is brewing in financial aid. The victims are student borrowers who must delay

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3. The Bankruptcy Code imposes a test borrowers must meet to discharge their obligations. *See infra* note 163 and accompanying text (discussing the "undue hardship" standard borrowers must meet in seeking to discharge student loans). *See also* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (2006) (codified at 11 U.S.C. § 523(a)(8)(B) (2006)) (permitting a debtor to discharge an educational loan if the loan "would impose an undue hardship on the debtor and the debtor's dependents"). For a full discussion of how this provision operates, see Rafael I. Pardo & Michelle R. Lacey, *The Real Student Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179 (2009).

4. "[T]here is a special deduction allowed for paying interest on a student loan." *See* INTERNAL REVENUE SERV., *Publication 970: Tax Benefits for Education*, ch. 5 (Student Loan Interest Deduction), http://www.irs.gov/publications/p970/index.html. The deduction is means-tested, however. *Id.*

5. Mark Kantrowitz, *Student Loans: Overview*, N.Y. TIMES (Oct. 1, 2010), http://www.nytimes.com/info/student-loans/.

6. *See* 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).

7. Since 1981, average tuition and fees at nonprofit, private colleges and universities more than doubled, from $14,747 to $36,993 in the 2010–11 academic year; at public four-year colleges, tuition, fees, room and board rose from $6,725 to $16,140. COLLEGE BOARD, TRENDS IN COLLEGE PRICING: FIGURES AND TABLES 13 fig.5 (2010), http://trends.collegeboard.org/downloads/2010_Trends_College_Pricing_All_Figures_Tables.xls [hereinafter TRENDS IN COLLEGE PRICING]. Over the same time period, even though the maximum amount undergraduate students can borrow through the federal Stafford loan program has roughly quadrupled, rising from $7,500 to $31,000, the total amount does not cover college costs. Mark Kantrowitz, *Historical Loan Limits*, FINAID.ORG, http://www.finaid.org/loans/historicallimits.phtml (last visited Oct. 4, 2010).

their life plans, give up on attending college, or abandon career aspirations, all because of debt. For example, Paula Clifford could afford to spend five years as a prosecutor in Boston only by keeping her college bartending job; she then had to move to a law firm to make ends meet.[8] Garrett Mockler, a teacher, dancer, and choreographer in Los Angeles, had to file for bankruptcy protection because he could not afford his student loans.[9]

For increasing numbers of students, the education financing problem is the result of reliance on consumer education loans outside of federal programs to fill the gap between college costs and available aid. This gap has created an opportunity for financial institutions to lend to students. Lending to students has been a profitable and consequently attractive business. For example, the student loan provider SLM Corporation—commonly known as Sallie Mae—reported profits in 2009 of $324 million; a few years earlier, before the financial crisis of 2008, its profits exceeded $1 billion.[10] The drive to grow lending operations led some loan companies to engage in dubious marketing practices to lure borrowers. Such schemes became public in 2007 in a series of scandals that illustrated the potential conflict between the interests of lenders and students.[11] Handed an opportunity to modify the law governing the financial aid system, Congress attempted to rein in abuses and improve loan disclosure requirements through legislation.[12] In 2010, with the Obama administration's support, federal lawmakers approved the termination of a decades-old program that guaranteed federal loans made by private companies.[13] But Congress did not significantly increase the amount students could borrow

8. Jonathan D. Glater, *High Tuition Debts and Low Pay Drain Public Interest Law*, N.Y. Times, Sept. 12, 2003, at A1.

9. Jonathan D. Glater, *That Student Loan, So Hard to Shake*, N.Y. Times, Aug. 23, 2008, at BU1.

10. SLM Corp., Annual Report (Form 10-K), at 21 (Dec. 31, 2009), http://www.salliemae.com/NR/rdonlyres/A0450B59-A4A0-4586-9B4C-253FF335008B/12210/BOW76911BOW024_BITS_N_1548.pdf [hereinafter SLM Corp. 2009 Annual Report].

11. *See, e.g.*, Jonathan D. Glater, *Cuomo Investigates Colleges And Ties to Student Lenders*, N.Y. Times, Feb. 1, 2007, at B6; Robert Tomsho, *U.S. Would Take Over Federal Student Loans*, Wall St. J., Feb. 26, 2009, at A10; *How the Student-Loan Inquiry Has Unfolded*, USA Today (Apr. 24, 2007, 11:34 PM), http://www.usatoday.com/money/industries/banking/2007-04-24-loan-timeline-usat_N.htm.

12. *See* Higher Education Opportunity Act, Pub. L. No. 110-315, § 434, 122 Stat. 3078, 3247 (2008) (requiring disclosure of loan terms to prospective student borrowers); *id.* § 436(c) (making lenders that offer certain incentives to colleges ineligible for participation in federal student loan programs).

13. Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. Times, Mar. 30, 2010, at A14.

through federal loan programs; as a result, new legislation did not make it easier for students to pay for college without recourse to loans outside of the federal aid system.

This article contends that Congress should further overhaul the federal aid system. My proposal does not seek to eliminate the role of debt in paying for college; I accept the persistence of student loans. Instead, I argue that federal aid programs should provide loans to students that pay all of the costs of college—an argument not for more indebtedness but for use of a different type of debt, recognizing that different types of debt are not equally bad and that debt can be a tool to make possible graduates' decisions to serve the greater good.

Before proceeding, I will define a few terms. The variety of programs providing loans to students and their families has generated a confusing lexicon. For the sake of clarity, I will describe loans made by private lenders, such as banks, and guaranteed by the federal government under the Federal Family Education Loan Program (FFELP)[14] as "guaranteed loans," loans made directly to students by the federal government, as "direct loans," and loans made by private lenders outside FFELP as "private loans." By "federal loans," I refer to both guaranteed and direct loans. The best-known federal loans are Stafford loans. Larger loan amounts are available through PLUS loans, which are available only to parents of undergraduate students and to graduate and professional students. Until 2010, Stafford and PLUS loans were available either directly from the government or through a lender.[15] The lenders that make private loans and guaranteed loans are "private lenders," even though they may be publicly traded companies, like Sallie Mae and Citigroup, or non-profit, state-related entities like the Pennsylvania Higher Education Assistance Authority.

Raising the maximum amount students can borrow through federal programs would have a far-reaching and beneficial impact on students and families. If students could finance college exclusively with federal loans, they could manage their debt more easily because fed-

14. The Federal Family Education Loan Program is what Congress voted to shut down. *See id.*

15. PLUS loans carry higher maximum loan amounts than Stafford loans. Parents can borrow up to the full cost of attendance, and graduate or professional students can borrow up to $138,500. *Applying for Direct Loans*, U.S. Dep't of Educ., http://www2.ed.gov/offices/OSFAP/DirectLoan/applying.html (last visited Oct. 6, 2010). The 2010 budget proposed by the Obama administration and approved by Congress eliminated the guaranteed loan program as of July 1, 2010. *See* Baker & Herszenhorn, *supra* note 13; *see also* David M. Herszenhorn & Tamar Lewin, *Student Loan Overhaul Approved by Congress*, N.Y. Times, Mar. 25, 2010, at A16 (reporting on elimination of the guaranteed loan program as part of health care legislation).

eral aid programs already offer borrowers flexible repayment terms, including the ability to make payments based on their income.[16] Federal programs also make it possible for indebted graduates facing economic hardship to defer payment.[17] Federal programs also forgive loans of graduates who pursue careers in the public interest.[18] Offering larger loan amounts through federal aid programs would be another step toward eventual elimination of a role in the financial aid system for private loan companies, which seek to profit from, rather than to promote, access to education.

Past proposals to assist students in paying for college focused on expanding loan forgiveness programs,[19] a step that some wealthy universities, states, and the federal government have already taken.[20] However, these programs, along with proposed enhanced forgiveness programs, do not cover loans made outside of the federal system.[21]

This article contends that, if we accept at face value the normative claim that widespread higher education benefits and protects democracy, and that the government's efforts to promote access to higher education are appropriate, then we should also endorse more

16. *Repayment Plans and Calculators*, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/PORTALSWebApp/students/english/OtherFormsOfRepay.jsp#IBR (last visited Oct. 4, 2010).

17. *Postponing Repayment*, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/PORTALSWebApp/students/english/difficulty.jsp (last visited Oct. 4, 2010).

18. *Public Service Loan Forgiveness*, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/PORTALSWebApp/students/english/PSF.jsp (last visited Oct. 4, 2010).

19. *See, e.g.*, Elizabeth Warren et al., *Service Pays: Creating Opportunities by Linking College with Public Service*, 1 HARV. L. & POL'Y REV. 127, 131–36 (2007) (calling for expansion and enhancement of loan forgiveness for graduates who go into public service careers).

20. *See, e.g.*, *COAP (Loan Repayment Assistance Program (LRAP))*, YALE LAW SCH., http://www.law.yale.edu/admissions/COAP.htm (last visited Oct. 4, 2010); *HKS Loan Repayment Assistance Program (LRAP)*, HARVARD KENNEDY SCHOOL, http://www.hks.harvard.edu/degrees/sfs/resources/lrap (last visited Oct. 4, 2010); *Nursing Student Loan Forgiveness Program (NSLFP)*, FLA. DEP'T OF HEALTH, http://www.doh.state.fl.us/phnursing/NLF/NSLFP.html (last visited Oct. 4, 2010); *Student Loan Forgiveness for Teachers*, TEX. EDUC. AGENCY, http://www.tea.state.tx.us/loan.aspx (last visited Oct. 4, 2010); *see also Public Service Loan Forgiveness*, *supra* note 18 and accompanying text (describing federal loan forgiveness programs).

21. In 2009, Senator Sherrod Brown introduced legislation that would allow students who borrow independently of any federal program to swap their student loans for federal loans at fixed rates. However, this swap would be available only to students who did not borrow the maximum available amounts through federal programs. Press Release, Office of Senator Sherrod Brown, Brown Announces Bill to Help Americans with Costly Private Student Loan Debt (July 29, 2009), *available at* http://brown.senate.gov/newsroom/press_releases/release/?id=4C941C07-3FC5-40A1-ACC1-38ABDB23915C.

complete government intervention in credit markets, in order to preserve the public benefits flowing from the education of more students.

This article has three parts. The first part discusses the significance of higher education in a democratic society and the challenge of enabling students to attend college. It then analyzes the negative consequences of the decision to employ student loans as the public policy tool to promote access. The second part briefly summarizes the history of federal loan programs in order to explain how the public policy choice to use loans was made, discusses how the loan programs have worked, and analyzes the most recent legislative changes to these programs. In the second part, I suggest that modifications enacted by Congress fell short, in that the changes did not enable more students to pay for college without recourse to private loans; lawmakers did not raise sufficiently the amount of federal loan money available per student. The third part argues for expansion of federal loan programs to allow undergraduate students to borrow more than the government currently permits. This part contends that, if operated in conjunction with existing loan forgiveness and repayment assistance programs, a program permitting students to borrow more through federal loan programs would better facilitate access to higher education overall and would also bolster borrowers' incentives to pursue public interest careers. By way of conclusion, I situate the need for student loan reform in the broader context of increasing global competition to develop talent.

I.
Private Credit Enlisted for the Public Good

The government's effort to help young people pay for college reflects lawmakers' deep—and probably widely shared—conviction that higher education is at once a public and a private good, benefitting both the community and the individual student. This section lays out the normative framework underlying existing government efforts to promote access to college, explains the ways in which debt finance of higher education has undermined achievement of the government's goals, and then discusses existing programs that offer loan repayment assistance and forgiveness.

A. A Bulwark of Democracy

> [E]xperience hath shewn, that even under the best forms, those entrusted with power have, in time, and by slow operations, perverted it into tyranny; and it is believed that the most effectual means of preventing this would be, to illuminate, as far as practicable, the

> minds of the people at large, and more especially to give them knowledge of those facts, which history exhibiteth, that, possessed thereby of the experience of other ages and countries, they may be enabled to know ambition under all its shapes, and prompt to exert their natural powers to defeat its purposes.[22]

While Thomas Jefferson wrote of the critical role of education as a bulwark against despotism, education also benefits people beyond the student because others enjoy students' inventions or guidance. For individual students, access to education helps in realizing life ambitions and may also lead to material rewards, as students capture the benefit of the application of their trained intellects.

In the context of legal battles over who may gain access to institutions of higher learning, the Supreme Court has echoed the view that education benefits people beyond the immediate student.[23] But in the analysis of the benefit of education, the Justices have often emphasized a slightly different public good: the importance of the college experience in the education of future leaders.

Beyond enhancing the nation's citizenry and its leaders, higher education also serves as a means to individual prosperity. Countless entrepreneurs and inventors have turned their learning to lucrative advantage in different marketplaces, developing new technologies and new financial tools, for example.[24] While for these financially successful beneficiaries of higher education college was clearly a private good, the fruits of their labors still benefit the many who use their inventions or learn from their ideas.

Federal aid programs seek to achieve another societal goal beyond access to education. Through loan forgiveness programs, lawmakers have attempted to encourage students to pursue careers in the public interest because those jobs help to preserve shared public values and order. Graduates who serve as firefighters, nurses, school-

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22. Jefferson, *supra* note 6.

23. For example, in *McLaurin v. Oklahoma State Regents*, the Court struck down university-enforced, racial isolation of a black student in a Ph.D. program in education. In explaining the decision, Justice Fred M. Vinson lamented that the restrictions on McLaurin "impair and inhibit his ability to engage in discussions and exchange views with other students, and, in general, to learn his profession." The Justice then noted that "[o]ur society grows increasingly complex, and our need for trained leaders increases correspondingly." He concluded that McLaurin's future "education and development will necessarily suffer to the extent that his training is unequal to that of his classmates." McLaurin v. Oklahoma State Regents, 339 U.S. 637, 641 (1950).

24. Consider, for example, the founders of the Internet search enterprise Google, Sergey Brin and Larry Page, who met at Stanford University and worked on the search engine now used by millions worldwide. *Management Team*, GOOGLE, http://www.google.com/corporate/execs.html#sergey (last visited Oct. 4, 2010).

teachers, police officers, local prosecutors, public defense lawyers, and in other roles can take advantage of these repayment assistance and forgiveness programs. Through their service to the "instruction, the trusts and government of society,"[25] they are the vital supporters of the republic that Jefferson envisioned. The combination of debt forgiveness and financial aid seeks to enable access to education generally, and in addition, to enable people who have incurred debt to select career paths that benefit society but that may not pay very well.

There is another reason the federal government may encourage students to pursue public interest careers, beyond the benefit they provide to the rest of the community: enabling young people to achieve their ambitions, to pursue careers that most appeal to them, to realize themselves as fully as they can, is a good in itself. Even as they place constraints on the borrower, loans permit a degree of independence, in that they allow a student to pursue an education that would otherwise be financially out of reach.

In the 1950s and 1960s, race- and ethnicity-based barriers to college admission were falling, as some of the nation's oldest, most selective universities shifted their admissions policies to focus on students' academic performance and/or other measures of merit.[26] Legal challenges forced other institutions to open their doors to young people who would previously have been excluded because of their race, ethnicity, religion, or socioeconomic status.[27] The rhetoric of merit and equality of opportunity operated in concert with and in favor of wider access to higher education.[28] "The main point of the Ameri-

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25. Letter from Thomas Jefferson to John Adams (Oct. 28, 1813), *in* 9 The Writings of Thomas Jefferson 424 (Paul Leicester Ford ed., 1898).

26. *See* Jerome Karabel, The Chosen: The Hidden History of Admission and Exclusion at Harvard, Yale and Princeton (2005). For example, under new leadership in the 1960's, the admissions office at Yale implemented a "radical reduction in preference for alumni sons and prep school boys, which opened up more spaces for applicants from different backgrounds." *Id.* at 364. Harvard, Yale, and Princeton all were "radically transformed" in the decade between 1960 and 1970, enrolling far more African American students than ever before. *Id.* at 379.

27. The Supreme Court has struck down legal barriers and university policies barring the admission of applicants from certain minority groups, for example. *See, e.g.*, *McLaurin*, 339 U.S. 637; Sweatt v. Painter, 339 U.S. 629 (1950) (striking down segregation in the context of law school).

28. In recent years, admissions officers have found growing tension between the goal of promoting access to education and the goal of recognizing academic achievement. *See* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of our Democratic Ideals*, 117 Harv. L. Rev. 113, 121 (2003) (discussing how "flawed formulations of merit have failed to allocate scarce educational opportunities in a manner that is consistent with democratic values").

can meritocracy was to marry the primary goal of elite selection to the secondary one of mass opportunity."[29]

Cost, however, remained a barrier to access. As students from more diverse socioeconomic backgrounds pursue higher education, and as tuition continues to rise, the question of how to help a growing number of students afford college costs has become more pressing. After all, many aspiring college students from groups previously discriminated against lack the wealth to pay for higher education.[30] Financial aid can be an important tool in any effort to diversify college classrooms along racial and/or ethnic lines.[31]

Congress addressed the challenge of designing a financial aid system in the Higher Education Act of 1965 (HEA). The goal of HEA was to promote access to higher education by making a limited amount of loan money available to almost any student.[32] In part because of the accessibility of funds, in the first forty-five years after HEA was passed, the number of people enrolling in institutions of higher learning soared.[33]

Neither Congress nor the states elected to allocate taxpayer dollars to make higher education free, as it is in some countries, although

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29. NICHOLAS LEMANN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY 280 (1999).

30. More than half of African-American and Hispanic households are in the bottom forty percent of the income distribution, according to the Bureau of the Census. *See Annual Social and Economic (ASEC) Supplement, Table HINC-05. Percent Distribution of Households, by Selected Characteristics Within Income Quintile and Top 5 Percent in 2008*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/cpstables/032009/hhinc/new05_000.htm (last visited Oct. 19, 2010). As these statistics indicate, when talking about enabling access to higher education for students of modest means, race and/or ethnicity is an issue.

31. For example, in guidance to colleges on their consideration of race in admissions decisions, the College Board observed that "recruitment, outreach, and retention programs . . . can operate as key facets of enrollment management, very much related to admissions and financial aid policies that have comparable (frequently overlapping) aims." Arthur L. Coleman et al., *Federal Law and Recruitment, Outreach, and Retention: A Framework for Evaluating Diversity-Related Programs*, COLLEGE BOARD 7–8 (2005), http://www.collegeboard.com/prod_downloads/diversitycollaborative/05diversity-fedlaw-framework.pdf.

32. On at least one occasion, Congress imposed a restriction on the availability of federal student aid to those convicted of certain crimes involving illegal drugs. *See* Omnibus Drug Initiative Act of 1988, Pub. L. No. 100-690, § 5051(i)(2)(C), 102 Stat. 4181, 4299 (1988).

33. According to the U.S. Department of Education's National Center for Education Statistics, the number of students enrolled in degree-granting institutions rose to 18.2 million in 2007, more than double the number enrolled in 1970. The department predicts that more than twenty million students will be enrolled in 2017. *Fast Facts*, NAT'L CTR. FOR EDUC. STATISTICS, http://nces.ed.gov/fastfacts/display.asp?id=98 (last visited Oct. 6, 2010).

states have public universities that generally charge less than their private counterparts. Lawmakers provided grants intended for the neediest students, but, recognizing the benefit of higher education to graduates[34] and the obstacle that rising tuition presented to middle class, as well as poor, families,[35] lawmakers chose to make loans available to enable students to pay for college. The government improved the availability of loans to students by guaranteeing borrowers' obligations to companies that made the loans. Congress retained control of both borrowers' interest rates and lenders' rates of return on these federal student loans.[36] This structure linked the market for higher education to the market for credit. Growth in the former was aided by government intervention in the latter.

This strategy created a potential conflict between the government's interest in promoting college access and lenders' interest in earning profits.[37] Indeed, student loan companies and the executives who run them have fiduciary responsibilities to their stakeholders to protect and grow their operations, which are more profitable the more students borrow and the more interest they pay.

By offering the government guarantee of students' obligations, lawmakers sought to correct the failure of private credit markets to provide loans on sufficiently favorable terms to enable more students to attend college.[38]

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34. Indeed, in the debate before passage of HEA, one senator proposed that student loan borrowers repay based on a calculation of the "profit" they earned from their degree. The proposal would have required comparing the salary of the degree-holding borrower to the average salary of a person without a college degree and requiring the college graduate to pay one-fourth of the difference. *See infra* note 119 and accompanying text.

35. In presenting HEA, Senator Winston Prouty emphasized lawmakers' concern over the challenge that the cost of higher education posed to the middle class. "[C]ollege costs represent a real problem for middle income families," the senator said. 111 CONG. REC. 22,702 (1965) (statement of Sen. Prouty).

36. *See, e.g.*, College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, § 201, 121 Stat. 784, 790–91 (2007), http://thomas.loc.gov/cgi-bin/toGPObss/http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=F:publ084.110.pdf (setting interest rates for federal student loans).

37. *See Accountability for the Department of Education's Oversight of Student Loans and the Reading First Program: Hearing before the H. Comm. On Educ. and Labor*, 110th Cong. (2007) (statement of George Miller, Chairman, H. Comm. On Educ. and Labor), *available at* http://edlabor.house.gov/statements/051007GMHearingStatement.pdf (describing a variety of practices by lenders that led students and families to take out loans with excessive terms and concluding that "these practices come at the expense of students and their families").

38. Congress did not take the same approach to home loans, although home ownership is another goal that the government has addressed by enhancing availability of credit: government-sponsored enterprises purchase home loans from lenders, reducing risk of default to the companies that extend home loans, and the interest on home

The government's intervention in the market for student loans was neither complete nor all-encompassing. The system created to distribute aid did not permit students to borrow as much as they might need.[39] As a result, more borrowers had to turn to private loans.[40] For years, two education loan markets have coexisted, one federally backed, the other private.

Critical aspects of the federal student aid scheme, such as loan forgiveness and variable repayment plans, do not extend to private student loans, which have become increasingly important to undergraduate borrowers and their families as the cost of higher education has increased.[41] Private debt is as difficult for students to discharge through bankruptcy as federal debt,[42] and private debt is not eligible for federal repayment assistance and other programs. The increase in private debt threatens Congress's efforts to enable graduates to enter low-paying careers that serve the public interest.[43]

B. The Trouble with Debt

Debt is a powerful tool that allows people to consume now what they could not otherwise afford until later. Student loans permit bor-

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loans is tax-deductible, making ownership more beneficial and affordable to consumers. *See* INTERNAL REVENUE SERV., PUBLICATION 936: HOME MORTGAGE INTEREST DEDUCTION 2 (2009), http://www.irs.gov/pub/irs-pdf/p936.pdf.

39. The College Board found that tuition and fees at private, nonprofit colleges averaged about $27,293 in the 2010-11 academic year. *See* COLLEGE BOARD, TRENDS IN COLLEGE PRICING 3 (2010), http://trends.collegeboard.org/downloads/College_Pricing_2010.pdf [hereinafter TRENDS IN COLLEGE PRICING]. The average net tuition and fees, after taking into account financial aid, totaled $11,320 per year (not including charges for room and board). *Id.* at 15, fig. 7. But the total loan amount available to dependent undergraduates for their education—not annually—is $31,000. For independent students, the maximum amount available is $57,500. A multi-part test determines whether a student qualifies as independent or dependent. *Direct Stafford Loans*, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/PORTALSWebApp/students/english/studentloans.jsp (last visited Oct. 4, 2010).

40. Between the 1999–2000 and the 2007–2008 academic years, the amount students and their families borrowed in the form of private loans nearly quintupled, rising from $4.5 billion to $21.8 billion. COLLEGE BOARD, TRENDS IN STUDENT AID 10 (2010), http://trends.collegeboard.org/downloads/Student_Aid_2010.pdf [hereinafter TRENDS IN STUDENT AID 2010]. The amount borrowed in 2008–09 fell, most likely as a result of the financial crisis that began in the fall of 2008. *Id.*

41. *See supra* note 7 and accompanying text and *infra* note 148 and accompanying text.

42. Legislation was proposed in 2010 that would change this, but as of this writing neither house of Congress has approved it. *See infra* note 240 and accompanying text.

43. Programs exist to help repay the debt obligations of graduates who pursue specific, favored public interest careers. *See, e.g.*, *Public Service Loan Forgiveness (PSLF)*, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/PORTALSWebApp/students/english/PSF.jsp (last visited Oct. 6, 2010).

rowers with no collateral, other than the promise the borrowers themselves embody, to pay for an education that will contribute to both a more enlightened society and a more successful graduate.

Because students who complete more schooling generally earn more,[44] the fact that many of them must use loans to pay for college may not necessarily be troubling. Because the typical borrower receives a personal financial benefit—higher lifetime income[45]—as a result of obtaining more education, the decision to impose a share of the cost of that education on students is defensible.

But forcing students and their families to borrow has collateral negative effects, which undermine loan programs' goal of promoting access to higher education. First, aversion to debt may cause some students to forgo higher education when it may be in the community's interest that they pursue it.[46] Second, debt affects people's decisions about career, health, and family[47] in ways that may deter graduates who would otherwise pursue public interest careers. The consequence may be a reallocation of human capital that does not benefit the larger community[48]—that is, students may choose careers that are

44. Orley Ashenfelter & Alan Krueger, *Estimates of the Economic Return to Schooling from a New Sample of Twins*, 84 AM. ECON. REV. 1157, 1157 (1994) (finding that "each year of school completed increases a worker's wage rate by 12–16 percent").

45. *Id.*; *see also* Anna Bernasek, *What's the Return on Education?*, N.Y. TIMES, Dec. 11, 2005, at C6 ("[T]he evidence suggests that, up to a point, an additional year of schooling is likely to raise an individual's earnings about 10 percent.").

46. *See infra* note 54 and accompanying text.

47. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 60 (2008).

48. This discussion does not focus on regimes to deal with students who do not complete their education or who fail to obtain employment after graduation. There is a literature on discharging student loan debts through bankruptcy proceedings. *See, e.g.*, Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 411 (2005) (raising concerns that bankruptcy courts' application of the undue hardship standard has been unequal and at times unfair); Amy E. Sparrow, *Unduly Harsh: The Need to Examine Educational Value in Student Loan Discharge Cases Involving For-Profit Trade Schools*, 80 TEMP. L. REV. 329, 331–32 (2007) ("[S]tudents have extreme difficulty in persuading a court to discharge their educational loans in a bankruptcy proceeding, particularly due to the requirement that a student has suffered an 'undue hardship' to qualify for an educational loan discharge."). There is no perfect solution to this problem, whether the loans taken out by students are private or federal. It is not ideal to put the government in the position of screening potential borrowers to determine their likelihood of completion before extending credit, nor is it desirable to put taxpayer funds at risk to pay for the education of a student who may take a decade to complete undergraduate degree requirements. I would err on the side of promoting access, perhaps with a time limit for school attendance funded with federal loans. *See* discussion *infra* Part III.B.3, regarding types of educational institutions that should be permitted to participate in an expanded federal loan program.

more lucrative over careers that lawmakers, at least, view as more valuable.[49]

1. No One Has to Borrow

Though it may seem implausible to speak of aversion to debt in our consumption-driven culture—especially in the wake of disclosure of just how much consumers borrowed prior to the onset of the 2008 recession—there exist students and parents who are uncomfortable borrowing to pay for college, graduate, or professional school.[50] In some cases, this may be part of a complete aversion to owing money to anyone, perhaps for cultural reasons.[51] In other cases, it may be that potential student borrowers and their families fear that possible post-graduate careers will not yield incomes sufficient to pay off the debt.

Healthy trepidation over student loan borrowing is rational: in addition to the difficulty of discharging the loans in bankruptcy proceedings,[52] some lenders have engaged in questionable marketing tactics and business practices.[53] If aversion to debt were evenly distributed across the national pool of potential college, graduate, and professional school students, then perhaps it would raise little concern.

However, recent research suggests that certain populations try to avoid debt more than others.[54] As a result, making student loans a primary means of paying for higher education may lead to under-representation of students from those populations on college and university campuses. Debt aversion, then, may undermine one of the explicit goals of federal student aid programs: to put higher education within

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49. *See* discussion *infra* Part I.B.2.

50. *See* INST. FOR HIGHER EDUC. POLICY & EXCELENCIA IN EDUC., STUDENT AVERSION TO BORROWING: WHO BORROWS AND WHO DOESN'T 18 (2008), http://www.edexcelencia.org/system/files/Aversion_to_Borrowing_2008.pdf.

51. For example, one study found that Hispanic and Asian students were less likely to borrow than were white and black students, and suggested that "[c]ertain characteristics and cultural contexts may influence their borrowing decisions." *Id.*

52. When lawmakers responded to the student loan scandals of 2007 through the College Cost Reduction and Access Act (CCRA) and reauthorization of the Higher Education Act, they did not change the treatment of student loans—even private student loans—under the federal Bankruptcy Code. Scholars have addressed the treatment of student loans in bankruptcy proceedings. *See infra* note 169 and accompanying text.

53. *See* discussion of the loan scandals of 2007 *infra* Part II.C.

54. *See, e.g.*, INST. FOR HIGHER EDUC. POLICY & EXCELENCIA IN EDUC., *supra* note 50, at 18; PAMELA BURDMAN, INST. FOR COLL. ACCESS AND SUCCESS, THE STUDENT DEBT DILEMMA: DEBT AVERSION AS A BARRIER TO COLLEGE ACCESS 6, 8 (2005), http://projectonstudentdebt.org/files/pub/DebtDilemma.pdf; Scott Jaschick, *In the Dark on Aid Changes*, INSIDE HIGHER ED (Jan. 31, 2008), http://www.insidehighered.com/news/2008/01/31/poll.

reach of students desiring it.[55] For students from populations that are debt averse, federal programs' use of loans may also hinder their achievement of career aspirations and of the upward social mobility that education often provides.[56]

For example, the prospect of student loan debt may undermine efforts to attract and enroll students who are immigrants or children of immigrants, or whose families have lower incomes and/or less wealth. If federal student aid seeks to promote college access and all the good that flows from widespread higher education, and if loans are the tool chosen to achieve this, then debt aversion undermines program efficacy.[57]

The very process of applying for and taking out a federal student loan may also deter some potential borrowers.[58] The form that students must complete in order to obtain a federal loan, the Free Application for Federal Student Aid (FAFSA), is an exhausting ordeal.[59] A variety of businesses will complete the application process for would-

55. As Senator Prouty put it in 1965, "It is a patent matter of fact that many of our youth who want and need postsecondary education, and who could derive great benefit therefrom, are denied opportunities to pursue it." 111 CONG. REC. 22,702 (1965) (statement of Sen. Prouty).

56. *See supra* notes 44 and 45 (regarding the financial benefits of investing in education).

57. Across the income spectrum, students of Asian and Hispanic backgrounds borrow less than members of other groups. *See* INST. FOR HIGHER EDUC. POLICY & EXCELENCIA IN EDUC., *supra* note 50. Drawing on Department of Education data from 2003–04, Excelencia in Education and the Institute for Higher Education Policy report that thirty-five percent of Asian students with at least $2,000 of financial need after grants and other aid took out loans, while forty percent of Hispanic students in the same situation borrowed, forty-three percent of white students and fifty-four percent of black students. *See id*. The reasons for the disparities likely reflect influences not easily subject to quantitative analysis. For example, in some cases students may have alternative sources of funds. Focus groups conducted with financial aid administrators, students and parents identified cultural biases against borrowing in Asian and Hispanic communities. *See id.* at 25. Financial aid officials said that some parents believed that because they had worked through college, their children should do the same. *See id*.

58. *See id.* at 26.

59. The Obama administration has moved to shorten the form. Tamar Lewin, *Easing a College Financial Aid Headache*, N.Y. TIMES, June 24, 2009, at A12. The Department of Education now pulls directly from the Internal Revenue Service some information that students had to provide in the past. *See* Press Release, Department of Education, Obama Administration Announces Streamlined College Aid Application (June 24, 2009), *available at* http://www2.ed.gov/news/pressreleases/2009/06/06242009.html. The Obama Administration's education secretary, Arne Duncan, criticized the old version of the form at his confirmation hearing, telling lawmakers, "You basically have to have a Ph.D. to figure that thing out." Tamar Lewin, *The Big Test Before College? The Financial Aid Form*, N.Y. TIMES, Feb. 22, 2009 at A1.

be borrowers for a fee.[60] Some students and parents may simply throw up their hands at the hassle.[61]

Some evidence exists that debt aversion hurts students in another way. Some of those who take out loans may be more likely to complete a course: among those students who began college in 2003–04 and needed at least $2,000 beyond other aid but did not borrow, thirty-six percent had left college without a degree three years later, while fewer—thirty-one percent of students—who did borrow, had left.[62] Among black and Hispanic students, the difference was greater: fifty-one percent of non-borrowing black students had left without a degree, compared to thirty-nine percent of black students who did borrow; and forty-one percent of non-borrowing Hispanic students left, compared to thirty-two percent who borrowed.[63]

The notion that fear of debt affects the behavior of some potential borrowers more than others is entirely plausible, but in-depth research on the issue is needed. Figuring out the extent to which fear of debt deters some students from higher education entirely and others from enrolling in certain types of postsecondary programs would require interviewing a broad swath of students and families from various racial and ethnic groups and socioeconomic segments of the population.[64] Such research is not necessary, though, to conclude that if use of debt is counterproductive to the effort to promote access to higher education across the population, other policy tools may be necessary.

2. *The Misallocation of Human Capital*

Determining how graduates' debt burdens distort important life choices, such as decisions about which career to pursue, when to get married, when to start a family, or when to invest in housing or cars, presents challenges, too. Even if there were a counterfactual life experience that a researcher could offer an indebted graduate, what strikes one observer as a distortion may appear to another to be a rational and

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60. Lewin, *The Big Test Before College? The Financial Aid Form*, *supra* note 59.

61. A 2005 study by the Advisory Committee on Student Financial Assistance, tasked with making recommendations to ease student access to federal aid, warned that "[m]illions of students and adult learners who aspire to college are overwhelmed by the complexity of student aid." ADVISORY COMM. ON STUDENT FINANCIAL ASSISTANCE, U.S. DEP'T OF EDUC., THE STUDENT AID GAUNTLET: MAKING ACCESS TO COLLEGE SIMPLE AND CERTAIN (Jan. 23, 2005), http://www2.ed.gov/about/bdscomm/list/acsfa/edlite-gauntlet.html.

62. INST. FOR HIGHER EDUC. POLICY & EXCELENCIA IN EDUC., *supra* note 50, at 28.

63. The pattern does not hold for all students, however. Asian students had similar persistence rates regardless of borrowing. *See id.*

64. *See id.* at 25, 32. Within the broad category of Asian families, students of Chinese and Vietnamese descent appear to be particularly resistant to borrowing.

therefore desirable response to a combination of personal financial circumstances and market incentives.

At least one survey of college graduates coping with student loans shows that borrowers believe that their debts affected decisions they made about both their personal lives and their careers. A 1993 study that compared data on borrowers between 1985 and 1991 found that for one-quarter of 1991 graduates, debt affected decisions about when to marry and for thirty-five percent, decisions about when to have children.[65] Nearly half said they rented housing rather than buying because of their loan obligations, and forty percent also reported working at least two jobs in order to keep up with payments.[66] More than forty percent said they were working either in a less desirable and/or higher-paying job as a result of loans.[67] Perhaps most disturbing, more than one-third said they put off needed health care as a result of debt.[68] In every case, the percentage of study respondents reporting these effects was larger in 1991 than in 1985, sometimes significantly.[69] The effects of debt likely grow stronger as debt burdens increase.

If debt deters borrowers from public service careers, then borrowers' responses to debt are undermining a critical goal of federal programs. If students resist borrowing in the first place and are not actually swayed by the availability of repayment assistance, then although lawmakers have established various programs to help graduates repay their loans to encourage them to become teachers, firefighters, and members of other important but less well compensated professions,[70] forgiveness may come too late.

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65. Joseph D. Boyd & Carol Wennerdahl, The Characteristics of Student Borrowers in Repayment and the Impact of Educational Debt 26, tbl.10 (1993), http://www.eric.ed.gov/PDFS/ED367284.pdf.

66. *Id.*; *see also* Jonathan D. Glater, *High Tuition Debts and Low Pay Drain Public Interest Law*, N.Y. Times, Sept. 12, 2003, at A1 (describing indebted law school graduates taking second jobs to try to afford loan payments while pursuing public interest law careers).

67. Boyd & Wennerdahl, *supra* note 65.

68. *Id.*

69. *Id.*

70. *See, e.g.*, Fed. Student Aid, U.S. Dep't of Educ., *Public Service Loan Forgiveness Program Questions and Answers* (Feb. 3, 2010) http://studentaid.ed.gov/students/attachments/siteresources/PSLF_QAs_final_02%2012%2010.pdf; *Public Service Loan Forgiveness*, *supra* note 18 (describing federal loan forgiveness programs for graduates working for public service organizations, including "any federal, state, or local government organization or agency and most charitable non-profit organizations"); *Student Loan Forgiveness for Teachers*, *supra* note 20 (describing forgiveness assistance for graduates going into certain teaching fields). Other states have similar programs for teachers, nurses and other careers.

Recent studies offer more information about the different choices indebted students make about what to do after graduation relative to decisions by their debt-free classmates. Two studies, which include analysis of repayment assistance programs, are discussed below.

a. "Anon U"

In the early 2000s, one wealthy, elite university[71]—"Anon U"—eliminated loans from its financial aid packages and replaced them with grants, freeing students who would otherwise have to borrow from repayment obligations. Jesse Rothstein and Cecilia Elena Rouse, two Princeton University graduate students at the time, studied the results of the shift by comparing career choices made by graduates who differed only in their debt burdens.[72] They found that the students benefitting from the no-loans policy made different choices:

> [D]ebt leads graduates to choose higher-salary jobs. Much or all of this effect is across occupations, as debt appears to reduce the probability that students choose low-paid "public interest" jobs. Debt effects are most notable on the propensity to take a job in the education industry. We also find suggestive (though imprecise) evidence that financial constraints affect students' academic performance during college.[73]

The study found that when the university freed students from the burden of debt, the students opted to pursue less financially lucrative careers. Among financial aid recipients there was "a notable increase

71. The university shared data on its financial aid policies on the condition that it not be identified. However, newspaper articles appearing at approximately the time described by the research here suggest that the institution was Princeton University; the newspaper articles described changes in aid policy that were very similar to changes described in the research article. *See, e.g.*, Ethan Bronner, *Princeton Will Liberalize Its Financial Aid Formulas*, N.Y. TIMES, Jan. 21, 1998, at B12 ("The plan . . . eliminates loans for students whose families earn less than $40,000 a year, turning them into grants."); Mary Beth Markelin, *Princeton Overhauls Aid to Ease Students' Burden*, USA TODAY, Jan. 21, 1998, at D9 ("Princeton would no longer automatically include $4,000 in federal loans as part of its aid. Instead, for students whose family income falls below $40,000, the aid package would substitute scholarships or grants.").

72. Jesse Rothstein & Cecilia E. Rouse, *Constrained after College: Student Loans and Early Career Occupational Choices* 4 (Nat'l Bureau of Econ. Research, Working Paper No. 13117, 2007), *available at* http://www.nber.org/papers/w13117.

73. *Id.* Rothstein and Rouse set out expecting to find effects of debt to be "extremely small," because debt for the typical college graduate is slightly more than one percent of lifetime earnings. *Id.* at 2. They offer two possible explanations for the outcome of their study: debt aversion or credit constraints—meaning that graduates find it harder to borrow after college, the more they already borrowed to pay for college.

in the share taking jobs in the nonprofit, government and education sectors."[74]

b. New York University School of Law

At approximately the same time that the unnamed undergraduate institution studied by Rothstein and Rouse instituted its new education funding program, New York University School of Law conducted a similar experiment through its financial aid policies. NYU created a lottery for law students interested in traditionally low-paying, public interest careers.[75] Lottery winners received partial tuition subsidies in place of loans. Both the lottery winners and losers could participate in the law school's loan forgiveness program, which repaid students' debts[76] in full over a ten-year term.[77]

Economist Erica Field studied the results of the school's policy changes and found that students who won the lottery were significantly more likely to accept admission to NYU instead of enrolling at another law school.[78] In addition, according to an entry survey of students, lottery losers reported "planning to spend nearly twice the amount of career time in a private law firm relative to lottery winners."[79] Students who won the lottery were more likely to work in public interest law.[80]

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74. *Id.* at 23.

75. Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, AM. ECON. J.: APPLIED ECON., Jan. 2009, at 1, 3–4.

76. It is not clear from Field's discussion whether only federal loans qualified for replacement or whether both federal and private loans were eligible.

77. Students who received subsidies toward tuition up-front would have to repay the amounts received if they did not keep their public interest jobs for a certain period of time after graduation.

78. Field, *supra* note 75, at 13. Separately, Field's research suggests that debt aversion is a real phenomenon: the law school's parallel assistance programs were designed so that their economic value was identical, but her results show that borrowers and potential borrowers cared whether their financial aid came in the form of grants or loans. Her research does not break down the reaction of would-be public interest lawyers by race or other demographic characteristics, which might capture differing degrees of aversion.

79. *Id.* at 14.

80. *Id*. at 17–18. Field finds that $10,000 in student loan debt "reduces the likelihood of taking a public interest job two years out of law school by approximately 6%." *Id.* at 18. Field is unequivocal in concluding that the tuition subsidy program at NYU was a powerful recruitment tool: "[T]he numbers suggest that 18.5% of lottery winners in the classes of 1999 and 2000 would not have attended NYU had they lost the lottery . . . . [I]t is unambiguous that tuition subsidies increased the supply of NYU graduates." *Id.* at 14.

3. The Rewards of Reducing Debt

For both law students and undergraduates, less debt led to greater participation in public interest employment.[81] But a lighter loan burden also confers benefits far beyond the individual borrower. Repayment obligations have collateral effects on borrowers' children, parents, and others close to them.[82] This issue almost certainly becomes more significant as loan balances balloon and repayment obligations stretch on for ten, fifteen, or even twenty-five years after graduation. Divorced spouses can count on less alimony,[83] and employers may find employees who are burdened by loans to be more distracted and less productive.[84] Aging relatives can expect less financial support from indebted children.[85] In fact, parents may find themselves supporting their children, in turn, affecting the older generation's saving capacity and retirement decisions.[86] Indebted graduates and their spouses may also be forced to put off retirement.

C. The Promise and Challenges of Loan Repayment Assistance Programs

Society suffers when debt leads graduates to forgo careers that would have benefitted the larger community.[87] Thus, debt can undermine the public good. Private student debt poses a particular problem because it is not eligible for repayment assistance programs available to federal loan borrowers. If more students take out private loans to pay for college, their debt may steer them away from careers in the public interest that are eligible for federal loan repayment assistance.

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81. Harvard Law School conducted a similar experiment a few years later, when it announced that it would waive tuition for third-year students if they promised to work for five years for either a nonprofit organization or the government. Almost twice as many students as expected signed up. This response was so overwhelming that the institution suspended the program. Tamar Lewin, *Harvard Law School Suspends Program Giving Students Free Tuition*, N.Y. TIMES, Dec. 3, 2009, at A25.

82. Bar-Gill & Warren, *supra* note 47, at 59 (describing, in particular, the impact of family financial distress on children).

83. *Id.*

84. *Id.* at 62 (citing case studies listed in U.S. DEP'T OF DEF., REPORT ON PREDATORY LENDING PRACTICES DIRECTED AT MEMBERS OF THE ARMED FORCES AND THEIR DEPENDENTS 39–43 (2006)).

85. *Id.* at 60.

86. *Id.* at 61 ("An individual in financial distress will often require support from more distant family, friends, or the state.").

87. This discussion does not cover all the ways that indebted graduates' life decisions may be affected by debt. For example, graduates might put off having children or buying a house. *See supra* note 65 and accompanying text. It is not clear what the societal benefits or costs to shifting the timing of such decisions may be.

Private borrowing thus undermines achievement of some of the societal benefits of higher education.

Nevertheless, if we weigh costs and benefits, we should address the role that debt plays in graduates' life choices only if the benefit to society from a choice unconstrained by debt exceeds the cost of reducing or eliminating that debt. While we may lament that the best and brightest graduates of colleges and universities pursue investment banking jobs instead of careers in the public interest, for example, the income taxes these graduates pay may outweigh the benefit of additional public service. However, that comparison excludes much that is both subjective and intangible. A cost-benefit analysis is frustrated by the fact that wages in public interest jobs may not accurately reflect the worth of those forms of employment to society. Without engaging in a debate over the efficiency of labor markets and the appropriate weight to be given to wages those markets set for certain jobs, it seems safe to conclude that there are careers that (1) are of positive value to society, (2) pay wages that do not reflect the societal value of the jobs, (3) students wish to pursue, and (4) nevertheless, students are deterred from pursuing as a result of debt.

Members of Congress and state legislatures[88] have reached this conclusion. Using federal aid programs, lawmakers have tried to promote not only access to higher education but also public service. They have enacted statutory provisions addressing student loans, requiring the state to reduce the debt burdens borne by graduates who allocate their human capital in ways lawmakers deem desirable. In the College Cost Reduction and Access Act (CCRA),[89] passed by Congress in 2007, lawmakers included provisions intended to promote public service through an expanded federal loan repayment assistance program. The program benefits graduates working in a broad range of areas, including:

> emergency management, government, military service, public safety, law enforcement, public health, public education (including early childhood education), social work in a public child or family

88. States such as Iowa, Missouri, New Hampshire, and Kentucky have created programs that help indebted graduates pay off their loans if they enter fields such as nursing, primary and secondary education, firefighting, and public interest law. In at least one state, repayment assistance has taken the form of reduced interest rates charged to borrowers. Unfortunately, deteriorating economic conditions forced some lenders and state agencies to cut back on their repayment assistance. *See* Jonathan D. Glater, *Recession Imperils Loan Forgiveness Programs*, N.Y. Times, May 27, 2009 at B1.

89. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, § 401, 121 Stat. 784, 800 (2007).

service agency, public interest law services (including prosecution or public defense or legal advocacy in low-income communities at a nonprofit organization), public child care, public service for individuals with disabilities, public service for the elderly, public library sciences, school-based library sciences and other school-based services.[90]

The federal initiative combines loan forgiveness, contingent upon public service, with a more generous repayment option that takes into account an indebted graduate's income.[91] In the income-based repayment program, borrowers pay a fraction of their income for twenty-five years and then the government forgives any remaining balance.[92] However, if the borrower takes a job in the public interest, loan forgiveness is accelerated, so that a graduate is debt-free after ten years of work in an eligible job.[93]

The income-based repayment plan and repayment assistance program are major improvements over the preexisting payment options offered with regard to federal loans.[94] However, the new programs do not encompass private loans or federal PLUS loans taken out by de-

90. *Id*. § 401. CCRA also lowered interest rates on federal loans. *Id.* § 201(a). It also raised the maximum amounts available through the federal Pell Grant scholarship program for the neediest students. *Id.* § 102(b)(9)(B). Finally, it reduced the subsidy payment that the federal government paid to loan companies to encourage them to make federally guaranteed student loans. *Id.* § 305(a).

91. Jonathan D. Glater, *College Loan Payments Will Be Linked to Income*, N.Y. Times, June 30, 2009, at A14.

92. The program also requires that borrowers' loans be held by the federal government. Students who took out federal loans from a bank or other private lender must shift them into the government's direct loan program, a process typically referred to as "loan consolidation." *See Income-Based Repayment Plan*, U.S. Dep't of Educ., http://studentaid.ed.gov/PORTALSWebApp/students/english/IBRPlan.jsp (last visited Oct. 6, 2010).

93. The federal Department of Education separately offers loan repayment assistance to teachers of mathematics and the sciences in particular. *Id.*; *see also* U.S. Dep't of Educ., Stafford Loan Forgiveness Program for Teachers, *available at* http://studentaid.ed.gov/students/attachments/siteresources/15936_GPO_Stafford_SCREEN.pdf (describing loan forgiveness available from the federal government for secondary school teachers in specific fields). Congress has also excluded from income tax the value of debt forgiveness provided through one of the repayment assistance programs. 26 U.S.C. § 108(f)(1) (2006).

94. Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Government and Nonprofit Organizations*, 36 Hofstra L. Rev. 27, 35 (2007). Professor Schrag outlines the program in detail in this very helpful article, noting that "the income-based formula for computing the amount due each month results in payments that are lower" than under its predecessor payment plan, known as "income-contingent repayment." Under the income-based plan, the government pays the interest on certain types of federal loans for borrowers for up to three years.

pendent students' parents.[95] Nor do they guarantee that students who would like to work in the public sector will obtain qualifying jobs. The prospect of making payments for twenty-five years, even relatively modest payments, might not reassure students already worried about debt. As the experience at NYU School of Law shows, repayment assistance alone may not be enough to overcome an aversion to borrowing.[96]

Elizabeth Warren, Sandy Baum, and Ganesh Sitaraman have proposed a much broader loan repayment assistance initiative that would pay off graduates' federal loan obligations in exchange for four years of public interest service[97] instead of ten. Their program would also guarantee public interest jobs to graduates who want them.[98] It would be a tremendously valuable benefit for students interested in such jobs.

A government pledge to provide public interest jobs seems unlikely, in light of fiscal limits and taxpayer resistance to government spending,[99] no matter the strength and appeal of the argument that greater access to higher education and broader participation in public service will produce a more engaged and informed democratic polity.

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95. Given the limits on how much students can borrow themselves, they and their families often turn to PLUS loans to cover additional costs. *See supra* note 15. Therefore, parental indebtedness—for which parents may ask or require assistance from graduates—persists, regardless of postgraduate income and career choice. Graduate PLUS loans, on the other hand, would be eligible for the program, which is good news for law and other graduate students interested in public interest careers.

96. *See* Field, *supra* note 75, at 22. Field's study compared the impact on students' career choices of loan repayment assistance after graduation with the provision of tuition subsidies while in law school; the economic value of the two programs was identical to borrowers. Nevertheless, the subsidies were "associated with higher rates of public interest law than are financially equivalent backward-looking loan repayment schemes[,] provid[ing] strong evidence of the influence of debt aversion on job choice." *Id.*

97. Warren et al., *supra* note 19, at 131.

98. *See id.* at 135. Further, the program outlined by Warren, Baum, and Sitaraman would provide that "[i]f student demand exceeded the supply of opportunities, then the federal government would commit to expanding its service opportunities so that those who want to serve would have that chance." *Id.*

99. State and local governments put employees on furloughs and laid them off as the recession that began with a credit crunch in 2008 reduced tax revenues and, consequently, government budgets. In California, Gov. Arnold Schwarzenegger in January 2009 ordered state employees to take two days off each month, leading to closure of some state offices. The move was contested by employee unions. *See* Patrick McGreevy, *Judge Orders Schwarzenegger to Halt State Worker Furloughs*, L.A. TIMES, Jan. 1, 2010, at A4. In Jefferson County, Alabama, as many as 1,400 county employees, or two-thirds of county employees subject to layoffs, expected to lose their jobs last summer. Shaila Dewan, *Alabama Area Reeling in Face of Fiscal Crisis*, N.Y. TIMES, Aug. 1, 2009, at A1.

At the same time, many students want to find employment in the public interest and are unable to do so, even when the economy is growing. There is no way to know whether there are enough public interest jobs to absorb all of the indebted students who might hope to benefit from a loan repayment program. The impact of the economic downturn that began in 2008 likely worsened the problem because more students turned to public service as the private sector contracted.[100]

These repayment assistance programs, even the expansive version put forth by Warren, Baum, and Sitaraman, do not cover private loans. Reliance on private loans undermines policies seeking to realize benefits characteristic of higher education as a public good. Private loans therefore interfere with achieving a critical goal of federal student aid. Forgiveness programs would be more effective if students did not need to use private loans—that is, if federal loan ceilings were lifted.[101] If graduates' loans came through federal loan programs, then all debts would be eligible for repayment assistance programs supporting careers in the public interest.[102]

II.
Warring Worlds: Federal and Private Loans

In light of the downsides of student loan debt, why is borrowing at the center of higher education finance? This part of the article first

100. Consider the case of Teach For America, which received 35,000 applicants for its 2009 class, more than in any single year in its past and a forty-two percent increase from the prior year. Just fifteen percent of applicants were accepted. Press Release, Teach For America, Teach For America Adds Largest Number of New Teachers and Regions in 20-Year History (May 28, 2009), *available at* http://www.teachforamerica.org/newsroom/documents/20090528_Teach_For_America_Adds_Largest_Number_of_Teachers_in_History.htm; *see also* About Teach For America (on file with author) (reporting that "[a]t more than 130 colleges and universities, over 5 percent of the senior class applied" to participate in the program).

101. Warren, Baum, and Sitaraman call for raising the maximum amounts students may borrow through federal loan programs. Warren et al., *supra* note 19, at 132 n.29 ("Under existing loan limits, students are increasingly turning to banks and other private lenders for supplementary funds . . . . The difficulty of including [private loans] in a publicly funded loan forgiveness program makes it imperative that their growth be stemmed . . . .").

102. In July 2009, Senator Sherrod Brown, an Ohio Democrat, proposed legislation that would permit students who had taken out private education loans to refinance through federal loan programs. This "debt swap" proposal would permit students who were eligible for federal Stafford loans, but did not borrow all they could have, to refinance into Stafford loans bearing a fixed interest rate (6.8%). Brown Announces Bill to Help Americans with Costly Private Student Loan Debt, *supra* note 21. As of November 2010, the Senate Committee on Health, Education, Labor, and Pensions had yet to vote on the bill.

addresses that question by providing a brief history of federal college aid programs, beginning with HEA.[103] The second section explains the more recent, parallel growth in the use of private student loans to pay for college and explores risks to borrowers of taking on private debt. The third section summarizes the student loan scandals of 2007. The fourth section analyzes the legislative responses to those scandals and argues that the steps taken by lawmakers failed to advance or protect two of the federal aid programs' primary goals: bolstering democracy by enabling more students to choose public interest careers and aiding student borrowers to pursue their own ambitions.

A. Federal Student Aid

At the time of HEA's passage, the nation was recovering from the loss of a president who had come to represent youth and hope for a better future. John F. Kennedy spoke of the "new frontier of education" in a speech in 1960, warning that "already our colleges are being overcrowded, their costs are rising, and some fifty percent of our top students do not receive a higher education."[104]

Lyndon Johnson sought to build on the sense of national purpose that his predecessor had so lyrically evoked[105] to establish a "Great Society" in the United States. The sweeping Civil Rights Act, barring discrimination on the basis of race, ethnicity, or sex, had become law in 1964, just a year earlier. It had followed a famous speech in Washington, D.C. by Reverend Martin Luther King, Jr., a civil rights leader at the apex of his power and influence.

The federal student aid system grew out of concerns about both the nation's future[106] and the reliability of the private sector as a

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103. This history could also start a few decades earlier, with the Servicemen's Readjustment Act of 1944. This legislation, popularly known as the "G.I. Bill," provided tuition, books, supplies, equipment, and other assistance to veterans who continued their education. Servicemen's Readjustment Act of 1944, Pub. L. No. 78-345, § 400(b)(5), 58 Stat. 284, 289 (1944). The National Defense Education Act, passed in 1958, included support for loans to college students. *See The Federal Role in Education*, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/overview/fed/role.html (last visited Sept. 7, 2010).

104. Senator John F. Kennedy, Remarks at the Valley Forge Country Club (Oct. 29, 1960), *available at* http://www.presidency.ucsb.edu/ws/index.php?pid=74292.

105. Consider also the soaring rhetoric at the inauguration of President Kennedy: "[M]y fellow Americans: ask not what your country can do for you—ask what you can do for your country. My fellow citizens of the world: ask not what America will do for you, but what together we can do for the freedom of man." President John F. Kennedy, Inaugural Address (Jan. 20, 1961).

106. *See supra* note 104 and accompanying text.

source of credit[107] for students and families trying to keep up with the rising cost of higher education. In the 1960s, lawmakers sought to promote access to higher education for an unprecedented number of young Americans.[108] Lawmakers wanted loan programs to make individual students' aspirations possible.[109]

HEA was an ambitious piece of legislation. In the words of President Johnson, the overarching goal was no less than to give "[e]very child . . . the best education that this Nation can provide,"[110] because "no nation can be both ignorant and free."[111]

Lawmakers were concerned about the difficulty facing students and their families coping with the practical challenge of finding money to pay for college—the same challenge that exists today for would-be college students. The dollar amounts were far lower, but the pace of tuition increases was comparable to the rate today: between 1955 and 1965, costs at private colleges increased forty percent,[112] to an average price of $2,370; at public institutions costs had risen by thirty percent, to an average of $1,560.[113]

Lawmakers worried that rising tuition compelled more middle-class families to turn to commercial loans to help pay for their children's higher education.[114] However, commercial and consumer loan terms did not favor borrowers. "[C]ommercial credit is frequently available only at high interest rates and must be repaid in the same year[115] in which it is borrowed,"[116] Senator Ralph W. Yarborough, a Texas Democrat, stated during discussion of the legislation.

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107. *See infra* note 116 and accompanying text (describing risks of commercial credit for education loans).

108. Debating HEA , Senator Edward Bartlett lamented "serious lacks" in higher education policy, "which can only be corrected, it appears, by the helping hand of the Federal Government." 111 CONG. REC. 22,643 (1965) (statement of Sen. Bartlett).

109. Discussing the legislation in 1965, Senator Jennings Randolph cited the goal of "extend[ing] the benefits of college education to more students by . . . establishing, assisting, and stimulating programs of insured reduced-interest loans for college students." *Id.* at 22,662 (statement of Sen. Randolph).

110. President Lyndon Baines Johnson, State of the Union Address (Jan. 4, 1965).

111. *Id.* (citing Thomas Jefferson). Appealing to the nation's can-do spirit, Johnson added, "Today no nation can be both ignorant and great."

112. 111 CONG. REC. 22,702 (1965) (statement of Sen. Prouty).

113. *Id.* at 22,700.

114. *Id.* at 22,692 (statement of Sen. Yarborough) ("With the ever-increasing cost of education, the financial burden of educating children has come to bear increasingly heavily upon middle income families . . . . [I]t is frequently very difficult for them to finance college study out of annual income," forcing them to turn to commercial loans).

115. For example, a student could not defer interest payments until after graduation, at which point a borrower would presumably earn wages from employment.

116. 111 CONG. REC. 22,692 (1965) (statement of Sen. Yarborough).

Federally guaranteed student loans were not a forgone conclusion in 1965, in part because many states already operated their own education loan programs.[117] Other ideas were also under consideration. For example, some politicians championed the use of tax credits for the cost of education.[118] Another proposal would have provided loans but, recognizing that graduates enjoyed a boost in earnings from obtaining a degree, would have required borrowers to pay twenty-five percent of that "profit," a figure which would be calculated by comparing a borrower's wages to the average earnings of someone with only a high school degree.[119]

The guaranteed student loan program took as its model preexisting state programs and loans offered under the National Defense Education Act (NDEA), a law passed in 1958 in reaction to the launch of the Sputnik satellite by the Soviet Union.[120] At that time, lawmakers encouraged Americans to educate themselves in scientific and technical fields. NDEA provided for improved elementary and secondary school teaching in science, mathematics, and foreign languages, as well as for funding of student loans for higher education.[121]

During the HEA debate, lawmakers supported a federal guarantee of student loans because they saw it as a way of leveraging federal money to harness private sector capital. Without a government guarantee of repayment, lenders might not extend credit to students and families, because such loans carried an unacceptable level of risk.[122] After all, students had no collateral, little or no income at the time of borrowing and only hope of earning an income in the future. In designing HEA's guaranteed loan program, lawmakers hammered out an agreement involving banks, state lending agencies, the Treasury De-

117. *See id.* at 22,665 (statement of Sen. Javits) ("Ninteen [sic] States already have active student loan insurance programs and three more have plans which will be operative shortly.").

118. The Treasury Department criticized this approach, because it would largely benefit better-off students with less financial need.

119. *See* 111 CONG. REC. 22,690 (1965) (statement of Sen. Miller). The proposal went nowhere. *Id.* at 22,691.

120. *See The Federal Role in Education*, *supra* note 103 ("The Cold War stimulated the first example of comprehensive Federal education legislation, when in 1958 Congress passed the National Defense Education Act . . . in response to the Soviet launch of Sputnik.").

121. *Id.*

122. In the years since the passage of HEA, lenders appear to have grown much more cavalier about extending credit. *See, e.g.*, David Streitfeld, *Tight Mortgage Rules Exclude Even Good Risks*, N.Y. TIMES, July 11, 2009, at A1 (describing "the lax lending standards of 2006, when buyers with no income or documentation could get loans").

partment, Bureau of the Budget, and the Department of Health, Education, and Welfare.[123]

In the guaranteed loan system, which lawmakers voted to shut down in 2010, lenders received a fixed rate of return, set by Congress, on federal student loans they made. Congress separately capped the interest rate borrowers paid on federal loans. If a borrower defaulted, lenders were reimbursed for nearly 100% of the outstanding loan balance by state or regional guarantee agencies—holdovers from the pre-HEA system. Those agencies were in turn reimbursed by the federal government.[124]

At the time of passage, lawmakers viewed this system of loan insurance as a win for everyone. According to Senator Winston Prouty, "[T]he loan insurance program bears the hallmark of the best type of Federal aid to education: it supplements, rather than supplants, efforts initiated by the States [sic] and private organizations."[125] Put another way, the program advanced both the goal of promoting access to higher education, with all the benefits for a growing democracy discussed in Part I, and the goal of advancing private enterprise, presumably with the benefits of creating jobs and wealth. Lawmakers perhaps did not foresee the potential conflict between the interest of both society and students in accessing education and the interest of private industry in profits.

In the years since HEA was passed, a few politicians questioned the need to provide an incentive for lenders to make student loans. Although guaranteeing federal loans might encourage lenders to deploy private capital for the public good of promoting higher education, the loans could also be made directly by the federal government.[126]

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123. 111 CONG. REC. 22,704 (1965) (statement of Sen. Morse).

124. Whose interests were best served by this structure, in which the federal government paid a private intermediary to make a loan that the government guaranteed, was fiercely debated for twenty years, with banks and other lenders contending they saved taxpayer funds and advocates of direct lending by the government dismissing that claim as impossible. For example, the budget presented by President George W. Bush in 2006 claimed that $100 in federal loans by a lender cost the government $13.81, while making the same loan through the direct loan program cost just $3.85. *See* Jonathan D. Glater & Karen W. Arenson, *Lenders Sought Edge Against U.S. in Student Loans*, N.Y. TIMES, Apr. 15, 2007, at A1. Student loan companies argued that the direct loan program was actually more expensive. *Id.*

125. 111 CONG. REC. 22,702 (1965) (statement of Sen. Prouty).

126. An early champion of this view was Senator Edward M. Kennedy, who helped design the direct loan program. Kelly Field, *Sen. Edward Kennedy, Longtime Champion of Higher Education, Dies at 77*, CHRON. OF HIGHER EDUC. (Aug. 26, 2009), http://chronicle.com/article/Sen-Edward-Kennedy-Longti/48175/.

One of the politicians who held this view was President Bill Clinton. Clinton supported direct lending, but not as an end in itself—that is, not simply out of concern that lenders might exploit students' neediness, rather than or in addition to helping more of them enroll and become productive citizens. Clinton wanted to make public service more affordable for a greater number of college graduates. The national service program he described on the campaign trail in 1992 included loan repayment assistance for college graduates who participated in public service. Under this program, low-income graduates would have an extended period over which to repay their student debts. They would also pay a fraction of their actual incomes, rather than a fixed amount based on their loan balance. This repayment scheme foreshadowed the income-based system discussed above.[127] This "pay-as-you-go"[128] scheme relied on the involvement of the Internal Revenue Service (IRS), the only entity that would know graduates' earnings and therefore be able to calculate how much, based on income, they should repay.[129] If the IRS were not to handle the process, private lenders would have to give students' financial and borrowing information to a third party. And "[i]f the government was going to switch to pay-as-you-can loans, then, it ma[de] sense to adopt simultaneously another radical reform: eliminating the entire student-aid industry and adopting 'direct lending,'" such that the government would itself extend loans to students.[130] Accordingly, in 1993, the Clinton administration pushed for legislation that would enable direct lending.[131]

All colleges and universities would be moved into a direct lending system, thereby eliminating a role for banks and other private lenders in federal student lending. These financial institutions have consistently opposed such a move,[132] arguing that service to students

127. *See supra* note 94 and accompanying text.

128. Steven Waldman, The Bill: How Legislation Really Becomes Law: A Case Study of the National Service Bill 31 (1996).

129. *Id.* at 53–55.

130. *Id.*

131. From a borrower's perspective, moving to direct lending would simply change the delivery channel for loan funds. For banks and other lenders, though, the move would be costly; for this reason, financial institutions fought the plan. Adam Clymer, *New U.S. Program of Student Loans Clears Key Panel*, N.Y. Times, June 11, 1993, at A1 ("[L]oan guarantee companies and secondary lenders like the Student Loan Marketing Association, or Sallie Mae, had mounted a stiff lobbying effort against the plan.").

132. Clifford Krauss, *Skeptics and Lobbyists Besiege Student Loan Plan*, N.Y. Times, June 2, 1993, at A14.

would suffer.[133] The administration lost the argument in Congress because lawmakers did not shut down the guaranteed program, although they did approve creation of the direct loan program and an income-contingent repayment option for borrowers.[134] Consequently, colleges and universities could choose whether to participate in the direct loan program or the guaranteed loan program.[135]

The parallel, competing lending programs were subjects of intense debate and fierce lobbying for years.[136] The battle over the channel through which federal loan money reached students foreclosed discussion of the larger question of how the federal aid system could best help students gain access to college. The lending industry did all it could to hobble the direct loan program, for example, by offering universities money to use the guaranteed loan program.[137] These and other lender tactics were possible because federal "oversight [was] so lax that the Education Department's assistant inspector general in 2003 called for tightened regulation of lender dealings with universities."[138] To compete with the federal direct loan program, lenders cut fees and offered interest rate rebates.[139]

When the Department of Education responded to private lenders' moves to undercut the direct loan program by lowering the program's interest rates and certain loan fees, the private lenders sued, using the law that had created federal aid programs as a weapon in a marketplace battle against the government. Lenders argued that the adminis-

133. For example, a Sallie Mae spokesman, Tom Joyce, more recently argued that "the private sector program has better prices, better product selection, better service and better technology." Glater & Arenson, *supra* note 124.

134. Instead, the legislation included a limit on how much of the student loan market the government could capture. Clymer, *supra* note 131 *see also A History of Direct Loans*, U.S. DEP'T OF EDUC., http://www.ifap.ed.gov/dlfsheets/doc0006_bodyoftext.htm ("The Student Loan Reform Act of 1993, a part of the Omnibus Budget Reconciliation Act of 1993, authorized that the program be implemented on a phased-in basis. Such a phase-in would be based on total guaranteed student loan volume: 5 percent in the first year, 1994–95; 40 percent in the second year, 1995–96; 50 percent in the third and fourth years, 1996–97 and 1997–98; and 60 percent in the fifth year, 1998–99.").

135. Students generally could not choose between the federal direct loan and guaranteed loan programs. Colleges and universities chose which program to use.

136. *See* Glater & Arenson, *supra* note 124, at A25.

137. *Id.* The article goes on to list cases in which lenders offered incentives to colleges and universities to leave the federal direct loan program.

138. *Id.*

139. The rates set by Congress were maximum rates. Lenders had the discretion to reduce them as a reward for on-time payments, for example.

tration lacked the authority to make such changes to loan terms without Congressional approval.[140]

Lenders' motives were clear. The companies that made student loans had grown powerful and hugely profitable. Their student loan operations generated safe, secure profits. The government entity created to lend to students, the Student Loan Marketing Corporation, became Sallie Mae, a for-profit, publicly traded corporation and the largest maker of student loans in the country. In 2007, the company reported a federal loan portfolio of more than $109 billion at year's end[141] and reported interest income of more than $6.3 billion.[142] Nelnet, another large loan company, reported holding $26 billion in loans in the same year, generating interest income of $1.6 billion.[143] Citigroup and other large financial institutions also have significant student loan operations.

Despite the dramatically increased generosity of financial aid programs at institutions of higher education, student indebtedness has continued to climb. Colleges with the means to do so have pursued a high-price, high-aid strategy, which allows them to offer more financial assistance to the poorest students while charging the wealthiest students the publicly stated tuition or "sticker price."

Critics have raised concerns about the implications of this pricing scheme.[144] Some argue that the system disfavors middle class fami-

140. *See* Glater & Arenson, *supra* note 124, at A25; *see also Government-Guaranteed Student Loan Lenders [sic] Lawsuit Threatens Millions in Savings for Direct Loan Borrowers*, U.S. DEP'T OF EDUC., http://www2.ed.gov/News/001215.html (last visited Oct. 4, 2010) (warning that the lawsuit threatened to undo "fee reduction and repayment incentives . . . [that] save students and parents money, are in the best interests of the taxpayer, and help prevent defaults").

141. SLM Corp., Annual Report (Form 10-K), at F-67 (Dec. 31, 2007), http://www.salliemae.com/NR/rdonlyres/98EB09F8-712E-41E5-B14B-B694791574F9/8874/200710KBOW49222BOW014_BITS_NFeb292009.pdf [hereinafter SLM Corp. 2007 Annual Report]. Circumstances have changed as the economy has deteriorated, but Sallie Mae remains a large and powerful company. As of Dec. 31, 2009, Sallie Mae held nearly $43 billion in federal loans. SLM Corp. 2009 Annual Report, *supra* note 10, at 37.

142. SLM Corp. 2007 Annual Report, *supra* note 141, at F-4, F-5.

143. Nelnet Corp., Annual Report (Form 10-K), at 6, F-3 (Dec. 31, 2008), http://www.nelnetinvestors.com/secfiling.cfm?filingID=1362310-08-1178.

144. *See, e.g.*, Jonathan D. Glater, *Harvard's Aid to Middle Class Pressures Rivals*, N.Y. TIMES, Dec. 29, 2007, at A1. Researchers of financial aid worried that "if Harvard's new aid program encouraged more middle- and upper-middle-income students to apply, then the number of slots for low-income applicants in an entering class would probably decline." One college president also worried that such a decline could result if colleges gave more aid to high-achieving but well-off applicants instead of poorer students. *Id.*

lies.[145] Others complain that it puts public colleges and universities, many of which face the same cost pressures associated with faculty recruitment, administration, and research funding as their private competitors, at a competitive disadvantage because they lack the resources to offer generous aid packages. So far, a politically feasible, new model for allocating the cost of college among students, educational institutions, and the government has not appeared.[146]

B. The Private Loan Alternative

Rising demand for higher education has coincided with decreasing public support for institutions of higher learning. While in absolute terms state support of public colleges and universities has not fallen steadily, financial support per student has declined.[147] As a result, more of the cost of higher education has landed on the shoulders of students and their parents, even as the price of higher education has risen. For decades, tuition has increased more quickly than the prices of other goods and services. At some private colleges and universities, the sum of tuition, fees, room, and board exceeds $50,000 per year.[148] For families of average means whose incomes have gone up less quickly,[149] the price of college is an ever-growing obstacle.[150]

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145. For example, Ronald G. Ehrenberg, director of the Cornell Higher Education Research Institute, warned that "[e]ventually, if we're going to keep raising tuition at rates much more than the increase in family incomes, then something has to be done to make the places more accessible to the middle class," because more aid will go to students on the basis of academic merit and to the poorest students. Jonathan D. Glater & Alan Finder, *In Tuition Game, Popularity Rises With Price*, N.Y. TIMES, Dec. 12, 2006, at A1.

146. Although in 2010 Congress approved the most dramatic overhaul of federal student aid programs in decades—eliminating the guaranteed loan program—that move neither compels colleges to change how they set tuition and allocate aid money, nor frees students from an ever-growing debt burden. *See* Herszenhorn & Lewin, *supra* note 15.

147. *See* TRENDS IN COLLEGE PRICING, *supra* note 39, at 18 figs.10a & b.

148. For example, annual tuition, fees, and room and board at Georgetown University cost up to $52,443 for a first-year undergraduate student in the 2010–11 academic year. That figure does not include travel costs, books, or other incidentals. *Board Approves Tuition Increases for 2010-2011: Funds for Undergraduate Financial Aid to Increase*, GEORGETOWN UNIV., http://explore.georgetown.edu/news/?ID=49130 (last visited Nov. 15, 2010).

149. Household income has increased steadily but more slowly, around one to two percent, adjusted for inflation; in 2007 and 2008, household income actually fell. *See* CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2008 29, http://www.census.gov/prod/2009pubs/p60-236.pdf; *see also* David Leonhardt, *A Decade with No Income Gains*, N.Y. TIMES (Sept. 10, 2009, 11:52 AM), http://economix.blogs.nytimes.com/2009/09/10/a-decade-with-no-income-gain/ (reporting that in 2008, "The typical

The government limits how much students can borrow through federal loan programs. Currently, a first-year undergraduate student can borrow up to $5,500 per year. A second-year student is limited to $6,500, and students who have completed at least two years of study can borrow up to $7,500 per year.[151] The aggregate total amount of borrowing possible for undergraduate students is $31,000.[152] These amounts do not cover the cost of attending many private institutions[153] or flagship public colleges and universities.[154] The need to fill the gap between federal loan amounts and the total cost of higher education has led to the meteoric growth of private lending.[155]

American household made less money last year than the typical household made a full decade ago.").

150. Median household income in 1980 was $42,429; in 2007, it had risen to $50,233, after taking inflation into account. *Table 674: Money Income of Households—Percent Distribution by Income Level, Race, and Hispanic Origin in Constant (2007) Dollars: 1980 to 2007*, U.S. CENSUS BUREAU, http://www.census.gov/compendia/statab/2010/tables/10s0674.pdf. That difference represents growth in income of 18.4%. In the same time period, average annual tuition and fees rose from $9,535 to $24,852 at nonprofit, private colleges and from $2,119 to $6,480 at public four-year colleges, representing increases of 160% and 206%, respectively. TRENDS IN COLLEGE PRICING, *supra* note 39, at 9, fig.4.

151. *Direct Stafford Loans*, *supra* note 39. The loan limits discussed are for dependent undergraduate students. For independent students, who are not claimed as dependents by their parents, the maximum available amounts are larger: $9,500 for first-year students, $10,500 for second-year students, and $12,500 for more senior students, up to a grand total of $57,500. *Id.*

152. *What You Should Know Before You Apply*, FUNDING EDUC. BEYOND HIGH SCHOOL, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/students/publications/student_guide/2009-2010/english/typesofFSA_loans_2.htm (last visited Nov. 10, 2010). Graduate and professional students can borrow up to $20,500 per year, up to a total of $138,500. *See Direct Stafford Loans*, *supra* note 39.

153. *See supra* note 148.

154. *See, e.g.*, *2010–11 Registration Fees*, UNIV. OF CAL. BERKELEY: OFFICE OF THE REGISTRAR, http://registrar.berkeley.edu/Registration/feesched.html (last visited Oct. 2, 2010). The Berkeley campus for the 2010–11 academic year charges $6,230.75 per semester to resident undergraduate students. This figure does not include living expenses or the cost of books, travel, and other expenses. Eight semesters at that price would cost more than the maximum amount available to a dependent undergraduate through the federal Stafford loan program.

155. Private loan volume grew nearly sevenfold between the 1998–99 academic year and the 2007–08 academic year, rising from $3.3 billion to $22.3 billion; it fell in 2008–09 to $11 billion. TRENDS IN STUDENT AID 2009, *supra* note 2, at 6. The more recent decline followed the credit crunch of 2008, which had severe effects on many student loan providers. The gap between federal loan amounts available and the cost of higher education has also led to increased use of federal PLUS loans taken out by parents of undergraduate students (and by graduate and professional students on their own). These loans have fixed interest rates, like other federal loans, but the rate is higher than that on the popular Stafford loan that undergraduates can use without parental help. There are other disadvantages to the PLUS loan. *See supra* note 95 and accompanying text; *see also infra* note 229 and accompanying text (describing increasing use of PLUS loans).

Companies that make private loans have benefitted historically from favorable treatment of education debts by the Bankruptcy Code[156] and the absence of federal oversight. Essentially, lenders make unsecured consumer loans on terms that are not easily monitored, and borrowers cannot easily void the obligations through personal bankruptcy. The following discussion summarizes the risks of private loan borrowing, the bad incentives that result from loan companies' operation in a regulatory blind spot, and the problems created by the difficulty of canceling debt in bankruptcy proceedings. Given these issues, and the fact that private loans are not eligible for federal forgiveness or flexible repayment programs, reliance on private debt means that more borrowers find themselves unable to pursue their career ambitions, especially in the area of public service.

1. Rates and Terms

There are three general problems for student borrowers using private loans. It is difficult to ascertain loan terms ahead of time in order to engage in comparison shopping, those terms are typically worse and repayment options less flexible than those offered by federal aid programs, and it may be too easy for students to borrow more than they need.

While the terms of federal loans are standardized and relatively straightforward, the terms of individual private loans—which the Department of Education does not oversee[157]—can be as diverse as those of home loans. When New York attorney general Andrew Cuomo spoke to members of Congress about private loans, he described them as the "Wild West" of student lending because there are few rules and few monitors to enforce them.[158]

The terms of private student loans are almost always worse for students than those of federal loans. The interest rates on such loans are not fixed; they fluctuate over the life of the loan, changing stu-

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156. In 2010, Congress took up a proposal to change the special status of private student loans in bankruptcy proceedings. *See infra* note 240 and accompanying text.

157. *Accountability for the Department of Education's Oversight of Student Loans and the Reading First Program: Hearing Before the H. Comm. on Educ. and Labor*, 110th Cong. (2007) (statement of Margaret M. Spellings, Sec'y of Educ. of the United States), *available at* http://edlabor.house.gov/hearings/2007/05/accountability-for-the-departm.shtml [hereinafter *Margaret Spellings Testimony*].

158. *Paying for College: The Role of Private Student Lending: Hearing Before the S. Comm. on Banking, Hous,. & Urban Affairs*, 110th Cong. 3 (2007) (statement of Andrew M. Cuomo, Att'y Gen. of the State of New York), *available at* http://banking.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=9196c024-c06d-424a-a3f3-e2d456133fa1.

dents' repayment obligations. A student has a hard time determining the terms of private loans in advance because lenders base loan terms on the individual applicant's credit history. As a result, would-be borrowers must complete a loan application process in order to learn the rate and other terms that a lender would offer. To engage in comparison shopping, borrowers must apply to several lenders. Each lender typically runs a credit check on the applicant, and the series of inquiries may hurt the applicant's credit rating, which in turn often leads to less favorable loan terms.[159]

When they complete their educational program, either graduating or dropping out, borrowers entering repayment may find loan companies inflexible. Whether a lender will adjust the repayment terms of a private loan to accommodate a borrower experiencing financial difficulty depends on the largesse of that lender. Federal loan repayment assistance, state incentives, and most colleges' forgiveness programs do not cover private loans. The loans are ineligible for the government's extended and/or income-based repayment.

Finally, companies that make private loans are by definition not covered by caps on total borrowing imposed by federal programs, which permit students to borrow no more than the total "cost of attendance," a term that refers not only to tuition, room, and board but also includes an allowance for travel, books, and other expenses. Limits on private loan borrowing are generally at the discretion of lenders. For the reasons discussed below, lenders may have little incentive to help students avoid excessive debt.[160]

2. *What, Me Worry?*

Many private lenders do not keep the student loans they have made on their own balance sheets. To raise money for more loans, they sell student debt in packages to investors or to other, larger lenders. Because they do not hold onto the obligations, smaller lenders have little incentive to evaluate carefully borrowers' ability to repay.

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159. Ron Lieber, *Danger Lurks When Shopping for Student Loans*, N.Y. TIMES, July 26, 2008, at C1.

160. Although I have raised a number of concerns about use of private student loans, I acknowledge that some borrowers have good reasons for using this form of credit to pay for higher education. Parents may for some reason refuse to fill out the forms necessary to apply for federal loans, for example. In addition, though I have summarized the characteristics of private loans relative to federal loans here, it is also the case that borrowers have both good and bad experiences with lenders of any type, making loans of any type. Some students have certainly complained about the treatment their federal loans have received. *See Testimonials*, STUDENT LOAN JUSTICE, http://www.studentloanjustice.org/victims.htm (last visited Oct. 6, 2010).

While larger lenders are more likely to hold onto loans they have made or purchased, they also operate other businesses that reduce the impact of borrower default and that, as a result, reduce the incentive to verify borrowers' ability to repay. Some loan companies earn money from offering default aversion services, intended to keep borrowers on track to pay off their debts, while others operate collections businesses that pursue students who default.[161] Through these ancillary businesses, lenders can make money off of loans that become delinquent and go into default, as they charge fees and impose penalties for attempting to restructure borrowers' debts or trying to track them down and compel payment.

3. *What, Me Worry? Part Two*

Companies that make private student loans benefit from the special status given to education debt under the federal Bankruptcy Code.[162] Lenders have little incentive to limit the size of students' loans because borrowers cannot easily avoid repayment obligations.[163]

For indebted students who have graduated or otherwise left school, bankruptcy may not afford the "fresh start" it is intended to

161. Many large lenders perform collections and other services. SLM Corp., for example, "earn[s] fee income from a number of services including student loan and guarantee servicing, loan default aversion and defaulted loan collections." SLM Corp. 2009 Annual Report, *supra* note 10, at 2. Nelnet, another large student loan company, "provid[es] software and data center services, borrower and loan updates, default aversion tracking services, claim processing services, and post-default collection services to guaranty agencies." Nelnet Inc., Annual Report (Form 10-K), at 5 (Dec. 31, 2009), *available at* http://www.nelnetinvestors.com/secfiling.cfm?filingID=1437749-10-526.

162. *See* 11 U.S.C. § 523(a)(8) (2006), which prohibits a debtor from discharging a debt:

> [U]nless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for—
>
> (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or
>
> (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or
>
> (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual . . . .

163. The Supreme Court recently ruled in favor of a borrower who attempted to restructure his student loan debts through bankruptcy. However, the Court did not address the thorny question of what constitutes undue hardship. The Court based its decision on procedural steps taken in the case. *See* United Student Aid Funds, Inc. v. Espinosa, 130 S. Ct. 1367, 1378, 1380–81 (2010).

provide most debtors.[164] Borrowers cannot obtain a discharge, or cancellation, of their obligation to repay their student loans[165] without showing that repayment would constitute an "undue hardship."[166]

The Bankruptcy Code does not define what level of hardship is undue. However, the Second Circuit has established a three-part test, adopted in several jurisdictions,[167] which debtors must meet to demonstrate undue hardship. The test requires that a debtor show:

> [T]hat the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the 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 the debtor has made good faith efforts to repay the loans.[168]

In practice, these factors do not provide clear guidance to judges or information to debtors. According to research by Rafael I. Pardo and Michelle R. Lacey, different judges interpret "minimal" differently, make different assessments of a debtor's future earning potential, and draw different conclusions about what constitutes a good faith effort to repay.[169] Because the outcomes of proceedings are affected by extra-legal factors, such as the identity of the judge, Pardo and Lacey suggest that borrowers cannot predict the outcome of litigation on the question of dischargeability of their loans.[170] Pardo and Lacey

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164. *See, e.g.*, Thomas H. Jackson, *The Fresh Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1394 (1985) (analyzing reasons for permitting the cancellation of debt through bankruptcy proceedings).

165. The Bankruptcy Code does not distinguish between federal and private student loans. While a public policy argument exists for disallowing discharge of federal student loans subsidized by taxpayers, the rationale for prohibiting discharge of private loans benefitting banks and other lenders is less clear.

166. *See* 11 U.S.C. § 523(a)(8).

167. Nine circuit courts of appeal have adopted the Second Circuit's test. *See In re* Nash, 446 F.3d 188, 190 (1st Cir. 2006) (summarizing the different views among appellate courts). The First and Eighth Circuits have not. *Id.*; *see also* Bronsdon v. Educ. Credit Mgmt. Corp., 435 B.R. 791, 800–01 (B.A.P. 1st Cir. Sept. 21, 2010) (declining to adopt the Second Circuit's test).

168. Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987) (per curiam); *see also* Pardo & Lacey, *supra* note 3, at 195.

169. Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 520 (2005) (raising the concern that "a judge, in making the determination of whether to discharge educational debt, will invariably impose his or her personal views on the proper role of bankruptcy, on the proper role of the fresh start, and on the type of debtor who is worthy of relief embodied in the Bankruptcy Code").

170. Pardo & Lacey, *supra* note 3, at 190. ("By signaling that undue hardship discharge litigation is a crapshoot, the doctrine produces noise rather than clarity.").

speculate that debtors may too readily go to trial to contest payment obligations, needlessly incurring litigation costs. "These are the hallmarks of a system that has run amok," the authors conclude.[171]

The combination of litigation costs and the uncertainty of outcomes may deter borrowers from trying to get rid of their loan obligations, even when they have legitimate reasons to seek discharge. Rising student debt burdens generally, and private debts in particular, mean more people are likely to find themselves in untenable financial situations with uncertain prospects of relief, even through the painful process of bankruptcy.

C. The Student Loan Scandals of 2007

The tension between the interest of loan companies in making money and the goal of federal aid in promoting access to higher education became visible as a result of a series of scandals involving student loans early in 2007.[172] *The New York Times* published an article detailing benefits that student loan providers offered to colleges' financial aid offices and administrators.[173] The article stated that lenders' gifts of travel, monetary donations for scholarships, and other benefits were offered in "hopes that [the colleges would] steer students their way."[174] The article highlighted the critical role financial aid officers played in directing students to particular lenders. Many colleges recommended "preferred lenders,"[175] or loan companies and banks from which students attending the colleges could borrow. The benefits offered to aid administrators raised the question of whether students were being directed by colleges to borrow from particular lenders based not on the terms of loans, but on the quality of the gifts

171. *Id.* at 235.

172. *See, e.g.*, Larry Abramson, *College Loan Scandal May Touch Many Schools* (Nat'l Pub. Radio broadcast Apr. 10, 2007), http://www.npr.org/templates/story/story.php?storyId=9501428; Kelly Field, *The Selling of Student Loans*, CHRON. OF HIGHER EDUC., June 1, 2007, at A15; Jonathan D. Glater, *Offering Perks, Lenders Court Colleges' Favor*, N.Y. TIMES, Oct. 26, 2006, at A1; Daniel Golden & David Armstrong, *Lenders Ply Aid Officials at Schools with Free Stuff*, WALL ST. J., Apr. 17, 2007, at B1; Lisa Myers, *NBC Nightly News: Student Financial Aid Scandal Grows* (NBC television May 10, 2007, 7:33 PM), http://www.msnbc.msn.com/id/18598574/; Amit R. Paley, *Federal Overseer of Student Loans Invested in Lender*, WASH. POST, Apr. 21, 2007, at D1; Paul Pringle, *Probe into Student Lending Spotlights Dual Role of U.S.*, L.A. TIMES, Apr. 24, 2007, at B1.

173. Glater, *supra* note 172.

174. *Id.* Gifts offered to colleges and financial aid officials included a Caribbean vacation, iPods awarded through raffles at conferences, and monetary bonuses to colleges based on loan volume. *Id.*

175. *Id.*

loan companies provided.[176] One financial aid administrator, L. Katharine Harrington of the University of Southern California, observed, "I don't think you have to be a bona fide ethicist to recognize the potential for a conflict of interest."[177]

Although HEA prohibited loan companies from offering "inducements" to colleges as a lure for federal loan borrowers, the prohibition was not often enforced.[178] For two decades prior to 2007, the Department of Education only twice used its power to punish lenders for offering improper inducements.[179] Moreover, the prohibition did not apply to private loans.

Financial aid officials at institutions that had arrangements with lenders insisted that they had negotiated more favorable private[180] loan terms for borrowers.[181] According to the officials, those better loan terms, not the gifts or other benefits provided by lenders, explained which companies were included on lists of preferred lenders. Unfortunately, it would be very difficult to verify the officials' claims. The terms of private loans are indirectly available only through public company regulatory filings that reveal aggregate, average interest rates on portfolios of loans.[182]

In the weeks after the article ran, investigators in the New York attorney general's office looked into the practices of loan companies

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176. *See id*. A new entrant in the student loan industry, MyRichUncle, had run a series of advertisements earlier in the year, challenging the objectivity and the motives of financial aid offices. The ads suggested that students put a series of questions to financial aid administrators, to ascertain whether their recommendations were unbiased. *See id.*

177. *See id.*

178. A 1986 amendment to HEA barred lenders from offering "points, premiums, payments or other inducements," in order to lure applicants for guaranteed loans. *See* 20 U.S.C. § 1085(d)(5)(A) (2006). However, an investigation by the Government Accountability Office in 2007 found that the Department of Education "has no oversight tools in place designed to proactively detect potential instances of lenders providing improper inducements," such as gifts to schools in exchange for preferred status on a school's suggested lender list, "or schools limiting borrower choice of lender." U. S. GOV'T ACCOUNTABILITY OFFICE, GAO-07-750, FEDERAL FAMILY EDUCATION LOAN PROGRAM: INCREASED DEPARTMENT OF EDUCATION OVERSIGHT OF LENDER AND SCHOOL ACTIVITIES NEEDED TO HELP ENSURE PROGRAM COMPLIANCE 2 (2007), http://www.gao.gov/new.items/d07750.pdf [hereinafter GAO-07-750].

179. GAO-07-750, *supra* note 178.

180. Lenders usually did not offer federal loan terms that differed from the maximum levels set by Congress, although they could have offered lower rates.

181. Glater, *supra* note 172.

182. For example, in filings with the Securities and Exchange Commission, Sallie Mae disclosed that the overall net interest earned on its private loans was 6.8% in 2009, down from nearly 12% two years earlier. Of course some students are paying much more and some are paying less. SLM Corp. 2009 Annual Report, *supra* note 10, at 55, F-32.

and into ties between lenders and college officials.[183] When Attorney General Eliot Spitzer became governor, Andrew Cuomo, his successor, seized on the issue.[184] Investigations by journalists and state attorneys general uncovered a variety of suspect relationships between loan providers and financial aid offices.[185]

Some colleges and lenders had "revenue sharing" agreements, under which the lender paid the college more money as students at that college borrowed more.[186] The colleges could then use that money as they saw fit, perhaps to extend more financial aid to needy students or to international students unable to participate in federal loan programs. Most likely because most students rely on financial aid offices for information about loan products and for advice in choosing a lender[187] instead of shopping around for the best deal on their own, the arrangements targeted the college officials. For lenders, the rewards could be significant: lenders whom college aid officials recommend can capture ninety percent of loan volume at an institution.[188]

A few financial aid officials held stock in loan companies whose services they were in a position to recommend to student borrowers.[189] Some accepted trinkets and junkets offered by lenders; some served on lenders' "advisory committees,"[190] which met in desirable locales. For example, the director of financial aid at Lasell College in Newton, Mass., was accused of taking "trips to Disney's Yacht and Beach Club Resort in Florida and Sanctuary on Camelback Mountain in Arizona through her involvement with Citizens[ ] [Bank's] 'Educational Finance Advisory Board.'"[191]

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183. Kathy Chu, *Cuomo Makes a Name for Himself in Replacing Spitzer*, USA TODAY, Apr. 24, 2007, at B3.

184. Glater, *supra* note 11.

185. *Examining Unethical Practices in the Student Loan Industry: Hearing before the H. Comm. on Educ. and Labor*, 110th Cong. 26 (2007) (statement of Andrew M. Cuomo, Att'y General of New York) [hereinafter *Cuomo House Testimony*], *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_house_hearings&docid=f:34603.pdf, at 8.

186. *Id.* at 4.

187. Glater, *supra* note 11, at B6 ("[S]tudents rarely shop around and tend to rely on guidance from a university's financial aid office.").

188. *Cuomo House Testimony*, *supra* note 185, at 8.

189. *Id.* at 5; *see also* Jonathan D. Glater, *U. of Texas Fires Officer over Tie to Loan Company*, N.Y. TIMES, May 15, 2007, at A13 (describing the decision of the University of Texas to fire a financial aid official who held stock in the parent company of a student loan provider).

190. *Cuomo House Testimony*, *supra* note 185 at 8.

191. Todd Wallack, *Lasell College Agrees to Settle Lender Gift Allegations*, BOSTON GLOBE, Sept. 3, 2010, at B5.

Some lenders also provided services on campus to facilitate the making of loans. They paid printing costs for financial aid offices, for example.[192] Employees of loan companies worked in college financial aid offices to help college administrators process applications from student borrowers.[193] Lenders even operated call centers on behalf of college aid offices; call center employees taking student borrowers' calls did not disclose that they were not affiliated with the college.[194] In each instance, investigators concluded, lenders sought to encourage college officials to steer student borrowers to specific loan companies.

In the most striking development, investigators revealed that a Department of Education official who was responsible for oversight of lenders participating in the federal loan program had held stock in one such lender.[195] According to Cuomo, the Department of Education was "asleep at the switch."[196]

D. The Legislative Response

The swirl of publicity[197] around the student lending industry prompted several investigations. Congress held hearings and eventually passed legislation aimed at curbing lending industry practices. Such legislation would have been unthinkable in prior years, not just because of the lack of attention to the industry, but also because of the readiness of its biggest players to wage war through lobbying and litigation.[198]

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192. *Cuomo House Testimony*, *supra* note 185, at 8.

193. *Id.* at 12.

194. *Id.* at 8; *see also* Jonathan D. Glater, *Colleges Hiring Lenders to Field Queries on Aid*, N.Y. TIMES, Mar. 29, 2007, at A1 (reporting that operators working at call centers run by loan companies did not disclose their affiliation).

195. The penalty imposed on this official was suspension with pay. Jonathan D. Glater & Karen W. Arenson, *Federal Official Put on Leave in Student Loan Scandal*, N.Y. TIMES, Apr. 7, 2007, at A10; Jonathan D. Glater & Karen W. Arenson, *U.S. Official Had Disclosed His Holdings*, N.Y. TIMES, Apr. 13, 2007, at A13.

196. *See Cuomo House Testimony*, *supra* note 185, at 10.

197. While *The New York Times* was first, several other major news organizations jumped on different pieces of the scandals involving the student loan industry. *See, e.g.*, Abramson, *supra* note 172; Field, *supra* note 172; Golden & Armstrong, *supra* note 172; Myers, *supra* note 172; Paley, *supra* note 172; Pringle, *supra* note 172.

198. *See* Glater & Arenson, *supra* note 124, at A25 (regarding lender efforts to hobble the direct loan program); *see also* Waldman, *supra* note 128, at 133–37 (discussing the lending industry's efforts to prevent the creation of the direct loan program in the first place); *accord supra* note 140 and accompanying text (describing lenders' tactics in competition with the federal direct loan program).

Reform[199] came through the Higher Education Opportunity Act of 2008 (HEOA), which reauthorized the HEA.[200] HEOA incorporated provisions championed by Representative George Miller, a California Democrat, and Senator Edward M. Kennedy, a Massachusetts Democrat. Both had been critical of student loan industry conduct in the past but had not had the votes to move legislation addressing the problems they had identified. After the 2006 election cycle, however, Representative Miller became chairman of the Committee on Education and Labor, while Senator Kennedy—an advocate of greater access to higher education for decades—became chairman of the Health, Education, Labor, and Pensions Committee. The election results gave them the leadership and votes; the scandals gave them the justification to take on student loan companies.

In HEOA, lawmakers imposed restrictions on lenders and, in some cases, colleges, to rein in exploitation of students and to restrain tuition increases. Although the legislation imposed a variety of disclosure requirements on colleges and lenders and modestly raised grant aid available to the neediest students, it did not raise maximum loan amounts significantly. The legislation consisted of a series of relatively narrow, precise responses to abuses uncovered by the recent investigations into the conduct of the student loan industry.

The law required that colleges disclose their reasons for designating certain loan companies as "preferred" federal loan providers for students and issue a statement that students could borrow from other loan providers.[201] It ordered companies making federal loans to provide "thorough and accurate loan information on such loan[s] to the borrower in simple and understandable terms," advising borrowers about loan terms and various available repayment plans, about their right to change repayment plans, about avoiding default, and about sources of loan repayment assistance.[202] The bill barred lenders from using institutions' names, emblems, logos, or mascots in marketing materials. It also prevented lenders from using their access to the Na-

199. Congress also passed CCRA as the financial aid scandals were discovered, but the legislation focused on increasing grants to the neediest students, reducing interest rates on certain need-based federal loans, and expanding an income-based repayment program and public service loan repayment assistance program for graduates. College Cost Reduction and Access Act, Pub. L. No. 110-84, § 102, 121 Stat. 784 (2007) (increasing Pell grants), § 201 (reducing federal loan interest rates), and § 203, 121 Stat. 792 (describing income-based repayment).

200. Higher Education Opportunity Act, Pub. L. No. 110-315, § 120, 122 Stat. 3078, 3117–3126 (2008) (governing relationships between lenders and educational institutions).

201. *Id.* § 120.

202. *Id.* § 434(a).

tional Student Loan Data System, a Department of Education database that contained detailed information on borrowers and their finances, as a tool to identify potential borrowers.

The legislation also made it easier for parents who fell behind on home loan payments to qualify for a parental PLUS loan for a dependent student, a move that responded to the wave of foreclosures that spread across the country as the credit crisis of 2008 worsened.[203] In an attempt to curtail college tuition increases, HEOA required that the Department of Education annually publish lists of institutions that charged the highest tuition and fees, raised tuition and fees the most, and charged the highest net tuition (i.e., tuition and fees, less average financial aid awards).[204] The law prohibited the business practices involving private student loans, expressly barring lenders from providing gifts to colleges, paying them bonuses, or sharing revenue with them.[205]

The legislation also addressed disclosure concerns involving private student loans by amending the federal Truth in Lending Act[206] to impose a series of requirements on companies making such loans. HEOA required disclosure of the following basic information to borrowers:

> (A) [T]he potential range of rates of interest applicable to the private education loan;
> (B) whether the rate of interest applicable to the private education loan is fixed or variable;
> (C) limitations on interest rate adjustments, both in terms of frequency and amount, or the lack thereof, if applicable . . .
> (E) potential finance charges, late fees, penalties, and adjustments to principal, based on defaults or late payments of the borrower;
> (F) fees or range of fees applicable to the private education loan.[207]

Unfortunately, these disclosures are inadequate. The law does not require lenders to report the size or terms of their private loans to financial aid administrators or the Department of Education. Without that information, it is very difficult for officials to track total student

203. *Id.* § 424.
204. *Id.* § 111.
205. *Id.* § 493.
206. 15 U.S.C. § 1601 *et seq.* (1968). The private loan term disclosure requirements were codified at 15 U.S.C. § 1638(e).
207. Higher Education Opportunity Act, Pub. L. No. 110-315, § 1021(a), 122 Stat. 3078, 3126 (2008). The law also subjects lenders to civil liability for failure to provide required disclosures. *Id.* § 1012.

borrowing and ensure that lending terms are fair.[208] Without information about the characteristics of those applicants who get specific rates, disclosure of a range of interest rates that a borrower might face is of little use.[209] As it stands, only after a student has applied for a private loan does a lender inform the potential borrower of the rate that the lender intends to impose.[210]

Students should know what their peers are being charged for comparable loans, as should aid administrators. While students may not pay attention to loan terms until they begin repayment years after signing master promissory notes to cover their college costs, financial aid administrators should. Aid officials understand the implications of different interest rates in a manner that student borrowers, who may have little experience with credit, may not. If aid officials can learn private loan terms, they will be able to advise students on the consequences of different types of borrowing and help them design a fiscally responsible budget. Finally, the Department of Education should have the ability to monitor rates and fees imposed.[211]

At a minimum, lenders should be required to disclose the average interest rate charged to each quartile of borrowers, so that prospective borrowers can see, for example, that one-fourth of borrowers face a rate of ten percent, one-fourth a rate of twelve percent, and so on. The disclosure should also include the average credit score for each quar-

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208. It can be a serious problem for students if financial aid administrators learn of private loans after the funds have been disbursed. Colleges are required to reduce the amount of financial aid they provide—whether through grants, federal loan programs or other sources—if the total amount of borrowing by students exceeds the cost of attendance. Instead of putting on lenders the duty of reporting private loan borrowing by students, the law requires lenders to obtain a "form developed by the Secretary of Education . . . signed by the applicant." Higher Education Opportunity Act § 1021, 122 Stat. 3078, 3485 (adding § 128(e) to § 1638(e) of the Truth in Lending Act). Separately, HEOA provides that a "private educational lender . . . has no liability under this section for failure to comply with section 128(e)(3))." *Id.* § 1012(a)(3)(j), 122 Stat. 3078, 3482. So there remains neither a requirement that lenders report students' private borrowing to financial aid offices and no penalty directed at a lender for failure to ensure that a college is informed of all that a student borrows.

209. Rates charged by some lenders on private student loans exceed fifteen percent. Jonathan D. Glater, *New York Art College Canceled Deal with Lender After Learning of High Interest Rates*, N.Y. TIMES, May 1, 2007, at A17.

210. HEOA imposes a number of disclosure requirements on lenders. The law requires, for example, that lenders disclose "expenses paid or provided" to college officials. Higher Education Opportunity Act § 120, 122 Stat. 3078, 3121. However, these disclosure requirements apply only to "any loan made, insured, or guaranteed under part B of title IV," thus specifically excluding private loans. *Id.*

211. In all of the investigations of the student loan industry in 2007, it never became clear which regulatory agency, if any, tracked the rates charged to student borrowers on private loans.

tile. This approach preserves student privacy while also enabling financial aid administrators to evaluate how well lenders are serving their students.

Additional disclosures, however, would not solve all the problems confronting students paying for higher education. Unfortunately, in its legislative response to the student loan scandals, Congress passed up an opportunity to tackle the more fundamental challenge of keeping higher education within reach. The legislation only requires the Department of Education to make public the names of colleges that raise tuition the most.[212] No individual college or university has an incentive to reduce tuition because steps to lower costs, such as cutting back on campus amenities, hurt an institution's standing relative to its competitors.[213]

Lawmakers again failed to address the broader problem of college costs when the financial crisis of 2008 forced them to revisit student loans. Instead, Congress acted to prop up[214] the student aid system, which was reeling as a result of investor fears about the quality of securities backed by student loans. While securities linked to mortgage debts received the most attention—and indeed, U.S. outstanding mortgage debts dwarf student loan balances—the crunch seriously affected student loan providers.[215] Unable to sell either guaranteed or private loans to investors, some lenders simply stopped making loans.[216] Concerned that students might not be able to borrow for school, Congress acted.

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212. Higher Education Opportunity Act § 111 (amending Part C of title I of 20 U.S.C. § 1015 to add § 132(c), requiring the education secretary to compile "college affordability and transparency lists").

213. Colin Diver, the president of Reed College, said no college wanted to be first to cut the "country club" aspects of college life. "'If we're going to change our ways, we're really going to need to be pushed,' Mr. Diver said, referring to colleges generally. 'It's not going to well up from within.'" *See* Jonathan D. Glater, *College in Need Closes a Door to Needy Students*, N.Y. TIMES, June 9, 2009, at A1.

214. "The Education Department agreed in the waning days of the Bush administration to expand its commitment to buy student loans to keep the market working, much as the government has agreed to buy up all manner of loans, from mortgages to commercial paper, to unfreeze various credit markets." Jonathan D. Glater, *Big U.S. Role in Lending to Students*, N.Y. TIMES, Feb. 26, 2009, at B1.

215. Jonathan D. Glater, *A Lender Halts U.S.-Backed Student Loans*, N.Y. TIMES, Feb. 28, 2008, at C1 (describing how "tight credit markets are affecting the industry, with some lenders warning that it could be more difficult and more costly for many students to obtain college loans for the 2008–9 academic year").

216. *Id.*; *see also* Mark Kantrowitz, *Lender Layoffs and Loan Program Suspensions*, FINAID.ORG, http://www.finaid.org/loans/lenderlayoffs.phtml (last visited Oct. 6, 2010) (listing loan companies that suspended making loans since August 2007, in some cases as a result of the financial crisis).

Under the Ensuring Continued Access to Student Loans Act of 2008[217] Congress authorized the federal Department of Education to support the industry by taking a variety of steps, including purchasing guaranteed loans from lenders to give them the capital to make new loans.[218] The law, which raised maximum federal loan amounts to their current levels,[219] also empowered the Department of Education to advance money to guaranty agencies[220] so that, if necessary, they could make federal loans as lenders of last resort.[221] In another bill passed a few months later, Congress extended the department's authority to aid the lending industry, allowing the government to buy guaranteed loans from loan companies through the 2009-10 academic year.

In March 2010, Congress attached sweeping changes to federal student loan programs to health care legislation. Lawmakers voted to end the guaranteed loan program, redirecting all federal loan borrowers to the direct loan program.[222] The vote ended "one of the fiercest lobbying fights in Washington."[223] Some of the savings[224] the bill would generate would contribute to funds for slightly larger grants to the neediest students. The maximum Pell grant was set to rise to $5,900 in the 2019–20 academic year from $5,550 in the 2010–11 academic year.[225] Yet this increase is "minuscule, compared with the steep, inexorable rise in tuition for public and private colleges alike."[226]

The elimination of the guaranteed loan program does not solve the fundamental problem of cost for students and families, who likely care less about the source of loans and more about the amount they can borrow and the terms of repayment. The political battles over the channel through which loan funds travel, either directly from the gov-

217. Ensuring Continued Access to Student Loans Act, Pub. L. No. 110-227, 122 Stat. 740 (2008).
218. *Id*. § 7, 122 Stat. 740, 746.
219. *Id*. § 2, 122 Stat. 740, 740-742.
220. Guaranty agencies are the intermediate entities, between lenders and the federal government, that essentially insure lenders against defaulted loans. *See supra* note 124 and accompanying text.
221. Ensuring Continued Access to Student Loans Act § 6.
222. Herszenhorn & Lewin, *supra* note 15, at A1.
223. *Id.*
224. Cost savings were realized by getting rid of the subsidy payment—really, the guaranteed rate of return on federal loans—to lenders. The subsidy had been an incentive to get lenders to make student loans in the first place. *See supra* note 124 and accompanying text (describing Congress's retention of the power to set interest rates charged to borrowers and paid to lenders under the guaranteed loan program).
225. Herszenhorn & Lewin, *supra* note 15, at A1.
226. *Id.*

ernment or through private corporate intermediaries, have precluded serious discussion about how best to revise federal aid programs.

After the onset of the financial crisis of 2008, it became more difficult and costly for students and their families to use private loans to pay for college because lenders making the loans adopted tighter credit standards. According to estimates by the College Board, because students have not had easy access to private loans,[227] the volume of private loans made in the 2008–09 academic year declined for the first time in more than a decade to $11 billion—less than half of the volume in 2007–08.[228]

For those concerned about the dangers private loans pose to borrowers, the decline is good news. But the drop does not mean that overall indebtedness is falling. It may indicate that fewer students from less affluent backgrounds are enrolling in college.

The decline in private loan borrowing paralleled a slight increase in use of PLUS loans, available both to graduate students and to parents of undergraduate students.[229] The increase is not nearly enough to offset the decline in private borrowing. Nevertheless, more students and parents may be turning to PLUS loans, which were already gaining in popularity, because they cannot get a private loan. PLUS loans carry a fixed interest rate and, like other federal loans and unlike private loans, offer some flexibility in repayment terms. However, undergraduate parent PLUS loans are not eligible for the income-based repayment plans available for other types of federal loans.[230] While PLUS loans help fill the gap between the full cost of attending college and what students can borrow on their own, PLUS loans do not pull college graduates out from under a debt overhang. Instead, the loans push students' parents under it, too.

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227. TRENDS IN STUDENT AID 2009, *supra* note 2, at 6 (observing that one reason federal loan borrowing "is growing [is] as a result of difficulties in private credit markets"). Private loan volume fell further in the 2009–10 academic year, to $7.7 billion. TRENDS IN STUDENT AID 2010, *supra* note 40, at 10 tbl.1.

228. *Id.*

229. *Id*. PLUS loan volume rose in 2008–09 to $11.8 billion from $11.1 billion the previous year. Clearly the increase does not make up for all of the decline in private lending. Total federal loan volume rose to $85 billion in the 2008–09 academic year from $71 billion a year earlier.

230. *Income-Based Repayment Plan*, U.S. DEP'T OF EDUC., http://studentaid.ed.gov/PORTALSWebApp/students/english/IBRPlan.jsp (last visited Nov. 10, 2010).

III. NOT ALL DEBTS ARE EQUAL

Barring loan companies from offering inducements to financial aid administrators repeated and made more specific a prohibition that had already been ignored.[231] It did not eliminate the *incentive* for private lenders to develop tactics to build their student lending businesses.[232] Nor did it reduce graduates' indebtedness.

Broader change is needed. The laws governing student lending should be changed. Congress should pass legislation enabling most college students who need to borrow to be able to pay by drawing only on federal student aid programs. This would mean tripling the maximum amounts available to an undergraduate, raising the total available to each student to nearly $100,000. Even in the absence of other grant aid, that amount of money would permit students to use federal loans exclusively to pay the full cost of attending a public flagship university, or at least half the current cost of even the most expensive private institution, which would have more financial aid resources available than public universities to help with the balance.

Many students would continue to receive grant aid from institutions they attend and from state and/or federal aid programs, so hopefully most borrowers would not need to use all of the available federal loan money to pay for college. Far fewer students would need to draw on private loans, and permitting students to borrow more through federal programs would address the problems caused by debt discussed in Part I.

This part has two sections. The first outlines the benefits of allowing students to borrow larger amounts through federal loan programs and explains how expanded programs can both restore the democracy-enhancing effects of higher education and mitigate the pernicious effects of debt. The second section identifies and responds to possible objections to raising maximum loan amounts.

A. *Borrowing More Can Be Good*

Increasing the amount of money students may borrow through federal loan programs so that students can use the loans to pay tuition, regardless of the type of college attended,[233] would increase access to

231. *See supra* note 178 and accompanying text.

232. The Department of Education under the Bush Administration stated that it did not have authority to regulate private loans. *Margaret Spellings Testimony*, *supra* note 157.

233. This argument reflects the view that, ideally, a student should be able to choose a college without cost playing a deciding role. Some might disagree with this view

safer loan products for more students. Given existing loan repayment assistance programs, such an initiative would also make it easier for borrowers to choose the careers they most strongly wish to pursue, especially in public service.

1. Learning to Love Debt

Making federal loans more palatable to those averse to borrowing requires two steps. First, existing federal loan products should be designated initially as grants, but grants with a twist: if borrowers do *not* pursue public service careers, then the grants become loans.[234] This is effectively what NYU School of Law did for some students when it offered tuition subsidies—grants—to students who planned to pursue public interest careers. If participating students did not end up working in the public interest for a sufficient period of time, they had to repay the subsidy as if it were a loan. By providing funds in the form of a grant, albeit one that the recipient could lose, the program attracted more students interested in public service.[235]

Second, the Department of Education should launch a broad and sustained publicity campaign about the expanded loan programs. The goal would be to ensure that potential borrowers understood that they would be saddled with student debt only if they did not pursue public interest careers.

As students realized how much they could borrow through federal sources, an incidental benefit of effective dissemination of information about the virtues of federal loan programs would be a reduction in the use of private loans. Some studies have found that student borrowers in the current system often do not take advantage of federal loan options available to them, suggesting that they do not re-

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and argue that students should only be assured they can attend college rather than any (or a specific) college.

234. The program's design—or "choice architecture" in the framework advocated by Cass Sunstein and Richard H. Thaler—is intended to encourage students to pursue public service jobs, at least until they have earned their grants, the equivalent of repaying their loans. The key is that the change in default costs taxpayers little, because students still may choose private sector jobs that pay well and repay loans, while still making a tremendous difference as what Sunstein and Thaler call a "nudge" to lead students in directions that benefit society at large. *See* CASS SUNSTEIN & RICHARD H. THALER, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS 3 (2008). The federal TEACH Grant Program uses this reversible grant structure, too; grants paid to teachers who do not complete their teaching obligations become federal student loans. U.S. DEP'T OF EDUC., TEACH GRANT PROGRAM, http://studentaid.ed.gov/students/attachments/siteresources/TEACHGrant10-11.pdf.

235. *See supra* Part I.B.2.ii (discussing the natural experiment in financial aid nomenclature at New York University School of Law).

alize the benefits of federal aid and the risks and costs of private borrowing.[236] A broad effort to publicize the advantages of federal loans would save students money under both the current system and the enhanced system I propose.[237]

2. The Wheel has Already Been Invented

Allowing students to borrow more through federal programs would afford them the ability to participate in existing flexible repayment plans available through the government, such as extended repayment and income-based repayment plans. It would no longer matter that repayment assistance programs omit private loans because students would not need to take out private loans in the first place. In many, if not most cases,[238] they would be able to pay for everything using only federal aid programs eligible for loan repayment assistance.

Federal loans offer borrowers certainty about costs: currently, interest rates are fixed for the life of a loan. Raising maximum loan amounts would also substantially increase the reach and, correspondingly, the appeal, of existing public service repayment assistance programs, by permitting them to cover all of a student's debt, without requiring the creation of a new national service initiative. Thus, allowing students to borrow more through federal programs has the surprising result of reducing the degree to which debt may skew career and life choices.

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236. According to the Project on Student Debt, an initiative of the Institute for College Access & Success, a nonprofit independent research and policy organization that tracks student borrowing, "[a]lmost two-thirds (64%) of private loan borrowers in 2007–08 borrowed less than they could have in [federal] Stafford loans." THE PROJECT ON STUDENT DEBT, PRIVATE LOANS: FACTS AND TRENDS (2009), http://projectonstudentdebt.org/files/pub/private_loan_facts_trends_09.pdf [hereinafter THE PROJECT ON STUDENT DEBT].

237. To be clear, while federal loan programs do offer clear benefits to indebted graduates, they can still be very difficult to deal with for those students who default. The government's collection powers include wage garnishment and more; the Supreme Court in 2005 upheld the government's power to seize a portion of social security payments to offset unpaid student loan obligations, even after the ten-year statute of limitations under the Debt Collection Act of 1982, 31 U.S.C. § 3716(e)(1), had run. Lockhart v. U.S., 546 U.S. 142, 145 (2005).

238. Although a college's sticker price might still exceed the amount students could borrow through expanded federal loan programs, for many students the sticker price is not the actual price. The College Board estimated that in the 2010-11 academic year, the average "net price" students actually pay in tuition and fees is less than $12,000 per year at private, nonprofit colleges—less than half the average, published price. TRENDS IN COLLEGE PRICING, *supra* note 39, at 15, fig. 7.

3. Doing What They Love

Providing financial assistance in the form of a grant also addresses the problem of career misdirection caused by repayment obligations. Because at the time they contemplated their careers students would not have any student loans, concern about how to cope with debt would not drive their decisions. Providing grant aid, even aid that may vanish if students make certain choices about their jobs after graduation, applies the lessons of the NYU School of Law and "Anon U" experiments, in which elimination of loans—not just assistance repaying them—encouraged students to pursue careers in less lucrative but highly valued professions. A grant program would create a wondrous incentive: the more a student borrows, and the more schooling that student obtains, the greater the financial benefit, in the form of repayment assistance, that would flow from working in the public interest after graduation.

4. A Better Rationale for Special Bankruptcy Treatment

Allowing students to borrow more through federal aid programs would not change how the Bankruptcy Code deals with educational debt. But the treatment of student loans in bankruptcy is not the biggest hurdle to students seeking to enroll in college. There is a rationale for making it difficult for borrowers to cancel federal student loans through bankruptcy, too, because those loans are taxpayer-subsidized.[239]

Private loans are not taxpayer subsidized, though, in that Congress does not set interest rates on those obligations. While legislation to eliminate the special treatment of private student loans in bankruptcy proceedings has been proposed in both houses of Congress, as of September 2010, it was approved only by a subcommittee of the House Judiciary Committee.[240]

239. In a sense, here, "bankruptcy policy becomes an indirect lever for education policy," in that the more difficult it is to discharge these loans, the less the government must either pay in the way of insurance to lenders in the guaranteed loan program or absorb as losses in the direct loan program, and the more money is available to fund aid to other students. John A. E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CAN. BUS. L. J. 245, 261 (2006). Pottow finds this one of the more compelling explanations of special treatment of student loans in bankruptcy.

240. Private Student Loan Bankruptcy Fairness Act of 2010, H.R. 5043, 111th Cong. § 2 (2010).

B. The Risks

This proposal is likely to raise several legitimate concerns. First, loans made by the federal government put taxpayers at risk in the event of borrower default; the larger the sums borrowed, the greater the potential exposure. Second, college and university administrators may react to greater availability of funds for students by raising tuition and fees. Third, greater availability of federal loans is a boon to the for-profit education sector. This is a potential concern because students who enroll in these programs may have fewer high-quality employment opportunities than students graduating from other types of institutions.[241] Fourth, allowing students to borrow more could mean that graduates' overall debt burdens will swell rather than shrink. I address each of these criticisms in turn.

1. Taxpayer Impact

Measures of current rates of default on student loans do not offer much guidance in predicting the impact of either a sharp increase in maximum loan amounts available to student borrowers or a system of reversible grants.[242] However, the important goal here is not to push more graduates into jobs that contribute to the public good, but rather to enable students who wish to enter such jobs to do so. For other students, the grants become loans, and they graduate in the same position they would be under the current system—but without obligations to private lenders.

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241. Indeed, for-profit educational institutions in 2010 have battled regulations proposed by the Department of Education that would curtail the availability of federal loans to institutions whose graduates do not find gainful employment. The proposed rule would apply "a two-part test: measuring the relationship between the debt students incur and their incomes after program completion; and measuring the rate at which all enrollees, regardless of completion, repay their loans on time." Press Release, U.S. Dep't of Educ., Proposed Rule Links Federal Student Aid to Loan Repayment Rates and Debt-to-Earnings Levels for Career College Graduates, (July 23, 2010), *available at* http://www.ed.gov/news/press-releases/proposed-rule-links-federal-student-aid-loan-repayment-rates-and-debt-earnings. A final version of the rule is scheduled to be released in early 2011. Press Release, U.S. Dep't of Educ., Department on Track to Implement Gainful Employment Regulations; New Schedule Provides Additional Time to Consider Extensive Public Input (Sept. 24, 2010), *available at* http://www.ed.gov/news/press-releases/department-track-implement-gainful-employment-regulations-new-schedule-provides-.

242. Estimating the fiscal impact of loan repayment assistance for borrowers who enter public service is yet more challenging. The repayment assistance program is new, but even if information on cost were easily ascertainable, it would be difficult to weigh the tangible cost of repayment assistance against the intangible benefit of encouraging more young college graduates to pursue public service jobs.

Depending on interest rates, the federal government can make money off student loans. As long as the government's cost of funds—the interest it pays on its own debt—is less than the rate charged to student borrowers, then the government gains financially, and that money can be used to fund more loans, forgiveness and/or repayment assistance, or make up for defaults.

Although it is difficult to predict whether allowing borrowers access to larger amounts of money from federal sources will make defaults more frequent than is currently the case, even if default rates hold steady, it is likely that, with larger loan balances per borrower, the average cost of each default to taxpayers will increase.

One reason forecasts are difficult is the scarcity of data. The government does not adequately track how many students default on their federal loan repayment obligations. While the Department of Education publishes a report every year on a "cohort default rate," that rate has been based on how many students default during the first two years of repayment. The 2008 official cohort default rate, the most recent available, was seven percent, an increase from 6.7% the previous year.[243] Default is defined as failure to pay for 270 days.[244] Borrowers typically must begin repaying loans six months after graduation. In combination, these two characteristics of repayment mean that a borrower could make payments for less than half of the two-year period under consideration[245] and still not count toward the relevant cohort default rate.

This method of tracking default does not accurately reflect how often the government must either make good on a guaranteed loan or absorb a loss on a direct loan. A study that followed federal student loan borrowers over a ten-year period—the standard repayment term for the loans—found that, on average, borrowers defaulted 3.9

243. Press Release, U.S. Dep't of Educ., Student Loan Default Rates Increase, (Sept. 13, 2010), *available at* http://www.ed.gov/news/press-releases/student-loan-default-rates-increase-0.

244. *Important Terms*, FUNDING EDUC. BEYOND HIGH SCHOOL,U.S. DEP'T OF EDUC., https://studentaid.ed.gov/students/publications/student_guide/2009-2010/english/importantterms.htm (last visited Sept. 8, 2010).

245. Consider a hypothetical student graduating in June 2009. That student would begin making payments six months later, in December 2009. If she stopped making payments as early as October 2010—less than 270 days (nine months) before the second anniversary of her graduation in June 2011—her default would not count toward the default rate for the class of 2009, although she would have made monthly payments for only eleven months.

years[246] after graduation, putting them well outside the two-year window used by the Department of Education. The study also found that 9.7% of borrowers defaulted,[247] a rate considerably higher than the two-year cohort default rate.

The average loan balance among 1993 bachelor's degree recipients who defaulted over the next decade was $10,000, just $2,400 more than the average balance among borrowers who did not default.[248] The more students borrowed, the higher the rates of default: among borrowers with $15,000 or more in student loans, nearly twenty percent defaulted.[249] This last finding is reason to worry that allowing students to borrow more may lead to more frequent defaults, but it should be considered in light of another finding in the report: of those borrowers who defaulted, 44.5% resumed making payments.[250] Additionally, the cohort under study did not have the advantage of access to current versions of income-based repayment or repayment assistance for those pursuing public interest careers. It is hard to know how much difference those interventions might have made.

The ten-year study raises the question of why the government has used a two-year window to measure default rates. As it turns out, the short time horizon benefits two groups: loan companies and the colleges and universities that receive lenders' money. The lower the default rate in the guaranteed loan program, the easier it was for lenders to argue for their role in the federal aid system. Separately, because federal loan program rules require participating institutions to keep default rates down, any step that lowers the measured default rate preserves eligibility for more institutions.[251]

The longer the time horizon used to evaluate student loan repayment, the higher the likely resulting cost of defaults. Congress has approved a shift to measuring the default rate over a three-year period following graduation.[252] Early evidence suggests this move will result

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246. Susan P. Choy et al. , Nat'l Ctr. for Educ. Statistics, Dealing with Debt: 1992–93 Bachelor's Degree Recipients 10 Years Later, 43 tbl.18 (2006), http://nces.ed.gov/pubs2006/2006156.pdf.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. Currently, institutions that participate in federal loan programs must keep their default rates below forty percent. *Official Cohort Default Rates for Schools*, U.S. Dep't of Educ., http://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html#table (last visited Sept. 8, 2010).

252. William Taggart, *Release of Trial Three-Year Cohort Default Rates*, U.S. Dep't of Educ. (Dec. 7, 2009), *available at* http://www.ifap.ed.gov/eannouncements/120709RelTrialThreeYearCohortDefaultRates.html.

in dramatically higher reported default rates.[253] In 2007, 0.4% of Harvard University graduates defaulted under the two-year definition, but the percentage would double under the three-year version.[254] Such a rate is far below the national average and likely reflects the success of Harvard graduates, but the change produced by a shift in definition is striking. Consider what happens at a less selective institution, such as the University of Phoenix, a for-profit school, where the default rate rises from 9.3% to 15.9% with the change in definition.[255] At the Fresno, California campus of Heald College, another for-profit institution, it rises from 16% to 28%.[256] At Diablo Valley College, a two-year, public institution, the default rate rises from 5.2% to 13.1%.[257] The increases raise disturbing questions about how well some institutions' educational programs serve students, an issue addressed in more detail below.

Student loan defaults likely result from a variety of factors in the lives of borrowers, of which the amount borrowed is one significant element. As a practical response to fears of ballooning taxpayer liability for defaulted student loans, in the short term, Congress could lift maximum loan amounts for a limited number of colleges and universities of various types. Running such a pilot program for several years would provide invaluable information about actual default rates over the lifetime of loans.[258]

It may be that a wisely designed loan program could forestall default by limiting the educational institutions that federal loan borrowers could attend or imposing other requirements on both students and colleges. Monitoring the experiences of borrowers in a pilot program would help identify criteria that would ensure that loan funds are not wasted. Additionally, a pilot program would likely draw less political opposition than an immediate expansion of federal aid programs.

253. *Trial Three-Year Cohort Default Rates*, U.S. DEP'T OF EDUC., http://federalstudentaid.ed.gov/datacenter/library/TrialYearCDR.xls (last visited Nov. 30, 2010).
254. *Id.*
255. *Id.*
256. *Id.*
257. *Id.*
258. It is important to note here that I do not propose elimination of the tough standard imposed on borrowers seeking to discharge federal student loans through bankruptcy. That high hurdle, forcing borrowers in many and perhaps most cases to repay all or most of their government-subsidized student loan obligations, may help to keep the cost of defaults down over the long run.

2. *Will College Costs Soar Higher?*

The cost of higher education has risen for decades and for years has outpaced growth in income.[259] If college administrators know that students' borrowing options have expanded, some might raise prices further, capturing in the present the future income against which students borrow. One critic of the current system, Andrew Gillen, contends that "current financial aid practices contribute to. . . [an] arms race in spending [by colleges and universities], which leads to higher costs."[260] In his view, colleges raise prices in order to invest in offerings that lure students, and the higher prices make higher education less affordable.[261]

Gillen's argument suggests that somehow, scarcity of credit has constrained tuition hikes by colleges and universities—a questionable assertion. Given how colleges' prices cluster around each other, the only current, evident constraint on tuition appears to be a desire not to be too much of an outlier.[262] Greater availability of loans might reasonably be expected to lead to greater demand for higher education. Higher demand in turn might be expected to result in a higher price, but the rules of the market for education are not clear-cut. College administrators say the cost of the education provided already exceeds, in some cases significantly, the price charged; the normal rules of economics do not apply.[263]

Empirical studies of changes in tuition do not support the assertion that colleges raise prices in response to greater perceived availability of funds to students.[264] A 2001 study of college costs and prices

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259. *See supra* note 150 and accompanying text.

260. ANDREW GILLEN, CTR. FOR COLL. AFFORDABILITY AND PRODUCTIVITY, FINANCIAL AID IN THEORY AND PRACTICE: WHY IT IS INEFFECTIVE AND WHAT CAN BE DONE ABOUT IT 6 (2009), http://www.centerforcollegeaffordability.org/uploads/Financial_Aid_in_Theory_and_Practice(1).pdf.

261. *Id.* at 27 (warning that "if loans are too widely available, they can contribute to the arms race which drives up costs and in turn tuition, and therefore reduces affordability").

262. *See* Glater & Finder, *supra* note 145 ("In setting tuition, Notre Dame watches 20 other colleges and universities, including the University of Chicago, Emory and Vanderbilt. 'We're setting it by our competitors,' said the Rev. John I. Jenkins, the institution's president.").

263. *See id.* (noting that Swarthmore College "spends about $73,690 a student. But its tuition, room, board and fees in the last academic year were little more than $41,000").

264. *See* ALISA F. CUNNINGHAM ET AL., NAT'L CTR. FOR EDUC. STATISTICS, STUDY OF COLLEGE COSTS AND PRICES, 1988–89 TO 1997–98, 101 (2001), http://nces.ed.gov/pubs2002/2002157.pdf (reviewing studies of the impact of financial aid on pricing and observing that "[r]esearch on the possible relationship of federal loan aid to prices has been even less conclusive [than on the relationship of grant aid to prices], sug-

identified associations between tuition and a variety of variables, including the percentage of students receiving student loans.[265] But the study did not find a relationship between student loan volume and tuition.[266] Determining how relationships involving loans, grant aid, and tuition work is challenging because each factor affects the others.

Even if tuition goes up with greater federal loan amounts available, the price increases could actually enable more low-income students to afford to enroll, as a result of the strange workings of financial aid. Rising tuition can promote access to higher education—in fact, one study suggests that rising tuition may be a sign of an educational institution's efforts to accommodate more lower-income students.[267] The more revenue colleges take in from students, the more money they have available to extend in the form of aid to those who need it.[268]

More generous financial aid, including greater institution-provided grant aid, helps correct the inequality-fostering effects of loans,[269] which otherwise result in larger debts for graduates whose families are of more modest means.[270] This high-cost, high-aid model

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gesting that if such a relationship exists, it may be indirect"). The authors' analysis "found no associations between most of the aid packaging variables and the change in tuition." *Id.* at 119.

265. *Id.* at 105. However, the study suffered because it used data from a single point in time rather than tracking variables over an extended period. *Id.* at 109.

266. *Id.* at 133.

267. *Id.* at 104. Gillen attacks this practice as "price discrimination": charging different customers different prices for the same service, because the different customers have different abilities to pay. Gillen contends that a so-called high-cost, high-aid strategy does not lead to greater enrollment of lower income students. GILLEN, *supra* note 260, at 11, 29.

268. Ian Ayres has forcefully articulated the view that charging higher tuition at public universities in particular can be positive because keeping prices low benefits the wealthy, while providing less financial aid hurts poorer students. "Tuition increases are actually a good idea—as long as they are matched with financial aid, including scholarships, for poor students." Ian Ayres, *Why California's Tuition Hike Might Be a Good Thing*, N.Y. TIMES (Nov. 23, 2009, 2:25 PM), http://freakonomics.blogs.nytimes.com/2009/11/23/why-californias-tuition-hike-might-be-a-good-thing/.

269. However, the wealthiest colleges have dramatically expanded their financial aid offerings to students from relatively wealthy families, too, in some cases offering assistance even to those whose families make $200,000 per year. *See, e.g.*, Karen W. Arenson, *Yale Plans Sharp Increase in Student Aid*, N.Y. TIMES, Jan. 15, 2008, at A14; Jonathan D. Glater, *Stanford Set to Raise Aid for Students in Middle*, N.Y. TIMES, Feb. 21, 2008, at A14; Sara Rimer & Alan Finder, *Harvard Steps up Financial Aid*, N.Y. TIMES, Dec. 10, 2007, at A1. Most colleges, of course, cannot afford such generosity to the upper classes.

270. Financial aid officials at colleges defend the current system, arguing that it makes it possible for more poor students to attend. In essence, wealthy students and their families pay the sticker price while poorer students pay a discounted price. The College Board has estimated that the average "net price" of an undergraduate educa-

may not be the ideal scheme for improving access to higher education, but the combination of high tuition and generous financial aid does undermine the argument that rising sticker prices serve to exclude the less wealthy from institutions of higher education.

3. *Why Help For-Profit Providers of Higher Education?*

Concern about the role of for-profit higher education companies may pose the most difficult challenge to an expansion of federal aid. Currently, for-profit companies that sell higher education are huge beneficiaries of federal loan programs. The College Board estimates that eighty-eight percent of students enrolled at for-profit colleges take out federal loans, compared to forty-two percent of public university students and fifty-five percent of private, nonprofit college students.[271] Even though relatively few students—just one in fourteen[272]—attend for-profit colleges, such institutions receive one-fourth of all federal education dollars.[273] And students at for-profit institutions take out private loans more often than do students enrolled in other educational programs, too.[274]

Reliance on federal loans would be less troubling, but for the data on rates of completion of degree programs by students enrolled in for-profit institutions. Just twenty-five percent of students enrolled at for-profit colleges obtain a bachelor's degree within six years, compared to sixty-four percent at private nonprofit colleges and fifty-five percent at public universities.[275] Loan default rates are higher at for-profit institutions: in 2007, 21.2% of students who took out federal loans to attend for-profit colleges defaulted within three years, nearly double the 11.8% rate for all borrowers.[276] Forty-four per-

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tion at private, nonprofit, four-year colleges is nearly $16,000 less than the average published sticker price of $27,290 in tuition and fees. *See* TRENDS IN COLLEGE PRICING, *supra* note 39, at 15, fig. 7.

271. TRENDS IN STUDENT AID 2009, *supra* note 2, at 8.

272. Press Release, The Pew Charitable Trusts, New Default Rate Data for Federal Student Loans: 44% of Defaulters Attended For-Profit Institutions (Dec. 15, 2009), *available at* http://www.pewtrusts.org/news_room_detail.aspx?id=56473.

273. 156 CONG. REC. S7589 (daily ed. Sept. 28, 2010) (statement of Sen. Durbin).

274. *See* THE PROJECT ON STUDENT DEBT, *supra* note 236, at 1 (analyzing data from the Department of Education showing that in 2007–08, forty-two percent of students at for-profit educational institutions had taken out private loans; at private, nonprofit schools, twenty-five percent of students had taken out private loans; and at public, four-year schools, just fourteen percent had done so).

275. NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., STUDENT EFFORT AND EDUCATIONAL PROGRESS 73 fig.21–1, http://nces.ed.gov/programs/coe/2010/pdf/21_2010.pdf.

276. Mark Kantrowitz, *Cohort Default Rates*, FINAID.ORG, http://www.finaid.org/loans/cohortdefaultrates.phtml (last visited Nov. 15, 2010).

cent of all students who borrowed to attend for-profit institutions defaulted.[277]

The completion and default rate statistics for the for-profit sector are more disturbing, in light of the characteristics of students who enroll at for-profit colleges. More than fifty-three percent of students at for-profit schools receive Pell grants,[278] federal grants available to the neediest students. In contrast, Pell grant recipients make up just thirty-one percent of students at public and private, non-profit institutions. For-profit institutions claim that they enroll large numbers of minority students.[279]

These statistics do not mean that all for-profit education programs do not serve the interests of students. Nor do they mean that such programs should be barred from participation in federal loan programs, although they do suggest that the for-profit sector merits additional study to ensure that students who attend them are well-served by the experience. Measures of efficacy other than debt burden should determine the extent of government support of higher education opportunities in the for-profit sector and beyond.

In the summer of 2010, the Department of Education proposed rules that would impose tough standards on for-profit educational institutions. In order to ensure that their students could receive federal student aid, for-profit schools would have to prove that their educational programs prepared students for "gainful employment" by demonstrating that at least forty-five percent of their former students were paying down principal on their student loans or that their graduates had a debt-to-income ratio of less than twenty percent of their discretionary income or eight percent of total income.[280]

277. New Default Rate Data for Federal Student Loans, *supra* note 272. Further, the Department of Education reported that "[t]here are 18 . . . [federal] loan defaults for every 100 graduates of for-profit institutions, compared to only 5 . . . [federal] loan defaults for every 100 graduates of public institutions." Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,618 (July 26, 2010) (to be codified at 34 C.F.R. pt. 668). However, all these figures do not make clear whether students who are more financially vulnerable become victims of poor educational programs and then default, or whether students of lesser means are more likely to fail to complete programs of study and/or default on debts regardless of the institution attended.

278. *Table 343: Percentage of Full-Time and Part-Time Undergraduates Receiving Federal Aid, by Aid Program and Control and Type of Institution: 2003–04*, NAT'L CTR. FOR EDUC. STATISTICS, U.S. DEP'T OF EDUC., http://nces.ed.gov/programs/digest/d08/tables/dt08_343.asp (last visited Nov. 15, 2010).

279. *See, e.g.*, CORINTHIAN COLLS., INC., 100,000 STUDENTS DON'T COUNT?, http://mycareercounts.org/MyCareerCounts_AdCampaign.pdf.

280. Program Integrity: Gainful Employment, 75 Fed. Reg. at 43,618. The Department of Education also summarized the requirements. Press Release, U.S. Dep't of Educ., Proposed Rule Links Federal Student Aid to Loan Repayment Rates and Debt-

In order to be eligible to participate in federal aid programs, colleges (for profit or otherwise) must keep their default rates below a certain threshold. It is clear that for-profit colleges should raise completion rates and lower default rates,[281] regardless of whether federal aid programs expand or remain unchanged. Poor outcomes[282] at for-profit schools do not mean overall federal lending should not expand; indeed, if federal programs were expanded, more federal loan money might at least lead to a decrease in the number of students at for-profit schools who are saddled with private loan debts.

For-profit colleges' response to student loan market turmoil caused by the financial crisis of 2008 suggests one possible solution to explore. Some colleges began extending loans to students themselves when those students could no longer obtain private loans.[283] If for-profit colleges with lower completion rates and higher loan default rates were required to extend loans themselves—alongside federal aid—that exposure could encourage the colleges to work harder to ensure that students pay their obligations. Colleges could invest more in job placement services or work harder to discourage students from taking on more debt than their chosen career could support. This is not

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to-Earnings Levels for Career College Graduates (July 23, 2010), *available at* http://www.ed.gov/news/press-releases/proposed-rule-links-federal-student-aid-loan-repayment-rates-and-debt-earnings. For-profit colleges opposed the regulation. Goldie Blumenstyk, *Education Dep't to Delay Issuing 'Gainful Employment' Rules Opposed by For-Profit Colleges*, CHRON. OF HIGHER EDUC., Sept. 24, 2010, http://chronicle.com/article/Education-Dept-to-Delay/124617/ ("The [proposed] rule, which is being vehemently opposed by the for-profit college industry and its allies and backed by a coalition of consumer and education groups, could eliminate federal financial aid for programs where high proportions of students are not repaying the principle [sic] on their student loans or end up with excessive debt loads for the salaries they can earn.").

281. Colleges and universities, public or private, have an incentive to keep their default rates down in order to maintain eligibility for federal student aid. Students may not use federal aid to attend schools that either (1) have default rates of twenty-five percent or greater for three years or more or (2) have default rates of forty percent or greater for one year. *Official Cohort Default Rates for Schools: Definitions*, U.S. DEP'T OF EDUC., http://www2.ed.gov/offices/OSFAP/defaultmanagement/definitions.html#loss25 (last visited Nov. 15, 2010).

282. The debate over the outcomes experienced by students who attend for-profit institutions has already begun over the 2010 regulatory proposal by the Department of Education. The Career College Association, whose membership includes for-profit educational institutions, has opposed the proposed rules. *See, e.g.*, *Career College Association Says ED Gainful Employment Proposal Imperils over 2 Million Students in Next Decade*, ASS'N OF PRIVATE SECTOR COLLS. AND UNIVS., http://www.career.org/iMISPublic/AM/Template.cfm?Section=home&TEMPLATE=/CM/ContentDisplay.cfm&CONTENTID=21196 (last visited Oct. 6, 2010).

283. Jonathan D. Glater, *As Lending Tightens, Education Could Suffer*, N.Y. TIMES, Feb. 19, 2008, at C1.

an ideal solution, and for-profit education providers might resist it because their shareholders likely would not want to take on the financial risk that extending credit to students entails.

4. *Some Debts Are Worse than Others*

It is inevitable that raising available loan amounts will lead to greater federal indebtedness among student borrowers who do not pursue public interest careers. To the extent that debt, by its very nature, is undesirable, then enlarging the federal loan program is undesirable, too. However, allowing students to take out larger loans would not occur in a vacuum. Students are already borrowing ever larger amounts, in the form of private loans. The goal of increasing federal options is the substitution of federal loans for private loans, rather than putting heavier debt burdens on students. I hope and expect that increasing the availability of federal loans would have primarily a substitution effect. My proposal recognizes that, while all debts may be undesirable, they are not equally so.

For borrowers, federal loans offer clear benefits over private loans, even though discharge of either type of debt through bankruptcy currently faces high hurdles.[284] Federal loan programs have more generous repayment plans and deferral options for students experiencing economic hardship. They also offer the income-based repayment options described previously. Perhaps most importantly, federal repayment assistance programs would cover additional borrowing through direct loan programs. If repayment assistance aims to make public service more attractive to students, regardless of socioeconomic background and debt level, federal aid programs should be expanded so that more students can take advantage of federal programs that help students pay off their debts.

Conclusion

The student loan scandals of 2007 raised a fundamental question about the way we pay, collectively and individually, for higher education in the United States. For years, the retail price of undergraduate tuition has outstripped most households' ability to pay. This trend, which shows few signs of slowing, has led to dramatic growth in the student loan industry.[285] The money at stake in turn led to the adoption of questionable marketing tactics by lenders.

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284. *See supra* note 162 and accompanying text.

285. According to the College Board, between the 1997–98 and the 2007–08 academic years federal loan volume grew by 70%, rising to $66.8 billion from $39.3

The legislative and regulatory responses to loan industry scandals have not gone far enough in facilitating access to higher education. For example, slightly more information about the terms of private loans does not eliminate the need for those loans.[286] In this article, I have argued that lawmakers should both toughen regulation of companies that make private student loans and increase the amount available through federal loan programs. The goal is to promote access to higher education, protect students from unnecessary debt with harsher terms, and enhance the effectiveness of loan repayment assistance programs intended to enable graduates to take jobs in the public interest. While raising maximum federal loan amounts may seem a counterintuitive remedy, doing so would have far-reaching positive effects. For these reasons, political attacks on an effort to provide funding for higher education for more students on better terms would be fraught with risk, even for the skilled and powerful lender lobby.

Correctly designed, an expanded federal loan program could move college, graduate, and professional school into the realm of possibility for students who otherwise might think such opportunities were unavailable to them. It would reduce the need for private loans, which have terms that are less favorable to borrowers. It would pave the way for eventual domination of student lending by the federal direct loan program, which could end up making money for taxpayers in the form of interest payments by borrowers.

This proposal is straightforward but resolves a very complicated set of problems; in the current political and economic climate, it has good odds of success. Supplementing the disclosure provisions in legislation passed in response to past scandals would not achieve as much. Greater disclosure would not overcome borrowers' lack of sophistication about credit and would not create additional borrowing alternatives for students and families facing total college costs that rival or exceed the price of a house. While any effort to impose additional disclosure requirements would almost certainly draw criticism

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billion. Private loan volume over the same period grew far more—592%—but from a smaller base, rising to $17.6 billion from $2.5 billion. *See* COLLEGE BOARD, TRENDS IN STUDENT AID 6 (2008), http://professionals.collegeboard.com/profdownload/trends-in-student-aid-2008.pdf). The increase in private loan volume reflects the growing importance of private loans to supplement federal borrowing options, which have not kept pace with tuition increases.

286. In the same vein, raising the amounts that students can borrow through federal loan programs—thereby avoiding private loans—does not address the deeper problem of rising student indebtedness. Only in conjunction with federal loan forgiveness and income-contingent repayment programs does the shift address the larger debt problem.

from lenders, who have benefitted from historically lax oversight,[287] political attacks on an effort to provide funding for higher education for more students on better terms would be fraught with risk, even for the skilled and powerful lender lobby.

Additional disclosure requirements would also fail to protect those private loan borrowers whose educational experience yields little in the way of professional advancement. Students who take on significant private loan debt, but then do not find employment paying sufficiently high wages, will have a difficult time honoring their loan obligations. Many lower-income students using private loans attend for-profit institutions with poorer records of job placement and loan repayment. Such a situation, in which poorer students end up carrying larger debts and facing difficulty in repayment, should not be permitted to continue. Federal loan programs offer more flexibility in repayment, allowing for adjustment of repayment amounts based on income, for example.

The question of how to help students pay for higher education is pressing. In recent legislation, Congress made a major change in the manner in which federal student loans are provided. Whether lawmakers are prepared to wade further into higher education finance will be a test of their leadership. In an ever more global marketplace, however, the United States must work to promote access to higher education in order to protect its position and its citizens' quality of life. At the practical level, those who have invested in higher education historically have earned higher incomes; at the more abstract level, a more educated polity is, as Jefferson observed,[288] better able to recognize and resist potential tyranny. Lawmakers should therefore endeavor to keep higher education within the financial reach of those students who seek it.

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287. *See* Glater & Arenson, *supra* note 124 (reporting that loan companies "benefited from oversight so lax that the Department of Education's assistant inspector general in 2003 called for tightened regulation of lender dealings with universities"); *see also A Closer Look: Inspectors General Address Waste, Fraud, Abuse in Federal Mandatory Programs: Hearing before the H. Budget Comm.*, 108th Cong. 78 (2003) (statement of John P. Higgins, Jr., Inspector Gen., Dep't of Educ.), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:88288.pdf ("The Department needs to increase its monitoring of schools, lenders, guaranty agencies, and other participants in these programs . . . . Our audits have repeatedly cited deficiencies in the Department's oversight of schools, including a significant decrease in program reviews and inconsistent enforcement of financial responsibility.").

288. *See* Jefferson, *supra* note 6.