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## Student Debt and Higher Education Risk

Jonathan D. Glater

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# Student Debt and Higher Education Risk

Jonathan D. Glater\*

*To borrow for college is to take a risk. Indebted students may not earn enough to repay their loans after they graduate or, worse, may fail to graduate at all. For students who cannot pay for college without borrowing, this risk is both a disincentive and a penalty. Greater risk undermines the efficacy of federal financial aid policy that seeks to promote access to higher education. This Essay situates education borrowing within a larger cultural and political trend toward placing risk on individuals and criticizes this development for its failure to achieve any of the typical goals of legislation that allocates risk—such as prevention of moral hazard or other, particular public policy outcomes.*

*The Essay describes dramatic increases in student borrowing and explains the negative effects of greater reliance on debt, which increases the risk of investing in higher education. The Essay contends that recognizing student debt as a mechanism that transfers risk bolsters criticisms of increased borrowing and provides a consistent way to evaluate aid policy. The Essay outlines an insurance regime as the logical response to undesirable or unmanageable risk. Such a regime would preserve access to higher education and mitigate the danger of borrowing for college.*

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#### INTRODUCTION

For students and policy makers, relying on loans to pay for higher education is a risk. Student borrowers, who hope to obtain the lifelong, tangible and intangible benefits of a college degree, embrace the risk<sup>1</sup> of ending up disappointed and struggling to repay debts because of unemployment, low wages, or catastrophic life events. Federal policy makers, who hope that government provision of education loans will achieve any number of civic ends, confront the prospect that borrowers may fail to repay their debts, and that the borrowers fail to act in service of the public goal that justified the government’s role as enabler of loans, or both.

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1. I use the term “embracing risk” as meant in the book of the same title, although in this Essay I will generally describe the placement of risk on students and families as a distribution or redistribution, allocation or reallocation, or shift of risk to clarify that the “embrace” is not necessarily by choice. Tom Baker & Jonathan Simon, *Embracing Risk*, in *EMBRACING RISK: THE CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 1* (Tom Baker & Jonathan Simon eds., 2002). The distinction between risks sought by and risks thrust upon an individual matters. Tom Baker, *Embracing Risk, Sharing Responsibility*, 56 *DRAKE L. REV.* 561, 567 (2008) (lamenting that in the book of the same name, “[w]e did not emphasize enough the negative consequences of taking risks, especially when people do not choose to do so”).

This Essay provides a risk-access framework for analyzing federal student aid policy. It makes three significant contributions to the scholarly discussion of student aid. First, this Essay contends that rising tuition and growing use of education loans<sup>2</sup> reallocate risk to students and their families and make paying for college excessively risky. To support this claim, this Essay advances a concept of higher education risk, or the danger that a student will not reap sufficient benefit from an undergraduate program<sup>3</sup> to justify the cost<sup>4</sup> or repay education debt.

Second, this framework enables a coherent critique of the negative effects of student debt and suggests innovative reforms. By recognizing that rising tuition and a reliance on debt reallocate risk, this Essay properly identifies the cause of borrower hardship. Placing student borrowing in this context allows me to draw on studies from other fields, like healthcare and retirement, where policy makers have redistributed risk to individuals from groups, institutions, or the government. In an effort to encourage healthy behavior under the Affordable Care Act, for example, health insurers can charge higher premiums to those who smoke but not to those with other potentially costly health conditions.<sup>5</sup> The availability of student loans encourages and enables students to seek higher education, but student indebtedness also encourages behavior that is not socially desirable. In fact, shifting risk to students may<sup>6</sup> be counterproductive. Students may choose to forgo higher education to avoid indebtedness. Indebted students may try to limit their borrowing by working more while in school and, with less time to study, may perform worse in their classes.<sup>7</sup> Indebted graduates may also be constrained in their choices of careers, and student borrowers who do not complete a course of study may suffer great financial hardship. While other scholarship has focused on the negative effects of student loans on the lives and careers of students—and has thereby presumed that debt's preclusive effect on other consumption is undesirable—this framework treats debt as a risk transfer device and supports federal policy reforms that benefit graduates and those who fail to graduate, current students

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2. Students also use private loans to cover costs of higher education, but the amount loaned through federal programs is far greater. COLLEGE BD., TRENDS IN STUDENT AID 2014, at 16 Fig.5 (2014), <http://trends.collegeboard.org/sites/default/files/2014-trends-student-aid-final-web.pdf>. This Essay focuses on federal loans.

3. The same concerns arise in the context of graduate and professional schooling. Critics of the cost of law school, for example, have argued that the benefit of a degree from many institutions does not exceed the financial burden. *See generally* BRIAN TAMANAHA, FAILING LAW SCHOOLS (2012). The focus of this Essay, though, is undergraduate education.

4. A student who does not borrow still faces higher education risk, but the impact of a poor education outcome is greater for the student who borrows.

5. Tom Baker, *Health Insurance, Risk, and Responsibility after the Patient Protection and Affordable Care Act*, 159 U. PA. L. REV. 1577, 1601 (2011) (describing how the Affordable Care Act distributes risk and noting that the law permits insurers to charge different prices based on permitted factors including tobacco use).

6. I use “may” here because causation is very difficult to pin down with any certainty.

7. *See infra* Part III.B.2.

and potential students, and the national community to which all belong. Thus this Essay does not base its call for reform on the distressing outcomes suffered by a subset of students,<sup>8</sup> but on the counterproductive effects of debt generally.

Third, recognizing student loan growth as an aspect of a broader risk reallocation phenomenon suggests new policy responses, such as repayment insurance. Federal policy is already moving in this direction by offering repayment programs that forgive loan balances for low-earners after a certain number of years.<sup>9</sup> The risk-access framework also offers a method of evaluating potential reforms. If policy makers use federal aid programs to redistribute risk, they should consider the relative ability of the affected groups to bear risk and the desirability of a particular allocation of risk. Further, determining the desirability of a particular risk distribution requires identifying goals, such as a target number of college graduates or matriculants. There is no baseline for these assessments; they should be subjects of public debate.

This Essay also broadens the conversation about the effects of debt by including potential students and students not obviously struggling to repay their loans. It helps explain why proposals to reduce the role of loans in federal student aid encounter difficulty: the growth of student lending is part of a broader political and cultural reallocation of risk onto individuals, and a deepening skepticism about spreading risk to reduce potential harms. Animating this Essay is the concern that redistributing risk toward individuals and families reinforces the effects of preexisting wealth and income inequality. People of lesser means are less able to cope with this greater risk. In higher education, reallocation of risk to students restricts access to opportunity.

Federal financial aid policy is fundamentally a product of law. At the concrete and practical level, student loans exist because of legislative action: Congress created them,<sup>10</sup> set the terms of eligibility<sup>11</sup> and interest rates,<sup>12</sup> and accorded them exceptional treatment under the Federal Bankruptcy Code, which requires the borrower to show “undue hardship” as a precondition to

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8. Despite media attention to the large debts carried by a fraction of students who borrow, most students—at the undergraduate and graduate levels—do not borrow so much. COLLEGE BD., TRENDS IN STUDENT AID 2013, at 22 fig.11A (2013), <http://trends.collegeboard.org/sites/default/files/student-aid-2013-full-report.pdf> (reporting that 4 percent of borrowers had balances greater than \$100,000 on federal loans in 2013, while 70 percent had less than \$25,000 in debt). Furthermore, students who default on their loans tend to have lower balances than students who do not default, suggesting that the amount borrowed is not the decisive factor driving default. Rohit Chopra, Assistant Dir. & Student Loan Ombudsman, Consumer Fin. Prot. Bureau, Remarks at the Symposium on Student Loans at Suffolk University Law School (Apr. 11, 2014).

9. See *infra* Part IV.B (describing the terms of Income-Based Repayment of student loans).

10. National Defense Education Act of 1958 (NDEA), Pub. L. 85-864, § 201, 72 Stat. 1580, 1583 (stating as its goal, “to stimulate and assist in the establishment at institutions of higher education of funds for the making of low-interest loans to students in need thereof to pursue their courses of study in such institutions”).

11. 20 U.S.C. § 1091 (2012).

12. 20 U.S.C. § 1077a.

discharge.<sup>13</sup> At the more abstract level, federal aid manifests a desire to move the nation closer to its ideal form and to realize the same educational benefits for students and the polity that intellectual and political leaders have praised since the founding of the republic.<sup>14</sup> Thus the issues addressed herein are proper concerns of the legal academy.

This Essay has four Parts. Part I provides an overview of scholarly writing on risk reallocation regimes that mitigate the potential harm suffered by individuals. Part II analyzes two trends that have driven this phenomenon in higher education: the rising cost of college and the corresponding increase in student borrowing. Part III explains why the combination of rising tuition and growing reliance on borrowing lead to a redistribution of risk, and discusses the implications of analyzing education debt in this way. Part III then identifies the potential negative consequences of relying on debt and illustrates how borrowing puts students, especially poorer students and those from historically excluded groups, at greater risk of failing to graduate or of experiencing difficulty in repayment. Finally, Part IV proposes correcting this undesirable redistribution of risk through a repayment insurance scheme. This final Part suggests that the prospects of federal aid reform proposals improve if advocates frame the debate over student debt in terms of risk redistribution that affects all current students, prospective students, and their families.

## I.

### THE DISTRIBUTION AND REDISTRIBUTION OF RISK

While there are different ways of thinking about risk, this Essay adopts a sociolegal perspective, exploring the distribution of potential costs and benefits, along with the related incentive effects, of a particular allocation of risk. Other approaches would yield useful insights, especially if intended to assess the wisdom of borrowing to pay for higher education. Potential students investing in college might use a mathematical model to predict their future earnings under different circumstances and then decide whether the expected

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13. 11 U.S.C. § 523(a)(8) (2012).

14. This has been recognized by national leaders from the founding through the presidency of Barack Obama and almost certainly will be recognized in the future. Thomas Jefferson wrote, “[E]xperience hath shewn, that even under the best forms, those entrusted with power have, in time, and by slow operations, perverted it into tyranny; and it is believed that the most effectual means of preventing this would be, to illuminate, as far as practicable, the minds of the people at large, and more especially to give them knowledge of those facts, which history exhibiteth, that, possessed thereby of the experience of other ages and countries, they may be enabled to know ambition under all its shapes, and prompt to exert their natural powers to defeat its purposes.” Thomas Jefferson, *Preamble to a Bill for the More General Diffusion of Knowledge* (1778), in 2 THE PAPERS OF THOMAS JEFFERSON 526–27 (Julian P. Boyd ed., 1950). And, more recently, President Obama warned, “Higher education is still the best ticket to upward mobility in America, and if we don’t do something about keeping it within reach, it will create problems for economic mobility for generations to come. And that’s not acceptable.” President Barack Obama, Remarks by the President on College Affordability—Buffalo, N.Y. (Aug. 22, 2013), <http://www.whitehouse.gov/the-press-office/2013/08/22/remarks-president-college-affordability-buffalo-ny>.

return on the investment makes the purchase worthwhile.<sup>15</sup> An empirical scholar might test the validity of a model of investor tolerance of risk, using real-world data reflecting investment decisions. A future article will develop a model that reflects a student's decision whether to attend and borrow for college,<sup>16</sup> and such a model will likely lend itself to empirical testing. This Essay lays the groundwork by first arguing that we should recognize that the current federal financial aid regime reallocates risk. The Essay then uses that perspective to critique the current risk distribution. This is not an empirical project, although this Part draws on scholarship identifying and analyzing the effects of student indebtedness to examine the federal aid regime. This Part then draws on the sociolegal scholarship that has developed around other policies to reflect on student lending.

Before going any further, I must clarify the term "risk." Risk has two elements: the probability of an event, and the cost or benefit should that event occur. The mathematical product of the two elements is the expected value of that event.<sup>17</sup> When this Essay describes redistribution, reallocation, shifting, or re-shifting of risk, it refers to a policy that changes the expected value of the event or the expected beneficiary or payer, such as the student or the student's family. If an increase in tuition requires a student to borrow more to pay for college, this increase may affect both the probability and net cost elements.<sup>18</sup> Both the likelihood of default and the total cost of the loan may increase.

There is no noncontroversial, baseline distribution of risk—that is, a distribution with clear and unequivocal moral authority. Although a "natural"

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15. Professor James Ming Chen developed a model based on the Sharpe Ratio, which provides a way to capture a given investment's rate of return relative to its riskiness, and to evaluate the effect of indebtedness on the decision whether to borrow for college—that is, how debt increases risk. James Ming Chen, *Sharpe-ly Leveraged: A Model of Human Capital Formation Under Debt Service Constraint* (prepared for and presented at the Jerome M. Culp Colloquium at Duke University School of Law on May 15, 2014), <http://bit.ly/SharpelyLeveraged>.

16. This project is fraught, I recognize. Advocates of restrictions on access to higher education might very well use such a model to argue that particular students should not enroll in college, based on student characteristics that, plugged into the model, predict the "return" on the education "investment." My hope, however, is that the model would help to identify variables, other than student characteristics, that might be subject to policy interventions increasing the likelihood of a positive education outcome.

17. Risk is related to uncertainty, but as Professor Lynn Stout has reminded us, they are not the same thing. Lynn Stout, *Uncertainty, Dangerous Optimism, and Speculation: An Inquiry into Some Limits of Democratic Governance*, 97 CORNELL L. REV. 1177, 1179–80 (2012). Risk involves a known probability; for example, there is a one in five chance that a student who takes out a loan will fail to complete a course of study. See LAWRENCE GLADIEUX & LAURA PERNA, NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., BORROWERS WHO DROP OUT: A NEGLECTED ASPECT OF THE COLLEGE STUDENT LOAN TREND 4 (May 2005), <http://www.highereducation.org/reports/borrowing/borrowers.pdf>. Uncertainty exists when the probability is not known. Disagreement over the likelihood of a particular occurrence enables speculation. Stout, *supra*, at 1180.

18. Some research has found that the likelihood of defaulting on a student loan does not increase with the absolute amount borrowed. J. Fredericks Volkwein et al., *Factors Associated with Student Loan Default Among Different Racial and Ethnic Groups*, 69 J. HIGHER EDUC. 206, 215 (1998) (finding lower default rates among borrowers who owed more).

distribution of risk arguably existed at some point, years of government policies and community and corporate conduct have modified that allocation. Today, any policy affecting the cost of action or inaction allocates risk by either reducing the potential cost for some beneficiary or increasing the potential cost for others. Without a baseline, advocates must draw on values external to the risk distribution itself.<sup>19</sup> Arguments may focus on compliance, efficiency, or equity, for example. Sometimes these normative arguments are explicit, as in debates over the allocation of health care costs,<sup>20</sup> and other times they are implicit, as in student lending.

For much of the twentieth century, policy makers spread the costs of harms across larger populations through privately and publicly provided insurance regimes, and thereby reduced potential harm to any individual. In what became part of the New Deal, the government intervened to provide a degree of retirement income security and health care financing to workers affected by the Great Depression. Supporters of these policy innovations saw the programs as a bulwark against financial cruelties,<sup>21</sup> like the inability to afford to live after retirement or pay for needed medical care.

Over the past few decades, scholars have observed a trend away from cost spreading and toward reallocating risk to individuals and families.<sup>22</sup> Advocates of this shift have generally cited two related benefits. First, shifting the risk to individuals and families reduces the likelihood that those actors will incur unnecessary costs or engage in high cost behavior. Second, because individuals and families incur fewer costs, the cost to society remains low. Proponents focus on the “moral hazard,” which Professor Tom Baker succinctly described as the incentive, created by insurance, for an insured person to take less care and cause more loss.<sup>23</sup> For example, drivers with liability insurance may drive more recklessly and cause more accidents, imposing greater costs on their

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19. Professor Baker makes this point in the context of products liability insurance. Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 275 (1996) (“If we understand the initial entitlement of manufacturers and employers to leave manufacturers and employers free to impose the costs of products and work-related accidents on consumers and employees . . . then we will regard legal rules that ‘interfere’ with that entitlement as ‘redistributions.’ . . . [But if] the insurance provided in the redistribution of entitlements is analyzed, the insurance provided in the ‘initial’ distribution is ignored.”).

20. For example, the Patient Protection and Affordable Care Act of 2010, Pub. L. 111-148, explicitly allocates some risks to the insured, but others to the insurer. The Act permits health plans to vary prices based on whether an applicant is an individual or family, the geographic region in which the applicant lives, age of the applicant, and tobacco use if any by the applicant. Tom Baker, *Health Insurance, Risk, and Responsibility*, *supra* note 5, at 1589. The restrictions on pricing explicitly limit the extent to which certain risks—for example, the risk of suffering certain diseases that may be related to applicant characteristics other than those listed previously—may be allocated to insured individuals.

21. See James R. Hackney Jr., *Guido Calabresi and the Construction of Contemporary American Legal Theory*, 77 L. & CONTEMP. PROBS. 45, 50–51 (2014) (summarizing the development of the idea of “loss spreading” in the writings of Judge Calabresi).

22. Baker & Simon, *supra* note 1, at 4.

23. Baker, *supra* note 19, at 268.



insurance provider. Insurance may therefore be counterproductive to the goal of reducing harm. If costs increase under an insurance regime, then insurance is a problem, not a solution. Similarly, if efforts to mitigate risk encourage counterproductive, excessively costly decisions, then the government should provide little to no risk spreading. Allocating risk serves a regulatory function by encouraging or discouraging certain behavior.<sup>24</sup>

However, a complete analysis of insurance's effects should also account for the benefit to the insured and constraints on the insured's ability to control their costs. People do not, for example, control all aspects of their health. Consequently, denying medical insurance coverage may punish not the rational manipulator of the system, but merely the unfortunate. As Professor Baker puts it, "moral hazard can become a sophisticated form of victim blaming."<sup>25</sup> But policy makers have focused ever more on the conduct of the potential victim, rather than on the nature and causes of harm. Professor Jacob Hacker noted this change in his analysis of what he describes as the "great risk shift"—a reaction against the New Deal paradigm of social security. The culprit, in Professor Hacker's view, is a particular political ideology that blames government and corporations for providing "basic . . . economic security" that undermines personal responsibility and productivity.<sup>26</sup> Proponents of this ideology would reduce or outright eliminate insurance protection, and consequently redistribute costs and benefits toward individuals, who then have a stronger incentive to take steps to avoid costly outcomes.<sup>27</sup>

This reallocation of potential costs and benefits matters. If an individual bears the cost of an event and there is a chance that the cost will exceed that individual's ability to pay, then the individual—and any affected third party—bears significant risk. A regime requiring individuals to bear more of the cost of health care may encourage people to try to take better care, but it also decreases the likelihood that people will spend on health care<sup>28</sup> relative to a system in which an insurer or the government covers a greater share of cost. A regime that enables but does not compel individuals to save for retirement may encourage those with means to set money aside, but it penalizes those who cannot, as well as those who underestimate how much their savings will grow or how much they need to live after retirement.<sup>29</sup>

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24. Nonetheless, to date, researchers have not analyzed federal student aid as a component of a regulatory system that determines who has access to higher education; this analysis will be the subject of a future article.

25. Baker, *supra* note 19, at 279.

26. JACOB S. HACKER, *THE GREAT RISK SHIFT: THE ASSAULT ON AMERICAN JOBS, FAMILIES, HEALTH CARE, AND RETIREMENT AND HOW YOU CAN FIGHT BACK* 37–38 (2006).

27. *Id.*

28. See, e.g., Teresa B. Gibson et al., *A Copayment Increase for Prescription Drugs: The Long-Term and Short-Term Effects on Use and Expenditures*, 42 *INQUIRY* 293, 303 (2005) (finding that increases in co-payments for prescription drugs led to a decrease in their use).

29. These examples show that it makes little sense to talk about an allocation of risk without also talking about insurance, a mechanism that reallocates risk away from the individual and spreads it

The availability and price of insurance change the distribution of risk by reducing the potential cost of certain conduct and therefore encouraging that conduct. Insurers fine-tune the incentive by setting and adjusting the pricing and terms of coverage, and offering lower premiums, copayments, or deductibles for those deemed less likely to impose costs on the insurer. Conversely, they require higher premiums and additional terms, or deny coverage to those who engage in conduct more likely to impose costs on the insurer.<sup>30</sup> Risk distributors also seek to encourage conduct that serves a policy goal. Government aid programs to the poor, for example, motivate recipients to find paid employment by reducing the amount of financial support. For more and more workers, the amount they will receive in pension payments after retirement depends on individual workers' investment decisions—and the financial markets.<sup>31</sup>

Much has been written about the reallocation of risk in health care, in part due to the adoption of the Federal Patient Protection and Affordable Care Act in 2010,<sup>32</sup> and in retirement, in part because of the impact of the 2008 financial crisis and the recession on retirement savings. The remainder of this Part draws on insights of scholars who have studied changes to risk allocation in those two contexts. Scholars, including Professor Hacker, Professor Baker, and Professor Nan Hunter, have identified the potential costs of trying to influence behavior, and their insights are relevant to what has happened in federal financial aid.

The debate over health care in the United States reflects competing goals: a desire to help people obtain healthcare, a determination to fight rising costs, and a fear of moral hazard effects. Here, moral hazard relates to cost because it manifests itself in an overconsumption of health care, which pushes up cost.<sup>33</sup>

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across a community. In the context of student loans, there has been no serious discussion among legal scholars of an insurance regime available to borrowers.

30. Omri Ben-Shahar & Kyle D. Logue, *Outsourcing Regulation: How Insurance Reduces Moral Hazard*, 111 MICH. L. REV. 197, 199–200 (2012). Federal student lending would be analogous, if the cost of loans reflected an assessment of the likelihood of default by the borrower; some critics of federal student aid contend that loan terms should therefore vary with the riskiness of the borrower. See, e.g., Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 625–28 (2013) (arguing that terms of student loans should vary depending on student borrowers' choice of major). A number of scholars have focused on the ways in which insurance companies can affect the behavior of insurers by, for example, demanding that borrowers adopt risk-reducing practices as a condition of coverage. Tom Baker & Rick Swedloff, *Regulation by Liability Insurance: From Auto to Lawyers Professional Liability*, 60 UCLA L. REV. 1412, 1414–15 (2013).

31. A smaller share of workers now participates in defined benefit retirement plans. Craig Copeland, *Retirement Plan Participation: Survey of Income and Program Participation (SIPP) Data, 2012*, NOTES, August 2013, at 4, [http://www.ebri.org/pdf/notespdf/EBRI\\_Notes\\_08\\_Aug-13\\_RetPart-CEHCS1.pdf](http://www.ebri.org/pdf/notespdf/EBRI_Notes_08_Aug-13_RetPart-CEHCS1.pdf).

32. Pub. L. 111-148, 124 Stat. 119 (2010).

33. Andrew C. Wicks & Adrian A. C. Keevil, *When Worlds Collide: Medicine, Business, the Affordable Care Act and the Future of Health Care in the U.S.*, 42 J.L. MED. & ETHICS 420, 427 (2014). The policy maker could also shift more of the economic risk of health care provision to providers, leading them to incorporate cost concerns when making decisions about the care they will provide. Nan D. Hunter, *Risk Governance and Deliberative Democracy in Health Care*, 97 GEO. L. J.

Pushing more of the cost onto consumers deters them from spending on care. Unfortunately, deterrence may work too well if people in need choose to forgo care as a result. To address this, policy makers may require consumers to pay for treatment related to morally objectionable conduct, but not health conditions out of their control or conditions that result from bad luck.<sup>34</sup> Such policy choices place in sharp relief the tension between actuarial fairness, or requiring high-cost consumers to pay more for the costs of their care, and moral fairness, or passing on costs only if the consumer has some control over whether they will incur the cost by, for example, stopping smoking.<sup>35</sup>

The debate over retirement income focuses on a slightly different question: Who is best placed to ensure that those no longer in the workforce have a decent standard of living? The incentive should be great for workers to put something aside for themselves, although empirical studies suggest that most people do not save enough,<sup>36</sup> and minute changes in the structure of retirement savings programs make more of a difference than they should.<sup>37</sup> The incentive should also be great to earn the maximum rate of return on any such savings, although it is not clear that active investing, which takes time and expertise, results in better returns over time.<sup>38</sup> Professor Hacker argues persuasively that the normative justification of shifting retirement income risk to workers has more to do with an ideological commitment to building a culture that emphasizes personal, individual responsibility than with expertise or, indeed, results.<sup>39</sup>

Tensions analogous to those in health care and pension funding come up in higher education finance. Some students cost more than others to educate, just as some people have costlier health conditions than others. Perhaps this justifies differential college pricing schemes that charge students more if they pursue higher-cost fields of study or lower-pay careers, or if they are more

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1, 10–11 (2008). Such an approach, which has potential implications for patients, may be instructive in the higher education context; some have suggested that education providers should bear more of the risk of poor student outcomes. See, e.g., Jeff Bailey, *For-Profit Ed: Skin in the Game on Student Loans*, FORBES (Jan. 9, 2014, 11:57 AM), <http://www.forbes.com/sites/investor/2014/01/09/for-profit-ed-skin-in-the-game-on-student-loans> (describing legislative proposal to penalize colleges when their students default on student loans).

34. See *supra* note 19; see also Baker, *supra* note 5, at 1589–90 (noting that insurers are permitted under the Affordable Care Act to charge higher premiums to people who smoke).

35. Baker, *supra* note 5, at 1602.

36. See Jack VanDerhei et al., *What Does Consistent Participation in 401(k) Plans Generate? Changes in 401(k) Account Balances, 2007–2012*, 402 ISSUE BRIEF 7 fig.3 (July 2012) (finding that 39.6 percent of 401(k) plan participants surveyed had less than \$10,000 saved), [http://www.ebri.org/pdf/briefspdf/EBRI\\_IB\\_402\\_July14.K-Longit.pdf](http://www.ebri.org/pdf/briefspdf/EBRI_IB_402_July14.K-Longit.pdf).

37. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 109–10 (2009).

38. Jeff Sommer, *How Many Mutual Funds Routinely Rout the Market? Zero*, N.Y. TIMES (Mar. 15, 2015), <http://nyti.ms/1AC0JEG>.

39. HACKER, *supra* note 26, at 37.

likely to drop out or default on student loans.<sup>40</sup> On the other hand, if the federal goal in higher education finance is to put college within reach regardless of student means, and if some of the characteristics that correlate with increased risk stem from poverty or other life challenges over which the student has little control, then differential pricing—either in the form of higher tuition or worse loan terms—is problematic. Indeed, if federal policy makers wish to avoid interfering with student course and life decisions, a differential college-pricing scheme may be counterproductive.<sup>41</sup> Yet studies of retirement savings have long shown that workers do not save enough, and people are not good at predicting future life events even when it is in their own interest to do so. If workers cannot ensure their own retirement income, we should not expect students to be any better at predicting likely career outcomes. Further, as a normative matter, it is not clear that students should make career choices based on anticipated income, any more than sick people should make choices about medical care based solely on cost. These unresolved tensions over both policy goals and effects undermine debates over debt finance of higher education and over the federal role in student lending.

Shifting responsibility for paying possible costs is one way that risk is redistributed, and increases in prices can contribute to the effect. Part II below describes how responsibility for paying for college has shifted and prices have increased. Despite these changes, advocates, policy makers, and scholars have explicitly addressed neither the distribution of higher education cost nor the risk of education debt. Federal responses to indebtedness include repayment plans, which allow for loan forgiveness after twenty or twenty-five years, and targeted loan forgiveness for graduates pursuing careers in the public interest.<sup>42</sup> Perhaps because higher education itself has been viewed as a kind of insurance and a ticket to middle-class security, a national conversation about the distribution of risk has not occurred. Now it is overdue.

## II.

### THE RISE OF DEBT

The broader cultural and political trend of placing more responsibility for coping with life events onto individuals and families both reallocates more of

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40. Some institutions charge differential tuition, but not based on student characteristics. Jonathan D. Glater, *Certain Degrees Now Cost More at Public Universities*, N.Y. TIMES (Jul. 29, 2007), <http://www.nytimes.com/2007/07/29/education/29tuition.html>. As a result, some scholars have proposed further changes to federal aid programs to shift more of the cost of education onto students to steer their courses of study or affect their decision whether to enroll. *See, e.g.*, Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 625–28 (arguing that students should pay higher interest rates on student loans if they pursue courses of study leading to lower-pay careers).

41. And such efforts may be ineffective if students do not take into account potential lifetime earnings and other factors when choosing what to study and, ultimately, what to do with their lives. Jonathan D. Glater, *The Unsupportable Cost of Variable Pricing of Student Loans*, 70 WASH. & LEE L. REV. 2137, 2142–46 (2013).

42. *See infra* Part IV.B.

the burden of higher education finance to students who must borrow and makes reform advocacy difficult. Changing cultural and political attitudes toward risk and insurance have played an unidentified role in the debate over rising student debt. This Part identifies two implications of the evolving views about the proper allocation of risk and reward in higher education finance. The first Section describes how state support of public colleges and universities has failed to keep up with costs, and how society has increasingly viewed education as a private good that benefits the student who receives it.<sup>43</sup> As a result of waning support, institutions have raised tuition sharply. The second Section describes how the price of higher education has increased faster than family income. The amount that students and their families must borrow to pay for higher education has increased, as has the higher education risk. For a college student who hopes to attend an institution that, like 85 percent of four-year colleges and universities, accepts more than half of its applicants,<sup>44</sup> the primary obstacle to college is likely not lack of merit. It is lack of money.

#### A. *The Rising Price of College*

Direct appropriations and state support of public colleges and universities have failed to keep pace with rising institutional costs. This is due at least in part to difficult economic times that have forced state governments to make hard fiscal choices. These changes have profoundly affected the public colleges and universities attended by the vast majority of U.S. students.<sup>45</sup> In the past, higher levels of state funding, in combination with federal aid, contributed to a risk distribution that favored students, but as state appropriations have dwindled,<sup>46</sup> the situation has changed. With state support providing a decreasing share of public university funds on the one hand, and costs—driven

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43. Federal funding of research at colleges and universities, as opposed to direct state support, has risen for decades through the 2006–2007 academic year. COLLEGE BD., TRENDS IN COLLEGE PRICING 2014, at 29 Figs.18A & 18B (2014), <http://trends.collegeboard.org/sites/default/files/2014-trends-college-pricing-final-web.pdf>. However, this funding declined over the next five years. *Id.* According to the National Science Foundation, federal funding for basic research at universities declined slightly between 2011 and 2012, but is projected to increase slightly thereafter. Michael Yamaner, *Federal Funding for Basic Research at Universities and Colleges Essentially Unchanged in FY 2012*, NAT. SCI. FOUND. (Sept. 2014), <http://www.nsf.gov/statistics/infbrief/nsf14318>. Federal funding has not proven nearly as volatile as state support.

44. *Table 305.40: Acceptance Rates*, DIG. EDUC. STAT. (Nov. 2014), [https://nces.ed.gov/programs/digest/d14/tables/dt14\\_305.40.asp?current=yes](https://nces.ed.gov/programs/digest/d14/tables/dt14_305.40.asp?current=yes).

45. Of the 17.4 million undergraduates enrolled in fall 2013, 13.3 million—more than 76 percent—attended public institutions. *Table 303.70: Total Undergraduate Fall Enrollment in Degree*, DIG. EDUC. STAT. (Mar. 2015), [http://nces.ed.gov/programs/digest/d14/tables/dt14\\_303.70.asp](http://nces.ed.gov/programs/digest/d14/tables/dt14_303.70.asp). Most students—nearly 80 percent of undergraduate students—attend colleges and universities that admit more than half of their applicants. COLLEGE BD., TRENDS IN COLLEGE PRICING 2013, at 35 fig.26A & 26B (2013), <http://trends.collegeboard.org/sites/default/files/college-pricing-2013-full-report-140108.pdf>. Just 4 percent of students attend institutions that admit no more than 25 percent of applicants. *Id.*

46. Per student state support of colleges and universities has declined over the past decade. COLLEGE BD., TRENDS IN COLLEGE PRICING 2014, *supra* note 43, at 29 figs.18A & 18B.

by factors like increasing competition with other institutions and the need to provide more financial aid to poorer students to compensate for each increase in price—rising, on the other,<sup>47</sup> many public colleges and universities have raised tuition and fees sharply. Tuition and fees at four-year, public institutions have increased by 17 percent over the five-year period between the 2009–2010 and 2014–2015 academic years, and rose 21 percent in the preceding five years.<sup>48</sup> In contrast, tuition and fees at private, nonprofit institutions rose 10 percent between 2009–2010 and 2014–2015 and 13 percent in the prior five-year period.<sup>49</sup>

Some have argued that the availability of federal loans has prompted tuition hikes, as institutions raise their prices to capture greater revenue.<sup>50</sup> Evidence supporting this argument is difficult to gather, and studies are decidedly mixed.<sup>51</sup> For purposes of this Essay, however, the reasons why prices and debt levels have increased do not much matter; the critical point is that they have, and the combination of trends has reallocated more responsibility and risk to students and their families.

The pressure to raise prices is not equally strong across all institution types. Colleges and universities fall into different categories: elite and endowed nonprofit, four-year colleges and universities; nonprofit, four-year institutions lacking significant endowment income; flagship public, four-year institutions; four-year state colleges and universities; two-year community colleges; and for-profit institutions. Institutions with significant endowment income face less pressure to raise tuition and fees and can reduce the pace and size of increases. Correspondingly, the costs of attending each type of institution vary: although the most elite colleges and universities carry the highest published “sticker price,” those with the income to provide significant financial aid do so, thereby reducing the cost for those who qualify for assistance. The wealthiest colleges and universities discount greatly; institutions like Princeton, Yale, and others at the most elite levels provide aid even to students whose families earn as much

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47. Ronald G. Ehrenberg, *American Higher Education in Transition*, 26 J. ECON. PERSPECTIVES 193, 194 (2012).

48. COLLEGE BD., TRENDS IN COLLEGE PRICING 2014, *supra* note 43, at 17 tbl.2A. These figures are in 2014 dollars.

49. *Id.*

50. This has become known as the “Bennett Hypothesis.” William J. Bennett, *Our Greedy Colleges*, N.Y. TIMES (Feb. 18, 1987), <http://www.nytimes.com/1987/02/18/opinion/our-greedy-colleges.html>. William J. Bennett, at the time the secretary of the federal education department, complained in a 1987 op-ed in *The New York Times* that “increases in financial aid in recent years have enabled colleges and universities blithely to raise their tuitions, confident that Federal loan subsidies would help cushion the increase.” *Id.*

51. DONALD E. HELLER, DOES FEDERAL FINANCIAL AID DRIVE UP COLLEGE PRICES?, AMERICAN COUNCIL ON EDUCATION 9–14 (Apr. 2013), <https://duckduckgo.com/l/?kh=1&uddg=http%3A%2F%2Fwww.acenet.edu%2Fnews-room%2FDocuments%2FHeller-Monograph.pdf> (summarizing research findings on drivers of tuition pricing).

as \$200,000 annually.<sup>52</sup> Less wealthy nonprofit colleges and universities also provide financial aid, as do public institutions. However, for in-state residents the sticker price at public institutions is on average much lower than at the private, nonprofit institutions.<sup>53</sup>

Among the private, nonprofit, four-year institutions, about half charge more than \$30,000 in tuition and fees per year and the average sticker price including room and board in 2013 was \$40,917.<sup>54</sup> Among public, four-year institutions, nearly three-fourths charge less than \$15,000 per year<sup>55</sup> and the average price including room and board was \$18,391. Tuition and fees totaled \$3,264 at public, two-year institutions, and \$15,130 at for-profit institutions.<sup>56</sup> Financial aid changes the picture somewhat.<sup>57</sup> In the 2013–2014 academic year, the average net price—that is, the cost of tuition, fees, and room and board after grant aid—was \$23,290 at private, nonprofit institutions.<sup>58</sup> At public, four-year institutions,<sup>59</sup> the average net price was \$12,620; at public two-year institutions it was \$5,920,<sup>60</sup> and at for-profit institutions it was \$3,420.<sup>61</sup> Even these figures mask incredible diversity in aid practices, with the wealthiest institutions taking significant steps to reduce the cost of education to lower-income students.<sup>62</sup> Great differences in actual cost, and consequently, the riskiness of paying for a degree from a particular institution, can be hidden by sticker price averages.

Education outcomes also vary by institution type.<sup>63</sup> Students who fail to complete a course of study may not receive an expected increase in earning power and may struggle more to repay student debt. Of students who started

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52. Jonathan D. Glater, *Stanford Set to Raise Aid for Students in Middle*, N.Y. TIMES (Feb. 21, 2008), <http://www.nytimes.com/2008/02/21/education/21tuition.html>.

53. COLLEGE BD., TRENDS IN COLLEGE PRICING 2013, *supra* note 45, at 10 tbl.1A. Nevertheless, tuition and fees have increased more rapidly at public institutions. *Id.* at 15 fig.4.

54. *Id.* at 15 tbl.2B.

55. *Id.* at 12 fig.2.

56. *Id.* at 10 tbl.1A.

57. Calculations of the impact of financial aid do not take into account the impact of tax credits and deductions. *Id.* at 22.

58. *Id.* at 21 fig.11.

59. This set of College Board data does not distinguish between public flagship institutions and other public four-year institutions.

60. *Id.* at 20 fig.10. Grant aid reduces tuition and fees but does not affect the cost of room and board. *Id.*

61. *Id.* at 21.

62. For example, Yale College has announced that the median price to students receiving aid is \$11,925, or less than one-fourth of the sticker price of attendance. *Yale Meeting White House Commitments to Expand College Opportunity*, YALENEWS (July 17, 2014), <http://news.yale.edu/2014/07/17/yale-meeting-white-house-commitments-expand-college-opportunity>. The cost was zero for students whose households earned less than \$65,000 annually. *Id.*

63. Completion rates also vary within institutional categories, with some community colleges and for-profit institutions, for example, doing very well by students, and some private, nonprofit institutions doing relatively poorly. This, too, increases risk for students.

college in 2005, 58.7 percent graduated within six years.<sup>64</sup> At public colleges and universities, the figure was 56.5 percent; at private, nonprofit institutions, 65.1 percent; and at for-profit institutions, 42 percent.<sup>65</sup> Dividing institutions by degree of selectivity, rather than institutional status, adds additional perspective. More highly selective institutions report higher completion rates. For colleges that accepted less than 25 percent of applicants, 85.6 percent of students starting in 2006 graduated within six years. For colleges that accepted between 25 and 49.9 percent of applicants, 72.4 percent of students graduated within six years, and for colleges that accepted between 50 and 74.9 percent of applicants, the six-year graduation rate was 60.5 percent. Colleges accepting between 75 and 89.9 percent of applicants, and more than 90 percent of applicants had the worst six-year completion rates, 55.9 percent and 47.6 percent respectively.<sup>66</sup> This is not to suggest that student educational background, effort, ability, and other characteristics do not play a role. Rather, a variety of factors, some under the control of the student and others less so, likely affect the probability of a successful education outcome.

This variability in education outcomes contributes to the riskiness of investing in higher education. The less likely a student is to complete a course of study or to attain employment sufficiently remunerative to repay student debt, the greater the downside risk of attending an institution. The amount borrowed and the likelihood of completion are critical factors in understanding and evaluating the risk borne by students and their families. But the statistics on completion rates also make clear that the choice of institution matters greatly. More selective colleges are generally less risky for students than less selective institutions, and private, nonprofit institutions, which tend to have a higher sticker price, are less risky than for-profit and public institutions. Higher education risk is a function of factors including the cost borne by the student, amount of debt, and likelihood of completion.

### B. Rising Debts

When federal lawmakers passed the Higher Education Act of 1965 (HEA),<sup>67</sup> they likely did not intend for debt to become the government's primary form of intervention in college access. HEA, along with amendments in 1972 that increased the size of need-based grant aid, represented the high-

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64. Table 326.10: *Graduation Rates of First-Time, Full-Time Bachelor's Degree-Seeking Students at 4-Year Postsecondary Institutions*, DIG. EDUC. STAT. (Jan. 2014), [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_326.10.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_326.10.asp).

65. *Id.* The figure for for-profit institutions is unusually high for the 2005 cohort and it is unclear why. Only 28.4 percent of students in the class entering in 2004 and 31.5 percent of the class entering in 2006 graduated within six years. *Id.*

66. *Id.*

67. Pub. L. 89-329, 79 Stat. 1219 (1965).



water mark for federally supported access to higher education.<sup>68</sup> The driving ambition of the law, as expressed in statements by its supporters, was to put college within reach of any student who wanted to go, regardless of that student's means.<sup>69</sup> In this aim, HEA differed significantly from two prior laws that provided funds to aspiring students. The first, the Servicemen's Readjustment Act of 1944,<sup>70</sup> better known as the G.I. Bill, sought both to recognize and reward the nation's returning warriors for their service and to help veterans readjust to civilian life. The second, the National Defense Education Act of 1958 (NDEA),<sup>71</sup> passed in the wake of the Soviet Union's successful launch of the Sputnik satellite a year earlier,<sup>72</sup> sought to draw more students into those fields deemed essential to win the Cold War.<sup>73</sup> HEA, passed seven critical years later, in the midst of battles for civil rights and equal access, fulfilled national ideals, rather than trying to serve as an instrument to some other end.<sup>74</sup> Higher education access was an end in itself.<sup>75</sup> As a result, a degree of policy confusion has arisen over the goals of HEA. Some federal interventions in higher education finance seek to reward students who have already shown great academic promise, while others draw students who would probably not go to college in the absence of aid.

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68. The purchasing power of the basic federal need-based grant that the HEA created, which was later called the Pell Grant, subsequently declined significantly. Michael S. McPherson & Morton Owen Schapiro, *Are We Keeping College Affordable? Student Aid, Access, and Choice in American Higher Education* 8 (Williams Project on the Economics of Higher Education, Discussion Paper No. 34, 1996), <http://sites.williams.edu/wpehe/files/2011/06/DP-34.pdf>; see also SUZANNE METTLER, *DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM* 65–66 (2014) (describing the failure of Pell grant funds to keep pace with increases in tuition); Lawrence E. Gladieux, *Federal Student Aid in Historical Perspective*, in *CONDITION OF ACCESS: HIGHER EDUCATION FOR LOWER INCOME STUDENTS* 45, 51 & fig.3.4 (Donald E. Heller ed., 2002) (charting the maximum Pell grant as a share of cost of attendance).

69. According to President Johnson, the HEA “mean[t] that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his family is poor.” President Lyndon Baines Johnson, Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965 (Nov. 8, 1965), [http://www.lbjlib.utexas.edu/johnson/lbjforkids/edu\\_whca370-text.shtm](http://www.lbjlib.utexas.edu/johnson/lbjforkids/edu_whca370-text.shtm). President Johnson went on to say, “I doubt that any future Congress will ever erect a prouder monument for future generations.” *Id.*

70. Pub. L. 78-346, 58 Stat. 284 (1944).

71. Pub. L. 85-864, 72 Stat. 1580 (1958).

72. Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y 11, 37 (2011).

73. This meant not only providing funds for students to study the sciences, technology, engineering, and mathematics—the “STEM” fields—but also such subjects as foreign languages. Pub. L. 85-864, § 301–305.

74. As Representative Adam Clayton Powell put it, “Today we act, not react. We no longer chase sputniks across the skies with a hastily devised program of scholarships for science. With this bill we proceed toward molding the myth of higher education for all into vivid, democratic reality.” 1965 CONG. REC. 21,880 (1965) (statement of Rep. Powell).

75. A future project will argue that this broader justification of the HEA made the law more vulnerable to counterattack by those attempting to curtail the government's role, not just in higher education finance, but also in the national economy generally.

But beginning in the late 1970s and then for several decades thereafter, federal grant aid to students, which at one point covered nearly 80 percent of the cost of attending a public university, languished.<sup>76</sup> And while many states continued to provide grant aid to students, several adopted aid programs based not on need but performance on standardized tests and high school grades.<sup>77</sup> Research shows that the beneficiaries of so-called merit aid tend to be residents of wealthier communities and suggests that recent grant flows have gone disproportionately to students who need the money less.<sup>78</sup> This means that non-need-based aid may not broaden access to higher education; wealthier students are more likely to attend college regardless of aid.

As grant aid has failed to keep pace with rising costs, two trends have worked together to elevate borrowing as the primary means of paying for college: household incomes stagnated<sup>79</sup> and, as previously discussed, college

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76. Gladieux, *supra* note 68; see also METTLER, *supra* note 68, at 66–67. Professor Mettler offers a convincing explanation of the trend, arguing that “policy drift” permitted the decline in federal support. *Id.* Shifts in popular ideology also helped, as the ascendance of Ronald Reagan to the presidency and a then-new fiscal conservatism made restricting government spending a priority. Because grant aid was not an entitlement but funded through the appropriations process, spending—let alone increases in spending—would have required periodic legislative action, and instead the legislature did not act. METTLER, *supra* note 68, at 66 (describing how Democrats and Republicans “settled into a contentious stalemate that left policies to drift and decay”). Even the benefits provided by the G.I. Bill evolved, requiring members of the armed forces to contribute a share of their salary toward the cost of education. Melissa Murray, *When War Is Work: The G.I. Bill, Citizenship, and the Civic Generation*, 96 CALIF. L. REV. 967, 997 (2008) (“Today, the benefits offered under the Montgomery G.I. Bill appear more like standard employment benefits, and, like tax benefits or government-subsidized pension benefits, are not necessarily understood as government-funded largesse.”).

77. More than a dozen states adopted non-need-based aid programs between 1993 and 2002. Donald E. Heller, *Merit Aid and College Access*, SYMPOSIUM ON THE CONSEQUENCES OF MERIT-BASED STUDENT AID 4 (Mar. 2006), [http://edwp.educ.msu.edu/dean/wp-content/uploads/2012/03/WISCAPE\\_2006\\_paper.pdf](http://edwp.educ.msu.edu/dean/wp-content/uploads/2012/03/WISCAPE_2006_paper.pdf). A more recent study found that thirty states have non-need-based programs. Lesley McBain, *State Need-Based and Merit-Based Grant Aid: Structural Intersections and Recent Trends*, AASCU POLICY MATTERS, Sept. 2011, at 1, <https://www.aascu.org/uploadedFiles/AASCU/Content/Root/PolicyAndAdvocacy/PolicyPublications/State%20Need-Based%20and%20Merit-Based%20Grant%20Aid.pdf>.

78. Heller, *supra* note 77, at 8; Donald E. Heller & Christopher J. Rasmussen, *Merit Scholarships and College Access: Evidence from Florida and Michigan*, in WHO SHOULD WE HELP? THE NEGATIVE SOCIAL CONSEQUENCES OF MERIT SCHOLARSHIPS 35 (Donald E. Heller & Patricia Marin eds., 2002).

79. “A household includes the related family members and all the unrelated people, if any, such as lodgers, foster children, wards, or employees who share the housing unit.” *Current Population Survey—Definitions*, CENSUS BUREAU, <https://www.census.gov/cps/about/cpsdef.html> (last visited Aug. 2, 2015). According to the Federal Reserve Bank of San Francisco, average household income in 2012 reached \$71,274, and the median household earned \$51,017. Fed. Reserve Bank of San Francisco, *U.S. Household Incomes: A Snapshot*, DATAPOST (Oct. 6, 2014), <http://www.frbsf.org/education/teacher-resources/datapost/microeconomics/income-inequality-us-household-incomes>. Ten years earlier, the median family earned more: \$54,127. Fed. Reserve Bank of San Francisco, *Median Household Income: Life in the Middle*, DATAPOST (Feb. 4, 2014), [http://www.frbsf.org/education/files/MedianIncome\\_Final\\_2014-02-04.pdf](http://www.frbsf.org/education/files/MedianIncome_Final_2014-02-04.pdf). These figures account for inflation. *Id.* The current median household income figure is nearly identical to that earned in the mid to late 1980s, although incomes did rise through the 1990s before falling. *Id.*

prices grew at a pace greater than the rate of inflation.<sup>80</sup> The second of these trends is not new; the pace of tuition increases was one justification for the NDEA more than fifty years ago.<sup>81</sup> The impact of rising prices, though, is greater as a result of flat or declining household earnings. Because of slower income growth, not only must students borrow larger amounts, they also face greater difficulty repaying what they owe.<sup>82</sup>

Not surprisingly, in response to the rising cost of higher education and the lack of growth in earnings, the amount borrowed by students has increased, as has the number of borrowers. The number of students borrowing rose to 10 million in 2012–2013 from 5.9 million ten years earlier.<sup>83</sup> Table 1 provides the growth statistics for borrowing by year.

TABLE 1  
AVERAGE FEDERAL LOANS PER BORROWER BY ACADEMIC YEAR<sup>84</sup>

	Debt per graduate at four-year public institutions	Debt per graduate at four-year private, nonprofit institutions
1999–2000	\$20,800	\$23,800
2000–2001	\$20,400	\$23,700
2001–2002	\$20,500	\$24,200
2002–2003	\$20,900	\$25,400
2003–2004	\$21,000	\$25,900
2004–2005	\$21,500	\$27,500
2005–2006	\$21,800	\$28,600
2006–2007	\$21,500	\$28,700
2007–2008	\$21,500	\$27,800
2008–2009	\$21,100	\$27,800
2009–2010	\$23,200	\$29,300
2010–2011	\$24,200	\$30,400
2011–2012	\$25,000	\$29,900

80. See *supra* Part II.A. Data collected by the College Board and data on the inflation rate compiled by the Federal Reserve Bank of Minneapolis show that, in nearly every year, the annual average increase in tuition and fees at both public and private, nonprofit colleges and universities has increased by more than the inflation rate since 1984. COLLEGE BD., TRENDS IN COLLEGE PRICING 2014, *supra* note 43, at 16 fig.5; *Consumer Price Index, 1913–*, FED. RESERVE BANK OF MINNEAPOLIS, <https://www.minneapolisfed.org/community/teaching-aids/cpi-calculator-information/consumer-price-index-and-inflation-rates-1913>.

81. In the words of Rep. Keating, discussing the HEA, “The plain facts are that college costs are zooming and we are making ivy-covered walls barriers rather than gateways to better living and national progress.” 1958 CONG. REC. 16,721 (1958) (statement of Rep. Keating).

82. Not surprisingly, the share of household income consumed by average tuition at public colleges and universities has increased for decades. Jennifer A. Delaney, *The Role of State Policy in Promoting College Affordability*, 655 ANNALS AAPSS 56, 58 tbl.1 (2014).

83. COLLEGE BD., TRENDS IN STUDENT AID 2013, *supra* note 8, at 18 fig.7B. About 85 percent of these borrowers were undergraduates. *Id.*

84. The source of these data is COLLEGE BD., TRENDS IN STUDENT AID 2013, *supra* note 8, Fig.10A & 10B.

It is noteworthy that most students borrow less than \$25,000.<sup>85</sup> According to the College Board, 40 percent of borrowers owe less than \$10,000 in student loans; 30 percent owe between \$10,000 and \$25,000; 18 percent owe between \$25,000 and \$50,000; 9 percent owe between \$50,000 and \$100,000; and 4 percent owe \$100,000 or more.<sup>86</sup>

Student loan default rates increased after the financial crisis of 2008. The Education Department reports both a two-year and a three-year “cohort default rate,” which reflects the rate of default for a cohort of students who entered repayment, whether following graduation or otherwise terminating their studies, for two or three years, respectively. The two-year rate rose to 10 percent in 2011, from 9.1 percent in 2010, and 8.8 percent in 2009;<sup>87</sup> the three-year rate, which has only been available since 2009, reached 13.7 percent in 2011, down from 14.7 percent the preceding year, but still exceeding 13.4 percent in 2009.<sup>88</sup> These statistics likely understate default rates over the full term of student repayment, which can extend considerably longer than three years. Nevertheless, determining whether the trends in borrowing and default rates are worrisome requires a normative judgment. The next Part situates rising debt and fluctuating default rates in the context of shifting risk, and contends that the reallocation of higher education risk is problematic.

### III.

#### HOW STUDENT DEBT ADDS TO HIGHER EDUCATION RISK

Student loans have enabled more students than ever to attend college, a remarkable and laudable achievement. Yet, loans also weigh more heavily than ever on college graduates and dropouts. If Congress intended for federal loan programs to close the gap in college participation between wealthier and poorer students,<sup>89</sup> it has not achieved its goal. Though a greater number of students now use federal aid programs<sup>90</sup> and more students enroll in institutions of higher learning, socioeconomic gaps in matriculation rates have held fairly constant for decades. A greater share of poorer students now enroll in college,

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85. *Id.* at 22 fig.11A.

86. *Id.*

87. *Table 332.50: Number of Postsecondary Students Who Entered the Student Loan Repayment Phase*, DIG. EDUC. STAT. (Dec. 2013), [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_332.50.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_332.50.asp).

88. FED. STUDENT AID, NATIONAL STUDENT LOAN DEFAULT RATES 2014 (2014), <http://www.ifap.ed.gov/eannouncements/attachments/2014OfficialFY20113YRCDRBriefing.pdf>.

89. *See* 111 CONG. REC. 21,887 (1965) (statement of Rep. Brademas) (explaining the need for student aid for poorer students because “there is almost a straight line correlation between your family income in this country and your prospects of getting into college”).

90. COLLEGE BD., TRENDS IN STUDENT AID 2014, *supra* note 2, at 18 fig.7B. The number of students taking out federal loans rose steadily between the 2002–2003 academic year and the 2011–2012 academic year before declining slightly in 2012–2013, according to the College Board. *Id.*

but that proportion remains several percentage points shy of the enrollment rate among wealthier students.<sup>91</sup>

This Part argues that the increasing burden of education debt has negative effects on students' educational experience. The first Section elaborates on the concept of higher education risk defined in the Introduction.<sup>92</sup> It analyzes the rise in student debt as a mechanism that shifts risk as described in Part I.<sup>93</sup> Drawing on research on education outcomes, the second Section identifies four potential negative effects of borrowing. Admittedly, it is difficult to draw conclusions about why certain students do not pursue higher education, receive poor grades, make certain career choices, and fail to graduate. Nonetheless, worrisome correlations exist between student indebtedness and education outcomes.

#### A. *Student Debt and Risk*

Federal aid policy and its emphasis on student lending reflect value-laden decisions about who should attend college and obtain the concomitant benefits. Yet over time, those decisions have not reflected a consistent, animating ideology or national role for higher education. Drawing on lessons from health care and retirement financing, this Section shows how the increasing use of debt, as a way of paying for higher education, shifts risk to individuals and away from the government. Adopting this perspective illustrates how debt affects all students, not just those who borrow and struggle to repay. Further, this perspective shows how access to higher education is affected by more than the admissions process. Recognizing student debt as a mechanism that transfers risk provides a framework for advancing normative arguments about the government's role in enabling access to higher education.

Before proceeding further, the concept of higher education risk requires elaboration. All investing entails risk; an investor may lose some or all of the money invested. If higher education is viewed as an investment, a student runs the risk that the amount paid for a degree will not yield a sufficient return. A sufficient return may be measured in subjective terms by asking, for example, whether a graduate is satisfied with her education, or objective terms by calculating, for example, the difference between a student's pre-college and post-graduation incomes. If a student does not borrow to pay for higher

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91. COLLEGE BD., TRENDS IN COLLEGE PRICING 1999, at 17 tbl.10, [http://trends.collegeboard.org/sites/default/files/CP\\_1999.pdf](http://trends.collegeboard.org/sites/default/files/CP_1999.pdf). In 1970, 46 percent of unmarried high school graduates, aged 18 to 24, from the lowest-earning families attended college, while 79 percent of high school graduates whose families were in the highest-earning quartile attended. *Id.* In 1997, 53 percent of high school graduates from the bottom quartile attended college and 89 percent of those from the wealthiest quartile attended. *Id.*

92. See *supra* note 3 and accompanying text.

93. See *supra* Part I.

education, the student cannot lose more than what she paid.<sup>94</sup> However, if a student uses debt to pay for higher education, she assumes additional risk because she must repay the debt regardless of her education outcome or income after graduation.<sup>95</sup> While both the borrower and non-borrower run the risk that their college experience will not produce sufficient returns in subjective terms, only the borrower must ensure that she earns enough to repay her loans after graduation. The indebted student not only worries that college will not increase her earning potential, but also the amount of her debt will exceed her income. The larger those debts, the more she must earn.

Investments in higher education differ from investments in conventional, tangible assets in several critical respects. If the value of an asset increases, an investor can borrow more and increase profits. For example, an investor can borrow and buy more shares of a publicly traded company than an investor who starts with the same amount of cash on hand but cannot borrow. The more the share price increases, the greater the likelihood that the leveraged investor will earn a larger profit. The same concept does not apply to a student who borrows to pay for college education; a student cannot pay more than the sticker price.<sup>96</sup> Leverage in higher education does not yield greater benefit.<sup>97</sup>

But leverage increases the impact of losses.<sup>98</sup> Here emerges a more significant difference between borrowing for higher education and borrowing in other contexts. An investor that buys a typical asset can sell if the value of the asset falls, thus preserving some income to satisfy any obligations. A student borrower cannot resell her education to reduce losses. Leverage in education thus worsens the borrower's downside risk.<sup>99</sup> This makes the risk of

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94. Here, the definition of what a student spends should include opportunity costs such as the earnings forgone as a result of college enrollment. The critical point for the discussion above is that what the student has paid is a sunk cost and not a future obligation.

95. Or after dropping out.

96. While students may invest in additional degrees, what is relevant here is that a student would not give more money to a college for an undergraduate degree than the college charges in tuition, fees, and other charges (notwithstanding evidence that colleges may well accept major donations from the families of wealthy students and consider such donations in deciding whether to grant or deny admission). See generally DANIEL GOLDEN, *THE PRICE OF ADMISSION: HOW AMERICA'S RULING CLASS BUYS ITS WAY INTO ELITE COLLEGES—AND WHO GETS LEFT OUTSIDE THE GATES* (2007).

97. Although the availability of leverage does, of course, enable attendance at all.

98. Put another way, student *A*, who does not borrow, may calculate the net benefit of her education by simply subtracting the cost from the benefit. Student *B*, who does borrow, must subtract both the cost of the education and the cost of debt from the benefit. Consequently, if *B*'s education yields an insufficient benefit, *B* stands to lose not just what she paid, but also the additional interest on her loan.

99. In a sense, this is the challenge of higher education finance for the borrower, a version of the problem faced by lenders extending credit to borrowers with little or no collateral. For a lender, there is the risk of having no recourse should a borrower fail to repay. But the borrower, too, suffers from the lack of collateral: the borrower cannot sell the collateral or abandon it in satisfaction of the debt. Hence, there has been scholarly attention to and criticism of the special treatment of student debt under the Bankruptcy Code. See, e.g., Jessica L. Gregory, *The Student Debt Crisis: A Synthesized Solution for the Next Potential Bubble*, 18 N.C. BANKING INST. 481, 492 (2014); Rafael I. Pardo &

investing in higher education different from and potentially greater than the risk of investing in other assets.

Consider first the student who does not borrow to pay for undergraduate education, either because she has the means to cover the cost or receives a full scholarship. Because of a career choice absent financial pressure or difficulty finding employment,<sup>100</sup> the college degree does not increase the student's lifetime income, a typical outcome for many students.<sup>101</sup> Even if the student's postgraduate income is identical to her pre-college income, when the student is completely unencumbered by debt, the most she, or the scholarship provider, can lose is the money sunk into the college education and the opportunity cost of any earnings foregone while enrolled.<sup>102</sup> For the student who does not borrow, this loss may have serious consequences, but it does not impose a future and continuing financial obligation.<sup>103</sup>

Now consider the student who must borrow to pay for college. Like the non-borrower, this student may not earn enough after graduation to manage her debt because of career choice or difficult employment market, and she may earn a lower lifetime income, earning the same or even less than before matriculating. But the indebted student's costs are not limited to the cost of the degree because she must repay her loans. The borrower has not only "lost" the resources that she spent on college, but also must repay the lender with interest.

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Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405 (2005); Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 515 (2000); Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 229 (2012).

100. One challenge of treating education as an "investment," a move that I make in this Part, is the variety of motivations behind the decision to seek higher education and select a particular career. In financial terms, a student who chooses a lower-paying career that is more personally rewarding to that student is a failure. But the government—and probably society more generally—does not always regard such choices as poor, or else loan forgiveness programs mitigating the hardship of lower wages would not exist for teachers and others who choose to embark on socially desirable careers. See, e.g., Higher Education Opportunity Act of 2008, Pub. L. 110-315, § 428K, 122 Stat. 3078, 3237 (2008) (identifying "areas of national need" and providing loan forgiveness to graduates who embark on careers in such areas, including early childhood education, nursing, foreign language teaching or using foreign language expertise in government service, library services, speech pathology, school counseling, or several public sector positions). This makes focusing only on graduates' income when characterizing outcomes problematic.

101. Walter W. McMahon, *The Private and Social Benefits of Higher Education: The Evidence, Their Value, and Policy Implications*, TIAA-CREF INST. ADVANCING HIGHER EDUC., at 3, 12 (Mar. 2010), [http://www1.tiaa-cref.org/ucm/groups/content/@ap\\_ucm\\_p\\_tcp\\_docs/documents/document/tiaa02029326.pdf](http://www1.tiaa-cref.org/ucm/groups/content/@ap_ucm_p_tcp_docs/documents/document/tiaa02029326.pdf).

102. Again, if the borrower is maximizing something other than income, this should not really be considered a loss.

103. Student indebtedness may take other forms. The student whose parents wipe out their retirement savings to avoid borrowing to pay for college may suffer if their child does not end up financially able to support them in their old age. Parents who borrow in other ways, perhaps leveraging a home, face a future repayment obligation just like a student who uses federal loans to pay for college. These outcomes, too, are the result of reallocation of more education costs to students and increases in the price of higher education.

Even if she achieves the same outcome as the unencumbered student, the borrower's downside risk is greater.

The lender, the federal government, is also exposed to risk.<sup>104</sup> This risk has both an objective, financial component—the borrower's failure to repay—and a subjective, nonfinancial component because the government has not achieved its policy objective. These financial and nonfinancial goals are in tension if satisfying the policy objective increases the likelihood of loan default, or if defaulting on the loan reduces the likelihood of satisfying the policy objective.<sup>105</sup> Even nonfinancial goals may be at odds, because the government may at once seek to promote socioeconomic mobility by enabling poorer students to attend college and embark on higher-paying careers, and seek to encourage entry into socially important, relatively lower-paying careers. This tension complicates identification of a desirable outcome. The choice to make student loans generally available *ex ante* and provide selective loan forgiveness *ex post*, once borrowers have made their career choices, represents an effort to reconcile these competing goals. Unfortunately, such a regime may have undesirable effects, because debt nevertheless affects student borrowers in a variety of adverse ways, as discussed below.<sup>106</sup>

The third party to the higher-education transaction is the college or university. The consequences to the institution of a poor education outcome are slight; the default rate among student borrowers must rise to quite a high level and persist for a few years before the institution suffers any consequences under Education Department regulations.<sup>107</sup> If the institution is to face additional penalties, as some have proposed,<sup>108</sup> that choice should serve a purpose; that is, the college should be positioned to improve student outcomes. Data on the institutions' ability to do so is mixed at best; though students fail to

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104. Currently, the federal government directly provides federal loans, although in years past private companies, such as banks, offered federal student loans that the government guaranteed. This program was known as the Federal Family Education Loan Program, or FFELP. Indeed, the government guaranteed FFELP student loans at 100 cents on the dollar (with some exceptions, and the rate was not always 100 cents historically), so the party bearing the risk of a borrower default was the government with respect to those loans too. Higher Education Act of 1965, Pub. L. 89-329, Title IV, § 425 (codified as amended at 20 U.S.C. § 1075(b)(1)(A) (2012)).

105. An indebted student choosing between a low-paying career in teaching and a high-paying job on Wall Street illustrates the tension. If the student chooses the lucrative option, she is unlikely to default, but her career choice will not clearly serve the public interest. Of course, federal aid policy has multiple goals that may be in tension, and if socioeconomic mobility is one, then this hypothetical student's choice to boost her postgraduate earnings represents a win-win.

106. See *infra* Part III.B.

107. 34 C.F.R. § 668.206 (2015) (institutions with default rates greater than 40 percent are subject to exclusion from federal loan programs). The Education Department rarely imposes the penalty, the consequences of which would be extremely harsh.

108. The Education Department has attempted to adopt regulations in the past that would impose greater restrictions on institutions with specified default rates. Press Release, White House, Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges (Mar. 14, 2014), <http://www.ed.gov/news/press-releases/obama-administration-takes-action-protect-americans-predatory-poor-performing-ca>.



complete courses of study at different rates at different institutions, there is tremendous diversity even within classes at an institution.<sup>109</sup> Studies of student-borrower default rates suggest that the institution may not have as much to do with default as the students' characteristics. These studies undermine the case for reallocating responsibility to colleges and universities.<sup>110</sup> Nevertheless, if additional research identifies ways for institutions to improve educational outcomes for students at risk of non-completion and default, the government would do well to require institutions to make use of these options as a condition of participation in a federal aid program.

What, then, justifies this redistribution of risk to students? In general, there are two rationales: society should allocate risk to the person best able to (1) avoid or prevent a negative outcome or (2) cope with that negative outcome.<sup>111</sup> In health insurance, for example, charging a higher premium to a smoker shifts some of the cost of that person's care to the actor best positioned to reduce costs by stopping smoking. This reallocation also incentivizes the smoker to change ways.<sup>112</sup> Keeping insurance available, albeit at a higher price, means that the party better able to cover the cost of care maintains that burden. Putting the risk of student loan default<sup>113</sup> onto student borrowers presents a different case. Students may not be best placed to achieve that policy goal and are not better positioned to cope with a negative outcome than an insurance provider.<sup>114</sup>

Requiring students to incur debt implicitly encourages them to focus on income and obtain a high-paying job; this aim assumes that each student borrower is in the best position to achieve that outcome. Problems abound.

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109. See *supra* notes 64–66 and accompanying text.

110. J. Fredericks Volkwein & Bruce P. Szelest, *Individual and Campus Characteristics Associated with Student Loan Default*, 36 RES. HIGHER EDUC. 41, 59 (1995).

111. Lee Anne Fennel, *Unbundling Risk*, 60 DUKE L.J. 1285, 1293–96 (2011). Allocating risk to a person best able to control an outcome “can improve the mix of bad and good events” and reduce the likelihood of losses caused by moral hazard. *Id.* at 1293. Efficiency gains may be realized, Professor Fennel writes, if a risk-averse individual or entity transfers risk to another person or entity with a “greater ability to diversify, spread, or pool it, or who [is] simply less averse to risk.” *Id.* at 1294. Placing costs on the person or entity best able to prevent harm may also be the approach that minimizes overall costs.

112. The more differential pricing of insurance is practiced, the less sharing, or pooling, of risk occurs. Again in the context of health insurance, some purchaser characteristics may not affect premiums as a matter of policy choice and public values. Insurers may charge smokers more, reflecting their likely higher health care costs, but they may not charge women more, despite their likely higher health care costs. Baker, *supra* note 5, at 1601. The federal government does not use traditional indicia of creditworthiness when extending student loans, and the terms of the loans are the same for all borrowers who take out the same type of loan.

113. If they graduate, of course. For students who do not complete a course of study, the situation is worse.

114. The transfer of risk could be viewed from the other perspective, too, as shifting potential costs away from the government. But the government, given its size and ability to pool borrowers, is better placed to absorb potential losses on student loans, while for any given borrower, the obligation to repay consumes a far greater share of income.

First, federal aid does not seek only, or even most importantly, to encourage graduates to seek higher incomes;<sup>115</sup> career choice can be evaluated using criteria other than wages.<sup>116</sup> Second, putting a heavier burden on some students disincentivizes those students from engaging in the very conduct that the government wishes to encourage: the pursuit of higher education. Third, no matter how hard student borrowers try, through no fault of their own some will fail to complete courses of study or obtain employment with sufficiently high wages.<sup>117</sup> Finally, some students will not respond to financial incentives, because they consciously choose to maximize something other than income, lack information about the implications of their choices, or do not think carefully about college costs before enrolling.<sup>118</sup> In short, the case for putting the risk of low postgraduate earnings on students is weak.

In contrast, the government's ability to absorb a student's failure to repay debts is considerable, not only because of the government's size and resources but also because government aid programs lend to many students, most of whom will not default. The government also has a longer time horizon than any one student borrower. While the consequences of default can be catastrophic for an individual student, they are less significant to the government.<sup>119</sup> If the government were not to seek in-kind repayment of student loans to cover the costs of higher education—if the government, in other words, paid for college—the risk of default would vanish, leaving only the risk that the investment would not pay off in other ways.<sup>120</sup> Taxpayers would then need to expend additional resources to provide higher education.<sup>121</sup>

Recognizing student borrowing as a risk reallocation process broadens the debate over what constitutes a positive education outcome. It matters less whether a student chooses to teach in a public school, for example, or whether, because of job market difficulties, the student takes a low-paying job that does

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115. Promoting socioeconomic mobility may be a goal of federal provision of higher education financing, but helping poorer students obtain a college education does not require use of loans. Further, the existence of federal loan forgiveness programs for graduates who work in public service suggests that the government actually seeks to encourage students to pursue careers *despite* low incomes.

116. This is subject to dispute. As Professor Michael Simkovic has argued, students may view an undergraduate education only as a stepping-stone to a well-paying job. Michael Simkovic, *supra* note 40, at 585 (citing studies that “have demonstrated that students choose their major based largely—but not exclusively—on expected post-graduation wages”). For present purposes, though, it is enough to show that aid policies pursue multiple objectives, not all consistent, and requiring students to borrow to pay for higher education serves some of these objectives and undermines others.

117. In saying this I do not suggest that “fault” should play a role in the analysis.

118. Glater, *supra* note 41, at 2144–46.

119. Of course, higher levels of default do pose a greater risk to taxpayer funds. But taxpayers collectively are better placed to absorb these costs than borrowers individually.

120. And perhaps in tangible ways, too, from the government's perspective, because more educated workers tend to earn higher incomes, on which they will pay higher taxes.

121. Professor Gladioux has calculated that raising the amount provided by Pell grants to enable access to lower-income students would require additional federal expenditure of between \$12 and \$15 billion. Gladioux, *supra* note 68, at 55. Doing so would raise the maximum Pell award into the \$7,000 to \$8,000 range and thereby restore its purchasing power to the peak reached in the 1970s. *Id.*

not clearly serve the public interest. The potential benefit of the college degree and the potential adverse impact of the repayment burden, considered before matriculation and in the abstract, are not affected by postgraduate career choice. Programs that forgive indebtedness of students who pursue particular career paths are fine policy interventions, but they do not mitigate risk for all. The Federal Public Service Loan Forgiveness program, for example, addresses a distinct problem related to perceived failure of labor markets to compensate particular professions highly; it incidentally addresses risk.<sup>122</sup>

A focus on higher education risk directs attention to the effects of debt on *all* students, including those who do not or have not yet borrowed. This systemic perspective permits aid policy analysts to draw on the principles underlying government policies in very different contexts. Focusing on risk redistribution allows one to draw analogies between education and other forms of investment, rather than fanning arguments over differences between them, such as whether, or to what extent, higher education is a commodity or a *sui generis* experience.<sup>123</sup>

Nevertheless, because prices and borrowing have increased amidst a political, cultural shift in perspective on how risk should be allocated, advocates of aid reform face a difficult challenge. They must effectively recast higher education as a national, strategic, public investment,<sup>124</sup> rather than a private one. Government programs enabling risk spreading in health insurance or retirement income, for example, are often criticized for failing to encourage personal responsibility or even for encouraging indolence and self-destructive behavior. Students struggling to repay their loans can be similarly criticized and find their concerns dismissed, because of views that they are responsible for their own predicament. In a culture that prioritizes independence and personal responsibility, students who do not complete programs of study are

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122. See FED. STUDENT AID, PUBLIC SERVICE LOAN FORGIVENESS PROGRAM (Dec. 2013), [studentaid.ed.gov/sites/default/files/public-service-loan-forgiveness.pdf](http://studentaid.ed.gov/sites/default/files/public-service-loan-forgiveness.pdf) (forgiving federal loans of student borrowers who work for a public service organization, such as a government or nonprofit entity).

123. Investing in higher education is an investment in human capital. One economist concluded that in the United States, far too little has been invested, given the private and social rates of return; a major contribution of the analysis was the effort to capture the social returns. McMahon, *supra* note 101, at 3–4. But this analysis does not suggest how to allocate the cost of higher education.

124. Certainly writers in the popular press have made precisely this argument, contending that, for example, the United States must produce far more graduates with advanced degrees to remain competitive in STEM fields with economic and potential military rivals. See, e.g., Thomas L. Friedman, *If You've Got the Skills, She's Got the Job*, N.Y. TIMES, Nov. 18, 2012, at SR12 (arguing that unemployment persists despite employers' needs because not enough potential workers have the required STEM backgrounds to handle the available jobs); Joe Light, *Labor Shortage Persists in Some Fields*, WALL ST. J. (Feb. 7, 2011), <http://online.wsj.com/news/articles/SB10001424052748704376104576122581603676882> ("Finding highly qualified applicants for more technical positions is proving a challenge for some companies."); Andrew J. Rotherham, *The Next Great Resource Shortage: U.S. Scientists*, TIME (May 26, 2011), <http://content.time.com/time/nation/article/0,8599,2074024,00.html> ("[E]veryone from President Obama to the United States Chamber of Commerce is worried about whether we're producing enough STEM graduates from our colleges and universities.").

not sympathetic; their financial hardship is not indicative of a failure of aid programs but a failure of personal effort or ability. A focus on higher education risk, which shows how debt makes students more vulnerable to adverse life events, shifts the terms of debate away from individual, personal responsibility.

Evaluating the benefits and costs of a particular distribution of risk should encompass the effects of borrowing and the prospect of borrowing on all students. To make arguments about the efficacy of policies placing more higher education risk on students and families, we need to know more about how debt affects prospective students' decisions about whether to apply to college; how to choose a college; whether to enroll; whether to remain in school; how to choose a major; how to choose a career; and how to seek employment after graduation. The next Part suggests specific policy proposals.

### B. Other Potential Effects of Growing Student Debt

This Section identifies potential effects, other than repayment risk, of increasing reliance on debt in the current aid regime.<sup>125</sup> This discussion identifies four significant ways and moments in which debt may increase the riskiness of investing in higher education and undermine the goals of federal student aid policy:

- the prospect of borrowing large amounts of money may deter some students from applying to or enrolling in college;
- students who borrow and work while enrolled to reduce borrowing may perform worse in their classes and may be more likely to drop out as a consequence;
- large amounts of debt may constrain graduates' career choices, either pushing them to seek the highest-paying jobs or perhaps steering them into lower-paying careers that enable them to take advantage of public interest loan forgiveness programs; and

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125. The discussion in this Section draws almost entirely on scholarship produced outside the legal academy. While loans and their effects on college access and success have received increasing critical scrutiny among scholars of education, *see, e.g.*, DEREK BOK, HIGHER EDUCATION IN AMERICA 108 (2013) (warning that “[l]evels of student indebtedness are . . . at or near the limits of feasibility if dropout rates are to fall”); Brian K. Fitzgerald & Jennifer A. Delaney, *Educational Opportunity in America*, in *CONDITION OF ACCESS*, *supra* note 68, at 3, 12–13 (“[R]esearchers have found that grants are more effective than loans at keeping students, particularly those from lower-income families, in college.”), fewer scholars of law have ventured into this area. *But cf.* Michael A. Olivas, *State College Savings and Prepaid Tuition Plans: A Reappraisal and Review*, 32 J.L. & EDUC. 475 (2003) (analyzing the risks of increasing popularity of tax-favored college savings); Michael A. Olivas, *Paying for a Law Degree: Trends in Student Borrowing and the Ability to Repay Debt*, 49 J. LEGAL EDUC. 333 (1999) (analyzing the implications of higher tuition at law schools). Much of the legal scholarship on student debt has focused on the process for discharging loans in bankruptcy proceedings. *See, e.g.*, Katherine Porter, *College Lessons: The Financial Risks of Dropping Out, in BROKE: HOW DEBT BANKRUPTS THE MIDDLE CLASS* 85, 97 (Katherine Porter ed., 2012) (arguing for easing the standard debtors must meet to discharge educational debt in bankruptcy).

- debt may severely punish students who fail to complete their courses of study.

Debt also may lead borrowers to put off major life decisions, such as purchasing a home, getting married, or having children.<sup>126</sup> Whether that should inform policy makers' decisions about student loans is unclear. All forms of indebtedness constrain other consumption, but education compensates for this by yielding a significant income benefit.<sup>127</sup> Higher lifetime income implies more overall spending on consumption and also greater societal returns in the form of benefits, including higher income tax payments and better health. These benefits may well outweigh the cost of delayed consumption, although indebted students likely would argue otherwise. This Section will not address this particular, potential implication further.<sup>128</sup>

To be clear, concerns about the effects of indebtedness are not based on unambiguous empirical findings. Redistributing education risk to students and their families may not cause students to decide against enrolling in college, perform worse in their classes, and take the wrong jobs. Research finds correlations only, and alternative theories explain emerging patterns. Perhaps particular students are at higher risk of a poor education outcome, regardless of

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126. Andrew Martin & Andrew W. Lehren, *A Generation Hobbled by College Debt*, N.Y. TIMES, May 13, 2012, at A1; see also PEW RES. CTR., YOUNG ADULTS, STUDENT DEBT AND ECONOMIC WELL-BEING (May 14, 2014), [http://www.pewsocialtrends.org/files/2014/05/ST\\_2014\\_05.14\\_student-debt\\_complete-report.pdf](http://www.pewsocialtrends.org/files/2014/05/ST_2014_05.14_student-debt_complete-report.pdf) (reporting that student debt correlates with lower wealth accumulation by indebted students, although a "more complete financial profile suggests a bachelor's degree does pay off in other ways, particularly in terms of household income"); Press Release, Am. Inst. of Certified Pub. Accountants, New AICPA Survey Reveals Effects, Regrets of Student Loan Debt (May 9, 2013), <http://www.aicpa.org/Press/PressReleases/2013/Pages/AICPA-Survey-Reveals-Effects-Regrets-Student-Loan-Debt.aspx> (describing a survey that found that "75 percent[] [of those surveyed] said they or their children have made personal or financial sacrifices because of monthly student loan payments. Forty-one percent have postponed contributions to retirement plans; 40 percent have delayed car purchases; 29 percent have put off buying a house; and 15 percent have postponed marriage").

127. See, e.g., PEW RES. CTR., THE RISING COST OF NOT GOING TO COLLEGE (Feb. 11, 2014), <http://www.pewsocialtrends.org/files/2014/02/SDT-higher-ed-FINAL-02-11-2014.pdf> (reporting on the widening income gap between those who attend college and those who do not).

128. Critics of student borrowing who emphasize borrowers' foregone consumption as a real economic cost tend not to incorporate the positive economic impact of the investment in higher education, both in the form of lender income and borrower earnings that are still higher than they would otherwise be. See PAMELA BURDMAN, INST. FOR COLL. ACCESS & SUCCESS, THE STUDENT DEBT DILEMMA: DEBT AVERSION AS A BARRIER TO COLLEGE ACCESS 6, 8 (2005), <http://projectonstudentdebt.org/files/pub/DebtDilemma.pdf>; ALISA F. CUNNINGHAM & DEBORAH A. SANTIAGO, INST. FOR HIGHER EDUC. POLICY & EXCELENCIA IN EDUC., STUDENT AVERSION TO BORROWING: WHO BORROWS AND WHO DOESN'T 18 (2008), <http://www.usafunds.org/USAFunds%20ResourceLibrary/StudentAversiontoBorrowing.pdf>; Scott Jaschik, *In the Dark on Aid Changes*, INSIDE HIGHER ED (Jan. 31, 2008), <http://www.insidehighered.com/news/2008/01/31/poll>. But see Annie Lowrey, *Heavy Load of Student Loan Debt Is Weighing on the Economy, Too*, N.Y. TIMES, May 11, 2013, at B1 (describing delayed consumption but noting that "on the other side of the equation, many college graduates now in their 20s and early 30s should eventually be able to make up for lost ground. Some students who take on debt to pay for higher education commit themselves to paying off huge sums, but they usually lift their lifetime earnings by substantial amounts").

indebtedness. If this is the case, however, then two important questions must be answered: Does reallocating education risk to students produce benefits? And is any social goal served by using debt to *increase* the risk of investing in higher education for those students already more likely to face significant hurdles to completion? The answer to both questions, as explained below, is no.<sup>129</sup>

### 1. Debt as Deterrent

Because the risk of borrowing for college increases with the amount borrowed, students uncertain of their chances of increasing their post-graduation income or completing college may not pursue higher education at all. As tuition has increased, more students have needed to borrow in greater amounts. Because of the nature of investing in education, the benefits of leverage in this context are not the same as in others; as discussed above, students cannot sell to mitigate losses.<sup>130</sup> The deterrent effect of debt might be less worrisome if students could correctly forecast their ability to repay their loans—that is, if the perceived riskiness of borrowing to pay for college perfectly matched actual riskiness. But it is not clear that students have such reliable ability to predict education outcomes.<sup>131</sup> As a result, students who are likely to succeed may forego education because they are more risk averse, less self-confident, or otherwise misperceive the risk they face. Likewise, students that are more likely to drop out may nevertheless pursue higher education because they are less risk averse, overconfident or, again, misperceive the risk they face. In either situation, student ability is not decisive; increasing the riskiness of college does not necessarily better select for the students who will succeed.<sup>132</sup>

Reallocating risk to students and families makes sense if government wishes to deter some borrowers from seeking higher education by using debt as a screening device. Indeed, some policy makers, commenting on the rising cost and risk of investing in higher education, have suggested that not everyone should obtain higher education.<sup>133</sup> But the argument proves too much: if

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129. In answering these questions, it bears reemphasizing that requiring students to borrow to pay for college is regressive; only poorer students need to borrow. Debt can thus reinforce preexisting socioeconomic inequality.

130. See *supra* note 99 and accompanying text.

131. This is no slight to students. It is not clear that anyone can consistently and accurately predict successful education outcomes, which turn on a variety of factors and can be very difficult to measure.

132. All students face the risk of random events, such as health problems or other family emergencies, that the student cannot anticipate and that make failure to complete more likely. The cost of failure to complete, however, is higher for the student who borrows.

133. This argument has circulated in the popular press as tuition at elite colleges and universities has risen. See, e.g., Erika Andersen, *Do You Really Need to Go to College?*, FORBES (Aug. 6, 2012), <http://onforb.es/TEPtpS>; *Should College Be for Everyone?*, N.Y. TIMES (Mar. 1, 2012), <http://www.nytimes.com/roomfordebate/2012/03/01/should-college-be-for-everyone>; Richard Vedder,

students should not go to college because the need to borrow makes attendance too risky—meaning that student financial resources are relevant in allocating higher education opportunity—the government need not be involved at all as a provider of aid. After all, lack of financial resources precludes poor people from buying all kinds of goods and services, and in the vast majority of cases, the federal government does not intervene. Education is different because of its perceived role as a different kind of investment, one that pays dividends to the larger community. Higher levels of education produce tangible benefits, in the form of higher tax revenues, lower health costs, lower crime rates, and lower law enforcement costs.<sup>134</sup> Education also results in intangible benefits, in the form of innovation, a more highly trained workforce, and possibly, socioeconomic mobility.

It is difficult to determine how often the prospect of taking on significant debt deters students from pursuing higher education. However, a growing body of scholarship suggests that immigrants, the children of immigrants, and poorer students are more likely to be deterred.<sup>135</sup> These college applicants are particularly sensitive to prices.<sup>136</sup> As the amount that the poor student must borrow increases, so does the perceived cost of college and the likelihood that this student will forego higher education. The sticker price of college is important because, while awareness of rising tuition is widespread, knowledge of financial aid is not.<sup>137</sup> Sticker shock may help explain the gap in college enrollment, which has persisted for more than forty years now, with high school graduates of lesser means significantly less likely to matriculate.<sup>138</sup>

Factors other than a student's attitude toward debt inevitably play a role in the decision to enroll in college. Debt could serve a useful screening function, deterring students who lack the determination to complete a course of study. If this is true, deterrence is less worrisome as debt aversion correlates closely with lack of determination. But if capable students of lesser means are more debt averse, the deterrent effect is disturbingly overbroad. If education loans fail to overcome the effects of socioeconomic inequality, debt remains a suboptimal tool for enabling college access for poorer students.<sup>139</sup> Instead of

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*Why College Isn't for Everyone*, BUSINESSWEEK (Apr. 9, 2012), <http://www.businessweek.com/articles/2012-04-09/why-college-isnt-for-everyone>.

134. WALTER W. MCMAHON, HIGHER LEARNING, GREATER GOOD: THE PRIVATE AND SOCIAL BENEFITS OF HIGHER EDUCATION 14 (2009).

135. BURDMAN, *supra* note 128, at 8; CUNNINGHAM & SANTIAGO, *supra* note 128, at 18; Jaschik, *supra* note 128. As I have noted elsewhere, there is also some evidence that students of particular racial or ethnic backgrounds may be more debt averse. Glater, *supra* note 72, at 24–25.

136. Fitzgerald & Delaney, *supra* note 125, at 3, 11.

137. *Id.* at 10.

138. *Id.* at 12–13.

139. Although this Essay focuses on undergraduate education, some studies have found that debt aversion also affects college students' decision whether to apply to graduate school, suggesting that poorer students who have already borrowed for college are more likely to avoid postgraduate study. Catherine M. Millett, *How Undergraduate Loan Debt Affects Application and Enrollment in*

promoting socioeconomic mobility and greater equality of opportunity, debt reinforces preexisting inequality of income and wealth.

## 2. *Debt and Academic Performance*

While the availability of loans puts college within reach for students who otherwise could not afford it, debt imposes a toll on borrowers while in school, potentially adversely affecting both completion rates and academic performance.<sup>140</sup> The decision to minimize borrowing is therefore rational. Indebted students fail to graduate on time more often than their classmates who do not borrow; one study found that one in five undergraduate students who borrowed did not graduate at all.<sup>141</sup> Indebted students also receive lower grades in their classes,<sup>142</sup> and lower grades in turn may make it harder to obtain the employment necessary to meet repayment obligations.

Students of lesser ability may also borrow more because they receive less non-need-based financial aid for past academic performance or other achievements. That is, a correlation between debt and poor academic performance does not necessarily establish that debt causes poorer grades. Determining the direction of causation is tricky, and more research on the academic performance of indebted students would shed light on the matter. However, if debt has potentially harmful effects on some students and offers little by way of benefit to others, a correlation alone may justify policy intervention seeking to improve student performance by decreasing the burden of debt.

A student's desire to reduce the riskiness of investing in higher education may manifest itself in the decision to work while enrolled, thereby decreasing the amount of debt incurred. The less leveraged an investment, the more limited the downside risk to the borrower. Unfortunately, the effort to decrease repayment risk by working may impose an unrecognized cost on the student borrower: students who avoid incurring additional debt by working excessively

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*Graduate or First Professional School*, 74 J. HIGHER EDUC. 386, 406 (2003). Debt aversion among college graduates is of particular concern to law schools, which as of this writing, continue to face a declining number of applicants. College graduates already bearing significant debt burdens may be particularly leery of borrowing even more to obtain a law or business degree. Because students with larger loan balances are almost certainly poorer students, including students of color, undergraduate debt poses a significant obstacle to efforts to diversify the student population at these institutions. The higher tuition rises, the greater the risk that indebted undergraduates will balk at the prospect of yet more borrowing, and law schools will be unable to recruit a diverse student body and produce a diverse group of lawyers ready to serve a diverse population. Further, Professor Olivas has found that the composition of financial aid offered by law schools affects rates of completion. Olivas, *Paying for a Law Degree*, *supra* note 125, at 338. The more heavily a law student relies on loans rather than grants, the more likely that student will fail to graduate or graduate on time. *Id.*

140. Fitzgerald & Delaney, *supra* note 125, at 3, 13. Students who work while enrolled also run a higher risk of dropping out. GLADIEUX & PERNA, *supra* note 17, at 5.

141. GLADIEUX & PERNA, *supra* note 17, at 4.

142. Fitzgerald & Delaney, *supra* note 125, at 3, 13.



during college reduce the amount of time they can spend on their studies, which may make poor academic performance more likely and may increase the probability of an unsatisfactory education outcome.<sup>143</sup> Perversely, efforts to reduce the potential harm suffered in the event of a poor education outcome may make that bad outcome more likely. In addition, employment has collateral effects outside the classroom: students who work have less time to build the personal relationships and social networks with classmates that can make it easier to identify employment opportunities. These collateral effects decrease the likelihood that higher education will yield the lifetime income and other intangible benefits associated with a degree.<sup>144</sup> Indebtedness may thus exacerbate the effects of socioeconomic inequality that force students to borrow in the first place.

As suggested above, however, a proper threshold question is whether increasing the riskiness of borrowing to pay for higher education has a positive effect on students—that is, might working while in school benefit students who borrow? The gifted student is more likely to be able to juggle the demands of employment and the classroom. Perhaps employment is beneficial generally if, for example, it incentivizes students to use their remaining time more efficiently, to study harder and succeed. The evidence is mixed.<sup>145</sup> Some research suggests that students who borrow relatively smaller amounts are more likely to default than students who borrow larger amounts,<sup>146</sup> suggesting that, maybe, if employment decreases indebtedness, it still may not promote academic success. It may also be that debt itself encourages some students to work hard, to make every borrowed dollar count. But that cannot be more than speculation, given the complexity of the relationship between indebtedness, student employment, and student academic performance. Whether the benefits of working while enrolled outweigh the costs may ultimately rest on views about the value of classroom education relative to real world experience.

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143. Provided a student does not work more than twenty hours per week, working while enrolled may actually improve student persistence and graduation. David W. Breneman & Jamie P. Merisotis, *Beyond Money: Support Strategies for Disadvantaged Students*, in *CONDITION OF ACCESS*, *supra* note 68, at 113, 129. Working longer hours may hamper performance. Grant aid avoids the potential deleterious effects of working or borrowing. Fitzgerald & Delaney, *supra* note 125, at 3, 13. It should be noted that causation is, again, difficult to establish, because students who choose to work may be high achieving. Ralph Stinebrickner & Todd R. Stinebrickner, *Working During School and Academic Performance*, 21 J. LABOR ECON. 473, 474 (2003).

144. For poorer students, accessible strategies for paying for college—putting off college, working while enrolled, or borrowing more—all contribute to a greater risk of failing to complete a degree. GLADIEUX & PERNA, *supra* note 17, at 5.

145. While working may affect grades, the effect may be quite small. Rajeev Darolia, *Working (and Studying) Day and Night: Heterogeneous Effects of Working on the Academic Performance of Full-Time and Part-Time Students*, 38 ECON. EDUC. REV. 38, 45 (2014).

146. Volkwein et al., *supra* note 18, at 215.

### 3. Debt and the Failure to Complete

Borrowing alone does not predict failure to complete and indebted students are only slightly less likely to graduate within six years than students who do not borrow.<sup>147</sup> This is a good thing, because more than half of college graduates have borrowed to help cover their costs of attendance.<sup>148</sup> However, student debt may affect different types of students in different ways. A student may ultimately drop out because of poor academic performance, but more research is needed to identify the reasons students drop out. Lower-income students who borrow are more likely to drop out than students with higher incomes.<sup>149</sup> And black students who borrow are more likely to drop out than black students who do not borrow,<sup>150</sup> suggesting that debt disproportionately hampers some student borrowers.

However, of students who borrow, about 20 percent drop out, and for those students, student loans can be a devastating millstone.<sup>151</sup> Dropouts do not receive the economic benefits of a college degree and may end up in a worse position than they started, earning their pre-enrollment income and now carrying an additional financial burden.<sup>152</sup> When a student fails to complete a course of study because of an unexpected, adverse life event, such as a medical emergency, death of a parent, or other personal crisis, that student is more likely to end up in bankruptcy proceedings where the treatment of student loans is exceptional.<sup>153</sup> Many students and scholars have criticized this treatment of student loans and argued for a more lenient standard for debtors, so far to no avail.<sup>154</sup>

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147. GLADIEUX & PERNA, *supra* note 17, at 5. Interestingly, when controlling for institutional characteristics and student expectations, the dropout rates are not very different—19 percent for borrowers and 20 percent for non-borrowers. *Id.*

148. COLLEGE BD., TRENDS IN STUDENT AID 2014, *supra* note 2, at 4. On average, students who borrowed had taken out \$26,500 in loans. *Id.*

149. GLADIEUX & PERNA, *supra* note 17, at 6–7.

150. *Id.* at 14.

151. *Id.* at 4. But the overall six-year completion rates found in this study are very close: 60.3 percent for borrowers and 62.3 percent for non-borrowers. *Id.* at 38 tbl.2. Further muddying the waters, according to the Education Department, about 59 percent of students, borrowers and non-borrowers alike, graduate from four-year institutions within six years of matriculation. *Table 326.10*, *supra* note 64. As noted above, see *supra* notes 64–67 and accompanying text, the percentage of students who complete a course of study varies with institution type. *Id.*

152. See Porter, *supra* note 125, at 96.

153. Professor Rafael I. Pardo and Professor Michelle R. Lacey have found that outcomes in student loan discharge proceedings seem to vary with characteristics and views of the presiding bankruptcy judge, rather than characteristics of the debtor. Pardo & Lacey, *supra* note 99. The “undue hardship” that a student borrower must establish to discharge debt is not clearly defined in the statute. *Id.* at 510.

154. See *id.*; see also Gregory, *supra* note 99, at 492 (“One proposed [statutory] modification is to replace the undue hardship exception [applicable to student loans under the Bankruptcy Code] with a more defined standard.”); Roots, *supra* note 99, at 515 (difficulty of discharge “has been considered indefensible as a matter of logic”); Taylor, *supra* note 99, at 229 (describing an alternative framework for determining when student loans may be discharged).

Evaluating the treatment of student loans in bankruptcy is difficult. Some debtors may be sympathetic because they seek discharge of student debt in the wake of circumstances beyond their control, but others may not be sympathetic. A student in a low-wage job, though not in the public interest, may deserve the protection of the bankruptcy court. The general argument in favor of a lower standard does not account for differences in student experiences or the federal government's exposure to loss.<sup>155</sup> The Bankruptcy Code requires all debtors to show "undue hardship" before granting discharge,<sup>156</sup> and courts' various tests<sup>157</sup> for determining such hardship do not reflect the morality of nonpayment, the core concern of the lawmakers that limit discharge.

While revising the Bankruptcy Code is one solution to alleviate the burden of student borrowers, it does not address the underlying shift of higher education risk. The Bankruptcy Code offers ex post insurance in a sense,<sup>158</sup> but it is a policy solution that misses the underlying problem.<sup>159</sup> Bankruptcy is only relevant after a poor education outcome when repayment is out of reach and the downside risk of borrowing has materialized. Bankruptcy carries severe consequences for debtors; it is an extreme remedy. And after the obligation to repay has accrued, there is no longer a risk of financial hardship but a harsh certainty.

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155. To be clear, I do not mean to suggest that discharge of private student loans—those neither made nor guaranteed by the federal government—should not be subject to a lower standard. Whatever rationales support barriers to discharge in the case of federal loans do not apply in the case of private loans.

156. 11 U.S.C. § 523(a)(8) (2012).

157. Professors Pardo and Lacey summarize the tests developed by courts to evaluate claims of "undue hardship." Pardo & Lacey, *supra* note 99. They identify two tests, described in *Brunner v. New York State Higher Education Services Corp.*, 831 F.2d 395 (2d Cir. 1987), and in *In re Andresen*, 232 B.R. 127 (B.A.P. 8th Cir. 1999), *abrogated by In re Long*, 322 F.3d 549 (8th Cir. 2003). *See also* Pardo & Lacey, *supra* note 99, at 487. The *Brunner* test requires a debtor seeking discharge of student loans to show that they cannot maintain a "minimal" standard of living . . . if forced to repay the loans; the difficulty of repayment is likely to persist, and the debtor "made good faith efforts to repay the loans." *Brunner*, 831 F.2d at 396. The *Andresen* test required the court to analyze the debtor's financial resources in the past, present and future, the debtor's living expenses, and "any other relevant facts and circumstances surrounding that particular bankruptcy case." *Andresen*, 232 B.R. at 139.

158. Rational and well-informed student borrowers might recognize bankruptcy discharge, were it readily available, as a form of insurance and make decisions accordingly. But it is not clear that students are so rational or well-informed, and bankruptcy carries a stigma that might well discourage strategic exploitation of discharge.

159. One might argue that the availability of bankruptcy discharge of student debt would reassure the rational student borrower—reducing the deterrent effect of debt and reducing the risk of failure to complete—and so achieve the same result as the availability of insurance. However, students are unlikely to be so informed or so rational in their decisions about student debt. *See* Glater, *The Unsupportable Cost of Variable Pricing of Student Loans*, *supra* note 41, at 2142–46 (arguing that students do not pay much attention to student loan terms when deciding whether and how much to borrow).

#### 4. *Debt and the Student Borrower's Career Choice*

Debt may lead some students to make different career choices after they graduate, which is unsurprising given that increased debt may have already affected some students' decisions to work while in school. The literature around such effects is relatively young, but scholars have found some evidence that decreasing the riskiness of higher education by reducing the amount that students borrow correlates with different career choices.<sup>160</sup> Students relieved of repayment obligations may choose lower-paying jobs after graduation, but it is difficult to know what to make of this finding. Even if risk, or the reduction of risk, affects student career choices, reasonable people may disagree about whether it is inequitable for indebted students to operate under constraints that wealthier students do not face.

Criticism of the constraints that debt imposes on graduates is frustrating. If the availability of student loans enables access and leads graduates to seek higher-wage, private-sector jobs, is that a policy failure or a success? On the other hand, if an indebted student pursues a career associated with lower wages, is that a policy failure if that career does not serve the public interest, as defined by lawmakers?<sup>161</sup> Some have argued that students are choosing courses of study based on their anticipated earnings,<sup>162</sup> suggesting that higher education serves primarily an instrumental, financial role in their lives.<sup>163</sup> But perhaps borrowers' views of the purpose of their education should not matter. If federal aid policy seeks to encourage graduates to pursue lower-paying, public-interest careers, then debt may deter poorer students from entering those fields.<sup>164</sup> If federal aid seeks to enable access to higher education, the effects of debt on postgraduate career choice may be irrelevant.

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160. See Erica Field, *Educational Debt Burden and Career Choice: Evidence from a Financial Aid Experiment at NYU Law School*, 1 AM. ECON. J.: APPLIED ECON. 1 (2009) (finding that elimination of student debt led more law students to select lower-paying careers in public interest law after graduation); see also Jesse Rothstein & Cecilia Elena Rouse, *Constrained After College: Student Loans and Early Career Occupational Choices*, 95 J. PUB. ECON. 149 (2011) (describing results of a study of career choices by graduates at an elite university that changed its financial aid policy to eliminate student loans from aid packages).

161. The list of such careers is long. Law makers have provided loan forgiveness for teachers, nurses, librarians, firefighters, and numerous other careers classified as "public interest." Higher Education Opportunity Act of 2008, Pub. L. 110-315, § 428K, 122 Stat. 3078, 3237 (2008) (identifying careers entitled to loan repayment assistance).

162. See Glater, *supra* note 41, at 2145–46 (describing research suggesting students choose courses of study based on anticipated earnings in related careers).

163. See, e.g., Simkovic, *supra* note 40, at 550 (describing the economic benefits of higher education as a rationale for federal student aid policy).

164. Public Service Loan Forgiveness, which cancels the balance of students' debts after ten years of work in the public interest, suggests that this is indeed a policy priority. FED. STUDENT AID, PUBLIC SERVICE LOAN FORGIVENESS PROGRAM, *supra* note 122. On the other hand, to the extent that lower grades of indebted students hinder their ability to obtain higher-paying jobs, these graduates run a greater risk of default.

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These potential negative effects of student indebtedness suggest that reallocating higher education risk to students and families, and saddling them with greater indebtedness, may worsen the effects of financial inequality among college aspirants. Debt itself is not necessarily a problem unless a borrower cannot repay; the risk distribution causes the problem, and reshifting risk toward students is regressive. Not everyone has to borrow and only those who do bear the burden of debt. Those who do not need to borrow face fewer constraints when choosing a career. They face a lower probability that financial hardship will interfere with college completion. And they avoid the stress of coping with indebtedness during and after school.<sup>165</sup>

Legal scholars who have addressed education debt have proposed reforms that would reduce the deleterious effects of student loan burdens on struggling borrowers but would not necessarily promote access. Some have suggested, for example, making it easier to discharge student loans in bankruptcy;<sup>166</sup> imposing limits on borrowing to pay to for particular types of institutions;<sup>167</sup> and increasing the amount that students can borrow through federal aid programs to reduce using commercial education loans that typically have worse terms.<sup>168</sup> So far, critics' prescriptions have not proven compelling to policy makers, in part because most student borrowers do manage to repay their obligations,<sup>169</sup> and in part because proposed reforms lack a normative theory justifying their treatment of education debt. Focusing on the harm to particular students may prove too little to be persuasive and relying on assertions of the special, societal value of education may prove too much.<sup>170</sup> A proper framework for evaluation of federal aid policies is needed.

#### IV.

##### POLICY IMPLICATIONS OF RECOGNIZING FEDERAL STUDENT LOAN PROGRAMS AS MECHANISMS THAT REALLOCATE RISK

The logical response to undesirable risk is insurance. This Part argues that the government should adopt a formal insurance regime distinct from existing federal programs that help students cope with debt. The first Section proposes an insurance scheme to protect student borrowers, with the government as the lender managing higher education risk. The second Section identifies ways in which the proposed insurance scheme is superior to current federal repayment

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165. See *supra* Part III.B.2.

166. See *supra* note 154.

167. Osamudia R. James, *Predatory Ed: The Conflict Between Public Good and For-Profit Higher Education*, 38 J. COLL. & UNIV. L. 47, 98 (2011).

168. Glater, *supra* note 72, at 59.

169. See *supra* note 8.

170. I say this as one who has made precisely this argument. Glater, *supra* note 72. The current Essay suggests that a broader critique of student lending, focusing not on the harsh outcomes suffered by some student borrowers, may stand a better chance of enabling reform.

assistance programs. The third Section returns to the above criticisms,<sup>171</sup> addressing the potential adverse effects of debt as a deterrent, a hindrance to academic performance, a constraint on career choice, and a cause of failure to complete a course of education. It suggests what a focus on higher education risk can add and how insurance better addresses the problems debt creates.

#### A. *Higher Education Risk Insurance*

Insurance reduces the cost of a given adverse event befalling an insured individual by spreading the impact across a broader community so that all pay a small amount to help the harmed person cope. Everyone in a community, including people not vulnerable to the adverse event, could help pay for insurance; for example, citizens could assist through general tax revenues, or members of the subset of the community subject to the risk could pay a premium. An insurer in turn can earn a profit by collecting premiums from a group of people, only some of who suffer the potential harm. Setting the correct premium matters because if too low, the insurer may lose money and fail to amass the resources necessary to pay on the policies sold. Setting the correct premium in turn requires an ability to forecast with some degree of accuracy the likely prevalence of the harm within the population purchasing coverage. Insurers seek to develop and profess to have the expertise necessary both to assess such probabilities and to set a premium that enables both payment on policies and profitability.

This Section briefly outlines two possible insurance schemes, beginning with the most desirable. First, it describes a national system that would spread risk broadly and impose a lower cost on insured student borrowers. Then this Section presents a model that could be adopted by a university system or, conceivably, even an individual institution. Finally, the Section addresses the effects of existing insurance schemes for student borrowers, analyzing the scope and nature of coverage.

##### 1. *A National Insurance Regime*

A nationwide insurance regime paid for by student borrowers has two critical advantages over a smaller program. First, it spreads costs across a larger population, thereby reducing the burden on each borrower. Second, because federal student lending is available to students nationwide, a national insurance regime could draw on funding sources other than borrower-paid premiums. These premiums could increase the cost of credit to insured student borrowers, unless offset by additional grant aid. The federal government could use excess revenue it receives from student borrowers to provide the nucleus of an insurance fund: student loans are currently an asset for the federal government

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171. See *supra* Part III.B.1–4.

because payments in the aggregate exceed the costs of extending credit.<sup>172</sup> Federal student loan interest rates are set based on the government's cost of funds plus a fixed increment.<sup>173</sup> The Treasury Department treats the excess revenue generated by student lending as an asset. Indeed, Senator Elizabeth Warren has bitterly attacked this excess, characterizing it as "profit" generated by an "extra tax" on student borrowers.<sup>174</sup> But these funds could help create an explicit insurance fund to cover the obligations of students struggling with repayment, rather than an implicit fund to be balanced against the cost of student defaults. The government lacks a direct link between its excess revenue and its provision of financial assistance to struggling borrowers. Creating an insurance fund would make this connection more explicit and would protect taxpayers and borrowers from adversity. Of course, whether the political will exists to allocate funds in this way is far from clear.

A number of economists have modeled a national student loan insurance scheme, and it is beyond the scope of this Essay to develop another such model. However, these models help us study the incentive effects of various repayment regimes; they are limited in that they do not characterize borrower protections, but typically involve forgiveness.<sup>175</sup> The models also rely on potentially unrealistic assumptions about student borrower characteristics and ignore the impact of political realities. For example, they do not accommodate the full range of possible student backgrounds that correlate with success. The models also assume that student borrowers who earn higher incomes ex post

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172. The Congressional Budget Office forecasts that the federal government's subsidy to student loan borrowers will remain negative through 2025, although there are critics of the Office's methodology. CONGRESSIONAL BUDGET OFFICE, STUDENT LOAN PROGRAMS – BASELINE PROJECTIONS (Mar. 2015), <https://www.cbo.gov/sites/default/files/cbofiles/attachments/44198-2015-03-StudentLoan.pdf>.

173. 20 U.S.C. § 1077a(c)(4)(B) (2012).

174. Dan Adams, *Elizabeth Warren Decries US College Loan Profits*, BOSTON GLOBE (Apr. 13, 2014), <http://www.bostonglobe.com/metro/2014/04/13/elizabeth-warren-blasts-government-profits-student-loans-quibbles-with-white-house-proposal-speech-suffolk-law/mTreATDFeUkh4fyGc1nBqN/story.html>.

175. See, e.g., Felicia Ionescu, *The Federal Student Loan Program: Quantitative Implications for College Enrollment and Default Rates*, 12 REV. ECON. DYNAMICS 205 (developing a model that analyzes the effects of federal aid programs on high school students' decision to enroll in college, to borrow, and to default, accounting for the risk of investing in college, and finding that flexible repayment options encourage enrollment); Sebastian Findeisen & Dominik Sachs, *Education and Optimal Dynamic Taxation: The Role of Income-Contingent Student Loans* (University of Zurich Department of Economics Working Paper No. 40, 2012) (developing a model combining income-contingent loan repayment and income tax to eliminate risk for student borrowers); Robert J. Gary-Bobo & Alain Trannoy, *Optimal Student Loans and Graduate Tax Under Moral Hazard and Adverse Selection* (CESIFO Working Paper No. 4279, 2013) (developing an optimal insurance scheme in a simple model with two types of students and two education outcomes); Lance J. Lochner & Alexander Monge-Naranjo, *The Nature of Credit Constraints and Human Capital* (NBER Working Paper No. 13912, 2008) (developing a model reflecting the impact of credit constraints, in combination with rising tuition, on college enrollment); see also Satyajit Chatterjee & Felicia Ionescu, *Insuring Student Loans Against the Financial Risk of Railing to Complete College*, 3 QUANTITATIVE ECON. 393 (2012) (developing a model for loan forgiveness for those student borrowers who fail to complete college).

will not resist subsidizing unsuccessful classmates to protect them from repayment risk.<sup>176</sup> Although these models represent systems that effectively insure borrowers against negative education outcomes, they neither charge premiums *ex ante*, discussed below, nor draw on profits generated by the lending regime.

That is not to say that premiums could not be charged; they could be, just as the federal government charges an origination fee to borrowers. That premium ideally would itself be subsidized, with the cost of insurance varying inversely with, for example, the wealth and income of the student borrower and her family. This would prevent imposing insurance costs that make debt finance of higher education more regressive than it already is. Alternatively and less generously, the premium could reflect an equal share of the likely total cost of defaults predicted across the student-borrower population. Yet another option might be to require employed graduates who borrowed to pay premiums, a structure essentially raising the cost of credit without imposing additional costs on students at the start of their schooling. Any of these structures would reduce the risk taken on by each borrower at a lower cost than a state-level or smaller program that would draw on a correspondingly smaller population.

## 2. *A Smaller-Scale Insurance Regime*

While a national insurance system might be closer to ideal, a smaller-scale regime—something that a state, a public university system, or even an individual college or university might adopt—is also possible. The following discussion illustrates that this is potentially feasible,<sup>177</sup> although it is beyond the scope of this Essay to develop a detailed regime, complete with pricing and other terms. Different systems may well be appropriate for different student populations, whether they are grouped by the affiliation of the institutions they attend, such as a public or private university system, or by location or another characteristic. Nevertheless, it is possible to sketch the outline of a program, at a high degree of abstraction, making a few assumptions and using data on loan balances and default rates. To keep the discussion simple, the regime does not consider some potentially relevant data, including institutional default rates and the share of students who drop out.<sup>178</sup>

In keeping with the historical goal of promoting access, student borrowers should contribute to an insurance regime on an equal basis, and should not be

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176. Gary-Bobo & Trannoy, *supra* note 175, at 22 (“The revenues from high repayments are typically used to finance cross-subsidies between types, and therefore to redistribute between types.”).

177. Feasibility may prompt the question: Why doesn’t this product exist? It is difficult to prove a negative, but it may be that the only interested party to the higher education transaction, the student, lacks information and power. The education provider receives money up front, and borrower default risk does not directly affect its bottom line.

178. It also does not consider the rate of change in the share of students who drop out, so that premium pricing would reflect institutional efforts to improve outcomes and lower risk.



made to pay more because of personal or family characteristics that increase the risk of default. The premium should not vary with the amount borrowed because that would have the same regressive effects as variable pricing; the less money a student has, the more that student will need to borrow. Instead, the lender would charge the premium as an up-front fee when originating the loan. Money gathered in this way would be available to protect both borrower and lender if the borrower can no longer honor loan obligations. This insurance could operate like private mortgage insurance, which lenders sometimes require borrowers to obtain to protect the lender in the event of borrower default. While the size of the premium could vary with the size of the loan and the riskiness of the student, measured by a combination of credit history and borrower characteristics, this Essay does not endorse such an approach. Introduction of such borrower characteristics would undermine the ability of poorer students to pay for college.

For ease of calculation, assume a small undergraduate student population of 1,000 students, with 250 in each class, and assume that the institution's student population has the same characteristics as the general student population. That would imply that about 64 percent, or 160 students, in each class took out federal loans to help cover the cost of attendance.<sup>179</sup> Further assume that at graduation, each student must repay \$26,000 in federal student debt,<sup>180</sup> and the interest rate on those loans is 4.66 percent.<sup>181</sup> The median annual income for bachelor's degree recipients who graduated in 2012 was \$46,900.<sup>182</sup> Based on these characteristics, the monthly payment due over a ten-year, standard repayment term will total approximately \$272.<sup>183</sup> The current, three-year cohort default rate for borrowers is 13.7 percent,<sup>184</sup> but there is good reason to believe that the default rate over the ten-year repayment term would

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179. See Table 331.95: *Percentage of Undergraduate Students Ages 18 to 24 in Their 4th (Senior) Year or Above Who Had Ever Received Federal Loans, Nonfederal Loans, or Parent Loans for Undergraduates*, DIG. EDUC. STAT. (Feb. 2012), [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_331.95.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_331.95.asp). The percentage is taken from the 2011–2012 academic year.

180. See COLLEGE BD., *TRENDS IN STUDENT AID 2014*, *supra* note 2, at 22 fig.13A. For purposes of the hypothetical, the average debt burden carried by a college graduate has been rounded up from \$25,600 to \$26,000.

181. This is the rate charged on undergraduate federal loans disbursed between July 1, 2014 and July 1, 2015. *What Are The Interest Rates for Federal Student Loans?*, FED. STUDENT AID, <https://studentaid.ed.gov/types/loans/interest-rates#what-are-the-interest-rates-of-federal-student-loans> (last visited Aug. 2, 2015).

182. *Annual Earnings of Young Adults*, NAT'L CTR. EDUC. STATISTICS: CONDITION OF EDUC. 2015 (May 2015), [http://nces.ed.gov/programs/coe/indicator\\_cba.asp](http://nces.ed.gov/programs/coe/indicator_cba.asp).

183. This is a rough estimate, because the loan repayment calculation is based on the reported gross salary. See *Repayment Estimator*, FED. STUDENT AID, <https://studentloans.gov/myDirectLoan/mobile/repayment/repaymentEstimator.action#view-repayment-plans> (last visited Aug. 2, 2015). In reality, the monthly payment could vary with income, depending on the repayment plan chosen by the borrower.

184. See *supra* note 88.

be higher, perhaps even double that rate.<sup>185</sup> This discussion will consequently assume a higher percentage: 27 percent. That means that approximately sixty-eight students in each class will at some point default on their loan.

The problem becomes more complex. While research has found that most students who default on their loans resume payment, that research does not establish how many monthly payments the typical student borrower misses. Rather than speculate, purely for purposes of this hypothetical exercise, presume that loan payments are covered by insurance for no more than one year. The cost of making those twelve monthly payments of \$272 would total \$3,264, which would add up to \$221,952 for all sixty-eight defaulting students. If the 160 borrowers were to share that cost, they would have to pay \$1,387 each, or \$347 per year for four years of college, not including any interest earned on those premium payments.

These numbers give a false sense of precision. While premiums paid by students each year would earn a rate of return greater than zero, the premiums would still have to be large enough to cover administrative costs. It would also make sense to adjust premiums based on particular institutional characteristics. Ideally, an institution would solicit bids from insurance providers to determine the concrete costs of such a regime. But this should give a very rough idea, a back-of-the-envelope calculation, of the impact of an insurance regime.<sup>186</sup>

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185. A study of borrowers' repayment patterns over ten years following graduation found that most defaulted four or five years after finishing college. SUSAN P. CHOY ET AL., NAT'L CTR. EDUC. STATISTICS, DEALING WITH DEBT: 1992-93 BACHELOR'S DEGREE RECIPIENTS TEN YEARS LATER 43 tbl.18 (2006), <http://nces.ed.gov/pubs2006/2006156.pdf>. The study found that 10 percent of borrowers—more than double the official cohort default rate calculated by the federal Education Department—defaulted over the ten-year period, although nearly half of those who defaulted subsequently resumed payments. *Id.* at 44.

186. The same kind of calculation could be performed for a professional school graduate, of course. Consider a law school with 200 students in each class, of whom 176, or 88 percent, borrow (again reflecting the findings of the College Board). COLLEGE BD., TRENDS IN STUDENT AID 2014, *supra* note 2, at 36 fig.17A. The average, total debt burden of law students who borrow is \$121,900. *Id.* The default rate for graduates with advanced degrees is lower than that for those with bachelor's degrees, but some reports have found that default rates for law school graduates are higher than other advanced degrees. NEW YORK CITY BAR ASS'N, LAW SCHOOL DEBT AND THE PRACTICE OF LAW 8, [nycbar.org/pdf/report/lawSchoolDebt.pdf](http://nycbar.org/pdf/report/lawSchoolDebt.pdf) (last visited Aug. 2, 2015). To be conservative, assume a default rate as high as 27 percent, the rate for undergraduates. That would mean that 48 students defaulted on their monthly payments at an average interest rate of 6.21 percent, *Calculators and Interest Rates*, FED. STUDENT AID: DIRECT LOANS, <http://www2.ed.gov/offices/OSFAP/DirectLoan/calc.html> (last visited Aug. 2, 2015), and a monthly payment of \$1,366 for ten years. Defaulting for one year would require insurance to pay \$16,392 for one student; for all 48 students, the total cost would be \$786,316. Spread over those 176 borrowing and premium-paying law students, the cost would be \$4,468 each, or \$1,489 in each of three years of law school (not taking into account the interest earned on premiums paid). While the larger amounts borrowed drive up the cost of coverage relative to the cost for undergraduates, actual default rates will likely be lower than 27 percent. Further, the marketing advantage for a law school offering such insurance coverage could be considerable, although the program would have to be carefully explained to ensure that it was not cast as a product that the institution had to offer to make up for the quality of the employment outcomes attained by its students. Again, as noted above, these are very rough estimates based on numerous assumptions and meant primarily to provoke a discussion of the possibilities.

### 3. Coverage

An effective insurance regime, whether funded by premiums or in some other fashion, would cover a student borrower's repayment obligations in the event that the borrower's income is insufficient. Coverage amounts could vary, providing partial repayment assistance for a range of incomes, but this would complicate the discussion and so it is not contemplated here. The insurance provider would cover monthly payment obligations of indebted students, after the student documented her income and showed an inability to make payments as scheduled. In this regard, student loan insurance would function much as current federal repayment assistance programs do. A borrower whose monthly payment obligation exceeded a specified percentage of after-tax income, perhaps 10 percent as under the current Pay-As-You-Earn program (PAYE),<sup>187</sup> would be relieved of the obligation to pay until her income increased. Unlike repayment assistance programs, such as Income-Based Repayment (IBR), insurance coverage of a loan obligation would neither extend the term of payment nor produce taxable income.<sup>188</sup> Importantly, insurance would not forgive the balance of the loan; it would be finite,<sup>189</sup> giving a borrower time to get life and finances in order and resume payments. It would not matter whether the borrower graduated or failed to complete a course of study; an insurance payment would be based on ability to repay an obligation and no more. This insurance regime could reduce the likelihood of a bankruptcy filing by a student borrower and protect the student from the personal financial damage associated with bankruptcy. This enables the borrower to cope with a period of financial difficulty.

Default, of course, is only a proxy for difficulty in making monthly loan payments; default occurs when no payment is made for more than nine months.<sup>190</sup> It is possible that more students will experience such adversity prior to default and seek the benefit of insurance before that point. Coverage creates a moral hazard: students may work less diligently to find employment. As a counterincentive, the insurer might publish the names of beneficiaries who use the coverage. Publishing would accomplish multiple goals, showing how the community of students supports its members, encouraging fellow alumni to help former classmates find employment or cope with whatever obstacle

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187. 34 C.F.R. § 685.209(a) (2015); see also *Glossary: Discretionary Income*, FED. STUDENT AID, [https://studentaid.ed.gov/glossary#Discretionary\\_Income](https://studentaid.ed.gov/glossary#Discretionary_Income) (last visited Aug. 4, 2015) (defining terms). The test could also be more stringent, finding financial hardship only when a monthly payment would consume 25 percent or more of a student's "discretionary income."

188. The proceeds of life insurance, health insurance, long-term care, and disability insurance policies are generally not taxed as income. See, e.g., Internal Revenue Serv., *Long-Term Care Insurance Contracts*, in PUBLICATION 525: TAXABLE AND NONTAXABLE INCOME (2014), [http://www.irs.gov/publications/p525/ar02.html#en\\_US\\_2014\\_publink1000229327](http://www.irs.gov/publications/p525/ar02.html#en_US_2014_publink1000229327) (discussing long-term care insurance contracts).

189. As outlined in Part IV.A.2, *supra*, coverage might extend to one year's worth of monthly student loan payments.

190. Glater, *supra* note 72, at 63 n.244 and accompanying text.

confronted them, and provoking some sense of shame. Insurers might also require borrowers to explain their failure to make loan payments or perhaps describe efforts to seek employment.

Any insurance scheme creates opportunities for deceitful, even fraudulent behavior by borrowers seeking to evade their obligations. To take advantage of a student loan repayment insurance program, borrowers could deliberately pursue lower-paying jobs, for example, or even seek to remain unemployed. These are risks confronting any regime that reduces indebtedness, and techniques to mitigate questionable, improper, or outright illegal conduct exist. Federal repayment programs already require careful documentation of borrower earnings and total income, for example. Because borrowers face monthly loan repayment obligations, and the insurance regime would cover payments only as they become due, a borrower would have to persist in unemployment or very low-pay work for the period of time covered by insurance.<sup>191</sup>

While grant aid sufficient to cover full cost of attendance, offered on the basis of need, is the ideal policy, if such aid were politically feasible, this Essay would be unnecessary. Insurance is a proper policy response to an undesirable distribution of risk, and the availability of coverage would improve the current system of federal repayment assistance.

One challenge in designing any aid system is the absence of reliable information *ex ante* about outcomes *ex post*. Were such information available, an education provider could engage in perfect price discrimination, taking into account lifetime income and not just pre-matriculation income. Grants that become loans can achieve this goal, effectively raising the price of education for students with higher incomes.<sup>192</sup> Even such convertible aid does not perform in the same way as insurance, in that grants, whether awarded before or after graduation, may provide more financial support than a student needs in light of that student's ultimate earning profile. This is particularly true in instances where the student may not require all the subsidy provided. But this problem of allocating aid resources differs from that addressed by insurance, which aims at reducing unexpected harm.

A second, more general challenge highly relevant to this proposal is the lack of information about the proximate causes of student borrowers' inability to repay. Insurance of finite duration is ideal in situations involving short-lived challenges; if a borrower is forced to drop out as a result of an adverse family event, like the illness or death of a parent, insurance coverage of repayment obligations could very well be an ideal response. There is some evidence that

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191. The standard repayment term for a federal student loan is ten years. *Income-Driven Plans*, FED. STUDENT AID, <https://studentaid.ed.gov/repay-loans/understand/plans/income-driven> (last visited Aug. 4, 2015).

192. This is how TEACH grants work, but these grants are limited to those pursuing careers as teachers. *See* 20 U.S.C. § 1070g (2012).

such life events often trigger default.<sup>193</sup> On the other hand, if default is more often the result of chronic impediments to employment, insurance is less helpful and existing repayment programs, like IBR, are a better response. For this reason, this Essay suggests that any insurance scheme must complement rather than replace flexible repayment plans.

*B. How Higher Education Risk Insurance Improves Existing Repayment Assistance*

This student loan insurance regime goes further than current financial aid repayment assistance and forgiveness programs in important ways, and also builds on existing structures. Currently, the federal government seeks to reduce student harm from debt through three principal programs: IBR,<sup>194</sup> PAYE,<sup>195</sup> and Income-Contingent Repayment (ICR).<sup>196</sup> The federal government and many states also provide loan repayment assistance to indebted students who pursue particular careers, such as primary and secondary education, nursing, and medical practice in underserved communities.<sup>197</sup> Lawmakers deem these careers valuable despite their relatively low wages, which make loan repayment difficult, and so they use repayment assistance to combat the perception that these careers are unappealing or financially impossible. I focus here on broadly applicable programs (IBR, PAYE, ICR) because they come closest in design to an insurance regime, but are ultimately inadequate, as explained below.

Under IBR, the borrower's monthly federal loan repayment cannot exceed 15 percent of discretionary income. The government calculates discretionary income by taking the difference between 150 percent of the federal poverty guideline<sup>198</sup> for that borrower's family size and the borrower's adjusted gross

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193. Rafael I. Pardo, *Illness and Inability to Repay: The Role of Debtor Health in the Discharge of Educational Debt*, 35 FLA. ST. U. L. REV. 505, 509 (2008) (finding that in 28 percent of surveyed bankruptcy filings, student borrowers reported health conditions as a factor supporting discharge of their obligations). Professor Pardo's findings may understate the frequency with which health conditions play a role in default, though, because not all student borrowers who default go on to seek bankruptcy protection and only a subset of the borrower filings studied included enough information to discern that the debtor cited a health condition to justify discharge. *Id.*

194. 34 C.F.R. § 682.215 (2015).

195. 34 C.F.R. § 685.209(a); *see also* Press Release, U.S. Dep't of Education, Education Department Launches 'Pay As You Earn' Student Loan Repayment Plan (Dec. 21, 2012), <http://www.ed.gov/news/press-releases/education-department-launches-pay-you-earn-student-loan-repayment-plan>.

196. 34 C.F.R. § 685.209(b); *see also* FED. STUDENT AID, INCOME-DRIVEN REPAYMENT PLANS FOR FEDERAL STUDENT LOANS, <https://studentaid.ed.gov/sites/default/files/income-driven-repayment.pdf>.

197. *See, e.g.*, 34 C.F.R. § 685.219 (listing a variety of public interest jobs that qualify a student borrower for loan forgiveness after a specified period of time).

198. The federal Department of Health and Human Services publishes the poverty guideline annually and specifies a given income level to support a family of specified size. *Id.* § 682.215(a)(5).

income, and dividing by twelve.<sup>199</sup> For students who became borrowers on or after July 1, 2014, the repayment obligation is limited to 10 percent of discretionary income<sup>200</sup> and after twenty years, if the borrower satisfies certain repayment requirements, the federal Secretary of Education forgives the loan balance.<sup>201</sup>

Under PAYE, the borrower's monthly federal loan repayment is calculated in the same way. The repayment amount is limited to 10 percent of discretionary income, or the difference between the borrower's income and 150 percent of the poverty guideline for that borrower's family size, divided by twelve.<sup>202</sup> To enroll, the borrower must provide documentation of income to support the claim of financial hardship. Under PAYE, the federal government forgives the outstanding student loan balance after twenty years, provided the borrower met one of several possible repayment obligations in that period.<sup>203</sup>

Under ICR, the borrower's annual repayment amount cannot exceed the lesser of (a) a specified fraction, calculated by dividing the borrower's expected twelve-year repayment by the borrower's income, or (b) 20 percent of discretionary income,<sup>204</sup> defined as income less the amount of the poverty line for the size of the borrower's family.<sup>205</sup> The Secretary of Education cancels the obligation to repay after twenty-five years of borrower participation in ICR.<sup>206</sup> Because of the longer repayment term and the repayment calculation method, ICR is generally less favorable to borrowers than PAYE.

Under all three programs, a borrower is eligible to participate in the federal Public Service Loan Forgiveness program (PSLF).<sup>207</sup> PSLF cancels any outstanding debt for a borrower who makes 120 monthly payments, or ten years of payments, while working for a public service entity, including a local, state, or federal government; a nonprofit organization, recognized by the Internal Revenue Service; or a specific program like Peace Corps or AmeriCorps.<sup>208</sup>

These programs have a few serious drawbacks, summarized briefly here:

- Eligibility is limited. These programs are available only to borrowers who took out federal loans,<sup>209</sup> and the amounts that students can borrow through federal aid programs are

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199. *Id.* § 685.221(b)(1).

200. *Id.*; see also *id.* § 685.221(a)(5) (defining "partial financial hardship" that a borrower must demonstrate in order to qualify for IBR).

201. *Id.* § 682.215(f).

202. *Id.* § 685.209(a)(2).

203. *Id.* § 685.209(a)(6).

204. *Id.* § 685.209(b)(1)(ii).

205. *Id.* § 685.209(b)(1)(iii).

206. *Id.* § 685.209(b)(3)(iii)(D).

207. *Id.* § 685.219.

208. *Id.* § 685.219(c)(1).

209. And for PAYE, eligibility is limited to federal loans taken out after 2007. *Id.* § 685.209(a)(1)(iii)(A).

limited.<sup>210</sup> These options are not available to students who used private loans.

- Borrowers have to know about the programs to take advantage of them, and participation has only slowly and recently begun to increase.<sup>211</sup> As more students take advantage of eventual federal debt forgiveness, flexible repayment programs are likely to draw political criticism because of their rising costs.<sup>212</sup>
- Forgiving federal student loans could result in a sizable tax burden on borrowers who benefit, because—except in the case of PSLF—debt forgiveness is generally treated as income under the Internal Revenue Code.
- Perhaps most importantly, repayment assistance is not unconditional, in that students not only must suffer some financial hardship, but also take on a repayment term significantly greater than otherwise expected. A borrower who would otherwise, financial circumstances permitting, repay an obligation in ten years must now—under PAYE or IBR—wait twice as long to escape indebtedness. Under ICR, the repayment term is two-and-a-half times longer. This is the case even though the monthly payments are of course smaller. In each case, the student borrower pays more interest as well.
- Finally, PSLF's more generous loan forgiveness depends on obtaining a public service job, which may be difficult to come by, especially in an era of cutbacks on local, state, and federal government spending.

For these reasons, while existing federal programs assist indebted students significantly, they do not go far enough in addressing the underlying problem facing borrowers: the greater riskiness of their investment in higher education. Addressing the identified drawbacks in current federal repayment regimes could create the equivalent of an insurance system, but in their current form, these programs do not provide insurance.

If legislators revised the Bankruptcy Code to ease the path to discharge student debt, it too could provide another possibility for students coping with

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210. Indeed, this is one reason I have argued that loan limits on federal loans should be lifted. See Glater, *supra* note 72, at 43.

211. Ann Carrns, *Relief From Student Loan Debt for Public Service Workers*, N.Y. TIMES (Sept. 10, 2013), <http://www.nytimes.com/2013/09/10/your-money/relief-from-student-loan-debt-for-public-service-workers.html> (“The program and other debt assistance options have been underused because of complex rules and sometimes conflicting benefit.”).

212. Some critics of the programs have already raised this issue. See, e.g., Kevin Carey, *Flip Side of Reducing Student Debt Is Increasing the Federal Deficit*, N.Y. TIMES (Feb. 10, 2015), <http://www.nytimes.com/2015/02/11/upshot/calculating-the-price-to-taxpayers-of-easing-the-student-debt-burden.html> (warning that the “federal government is expecting to write off billions of dollars in future student loan balances” as a result of future loan forgiveness).

repayment difficulty.<sup>213</sup> Currently, student loans receive exceptional treatment under the Code,<sup>214</sup> and borrowers must clear a vaguely defined hurdle<sup>215</sup> to eliminate their obligation to repay. Bankruptcy reform would, like insurance, reduce the riskiness of taking on education debt. Indeed, from the borrower's perspective, discharge in bankruptcy might even be superior to reliance on finite insurance coverage because discharge in bankruptcy is total; insurance only forestalls payments until some future date. However, bankruptcy also imposes high costs on debtors, hampering efforts to obtain credit for years afterward. Of more practical relevance is Congress's failure to modify the Code despite years of criticism. Insurance is not a panacea, but it may be more realistic.

Others have proposed different reforms to the federal student lending regime, either steering students into higher-paying careers that make loan obligations more manageable,<sup>216</sup> or developing repayment schemes that are sensitive to students' post-graduate<sup>217</sup> earnings. The latter proposal, which attempts to address the problem of higher education risk directly, is most relevant here.<sup>218</sup>

Some scholars have explored the possibility that college students could obtain financing for their higher education from investors in "human capital." Under this model, the investor's rate of return would be a fixed fraction of the student's post-graduation earnings.<sup>219</sup> Such an approach to paying for college attempts to deal with the risk that a student might graduate and earn too little; the student pays a small fraction of their income, and the burden of an adverse economic outcome falls on the investor, who receives a lower rate of return on their investment.<sup>220</sup> This is akin to an insurance arrangement, with the fixed fraction of earnings playing the role of a premium. This arrangement is

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213. Scholars have indeed argued for this policy move. *See supra* note 154 and accompanying text.

214. *See* 11 U.S.C. § 523(a)(8) (2012) (barring education debt from discharge in bankruptcy proceedings "unless excepting such debt from discharge . . . would impose an undue hardship on the debtor and the debtor's dependents").

215. *See supra* note 153.

216. *See, e.g.,* Simkovic, *supra* note 40 (arguing for varying interest rates to influence student choice of course of study).

217. Or, presumably, students' post-dropout earnings. Proposals generally do not separately address the situation of students who enter repayment but have not graduated.

218. For a critique of Professor Simkovic's proposal to tie student loan interest rates to probable post-graduate wages, *see* Glater, *supra* note 41.

219. Benjamin M. Leff & Heather Hughes, *The Income-Based Repayment Swap: A New Method for Funding Law School Education* (July 9, 2013) (unpublished manuscript) (on file with author), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2291714](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2291714). Although the authors focus on law schools, the method presented would work for undergraduate students.

220. The proposal developed by Professors Leff and Hughes attempts to deal with the risk that the investor would take on by providing funds for college in advance as well. They suggest that a student borrow to pay for college and then enter into a contract with an investor who agrees to cover monthly loan payments as they come due, in exchange for a fixed percentage of the graduate's monthly income. *Id.* at 5.



appealing because of its sensitivity to actual student earnings. Professors Benjamin M. Leff and Heather Hughes have proposed an innovative version of this kind of repayment regime for law students. Their proposal highlights the normative question whether the cost of downside risk protection should vary with income, while not varying with other factors such as the size of the debt.

Other scholars have proposed enabling students to “put,” or sell, their loans back to the institution that provided the education after a fixed period of time, thereby forcing the college or university to absorb some of the cost of a poor economic outcome for the student borrower.<sup>221</sup> This arrangement, too, attempts to mitigate the repayment risk to the borrower by providing the option to sell. This arrangement could be adjusted to enable a graduate to manage monthly payments as they become due. The critical recognition underlying this proposal, the one discussed above, and others<sup>222</sup> is that the underlying challenge confronting student borrowers is the risk of inability to repay. Proper policy responses should attempt to mitigate that risk.

### C. *Ill Effects of Debt in a Higher Education Risk Framework*

Having analyzed the nature and impact of federal aid policy’s distribution of higher education risk, the logical next question is, does the shift toward greater allocation of risk to students and families serve a policy purpose? This is the same test applied in health care and retirement saving. Yet we have not asked the same question of student lending. This Section revisits concerns from earlier in the Essay and discusses how an insurance scheme would address them.

#### 1. *Debt as Deterrent Revisited*

Return for a moment to the argument that increased risk of debt finance of higher education may deter some students who could succeed in college. Borrowing to pay for college makes failing to graduate and, beyond that, failing to earn a specific income more dangerous. Accordingly, rational prospective borrowers with a degree of risk aversion will be less willing to incur education debt the larger the amounts they must borrow. This intuition is reinforced by the extant literature on risk shifting. In health care, raising the

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221. Michael C. Macchiarola & Arun Abraham, *Options for Student Borrowers: A Derivatives-Based Proposal to Protect Students and Control Debt-Fueled Inflation in the Higher Education Market*, 20 CORNELL J.L. & PUB. POL’Y 67, 120–23 (2010) (describing the put option arrangement).

222. See, e.g., John R. Brooks II, *Income-Driven Repayment and the Public Financing of Higher Education*, 104 GEO. L.J. (forthcoming 2015) (framing the combination of student lending and loan forgiveness as a tax regime, in which students receive money for tuition ex ante and pay a fixed percentage of their income ex post). Professor Brooks’s article is particularly helpful because it clarifies the taxpayer’s role in the income-linked repayment plans: the taxpayer covers the amount of loan forgiven after a period of years. *Id.* at 36 n.180. This means that the size of the subsidy is obscured by time and uncertainty.

cost of care deters some who should seek medical care from doing so.<sup>223</sup> In retirement saving, raising the cost of retirement<sup>224</sup> leads some at retirement age to keep working, potentially occupying a job that would otherwise be available to a younger worker. These policy critiques focus on the deterrent effect of re-shifting risk to individuals and away from institutions that spread risk. Insurance addresses the problem.

Education policy critics who contend that too many students go to college may argue that deterrence is good.<sup>225</sup> If not everyone should go to college, borrowing serves an important screening function. However, deterrence by debt is inequitable because it disproportionately deters poorer students and undermines the goal of educational access. Recognizing student debt as a risk transfer mechanism highlights this problematic fact; deterring students by requiring them to borrow redistributes risk to those least able to bear it. The risk of borrowing for college is higher the more a student has to borrow, and students with fewer financial resources need to borrow larger amounts. It is not necessary to advocate universal, government-financed higher education to make a case for reducing the role of student loans in higher education finance. Recognizing student debt as a risk-transfer mechanism challenges the rationale for the redistribution and provides a defense of the deterrent critique of student debt.

Further, by drawing attention to programs that benefit a subset of current and prospective college students, the higher education risk framework strengthens criticism of regressive subsidies to relatively wealthy students and families. Reducing the riskiness of investing in higher education for those who need to borrow less or not at all promotes neither access nor matriculation by potential stars<sup>226</sup> likely to excel in college and beyond, because such students are very likely to seek higher education regardless of subsidies.<sup>227</sup> From a risk

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223. See, e.g., Jonathan Rockoff, *More Balk at Cost of Prescriptions*, WALL ST. J. (Oct. 12, 2010, 12:01 AM), <http://online.wsj.com/news/articles/SB10001424052748703927504575540510224649150> (reporting that “[g]rowing numbers of Americans with health insurance are walking away from their prescriptions at the pharmacy counter” in response to the rising share of medicine costs they must bear). Of course, conditions in the larger economy may make it more likely that people will forego care.

224. The apparent cost of retirement could rise because a potential retiree fears that his or her savings are inadequate to cover the cost of living, or inadequate if financial markets perform poorly.

225. This argument has appeared more often in the popular press, as the cost of college has continued to rise. See, e.g., Lauren Weber, *Do Too Many Young People Go to College?*, WALL ST. J., (June 21, 2012, 11:55 AM), <http://www.wsj.com/articles/SB10001424052970203960804577239253121093694> (reporting on debate among education experts over the value of college education); *Do Too Many Kids Go to College?*, NAT’L PUB. RADIO (Oct. 18, 2011, 11:46 AM), <http://www.npr.org/2011/10/17/141434876/do-too-many-kids-go-to-college>.

226. Unless, that is, academic excellence and student wealth go hand-in-hand. But again, given that wealthier students are likely to attend college regardless, the adverse effect on families that cannot take advantage of tax-favored savings plans, for example, outweighs the benefit of the subsidy.

227. Students from higher-income or wealthier families are significantly more likely to attend college. See Sandy Baum, *Lowering Work and Loan Burden: The Current Status of Student Reliance*

reallocation perspective then, tax-favored college savings plans and the deduction for higher education costs are not effective policy tools. A potent policy change might involve strict means-testing<sup>228</sup> or outright elimination of education subsidies through the tax code. These would increase the risk borne by the wealthier families best positioned to bear an adverse outcome.<sup>229</sup>

Insurance that reduces the risk of borrowing to pay for college should reduce the deterrent effect for students who do not want to borrow. Neutralizing the effect of debt aversion, which may be distributed unevenly across the student population, should also ensure that borrowing does not disproportionately discourage particular kinds of students, such as recent immigrants.<sup>230</sup> Publicizing the insurance regime would be critical: prospective borrowers need to know that there is less reason to be fearful.<sup>231</sup> If aspiring college students know of insurance, they should have less trepidation, and even less as coverage becomes more extensive.

Still, if policy makers wish to reduce the risk for the students and families less able to bear it, they should consider moving away from loans and toward grants based on need rather than past academic achievement. This move would go further than insurance, but federal policy has not taken this direction. If it had, the government as lender could demand that graduates who enter highly lucrative professions repay the grants once they are able to do so. For these graduates, federal aid would take the form of a convertible grant: the grant would become a loan once the graduate's income exceeded a certain level.<sup>232</sup> In the abstract, the grant that converts to a loan is no different from a loan that becomes a grant under certain circumstances. But those circumstances make a difference. Public service loan forgiveness does not function like insurance; the benefit is not automatic but contingent on career choice and success in finding a job in the chosen career. Further, if the *perceived* riskiness of higher

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*on Grants, Loans and Work*, in SYMPOSIUM, ADVISORY COMM. ON STUDENT FIN. ASSISTANCE, REFLECTIONS ON COLLEGE ACCESS & PERSISTENCE 62 (Sept. 8, 2005).

228. This could be done by making the tuition deduction fully refundable, as is the current Earned Income Tax Credit. *Id.* at 72.

229. Professor Kerry A. Ryan has called for such changes to tax policy. Kerry A. Ryan, *Access Assured: Restoring Progressivity in the Tax and Spending Programs for Higher Education*, 38 SETON HALL L. REV. 1, 30–31 (2008).

230. See *supra* note 135 and accompanying text.

231. This is not a trivial point. The rate at which student borrowers have taken advantage of IBR suggests that word of beneficial programs travels slowly. Kevin Carey, *Helping to Lift the Burden of Student Debt*, N.Y. TIMES, Jan. 25, 2015, at BU1.

232. As I have noted elsewhere, such a program would also reduce the apparent riskiness of college, decreasing the deterrent effect of loans. Glater, *supra* note 72, at 61. Loan forgiveness attempts to achieve the same result by essentially converting student loans into grants after graduation, depending on the career choice of the graduate. But because the prospect of borrowing deters poorer students, the loans-to-grants regime only promotes access if prospective students both wish to pursue a career in one of the fields favored by the forgiveness program and know of the availability of forgiveness beforehand. A grants-to-loans regime avoids this problem while still taking advantage of information available after graduation about a student's career choice and income.

education deters potentially successful students, the difference in structure matters.

Such convertible grants are not unprecedented: federal TEACH grants work this way.<sup>233</sup> New York's governor has proposed a similar state grant program.<sup>234</sup> Such a convertible loan program would reduce the *ex ante* risk of going to college and could even encourage students to pursue careers in the public interest by re-instilling in them a sense of obligation. While financial debts may lead students to seek jobs that pay well, a sense of gratitude or of civic obligation—forms of noneconomic debt—can be quite powerful. One study of career choice at a university that eliminated loans from its student aid packages found that after the policy change, students who received aid were more likely to enter professions that served the public interest.<sup>235</sup>

## 2. *Debt and Academic Performance Revisited*

The higher education risk framework similarly bolsters other criticisms of student indebtedness and demonstrates the efficacy of insurance as a policy response. Student debt may hinder academic achievement and increase the likelihood that students fail to complete a course of study. Insurance should reduce the pressure students feel to limit or reduce borrowing by working while enrolled because insurance makes debt less dangerous.

Again, reallocating risk to students and families in the absence of insurance serves no policy purpose because it neither encourages academic excellence nor promotes access. Nor does increasing the penalty for students who do not graduate, by demanding repayment of loans even when the student lacks the resources to do so, serve any of the goals of federal aid programs. These ill effects manifest the downside risk of borrowing for college and undermine the goals of education policy.

Insurance that protects students if they cannot repay their loans as a result of an adverse life event addresses the potential problems debt creates. The simple awareness that insurance exists should reduce the aversion to borrowing

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233. A student who intends to go into teaching may apply for a federal TEACH grant, which funds the student's education. 20 U.S.C. § 1070g (2012). However, if the student does not complete the teaching obligation required by statute, then the grant converts into a loan, which the student must repay. *Id.* § 1070g–2(b)(2).

234. See Press Release, New York State, Governor Cuomo Launches Scholarship Program to Encourage Top High School Students to Pursue STEM Careers in New York (May 6, 2014), <http://www.governor.ny.gov/press/05062014-scholarship-stem-careers>.

235. Rothstein & Rouse, *supra* note 160, at 25. Researchers estimated that an additional \$10,000 in student debt “reduces the likelihood that an individual will take a job in nonprofits, government, or education by about 5 to 6 percentage points.” *Id.* Of course, student motivations remain a mystery; the study does not establish definitively that students chose to pursue careers in public interest *because* they felt a sense of obligation to repay the institution for its grant aid. Perhaps the students always hoped to pursue careers in the public interest and, but for the grant aid, would have been deterred. For purposes of this Essay, it does not matter.

for college, the degree of stress caused by borrowing, and the extent that debt distracts from studying.

### 3. *Debt and the Failure to Complete Revisited*

Not enough is known about the reasons students fail to complete courses of study. This is true of students who borrow and those who do not. However, studies suggest that when indebtedness is combined with other risk factors for non-completion, costs can be particularly difficult to manage.<sup>236</sup> A limited insurance regime<sup>237</sup> would not eliminate the cost of dropping out from college. However, if an adverse event, such as a medical crisis or other challenge of finite duration,<sup>238</sup> coincides with dropping out,<sup>239</sup> coverage would enable a student borrower to take time off and re-enroll after. Insurance thus would reduce the potential harm from adverse events and might even encourage the student to resume studies after dropping out, but it would not take the place of loan forgiveness.<sup>240</sup> The more we learn about the factors precipitating the abandonment of higher education, the better we could design an insurance regime.

### 4. *Debt and the Student Borrower's Career Choice Revisited*

Debt may place career restraints on students, causing them to make career choices based on the need to repay their student loans. Federal loans enable students to attend college, but afterward, student ambitions are limited by debt. If federal aid programs aim to promote socioeconomic diversity by enabling poorer students to obtain the benefits of higher education, then freeing student borrowers from debt constraints serves that end. Federal aid programs enable access to higher education but not the full range of opportunities that higher education affords students who do not need to borrow. Indebted students, facing monthly payments and more vulnerability than their wealthier

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236. See GLADIEUX & PERNA, *supra* note 140, at iv.

237. An insurance regime need not be so limited. The cost of coverage of debt obligations indefinitely, however, would be considerably greater than the cost of a program that promised to cover debt obligations for a specified period of time.

238. Common reasons that students drop out of courses of study include financial pressures or work, a move, or family need, according to a study by the Education Department. LISA HUDSON ET AL., NAT'L CTR. EDUC. STATISTICS, STUDENTS ENTERING AND LEAVING POSTSECONDARY OCCUPATIONAL EDUCATION: 1995–2001, at 47 (2007), <http://nces.ed.gov/pubs2007/2007041.pdf>.

239. There is some indication that such events play a role in the decision to leave higher education. See LAURA HORN & THOMAS WEKO, NAT'L CTR. EDUC. STATISTICS, ON TRACK TO COMPLETE? A TAXONOMY OF BEGINNING COMMUNITY COLLEGE STUDENTS AND THEIR OUTCOMES 3 YEARS AFTER ENROLLING: 2003–04 THROUGH 2006, at 35 (2009), <http://nces.ed.gov/pubs2009/2009152.pdf> (reporting that about 49 percent of students who left in the first year of community college cited “personal reasons” for the decision).

240. Existing federal repayment regimes like IBR are available to students who fail to complete their courses of study; the rules refer to students who enter repayment, not those who graduate. 34 C.F.R. § 685.208(a)(1), (2) (2015). Dropouts are thus eligible for loan forgiveness after a period of years, alongside graduates.

classmates to family health crises and financial mishaps, are likely to feel pressure to earn a higher salary to repay their loans.

Insurance reduces that pressure by covering the monthly loan obligation in the event of misfortune.<sup>241</sup> This assistance would both reduce the student borrower's apprehension over the risk created by the repayment obligation and assist the student in coping with unexpected setbacks. Of course, insurance protection is not forgiveness or even the equivalent of grant aid, which would reduce or eliminate the cost of attending college. Insurance is a bridge, giving an indebted student time to manage obstacles and take advantage of IBR or PSLF. This is not insignificant, given the potential difficulty of finding a public service position. Insurance does not undermine existing repayment assistance schemes,<sup>242</sup> but instead complements them by providing protection from short-term financial disruptions.

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Recognizing student loans as mechanisms that redistribute risk suggests novel reform proposals and bolsters arguments in their favor. The risk-access framework also shifts the debate over federal aid policy from stories about individual students affected by debt to broader questions about the goals the federal government should pursue in attempting to promote both access and equity in higher education.

#### CONCLUSION

This Essay provided a framework for evaluating the use of loans as the primary means of financing higher education for an ever-growing number of students. It developed the concept of higher education risk to capture the danger to students unable to repay their loans, and it analyzed the growth in student lending as an aspect of a broader political and cultural reallocation of risk. In response to this redistribution of risk, the Essay proposed a new insurance regime to protect against adverse events that hamper student achievement and make loan repayment more difficult.

Requiring students and their families to borrow is fraught with political and cultural significance. It affects who has access to higher education as much as any admissions decision. Using debt to promote access redistributes higher education risk to students and families and makes the choice to borrow to attend college that much more difficult. This higher education risk perspective

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241. More data illuminating the causes of student borrower financial hardship would be quite helpful here. See Susan Dynarski, *So Much Student Debt, So Little Information*, N.Y. TIMES, Mar. 22, 2015, at BU5 (describing lack of information about the causes of student loan defaults). We do not know, for example, how often family emergencies lead students to drop out of college and subsequently default on their loans.

242. See *supra* notes 194–213 and accompanying text.

strengthens criticisms of student lending, and bolsters reform proposals that, like those described above, seek to preserve and promote higher education access and success.