THE SOCIAL COST OF UNPAID STUDENT LOANS

BROOK E. GOTBERG[†] & EVAN MILLER[†]

ABSTRACT

Federal student loans represent a multibillion-dollar investment by American taxpayers. Although most student loans are repaid on time, a significant minority of borrowers struggle to repay their debts. This is particularly true when the education obtained using the loans does not translate into higher earning potential for the borrower. Policymakers have periodically focused attention on easing the burden of student debt. The sympathetic plight of many borrowers makes it easy to consider only their best interests. However, on the opposite side of every debtor is a creditor; in this case, it is the federal government as a representative of taxpayers. Failure to consider the best interests of creditors when considering debt forgiveness can lead to inefficient and unfair outcomes. When making decisions to forgive student debt, policymakers would do better to consider the repayment interests of taxpayers and grant loan forgiveness only when the costs of attempting to collect from borrowers exceeds the likely recovery, or when borrowers demonstrate an inability to satisfy all of their debts. Bankruptcy proceedings can offer targeted and efficient solutions to the student loan debt forgiveness problem and should be better implemented in this space. Furthermore, administrators of student loan programs should update lending criteria for future loans based upon past student loan performance.

TABLE OF CONTENTS

INTRODUCTION 756
I. THE PROBLEM OF UNPAID STUDENT DEBT.......................................759
A. *Individual Borrowers*..759
1. Is the Cost of Higher Education Too High for Students? 762
2. Are All Students Burdened by Student Loans? 766
3. Will Forgiving Student Loans Solve the Problem? 769
B. *Individual Taxpayers* 770
C. *Broader Policy Considerations* 772
II. THE INCOMPLETE SOLUTIONS THUS FAR..773
III. PRINCIPLES OF DEBT FORGIVENESS...778
A. *Student Loan Forgiveness in Context* 778
B. *Debt Discharge Through Bankruptcy*..782
IV. POLICY PROPOSALS GOING FORWARD 785

†. Professor of Law, BYU Law School.
†. Term law clerk to the Honorable Robert J. Faris.

A. *Congressional Action* 786
B. *Judicial Action* 787
C. *Executive Action* 787
D. *Lending Decisions Going Forward* 790
CONCLUSION 791

INTRODUCTION

College expenses and trade school tuition have dramatically increased over the past thirty years, even relative to inflation.[1] For all but the wealthiest families, these increases have made financial assistance essential to finance higher education. Borrowing can empower individuals to pursue higher education, but in some cases may hopelessly burden even successful graduates. Repayment is even more difficult for individuals who leave school before they obtain their final degree.

When repayment obligations associated with student loans outstrip graduates' expected earning potential, the loans impose a significant burden.[2] This burden can contribute to a decreased standard of living and an inability to make the typical investments expected of young adults, such as buying a home, saving for retirement, and starting a family.[3] The situation is significantly worse for individuals who cannot realize the benefit of increased education because they were unable to complete their degree, suffer from a disability, or experience other misfortunes that impede their ability to work.[4] Most policy discussions center on how to support these struggling borrowers.[5]

---

1. *See* JENNIFER MA & MATEA PENDER, TRENDS IN COLLEGE PRICING AND STUDENT AID 2023 12 (College Board ed., 2023).

2. *See* Stacy Cowley, *As Student Loan Collections Restart, Millions Are Not Yet Paying*, N.Y. TIMES (Dec. 18, 2023), https://www.nytimes.com/2023/12/15/business/student-loan-debt-payments.html.

3. *See* Luke M. Cornelius & Sharon A. Frank, *Student Loan Debt Levels and Their Implications for Borrowers, Society, and the Economy*, 42 EDUC. RES. INFO. CTR., Spring 2015, at 35, 37. These negative consequences are accepted as fact by many within the academic community. *See, e.g.*, Dara Bright & Amanda Barany, *An Examination of Student Loan Borrowers' Attitudes Toward Debt Before and During COVID-19*, *in* ADVANCES IN QUANTITATIVE ETHNOGRAPHY 185, 186–88 (2022) (examining Reddit threads pre- and post-COVID to track borrowers' emotional experiences with student debt). *But see* BETH AKERS & MATTHEW M. CHINGOS, GAME OF LOANS: THE RHETORIC AND REALITY OF STUDENT DEBT 1–2 (2016) (arguing that student loans have become "a scapegoat" for these concerns).

4. Borrowers who attend for-profit schools seem particularly vulnerable to early withdrawal. *See* Vasanth Sridharan, *The Debt Crisis in For-Profit Education: How the Industry Has Used Federal Dollars to Send Thousands of Students into Default*, 19 GEO. J. POVERTY L. & POL'Y 331, 340 (2012). Sympathy for debtors with severe medical issues appears to inform some decisions in bankruptcy on whether to discharge debt. *See* Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. STATE U. L. REV. 505, 508 (2008); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1311 (10th Cir. 2004) (servicer argued that typically medical disability is required to prove prospective undue hardship).

5. *See, e.g.*, ALEXANDRA HEGJI, CONG. RSCH. SERV., R46314, FEDERAL STUDENT LOAN DEBT RELIEF IN THE CONTEXT OF COVID-19 1–2 (2022); Daniel Cooper & J. Christina Wang, *Student Loan Debt and Economic Outcomes*, 1 (Fed. Rsrv. Bank of Boston, Working Paper No. 14-7, 2014)

However, the staggering rates of outstanding unpaid student loans and the high cost of education harm an entirely separate, much larger group as well. An overwhelming percentage of student loans are federally funded and government-backed,[6] meaning that all U.S. taxpayers are invested in their successful repayment. Taxpayers presumably support the student loan program because they want the benefit those loans were intended to achieve—a more productive population of citizens.[7] They consent to fund student loan programs in pursuit of this objective, but under the plain terms of these loans, full repayment is required.[8] Most policy discussions have overlooked the interests of those who finance student loans: the creditors, American taxpayers.[9]

Instead, conversations about the student debt crisis tend to focus on the browbeaten borrower buried in debt.[10] To the extent the discussion considers the student loan burden from the creditor side of the ledger, it fails to adequately acknowledge creditors' compelling interest in repayment, as exists with any debt. The interest in repayment of student loans may even be trivialized by equating it with the servicer's duty as an agent to administer the program.[11] In addition to considering the needs of individual borrowers, policymakers should weigh the interests of taxpayers who invest in the student loan program on the promise that the loans will eventually be repaid.

It is particularly important to consider lenders' interests when those individuals who have financed student loans differ from the typical

(questioning what the optimal level of borrowing is to maximize student benefit); Matthew S. Rutledge, Geoffrey T. Sanzenbacher, & Francis M. Vitagliano, *How Does Student Debt Affect Early-Career Retirement Saving?* 17 (Ctr. for Ret. Rsch. at Bos. Coll., Working Paper No. 2016-9, 2018) (inquiring how policymakers can help individuals with student loans increase their retirement savings); Holger M. Mueller & Constantine Yannelis, *The Rise in Student Loan Defaults*, 131 J. FIN. ECON. 1, 1 (2019) (observing that the consequences of student loan defaults go beyond the federal budget). *But see* Judith Scott-Clayton, *What Accounts for Gaps in Student Loan Default, and What Happens After*, 2 BROOKINGS 10–11 (2018) ("[W]hile defaults may be of greatest consequence to borrowers, repayment rates are a legitimate concern for policymakers and taxpayers."); Kyle L. Grant, *Student Loans in Bankruptcy and the "Undue Hardship" Exception: Who Should Foot the Bill?*, 2011 BYU L. REV. 819, 820 (2011) ("[T]axpayers would ultimately have to foot the bill when the government ends up with a large number of defaulted loans.").

6. *See* Melanie Hanson, *Student Loan Debt Statistics*, EDUC. DATA INITIATIVE, https://educationdata.org/student-loan-debt-statistics (last visited Mar. 3, 2024) (estimating over 93% of student loan debt is federal).

7. *See* Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 531–34 (2013).

8. *See Federal Student Loans*, FED. STUDENT AID, https://studentaid.gov/understand-aid/types/loans (last visited Mar. 18, 2024). Total federal student loan debt exceeds $1.6 trillion, an amount nearly equivalent to the entire economy of Australia or South Korea. Hanson, *supra* note 6; *The World's Largest Economies*, WORLDDATA.INFO (Feb. 2024), https://www.worlddata.info/largest-economies.php.

9. Student loans are funded by taxpayers through government appropriations, including income taxes. *See* discussion *infra* notes 157–70 and accompanying text.

10. *See, e.g.*, JOSH MITCHELL, THE DEBT TRAP: HOW STUDENT LOANS BECAME A NATIONAL CATASTROPHE 1–2 (2021); AKERS & CHINGOS, *supra* note 3, at 4.

11. *See* Jason Iuliano, *Student Loans and Surmountable Access-to-Justice Barriers*, 68 FLA. L. REV. 377, 378 (2016) (equating loan servicer Educational Credit Management Corporation with "student loan creditor[s]").

creditor. The classic creditor makes informed and voluntary choices regarding where and when to lend. Typically, creditors lend using surplus funds to build wealth. Conversely, the student loan creditor—the American taxpayer—is coerced to contribute capital through taxation. Taxpayers have only tangentially authorized the issuance of federal student loans and have nominal oversight into how those loans are issued and who receives the funding. They rely instead on federal overseers to exercise discretion in educational lending. Many taxpayers personally enjoy the benefits of higher education. This is particularly true among the wealthiest segment of the population, which pays the highest amount of taxes.[12] But many wage earners pay taxes on income obtained without a college degree.[13] For those taxpayers, repayment of the loan may be of even greater importance. For them, student loan forgiveness operates regressively, transferring wealth away from them and to the more educated, thereby exacerbating preexisting income and wealth inequality.

Proponents of student loan forgiveness often fail to account for how their proposals will affect the taxpayer creditor. The creditor's interest in being repaid is often overlooked or disregarded. This leads to predictable political backlash when proposals for broad debt forgiveness are made, particularly when student loan forgiveness is not premised on any evidence that the debtor is struggling to repay debts. Forgiveness programs that give no regard to repayment ability subordinate the rights of creditors who finance higher education. If forgiving a borrower's student loans allows the borrower to take on more debt elsewhere, then student loan creditors are subordinated to the borrower's other creditors, or at least to the borrower's other spending priorities.

Some debt forgiveness will be in the best interests of both the borrowers and creditors. When the costs of attempting to recover the debt exceed the likely recovery, or where the process of recovery will otherwise destroy wealth by wasting assets, forgiveness is the more rational response. Well-established principles underlying bankruptcy law presuppose that it can be in the best interests of creditors as a group to permit sanctioned default.[14] Permitting bad debt to be discharged can both empower the debtor with a "fresh start" and allow creditors to realize the loss. This loss realization reconfigures expectations regarding income, clarifies expectations for outstanding investments, and sharpens decision-making for future investments. Fortunately, there is an established system in place

---

12. *See* Erica York, *Summary of the Latest Federal Income Tax Data, 2023 Update*, TAX FOUND. (Jan. 26, 2023), https://taxfoundation.org/data/all/federal/summary-latest-federal-income-tax-data-2023-update/.

13. *See* Stephen J. Carroll & Emre Erkut, *How Taxpayers Benefit When Students Attain Higher Levels of Education*, RAND (Oct. 16, 2009), https://www.rand.org/pubs/research_briefs/RB9461.html.

14. *See* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 861 (1982) (discussing reasons that creditors might willingly agree to a government-imposed system providing for the collective treatment of claims, including reduction of strategic costs, increased aggregate pool of assets, and administrative efficiencies).

to discharge student loans, along with all other forms of debt: The bankruptcy courts.

In addition to harnessing the bankruptcy system to respond to student loan defaults, policymakers should consider changes to lending practices that will reduce the likelihood of default. Nonpayment of student loans has negative ramifications for borrowers and lenders alike.[15] Responsible lenders should be wary of issuing loans when default or nonpayment is likely.[16] Because data-driven decisions more effectively manage risk and safeguard the return on creditors' investment, data on the frequency of and reasons for default should inform future lending decisions. But incorporating data into decisions on student loan issuance will require amending federal law to permit underwriting loans that finance higher education.

This Article explores the social cost of unpaid student loans from a more holistic perspective than much of the existing literature to date. It acknowledges the burden of debt overhang on individual borrowers, but also approaches the problem from the perspective of the best interests of creditors—American taxpayers—and the wider market for student loans. It applauds policy decisions that account for borrowers' ability to repay in a way that meaningfully protects lenders' investment and condemns policy recommendations that fail to do so. Finally, it promotes the use of the bankruptcy system, which has already established a meaningful, transparent balance between the interests of debtors and creditors, to address unpaid student loans. Part I summarizes the burdens and benefits attending student loans from the perspective of individual borrowers and the taxpayers who lend. Part II recognizes recent policy responses to the perceived problems of unsustainable student loan debt and highlights their strengths and weaknesses, paying particular attention to whether and how current proposals acknowledge the best interests of lenders. Part III sets forth established principles of debt forgiveness in the United States, which universally recognize the rights of creditors. Part IV promotes a more efficient use of bankruptcy proceedings as a possible method of resolving unaffordable student loans and a change in lending policy going forward that should reduce the likelihood of future defaults.

I. THE PROBLEM OF UNPAID STUDENT DEBT

A. Individual Borrowers

Most commentary on student loans in popular culture focuses on the individual borrower: recent graduates starting out under a mountain of debt present a compelling narrative that elicits sympathy and calls for

---

15. *See* Samantha L. Bailey & Christopher J. Ryan, Jr., *The Next "Big Short": COVID-19, Student Loan Discharge in Bankruptcy, and the SLABS Market*, 73 SMU L. REV. 809, 840–44 (2020).

16. Issuing student loans to borrowers who are likely to default due to inability to repay is irresponsible at best, and very likely predatory. *See* Donald P. Morgan, *Defining and Detecting Predatory Lending* 2–3 (Fed. Rsrv. Bank of N.Y., Working Paper No. 273, 2007), https://www.econstor.eu/handle/10419/60671 (defining predatory lending as a welfare-reducing provision of credit).

reform.[17] Reporting often references the staggering $1.7 trillion dollar aggregate student loan debt held in the United States today as proof that student debt represents a national crisis.[18] But a closer look at the numbers reveals that a large percentage of defaults can be traced back to a one-time increase in student enrollment and student debt correlating with the Great Recession.[19] Furthermore, the numbers indicate that most individual borrowers are fully capable of repaying their debts, in large part because their education has significantly enhanced their earning potential.[20]

Individual taxpayers empowered this borrowing.[21] The federal government issues taxpayer-funded loans on the premise that they will be used to promote education among the general population.[22] Structuring support for higher education loans as lending assumes eventual repayment, in addition to the broad societal benefits resulting from a more highly educated populace.[23] Wholesale forgiveness of student loans partially betrays the underlying agreement,[24] amounting to a transfer of wealth from those who made the loans to those who took the loans. At its most objectionable level, this represents a transfer from less-wealthy, less-educated taxpayers to student loan borrowers with full capacity to repay.[25]

---

17. Natalie Sherman, *Bankruptcy 'Opportunity' After Student Loan Crisis*, BBC NEWS (Dec. 3, 2023), https://www.bbc.com/news/business-67546893.amp (featuring a story about a Psychology PhD grad with $600,000 in student loans).

18. *See, e.g.*, Cowley, *supra* note 2; Sherman, *supra* note 17. Over $1.6 trillion of the total $1.7 trillion is held by the government. CFR.org Editors, *Is Rising Student Debt Harming the U.S. Economy*?, COUNCIL ON FOREIGN RELS. (Apr. 16, 2024, 9:40 AM), https://www.cfr.org/backgrounder/us-student-loan-debt-trends-economic-impact.

19. MA & PENDER, *supra* note 1, at 35.

20. Guillaume Vandenbroucke, *The Return on Investing in a College Education*, FED. RSRV. BANK OF ST. LOUIS (Mar. 23, 2023), https://www.stlouisfed.org/publications/regional-economist/2023/mar/return-investing-college-education. For an argument that the college income premium has declined over time, see William R. Emmons, Ana H. Kent, & Lowell R. Ricketts, *Is College Still Worth It? The New Calculus of Falling Returns*, 101 FED. RSRV. BANK ST. LOUIS 297, 297 (2019). For borrowers whose earnings do not allow them to repay their student loans on a standard schedule, there are income-based repayment options. Many repayment plans are linked directly to a borrower's income. *See* Bailey & Ryan, Jr., *supra* note 15, at 816–18 (describing repayment plans).

21. *See 5. The Value of a College Education*, PEW RSCH. CTR. (October 6, 2016), https://www.pewresearch.org/social-trends/2016/10/06/5-the-value-of-a-college-education/; *see also* Phillip Levine, *How Much Should College Cost Students?*, BROOKINGS INST. (Sept. 6, 2023), https://www.brookings.edu/articles/how-much-should-college-cost-students/.

22. *See* Levine, *supra* note 21; *see also Student Loans*, NEW AM., https://www.newamerica.org/education-policy/topics/higher-education-funding-and-financial-aid/federal-student-aid/federal-student-loans/ (last visited Mar. 23, 2024).

23. *See* Levine, *supra* note 21.

24. Student loan forgiveness has been contrasted with so-called "Paycheck Protection Programs" created during the COVID-19 Pandemic. *See, e.g.*, *Fact Check: Biden Draws False Equivalence Between PPP Loans and Student Loan Giveaway*, U.S. HOUSE COMM. ON WAYS & MEANS (Aug. 26, 2022), https://waysandmeans.house.gov/fact-check-biden-draws-false-equivalence-between-ppp-loans-and-student-loan-giveaway/. These "PPP" loans contained a clause that would trigger forgiveness if the loan was used appropriately. 15 U.S.C. § 636m. While this program's implementation and impact may be controversial, Congress created these loans and blessed them with forgiveness under specific circumstances. *Id.* Student loans are not structured the same way. 11 U.S.C. § 523(a)(8).

25. *See* Adam Looney, *Student Debt Forgiveness is Regressive Whether Measured by Income, Education, or Wealth: Why Only Targeted Debt Relief Policies Can Reduce Injustices in Student*

This is rarely the narrative depicted in the news. Instead, journalists focus on the borrowers who report taking on large amounts of debt to follow the American Dream based on a belief that education will lead to financial stability.[26] Evidence suggests that financial stability may elude these borrowers because the burden of student loans delays and decreases socioeconomic mobility, particularly in the short term.[27] Outstanding student loans may also negatively affect borrowers by discouraging healthy risk-taking and investment. When student loans increase, small business formation decreases[28] and homeownership is delayed.[29] Those with student loans also tend to save less for retirement early in their careers, which can cause large discrepancies in later years due to lost investment returns.[30] Defaulting on student loans can cause additional difficulties, including reduced credit opportunities.[31] Some borrowers struggle more than others, with evidence suggesting that women and racial minority groups are particularly at risk for student default.[32] Concern for these borrowers—and perhaps the mistaken belief that their difficulties are universally shared—has motivated calls for universal student loan forgiveness.[33]

Mass forgiveness of federal loans is often justified by the argument that the cost of higher education is simply too high for students to pay individually, and because a more educated workforce benefits the general

---

Loans 14 (Hutchins Ctr. on Fiscal & Monetary Pol'y at Brookings, Working Paper No. 75, 2022), https://www.brookings.edu/research/student-loanforgiveness-is-regressive-whether-measured-byincome-education-or-wealth/.

26. *See, e.g.*, Sherman, *supra* note 17; Jessica Dickler & Annie Nova, *This is How Student Loan Debt Became a $1.7 Trillion Crisis*, CNBC (May 6, 2022, 11:09 AM), https://www.cnbc.com/2022/05/06/this-is-how-student-loan-debt-became-a-1point7-trillion-crisis.html.

27. *See* Dara Bright & Amanda Barany, *An Examination of Student Loan Borrowers' Attitudes Toward Debt Before and During COVID-19*, *in* ADVANCES IN QUANTITATIVE ETHNOGRAPHY 185, 189 (Crina Damşa & Amanda Barany eds., 2022); Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 407 (2005) ("[S]ome have discovered that the financial rewards have not been commensurate with the costs of obtaining their education, and they have suffered financial distress as a result.").

28. Brent W. Ambrose, Larry Cordell, & Shuwei Ma, *The Impact of Student Loan Debt on Small Business Formation* 19–20 (Fed. Rsrv. Bank of Phila., Working Paper No. 15-26, 2015). This is a troubling outcome because small business powers the economy. *Id.* at 1.

29. Alvaro Mezza, Daniel Ringo, Shane Sherlund, & Kamila Sommer, *Student Loans and Homeownership*, 38 J. LAB. ECON. 215, 255 (2020).

30. Matthew S. Rutledge, Geoffrey T. Sanzenbacher, & Francis M. Vitagliano, *How Does Student Debt Affect Early-Career Retirement Saving?* 16 (Ctr. for Ret. Rsch. at Bos. Coll., Working Paper No. 2016-9, 2018).

31. *See What Happens if I Default on a Federal Student Loan?*, CONSUMER FIN. PROT. BUREAU (Nov. 7, 2023), https://www.consumerfinance.gov/ask-cfpb/what-happens-if-i-default-on-a-federal-student-loan-en-663/. There is some reason to believe that the consequences for defaulting on student loans are preferable to the consequences for defaulting on credit cards, however. *See* Felicia Ionescu & Marius Ionescu, *The Interplay Between Student Loans and Credit Card Debt: Implications for Default in the Great Recession* (Fed. Rsrv. Bd., Working Paper No. 2014-14, 2014), https://ssrn.com/abstract=2399182.

32. *See* Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1440–41 (2020) (acquiring college degrees leads to more debt for women than for men, and student loan defaults are higher for communities of color).

33. *See generally Telling the Story of the Student Debt Crisis*, STUDENT DEBT CRISIS CTR., https://www.studentdebtcrisis.org/stories (last visited May 4, 2024).

population, taxpayers should pay the difference.[34] However, proposals are not limited to simply increasing taxpayer funding of education by offsetting student tuition costs with direct government financing, which typically would be covered by an increase in state taxes.[35]

Instead, the solution currently in vogue is to subsidize the costs of higher education on an *ex post* basis through the federal executive branch by simply writing off some portion of the amount already loaned.[36] There are several logical concerns with this position. First, it assumes that the cost of higher education *is* "too high" without establishing a standard under which this assertion can be tested, or explaining why market forces have failed to set the price of college tuition at its optimal level. Second, it assumes that the costs of higher education have proven onerous for all borrowers—or at least all borrowers below a set current income—without making any meaningful distinction between borrowers based on preexisting resources, the degree pursued, the future earning potential, or the actual ability to repay. Finally, it assumes that forgiving debt associated with the cost of higher education will somehow ameliorate, rather than exacerbate, the problem of high tuition. These assumptions are tested below.

1. Is the Cost of Higher Education Too High for Students?

Theories of a free market assume that people are incentivized to act individually in their own best interests and collectively in the best interests of the larger group.[37] Markets fail if individuals do not maximize societal welfare when responding rationally to individual incentives.[38] This failure can occur in a variety of ways that affect the price of goods and services. For example, a monopoly over a good may permit the supplier of that good to charge higher prices, which in turn restricts output and lowers overall societal welfare. Alternatively, the inability to restrict public access to a good may depress the price to a point where suppliers are unwilling to sufficiently produce the good to satisfy demand. Furthermore, lack of information within the market might distort pricing, causing consumers to purchase more or less of a good than will maximize welfare. Government

---

34. *See, e.g.*, NOAH BERGER & PETER FISHER, ECON. ANALYSIS & RSCH. NETWORK, A WELL-EDUCATED WORKFORCE IS KEY TO STATE PROSPERITY 7, 9–10 (2013), https://files.epi.org/2013/A%20well-educated%20workforce%20is%20key%20to%20state%20prosperity.pdf.

35. Historically, states have provided a far greater share of assistance to postsecondary institutions than the federal government, although the gap has narrowed considerably in recent years. *See Two Decades of Change in Federal and State Higher Education Funding*, PEW (Oct. 15, 2019), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/two-decades-of-change-in-federal-and-state-higher-education-funding.

36. Matt Kasman, *Data-Driven Approaches to Subsidizing College Enrollment Costs*, BROOKINGS INST. 1, 1 (2020), https://www.brookings.edu/wp-content/uploads/2020/04/Big-Ideas_Kasman_CollegeSubsidies_MAY2020.pdf.

37. *See* ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 349 (Salvio Marcelo Soares ed., MetaLibri Digital Library 2007) (1776).

38. *Id.*

involvement is the commonly accepted solution to market failure.[39] In the student loans context, the most frequently proposed government involvement is debt cancellation, but there has been little explanation for why the interference is necessary or appropriate.[40]

Students enrolled in higher education are generally expected to pay tuition and cover their own housing and other expenses.[41] Tuition revenues substantially contribute to higher education funding.[42] That said, the majority of the cost of higher education is covered by endowments, alumni donations, and government appropriations.[43] During the financial crisis of 2008–2011, tuition spiked as state support fell dramatically, and student borrowing increased accordingly.[44] State governments have decreased financial support for general operations from an average of $9,547 per full-time student in 2001 to $7,388 per full-time student in 2019.[45] However, the average amount of borrowing per student has also declined over the same time period, descending from a high of roughly $7,000 per year in 2008–2009 to less than $4,000 per year in 2022–2023.[46]

Students are borrowing less in large part because of an increase in institutional and federal grants.[47] With the onset of the Great Recession, the federal government placed greater emphasis on Pell Grants, dramatically increasing the size of Pell awards and overall Pell expenditures.[48] As a percentage of overall student aid, federal loans dropped from 44% in the

---

39. For a criticism of this approach, see Richard O. Zerbe Jr. & Howard E. McCurdy, *The Failure of Market Failure*, 18 J. POL'Y ANALYSIS & MGMT. 558, 558 (1999).

40. Annie Nova, *Democrats' $50,000 Student Loan Forgiveness Plan Would Make 36 Million Borrowers Debt-Free*, CNBC (Feb. 4, 2021, 11:34 AM), https://www.cnbc.com/2021/02/04/biggest-winners-in-democrats-plan-to-forgive-50000-of-student-debt-.html.

41. The figures in the paper address undergraduate education, not graduate or professional education.

42. MA & PENDER, *supra* note 1, at 24. Public institutions draw about 41% of their funding from tuition. Christopher Hessenthaler, *The Unintended Consequences of Tuition Discounting*, J.P. MORGAN ASSET MGMT. (June 9, 2023), https://am.jpmorgan.com/us/en/asset-management/liq/insights/portfolio-insights/fixed-income/fixed-income-perspectives/the-unintended-consequences-of-tuition-discounting/ (citing Moody's Investor Service for this proposition).

43. MA & PENDER, *supra* note 1, at 24. Decreases in these sources of funding, particularly government appropriations, will lead to a corresponding increase in tuition rates. *See, e.g.*, Kristen Cummings, Sophia Laderman, Jason Lee, David Tandberg, & Dustin Weeden, *Investigating the Impacts of State Higher Education Appropriations and Financial Aid*, STATE HIGHER EDUC. EXEC. OFFICERS ASS'N 1, 18 (2021), https://files.eric.ed.gov/fulltext/ED614983.pdf.

44. MA & PENDER, *supra* note 1, at 22.

45. Cummings, Laderman, Lee, Tandberg, & Weeden, *supra* note 43, at 8.

46. MA & PENDER, *supra* note 1, at 33.

47. *Id.* at 35. Institutional grants have steadily increased as a percentage of overall student aid since 2011. *Id.*

48. *See* Eric Bettinger & Betsy Williams, *Federal and State Financial Aid During the Great Recession*, *in* HOW THE FINANCIAL CRISIS AND GREAT RECESSION AFFECTED HIGHER EDUCATION 235, 235 (Jeffrey R. Brown & Caroline M. Hoxby eds., 2015) (noting that "[e]ven in historical perspective these changes are extreme"); MA & PENDER, *supra* note 1, at 47. Federal Pell Grants are awarded to undergraduate students who display exceptional financial need and have not yet earned a bachelor's, graduate, or professional degree. *Federal Pell Grants*, FED. STUDENT AID, https://studentaid.gov/understand-aid/types/grants/pell (last visited May 4, 2024). Pell Grants are awarded on a yearly basis and are based on expected family contribution, cost of attendance, and full- or part-time status as a student. *Id.* Pell Grants may be awarded for up to six years (twelve terms) of schooling. *Id.* The maximum award for a Pell Grant for the 2023-2024 academic year was $7,395. *Id.*

2008–2009 school year to 38% in 2010–2011.[49] Since then, that percentage has continued to decline, sitting at 25% of the $177 billion in total student aid issued in 2022–2023.[50]

The practice of institutions dispersing scholarships, grants, or other similar aid to students is called tuition discounting.[51] The tuition discount rate is the difference between the advertised "sticker price" and what students will actually pay.[52] This rate has increased steadily in the last ten years, presently hitting an all-time high at over 50%, meaning that the average student will pay less than half of the advertised cost for higher education.[53] Put another way, reports that tuition is increasing are accurate on their face, but non-loan, institutional assistance in the form of grants and scholarships has held the average net cost of attending a public, four-year university consistent over the past two decades.[54] Going forward, trends indicate the net cost of attendance will likely fall as tuition prices drop[55] and universities compete for a decreasing number of potential students.[56]

When commentators argue that the costs of schooling are "too high," presumably they do not suggest that there is a monopoly on higher education or that students lack choices in determining whether and where to obtain higher education. Such an argument would fly in the face of available evidence. The reduction of net tuition costs over the last few years suggests that the cost of higher education is decreasing in response to market forces—as fewer students enroll, universities compete by adjusting tuition or providing additional services to increase the value of the education.[57] If

---

49. MA & PENDER, *supra* note 1, at 35. That school year also saw a peak in overall federal student aid at $248.4 billion. *Id.* The peak may be attributable to high enrollment inspired by the Great Recession, which created a sluggish job market and the perceived need for education in order to be competitive for employment. Anthony P. Carnevale, Tamara Jayasundera, & Artem Gulish, *America's Divided Recovery: College Have and Have-Nots*, GEO. UNIV.: CTR. ON EDUC. & THE WORKFORCE 1 (2016), https://cew.georgetown.edu/wp-content/uploads/Americas-Divided-Recovery-web.pdf. State expenditures on higher education also dipped in many states during the Great Recession, which may have largely offset the increase in federal funding for many student borrowers. Bettinger & Williams, *supra* note 48, at 236. President Barack Obama's stated policy platform may have also played a role in increasing federal spending on higher education, insofar as he set a goal that America would have the highest proportion of college graduates in the world by the year 2020, and adopted a policy position to encourage that goal. *See Ensuring That Student Loans Are Affordable*, THE WHITE HOUSE: PRESIDENT BARACK OBAMA, https://obamawhitehouse.archives.gov/issues/education/higher-education/ensuring-that-student-loans-are-affordable (last visited May 4, 2024).

50. MA & PENDER, *supra* note 1, at 35.

51. Paul Fain, *Tuition-Discount Rate Hits Record High, Nacubo Survey Finds*, THE CHRON. OF HIGHER EDUC. (March 30, 2010), https://www.chronicle.com/article/tuition-discount-rate-hits-record-high-nacubo-survey-finds/.

52. Hessenthaler, *supra* note 42.

53. *Id.*

54. MA & PENDER, *supra* note 1, at 18. In 2006, the average net cost of attendance was $19,910. In 2023, the net cost of attendance was $20,310.

55. *Id.*

56. MA & PENDER, *supra* note 1, at 28; *see id.* at 37 (illustrating increasing institutional grants even at time when enrollments are dropping). This decrease is primarily due to demographic trends, although it may also reflect the perception that higher education does not provide the value it used to. *See 5. The Value of a College Education*, *supra* note 21.

57. MA & PENDER, *supra* note 1, at 3.

tuition costs are responsive to market forces, then tuition costs are not "too high"; rather, they reflect fair market value.

But some may argue that students pay too much for higher education because they lack sufficient information regarding both the long-term costs and benefits of doing so. Students frequently make decisions regarding higher education while they are young adults without much life experience. Some come to regret those decisions later on.[58] Lack of wisdom and maturity when making decisions about schooling is certainly a disadvantage for students, but there is no reason to believe there is any information asymmetry between students and universities that would distort the market in any appreciable way.[59] This is particularly true in light of increased mandated disclosure requirements incorporated during the Obama Administration.[60] In cases where students can bring credible allegations of fraud, the cancellation of student debt incurred in reliance on intentional misrepresentations is surely warranted, with the fraudulent parties held to account for the damages they have imposed on the borrower and the lender alike. But this does not represent the bulk of student lending. Most students borrow on the rational and frequently correct belief that higher education will increase their future earning potential or otherwise improve their lives sufficient to justify the cost of tuition.

Another argument for market failure in higher education is that the current model of funding fails to capture all applicable externalities. A more highly educated workforce produces positive externalities for society by giving market participants more options for well-trained doctors, accountants, engineers, and other professionals. Some may argue that the tuition costs borne by students are too high because they discourage individuals from obtaining higher education to the detriment of the greater societal welfare. If true, this would be a justifiable reason to further subsidize the cost of higher education. But the most direct way of doing so would involve incentivizing enrollment on the front end through increased grants and scholarships, not providing loan forgiveness on the back end.[61] Forgiving student loans that have already been issued provides no incentive to future students because past debt forgiveness has no direct impact on future tuition costs.

---

58. *See 5. The Value of a College Education*, *supra* note 21.

59. Information asymmetries exist when one party to the transaction has more information than the other party. This discrepancy often disadvantages the less-informed party. *See generally* George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488 (1970).

60. *See* Grover J. Whitehurst & Matthew M. Chingos, *Deconstructing and Reconstructing the College Scorecard*, 1 ECON. STUD. AT BROOKINGS 1, 2 (2015), https://www.brookings.edu/wp-content/uploads/2016/07/Deconstructing-and-Reconstructing-the-College-Scorecard.pdf (providing constructive feedback on the College Scorecard).

61. It is worth noting that increasing the number of individuals with college degrees may decrease their relative advantage. *See* Jonathan Horowitz, *Relative Education and the Advantage of a College Degree: If Everyone Stands on Tiptoe, No One Sees Better*, 83 AM. SOCIO. REV. 771, 772 (2018) ("The value of a degree depreciates as it becomes more common in the labor market, unless skilled jobs increase at a similar or greater rate.").

2. Are All Students Burdened by Student Loans?

The data demonstrates relatively low levels of debt among the general student population and documented improvements in earning potential associated with standard college degrees. This reality raises real questions regarding the nature of the alleged student loan "crisis" and the scope of its impact on student borrowers.[62] Student debt tends to be concentrated among the most affluent households, reflecting the fact that the most expensive schooling typically results in professional graduate degrees, which enable borrowers to qualify for higher paying jobs.[63] Borrowers who obtain lucrative employment after graduation are capable of managing loan repayment by virtue of their increased earning potential: they make more money than their less educated peers, and presumably more than they would have without the education they borrowed for in order to obtain.[64]

It is undeniable that some borrowers subsequently struggle to repay their debts.[65] But the negative impact of student loans on the population may be overstated, at least in terms of how many individuals are actually affected. Of the adults who choose to pursue higher education,[66] just over half take on student debt in the form of federal loans.[67] The amount of debt varies widely: more than 50% of borrowers have less than $20,000 in student loans,[68] but a smaller group—7% of borrowers—holds over $100,000

---

62. Adam Looney & Constantine Yannelis, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Loan Defaults*, BROOKINGS 1, 2 (2015), https://www.brookings.edu/wp-content/uploads/2015/09/LooneyText-Fall15BPEA.pdf.

63. Adam Looney, *Student Debt Forgiveness is Regressive Whether Measured by Income, Education, or Wealth: Why Only Targeted Debt Relief Policies Can Reduce Injustices in Student Loans* 11 (Hutchins Ctr. on Fiscal & Monetary Pol'y at Brookings, Working Paper No. 75, 2022).

64. *See* AKERS & CHINGOS, *supra* note 3, at 1–2 ("There is no evidence of a widespread, systemic student loan crisis, in which the typical borrower is buried in debt for a college education that did not pay off."). The question of whether student loans are a serious problem has arisen on a regular basis. A report issued in 1987 concluded they were not. *See* Janet S. Hansen, *Student Loans: Are They Overburdening a Generation?*, COLL. BD. PUBL'NS, at v (1987), https://eric.ed.gov/?id=ED280342 ("[I]t is not yet clear that high debt levels are causing serious problems for many students; that education, career, and personal decisions are being affected by indebtedness; or that the growth in student borrowing poses a threat to the national economy.").

65. MA & PENDER, *supra* note 1, at 43.

66. *College Enrollment Statistics*, NAT'L CTR. FOR EDUC. STAT. (May 2023), https://nces.ed.gov/programs/coe/indicator/cpb/college-enrollment-rate. On average, forty percent or less of 18 to 21-year-olds enroll each year, a number that has remained stable for the past ten years. An even smaller percentage seeks a conventional four-year degree. *Id.*

67. MA & PENDER, *supra* note 1, at 44–45. In 2019–2020, approximately 49% of bachelor's degree recipients from public school and 52% of recipients from private school graduated with federal loans. This represents a decrease from previous years. The same report indicated that only 40% of those who received associate degrees borrowed to fund their education, although nearly 90% of individuals attending for-profit institutions to obtain an associate degree borrowed. *Id.* at 44. A higher number of students may take on debt generally, including private loans, although the percentage of students borrowing has decreased over time. *See* Sarah Wood, *How Much Student Loan Debt Does the Average College Graduate Have?*, U.S. NEWS & WORLD REP. (Sept. 22, 2023), https://www.usnews.com/education/best-colleges/paying-for-college/articles/see-how-student-loan-borrowing-has-changed.

68. MA & PENDER, *supra* note 1, at 44–45. In 2021–2022, the average borrowing in federal loans for bachelor's degree recipients from public four-year institutions was $20,700 per borrower.

in loans.[69] Borrowers with these large loan balances account for 39% of the total aggregate debt currently outstanding.[70]

But borrowers with large balances are less likely to default on their student loans than borrowers who owe smaller amounts.[71] Instead, the population consistently at highest risk for default has a below-average level of borrowing.[72] This data point is likely influenced by the number of borrowers who never completed a degree; they borrow less but struggle more to repay.[73] Because obtaining a diploma is disproportionately more valuable in terms of increased employability than having completed some number of college courses, individuals who never graduate may experience a disproportionate burden of student loans compared with the benefit they receive from their education.[74]

Recent data analysis also suggests that student loan defaults are disproportionately associated with borrowers who enrolled in two-year or for-profit programs.[75] Enrollment in these programs increased significantly during the Great Recession,[76] as did borrowing for these programs.[77] Between 2009 and 2011, almost half of all new federal student loan borrowers were enrolled in nontraditional programs; these borrowers tended to be older and less likely to rely on the support of parents than those enrolled in traditional programs.[78] These nontraditional borrowers captured substantially less value from their education than traditional borrowers.[79] They also faced a bleak employment outlook due to broader macroeconomic forces.[80] Student loan debts taken by nontraditional borrowers

The average borrowing in federal loans for bachelor's degree recipients from private four-year institutions was $22,200. On top of this amount, 9% of bachelor's degree recipients from public four-year institutions graduated with private loans, with an average private debt level of $34,600 per borrower, and 13% of bachelor's degree recipients from private nonprofit four-year institutions graduated with private loans with an average private debt level of $44,600. *Id.* Students who earn bachelor's degrees at for-profit institutions are more likely to borrow and accumulate higher levels of debt. *Id.* This Article addresses exclusively federal student loan debt.

69. *Id.*

70. *Id.* This group is also significantly more likely to hold a professional degree. For example, the average borrowing for a law degree exceeds $115,000, and the average student loan debt for medical school students is over $190,000. *See* Bailey & Ryan, Jr., *supra* note 15, at 816 n.30.

71. This may be driven by the fact that students with larger balances also tend to have much higher earnings. *See* Scott-Clayton, *supra* note 5, at 3.

72. *See id.*

73. *See id.*

74. *See* Looney & Yannelis, *supra* note 62, at 2.

75. Holger M. Mueller & Constantine Yannelis, *The Rise in Student Loan Defaults*, 131 J. FIN. ECON. 1, 2 (2019).

76. Looney & Yannelis, *supra* note 62, at 2.

77. MA & PENDER, *supra* note 1, at 35.

78. Looney & Yannelis, *supra* note 62, at 21.

79. *See* Kevin Lang & Russel Weinstein, *Evaluating Student Outcomes at For-Profit Colleges* 12–14 (Nat'l Bureau of Econ. Rsch., Working Paper No. 18201, 2012) (finding no improvement in student income from obtaining a certificate or degree from a for-profit institution).

80. Looney & Yannelis, *supra* note 62, at 4.

for nontraditional schooling have proved to be remarkably more susceptible to default.[81]

The legacy of the Great Recession, when many of the loans issued proved to be unprofitable for the lenders and the borrowers,[82] also informs the age demographics of borrowers most likely to default or be unable to repay student loans. Today, younger borrowers have a smaller average outstanding debt balance than older borrowers,[83] which likely reflects lower borrowing rates in recent years. The larger balances held by older borrowers also demonstrate that repayment policies permit an unhealthy accrual of interest on loans over time.[84] Over 25% of the borrowers who owe more than $200,000—a shocking amount—are over the age of fifty.[85] If trends hold, ever larger portions of the overall student loan debt will be borne by an increasingly older share of the population.[86]

As of this writing, the difficulties experienced by current student loan borrowers are difficult to ascertain at scale, despite the availability of anecdotal stories of hardship. Data on current defaults is unreliable due to recent governmental intervention. The Coronavirus Aid, Relief, and Economic Security (CARES) Act suspended all payments on federal student loans and reduced interest rates to zero.[87] Although repayment plans were restarted in June of 2023, the Department of Education (ED) reported that nearly 40% of borrowers failed to make their first payment due in October of that year.[88] The ED attributed high rates of nonpayment to confusion or uncertainty about the different options available to borrowers, and accordingly proposed a twelve-month on-ramp period that would grant borrowers a grace period to avoid default and mandatory collections.[89]

Many borrowers do face difficulties, some of which may not be accurately reflected in the available statistics.[90] But the caricature of the

---

81. Looney & Yannelis, *supra* note 62, at 2 ("Of all the students who left school, started to repay federal loans in 2011, and had fallen into default by 2013, about 70 percent were non-traditional borrowers.").

82. Looney & Yannelis, *supra* note 62, at 1–2.

83. *Id.* at 2.

84. MA & PENDER, *supra* note 1, at 42. Graduated repayment plans that allow borrowers to spread payments out over time, as a means of providing lower monthly payments, often become more expensive because the interest on the loans compound as the monthly payments fail to reduce the amount of the principal. Bailey & Ryan Jr., *supra* note 15, at 819.

85. MA & PENDER, *supra* note 1, at 42.

86. Over 25% of the borrowers who owe more than $200,000 are over the age of 50. *Id.* Although some portion of this group is presumed to hold advanced degrees that have increased the borrower's earning potential, the high amount of outstanding debt relatively late in the borrower's productive years is disconcerting and may portend a future inability to repay.

87. CARES Act, H.R. 748, 116th Cong. § 3513 (2020).

88. James Kvaal, *A First Look at Student Loan Repayment After the Payment Pause*, HOMEROOM: OFF. BLOG OF THE U.S. DEP'T OF EDUC. (Dec. 15, 2023), https://blog.ed.gov/2023/12/a-first-look-at-student-loan-repayment-after-the-payment-pause/.

89. *Prepare for Student Loan Payments to Restart*, FED. STUDENT AID, https://studentaid.gov/manage-loans/repayment/prepare-payments-restart#questions (last visited Mar. 25, 2024); *see also* Cowley, *supra* note 2.

90. *Telling the Story of the Student Debt Crisis*, *supra* note 33 (compiling stories of borrowers' individual experiences with student loans).

overburdened, under-earning graduate is not representative of all or even most borrowers.[91] Any proposal for student loan forgiveness should differentiate between students who can and cannot repay their loans, and more specifically target the population of nontraditional, older borrowers who have demonstrated a sustained inability to repay, particularly if evidence shows that they have not experienced an increase in earning potential relative to their borrowing.

3. Will Forgiving Student Loans Solve the Problem?

As explained above, the first two assumptions underlying a move towards mass student loan forgiveness—that tuition costs are too high and burden all borrowers—stand on shaky ground. But even if they were accurate, mass student loan forgiveness is an ill-suited solution to the perceived problem. Wholesale debt forgiveness will certainly be a boon to current borrowers, whether or not they objectively struggle to repay their student loans. However, the move is decidedly a one-time fix, not a long-term solution.

Regular periodic forgiveness of student loans—a sort of modern "year of Jubilee"[92]—is likely to be politically infeasible and promote significant moral hazard problems. Students confident in the prospect of future debt forgiveness would willingly take on student debt they did not need as a form of consumption, rather than as an investment in their future. This could include taking out student loans to pay for more luxurious housing, food, or other consumer spending that is related to but not directly associated with the costs of the education itself.[93] Students might also pursue diplomas that provide no meaningful economic advantages to the detriment of their own future employment prospects and in contravention to the underlying societal goals of subsidized higher education. At an extreme level, students could enroll in college courses primarily motivated by the social aspects of the college experience, without any intention (or indeed, need) to pursue serious scholarship.[94]

---

91. Looney, *supra* note 25, at 14.

92. *See* Michael A. Harbin, *Jubilee and Social Justice*, 54 J. EVANGELICAL THEOLOGICAL SOC'Y 685, 686 (2011). The year of Jubilee occurred every 50 years according to ancient Hebrew Law, as recorded in the book of Leviticus. In that year, all slaves would be set free and all debt forgiven. *Id.*

93. *See* MA & PENDER, *supra* note 1, at 13. Tracking prices year over year shows a remarkable increase in estimated housing and food costs for students over the past thirty years, considerably outstripping any increase in the cost of tuition and fees. Housing and food costs should not be factored into the cost of attendance because all people incur those costs regardless of whether or not they choose to pursue higher education.

94. *See* Kelly McLaughlin, *Olivia Jade Dropped Out of USC and Left Her Thriving YouTube Career Amid the College Admissions Scandal. Now She's Back on Instagram*, BUS. INSIDER (Aug. 21, 2020, 2:03 PM), https://www.businessinsider.com/olivia-jade-giannulli-no-longer-attending-usc-year-later-2019-9#usc-put-accounts-connected-to-students-with-links-to-the-college-admissions-scandal-including-olivia-jade-on-hold-5. Olivia Jade Giannulli is an extreme example. The daughter of wealthy parents was admitted to the University of Southern California after her parents bribed university officials. She recorded videos of herself on social media stating "I don't know how much of school I'm going to attend, . . . But I do want the experience of game days, partying . . . ." *Id.*

Current proposals do not provide relief to future borrowers, nor do they propose any meaningful changes to how student loans are issued on a going-forward basis. Unless future administrations regularly forgive student debts, meaningfully underwrite lending, or take other steps to render higher education more affordable, future students will certainly find themselves saddled with loans they cannot repay. If there is no distinction drawn in lending between programs that enhance student outcomes and those that do not, the cycle of issuing bad debt will continue. The debt forgiveness proposed will cost taxpayers a significant amount without providing any long-term benefit. A more systematic approach to debt forgiveness is needed. Ideally, that solution would minimize the cost to lenders on the other side of the borrowing equation.

B. Individual Taxpayers

Congress appropriates money to fund student loans in large part through individual income taxes, which represent about forty-eight percent of all government revenue.[95] In Fiscal Year 2023, Congress spent about three percent of total receipts on higher education, or about $300 billion.[96] Of that sum, $145 billion went to federal direct student loans.[97] Total outstanding student loan debt—which is ultimately held by American taxpayers who issued loans with the expectation that they would be repaid—increased by a factor of four from 1995 to 2023.[98] The swelling aggregate balance of outstanding loans is driven by increased lending, but also reflects a slowed repayment rate and the accrual of interest.[99] The federal government's suspension of all student loan payments in response to COVID-19 exacerbated the increase in student loan debt, although the increase was offset by the choice to reduce interest rates to zero.[100]

The tax burden supporting student aid is not distributed evenly across income brackets: the wealthiest ten percent of Americans pay more than sixty percent of all federal income taxes, and the top twenty-five percent

---

95. *See How Much Has the Government Spent This Year?*, FISCALDATA.TREASURY.GOV, https://fiscaldata.treasury.gov/americas-finance-guide/federal-spending/ (last visited May 13, 2024); Drew DeSilver, *Who Pays, and Doesn't Pay, Federal Income Taxes in the U.S.?*, PEW RSCH. CTR. (April 18. 2023), https://www.pewresearch.org/short-reads/2023/04/18/who-pays-and-doesnt-pay-federal-income-taxes-in-the-us/.

96. *Spending Explorer*, USASPENDING.GOV, https://www.usaspending.gov/explorer/budget_function (choose "2023" from dropdown) (last visited May 13, 2024).

97. *Id.*

98. *See* David Burk & Jeffrey Perry, *The Volume and Repayment of Federal Student Loans: 1995 to 2017*, CONGR. BUDGET OFF. (Nov. 2020), https://www.cbo.gov/publication/56754. In 1995, student loan debt was (in 2017 dollars) $36 billion distributed to 4.1 million students. In 2023, the sum loaned stands at $145 billion, more than four times the amount loaned in 1995. *See Spending Explorer*, *supra* note 96.

99. Burk & Perry, *supra* note 98.

100. *See* MA & PENDER, *supra* note 1, at 43 (only 1% of borrowers are currently in repayment). Of course, reducing interest rates to zero also reflected a loss to creditors, who were not able to realize the time value of the money lent during the interest rate freeze.

of all earners pay almost ninety percent of the total income tax bill.[101] In contrast, the bottom fifty percent of earners pay less than three percent of the income tax amount collected each year.[102] Accordingly, the highest income taxpayers are inherently subsidizing government services, including higher education and student loans, on behalf of a majority of Americans.

Differences in income, and therefore differences in income taxes, are partially attributable to levels of education.[103] College graduates tend to earn double the yearly salary of their less educated peers, and earn almost one million more over a lifetime.[104] In the U.S., about thirty-seven percent of all adults over the age of twenty-five have obtained a bachelor's degree or higher.[105] About forty percent of younger adults are actively engaged in the pursuit of a higher degree.[106] This highly educated population is more likely to be in the wealthiest brackets, meaning they are paying the advantage of higher education forward. Roughly sixty percent of Americans do not have a degree or are not currently attending school.[107] When this population pays taxes,[108] they contribute to a pool that invests in the education of others, assisting loan recipients to increase their earning potential.[109]

This Article encourages the reader to think of the taxpayers who fund student loans as creditors, with legal expectations of repayment that should be acknowledged. But there are some important distinctions between taxpayers and the typical creditor. For example, typical creditors are not compelled to lend.[110] Further, most voluntary creditors can review a borrower's financial information before issuing a loan. Finally, rational creditors are motivated to use resources to their highest value. If creditors believe a given borrower will not use their capital productively, they are free to walk away from the opportunity to lend to that borrower, and may instead invest capital elsewhere.

Taxpayers do not have the same luxuries as the typical creditor. Taxes are not elective; failure to pay taxes can result in a criminal penalty, so taxpayers are compelled to lend whether or not they personally agree with

---

101. *See* Erica York, *Summary of the Latest Federal Income Tax Data, 2023 Update*, TAX FOUND. (Jan. 26, 2023), https://taxfoundation.org/data/all/federal/summary-latest-federal-income-tax-data-2023-update/.

102. *Id.*

103. Vandenbroucke, *supra* note 20.

104. Looney, *supra* note 25, at 6.

105. *Census Bureau Releases New Educational Attainment Data*, U.S. CENSUS BUREAU (Feb. 16, 2023), https://www.census.gov/newsroom/press-releases/2023/educational-attainment-data.html.

106. *College Enrollment Statistics*, *supra* note 66.

107. *Census Bureau Releases New Educational Attainment Data*, *supra* note 105.

108. Presumably a higher percentage of this population will fall within the bottom half of the population, which pays a considerably smaller amount of taxes, or none at all.

109. *See* Vandenbroucke, *supra* note 20.

110. Tort victims are a notable exception. They become creditors involuntarily by virtue of the debtor's actions.

the proposed investment.[111] Taxpayers are obligated to issue loans to individuals they cannot vet for likelihood of repayment. They must rely on government officials to issue, monitor, and collect on those loans.[112] Under the current statutory regime, the ED is not allowed to discriminate on the loans, which severely restricts any ability to underwrite.[113] The best education policy should acknowledge the relationship of trust between the government and the taxpayer lenders.[114] Decisions regarding issuance, collection, and debt forgiveness should align with the best interests of the creditors the government represents.

C. Broader Policy Considerations

An additional—and important—distinction between the typical creditor and the American taxpayer funding student loans is the motivation for lending. The average creditor seeks to maximize pecuniary return on investment, while student loans seek to maximize societal welfare. The expectation for student loans is that any individual loan may not be profitable on its face, but the loan program as a whole may nevertheless result in a higher payoff for society. Increasing access to higher education is a primary motivation for federal funding of student loans.[115] Higher education generally improves economic mobility and enhances earning power for individuals.[116] These individual improvements translate into a more robust tax base and improved civil society, comprised of more doctors, lawyers, engineers, and other highly-skilled workers. In many countries, these benefits have led to a model in which higher education is fully funded by the public, with no need for individual students to borrow.[117] Certainly, any profit realized on the loans themselves is unlikely to be returned directly

---

111. 26 U.S.C. § 7203.

112. *See* Bailey & Ryan, Jr., *supra* note 15, at 839–44 (describing the government's tenuous ability to monitor and collect its issued loans).

113. *See generally* 20 U.S.C. § 1091(a) (requirements for receiving federal student loans are limited to six requirements, none of which require general credit worthiness or demonstrate the borrower's ability to repay the loan). The ED determines which institutions can receive loans by designating local accreditation bodies. *Id.* § 1099b(a) (setting the requirements for an accreditation entity).

114. There are ample avenues in which to criticize the government's performance in this regard, most of which are beyond the scope of this Article. *See, e.g.*, Ryan Craig, *Succession Over Success: Sending Out an SOS on Accreditation*, GAP LETTER, https://gapletter.com/letter_80.php (last visited May 13, 2024) (arguing that the current accreditation process fails to establish meaningful standards for higher education).

115. It may lead to improved economic circumstances for the community, for example. *See* BERGER & FISHER, *supra* note 34; *see also* Cummings, Laderman, Lee, Tandberg, & Weeden, *supra* note 43, at 7 (noting that public benefits accrued by society may be greater than the private benefits enjoyed by individuals).

116. *See* Stephan D. Whitaker, *Are Millennials with Student Loans Upwardly Mobile?*, FED. RSRV. BANK OF CLEVELAND (Oct. 1, 2015), https://www.clevelandfed.org/publications/economic-commentary/2015/ec-201512-are-millennials-with-student-debt-upwardly-mobile; Looney & Yannelis, *supra* note 62, at 2. Some may nevertheless question the value of higher education. *See 5. The Value of a College Education*, *supra* note 21, at 5–6, 9, 77, 81.

117. *See, e.g.*, Maria Marta Ferreyra, Carlos Garriga, Juan David Martin-Ocampo, & Angelica Maria Sanchez-Diaz, *The Limited Impact of Free College Policies* 2 (Annenberg Brown Univ. Ed.WorkingPaper, Paper No. 23-711, 2023), https://edworkingpapers.com/sites/default/files/ai23-711.pdf (observing that countries with higher college subsidies may have higher enrollment rates but not higher graduation rates).

to individual taxpayers, and will instead be funneled back into appropriations to fund other government priorities.

But the federal loan program still presupposes repayment. The American model of funding higher education encourages greater personal responsibility for the cost of that education, reflecting the fact that the students reap the largest reward in the form of higher earnings.[118] It is rational and desirable for individuals who expect to enhance their earning potential through education to invest in their future selves at a higher rate than strangers. When students need to borrow to accomplish this investment, they can expect their future selves to be in a better position to repay the loans by virtue of having obtained the degree.[119] The same individuals who experience this increase in wealth due to education also tend to pay higher taxes, so the burden of paying for higher education is further borne by those who have experienced the greatest benefit.[120]

This represents a virtuous cycle: individuals borrow to increase their own earning potential, then make funds available for future generations to do the same thing, thereby paying forward the advantages they received. But it does not always run smoothly. When this model breaks down because borrowers are left unable to repay, there should be a measured and targeted response to acknowledge the failure. But policy should acknowledge situations where the baseline assumptions have held and forebear from intervening in those cases. Any policy response to a mass default in student loans should respect the interests of the taxpayer-creditors and ensure that those who can repay their student loans do so.

II. THE INCOMPLETE SOLUTIONS THUS FAR

Making a meaningful and informed decision on where and when to forgive student loans requires an understanding of why defaults happen and whether they stem from an unwillingness to repay or an inability to repay. In situations where debtors experience personal disasters that render them unable to repay, there is no real benefit to creditors in attempting to collect. In fact, futile collection efforts impose greater costs on creditors: attempting to squeeze blood from a stone wastes the squeezer's energy. In situations where debtors are unable to repay because their education did not help them increase their earning potential, forgiveness may be warranted for reasons of efficiency. Creditors should also be wary of issuing further loans in similar situations because there is no real benefit to

118. *See* Vandenbroucke, *supra* note 20; Emmons, Kent, & Ricketts, *supra* note 20, at 297–99.

119. Adam Looney, *Responses to Reader Questions About My Report "Student Loan Forgiveness Is Regressive*,*"* BROOKINGS (Jan. 31, 2022), https://www.brookings.edu/articles/responses-to-reader-questions-about-my-report-student-loan-forgiveness-is-regressive/ ("The economic benefit to a college degree has, in fact, never been larger.").

120. *See* DeSilver, *supra* note 95.

creditors or borrowers in issuing loans that have little chance of future repayment.

An appropriate policy response to defaults on student loans should examine the problem not only from the perspective of borrowers, but also from the perspective of lenders. From the perspective of lenders, loan forgiveness should depend on the expected ability of debtors to repay. Prior lending should inform future lending. Efforts at policymaking that ignore creditors' interests in student loans are myopic and inherently problematic. They will be controversial among the taxpaying population and can interfere with market incentives. Accordingly, their lack of efficacy is not surprising.

While on the campaign trail in 2020, Joe Biden proposed to immediately cancel a minimum of $10,000 of student debt per person, in addition to his other proposed student loan forgiveness and reduced repayment plans.[121] At the time of his announcement, federal student loan repayment had recently been paused in response to COVID-19 and the national lockdown.[122] Biden's ultimate ambition, he reported, was to "forgive all undergraduate tuition-related federal student debt from two- and four-year public colleges and universities for debt-holders earning up to $125,000 . . . ."[123] To the extent his proposed debt forgiveness was at all predicated on ability to repay, that ability was based entirely on current income. While in office, President Biden made multiple attempts to forgive student loans, all of which were challenged in court.

Policy regarding student loans has historically been made through the legislative branch. The Higher Education Act (HEA), which controls the issuance of federal student loans, was last reauthorized and amended in 2008.[124] In 2017, Republicans in the House attempted to reauthorize the HEA through the PROSPER Act.[125] The PROSPER Act would have streamlined all federal student aid into a single loan process, with new caps for borrowers depending on the level of education (undergraduate or graduate) and reforms to the Pell Grant program.[126] Democrats in the House

---

121. *See* Joe Biden, *Joe Biden Outlines New Steps to Ease Economic Burden on Working People*, MEDIUM (Apr. 9, 2020), https://medium.com/@JoeBiden/joe-biden-outlines-new-steps-to-ease-economic-burden-on-working-people-e3e121037322.

122. *See* CARES Act, H.R. 748, 116th Cong. (2020).

123. Biden, *supra* note 121.

124. Higher Education Act of 1965, H.R. 9567, 89th Cong. (1965) (enacted); *Higher Education Act*, AACRAO, https://www.aacrao.org/advocacy/issues/higher-education-act (last visited Mar. 23, 2024).

125. *See* PROSPER Act, H.R. 4508, 115th Cong. (2017). The full name of the bill was the Promoting Real Opportunity, Success, and Prosperity through Education Reform Act.

126. *See id.* The Bill was unsurprisingly controversial, as much of the reform surrounding higher education has proven to be. *Compare* Ames Brown, *New Higher Education Reform Bill Will Help Low-Income Americans Go to College*, FORBES (Dec. 1, 2017, 8:50 AM), https://www.forbes.com/sites/amesbrown/2017/12/01/prosper-higher-education-proposed/?sh=6d230dfd695c (discussing the Bill positively), *with* Danielle Douglas-Gabriel, *CBO Estimates Show House Higher Ed Bill Could Hit Student Loan Borrowers Hard*, WASH. POST (Feb. 7, 2018, 2:45 PM), https://www.washingtonpost.com/news/grade-point/wp/2018/02/07/cbo-estimates-show-house-higher-ed-bill-could-hit-student-loan-borrowers-hard/ (discussing the Bill negatively).

responded with two alternative proposals: the Aim Higher Act[127] and the College Affordability Act.[128] A bipartisan bill called the Student Aid Improvement Act was later introduced in the Senate,[129] but none of these proposed bills became law.[130]

Longstanding Congressional gridlock on higher education created pressure for other policymakers, the executive branch especially, to act.[131] In August of 2022, President Biden fulfilled his campaign promise by announcing that the ED would provide up to $10,000 in debt cancellation for all borrowers with individual income less than $125,000 per year, and up to $20,000 in debt cancellation for borrowers who had received Pell Grants.[132] This blanket forgiveness was constrained only by individual and household income, without any other inquiry into the likelihood that the loans could and would be repaid.[133] The proposed cap of $125,000 per individual earner is extremely generous—it would include roughly 85% of the population.[134] The announcement was met with significant criticism, some targeted directly at the estimated loss this debt forgiveness plan would impose on taxpayers.[135] It was also met with legal challenges, raised on the grounds that President Biden lacked the authority to execute the policy.[136]

Within a few weeks of President Biden's announcement, multiple parties sued the Administration. An individual named Frank Garrison brought the first lawsuit on grounds that student loan forgiveness would trigger a tax liability under Indiana state law.[137] The court dismissed his

---

127. H.R. 6543, 115th Cong. (2018).

128. H.R. 4674, 116th Cong. (2019).

129. S. 2557, 116th Cong. (2019).

130. *Id.*; H.R. 4674; H.R. 6543; H.R. 4508.

131. *See* Denisa Gándara & Sosanya Jones, *Who Deserves Benefits in Higher Education? A Policy Discourse Analysis of a Process Surrounding Reauthorization of the Higher Education Act*, 44 REV. HIGHER EDUC. 121, 123 (2020) (noting that Congress has only reauthorized the Higher Education Act eight times over the last 55 years).

132. *See Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, THE WHITE HOUSE (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/. Married borrowers with incomes up to $250,000 could receive debt forgiveness. *Id.*

133. *Id.*

134. *See* PK, *Average, Median, Top 1% and All United States Salary Percentiles*, DQYDJ, https://dqydj.com/average-median-top-salary-percentiles/ (last visited Mar. 23, 2024).

135. *See* Katie Rogers & Jim Tankersley, *White House Student Loan Forgiveness Could Cost About $400 Billion*, N.Y. TIMES (Sept. 26, 2022), https://www.nytimes.com/2022/09/26/us/politics/white-house-student-loan-forgiveness.html. The Committee for a Responsible Federal Budget estimated that roughly one-quarter of the $1.6 trillion of outstanding federal student loans would be forgiven by Biden's proposed student loan forgiveness program. *Id.* As reported in the same story, the Wharton School at the University of Pennsylvania estimated the student loan forgiveness plan would cost $605 billion, including $519 billion in debt cancellation. *Id.*; *The Biden Student Loan Forgiveness Plan: Budgetary Costs and Distributional Impact*, PENN WHARTON UNIV. OF PA. (Aug. 26, 2022), https://budgetmodel.wharton.upenn.edu/issues/2022/8/26/biden-student-loan-forgiveness.

136. *See* Adam Liptak, *Supreme Court Rejects Biden's Student Loan Forgiveness Plan*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/2023/06/30/us/student-loan-forgiveness-supreme-court-biden.html; *see, e.g.*, Brief for State of Utah et al. as Amici Curiae Supporting Respondents, Biden v. Nebraska, 143 S. Ct. 2355 (2023) (No. 22-506).

137. *See* Garrison v. U.S. Dep't of Educ., 636 F. Supp. 3d 935, 937–38 (S.D. Ind. 2022).

initial complaint due to lack of Article III standing because Garrison could simply opt out of debt forgiveness, thereby avoiding any potential tax liability.[138] However, a separate lawsuit was filed by a coalition of six states—Nebraska, Missouri, Arkansas, Iowa, Kansas, and South Carolina—two days after Garrison's challenge.[139] The complaint in *Nebraska v. Biden*[140] asserted that the Biden Administration's plan, which it termed the Mass Debt Cancellation, was both poor policy and regulatory overreach.[141] President Biden's statutory justification for the loan forgiveness plan came from language in the HEROES Act,[142] passed in 2003 in response to the terrorist attacks on September 11, 2001.[143] The bill authorized the Secretary of Education to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs" under the HEA as the Secretary deemed necessary "in connection with a war or other military operation or national emergency."[144] The plaintiffs asserted that this language could not reasonably be read to cover President Biden's proposed loan forgiveness.[145] The district court dismissed the case for lack of standing under Article III,[146] but an Eighth Circuit panel granted a preliminary injunction pending appeal.[147] The Supreme Court granted the petition for certiorari[148] and found for the states, both on the issue of standing and on the merits.[149]

With the initial plan of debt forgiveness judicially blocked, the Biden Administration presented an alternative proposal in August of 2023, roughly a year after making its first announcement. Under the SAVE Plan, borrowers with lower incomes could make lower payments and enjoy subsidies on accruing interest.[150] The Administration also promised further developments that might include earlier debt forgiveness (after ten years rather than twenty years).[151]

---

138. *Id.*; *see also* Garrison v. Dep't. of Educ., No. 22-2886, 2022 WL 16626750, at *1 (7th Cir. Oct. 28, 2022) (denying application for an injunction).

139. Nebraska v. Biden, 636 F. Supp. 3d 991, 995 (E.D. Mo. 2022), *rev'd*, 143 S. Ct. 2355 (2023).

140. 636 F. Supp. 3d 991 (E.D. Mo. 2022).

141. Complaint ¶¶ 7–8, Nebraska v. Biden, 636 F. Supp. 3d 991 (E.D. Mo. 2022) (No. 22 Civ. 01040).

142. *See* Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 46 Op. O.L.C. 1, 1–2 (2022) (expressing the legal opinion that the HEROES Act authorizes the Secretary of Education to reduce or cancel the principal balance of student loans for a broad class of borrowers).

143. Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108–76, 117 Stat. 904 (codified as amended at 20 U.S.C. §§ 1098aa–1098ee).

144. 20 U.S.C. § 1098bb(a)(1).

145. Complaint ¶¶ 10–11, Nebraska v. Biden, 636 F. Supp. 3d 991 (E.D. Mo. 2022) (No. 22 Civ. 01040).

146. *See Biden*, 636 F. Supp. 3d at 1002.

147. Nebraska v. Biden, 52 F.4th 1044, 1046 (8th Cir. 2022) (per curiam).

148. Biden v. Nebraska, 143 S. Ct. 477, 477 (2022) (mem.).

149. Biden v. Nebraska, 143 S. Ct. 2355, 2368 (2023).

150. *The Saving on a Valuable Education (SAVE) Plan Offers Lower Monthly Loan Payments*, FED. STUDENT AID, https://studentaid.gov/announcements-events/save-plan (last visited Mar. 15, 2023).

151. *Id.*

Around the same time, the ED conducted a series of negotiated rulemaking sessions to develop additional student financial assistance regulations.[152] The negotiators who were invited included legal assistance organizations, civil rights organizations, state officials, representatives from public and private universities, loan servicers, and borrowers of all kinds.[153] In its press release announcing the negotiated rulemaking, the Biden Administration included text intended to provide debt relief to four groups of borrowers:

> (1) Those who have federal student loan balances exceeding the amount originally borrowed;
>
> (2) Those whose loans first entered repayment 25 or more years prior;
>
> (3) Those who borrowed to attend career-training programs that "created unreasonable debt loads or provided insufficient earnings for graduates"; and
>
> (4) Those who the Secretary of Education independently determines are eligible for forgiveness under repayment plans, but do not apply for such relief.[154]

The committee spent considerable time discussing possibilities for establishing "hardship" warranting waiver or forgiveness of debt but failed to reach a full consensus on applicable parameters.[155] Communities of taxpayers who did not seek or obtain higher education were largely unrepresented during the proceedings.[156]

On January 12, 2024, President Biden issued a press release announcing the implementation of a new plan that would cancel the debt of borrowers enrolled in the SAVE plan who took out less than $12,000 in loans and have been in repayment for 10 years.[157] Borrowers who would qualify

---

152. U.S. DEP'T OF EDUC., 2023 NEGOTIATED RULEMAKING STUDENT LOAN DEBT RELIEF COMMITTEE ORGANIZATIONAL PROTOCOLS (2023) (noting the Mission Statement states "[t]he goal of the committee's work is to obtain consensus on proposed regulations."). The makeup of the negotiating panel has been criticized as unduly partisan. *See* Michael Brickman, *Biden Administration Continues to Push Student Loan Debt Forgiveness with Biased Regulatory Panel*, AM. ENTER. INST. (Oct. 25, 2023), https://www.aei.org/op-eds/biden-administration-continues-to-push-student-loan-debt-forgiveness-with-biased-regulatory-panel/.

153. *See* U.S. DEP'T OF EDUC., 2023 NEGOTIATED RULEMAKING STUDENT LOAN DEBT RELIEF COMMITTEE (2023).

154. *Biden-Harris Administration Continues Efforts to Provide Debt Relief for More Student Loan Borrowers*, U.S. DEP'T OF EDUC. (Oct. 30, 2023), https://www.ed.gov/news/press-releases/biden-harris-administration-continues-efforts-provide-debt-relief-more-student-loan-borrowers.

155. U.S. DEP'T OF EDUC., NEGOTIATED RULEMAKING: STUDENT DEBT RELIEF COMMITTEE, 20–22 (2023), https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/negotiated-rulemaking-student-debt-relief-committee-december-11-2023-am-final.pdf. Concerns regarding complaints of servicer errors were also largely unaddressed. *Id.* at 27 (statement of Ashley Pizzuti).

156. *See id.* at 9–11 (statement of Josh Divine, Solicitor General of Missouri). The committee decided not to permit the addition of proposed representatives. *Id.* at 13–14.

157. *Statement from President Joe Biden on Early Student Debt Cancellation for Borrowers Enrolled in SAVE*, THE WHITE HOUSE (Jan. 12, 2024), https://www.whitehouse.gov/briefing-

for debt cancellation under the new program must have entered repayment prior to 2014.[158] Many would have borrowed during the Great Recession, likely part of the large group of nontraditional borrowers who took out relatively small amounts of debt to finance education at ineffective schools and subsequently were unable to repay even these small loans over the next decade.[159] The fact that these loans remain outstanding after 10 years of repayment is convincing evidence that prior collection efforts have been ineffective. From the perspective of the borrowers, forgiving the loans would relieve them of a burden that, while small in absolute numbers, has proved to be a lingering weight. And even exclusively self-interested lenders would recognize these student loans as bad debt; it would be more logical to write them off as a loss than attempt to continue to pursue repayment. As of this writing, the legality of the SAVE plan is undergoing judicial review.[160]

For any plan of debt forgiveness or debt cancellation, the creditors' interest in recovery must be taken into consideration, and the likelihood of recovery should be an essential factor for creditors in the decision to abandon the possibility of repayment. In many cases, reasonable people can agree that the circumstances warrant debt forgiveness. But failure to appreciate the interests of both borrowers and creditors can lead to warped policy outcomes that unfairly prejudice creditors and distort market incentives.

III. PRINCIPLES OF DEBT FORGIVENESS

A. *Student Loan Forgiveness in Context*

Systemic debt forgiveness has an extensive history in the United States. Although this country inherited a system from England under which nonpaying debtors would be imprisoned,[161] this practice fell out of favor in the mid-1700s.[162] By the time the Constitution was drafted in 1787, the Founding Fathers thought it would be prudent to grant Congress

---

room/statements-releases/2024/01/12/statement-from-president-joe-biden-on-early-student-debt-cancellation-for-borrowers-enrolled-in-save/.

158. *See id.*

159. *See* Looney & Yannelis, *supra* note 62, at 2; *supra* notes 74–80 and accompanying text.

160. Kansas v. Biden, No. 24-1057-DDC-ADM, 2024 WL 2880404, at *1 (D. Kan. June 7, 2024) (holding that three of the eleven states had standing to proceed with the lawsuit). As of this writing, two federal courts have enjoined implementation of the SAVE plan. The basis for the injunction is that the early loan forgiveness provisions were promulgated in a manner exceeding the Secretary's statutory authority. *See* Missouri v. Biden, No. 4:24-cv-00520-JAR, 2024 WL 3104514 (E.D. Mo. June 24, 2024); Alaska v. U.S. Dep't of Educ., No. 6:24-CV-01057-DDC-ADM (D. Kan. filed June 30, 2024). This Article takes no position on either the constitutional or statutory authority of the executive and focuses instead on the advisability of the underlying policy within the broader context of debt forgiveness.

161. *See* BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 79–81 (2002). For a discussion of the history of debtors' prisons in the United States, and their modern-day recurrence, see Christopher D. Hampson, *The New American Debtors' Prisons*, 44 AM. J. CRIM. L. 1, 8–27 (2016).

162. Hampson, *supra* note 161, at 18–19 (detailing the movement toward abolishing debtors' prisons, completed by the 1870s).

the explicit power to establish "uniform laws on the subject of [b]ankruptcies."[163] The earliest bankruptcy laws functioned primarily as creditor remedies and were intended to overcome collective action problems associated with recovery from an insolvent debtor.[164] Debtors were brought into bankruptcy proceedings involuntarily: granting a discharge required creditor consent, even in liquidation cases.[165] This approach gradually evolved into the legal structure we have today where discharge of debts is assumed for individual debtors, so long as they cooperate with the proceedings and comply with all relevant requirements.[166]

Over time, bankruptcy proceedings have become primarily associated with providing relief for struggling debtors. Modern theories of bankruptcy relief consider how best to provide relief to individual debtors[167] and often advocate making *ex ante* policy choices that might reduce the likelihood of financial distress for vulnerable populations.[168] But the original motivating concern of how to minimize creditors' costs and maximize creditors' recovery remains relevant today.[169]

Under today's Bankruptcy Code, the concern for rehabilitating insolvent debtors is balanced with concern for satisfying the rights of creditors. These concerns are present in both commercial and consumer cases, although consumer cases arguably present a more complicated analysis.[170]

---

163. U.S. CONST. art. I, § 8, cl. 4.

164. *See* Charles Jordan Tabb, *The Historical Evolution of the Bankruptcy Discharge*, 65 AM. BANKR. L.J. 325, 333–34, 345 (1991) (the first discharge granted in the Statute of Anne in 1705 was motivated largely by concerns for creditors' welfare).

165. *See, e.g.*, Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803); Stefan A. Riesenfeld, *The Evolution of Modern Bankruptcy Law: A Comparison of the Recent Bankruptcy Acts of Italy and the United States*, 31 MINN. L. REV. 401, 407 (1947).

166. *See, e.g.*, 11 U.S.C. §§ 727, 1328.

167. For example, bankruptcy law and policy are tested against "the fresh start principle," which asserts that substantive relief should be afforded to the debtor to restore him to economic productivity. *See* THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 4 (1986); Richard E. Mendales, *Rethinking Exemptions in Bankruptcy*, 40 B.C. L. REV. 851, 853 (1999) ("The substantive purpose of personal exemptions is to ensure that individual debtors will not emerge from bankruptcy completely destitute . . . .").

168. *See, e.g.*, Jean Braucher, *Consumer Bankruptcy As Part of the Social Safety Net: Fresh Start or Treadmill?*, 44 SANTA CLARA L. REV. 1065, 1066 (2004) ("[G]aps in unemployment and health care insurance benefits in the United States, combined with ready availability of consumer credit, have led to use of credit as a self-financed safety net, contributing to dramatic increases in personal bankruptcy filings."); Amy K. Yarbrough & Robert J. Landry III, *Navigating the Social Safety Net: A State-Level Analysis of the Relationship Between Medicaid and Consumer Bankruptcy*, 35 POL'Y STUD. J. 671, 674 (2007) (suggesting that lack of medical insurance might be contributing to bankruptcy filings). *But see* Robert J. Landry, III & Amy K. Yarbrough, *Global Lessons from Consumer Bankruptcy and Healthcare Reforms in the United States: A Struggling Social Safety Net*, 16 MICH. STATE J. INT'L L. 343, 344–46 (2007).

169. *See generally* Harrington v. Purdue Pharma L. P., 144 S. Ct. 2071 (2024).

170. *See* Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 777 (1987) (observing that while principles of distribution and the creditor's bargain have significance in consumer settings, there are additional issues that make consumer bankruptcy policy more complex). The increased complication arises in part from the fact that society is inherently invested in the long-term health and well-being of individuals, whereas unprofitable corporations are disposable. *See* Douglas G. Baird, *A World Without Bankruptcy*, 50 L. & CONTEMP. PROBS. 173, 182–83 (1987) ("[N]o one should be too troubled if a particular corporate charter is torn up. . . . [because c]orporations and people are not the same."); *see also* Tabb, *supra* note 164, at 335–36 (under early laws only commercial parties were eligible for bankruptcy relief).

Bankruptcy proceedings are a benefit to creditors insofar as they reduce strategic costs associated with a race to collect from an insolvent debtor and also prevent premature liquidation of assets, thereby maximizing the total sum available for distribution while minimizing the costs attendant to that distribution.[171] A predictable system also helps creditors price and provide credit.

Creditors' concerns are always relevant to conversations about debt forgiveness, even in cases where lenders are large, powerful institutions. Although it is easy to feel less sympathy for these well-funded stakeholders, responsible policymakers recognize that businesses will not lend when doing so is unprofitable. When normal market forces operate, creditors are less likely to issue loans when repayment is less likely, whether it is due to default or loan forgiveness.[172] Policy that increases the availability of loan forgiveness will inherently discourage lenders from issuing loans, thereby reducing the availability of credit. In the absence of external constraint, lenders will also discriminate among different borrowers by their risk of nonpayment. Riskier loans will be more expensive, with higher rates of interest.

Creditors' interests should also be relevant in the context of federally-backed student loans, although student loan lenders' interests are arguably more complicated than that of the average creditor. One might imagine the ED as a separate business entity engaged in the business of lending. Its investors and shareholders are American taxpayers. The current political administration serves as the executive and board of directors for the company, subject to congressionally created bylaws. If the ED were a capitalist enterprise, its goal would be to increase the wealth of its shareholders—the taxpayers. A shareholder-centric model would reasonably avoid issuing unprofitable loans and object to their nonconsensual discharge.[173]

Of course, these baseline assumptions break down very quickly in real life. The ED is motivated by more than simple profit. The department lends primarily to promote higher education,[174] which can expand individual citizens' ability to contribute to civil life. A more educated populace tends to create a larger tax base, which provides an alternative return on the investment, separate and apart from loan repayment with interest. A more educated and informed constituency arguably makes better choices in a democratic society. A more educated workforce can improve the

---

171. *See* Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857, 861–68 (1982).

172. *See* Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 LOY. CONSUMER L. REV. 167, 183–87 (2016).

173. This would likely constrain lending, but when lending decisions are data-driven, they improve outcomes for potential borrowers as well. A restriction against lending to schools with poor employment outcomes, for example, might help students to make more informed choices on borrowing, and help students avoid incurring debt they cannot reasonably expect to repay.

174. *See Federal Student Loans*, *supra* note 8 (noting that federal student loans are intended to finance undergraduate and graduate studies).

living experience of all other citizens, making medical, educational, and engineering services available for the benefit of society. There are benefits and advantages to providing student loans aside from their ultimate repayment.

Furthermore, decision-making in the ED surrounding the issuance and availability of student loans is significantly more complex than decisions in commercial lending. Political considerations and differences in policy priorities may inhibit cooperation and coordination between those who write the laws and those who administer the program. Decision-makers may be motivated to prioritize short-term policy wins over longer-term interests. Some constituents might be benefited to the detriment of other constituents for partisan reasons.

This was precisely the criticism levied at the Biden Administration's promise to forgive a large swath of student loans. Commentators observed that President Biden's promise was directed to a vital voting constituency—young and minority voters.[175] Many objected to the proposed programs for student loan forgiveness because they would benefit only a small fraction of the population at the expense of the majority.[176] Republicans who opposed loan forgiveness did so in part to shore up their own support among working-class voters without college degrees, who they argued would bear the cost of the loan forgiveness without receiving any benefit.[177]

Any stand-alone proposal to forgive student loans is likely to face resistance and criticism, particularly if it runs inconsistent to baseline principles that balance the interests of creditors alongside the interests of debtors. These long-standing principles have already been tested and confirmed in how bankruptcy proceedings are developed and applied.[178] The bankruptcy system has the personnel and procedures to relieve struggling debtors of a wide variety of debts, positioning it perfectly to serve debtors struggling to repay student loans and other burdensome obligations.[179] Using the bankruptcy system to manage student loan debt forgiveness could thus avoid many of the pitfalls associated with a stand-alone program.

175. *See* Peter Nicholas, *Biden Moves Quickly in Effort to Reassure Young Voters on Student Loans*, NBC NEWS (June 30, 2023, 5:42 PM), https://www.nbcnews.com/politics/joe-biden/biden-moves-quickly-effort-reassure-young-voters-student-loans-rcna92028.

176. *See* Tom Norton, *Fact Check: Republicans Say 87% of American Adults Don't Have Student Loans*, NEWSWEEK (Sept. 2, 2022, 4:04 AM), https://www.newsweek.com/fact-check-republicans-say-87-american-adults-dont-have-student-loans-1736897 (finding that estimates suggest that 14% of American adults would benefit from Biden's student loan forgiveness as originally proposed).

177. *See* Daniela Altimari, *In Play to GOP Base, House Votes to Block Student Loan Relief*, ROLL CALL (May 24, 2023, 5:24 PM), https://rollcall.com/2023/05/24/in-play-to-gop-base-house-votes-to-block-student-loan-relief/.

178. *See* Warren, *supra* note 170, at 805.

179. Proposed regulations would permit waiver of a loan that first entered repayment twenty or twenty-five years earlier. *See* DEP'T OF EDUC., PROPOSED REGULATORY TEXT: STUDENT DEBT RELIEF NEGOTIATED RULEMAKING § 30.83 (2023), https://www2.ed.gov/policy/highered/reg/hearulemaking/2023/new-student-loan-debt-relief-proposed-regulatory-text-session-3-v1.pdf.

Of course, bankruptcy is not a costless solution for student loan borrowers.[180] For this reason alone, it is an unpopular solution for those focused primarily or even exclusively on borrowers' interests. In the recent past, there have also been sizable barriers in place to make bankruptcy a largely ineffective avenue for student loan debt relief. Advocates of debt cancellation argue that the most appropriate course of action is swift and conclusive debt relief.[181] But this perspective disregards the interest of creditors in being repaid.

It is incomprehensible that the bankruptcy system—our legal system's baseline response to debtor insolvency—has not been better utilized to confront the problem of unrepayable student loans. The reason for the mismatch lies primarily in a strict interpretation of congressional standards for discharge that have stymied student loan borrowers over several decades. Recent changes may offer a major breakthrough, as explained in Part IV.

B. Debt Discharge Through Bankruptcy

Bankruptcy proceedings are a remedy for creditors seeking to avoid the collective action problems associated with attempting to recover unpaid obligations from insolvent debtors.[182] Deliberate reference to the best interests of creditors runs throughout the language of the Bankruptcy Code. For example, any proposed reorganization plan, whether for a corporate debtor or an individual, must pay creditors at least as much as they would have received in liquidation proceedings under Chapter 7 of the Bankruptcy Code.[183] Reorganization and repayment over time are preferred to liquidation, insofar as they tend to offer creditors a larger return.[184] In consumer liquidation proceedings, debtors with sufficient means must repay their debts over a set period of time[185]— typically three to five years[186]—before obtaining a discharge.[187] An experienced cadre of bankruptcy personnel oversee each case.[188]

---

180. In addition to the costs of filing, which may include employing an attorney to assist in the bankruptcy case, debtors in bankruptcy can also expect a reduction in credit scores and often feelings of stigma both internally and from others in the community.

181. *See* Seth Frotman, Dalié Jiménez, & Jonathan Glater, *Foreword* to DELIVERING ON DEBT RELIEF: PROPOSALS, IDEAS, AND ACTIONS TO CANCEL STUDENT DEBT ON DAY ONE AND BEYOND 6–9 (2020).

182. *See* Baird, *supra* note 170, at 173–74.

183. *See, e.g.*, 11 U.S.C. §§ 1129(a)(7)(A), 1225(a)(4), 1325(a)(4).

184. *See* Richard M. Hynes, *Why (Consumer) Bankruptcy*, 56 ALA. L. REV. 121, 124 (2004) (arguing that the *raison d'etre* of consumer bankruptcy is means-testing to determine whether a consumer can repay her debts).

185. *See* 11 U.S.C. §§ 707(b), 1322(d). For a thorough explanation (and criticism) of the means test, see David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 225–27 (2007).

186. *See* 11 U.S.C. § 1322(d).

187. *See id.* § 1328(a).

188. This group includes a bankruptcy judge (typically very seasoned in bankruptcy practice), the standing trustee, and the United States Trustee, a member of the Department of Justice. *See id.*

All natural persons may voluntarily seek bankruptcy relief, although the law places well-established restrictions on nonconsensual debt discharge in bankruptcy proceedings.[189] Debtors must demonstrate a high level of cooperation with the courts, which includes the timely filing of all necessary information regarding the debtor's assets, liabilities, and general financial situation.[190] Any willful actions to impede creditors or defraud the court will result in a denial of discharge.[191] Although a debtor may obtain a bankruptcy discharge more than once in a lifetime, relief is unavailable for many years after each discharge.[192]

Beyond these limitations, the law currently restricts the types of debts that may be discharged in bankruptcy. A debtor cannot obtain a discharge for debts obtained by fraud,[193] for debts not disclosed to the court,[194] or for debts arising from "willful and malicious injury" to another person.[195] In addition, tax debts are not discharged,[196] nor are "domestic support obligation[s]."[197] Based on amendments to the Bankruptcy Code that began in 1976, student loans have also been nondischargeable except in limited situations.[198] The initial reason for excepting student loans from discharge was a concern that recent graduates would abuse the bankruptcy system by filing immediately upon graduation without any attempted repayment.[199] Congress initially imposed restrictions by prohibiting a discharge for student loans that had first come due within five years prior to the bankruptcy filing, where repayment would not impose an undue hardship on the debtor.[200] Multiple amendments followed, with the end result that student loans are nondischargeable regardless of how long they have been in repayment, unless the debtor can prove that barring student loans from discharge would impose an undue hardship.[201]

Placing the burden of proof upon the student loan borrower creates an obstacle that is difficult to overcome. A debtor seeking to discharge

---

§§ 704, 1106, 1302; *see also* Lindsey D. Simon, *The Guardian Trustee in Bankruptcy Courts and Beyond*, 98 N.C. L. REV. 1297, 1299–1300 (2020) (identifying the U.S. Trustee as a quintessential "guardian" trustee that exists to guard the integrity of the decision-making system).

189. *See, e.g.*, 11 U.S.C. §§ 523, 727, 1328.

190. *See id.* § 727(a).

191. *See id.*

192. *See id.* §§ 727(a)(8)–(9) (a debtor cannot receive a discharge under chapter 7 less than eight years after a previous chapter 7 discharge, or less than six years after a discharge under chapter 13, with limited exceptions).

193. *See id.* §§ 523(a)(2), (4). Further, a consumer debtor cannot discharge credit purchases of "luxury goods" in the ninety days before the bankruptcy filing, nor also cash advances over $1,100 made within the seventy days before the bankruptcy filing. *Id.* § 523(a)(2)(C).

194. *Id.* § 523(a)(3).

195. *Id.* § 523(a)(6).

196. *Id.* § 523(a)(1).

197. *Id.* § 523(a)(5).

198. *See* Pardo & Lacey, *supra* note 27, at 419–21 (presenting a full history of the amendments regarding student loans).

199. *Id.* at 420.

200. *See* Education Amendments of 1976, Pub. L. No. 94-482, sec. 127(a), § 439A, 90 Stat. 2081, 2141 (codified as amended at 20 U.S.C. § 1087-3), *repealed by* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 317, 92 Stat. 2549, 2678 (effective Oct. 1, 1979).

201. *See* 11 U.S.C. § 523(a)(8); Pardo & Lacey, *supra* note 27, at 419–28.

student loans must bring a separate lawsuit—called an adversary proceeding—within the bankruptcy case.[202] In an adversary proceeding, litigants must follow Federal Rules of Bankruptcy Procedure's exacting procedural requirements.[203] Most debtors will find this process confusing and difficult. Hiring an attorney to conduct this litigation may be prohibitively expensive and irrational if the loan balance is small.[204]

The standard of undue hardship presents its own barriers. The statutory language is vague enough to require court interpretation. Most courts have adopted and follow the test for undue hardship laid out in *Brunner v. New York State Higher Education Services, Corp.*[205] The so-called "*Brunner*" test for undue hardship requires a three-part showing:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[206]

As it was applied in courts across the country, the standard developed into a requirement that the debtor demonstrate a "certainty of hopelessness" that she could ever repay her loans.[207] Given the perceived difficulty of meeting this standard, debtors have largely declined to bring adversary proceedings seeking the discharge,[208] even in very difficult circumstances where courts may have found undue hardship.[209] Uncertainty surrounding the precise parameters of the standard contributes to this reluctance.[210]

---

202. FED. R. BANKR. P. 7001(6).

203. *Id.*; *see also* Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2108–09 (2014) (reporting that the complex process disadvantages debtors seeking a discharge).

204. *See* Pardo, *supra* note 203, at 2137–38 (estimating that the cost to properly litigate an adversary proceeding could easily exceed $10,000). The average amount of debt in default is $21,500. MA & PENDER, *supra* note 1, at 43.

205. 831 F.2d 395 (2d Cir. 1987).

206. *Id.* at 396.

207. *See In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993); Richard Fossey, *"The Certainty of Hopelessness:" Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, 26 J.L. & EDUC. 29, 30, 36–37 (1997) (gathering cases applying a certainty of hopelessness standard).

208. *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 505 (2012) (arguing that debtors do not bring cases they can win despite the availability of relief as reflected in empirical statistics). Scholars agree on this point, even while they disagree on the reasons behind it. *See* Pardo, *supra* note 203, at 2124–42 (criticizing the Iuliano study and its implications for claims that debtors receive inadequate access to justice).

209. Iuliano, *supra* note 208, at 523–24 (finding that many debtors who did not seek discharges had financial positions that were just as bad as the debtors who successfully obtained discharges); Pardo & Lacey, *supra* note 27, at 479 (finding that 57% of the discharge determinations in their study granted the debtor some form of relief).

210. *See* Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 229 (2009) (three of the five determining factors for the extent of a discharge of student loans are nondoctrinal case characteristics like the identity of the judge and the experience level of the debtor's attorney).

With the common perception that bankruptcy is not a viable option for borrowers needing relief from student loan debt, it is little wonder that social pressure has called for alternatives, including indiscriminate student loan forgiveness. Indeed, the proposals considered in negotiated rulemaking to establish forgiveness are more objective and permissive than the current standard for a bankruptcy discharge.[211] It would be ironic and distorted if the law permitted wholesale nonconsensual cancellation of debt to borrowers outside bankruptcy but continued to deny that same discharge in bankruptcy proceedings for debtors, particularly when bankruptcy debtors are in worse financial situations. Forgiving student loans for borrowers who show need and request relief aligns with long-standing debt forgiveness principles. Most of the current proposals for debt cancellation do not.

Bankruptcy proceedings are significantly better suited than indiscriminate debt forgiveness—or even debt forgiveness based solely on a borrower's income levels—to account for the interests of both debtors and creditors. The Bankruptcy Code establishes gatekeeping and oversight functions that can provide legitimacy and transparency to loan forgiveness. The bankruptcy system could provide relief, but current law limits its effectiveness for student loan borrowers.[212] Although changes to the law requiring legislative action could serve to significantly improve the bankruptcy courts' ability to issue needed relief, improvement is also possible through simple policy changes within the executive branch. Indeed, many of these policy changes are already in play.

IV. POLICY PROPOSALS GOING FORWARD

The statutory text establishing an "undue hardship" standard in bankruptcy has been in place for several decades.[213] Based on current political sentiment, it is unlikely that Congress will alter this standard.[214] Many commentators have criticized judicial interpretations as unduly harsh or inconsistent across courts,[215] but a change in the law via judicial interpretation has seemed similarly intractable. Accordingly, recent calls for reform have addressed the executive branch, which represents the taxpayers in adversary proceedings considering a debtor's petition to discharge

211. *See* discussion *supra* notes 141–57 and accompanying text.

212. *See* 11 U.S.C. § 523(a)(8).

213. *See* Pardo & Lacey, *supra* note 27, at 419–26.

214. In 2021 a bipartisan bill to allow debtors to discharge student loan debts after a waiting period of ten years was proposed in the Senate, but ultimately died in committee. *See* FRESH START Through Bankruptcy Act of 2021, S. 2598, 117th Cong. (2021).

215. *See, e.g.*, Speer v. Educ. Credit Mgmt. Corp. (*In re* Speer), 272 B.R. 186, 191 (Bankr. W.D. Tex. 2001) (expressing irritation with the undue hardship standard); Iuliano, *supra* note 11, at 379 ("the undue hardship standard is neither a perfect nor even a particularly reasonable provision"); Pardo & Lacey, *supra* note 27, at 510 ("we believe that courts have lost their way in the morass of decisional law that has dominated understanding of undue hardship"); Richard Fossey, *Attention Student Loan Debtors: The Department of Education May Want a Piece of Your Inheritance*, CONDEMNED TO DEBT: THE $TUDENT LOAN CRISIS (Jan. 12, 2021, 8:16 AM), https://www.condemnedtodebt.org/search/label/Educational%20Credit%20Management%20Corporation.

student loans.[216] Compared to other efforts, these calls have gained some traction.

A. Congressional Action

The simplest and most comprehensive approach to improve the ability of bankruptcy proceedings to manage student loan defaults would be to amend the Bankruptcy Code to permit the discharge of student loans after they have been in repayment for a designated period (such as ten years), as was recently proposed in the Senate.[217] Borrowers seeking debt forgiveness under this proposed amendment would have completed the entire term of the Standard Repayment Plan.[218] Loan servicers would have had a full decade to recover the loan, and any funds left still unpaid by that point are unlikely to be recoverable. The primary concerns with applying such a blanket standard are moral hazard and strategic behavior, the very concerns that first motivated Congress to make student loans nondischargeable.[219] Policymakers feared that recent graduates would discharge their student loans on the cusp of a lucrative career.[220] However, those fears lacked any empirical support at the time,[221] and there is significant disagreement among scholars as to whether or not strategic behavior should be expected if the law were changed today.[222] Furthermore, a law that only permitted borrowers to discharge student loans ten years after the start of repayment is considerably less likely to induce strategic behavior; few rational borrowers would delay a lucrative career for ten years for the express purpose of filing for bankruptcy at the end of that time period.

An alternative to a blanket ten-year standard for discharge in bankruptcy would be clarifying the scope of "undue hardship"—circumstances in which relief should be granted—by specifically identifying factual scenarios that would satisfy the standard in the statute itself. When compiling this list, policymakers would do best to consider situations in which creditors are least likely to be repaid even with the most effective collection efforts. A potential starting point could be to permit discharge when borrowers are on the verge of retirement, disabled, or chronically unemployed. When the debtor is too old or sick to work or has demonstrated an inability to retain employment, efforts to collect are more likely to be futile and ultimately inefficient.

---

216. *See generally* Matthew Bruckner, Brook Gotberg, Dalié Jiménez, & Chrystin Ondersma, *A No-Contest Discharge for Uncollectible Student Loans*, 91 U. COLO. L. REV. 183, 183–84 (2020).

217. *See* discussion *supra* notes 141–57 and accompanying text.

218. *See supra* note 20 and accompanying text.

219. Pardo & Lacey, *supra* note 27, at 429–30.

220. *Id.* at 427.

221. *See id.* at 423.

222. *Compare* Rajeev Darolia & Dubravka Ritter, *Strategic Default Among Private Student Loan Debtors: Evidence from Bankruptcy Reform* 5, 20–21 (Fed. Rsrv. Bank of Phila., Working Paper No. 17-38, 2020) (finding no strategic default in private student loans), *with* Constantine Yannelis, *Strategic Default on Student Loans*, CHI. BOOTH 6–7 (2017), https://web.archive.org/web/20180411130644id_/http://faculty.chicagobooth.edu/workshops/finance-lunch/past/pdf/Strategic%20Default.pdf (finding strategic default in federal student loans).

Another situation that justifies a finding of undue hardship involves student loan borrowing that failed to produce a return on investment for the student. Where the debtor failed to obtain the degree for which the student loans were borrowed, repayment is significantly less likely. In cases where the debtor has been in repayment for an extended period, especially if the debtor owes more at the end of that period than the original principal amount, debt forgiveness may be warranted. A realistic evaluation of the facts would indicate that the debtor cannot repay the debt and has little likelihood of doing so in the future. The education is unlikely to have increased the debtor's earning potential because it did not result in a degree. It would be better for creditors to write off the loan as bad debt and avoid issuing similar loans in the future.

B. Judicial Action

Another approach to improving the prospects of bankruptcy discharge for borrowers is reinterpreting the term "undue hardship" within the judiciary. Courts could abandon the *Brunner* test entirely and instead adopt a more lenient view. For example, the court might determine undue hardship in all cases where the debtors satisfy the means test[223] by presumptively demonstrating a lack of means to repay their debts. Expanding the universe of factual scenarios in which undue hardship is granted would encourage more debtors to seek a discharge, particularly if the judiciary adopted a standard with predictive and objective elements.

Unfortunately, broader interpretations of undue hardship are unlikely to take hold at the bankruptcy court level, insofar as bankruptcy judges are bound by judicial precedent. In most circuits, this precedent includes the *Brunner* test.[224] Indeed, a change of judicial interpretation on any considerable scale would likely require intervention of the Supreme Court, or at the very least multiple circuit courts. Bankruptcy judges issue decisions granting student loan discharges on a regular basis,[225] but with no power to affect cases outside their own jurisdictions, these rulings are unlikely to meaningfully influence broader policy.

C. Executive Action

Even if Congress declines to clarify the undue hardship standard, and even if the judiciary declines to provide a more objective interpretation of undue hardship, the ED can and should adopt objective standards for the

---

223. *See* 11 U.S.C. § 707(b)(1).

224. Brunner v. N.Y. State Higher Educ. Servs. Corp., 831 F.2d 395, 396 (2d Cir. 1987); *In re* Faish, 72 F.3d 298, 306 (3d Cir. 1995); *In re* Frushour, 433 F.3d 393, 400 (4th Cir. 2005); *In re* Gerhardt, 348 F.3d 89, 91 (5th Cir. 2003); *In re* Oyler, 397 F.3d 382, 385 (6th Cir. 2005); *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir. 1993); *In re* Pena, 155 F.3d 1108, 1114 (9th Cir. 1998); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004); *In re* Cox, 338 F.3d 1238, 1241 (11th Cir. 2003). The Eighth Circuit uses a "totality of the circumstances" approach. Educ. Credit Mgmt. Corp. v. Jesperson, 571 F.3d 775, 779 (8th Cir. 2009).

225. *See, e.g.*, *In re* Love, 649 B.R. 556, 571 (Bankr. E.D. Cal. 2023); *In re* Randall, 628 B.R. 772, 788 (Bankr. D. Md. 2021) (partial discharge); *In re* Clavell, 611 B.R. 504, 532 (Bankr. S.D.N.Y. 2020) (partial discharge).

discharge of student loans in bankruptcy. As the largest holder of student loans, the ED is in the best position to establish uniform policy by making consistent choices on when to stipulate to a discharge.[226] By so stipulating, the ED can meaningfully influence policy by providing a predictable standard for debtors to consider when deciding whether or not to pursue bankruptcy discharge of their student loans.

In 2020, a group of academics proposed a set of ten easily ascertainable and verifiable circumstances in which the ED should decline to contest a debtor's attempt to discharge student loan debt.[227] In November of 2022, the ED and the Justice Department partially adopted the suggestions set forth in the academic proposal, announcing a new process for handling cases that directed U.S. Attorneys to stipulate to undue hardship when a debtor lacks the ability to repay.[228] Under guidance published by the Justice Department, the debtor's inability to repay would be determined from an attestation form filed by debtors.[229] The attestation form would include information about the debtor's income and expenses and likely future difficulties with repayment.[230] A presumption in favor of a discharge would arise in specified instances, including:

> (1) [T]he debtor is age 65 or older; (2) the debtor has a disability or chronic injury impacting their income potential; (3) the debtor has been unemployed for at least five of the last ten years; (4) the debtor has failed to obtain the degree for which the loan was procured; and (5) the loan has been in payment status other than 'in-school' for at least ten years.[231]

---

226. Currently $1.4 trillion of outstanding student loans are Direct Loans owned by the ED. *See* ALEXANDRA HEGJI, CONG. RSCH. SERV., R46314, FEDERAL STUDENT LOAN DEBT RELIEF IN THE CONTEXT OF COVID-19, at 1 (2022). Following passage of the Health Care and Education Reconciliation Act of 2010 (Pub. L. No. 111-152, 124 STAT. 1029 (2010)), all federal student loans are administered directly by the ED. However, loans issued prior to that date likely fell under the Federal Family Education Loan (FFEL) Program, pursuant to which the ED worked with private lenders to provide student loans and relied on private servicers to administer the program. *See Who We Are*, ECMC GROUP, https://www.ecmcgroup.org/who-we-are (last visited Mar. 26, 2024). The Educational Credit Management Corporation (ECMC), a major servicer of FFEL loans, has been heavily criticized for its aggressive response to debtor efforts to discharge student loans in bankruptcy. *See* Pardo, *supra* note 203, at 2146. As of March 31, 2022, approximately 9.6 million borrowers owed about $219.3 billion in FFEL program debt, $79.9 billion of which was held by ED. *See* HEGJI, *supra*, at 1.

227. Bruckner, Gotberg, Jiménez, & Ondersma, *supra* note 216.

228. *See* Tara Siegel Bernard, *Biden Administration Office Offers New Path to Discharging Student Debt in Bankruptcy*, N.Y. TIMES (Nov. 17, 2022), https://www.nytimes.com/2022/11/17/your-money/bankruptcy-student-loans.html.

229. DEP'T OF JUST., GUIDANCE FOR DEPARTMENT ATTORNEYS REGARDING STUDENT LOAN BANKRUPTCY LITIGATION 1 (2022), https://www.justice.gov/d9/pages/attachments/2022/11/17/student_loan_discharge _guidance_-_guidance_text_0.pdf.

230. *Id.* at 5, 9–10.

231. *Id.* at 9 (footnotes omitted).

A later letter clarified the goals of the new regulations, which included reducing the burden for borrowers in pursuing an adversary proceeding and increasing the number of cases in which a discharge is granted.[232]

The administration published the new guidelines and touted them as providing "a better, fairer, more transparent process for student loan borrowers in bankruptcy."[233] Over time, these changes have led to some small but noticeable increases in borrowers seeking a discharge of student loans via bankruptcy.[234] However, given the continuing pressure to do more for student borrowers, even this improvement risks being too little to create meaningful relief for borrowers that is consistent with creditors' best interests.

The Justice Department's guidance offers hope to burdened borrowers. Bankruptcy can become a more meaningful option to resolve unpaid—and unrepayable—student loans. However, early results show only modest relief for student loan borrowers. In the first ten months following issuance of the new guidance, the ED reported that 632 cases had been filed seeking discharge of student loans.[235] Previous years had seen about 480 borrowers attempt to discharge student loans every year, suggesting roughly a 70% increase.[236] However, the overall numbers are still very small compared to the millions of borrowers in default and unable to pay.[237] Furthermore, the vast majority of cases brought were not resolved at the time of the report,[238] reflecting significant issues with delay that continue to plague the system.[239] These delays discourage borrowers and their attorneys from

---

232. Nassar H. Paydar, *Undue Hardship Discharge of Title IV Loans in Bankruptcy Adversary Proceedings*, FEDERALSTUDENTAID (Oct. 19, 2023), https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2023-10-19/undue-hardship-discharge-title-iv-loans-bankruptcy-adversary-proceedings.

233. *See* Kim Porter & Jerry Brown, *Can You File for Bankruptcy on Student Loans?*, U.S. NEWS & WORLD REPORT (Apr. 29, 2024, 1:48 PM), https://money.usnews.com/loans/student-loans/articles/can-you-file-for-bankruptcy-on-student-loans.

234. *See* Gabriel T. Rubin, *Student Borrowers Tap a New Path to Loan Forgiveness: Bankruptcy*, WALL ST. J. (Nov. 16, 2023, 2:35 PM), https://www.wsj.com/us-news/education/student-borrowers-tap-a-new-path-to-loan-forgiveness-bankruptcy-05a0854b (reporting 632 applications in the previous 12-month period, compared with previous average annual rates of 480).

235. Press Release, Department of Justice, Justice Department and Department of Education Announce Successful First Year of New Student-Loan Bankruptcy Discharge Process (Nov. 16, 2023), https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-successful-first-year-new-student-loan.

236. *See* Rubin, *supra* note 234.

237. *Id.*

238. *See* Sherman, *supra* note 17 (reporting that relief had been granted to "just a few dozen [borrowers] as of July"); E-mail from John Rao, Senior Att'y, Nat'l Consumer L. Ctr. to Brook Gotberg, Professor of L., BYU L. Sch. (Jan. 10, 2024) (on file with author).

239. Delay is a meaningful deterrent to bringing an adversary proceeding, particularly as expectations in bankruptcy trend to quick resolution. *See Discharge in Bankruptcy – Bankruptcy Basics*, U.S. COURTS, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/discharge-bankruptcy-bankruptcy-basics (last visited Mar. 18, 2024) (reporting that the court usually grants the discharge about four months after the debtor files the petition). As observed by others, "[s]ix months is an eternity in bankruptcy court." *See* Douglas G. Baird & Edward R. Morrison, *Adversary Proceedings in Bankruptcy: A Sideshow*, 79 AM. BANKR. L.J. 951, 966 (2005).

seeking resolution in bankruptcy and add to the already high costs of bringing an adversary proceeding. More can be done.

The Biden Administration has proposed changes to executive policy regarding student loans outside bankruptcy where the Secretary of Education would affirmatively identify loans that would qualify for relief but have not requested such relief.[240] Within bankruptcy cases, the ED might identify cases in which debtors should qualify for relief and stipulate to the discharge of their student loans ahead of any adversary proceeding being filed.[241] Such a stipulation could reduce the perceived cost of pursuing student loan discharge and encourage more debtors to resolve their student loans in bankruptcy. Other alternatives include permitting an attestation form to serve as the complaint, which would streamline and simplify petitions to discharge student loans.

The ED might separately make an administrative decision not to challenge the discharge of student loans at a *de minimis* level, where the amount at issue is less than the likely costs of collection. If the sum to be recovered for investors is less than it would cost investors to recover the debt, it would be in the best interests of creditors to discharge the debt. There is no reason to take a principled stand on repayment when it ultimately harms creditors by costing them more to pursue the debt than they expect to recover.

D. Lending Decisions Going Forward

Policymakers should also reexamine decisions regarding lending to better align the goals of the student loan program with the loans being issued. Specifically, the HEA should be amended to permit information regarding uncollectible loans to inform future lending decisions.

Several data points could be used to effectively underwrite student loans. Much of the uncollectible student debt currently outstanding arose from lending to nontraditional students pursuing career training programs of dubious quality during a recessionary period.[242] Future lending should

240. *See* discussion *supra* notes 141–57 and accompanying text.

241. Implicit in this recommendation is the assumption that the ED would be aware of bankruptcy cases filed in which the debtor holds student loans. When a debtor files for bankruptcy, all the debtor's scheduled creditors receive notice of the bankruptcy filing. In some cases, debtors fail to list their student loans on the assumption that they will not be affected by the bankruptcy filing, or provide notice only to loan servicers, and not to the ED. When given notice, the ED can identify cases in which the debtor is over age 65 or has social security disability income or veteran disability income. This information is independently available to the government and would be independently verifiable. Such monitoring would impose costs at the governmental level, and so may only be desirable for a limited period of time, to establish a stronger precedent toward seeking a discharge, counteracting the historical understanding that student loans cannot be discharged in bankruptcy. Once the precedent is set, debtors and debtors' counsel should be more proactive in self-identifying cases in which the stipulation for discharge is warranted.

242. Kristen Blagg & Erica Blom, *Student Debt Repayment Fell During the Great Recession. Borrowers from Low-Income Backgrounds Saw the Steepest Decline*, URB. INST. (May 16, 2018), https://www.urban.org/urban-wire/student-debt-repayment-fell-during-great-recession-borrowers-low-income-backgrounds-saw-steepest-decline.

be more constrained in connection with such programs, recognizing that unrepayable debt is harmful to both the lender and to the borrower.[243] Initial lending should be more constrained in the first few years of higher education, reflecting the limited additional value garnered by attending some college, with larger loans available in the final years of a degree.[244] Decreasing the flow of student loans in this way would limit the uncollectible student debt held by individuals who did not complete their degrees.[245] Other proposals include limiting lending by area of study, with more funds available for programs where graduate incomes are higher, and reduced amounts available for less lucrative degrees.[246]

These proposals would certainly impact higher education as we currently know it. They would encourage market corrections that might result in fewer individuals attending college. However, government policy, including state policy, can adjust for this outcome by making further increases in scholarships and grants.[247] Borrowers who cannot pay for college through scholarships, grants, or personal funds, and who are denied student loans because they wish to pursue a career path that is not lucrative, would undoubtedly invest their time and resources elsewhere. In this way, limits on borrowing would increase the chances that they make more economically rational choices, to their own benefit and that of their creditors. Higher education is not the exclusive path to prosperity.

CONCLUSION

This Article provides a novel perspective on student loans by invoking the interests of student loan creditors. Previous efforts to address the so-called student loan crisis have often viewed the problem exclusively from one side of the ledger—the borrowers—proposing solutions that are consequently unfair or incomplete. Acknowledging the interests of creditors encourages a more nuanced crafting of solutions, based primarily on whether the borrower has the capacity to repay the debt.

---

243. *See* Atkinson, *supra* note 32, at 1405–06 (2020) ("[T]he increased ability to borrow money, cast as a mechanism of positive social change, may function in some ways as a Trojan horse, wheeling in the unique dangers of indebtedness to the front gates of marginalized communities and threatening their already tenuous socioeconomic existence.").

244. This might motivate colleges to charge lower tuition in the first few years of college and only admit students they are confident will complete the program. In the alternative, it might ensure that only students with financial backing, by parents or institutional grants, will enroll in college.

245. We acknowledge that this could be perceived as limiting access to college education. While that may be true, if the cost of initially attending is higher, prospective students may be more careful in deciding when and where to attend college.

246. In the alternative, interest rates associated with student loans might vary depending on the expected profitability of the degree. *See* Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 590 (2013).

247. Texas has implemented a so-called "10% plan" for graduating highschoolers. Those who finished in the top 10% of their graduating class could not be denied admission to certain schools. *See* TEX. EDUC. CODE ANN. § 51.803(a) (West 2023). This could be applied in the context of full-ride scholarships. Allowing high-performing students a pathway to further studies regardless of need might be one way to select for those poised to perform immediately at a high level in college.

Using the bankruptcy system as the primary means for resolving student loan default is an obvious solution when considering the concerns of creditors. Bankruptcy courts are staffed with experienced personnel who can act as gatekeepers, ensuring the legitimacy of the system and fairness of the outcome. Bankruptcy has been underutilized because the discharge standard for student loans is wholly unworkable. The standard misses the creditor's main interest: likelihood of repayment. Revisions to the Bankruptcy Code, or the establishment of objective, predictable stipulations to discharging student loans through the judicial or executive branches, may enable more honest but unfortunate debtors to obtain a true fresh start.[248]

In conjunction with these efforts, policymakers should also reconsider the circumstances under which loans are offered and the extent to which the loans issued are likely to be repaid. Not all lending is beneficial: ideal lending policy balances social costs and social benefits, leaving creditors and debtors better off than they were before money changed hands. Those in control of federal student loan policy can do better to ensure that loans are more targeted and more likely to enrich, not impoverish, their borrowers.

---

248. *See* Loc. Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).