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

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

TABLE OF CONTENTS

INTRODUCTION .................................................. 132 R
I. EDUCATION ACCESS AND RACIAL JUSTICE .......... 140 R
A. Higher Education Policy Choices Have Put Students of Color Further Behind ..................................... 141 R
1. Wealth and the “Choice” to Borrow .................... 142 R
2. Predatory Schools and the “Choice” of Post-Secondary Institution ................................................. 145 R
B. How We Got Here and Why We Need to Get Out ...... 155 R
1. Student Debt Crisis as a Case of Policy Drift ......... 156 R
2. Student Debt: A Threat to Democracy .................. 159 R
II. PATHS FORWARD ........................................ 161 R
A. Hobbled Civil Rights Paradigm ............................ 162 R

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INTRODUCTION

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


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

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

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

default on their loans relative to their White peers. Latinx students are less likely to borrow than White students but when they do, they borrow nearly as much, and like Black students are more likely to attend a for-profit institution and more likely to default than White students. Both Black and Latinx students are less likely to complete a course of study than are White students, which significantly impacts their ability to repay loans. Unscrupulous for-profit institutions disproportionately target these communities of color—historically excluded from higher education opportunities—and scoop up an outsized share of federal student aid dollars. The combination of these outcomes has worse outcomes. See, e.g., David J. Deming et al., The For-Profit Postsecondary School Sector: Nimble Critics or Agile Predators?, 26 J. Econ. Persp. 139, 152–60 (2012) (analyzing higher student loan default rates at for-profit institutions, the lower likelihood of achieving a bachelor's degree at such schools, and the heavier debt burdens borne by students who attend them).


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

See Chan et al., supra note 3, at 560 tbl.1.


See, e.g., U.S. Gov’t Accountability Off., GAO-11-4, For-Profit Schools: Large Schools and Schools that Specialize in Healthcare Are More Likely to Rely Heavily on Federal Student Aid 7, 16 (2010); Anna S. Chung, Choice of For-Profit College, 31 Econ. Educ. Rev. 1084, 1096 (2012) (finding that even when geographical location is held fixed, the for-profit student population has a higher concentration of Black students); Deming, supra note 5, at 148 (“The Title IV—eligible, for-profit sector receives the majority of its revenues from federal financial aid programs in the form of loans and grants to their students.”); Gregory Gilpin & Christiana Stoddard, Does Regulating For-Profit Colleges Improve Educational Outcomes? What We Know, What We Don’t Know, and What We Need to Find Out, 36 J. Pol’y Analysis & Mgmt.
of congressional action and inaction\textsuperscript{14} that permitted student loans to become the dominant federal intervention in higher education finance has proven an ill-advised choice and one that has had a disparate, negative impact on students who belong to racial and ethnic groups that have historically suffered racial oppression.\textsuperscript{15} On the other hand, in deciding to heavily subsidize higher education through the tax code, Congress chose to disproportionately benefit already advantaged groups.\textsuperscript{16}

Student lending is now the centerpiece of higher education financing—but that was not the intention expressed by the lawmakers who wrote the Higher Education Act of 1965 (the “HEA”), which established today’s student aid regime.\textsuperscript{17} When lawmakers drafted the HEA and increased availability of federal student loans, they spoke providing students with the opportunity to pursue higher education,\textsuperscript{18} to achieve their full potential regardless of poverty, and to contribute to the wider national community.\textsuperscript{19} If
we take the drafters of the HEA at their word, they did not intend to perpetuate racial and socioeconomic inequality through imposition of injurious debt.

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

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

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

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

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


24 See id. (emphasis added).

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

26 Thirty-two percent of Black borrowers who entered college in the 2011–12 academic year and had entered repayment in 2017 defaulted on at least one federal student loan; the default rates for Latinx and White students were 20% and 13% respectively. See Ben Miller, THE CONTINUED STUDENT LOAN CRISIS FOR BLACK BORROWERS, CTR. FOR AM. PROGRESS (Dec. 2,
devastating and the effects linger, leading to the imposition of sizable collection fees, wage garnishment, interception of tax refunds, and getting in the way of future efforts to use credit to advance in life. In an economic downturn the most heavily indebted students will suffer more—and they are disproportionately Black and Latinx. Thus, while loans help many students overcome financial barriers to access higher education, they are also millstones around the necks of others, especially people of color.

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

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27 See infra note 116 and accompanying text.

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


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


32 Id.

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


35 See Patten, supra note 30.
borrow more, to pay for higher education.36 This problem has worsened in the last few decades, as tuition and fees have increased,37 but neither grant aid38 nor family incomes39 have kept pace. To ignore these differences in socioeconomic circumstances is to do exactly what Lyndon Johnson warned would be an inadequate measure to address inequity: to “take a person who, for years, has been hobbled by chains, bring him up to the starting line of a race and then say, ‘you are free to compete with all the others,’ and still justly believe that you have been completely fair.”40 In fact, the failure to account for economic inequality along lines of race has meant that those once hobbled by chains are in fact a long way behind the starting line when the race begins.

The phenomenon of racial oppression by debt is not new.41 In the United States, debt has been used to oppress Black people in particular throughout the nation’s history.42 The fight against debt and economic ine-
quality has deep—but often erased or ignored—roots in the struggle for racial justice. The financial position of Black Americans is the product of a lengthy history that implicates government action at almost every turn, beginning with slavery. Mortgages and collateralized bonds were created as a way for slave owners to generate capital. After the Civil War ended, employers paid low wages and governments imposed high taxes that disproportionately affected Black workers, forcing them into labor relationships of debt bondage. As W.E.B. Du Bois put it in his history of the Reconstruction era, “[i]t was the policy of the state to keep the Negro laborer poor, to confine him as far as possible to menial occupations, to make him a surplus labor reservoir and to force him into peonage and unpaid toil.” After Reconstruction, the government excluded Black citizens from holding property and land grants, originating the practice of “redlining” in housing markets to keep Black and Latinx citizens in poorer, racially isolated neighbor-


The Rev. Martin Luther King, Jr. came to champion economic justice through fighting racial oppression; indeed, the march he was organizing when he was gunned down in Memphis, Tennessee, challenged poverty and economic rights. See TAYLOR BRANCH, AT CANAAN’S EDGE: AMERICA IN THE KING YEARS, 1965—1968, 689 (2006); Trina Jones, Occupying America: Dr. Martin Luther King, Jr., the American Dream, and the Challenge of Socio-Economic Inequality, 57 VILL. L. REV. 339, 341 (2012).


Du Bois, supra note 45, at 570.

Discrimination in a litany of other government programs hindered access to home ownership and the related benefit of wealth accumulation.\(^4\)

We believe that we write at a moment of potential opportunity. The burden of student indebtedness and the folly of pushing the cost of higher education onto students who struggle to bear it garnered increasing popular attention as outstanding student debt increased in the new millennium. As we write this, candidates vying for the Democratic Party presidential nomination are staking out bold positions on higher education finance, addressing both the vast pool of outstanding debt and the need to support current and future students.\(^5\) While the prospects of these proposals for federal reform are poor if the Democratic Party does not seize control of Congress and uncertain even if they do, individual states are also taking steps to reduce or eliminate the cost of higher education.\(^6\) Whatever the fate of any particular initiative, the popular support of proposals that materialized over less than a decade is evidence of a dramatic change in attitude toward higher education finance.

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

\(^4\) See Rothstein, supra note 45, at 154–55.
\(^5\) Id. at 58–67.
\(^5\) See, e.g., David W. Chen, Free Tuition? Tennessee Could Tutor New York, N.Y. TIMES, May 14, 2017, at A1 (describing Tennessee’s Promise program that seeks to fill the gap between federal students aides and the tuition at community colleges or colleges of applied technology); Lisa W. Foderaro, Free Tuition in New York Adds Powerful Pull at Decision Deadline, N.Y. TIMES, Apr. 30, 2017, at A1 (describing New York State’s Excelsior Scholarship program, which offers free tuition at a state’s two- and four-year publicly funded schools); John Myers, California Gov. Gavin Newsom Has Signed His First Budget, Here’s Where the $215 Billion Will Go, L.A. TIMES, June 27, 2019, at A4 (explaining that the new California state budget will enable lower tuition costs and competitive Cal Grant awards for more students and provide additional help for low-income families and students with children); Simon Romero & Dana Goldstein, New Mexico Announces Plan for Free College for State Residents, N.Y. TIMES, Sept. 18, 2019, at A14; Emily S. Rueb, Washington State Moves Toward Free and Reduced College Tuition, With Businesses Footing the Bill, N.Y. TIMES, May 10, 2019, at B4 (describing Washington’s 2019 Workforce Education Investment Act which aims to provide free or reduced tuition for lower- and middle-income students attending community colleges and public institutions).
the current federal student aid system came into being and analyzing how federal interventions in higher education finance have disparate, negative effects on members of historically excluded and currently underrepresented populations in or seeking higher education. This discussion also highlights the special role of education in a democracy and the importance of ensuring that this societal resource is equitably available.

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

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

I. Education Access and Racial Justice

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

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


Student Debt is a Civil Rights Issue

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

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

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

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

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

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


58 See MONICA PRASAD, THE LAND OF TOO MUCH: AMERICAN ABUNDANCE AND THE PARADOX OF POVERTY 42 (2012) (describing how race “as economic interests” shaped political institutions which, in turn, affected economic opportunities); see also Rothstein, supra note 45, at 178–79 (describing how denial of equal access to housing and labor markets perpetuated racial inequality across generations); discussion supra I.B.2.
the financial resources of White and some Asian American people, so the necessity of borrowing disproportionately burdens them.\textsuperscript{59} In addition, lax oversight from the Department of Education has enabled wrongful conduct by for-profit colleges that deceptively target poor communities and communities of color, offering them educational services of poor quality\textsuperscript{60} in exchange for federal dollars that students borrow and then must repay. Student loans may not be directly predatory, but they enable predation.

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

1. Wealth and the “Choice” to Borrow

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

\textsuperscript{59} In 2013, more than 59\% of White families and 51\% of Asian families had accumulated wealth above the nationwide median, but only 23\% of Black and 25\% of Latinx families were similarly situated. See Ray Boshara et al., Ctr. For Household Fin. Stability, The Demographics of Wealth: How Age, Education and Race Separate Thrivers from Strugglers in Today’s Economy 6 (2015), https://www.stlouisfed.org/-/media/files/pdfs/hfs/essays/hfs-essay-1-2015-race-ethnicity-and-wealth.pdf, archived at https://perma.cc/7EC5-NJMY. The absolute numbers are important too. The median wealth in the country was $81,456 in 2013, but White median wealth was more than 1.5 times that, at $134,008. See id. Black median wealth was just $11,184. See id. These aggregate figures obscure considerable diversity: many White families are not wealthy, of course, and within the broad category of “Asian” there is considerable diversity. One study that examined Asian communities in Los Angeles found that the median net worth of people of Korean descent was less than 4\% of that of people of Japanese descent, for example. See Runes, supra note 2.

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

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

\textsuperscript{62} See id. at 561 tbl.1. Latinx students who do borrow tend to borrow smaller amounts than Black borrowers (and more similar to White borrowers). See id.

\textsuperscript{63} See, e.g., id. at 5.
in their studies.\textsuperscript{64} Borrowing has become ever more necessary in recent years as federal and state governments slashed financial support for higher education, shifting costs onto students and families,\textsuperscript{65} and as socioeconomic inequality has increased.\textsuperscript{66}

Because there is such a sizable and persistent racial wealth gap\textsuperscript{67} in the United States,\textsuperscript{68} debt has racially disproportionate effects and is unavoidable.


\textsuperscript{65} See Barb Rosewicz et al., ‘Lost Decade’ Casts a Post-Recession Shadow on State Finances, Pew Charitable Tr. (June 4, 2019), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/06/lost-decade-casts-a-post-recession-shadow-on-state-finances, archived at https://perma.cc/QXN2-PQ6Y (explaining the recent decline in state spending); \textit{see also Mettler, supra note 38, at 66–67 (arguing that ‘policy drift’ permitted the decline in federal support); Glater, supra note 33, at 1577 (stating, ‘beginning in the late 1970s and then for several decades thereafter, federal grant aid to students, which at one point covered nearly 80 percent of the cost of attending a public university, languished’)).


\textsuperscript{68} The wealth gap persists among White and Black households, regardless of education levels. ‘White households with a bachelor’s degree or post-graduate education (such as with a Ph.D., MD, and JD) are more than three times as wealthy as black households with the same degree attainment.’ \textit{Darity Jr. et al., supra note 55, at 6. Even more dramatically, ‘on average, a black household with a college-educated head has less wealth than a white family whose head did not even obtain a high school diploma.’ Id; see also Judith Scott-Clayton & Jing Li, \textit{Black-White Disparity in Student Loan Debt More Than Triples After Graduation, Brookings (Oct. 20, 2016), https://www.brookings.edu/research/black-white-disparity-in-stu-
for more members of historically subordinated groups.\textsuperscript{69} Black students borrow at much higher rates than White students, and by the time they are in their fourth year of study, 90\% of Black and 72\% of Latinx undergraduate students have student loan debt, as compared to 66\% of White students.\textsuperscript{70}

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

\textsuperscript{69} In 2012–13, 29.3\% of White undergraduate students were able to cover their full cost of attendance with their expected family contribution and grant aid whereas only 12.4\% of Black students and 18.1\% of Latinx students could do likewise. \textit{See DataLab, Nat’l Ctr for Educ. Stat.}, \url{https://nces.ed.gov/datalab/index.aspx?ps_x=cfgbmdc3,} archived at \url{https://perma.cc/1USZ-WAL8}. Students can also work to try to meet their financial needs (and indeed 43\% of full-time undergraduate students and 81\% of part-time students report being employed while at school). \textit{See Sara Goldrick-Rab, \textit{Paying the Price: College Costs, Financial Aid, and the Betrayal of the American Dream}} (2016); \textit{see also} Anthony P. Carnevale et al., \textit{Georgetown Univ. Ctr. on Educ. & the Workforce, Learning While Earning: The New Normal} 1 (2015), \url{https://1gyhoq479ufd3yna29x7ubjn-wpengine.netdna-ssl.com/wp-content/uploads/Working-Learners-Report.pdf,} archived at \url{https://perma.cc/C79B-L9ZA}.

\textsuperscript{70} See Aissa Canchola & Seth Frotman, \textit{The Significant Impact of Student Debt on Communities of Color}, Consumer Fin. Protection Bureau (Sept. 15, 2016) \url{https://www.consumerfinance.gov/about-us/blog/significant-impact-student-debt-communities-color,} archived at \url{https://perma.cc/Z73A-XA5A}. These numbers were based on 2011–12 NPSAS data, which undercounted the total debt load. \textit{See Dep’t of Educ., 2015–16 National Postsecondary Student Aid Study (NPSAS:16) Student Financial Aid Estimates for 2015–16 First Look}, at B-29 (2018). Another study found that “[f]our years after earning a bachelor’s degree, black graduates in the 2008 cohort held $24,720 more student loan debt than white graduates ($52,726 versus $28,006), on average.” Scott-Clayton & Li, \textit{supra} note 68, at 3.

\textsuperscript{71} See Am. Student Assistance, \textit{Life Delayed: The Impact of Student Debt on the Daily Lives of Young Americans} 1 (2015), \url{https://file.asa.org/wp-content/uploads/2019/01/28203317-Life-Delayed-2015.pdf,} archived at \url{https://perma.cc/V2G8-ATT5} (arguing that student loans affect people’s ability to make major purchases and life decisions such as starting a business, getting married, and starting a career in their choice of field); \textit{see also} Irene Lew, \textit{Harvard Univ. Joint Ctr. for Bus. Studies, Student Loan Debt and the Housing Decisions of Young Households} 1 (2015) (concluding that the growth of student loan debt will impact young households’ homeownership and saving outcomes); Alvaro Mezza et al., \textit{Fed. Reserve Bd., On the Effect of Student Loans on Access to Homeownership} 32 (2016) (finding that a 10\% increase in student loan debt causes a 1\%—2\% drop in the homeownership rate for student loan borrowers during the first five years after exiting school).
Student Debt is a Civil Rights Issue

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

2. Predatory Schools and the “Choice” of Post-Secondary Institution

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

For-profit colleges aggressively market to Black and Latinx students,\textsuperscript{81} as well as other marginalized groups like women, single parents, immi-

\textsuperscript{72}See Miller, supra note 23 (discussing greater debt for Black borrowers twelve years after graduation than initially borrowed).
\textsuperscript{73}See Volkwein et al., supra note 7, at 215.
\textsuperscript{74}See Huelsm, supra note 15, at 24–25 (noting that “the burden of paying off student debt is taking away a sizeable portion of the ability to accumulate meaningful assets as workers enter their prime earning years”).
\textsuperscript{75}Atkinson, supra note 33, at 1104.
\textsuperscript{76}See infra Section I.A.3.
\textsuperscript{77}Cf. Atkinson, supra note 33, at 1101 (describing the access to credit debate as, at best, showing optimism bias, and at worst, a way to avoid difficult conversations).
\textsuperscript{78}See Adam Looney & Constantine Yannelis, A Crisis in Student Loans?, 53 fig.4 (Brookings Papers on Econ. Activity, Sept. 2015).
\textsuperscript{79}See Cellini & Chaudhry, supra note 6, at 126 (estimating labor market returns to a for-profit education that “fall below the returns needed to offset the private and social costs of for-profit’s degree attendance” and suggesting that for-pro’s may not be worthwhile for the average student); Patrick Denice, Does it Pay to Attend a For-profit College? Vertical and Horizontal Stratification in Higher Education, 52 SOC. SCI. RES. 161–178 (2015) (finding “that for-profit associate’s degree holders encounter lower hourly earnings than associate’s degree holders educated at public or private, nonprofit colleges, and earnings that are not significantly different than high school graduates.”)
\textsuperscript{80}Deming et al., supra note 5, at 141–42.
\textsuperscript{81}Senator Elizabeth Warren has proposed banning for-profit schools from receiving federal dollars as part of her presidential campaign. Warren, supra note 50 (“After an appropriate transition period, ban for-profit colleges from receiving any federal dollars (including military benefits and federal student loans), so they can no longer use taxpayer dollars to enrich themselves while targeting lower-income students, servicemembers, and students of color and leaving them saddled with debt.”);
grants, formerly incarcerated people, and military veterans.82 While Black and Latinx students make up less than one-third of all college students, they represent nearly half of all those attending for-profit institutions.83 Fifteen percent of Black students attended private for-profit institutions: more than students of any other race or ethnicity.84 For-profit colleges are generally far more expensive than their public and nonprofit counterparts.85 The typical business model relies on federal student loan dollars for revenue and profit.86 Because for-profit schools charge higher tuition and enroll a disproportionate share of poor students, they receive a disproportionate share of federal student aid dollars.87 The for-profit business model relies so heavily on federal money that lawmakers amended the HEA to require for-profits to get less than 100% of their funding from federal student aid.88 However, the restriction is modest. Lawmakers curtailed the maximum federal share of for-profit institutions’ revenue first to 85%, in 1992, and a few years later adjusted that figure upward to 90%.89 Notably, military and veteran’s benefits are excluded from the 90% threshold, which obscures the fact that an estimated 200 for-profit schools were at one point receiving more than 90% of their revenue from federal dollars.90


85 See Deming et al., supra note 5, at 159 (“For-profit students face higher sticker-price tuition and pay higher net tuition (tuition plus fees minus grants) than comparable students.”) See GAO-11-4, supra note 13, at 8; Rebecca R. Skinner, Cong. Research Serv., RL 32182, Institutional Eligibility and the Higher Education Act: Legislative History of the 90/10 Rule and its Current Status 1 (2007); Deming et al., supra note 5, at 150 (noting that “[f]ederal student financial aid is the lifeblood of for-profit higher education”).

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


88 See Lewin, supra note 89 (noting that a little over 10% of the approximately 2800 for-profit schools would exceed the 90-10 rule if military and veteran’s benefits are included).
Students at for-profit institutions pay more, are more likely to borrow, and borrow larger amounts than those attending a non-profit or public school. In fact, “[a]ssociate’s degree recipients at for-profit schools borrow almost the same amount (only $956 less) than bachelor’s degree recipients at public colleges.” This, despite the fact that a typical bachelor’s degree requires twice as many courses as an associate’s degree.

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

A significant number of for-profit colleges have shuttered amidst lawsuits and investigations into financial mismanagement, and allegations that their practices predatory, abusive, and illegal. Most notoriously, Corinthian...
Colleges, Inc. collapsed in 2015 in a wave of investigations and allegations of fraud.99 The attorney general of California sued Corinthian and won a $1.1 billion judgment against the company.100 The judge in the case found that Corinthian had misled prospective students about the courses of study offered,101 used insignia of various branches of the United States military in recruiting materials without permission or approval,102 engaged in unlawful debt collection practices on loans to Corinthian students,103 and misled students about the ease of transferring credits earned at Corinthian institutions to other institutions.104 These practices, together, persuaded students to enroll105 and undermined their subsequent opportunities.106

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

100 See People v. Heald, 2016 Cal. Super. LEXIS 13746.
101 See id. at *10–11.
102 See id. at *11–12.
103 See id. *14.
104 See id. *16.
106 See id. (describing students coping with ruined credit and other consequences of indebtedness).
courses of study, provide a plausible explanation\textsuperscript{109} of the higher default rate of Black graduates.\textsuperscript{110}

3. Wealth, Racism, and the “Choice” to Repay

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

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


\textsuperscript{110} See Scott-Clayton, \textit{supra} note 11, at 2.

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


\textsuperscript{114} See id.
difficult to get or hold a job. The consequences of defaulting on federal student loans are even more severe: after default, private loan servicers tack on collection fees that can add many years to the loan repayment. In addition, the federal government has the power to garnish wages or seize Social Security payments and tax refunds. Because federal student loans have no statute of limitations, borrowers may face such collection methods until death. In a number of states, student loan borrowers who default on their student loans may be unable to get a copy of their transcript and may even lose their professional license. To top it off, borrowers face exceptional hurdles to discharging their student loans in bankruptcy. The Bankruptcy Code permits discharge only if a borrower can establish that repayment of the loan would result in an “undue hardship,” a standard that is undefined in legislation and harshly interpreted by courts.

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

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115 See id. at 2.
121 See infra Part II.C.1 (describing exceptional treatment of student loans by the Bankruptcy Code).
122 However, students may assert a “defense to repayment” if the borrower can show “any act or omission of the school attended by the student that relates to the making of the loan for enrollment at the school or the provision of educational services for which the loan was provided that would give rise to a cause of action against the school under applicable State law,” 34 C.F.R. § 685.206(c) (2016), or if the borrower can show a judgment has been issued against the school, the school has violated the terms of a contract with the student, or the school committed a “substantial misrepresentation” to the student.” 34 C.F.R. § 685.222(b)—(d) (2016). As noted in Part II.C.2 infra, the Department recently modified these rules.
123 See infra Part II.C.1.
124 See Mike Brown, College Dropouts and Student Debt, LENDEDU (Nov. 2, 2017), https://lendedu.com/blog/college-dropouts-student-loan-debt, archived at https://perma.cc/6KJ5-4F6S (finding that average college dropout leaves campus with over $10,000 in student loan debt and more than half of college dropouts are not making payments toward their student loan
Student Debt is a Civil Rights Issue

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

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

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

126 See id.

127 See Miller, supra note 23, at tbl.4.

128 See id. at tbls.4–5.

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

130 See id. at tbl.4.

131 See Atkinson, supra note 55, at 12.

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economic effects of those policies,\textsuperscript{133} and the impact of current discrimination in the labor market.\textsuperscript{134} Even with all of these difficulties, default should in theory be avoidable, because Congress has approved several income-driven repayment and forgiveness plans to limit the negative effects of suffocating student loan debt.\textsuperscript{135} The default repayment plan for federal student loans requires a fixed monthly payment amortized over a ten-year period.\textsuperscript{136} This presents a problem for many students, since the returns to their education do not necessarily accrue at the time loans are due.\textsuperscript{137} Almost every federal student loan borrower is currently eligible to enroll in an income-driven repayment (IDR) plan.\textsuperscript{138} Students who enroll in IDR are able to limit monthly payments to 10-15% of their income each month.\textsuperscript{139} If a borrower remains current on


\textsuperscript{134}Lincoln Quillian, et al., \textit{Meta-analysis of Field Experiments Shows No Change in Racial Discrimination in Hiring Over Time}, 114 PROC. NAT’L ACADEM. SCI. 10870, 10870 (2017) (finding little has changed since 1989, when “whites receiv[e]d on average 36% more callbacks than African Americans, and 24% more callbacks than Latinos . . . Accounting for applicant education, applicant gender, study method, occupational groups, and local labor market conditions does little to alter this result.”)

\textsuperscript{135}See \textit{infra} Part II.C.2 for an expanded discussion of IDR and forgiveness programs.

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


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

Students may not take advantage of the various repayment plans because they do not know about them.\(^{145}\) But there is another, more disturbing possibility: the companies that service student loans for the Department of Education may not provide needed information to borrowers.\(^{146}\) Student loan servicers are firms hired by the Department to provide loan servicing and collection\(^{147}\) on its $1.5 trillion portfolio of student loans.\(^{148}\) These servicers of the borrower’s family. See, e.g., 34 C.F.R. §685.209(a) (2016) (describing one of the income-linked repayment plans, dubbed “Pay As You Earn”).

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

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


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

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


148 This includes loans reinsured by the federal government and issued under the Federal Family Education Loan (FFEL) Program, which ended on June 30, 2010. See U.S. Dept. of Educ., Federal Family Loan Program Lender and Guaranty Agency Reports, FEDERAL STU-
and debt collectors are subject to consumer protection laws, such as the Equal Credit Opportunity Act, the Fair Debt Collection Practices Act, and the Consumer Financial Protection Act’s prohibition against unfair, deceptive, or abusive acts or practices. Despite this, there are widespread servicing failures. These federal laws do not specifically address the forms of harm inflicted by student loan servicers, and the servicers have fought fiercely against the potential application of state consumer protection laws to their businesses.

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

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152 See id. at § 1061.
155 Data from the 2016 Survey of Consumer Finances suggests that less than 10% of Black borrower households and less than 5% of Hispanic households use income-driven repayment plans, while more than 15% of White borrowers do. See Kristin Blagg, The Demographics of Income-Driven Student Loan Repayment, U.S. Inst.: Urban Wire (Feb. 25, 2018), https://www.urban.org/urban-wire/demographics-income-driven-student-loan-repayment, archived at https://perma.cc/BS43-FE27. However, recently released data from the Department of Education’s Beginning Postsecondary Students Longitudinal Study (BPS) tracking students who entered college in 2011–12 through 2017 suggests that Black borrowers with college degrees are enrolling in IDR plans at rates higher than any other racial or ethnic group. See Miller, supra note 26.
156 See, e.g., Seamerst, supra note 44, at 30–35 (“The historical precedents for Black debt show that Black people have been systematically excluded from the processes that allow one to convert debt to an asset.”)
chose to sue defaulted borrowers at higher rates in communities that have a higher proportion of people of color.\textsuperscript{157} Almost 60\% of these cases result in a default judgment.\textsuperscript{158} Given that communities with higher numbers of people of color generally have less wealth, the pattern of lawsuits makes little economic sense.

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

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

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

\textsuperscript{157} See Mattes & Yu, supra note 112, at 1.

\textsuperscript{158} See id.


\textsuperscript{160} See id. § 4, 79 Stat. at 438–440.


\textsuperscript{162} See id. §§ 401(b), 407, 78 Stat. at 246, 248. However, section 401(b) specified that “desegregation” shall not mean the assignment of students “. . . to overcome racial imbalance.”

\textsuperscript{163} The law passed to achieve this was the Servicemen’s Readjustment Act, better known as the “G.I. Bill.” See Pub. L. No. 78-346, § 400, 58 Stat. 284, 289 (1944) (codified at 38 U.S.C. § 3011).

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

\textsuperscript{165} Indeed, federal legislation included provisions that specifically allowed forms of racial exclusion to persist, permitting fraternities and sororities to continue to discriminate on the
inadvertently, lawmakers also created a regressive system that perpetuates and exacerbates racial inequality. The federal government now uses two major tools to promote access: student loans and tax benefits. However, both simultaneously enable access and increase existing socioeconomic inequality. Student loans impose a repayment burden and thereby undermine the opportunity that education is intended to afford. Tax credits reward those who earn more or have greater wealth to begin with.

1. Student Debt Crisis as a Case of Policy Drift

The dominance of loans in federal student aid reflects not a failure of foresight or explicit malevolence so much as a failure of political will in the face of rhetoric of private gain from higher education and the effective lobbying of industry groups that benefitted from the loan programs of the HEA. Professor Suzanne Mettler has identified this as an instance of policy “drift.” However, the motives for allowing debt to expand were almost certainly venal, rather than innocent. Over time, as tuition rose, “student aid policies no longer functioned as effectively as they had in the 1970s.” At the same time, student lending became too prized by lenders and too essential for students and their families for lawmakers to risk alienating them. The availability of student loans benefitted powerful institutions: for-
profit education providers and private lenders. Because students could rely on credit and still enroll, for years they did not try to pressure lawmakers to act. But in the years leading up to and after the 2008 financial crisis, borrowers have become much more vocal as costs and debt burdens increased.

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

The critical component of the HEA was the creation of “educational opportunity grants,” scholarships available to students who needed the money in order to enroll. The law also expanded the infrastructure for the loan program, along with campus work-study. It is unlikely that any lawmakers foresaw that student debt would undermine the very students that federal loans aimed to help. Rather, the record suggests that they viewed these policy tools—grants, loans, and work study—as complementary. It is hard to concoct a narrative in which intentions at this historical moment
were anything other than benign, but unintended and negative consequences have appeared over time.\textsuperscript{181}

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

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

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

\textsuperscript{181} This is not a new problem. See generally Robert K. Merton, The Unanticipated Consequences of Purposive Social Action, 1 AM. SOC. REV. 894 (1936).

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

\textsuperscript{183} See Mettler, \textit{supra} note 38, at 53 fig.2.1.

\textsuperscript{184} See id. Under the Obama administration, the maximum Pell grant increased, but even so, the purchasing power has not recovered sufficiently to cover the full need of most students. See Aboozar Hadavand, Educational Aid Policy and Inequality: The Case for Merit- and Need-Based Aid, 76 REV. SOC. ECON. 535, 540 (2018).

\textsuperscript{185} See Hadavand, \textit{supra} note 184, at 541 fig.3.


\textsuperscript{187} Cf. Atkinson, \textit{supra} note 33, at 1156-57 (noting that government policies have “encouraged middle-class borrowers to look to credit to finance their well-being” and that “the middle class has come to rely on credit to meet daily needs and as a means of filling in the gaps left by the lack of satisfactory social insurance”).
2. **Student Debt: A Threat to Democracy**

For decades now, the public debate has framed the decision to attend college as a choice by an individual to pursue personal, private benefit.188 The neoliberal perspective has emphasized the returns to the average graduate: better jobs, higher pay, and greater likelihood of upward class mobility.189 But these benefits do not hold for many who entered the labor market in the last two decades. Since at least the turn of the century, the wage premium from higher education “has been sustained solely because of falling wages for lower levels of education,”190 according to Julie Margetta Morgan and Marshall Steinbaum. Their research, which used data from 2000-2017, suggests that declining worker power has led employers to demand more education for a given job.191 Other economic research suggests that in many areas of the economy, employers are exercising monopsony power to depress wages.192 These are structural, political issues. The research findings highlight the importance of policies that complement expanded investment in higher education access. The policy proposals we offer below193 would ensure that more students from historically excluded groups can matriculate and graduate, but such reforms should be implemented in the context of a broader, progressive effort to combat both racism and inequality. While this Article addresses higher education finance, the inequities perpetuated by student debt cannot be fully addressed in isolation.

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191 This phenomenon is termed “credentialization.” Id. at 4.


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

Lawmakers have long seen education as a means of enhancing democracy and protecting desirable characteristics of the polity.195 The Supreme Court has also acknowledged that education is special,196 although the justices have declined to recognize it as a fundamental right.197 Yet the case for greater access to advanced learning is greater now than it has ever been, as the world’s challenges, knowledge, and technology grow ever more complex. Education also implicates other rights that the Court has recognized as fundamental, such as the right to vote198 and the right to speak.199

If we take the shared, social returns to higher education into account, the United States is underinvesting in advanced learning.200 Those with more education enjoy better health,201 are less likely to be implicated in the criminal law enforcement regime,202 pay more toward the common good in the form of higher income taxes,203 and are more engaged in political and civic activities.204

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196 Brown v. Board of Educ., 347 U.S. 483, 493 (1954) (“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.”).
199 Protected by the First Amendment, the right to freedom of speech is explicitly fundamental, U.S. CONST. amend. I, and informed debate is critical to informed voting. Derek W. Black, The Constitutional Compromise to Guarantee Education, 70 STAN. L. REV. 735, 741 (2018) (“[C]itizenship requires[ ] education . . . .”). For this and other reasons, the right to equitable access to education should be defended as such. Courts may recognize other principles — and other statutes, as Professor Elengold has argued — as bases for protecting civil rights and we applaud such efforts, but we are reluctant to cede the fundamental and direct demand for equity. See Elengold, supra note 52, at 639 (demonstrating that consumer protection law affords a viable avenue for vindication of certain civil rights).
200 See, e.g., LINDA DARLING-HAMMOND, THE FLAT WORLD AND EDUCATION 8 (2015) (arguing that the United States has lost ground relative to other nations and needs to move more decisively than it has in the last few decades to establish a purposeful, equitable education system).
202 McMahon, supra note 201, at 217-20.
203 Id. at 206-07.
2020] Student Debt is a Civil Rights Issue 161

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

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

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

II. Paths Forward

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

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204 Id. at 206-09.
205 Id. at 223-24.
206 See Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, § 601, 78 Stat. 252 (commonly known as Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in all federally-funded programs, including higher education).
207 See id. Unfortunately, the Supreme Court has declined to recognize education as a fundamental right enshrined in the Constitution. San Antonio v. Rodriguez, 411 U.S. 1, 37 (1973).
208 There is a new, historically grounded argument that Rodriguez was wrongly decided, because at the time of the adoption of the Fourteenth Amendment lawmakers believed “the twin pillars of state citizenship . . . [were] education and voting” — and if the Amendment guaranteed citizenship, citizenship meant voting, and voting required education. Black, supra note 199, at 741 (arguing that “the original intent behind the Fourteenth Amendment included a commitment to guarantee education as a core aspect of state citizenship” and so the Court should recognize education as a fundamental right).
209 This is not an argument that the federal government should stop making student loans; that would not solve the problem of debt-financed access to higher education and outstanding debt. Other lenders would happily step in to fill the gap, charging higher interest rates than the federal government does. The terms of such private education loans were one reason that Congress created a federal loan program in the first place. See Jonathan D. Glater, Student Debt and the Siren Song of Systemic Risk, 53 Harv. J. on Legis. 99, 113 (2016) (noting that terms of commercial loans were a reason the federal legislature expanded federal student lending).
Latinx students. This section develops the argument for such a remedy, then identifies the challenges faced by such an effort under existing law and doctrine. The second section steps back to consider more broadly available, facially race-neutral reforms implementing an anti-inequality paradigm to eliminate the problem of student debt for all who currently owe and for all who will pursue higher education in the future. The third section suggests a set of incremental, carefully targeted policy reforms, all adopting a consumer protection paradigm, that would help to resolve some of the more egregious ill-effects of debt.

A. Hobbled Civil Rights Paradigm

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

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

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


Civil Rights Act of 1964, supra note 206.
federal student loan faces essentially the same terms. This distinguishes the harm of student lending from, for example, that of discriminatory mortgage lending. Each borrower’s socioeconomic context, which has been shaped by a history of overt, de jure racial discrimination and continuing de facto discriminatory treatment results in the disparate impact of student loan debt on (primarily) Black and Latinx borrowers. Importantly, this disparate impact is a direct result of the government’s choice to provide access to higher education primarily through student debt.

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

But even if Congress were inclined to engage in such race-conscious legislation, any of these remedies would likely encounter a hostile reception in the Supreme Court. A majority of the Court has adopted an understanding of discrimination as an individual phenomenon: the product of individual, intentional acts. Efforts to remedy broader, structural disparities — those not obviously related to the conduct and malevolent intent of an indi-
individual defendant — have received hostile treatment.\textsuperscript{220} For example, a majority of the justices have shown considerable skepticism toward race-based affirmative action.\textsuperscript{221} If legislation is to offer a viable way forward, we need a Court with a different understanding of discrimination and a national legislature with a different perception of the government’s obligation to combat it.

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

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

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


\textsuperscript{222} Hughes, supra note 216, at 1066.

\textsuperscript{223} The mismatch, between the moral wrong and remedies based on a paradigm focused either on equity or on consumer protection, matters because there are obstacles in addition to disparate, relative poverty that undermine higher education access for members of historically subordinated groups. See, e.g., Jewel, supra note 133, at 658 (describing the “new science [that] indicates that persons living in poverty . . . become saddled with persistent disabilities, as the ill effects of deprived material environments seep into the body and mind and get passed on, through biology”) and accompanying text. In higher education alone, a variety of institutional policies and practices also hamper access and success for Black and Latinx students. For example, criteria that disproportionately screen out these students in selective admissions processes, inadequate academic support for them once enrolled, and lack of faculty mentors and role models undermine prospects for success. These other barriers to Black and Latinx students are beyond the scope of this Article, but we recognize that racial justice would require attention to such obstacles and that the law should not only permit, but require, these steps.
race-based affirmative action has.\textsuperscript{224} As a practical matter a race-conscious remedy would certainly provoke powerful resistance. We make the argument because the racial justice claim is overwhelming. Providing additional financial assistance in whatever form for members of historically excluded groups, especially Black people, is a move toward equity. This is not a claim about enhancing efficiency, promoting innovation, or even improving the quality of education, although these would certainly be results. This is simply a claim about fairness.\textsuperscript{225}

\textbf{B. Bold—and Essential—Solutions}

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

The critical role of education in our society justifies bold thinking and far-reaching reforms to improve access to higher education, rather than cautious incrementalism aimed at addressing each of the myriad flaws of the current, debt-centric system. The possibility of structural reform to promote access to higher education has energized progressive advocates and academ-
ics. Two contenders for the Democratic presidential nomination in 2020 have proposed both mass debt forgiveness and virtual elimination of tuition at public colleges and universities, two steps that would radically reduce the barriers to higher education. In this section we briefly discuss the plans offered by Senators Bernie Sanders and Elizabeth Warren, respond to actual and potential criticisms of such an expanded investment in access, and offer an argument based on racial justice, which is too often left aside in favor of pragmatic claims about individual cost and benefit of debt and degrees, in favor of comprehensive federal intervention in higher education finance. We conclude with a proposal for revitalizing the government’s role in financing higher education.

1. Debt Forgiveness

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


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

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


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

See Stratford, supra note 1. One recent paper used a “natural experiment” to estimate the effects of debt relief. It found that borrowers reduced their debt by 26% were 11% less likely to default on other accounts, enjoyed increased geographic mobility, and their income increased $3,000 over a three-year period. See Marco Di Maggio et al., Second Chance: Life
Two leading presidential candidates for the upcoming election have proposed plans to cancel varying amounts of student loan debt. Senator Elizabeth Warren announced a “transformational” plan to cancel student loan debt for more than 95% of Americans with student loans and to provide tuition-free public college nationwide through increased federal financial support. Her proposal would cancel up to $50,000 in student loan debt for borrowers in households with annual incomes of less than $100,000, and provide a decreasing amount of forgiveness for those in households earning between $100,000 and $250,000. Under the proposal, the forgiven debt would not count as income for tax purposes. And the proposal would pay for forgiveness through a tax imposed on “ultra-millionaires,” the 75,000 families in the United States whose fortunes total at least $50 million.

Senator Sanders’ plan would forgive all student debt for all borrowers, regardless of income. His proposal would tax financial transactions rather than the wealthiest households but, collecting $0.50 for every $100 traded, 0.1% of every bond trade, and 0.005% on every derivative transaction. Thus, while this proposal would benefit more borrowers, it would take less direct aim at economic inequality. In advocating for their respective proposals, Senator Sanders and Senator Warren emphasize the harm of debt and the benefit of its cancellation. To be sure, if either plan is implemented, most of the negative effects and implications of student borrowing and existing debt would be eliminated at once. But there is a stronger argument to be made without student debt.


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

Warren, supra note 50.

See id.

See id.

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

See BernieSanders.com, supra note 50.

Id.

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

For example, eliminating student borrowers’ repayment obligations would free them to make life choices that would be less constrained. One more subtle implication might be a reduction in pressure on professors to inflate student grades. See R. Todd Jewell et al., Whose Fault Is It? Assigning Blame for Grade Inflation in Higher Education, 45 Applied Econ.,
made, a claim that hearkens back to the ambition and idealism of the architects of the federal interventions in higher education finance of years past. Public higher education represents a shared aspiration that higher education should be available to all members of the public who wish to pursue it. The argument is bolstered when placed in historical context of racial exclusion and discrimination. When entire segments of the national community have been unfairly and unjustly stopped at the campus gate, that in itself creates an ethical obligation to ensure that access in the future is allocated in a fair and just fashion. To be clear, then, restricting meaningful access as we currently do, based on wealth and income, is unjust.

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

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

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

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

243 MARSHALL STEINBAUM, JAIN FAMILY INST., STUDENT DEBT AND RACIAL WEALTH INEQUALITY 31-32 (2019), https://phenomenalworld.org/content/2-higher-education-finance/1-student-debt-racial-wealth-inequality/student_debt_and_racial_wealth_inequality_final_7-19-19.pdf, archived at https://perma.cc/9LJY-BN4J (“[L]abor market discrimination means that black students have to obtain more degrees, and go into more debt, to obtain the same jobs with the same salaries that white people can obtain with fewer degrees and less debt.”).

244 The effect is compounded by differences in wages, as alluded to above, see supra Part I.A.3, because the income effect of a given level of education is smaller for Black people relative to White people. See Sandy Baum, Jennifer Ma, & Kathleen Payea, EDUCATION PAYS: THE BENEFITS OF HIGHER EDUCATION FOR INDIVIDUALS AND SOCIETY 14 fig.1.4 (2013).

245 KENDI, supra note 216, at 218 (2019) (“The story of our generation will be based on what we are willing to do. Are we willing to endure the grueling fight against racist power and policy?”). Neither forgiveness of student debt nor elimination of tuition at public institutions of higher education would constitute reparations for the historic and catastrophic impact of slavery on Black people. That does not weaken the moral argument for taking these steps, which represent an effort to create the kind of republic we want to inhabit.
2020] Student Debt is a Civil Rights Issue 169

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

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

\textsuperscript{246} Warren, supra note 50.

\textsuperscript{247} Graduate and professional school students account for 17% of federal student loan borrowers, but 38% of federal education loans. See Sandy Baum & Patricia Steele, Graduate and Professional School Debt: How Much Students Borrow 4 (2018), https://www.urban.org/sites/default/files/publication/95626/graduate-and-professional-school-debt_0.pdf, archived at https://perma.cc/W4N8-HWVW.

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


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

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

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

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

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


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

257 Id. at 35 (explaining that individuals with more education are less likely to live in households receiving public assistance).
good and neither is forgiveness, and to the extent that we wish to recapture some of the private, economic gain received through public subsidy, the tax code offers a more direct solution.

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

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

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

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


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

261 See Warren, supra note 50.

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

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

Senators Warren and Sanders have each proposed reducing tuition at public colleges and universities to zero.264 Under Senator Warren’s plan, the “federal government w[ould] partner with states to split the costs of tuition and fees and ensure that states maintain their current levels of funding on need-based financial aid and academic instruction.”265 To cover additional costs of room and board, Senator Warren would also expand need-based grant aid that could be used for expenses other than tuition and fees.266 Senator Sanders, in turn, proposed legislation “to provide at least $48 billion per year to eliminate tuition and fees at four-year public colleges and universities, tribal colleges, community colleges, trade schools, and apprenticeship programs.”267 The proposed legislation adopts the current definition of “costs of attendance” in the U.S. Code268 and provides that room, board, and other miscellaneous costs269 would be covered for the neediest students.270

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

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264 See Bershine Sanders, supra note 50 (identifying the proposals of Senator Sanders); Warren, supra note 50 (identifying the proposals of Senator Warren).
265 Warren, supra note 50.
266 See Warren, supra note 50. Specifically, Senator Warren would “invest an additional $100 billion over the next ten years in the next ten years in Pell Grants—and expand who is eligible for a Grant—to make sure lower-income and middle-class students have a better chance of graduating without debt.” Id.
268 This includes, for example, the cost of textbooks. See id.
269 That is, those who are eligible for Pell grants. See College for All Act, S. 1947 supra note 269 at § 901(d)(8).
270 See, e.g., Gutmann, supra note 194, at 226 (observing that the reform “with the greatest merits from the standpoint of nondiscrimination is eliminating tuitions almost entirely and subsidizing higher education so heavily as to insure equal access to all qualified students”).
model for a sharp expansion of public funding from both the federal and individual state governments. This system, which we regard as the ideal step to enable fair access to higher education opportunity, would shift costs from students and their families back\textsuperscript{272} to the national community.\textsuperscript{273} Second, we explore a more modest proposal to change the existing student aid structure.\textsuperscript{274} This alternative would use drastically increased, more effectively targeted means-tested aid to students as individuals instead of funding directed to the institutions they attend.\textsuperscript{275} This, too, would reallocate the cost of higher education away from students. Either reform would increase equity of access, but the consequences and political perils differ, not always in obvious ways.

\textit{(a) Federal Aid to the States}

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

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

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

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

\textsuperscript{274} See infra Part II.B.2.b.

\textsuperscript{275} Id.

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


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

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

In the absence of federal intervention, states could still choose to dedicate revenue to reducing or eliminating the cost to students. Some states, like New Mexico, California, Tennessee, Washington, and New York, are moving in this direction. New York created the Excelsior Scholarship in 2017, providing free tuition at the state’s public colleges and universities for students whose families earn no more than $125,000 per year. In Tennessee, a
state that pioneered free community college, the interim president of the state’s university system announced in 2019 the creation of a free tuition program for students whose families earn less than $50,000 annually. The Washington legislature in 2019 passed a law that will cover tuition and fees for students whose families earn about $50,000 a year or less, paid for by a “surcharge” on companies that employ highly skilled workers. In California, lawmakers in 2017 expanded funding for community colleges to eliminate the state equivalent of tuition and fees.

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

(b) Direct Federal Aid to Public Institutions

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


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

285 Id.

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

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

288 Professor Derek Black has argued that the Education Department effectively has already done this. Derek W. Black, Federalizing Education by Waiver?, 68 Vand. L. Rev. 607, 613 (2015) (describing use of the power to waive compliance with federal law as a tool to impose other requirements on schools).
government for myriad purposes other than funding student aid. The federal government could leverage control over funds to influence what colleges and universities teach and has indeed threatened to do so. Still, an executive who actually ignores the norm may not receive a friendly reception in the courts.

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

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

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


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

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

293 Glenn Hubbard, former chair of the Council of Economic Advisers under President George W. Bush, made this point eloquently in an op-ed. Glenn Hubbard, *Tax Reform is the*
above are the best ways to expand higher education access and solve the problems created by the current system. It is difficult to overstate the benefits this overhaul would bring to students who pursue higher education, to their families, and to public providers of higher education. Students and their families would avoid the costs and risks of taking on life-altering debt to cover tuition. Reducing tuition to zero would ensure that willing and capable students apply and enroll. Students would face less pressure to work while enrolled, freeing them to take full advantage of their postsecondary education experience. And poorer students would face less pressure to pursue only courses of study and career pathways that they anticipate will result in higher incomes, providing greater freedom to choose diverse opportunities in public service.

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


294 But see Tressie McMillan Cottom, Why Free College is Necessary, DISSERT MAGAZINE (Fall 2015), https://www.dissentmagazine.org/article/tressie-mcmillan-cottom-why-free-college-necessary, archived at https://perma.cc/U6G6-UZZE (arguing that “free college would likely benefit only an outlying group of students who are currently shut out of higher education because of cost—students with the ability and/or some cultural capital but without wealth”).


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

To address costs of higher education beyond tuition and fees, then, the federal government should provide need-based grant aid, either directly or through colleges and universities, so that students can graduate debt-free.

C. Helpful but Insufficient Fixes: A Consumer Protection Paradigm

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

This section first describes necessary changes in how student loans are treated in bankruptcy proceedings to make it easier for borrowers to eliminate or discharge their obligations. The next section advocates for changes in repayment plan structure, expanded forgiveness for borrowers who take public interest jobs, tougher regulation of for-profit higher education providers,
and a more robust process allowing students to cancel their debts if their education provider defrauded them.

1. Bankruptcy Reform

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

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


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

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

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

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

This section discusses two tools judges can use to discharge student loan debt in bankruptcy court, despite the challenging standards. Our first proposal is informed by the evidence we described in Part I. Our goal is to have bankruptcy courts make more informed decisions when adjudicating student loan cases by considering the value of the education the student received. Under current tests, courts evaluate whether a debtor’s current inability to repay their loans will continue in the future.\footnote{Brunner directs a court to consider whether the current state of affairs “is likely to persist for a significant portion of the repayment period of the student loans” while the totality test speaks about this in terms of the debtor’s “reliable future financial resources.” \textit{See infra} notes 341-42 and accompanying text. Courts vary as to what is the appropriate future period for consideration. Is it the original term of the loans? A longer term if the loans could be refinanced? Forever? \textit{See In re Price}, 573 B.R. 579, 602-06 (Bankr. E.D. Pa. 2017), rev’d sub nom. DeVos v. Price, 583 B.R. 850 (E.D. Pa. 2018).} Few courts consider the value of the education received by the student.\footnote{“The court [in Brunner] stated that consideration of educational benefit was improper because it made the federal government an insurer of educational value. The court rejected the view that discharging loans serves as a form of punishment for schools with unsatisfactory educational programs. Discharge does not impact the schools, but rather hurts the taxpayers who foot the bill for unpaid student loans.” Robert F. Salvin, \textit{Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans}, 71Tul. L. Rev. 139, 160-61 (1996).} This is inconsistent with the original legislative purpose underlying the exceptional treatment of student debt under the Bankruptcy Code.

It wasn’t always this way. Before 1976, student loans were treated like other consumer debts — that is, freely dischargeable so long as the debtor did not obtain them through fraud.\footnote{See \textit{11 U.S.C. § 35(a) (1976) (repealed 1978); 11 U.S.C. § 523(a)(2) (2019) (exempting from discharge most debts that were “obtained by false pretenses, a false representation, or actual fraud”). “There are nineteen enumerated exceptions to the bankruptcy discharge. Most have to do with debts owed to the federal or state governments[,] fraud or defalcation, certain kinds of injuries caused to persons or property... or debts in connection with a divorce or separation agreement.” Jiménez, \textit{supra} note 306, at 630-31.} Congress has since amended this section of the Bankruptcy Code five times, on each occasion further restricting the availability of discharge to student loan debtors.\footnote{The Higher Education Amendments of 1976 (section 439A) made student loans presumptively nondischargeable for five years, unless the debtor could prove undue hardship or if}
2005, presumptively barred discharge of private student loans — those neither made nor guaranteed by the federal government — from financial firms that had already priced the risk of default into the loan price. The law benefited private financial firms, which issued loans with interest rates as high as 20%, and those firms lobbied in favor of the bill. To the extent that legislators claimed this change would help make loans available to more students, it failed to do so. The legislation had no long-term effect on loan availability, the cost of the loans increased by an average of 0.35%, and more students were required to borrow with a co-borrower. Concerned about fraud and abuse, Congress opted to treat student loan borrowers more harshly than other consumer debtors. Lawmakers were particularly worried that recent graduates would dump debts in bankruptcy and go on to highly lucrative careers. This concern motivated the passage they filed a Chapter 13 case. In 1990, Congress extended the period of presumptive nondischargeability to seven years and included cases filed under Chapter 13. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4865 (1990); see also Salvin, supra note 309, at 148. In 1998, most publicly funded or guaranteed student loans became presumptively nondischargeable irrespective of how long they had been in repayment. Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1581 (1998). The last amendment was enacted in 2005, when Congress added private student loans to that list. Alexei Alexandrov & Dalie Jimenez, Lessons from Bankruptcy Reform in the Private Student Loan Market, 1 Harv. L. & Pol’y Rev. 175, 178 (2017).
of the 1976 law, but because there was no empirical evidence to support it, Congress prevented the law from taking effect for a year, and two members of Congress asked the General Accounting Office (GAO)\textsuperscript{320} to investigate historical cases of abuse in the interim.\textsuperscript{321} The subsequent GAO report found that in most of the bankruptcy cases they studied, student loan claims constituted less than 60\% of all debts.\textsuperscript{322} In addition, bankruptcy claims involved less than one percent of the total federal student loans issued to date.\textsuperscript{323} This led Representative Don Edwards to conclude that “the number of abusive bankruptcies is a small minority of the whole,”\textsuperscript{324} and to refer to the treatment of student loans in bankruptcy as a “discriminatory remedy for a ‘scandal’ which exists primarily in the imagination.”\textsuperscript{325} Nevertheless, efforts to amend the law over the years have not succeeded.

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

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\item See, e.g., REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE U.S., Part 1 at 179 (1973) (finding that the bankruptcy rate for student loans was 0.23\% in 1972); Individual Views of Chairman James G. O’Hara, H.R. Rep. No. 95–595, supra note 312, at 64 (reporting a 0.2 to 1.1\% bankruptcy rate for private student loans).
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and after the 2005 change in the law and failed to find strategic behavior of this kind by private student loan borrowers.\textsuperscript{328}

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

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


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

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

\textsuperscript{333} Salvin, supra note 309, at 170.


\textsuperscript{335} In re Long, 322 F.3d 549, 554 (8th Cir. 2003) (announcing and adopting the totality of circumstances test).

\textsuperscript{336} In re Schatz, 602 B.R. 411, 417, 420 (B.A.P. 1st Cir. 2019) (noting that “the U.S. Court of Appeals for the First Circuit . . . has not yet adopted a specific test” and remanding the case to the bankruptcy court for a “proper application of the totality of the circumstances test”).
The Brunner test requires debtors to show they (1) “cannot maintain, based on current income and expenses, a ‘minimal standard’ of living” for themselves and dependents if required to repay their loans; (2) that “additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans,” and (3) that they have made “good faith efforts to repay the loans.”

The totality test directs courts to evaluate “(1) the debtor’s past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor’s and [their] dependent’s reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case.”

Both judicial glosses have received a great deal of criticism due to their oftentimes harsh results. For example, in a recent Fifth Circuit case, despite the different language in the tests, note that it is not clear that they produce significantly divergent results. Pardo, supra note 331, at 1141 (reporting that “debtors experienced litigation success 38.8% of the time in Brunner jurisdictions and 40.6% of the time in totality jurisdictions,” a difference that is not statistically significant); see also Pardo & Lacey, Undue Hardship in the Bankruptcy Courts, supra note 310, at 486-509 (arguing that the best way to explain the substantive outcome was “differing judicial perceptions of how the same standard applies to similarly situated debtors”).


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

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


See, e.g., Salvin, supra note 309, at 142-43 (describing a case in which the debtor “will remain liable on her student loan until she is seventy-five years old, ten years after the age at which it would be customary for her to retire” and noting that the court issued the decision without discussing the debtor’s retirement savings). Some courts go so far as to require that the debtor prove “a certainty of hopelessness,” regardless of whether they use Brunner or a totality test. Compare Oyler v. Educational Credit Mgt. Corp. (In re Oyler), 397 F.3d 382, 386 (6th Cir. 2005) (using the “certainty of hopelessness” formulation in a Brunner jurisdiction), with Mulherin v. Sallie Mae Servicing Corp. (In re Mulherin), 297 B.R. 559, 566 (Bankr. N.D. 184 Harvard Civil Rights-Civil Liberties Law Review [Vol. 55
Student Debt is a Civil Rights Issue

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

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

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

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

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

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

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


In re Powelson, 25 B.R. 274, 275-76 (Bankr. D. Neb. 1982) (“The most obvious example would be the doctor who, while in medical school, borrows money to increase his economic potential, becomes a doctor and enjoys a significantly higher amount of income. It seems reasonable in that case generally to say that he should be obligated to repay that loan because it made him the doctor that he is.”). However, note that this rationale is also applicable to many kinds of loans that are dischargeable — for example, medical debts or car loans, which do not receive exceptional treatment under the Bankruptcy Code. See Atkinson, supra note 55, at 16-17 n.57.
But what if the borrower did not graduate? Or attended a for-profit school that provided only questionable credentials? The discharge exception contains, as one attorney put it, “a rebuttable presumption that education increases a person’s economic opportunities and ability to repay,” but if the person can show that their future prospects are not improved as a result of the education received, a court should take that into account. In the case of for-profit schools and certificate programs, this is a likely scenario, as discussed above. For-profit students receive modest or no salary bumps even when they graduate, and no bump at all if they fail to complete a course of study. As we also discussed in Part I.A.3 above, Black and Latinx borrowers routinely encounter labor market discrimination in hiring and wages, leading to decreased earning potential. Bankruptcy judges should weigh these factors when deciding whether the borrower’s current financial situation is likely to improve in the future to enable repayment. Bankruptcy judges “themselves must guard against falling victim to the same cognitive flaws that lead debtors to underestimate risks.”

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

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

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

350 Salvin, supra note 309, at 196.

351 See supra Part I.A.

352 Salvin, supra note 309, at 197.

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

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

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

2. Other Reforms

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

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355 In re Correll, 105 B.R. 302, 307 (Bankr. W.D. Pa. 1989) (discharging the debt and stating that “[t]he abuse which Congress sought to prevent does not appear in this case. We do not have a highly-educated debtor filing for bankruptcy relief to avoid his student loan obligations”).
356 Id. at 307.
358 Id. at 679.
359 See generally Paul Kiel & Hannah Fresques, Data Analysis: Bankruptcy and Race in America, ProPublica (Sept. 27, 2017), https://projects.propublica.org/graphics/bankruptcy-data-analysis, archived at https://perma.cc/K779-9FAR (discussing racial patterns in bankruptcy filings and outcomes); Jean Braucher et al., Race, Attorney Influence, and Bankruptcy Chapter Choice, 9 J. EMPIRICAL LEGAL STUD. 393, 419 (2012) (reporting on two studies, including an experimental vignette study, suggesting that bankruptcy attorneys are part of the reason for the racial disparities in bankruptcy chapters); Mechele Dickerson, Racial Steering in Bankruptcy, 20 AM. BANKR. INST. L. REV. 623, 625 (2012) (reviewing previous study and noting that “race matters, has always mattered, and will always matter in bankruptcy”).
(a) Streamlined and Reformed Income-Driven Repayment Plans

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

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

\textsuperscript{360} See supra Part I.A.3.

\textsuperscript{361} See supra note 145 and accompanying text.

\textsuperscript{362} See U.S. Dep’ t of Educ., supra note 139 (describing various income-linked repayment plans).


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

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

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

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

371 Cheng & Thompson, supra note 367, at 14.
thereby exacerbating the gap in wealth between relatively privileged White people and less well-resourced Black and Latinx people, even those who have invested in higher education. Flexibility in repayment can reduce the impact of financial hardship, to be sure, but much more is needed.

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

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

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

The Solution: At a minimum, legislation or regulation should set deadlines for the Education Department’s PSLF application processing; explicitly...
2020] Student Debt is a Civil Rights Issue

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

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

(c) Student Loan Servicer Oversight and Contract Reform

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

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

384 See Office of the Inspector Gen., U.S. Dep’t of Educ., supra note 383, at 2, 4 (finding that 25% of the call reports reviewed “disclosed instances of servicers not correctly calculating borrowers’ repayment amounts”).
suits against servicers charging that they failed to keep accurate records of borrowers’ obligations and payments and failed to advise students accurately on choosing the most favorable of the repayment plans available to them.385 The need for enforcement by state officials alleging violations of state law only highlights the gap left by the lack of enforcement at the federal level, and servicers are fighting those states tooth and nail.386

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

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

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


387 For a list of recommendations for how to improve student loan servicing, see CONSUMER FIN. PROT. BUREAU, STUDENT LOAN SERVICING, supra note 142, at 133–45.


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

Reforms have been enacted by or proposed in multiple states, including Connecticut, Massachusetts, New Jersey, California, and Rhode Island.

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


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


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

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

(d) Bolster the "Gainful Employment" Requirement

In the wake of revelations of misconduct by for-profit providers of higher education, the Obama-era Education Department promulgated rules aimed at denying higher education institutions access to Title IV funds if their graduates did not find “gainful employment” from federal student aid programs. Because these for-profit institutions rely heavily on federal...
aid,\textsuperscript{409} their exclusion from the program virtually guarantees their shutdown. These rules determine indirectly whether a student is gainfully employed by assessing multiple data points, including the ratio of students’ debt to income\textsuperscript{410} and the pace of students’ progress in repaying student loans.\textsuperscript{411}

\textit{The Problem:} The Trump Education Department criticized the gainful employment rules—and then rescinded them altogether.\textsuperscript{412}

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

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


\textsuperscript{410} 34 C.F.R. § 668.7(a) (2014).

\textsuperscript{411} 34 C.F.R. § 668.7(b) (2014).


\textsuperscript{413} 34 C.F.R. § 668.7(i) (2014).
income specified in the rule toward repayment of their student loans. The balance would be forgiven, although the government could try to recover the cost of any forgiveness from the institution.\footnote{Another alternative would be to require institutions to begin placing a fraction of revenue in escrow to cover the costs of such forgiveness as soon as the institution ceases to comply with the rule’s requirements.}

(e) True Borrower Defense to Repayment

In response to findings of fraud at Corinthian College, a for-profit chain that collapsed in 2016, the Department of Education promulgated another set of rules, this time intended to create a pathway to elimination of repayment obligations for students who could establish that they were victims of fraud. The rules expanded on a general requirement imposed by Congress that the Department “specify in regulations which acts or omissions of an institution of higher education a borrower may assert as a defense to repayment of a [federal student] loan.”\footnote{20 U.S.C. §1087e(h).}

The Problem: The process established by the rules was complex and, significantly, did not include an avenue for borrower appeal beyond the Department. To obtain loan forgiveness, a student borrower had to persuade a Department hearing officer that the school attended had not provided the educational services promised, thus breaching an agreement,\footnote{34 C.F.R. § 685.222(c) (2019).} or else made a “substantial misrepresentation” to the student borrower and the borrower had reasonably relied on the misrepresentation.\footnote{See 34 C.F.R. § 685.222(d) (2019).} A borrower could make this argument in an application, including any supporting evidence, and submit it to the Secretary of Education.\footnote{Id.} The Secretary designated a Department official to engage in factfinding regarding the defense claim.\footnote{Id.} The designated official was to produce a written decision denying or allowing the defense to repayment in whole or in part.\footnote{34 C.F.R. § 685.222(e)(5)(i).} If the Department official denied the application in whole or in part, the borrower could request review by the Secretary; no further appeal process was contemplated by the regulation.\footnote{See Complaint, California v. Dept. of Education, 3:17-CV-07106 (N.D. Cal. Dec. 14, 2017), at ¶¶5-11, https://oag.ca.gov/system/files/attachments/press_releases/California%20v.}
2020] Student Debt is a Civil Rights Issue

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

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

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

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

Conclusion

Every student, regardless of race, deserves an equal opportunity to learn. In this Article, we have outlined myriad ways that the current system of higher education finance undermines equal educational access, dispropor-
tionately burdening poor students and especially those who are Black and Latinx. We have offered a blueprint for a revitalized role for the federal government in financing higher education, a radical experiment in expanded access never attempted on a national scale. We have also identified a series of more modest changes that would at least mitigate some of the racially disparate harms of student indebtedness.

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

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

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