

# ARTICLE

## STUDENT DEBT AND THE SIREN SONG OF SYSTEMIC RISK

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*This Article analyzes the dangerous effects of restricting federal student aid in response to fears of a student loan “bubble” that could cause a future financial crisis. Scholars and pundits have suggested that increases in student debt resemble the expansion of mortgage borrowing in the years before the 2008 financial crisis, and that higher default rates on student loans contribute to risk of a similar financial calamity in the future. This Article identifies the analogy’s potentially pernicious effects, given the popular narratives attached to mortgage borrowers who defaulted on their debts in the period leading up to and following the financial crisis. Critics of government policies that made homeownership more accessible to poor and minority buyers blamed borrowers, whom they characterized as greedy and foolish. Applying such reasoning to student debt would imply that access to education loans should be limited, a development utterly at odds with the purpose of the Higher Education Act of 1965. Thus, those likening student loans to home loans sing a siren song that could mislead lawmakers, who for decades have sought to use federal aid to make higher education more accessible regardless of students’ financial resources. Further, the Article’s analysis shows that student loans and home loans differ in ways that make it unlikely that defaults could contribute to a crisis.*

I. INTRODUCTION

For decades, federal lawmakers have sought to promote access to higher education in the United States through programs that provide grants, work-study jobs, and loans for those students who need to borrow to pay for college.<sup>1</sup> Unfortunately, the efficacy of these programs has been undermined by a combination of rising tuition<sup>2</sup> and stagnant family incomes;<sup>3</sup> these trends mean students and their families must borrow ever-larger amounts to pay for higher education.<sup>4</sup> Debt disproportionately burdens poorer students

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<sup>1</sup> These programs have evolved since the end of World War II, but were crystallized in the Higher Education Act of 1965, Pub. L. No. 89–329 (1965).

<sup>2</sup> Tuition at public, four-year colleges and universities has increased by 3.5 percent per year, after taking into account inflation, between the 2004–05 academic year and the 2014–15 academic year. At private, nonprofit four-year institutions, the increase was 2.2 percent per year. COLLEGE BOARD, TRENDS IN COLLEGE PRICING 2014 16 fig.5 (2014), <http://trends.collegeboard.org/sites/default/files/college-pricing-2013-full-report-140108.pdf> [<http://perma.cc/XFZ2-HGY6>].

<sup>3</sup> CARMEN DENAVAS-WALT & BERNADETTE D. PROCTOR, INCOME AND POVERTY IN THE UNITED STATES: 2013 5 fig.1 (2014) (showing “Real Median Household Income by Race and Hispanic Origin 1967 to 2013”).

<sup>4</sup> The average debt owed by borrowers who graduated from public, four-year institutions rose to \$25,600 in 2013. COLLEGE BOARD, TRENDS IN STUDENT AID 2014 22 fig.13A (2014). At private, nonprofit institutions the figure was \$31,200. *Id.* at fig.13B.

and people of color,<sup>5</sup> and serves as a deterrent to aspiring college graduates.<sup>6</sup> The more these students must borrow,<sup>7</sup> the more financially risky college is, because borrowers must earn enough to repay their debts.<sup>8</sup> Policy responses that would counter the effects of this reallocation of risk toward students would decrease the amount they must borrow, reducing the repayment risk they face. As of this writing, several candidates seeking the nation's highest office have offered proposals to effectuate such a shift.<sup>9</sup> Unfortunately, lawmakers may not go along; increasingly, popular discourse on the issue of student debt has focused on risks it poses to government and financial markets, as well as to students themselves.<sup>10</sup>

In the summer of 2013, with little controversy and a thin debate over the value judgments implicit in their action, lawmakers approved tying interest rates charged on student loans to the rate paid by the federal government to its lenders.<sup>11</sup> In doing so, members of Congress decided that market events affecting the government's cost of funds were relevant to the national com-

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<sup>5</sup> College Board, TRENDS IN STUDENT AID 2015 27 fig.18 (2015), <http://trends.collegeboard.org/sites/default/files/trends-student-aid-web-final-508-2.pdf> [<http://perma.cc/ER4K-USMJ>].

<sup>6</sup> See, e.g., Therese L. Baker & William Vélez, *Access to and Opportunity in Postsecondary Education in the United States: A Review*, 69 SOC. OF EDUC. 82, 88 (1996) (reviewing scholarly literature finding debt aversion among prospective African-American college students); Sandy Baum & Marie O'Malley, *College on Credit: How Borrowers Perceive Their Education Debt*, 33 J. STUDENT FIN. AID 7, 14 (2003) (finding that lower-income borrowers perceived their debt burdens to be heavier); PAMELA BURDMAN, THE STUDENT DEBT DILEMMA: DEBT AVERSION AS A BARRIER TO COLLEGE ACCESS 8 (2005), <http://ticas.org/files/pub/DebtDilemma.pdf> [<http://perma.cc/WS9F-4AYR>] (reporting that Mexican-American students at the University of California, Berkeley borrowed less than other students and quoting financial aid officials who attributed this to debt aversion).

<sup>7</sup> Debt aversion is also unevenly spread across the population, with African-Americans less averse to borrowing than whites, while Asian-Americans and Hispanic-Americans are more averse. SARA GOLDRICK-RAB & ROBERT KELCHEN, MAKING SENSE OF LOAN AVERSION: EVIDENCE FROM WISCONSIN 9–10 (2013). The mere prospect of borrowing consequently deters some students from seeking to matriculate.

<sup>8</sup> Jonathan D. Glater, *Student Debt and Higher Education Risk*, 103 CALIF. L. REV. (forthcoming 2015), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2597251](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2597251), [<http://perma.cc/RA8F-669N>].

<sup>9</sup> For example, presidential candidate Hillary Rodham Clinton has proposed increasing funding of public colleges and universities to reduce the amount students must borrow. Patrick Healy, *Hillary Clinton to Offer Plan on Paying College Tuition without Needing Loans*, N.Y. TIMES (Aug. 10, 2015), [http://www.nytimes.com/2015/08/10/us/politics/hillary-clinton-to-offer-plan-on-paying-college-tuition-without-needing-loans.html?\\_r=0](http://www.nytimes.com/2015/08/10/us/politics/hillary-clinton-to-offer-plan-on-paying-college-tuition-without-needing-loans.html?_r=0) [<https://perma.cc/Q7YL-8G4A>]. Other presidential candidates seeking the Democratic Party nomination, Senator Bernie Sanders and Governor Martin O'Malley, have offered similar proposals. *Id.*

<sup>10</sup> See *infra* notes 19 and 20 (listing commentary in scholarly and popular media warning of role student loans could play in a future financial crisis).

<sup>11</sup> Bipartisan Student Loan Certainty Act of 2013, Pub. L. 113–28, 127 Stat. 506 (2013). Previously, interest rates were set directly through legislation. Tamar Lewin, *Student Loan Rate Set to Rise, Despite Lack of Support*, N.Y. TIMES (Apr. 9, 2013), [http://www.nytimes.com/2013/04/09/education/student-loan-rate-set-to-rise-despite-lack-of-support.html?\\_r=0](http://www.nytimes.com/2013/04/09/education/student-loan-rate-set-to-rise-despite-lack-of-support.html?_r=0) [<http://perma.cc/J5H6-K43H>] (discussing how lawmakers approved tying rates to the federal government's cost of credit instead).

mitment to help pay for broader access to higher education.<sup>12</sup> Linking education loan rates to prevailing interest rates benefitted students in the short run because the government's cost of funds was low at the time,<sup>13</sup> but the move made the cost of education debt that much more uncertain for future borrowers and so made borrowing for college more risky. The legislation, which mandated that federal student loan interest rates be set 2.05 percentage points above the rate on ten-year Treasury notes,<sup>14</sup> marked a shift in how federal student aid is perceived: commitment to college access is not unlimited.

Applying market-based values to federal higher education policy frustrates the policy's purpose. Market-based reasoning holds that because the education purchased with student debt ultimately benefits the student, it should be the student who bears the risk of financing it. Such reasoning fails to take into account the benefits of higher education to society at large, and runs counter to the goal of making higher education affordable for students who belong to groups historically excluded from college campuses—especially poor students—because inequality of financial resources means that the burden of paying for college is greater for them, though the potential rewards are the same. Legislative changes that tie federal education aid more closely to conditions or practices in financial markets reinforce preexisting inequality in income and wealth, working against access rather than promoting it.

Law shapes access to higher education. Federal student loans are the products of legislation: Congress created these programs<sup>15</sup> and has set the terms of financial aid and of eligibility for students.<sup>16</sup> Consequently, reforms that could restrict access to higher education opportunity are proper—in deed, necessary—subjects of legal scholarly analysis.

This Article analyzes a powerful rhetorical device contributing to ongoing efforts to weaken federal student aid: the analogy between student lend-

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<sup>12</sup> 113 CONG. REC. H3,109 (daily ed. June 5, 2013) (statement of Rep. Rokita) (praising the draft legislation that became Pub. L. 113–28 because it “stops student loan rates from doubling in July, fixes the student loan process long-term, and takes politicians out of the business of setting interest rates by moving to a market-based system”).

<sup>13</sup> The benchmark federal funds rate, set by the Open Market Committee of the Federal Reserve, has hovered just above zero since the financial crisis of 2008. Kevin Granville, *When Will the Fed Raise Rates?*, N.Y. TIMES (Oct. 2, 2015), [http://www.nytimes.com/interactive/2015/business/economy/fed-interest-rates.html?\\_r=1](http://www.nytimes.com/interactive/2015/business/economy/fed-interest-rates.html?_r=1) [<http://perma.cc/M7FJ-3SGK>]. The rate paid on the ten-year Treasury note hovered around 2.5 percent in summer 2013. *Historical Treasury Rates*, U.S. TREASURY DEP'T, <http://www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/Historic-LongTerm-Rate-Data-Visualization.aspx> [<http://perma.cc/27QK-8LNJ>].

<sup>14</sup> *Id.*

<sup>15</sup> National Defense Education Act of 1958 (“NDEA”), Pub. L. 85-864, §201 et seq., 72 Stat. 1580, 1583–1605 (1958) (indicating that Congress created these programs “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”).

<sup>16</sup> 20 U.S.C. § 1091 (2012).

ing today and mortgage lending in the years leading up to the financial crisis of 2008 (the “financial crisis”).<sup>17</sup> Historically, the government has sought to promote education and home ownership, two hallmarks of the American dream,<sup>18</sup> through policies intended to mitigate income and wealth inequality. Restricting access to credit for aspiring college students raises a question as to the continued viability and efficacy of the Higher Education Act of 1965 (“HEA”). This Article offers a critique of arguments that could justify restrictive and regressive changes in federal aid policy.

For years now, references to a student loan “bubble”—even a “higher education bubble”—that could burst and cause a future financial crisis have appeared with some frequency in law journals<sup>19</sup> and in the popular media.<sup>20</sup>

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<sup>17</sup> The phrase “financial crisis of 2008” may refer to many aspects of the turmoil in financial markets that began in 2007 and continued for the next two years, as well as to the “Great Recession” that followed. In this Article, the phrase refers simply to the chain of events beginning with rising rates of default on home loans in the years prior to 2008 and the radical government intervention to support financial institutions and the national economy in that year and thereafter.

<sup>18</sup> MECHELE DICKERSON, HOMEOWNERSHIP AND AMERICA’S FINANCIAL UNDERCLASS: FLAWED PREMISES, BROKEN PROMISES, NEW PRESCRIPTIONS 1 (2014).

<sup>19</sup> See, e.g., William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. ECON. & POL’Y 485, 488 (2011) (describing an “eerie conceptual analogy to the student loan crises . . . in the American housing market” and proposing restrictions on student borrowing and on tuition to forestall crisis); Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501 (2000) (arguing that the relatively easy availability of student loans has fueled increases in tuition and resulted in excessive indebtedness of students); Eryk J. Wachnik, *The Student Debt Crisis: The Impact of the Obama Administration’s “Pay as You Earn” Plan on Millions of Current and Former Students*, 24 LOY. CONSUMER L. REV. 442, 446 (2012) (describing a “crisis” caused by student indebtedness that forces “[m]any new graduates [to] have to forgo things such as vacations, new cars, home purchases and starting a family because they simply cannot afford it,” and criticizing federal program allowing some students to adjust loan payments based on income, a program intended to mitigate the effects of indebtedness on graduates). Not surprisingly, students have been attracted to the topic, too. See, e.g., Ami Bhatt, *Impact of the Subprime Mortgage Crisis on the Student Lending Industry*, 27 REV. BANKING & FIN. L. 91, 99 (2007) (describing pre-financial crisis investors’ fear of a financial crisis in student lending and concluding that student loans bore a “remarkable similarity to the subprime mortgage industry”); Jonathan Noble Edel, *The Pyrrhic Victory of American Higher Education: Bubbles, Lemons, and Revolution*, 88 NOTRE DAME L. REV. 1543, 1544 (2013) (finding “myriad problems created by the over-education phenomenon”); Jennifer Grant & Lindsay Anglin, *Student Loan Debt: The Next Bubble?*, 32 AM. BANKR. INST. J. 44 (2013); Jessica L. Gregory, *The Student Debt Crisis: A Synthesized Solution for the Next Potential Bubble*, 18 N.C. BANKING INST. 481 (2014) (comparing growth in student loan debt to pre-financial crisis growth in mortgage debt and proposing a combination of policy responses); April A. Wimberg, Note, *Comparing the Education Bubble to the Housing Bubble: Will Universities Be Too Big to Fail?*, 51 U. LOUISVILLE L. REV. 177, 178 (2012) (comparing education debt to home mortgage debt and arguing that the “major difference in the markets is that the bubble in the education market has yet to burst”); Andrew Woodman, Note, *The Student Loan Bubble: How the Mortgage Crisis Can Inform the Bankruptcy Courts*, 6 ALB. GOV’T L. REV. 179, 179 (2013) (comparing a “current student loan bubble with the housing bubble of the late 1990s to early 2000s” and proposing changes to the Bankruptcy Code’s treatment of student loans as a prophylactic measure to head off a future crisis). The views expressed in student notes addressing education loans are particularly helpful both because the authors may have recent and firsthand experience with the subject they write about and because their perspectives are likely closer to those of the general public than are those of, for example, a relatively cloistered law professor.

Some comments on trends in student debt focus on the average amount of debt carried by individual graduates,<sup>21</sup> others on the aggregate amount borrowed by all students,<sup>22</sup> and still others on the difficulty of discharging student loans in bankruptcy proceedings.<sup>23</sup> All of the commentaries express

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<sup>20</sup> See, e.g., GLENN REYNOLDS, *THE HIGHER EDUCATION BUBBLE 1* (2012) (warning of the harsh impact of the “burst[ing]” of the “still-inflating higher education bubble” and likening trends in college pricing and student indebtedness to mortgage borrowing prior to the financial crisis); Bill Bonner, *Student Loan Bubble Sets Up to Be Subprime Disaster Part Deux*, FORBES (June 12, 2012), <http://www.forbes.com/sites/greatspeculations/2012/06/04/student-loan-bubble-sets-up-to-be-subprime-disaster-part-deux/> [<http://perma.cc/7F4Y-6AU5>] (arguing that federal support of higher education through loans, like federal support of home ownership, contributes to a “bubble”: the government “paid for one heckuva a lot of education, subsidizing students and colleges with trillions of dollars. They pay for GIs to go to school. They give grants to the schools themselves. And they hand out hundreds of billions in loans, at low teaser rates (just like subprime [loans]!) to students, often to students who are unqualified and unlikely to get much out of it.”); John Carney, *The Student Loan Bubble Is Starting to Burst*, CNBC (Sept. 5, 2013), <http://www.cnbc.com/id/101012270> [<http://perma.cc/YE56-E2JS>] (reporting on decision by large financial institution to stop making student loans and suggesting that the “move is eerily reminiscent of the subprime shutdown that happened in 2007”); Editorial, *Troubling Student Loans*, N.Y. TIMES (Apr. 29, 2014), <http://www.nytimes.com/2014/04/29/opinion/troubling-student-loans.html> [<http://perma.cc/UL7V-S3HZ>] (warning of the danger to borrowers posed by the terms of private student loans, those neither made nor guaranteed by the federal government, for student borrowers); Justin Pope, *Student Loans: The Next Bubble?*, HUFFINGTON POST (Nov. 6, 2011), [http://www.huffingtonpost.com/2011/11/06/student-loans-the-next-bu\\_n\\_1078730.html](http://www.huffingtonpost.com/2011/11/06/student-loans-the-next-bu_n_1078730.html) [<http://perma.cc/RT5Y-W42C>] (seeking to answer the question of whether student loans could contribute to a future financial crisis and concluding that “[t]here are worrisome trends” but that the “bubble . . . poses much less of a threat than housing debt did”). But see Donald E. Heller, *Is the \$1 Trillion Student Loan Debt Really a Crisis?*, WASH. POST (May 1, 2014), <http://www.washingtonpost.com/blogs/answer-sheet/wp/2014/05/01/is-the-1-trillion-student-loan-debt-really-a-crisis/> [<http://perma.cc/5EUC-QFJB>] (arguing that the “fact that student loans passed \$1 trillion is nothing more than that—a fact” and criticizing the attention of the popular media to the figure as “generally misplaced”); Phil Izzo, *Number of the Week: Student Loan Bubble*, WALL ST. J.: REAL TIME ECONOMICS (May 19, 2012, 5:00 AM), <http://blogs.wsj.com/economics/2012/05/19/number-of-the-week-student-loan-bubble/> [<http://perma.cc/LX5S-7N6N>] (arguing that student debt outstanding is very unlikely to contribute to a financial crisis as mortgage lending did and concluding that the “bulk of any burden from a student-loan debt bubble bursting is likely to fall on the borrowers themselves”); Christopher Matthews, *Viewpoint: Stop Calling Student Loans a “Bubble”!*, TIME (Mar. 7, 2013), <http://business.time.com/2013/03/07/viewpoint-stop-calling-student-loans-a-bubble/> [<http://perma.cc/GKP6-7KK4>] (noting caustically that “since the financial crisis, Americans have begun to see bubbles everywhere they turn”).

<sup>21</sup> See, e.g., Andrew Martin & Andrew W. Lehren, *A Generation Hobbled by the Soaring Cost of College*, N.Y. TIMES (May 13, 2012), <http://www.nytimes.com/2012/05/13/business/student-loans-weighing-down-a-generation-with-heavy-debt.html?pagewanted=all> [<http://perma.cc/QV6A-W4QV>] (describing the impact of debt on graduates and reporting that the average debt load in 2011 was \$23,300).

<sup>22</sup> See, e.g., Chris Denhart, *How the \$1.2 Trillion College Debt Crisis Is Crippling Students, Parents and the Economy*, FORBES (Aug. 7, 2013), <http://www.forbes.com/sites/specialfeatures/2013/08/07/how-the-college-debt-is-crippling-students-parents-and-the-economy/> [<http://perma.cc/W7XS-6NEP>] (warning that aggregate student debt will cause “slow[ ] economic growth (translating into fewer jobs being created) and rising interest rates”).

<sup>23</sup> See *infra* notes 88 and 89 (listing scholarly articles analyzing the impact of limits on discharge of student loans in bankruptcy proceedings). See, e.g., Natalie Kitroeff, *Loan Monitor Is Accused of Ruthless Tactics on Student Debt*, N.Y. TIMES (Jan. 2, 2014), <http://www.nytimes.com/2014/01/02/us/loan-monitor-is-accused-of-ruthless-tactics-on-student-debt.html> [<http://perma.cc/NW8W-WMYB>] (reporting on tactics of a lender pursuing struggling borrowers and on the difficulty of discharge of student loan debts).

concern that rising student indebtedness is precarious and unsustainable, and that it represents a serious threat to students, to colleges and universities, and indeed, to the wider economy.<sup>24</sup> With increasing frequency, critics have asked a version of the following question: could student loans, or more precisely defaults on student loans, precipitate or exacerbate a future financial crisis?<sup>25</sup> In other words, do student loans pose a systemic risk to the stability of financial markets, to the institutions that rely on them, and all the people who in turn rely on those institutions? If so, then perhaps federal student lending programs demand overhaul in order to reduce outstanding debt and protect against a future economic disaster.

To be clear, rising indebtedness does pose a threat to student borrowers and their families. Debt, especially in combination with adverse life events, can tragically sabotage borrowers by imposing repayment obligations greater than they can afford. Reallocating a larger share of the cost of education away from students and families and back to states and to the federal government would restore a funding regime that existed as recently as the late 1970s. That reallocation would reduce the danger to students who might find themselves unable to repay their debts and thus any harm to financial markets that defaults could cause. So far, such increased direct funding of higher education, however preferable to the current, debt-centric system of federal financial aid, has been politically unrealistic.<sup>26</sup> Student debt appears to be here to stay.

Yet the crisis exacerbated by debt is not the one that either the rhetoric or policies of the market will resolve in a way favorable to students who need to borrow. This Article contends that critics who warn of the systemic

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<sup>24</sup> Certainly, a number of those within the academy have responded sharply and critically to “crisis” rhetoric around student lending. See, e.g., Heller, *supra* note 20.

<sup>25</sup> See, e.g., Wimberg, *supra* note 19; Woodman, *supra* note 19; Bhatt, *supra* note 19.

<sup>26</sup> The Obama administration has attempted to restore financial support to students who must borrow by providing increasingly generous loan repayment and forgiveness programs. See Kevin Carey, *A Quiet Revolution in Helping Lift the Burden of Student Debt*, N.Y. TIMES (Jan. 24, 2015), <http://www.nytimes.com/2015/01/25/upshot/a-quiet-revolution-in-helping-lift-the-burden-of-student-debt.html> [https://perma.cc/88E6-JBJ3]. Students’ monthly payments under the most generous plan, known as “Pay As You Earn,” are limited to 10 percent of their discretionary income (defined as “the difference between the borrower’s AGI and 150 percent of the poverty guideline for the borrower’s family size”) and the balance of the loan is forgiven after 20 years. 34 C.F.R. § 685.209 (2012). Forgiveness is available after 10 years for those who work in a public interest job. 34 C.F.R. § 685.219(c) (2009). The benefit of these programs is economically the same as an up-front, ex ante subsidy, but they do not eliminate the need to borrow and do not eliminate debt’s potentially discouraging and punishing effects. Studies have found that grant aid is more effective than loans in promoting access and success of students more averse to taking on debt. See Sara Goldrick-Rab & Robert Kelchen, *Making Sense of Loan Aversion: Evidence from Wisconsin*, in *STUDENT LOANS AND THE DYNAMICS OF DEBT* 317, 377 (Brad Hershbein & Kevin M. Hollenbeck, eds., 2015). Sen. Hillary Rodham Clinton, who is competing to succeed President Obama, has proposed greater direct funding of public colleges and universities by the federal government, but the prospects for her plan are uncertain. See Julie Bosman & Tamar Lewin, *With \$350 Billion Plan, Hillary Clinton Prods Rivals on Student Debt*, N.Y. TIMES (Aug. 13, 2015), <http://www.nytimes.com/2015/08/14/us/with-350-billion-plan-hillary-clinton-prods-rivals-on-student-debt.html> [http://perma.cc/8A2E-R7YY].

risk posed by student loans have focused on a nonexistent problem and the solutions they offer would exacerbate the real challenge: overhauling a flawed federal aid system that is less effective in enabling students of lesser means to realize the benefits of higher education. The danger is not that federal student aid policy will contribute to financial market instability, but that it will fail to aid students effectively.

In making this argument, the Article builds on a prior project that analyzed how federal aid policy has reallocated the risk of investing in higher education away from the state and to students and their families.<sup>27</sup> The prior article contended that policies intended to promote access have, perversely, come to reinforce preexisting income and wealth inequality: those with more money do not need to borrow and so are not constrained by repayment obligations when they graduate or drop out of college.<sup>28</sup> The present Article extends the analysis in two ways. First, this Article looks beyond students to investigate whether student debt effects another, dangerous reallocation of risk to the financial system and to taxpayers. The Article concludes that student debt does not pose a threat to the national economy or financial system, and that policy changes driven by fear of this nonexistent threat could limit access to higher education for poorer students and for those who are members of minority groups. Second, in criticizing the analogy between home lending and student lending, this Article challenges one rationale for the reallocation of risk to students.

The discussion that follows has four parts. Part II addresses the possibility of borrower defaults and puts criticism of the federal aid regime into context, offering data on who borrows, how much they borrow, who defaults, and who winds up in bankruptcy proceedings attempting to discharge education debt. Part III analyzes whether student lending resembles home lending from the perspective of systemic risk and concludes that student debt does not constitute the same threat. Part IV, which underscores the importance of perceptions of student borrowing, discusses the pernicious effects of cries of bubbles and crises that suggest federal aid programs promoting access to higher education should be curtailed.<sup>29</sup> Part V turns to history to explain why imposing restrictions on the availability of federal student aid would be antithetical to the goals of the HEA, which expanded student aid programs to widen the availability of education grants and loans. Part VI concludes.

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<sup>27</sup> See Glater, *supra* note 8.

<sup>28</sup> Glater, *supra* note 8.

<sup>29</sup> Glater, *supra* note 8 (indicating that whether less borrowing is actually good depends on one's point of view; more borrowing because of more and larger investments in higher education may be viewed as positive).



## II. WHERE IS THE “BUBBLE” AND WHAT IS THE “CRISIS”?

This Part describes arguments made by scholars<sup>30</sup> who have warned of a student loan bubble that, upon bursting, could lead to a crisis. Criticisms of growing student debt have focused generally on five issues: (i) the harm that student debt inflicts on borrowers and on the larger economy; (ii) the role of the federal government in making loans available; (iii) the difficulty of discharging student loans in bankruptcy proceedings; (iv) the danger to colleges and universities as institutions; and (v) the potential harm student loan defaults could inflict on the financial system. The sections that follow briefly assess these concerns.<sup>31</sup>

A. *The Harm Debt Inflicts on Borrowers*

Debt constrains borrowers. After graduation, indebted students face repayment obligations that reduce the amount of income available for consumption or personal savings. As a result, some borrowers must put off major investments in material goods or entrepreneurial efforts in order to make their monthly payments.<sup>32</sup> Student indebtedness thus may slow national economic growth because students do not have as much income available to spend.<sup>33</sup> Students who do not have money to put aside are also unable to begin saving for retirement or for the education expenses of their children. As Professor Katherine Porter has suggested, debt is a source of stress<sup>34</sup> and may have adverse effects on health, job training, and (additional or continued) education.<sup>35</sup> Debt may reduce willingness to take future risks.<sup>36</sup> And

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<sup>30</sup> The focus of this discussion is academic arguments, rather than those made in the popular press, which are too numerous, typically brief and underdeveloped. Since the financial crisis of 2008, legal scholars and law students have produced a few dozen articles—a manageable number—making the argument that education debt constitutes a bubble that could lead to a crisis. I base this conclusion about the quantity of legal scholarship on a review of articles on Westlaw, using several versions of a search most recently completed on November 9, 2015, that included the terms “student loan” or “student debt” or “education debt” within the same sentence as the word “bubble” or the word “crisis.”

<sup>31</sup> This Article focuses on federal student loans, those made by the Department of Education or those made by private lenders through the guaranteed loan program that Congress terminated in 2010. A few articles commenting on the dangers of student debt have focused on “private” student loans, those made by lenders without any federal role. *See, e.g.*, Bhatt, *supra* note 19 (warning even before the full scale of the financial crisis had become clear of both the potential danger to borrowers of private loan terms and discussing the risk of decreased availability of private loans as a result of less capital availability); 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 (2011) (arguing that because of the dangers private loan terms pose to student borrowers, limits on the amounts that students can borrow through federal program should be lifted).

<sup>32</sup> *See* Phyllis Korkki, *The Ripple Effects of Rising Student Debt*, N.Y. TIMES (May 24, 2014), <http://www.nytimes.com/2014/05/25/business/the-ripple-effects-of-rising-student-debt.html> [<http://perma.cc/F6NF-4BFY>].

<sup>33</sup> *See* Wachnik, *supra* note 19, at 446.

<sup>34</sup> Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 1008 (2014).

<sup>35</sup> *Id.* at 1006.

debt compounds the impact of adverse life events like health crises affecting the borrower or the borrower's family.

In these respects, education debt is like any other debt; the obligation to repay constrains spending. This is true for the buyer of a new car, a home, or any other major investment, who may for a time be unable to engage in additional consumption or in saving.<sup>37</sup> The delays related to those purchases, however, do not cause the degree of public concern that the delays potentially caused by student indebtedness do.<sup>38</sup> What makes borrowing for college different? Perhaps the distinction lies in the role of the federal government in making loans available, and critics' belief that the government should not be contributing to financial behavior that may adversely affect the larger economy. If that is the implicit view, it is a criticism that fails to take into account the fact that the alternative would most likely be student use of commercial loans with worse terms, resulting in even greater delays in spending by indebted graduates.<sup>39</sup> Perhaps critics' underlying concern about the adverse effects of student debt relates to timing, because the repayment obligation often begins as a borrower starts a working life. But this criticism also seems misguided, given that student lending intentionally *enables* students to choose when to attend college: students with few or no assets can access credit so that they can matriculate without having to save first. Student borrowers take money from their future income to allocate to present consumption of education. Aspiring college students with fewer financial resources could choose to put off matriculation to work and save,<sup>40</sup> a strategy that wealthy students would not need. Yet one of the goals of federal student aid is the reduction or elimination of barriers to higher education resulting from disparities in family income and wealth that lead poorer students to put off or forgo higher education.<sup>41</sup> Criticism of the timing of repayment obligations turns the virtue of debt—that it makes possible today an

<sup>36</sup> *Id.* at 1014. Debt may drive some to eschew banks in an effort to hide assets or income, thereby forgoing the advantages of the banking system and incurring other costs, for example.

<sup>37</sup> John Carney, *How Debt Shrinks the Economy*, CNBC: NETNET (Aug. 29, 2011, 3:53 PM), <http://www.cnbc.com/id/44316987> [<http://perma.cc/KW73-E3LW>].

<sup>38</sup> *See, e.g.*, Annie Lowrey, *Student Debt Slows Growth as Young Spend Less*, N.Y. TIMES (May 10, 2013), <http://www.nytimes.com/2013/05/11/business/economy/student-loan-debt-weighting-down-younger-us-workers.html> [<http://perma.cc/5QNJ-JVYX>] (“[The] milestone of student loan debt, which recently exceeded \$1 trillion in total, is making it even harder for many [borrowers], delaying purchases of things like homes, cars and other big-ticket items and acting as a drag on growth.”).

<sup>39</sup> *See* Glater, *supra* note 31, at 44 (explaining why the terms of private, commercial education loans are worse than those of federal student loans).

<sup>40</sup> And indeed, many “non-traditional” students pursue precisely this path. *See* NAT'L CTR. FOR EDUC. STAT., DIGEST OF EDUCATION STATISTICS 323 tbl.225 (2012), [http://nces.ed.gov/programs/digest/d12/tables/dt12\\_225.asp](http://nces.ed.gov/programs/digest/d12/tables/dt12_225.asp) [<http://perma.cc/F6CA-7VKG>].

<sup>41</sup> *See* President Lyndon B. 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) [<http://perma.cc/S8D2-K6G4>] (stating that the Higher Education Act “means 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”).

investment that would otherwise be impossible until tomorrow—into a vice. Nor, as a practical matter, does it take into account more flexible repayment regimes that allow students to make smaller payments in the early years of repayment and larger ones later, when they are earning more.<sup>42</sup>

Focusing on the potential difficulty of making payments early in a borrower's career fails to take into account the lifetime benefit from investing in higher education. A borrower enjoys a greater boost when more of her working life follows completion of a course of study, which means that going to college at a younger age maximizes the degree's benefit. Students who borrowed, graduated, and are likely to earn higher lifetime incomes<sup>43</sup> may well end up spending more, paying more in taxes, and consuming fewer state resources as they get older,<sup>44</sup> even if they put off some purchases in the early years of repayment. Student loans simply shift the timing of spending,<sup>45</sup> but that does not mean that overall spending or, more broadly, the benefits accruing to education have declined. Further, there exist other, nonfinancial benefits of higher education, which correlate with better health and greater longevity,<sup>46</sup> not to mention the intangible, societal benefits of a better-educated community. While indebted students—and many of those who write of the risk of delayed spending are themselves students<sup>47</sup>—may chafe at constraints on their consumption, their investment in higher education was not necessarily a mistake, and limits on spending created by repayment obligations do not necessarily warrant federal policy changes.

This is not to say that excessive indebtedness is not a problem. Clearly, for a subset of student borrowers, the obligation to repay is a tremendous obstacle to financial security. But without knowing in advance which students are most likely to earn incomes too low to manage their payment obligations, and knowing that for most students, the investment in higher education is likely to increase earnings significantly,<sup>48</sup> appropriate policy responses should focus on the risk a borrower takes on, rather than on delays in consumption.<sup>49</sup> An unmanageable student debt may be evidence of a bubble because it indicates that the financial benefit of the investment in education does not outweigh the cost: the price of the asset has exceeded its value. This argument is developed further below,<sup>50</sup> but the fact that borrowing for

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<sup>42</sup> See, e.g., *Graduated Plan Description*, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/understand/plans/graduated> [<https://perma.cc/6QNQ-AXGW>].

<sup>43</sup> See David Leonhardt, *Is College Worth It? Clearly, New Data Say*, N.Y. TIMES (May 27, 2014), <http://www.nytimes.com/2014/05/27/upshot/is-college-worth-it-clearly-new-data-say.html?abt=0002&abg=0> [<http://perma.cc/668J-KWVR>].

<sup>44</sup> See WALTER MCMAHON, HIGHER LEARNING, GREATER GOOD: THE PRIVATE AND SOCIAL BENEFITS OF HIGHER EDUCATION 220–22 (2009).

<sup>45</sup> Whether the cost of delayed consumption outweighs the benefit of higher overall lifetime income is an empirical question well beyond the scope of this article.

<sup>46</sup> See MCMAHON, *supra* note 44, at 212.

<sup>47</sup> See Wachnik, *supra* note 19.

<sup>48</sup> See Leonhardt, *supra* note 43.

<sup>49</sup> See generally Glater, *supra* note 8.

<sup>50</sup> See *infra* Part II.D.

college results in hardship for some students does not mean that higher education's price exceeds its value. Overall, given the correlation between higher incomes and higher education, college remains one of the best investments available.<sup>51</sup> The catch lies in the meaning of the word "overall," because for some fraction of students whose post-college earnings are insufficient to cover repayment, the investment turns out badly. This is indicative not of a bubble but of either a selection problem or, as argued in a prior paper,<sup>52</sup> a risk distribution problem, and the problem of unmanageable debt cries out for a targeted solution rather than curtailment of federal student lending.

### B. *The Federal Role in Student Lending*

Federal student loans are made available to students regardless of financial history or characteristics that would be considered in other contexts by lenders extending credit.<sup>53</sup> Federal loan programs generally are available to all students,<sup>54</sup> and most potential college students<sup>55</sup> need not worry that they will not be able to borrow to pay for higher education.<sup>56</sup> However, critics describing a potential crisis in higher education finance warn that student loans are too readily available,<sup>57</sup> that perhaps student loan availability and terms should take into account some borrower characteristics,<sup>58</sup> and that students do not properly investigate the impact of indebtedness given the wide-

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<sup>51</sup> See, e.g., PEW RESEARCH CENTER, THE RISING COST OF NOT GOING TO COLLEGE 3 (2014), [www.pewsocialtrends.org/files/2014/02/SDT-higher-ed-FINAL-02-11-2014.pdf](http://www.pewsocialtrends.org/files/2014/02/SDT-higher-ed-FINAL-02-11-2014.pdf) [<http://perma.cc/EXA4-48S2>] (reporting that among people between ages 25 and 32, the median income of holders of a college degree exceeded \$45,000, while that of high school graduates was \$28,000).

<sup>52</sup> See Glater, *supra* note 8.

<sup>53</sup> See FED. RESERVE BD. OF GOVERNORS, CREDIT REPORTS AND CREDIT SCORES (2011), <http://www.federalreserve.gov/creditreports/> [<http://perma.cc/GR28-DZ5K>] ("Your credit report is important because . . . [l]enders may use your credit report information to decide whether you can get a loan and the terms you get"). Most federal student loans do not take into account credit history. See *Loans*, U.S. DEP'T OF EDUC., <https://studentaid.ed.gov/sa/types/loans> [<http://perma.cc/VWA6-7XC4>] ("You don't need a credit check or a cosigner to get most federal student loans.").

<sup>54</sup> Lenders offering private student loans, those neither made nor guaranteed by the federal government, do take into account financial characteristics of borrowers and adjust terms of the loans accordingly. See Glater, *supra* note 31.

<sup>55</sup> There are restrictions on participation in federal student aid programs based on other applicant characteristics. Criminal conviction, for example, can render a would-be student ineligible. 20 U.S.C. § 1091 (2012).

<sup>56</sup> See U.S. DEP'T OF EDUC., *supra* note 53.

<sup>57</sup> See, e.g., Edell, *supra* note 19, at 1544, 1560, 1564 (2013) (describing "myriad problems created by the over-education phenomenon," including contributing to a future financial crisis and the declining value of higher education).

<sup>58</sup> See, e.g., Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 530 (2013) (arguing that student loan terms should vary with, for example, borrower choices of fields of study).

ranging outcomes of a chosen educational investment.<sup>59</sup> Ultimately, these critics suggest that federal intervention to make student loans more available has “distorted” the market for higher education.<sup>60</sup> Some of these critics contend that easy access to credit for higher education produces too many indebted students and reduces the return on the investment in college.<sup>61</sup> These critics find support in data describing unemployment rates and wages of recent college graduates. For example, these critics point to data describing unemployment rates and wages of recent college graduates,<sup>62</sup> despite the fact that studies consistently find that over the long term, workers with college degrees earn more than their counterparts without them.<sup>63</sup> Drawing a conclusion about the wisdom of borrowing based on unemployment rates immediately after graduation and in one of the most difficult economies in generations is dangerous; evaluating the decision to pursue higher education should entail analysis of the effects over the lifetime of the student. And over a lifetime, for most students, college pays off tremendously.<sup>64</sup>

Some critics of federal student loan policy suggest that readily accessible credit fuels hikes in tuition, because college and university administrations need not worry that a lack of credit could result in fewer students. This is a cycle, the argument goes: rising demand for higher education is enabled by easy availability of credit which leads to increases in tuition, which in turn lead to greater indebtedness as students and their families cope with higher prices by borrowing more.<sup>65</sup> Were students unable to borrow, perhaps college tuition growth would be constrained.<sup>66</sup> This is a version of what has

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<sup>59</sup> See Amanda Harmon Cooley, *Promissory Education: Reforming the Federal Student Loan Counseling Process to Promote Informed Access and to Reduce Student Loan Debt Burdens*, 46 CONN. L. REV. 119, 121, 124 (2013) (warning that “in obtaining financial assistance [for higher education], most postsecondary students do not contemplate the legal obligations that they accept as conditions to receiving student loans,” and that greater indebtedness in turn harms the “country’s democratic governance, class diversity, economic growth and public health”).

<sup>60</sup> See 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, 125 (2010). While the authors focus on law schools in particular, their criticism of the effects of readily available education loans apply to all sectors of higher education.

<sup>61</sup> See Edelman, *supra* note 19, at 1559–60. If federal policy produces more college graduates, then competition for employment among those graduates could push wages down, thereby reducing the earnings premium associated with higher education.

<sup>62</sup> See *id.* at 1564.

<sup>63</sup> See Glater, *supra* note 8. For an overview of scholarly findings, see McMAHON, *supra* note 44, at 3. However, default rates at for-profit colleges undermine this story; outcomes for students at these institutions more often do not generate the benefits identified by Professor McMahon.

<sup>64</sup> See Leonhardt, *supra* note 43.

<sup>65</sup> See Edelman, *supra* note 19, at 1558; see also Roots, *supra* note 19, at 507–08 (2000) (arguing that “meteoric tuition increases . . . are owed to the student loan program”).

<sup>66</sup> This story ignores the possibility that students could borrow from private sources, such as banks and other lenders. Poorer students would be forced to turn to these sources of credit. The demanding terms of those loans led lawmakers to support the creation of federal aid programs in the first place.

come to be known as the “Bennett Hypothesis,” named after the Reagan Administration’s Secretary of Education, William J. Bennett. In 1987, Bennett wrote a *New York Times* op-ed article titled “Our Greedy Colleges” in which he argued that “increases in financial aid in recent years have enabled colleges and universities blithely to raise their tuitions, confident that Federal [sic] loan subsidies would help cushion the increase.”<sup>67</sup>

Ready availability of credit to college students also has the pernicious effect of enabling and perhaps encouraging tuition increases that are greater than they might be otherwise, critics contend. Again, providers of higher education know that students and families can borrow to pay for higher education, so, critics argue, their ability to raise tuition and fees is unconstrained.<sup>68</sup> While the increases in college prices are not as great as those of residential real estate prices in the pre-crisis years, as stated above,<sup>69</sup> there is still the possibility that price increases would be smaller were government loans less readily available.

However, the cause of tuition increases is difficult to establish; not only do multiple factors affect college pricing, but for many students, the publicly stated or “sticker” price given by a college does not represent the true cost, as a result of aid provided to students in the form of grants.<sup>70</sup> Professor Ronald G. Ehrenberg, who has studied what drives pricing at highly selective colleges and universities, concludes that the culprit is not students’ access to credit but the institutions’ “desire . . . to be the very best that they can be” and the expansion of the meaning of the “best” to encompass student living, dining and athletic facilities.<sup>71</sup> Competition among elite institutions, which receive a disproportionate share of media attention and provide the benchmarks that officials at other colleges and universities use to measure their own quality and performance, also helps push spending.<sup>72</sup>

At the same time, the cost of college for those with less wealth and lower family income remains more manageable than the sticker price suggests. The College Board’s annual survey of college pricing reported that

<sup>67</sup> William S. Bennett, *Our Greedy Colleges*, N.Y. TIMES (Feb. 18, 1987), <http://www.nytimes.com/1987/02/18/opinion/our-greedy-colleges.html> [<http://perma.cc/995T-2X5K>]. See *Default Rate Declines, Yet 611,000 Defaulted on Federal Student Loans*, INSTIT. FOR COLLEGE ACCESS AND SUCCESS (Sept. 30, 2015), [http://ticas.org/sites/default/files/pub\\_files/cdr\\_2015\\_nr.pdf](http://ticas.org/sites/default/files/pub_files/cdr_2015_nr.pdf) [<http://perma.cc/3UWL-YJ5G>] (reporting on the relatively high rates of default among students who enrolled at for-profit institutions).

<sup>68</sup> This is the “Bennett Hypothesis,” articulated by William J. Bennett, former federal secretary of education, in a 1987 op-ed in *The New York Times*. *Id.* Secretary Bennett complained that “increases in financial aid in recent years have enabled colleges and universities blithely to raise their tuitions, confident that Federal [sic] loan subsidies would help cushion the increase.” *Id.*

<sup>69</sup> See *infra* notes 181–185 and accompanying text.

<sup>70</sup> In the 2013–14 academic year, students at public colleges and universities received, on average, grant aid exceeding half of the sticker price of attendance. COLLEGE BOARD, *supra* note 2, at 20 fig.10.

<sup>71</sup> RONALD G. EHREBERG, TUITION RISING: WHY COLLEGE COSTS SO MUCH 265 (2002).

<sup>72</sup> Caroline M. Hoxby, *How the Changing Market Structure of U.S. Higher Education Explains College Tuition*, (Nat’l Bureau of Econ. Research, Working Paper No. 6323, 1997).

after taking into account grant aid to students, the average net cost, including tuition, fees, room, and board in the 2012–13 academic year was \$12,400 at public, four-year institutions,<sup>73</sup> and \$22,590 at private, nonprofit, four-year institutions.<sup>74</sup> In contrast, the sticker price was almost fifty percent greater at public institutions, where tuition, fees, room, and board added up to \$18,170 per year,<sup>75</sup> and nearly eighty percent greater at private institutions, where the total was \$40,220.<sup>76</sup> This practice of discounting means that while indebtedness is a problem, institutions do take steps to mitigate the need to borrow for those of modest means.

At public institutions, state appropriations that have not kept pace with increases in cost have also affected tuition. Thus public institutions have been under pressure to raise prices for reasons unrelated to demand for higher education. State support per student has fallen while the number of students enrolled at public colleges and universities has increased.<sup>77</sup> Many institutions have responded by cutting costs and raising prices.<sup>78</sup>

There is reason to think that tuition would rise regardless of the existence of federal aid. Indeed, before federal student aid was so widely available, tuition was rising rapidly, suggesting that factors other than federal aid policy play a role in tuition increases. The arguments that a student loan crisis exists because credit is too accessible are striking given the historical context. When the federal student loan program was created by the National Defense Education Act in 1958,<sup>79</sup> the combination of harsh commercial loan terms<sup>80</sup> and increasing tuition motivated some of the strongest supporters of the new law. Lawmakers determined that the failure of the government to intervene in the market for higher education would be unacceptable. Increases in the number of students pursuing postsecondary education and in the amounts they borrow are not the adverse consequences of market distortion, but the intended result of a policy motivated by concern that the unfettered functioning of the market did not serve the national interest. The same concern may underlie proposals to make community college more affordable to students.<sup>81</sup>

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<sup>73</sup> COLLEGE BOARD, *supra* note 2, at 20 fig.10.

<sup>74</sup> *Id.* at 21 fig.11.

<sup>75</sup> *Id.* at 20.

<sup>76</sup> *Id.* at 21.

<sup>77</sup> *Id.* at 28 fig.17b.

<sup>78</sup> Both the net price, which takes into account grant aid, and the sticker price have risen. As I have argued elsewhere, substitution of private education loans for federal education loans typically has negative consequences for student borrowers. Glater, *supra* note 31. Reining in college costs by limiting student indebtedness would require limiting how much students can borrow from all sources, not just through federal aid programs. Glater, *supra* note 8, at 103.

<sup>79</sup> National Defense Education Act of 1958, Pub. L. No. 85-864.

<sup>80</sup> See COLLEGE BOARD, *supra* note 2.

<sup>81</sup> Julie Hirschfeld Davis & Tamar Lewin, *Obama Plan Would Help Many Go to Community College Free*, N.Y. TIMES (Jan. 9, 2015), <http://www.nytimes.com/2015/01/09/us/politics/obama-proposes-free-community-college-education-for-some-students.html> [<http://perma.cc/KC4X-9BZD>]. President Obama justified the proposal by arguing that to compete in a global economy, the United States will need a more highly educated workforce. David Hudson, *Pres-*

Overall, decisions about how and how much to fund access to higher education rest on a normative, rather than a positive, assessment of what is good for the United States. There is no objective baseline to guide an assessment of whether too many or too few people pursue a college education. The question of whether we as a society would be better off with less student debt and fewer college students,<sup>82</sup> which would be the result of imposing constraints on federal student lending, on the one hand, or more students and more debt, on the other, does not have an objective answer. Critics of the government's role in higher education finance contend that the government should not attempt to promote access to higher education either in the way or to the extent that it currently does.<sup>83</sup>

While predictions of the effect of curtailing the federal government's role as lender to students must be uncertain, it seems likely that fewer poor students would pursue higher education, and those who did would be forced to turn to commercial loans, which generally carry harsher terms than federal loans.<sup>84</sup> Restricting the availability of federal aid to students would just force students to borrow from somewhere else; it is not clear why tuition would in any way be limited by this shift.

Student loans are, of course, a burden to borrowers. But the loans have enabled people to pay for a college education that might otherwise have been out of reach. In the 1976–77 academic year, United States colleges and universities conferred 917,900 bachelor's degrees, while by 2010–11, that number had risen eighty-five percent to 1.7 million.<sup>85</sup> By that measure, the federal investment in higher education finance has been a success.

### C. *The Difficulty of Discharging Student Loans in Bankruptcy Proceedings*

Student debt receives exceptional treatment under the Bankruptcy Code: borrowers must establish that they face “undue hardship” in order to receive relief.<sup>86</sup> Debtors do not need to show “undue hardship” in order to

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*ident Proposes to Make Community College Free for Responsible Students for 2 Years*, WHITE HOUSE (Jan. 8, 2015), <https://www.whitehouse.gov/blog/2015/01/08/president-proposes-make-community-college-free-responsible-students-2-years> [<http://perma.cc/K7U2-YKR7>]. The president justified the proposal by citing projections of the kinds of jobs that will be available in the future and what those jobs will require. *Id.*

<sup>82</sup> Who those students are matters to this discussion. See *infra* Part IV.

<sup>83</sup> See *infra* Part V.

<sup>84</sup> Glater, *supra* note 8.

<sup>85</sup> DIGEST OF EDUCATION STATISTICS, *supra* note 40, at tbl.328, *Bachelor's Degrees Conferred by Degree-Granting Institutions, By Race/Ethnicity and Sex of Student: Selected Years, 1976-77 Through 2010-11*, [http://nces.ed.gov/programs/digest/d12/tables/dt12\\_328.asp](http://nces.ed.gov/programs/digest/d12/tables/dt12_328.asp) [<http://perma.cc/68C3-D4S4>]. In the same period, the number of high school graduates increased by twenty-five percent, rising to 3.5 million from approximately 2.8 million. *Id.* at tbl.219.10: *High School Graduates, by Sex and Control of School: Selected Years, 1869-70 Through 2023-24*, [http://nces.ed.gov/programs/digest/d13/tables/dt13\\_219.10.asp](http://nces.ed.gov/programs/digest/d13/tables/dt13_219.10.asp) [<http://perma.cc/4W8Z-R58Y>].

<sup>86</sup> Glater, *supra* note 8.



discharge other types of debt. In the case of federal loans, at least one argument exists for this special treatment. If taxpayers are subsidizing loans to students, they may demand special protection against default. The Bankruptcy Code's treatment of education debt may reflect the view that a loan from the government qualitatively differs from a loan from a commercial lender. This rationale is undermined, however, by the fact that the Code currently does not distinguish between federal student loans and commercial, or private, student loans; the same hurdles obstruct discharge whether the student loan is federal or private. The difficulty of discharging student loans in bankruptcy proceedings perhaps suggests that students should be discouraged from incurring such debts in the first place.

Advocates who work with struggling student borrowers contend that discharge is rarely obtained, and then only after great difficulty.<sup>87</sup> Several scholars<sup>88</sup> and, not surprisingly, students,<sup>89</sup> have called for modifications to the Bankruptcy Code to ease the path to discharge of education debt. Because of the difficulty of discharge, they argue, lenders have little incentive to monitor student borrowing or to work with borrowers who are struggling.<sup>90</sup> One empirical study found disturbing patterns in bankruptcy courts' treatment of student borrowers who attempted to discharge education debt; the study concluded that outcomes for debtors turned on judges' individual and often inconsistent perceptions of the meaning of the phrase "undue hardship," and the degree to which judges found a debtor "worthy of re-

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<sup>87</sup> See, e.g., NAT'L CONSUMER LAW CTR., *THE TRUTH ABOUT STUDENT LOANS AND THE UNDUE HARDSHIP DISCHARGE* (2013), <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/ulianoresponse.pdf> [<http://perma.cc/DF3K-EKJ8>] (reporting that a "consumer's prospects of winning a student loan discharge case are slim and worse than in typical civil litigation").

<sup>88</sup> See, e.g., Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 415–17 (2013) (describing policy reforms to ease the path to discharge of student loans); see also Sarah Edstrom Smith, *Should the Eighth Circuit Continue To Be the Loan Ranger? A Look at the Totality of the Circumstances Test for Discharging Student Loans Under the Undue Hardship Exception in Bankruptcy*, 29 HAMLINE L. REV. 601, 633–35 (2006) (arguing for easing path to discharge of education debt in bankruptcy).

<sup>89</sup> See, e.g., Kathryn E. Hancock, *A Certainty of Hopelessness: Debt, Depression, and the Discharge of Student Loans under the Bankruptcy Code*, 33 L. & PSYCHOL. REV. 151, 165 (2009) (arguing that "Congress can and should change the standard to make the discharge of student loans both easier to obtain and more uniform"); see also Brendan Baker, *Deeper Debt, Denial of Discharge: The Harsh Treatment of Student Loan Debt in Bankruptcy, Recent Developments, and Proposed Reforms*, 14 U. PA. J. BUS. L. 1213, 1232 (2012) (concluding that "there is no evidence that educational loans are fundamentally different from other types of loans that can be discharged" and that, consequently, the special treatment of education debt in bankruptcy should end).

<sup>90</sup> Glater, *supra* note 8, at 46. The federal government has established programs intended to help struggling borrowers modify payment plans, for example, but also uses private collection agencies that some advocates warn engage in abusive practices. *Policy Brief: Stop Collectors from Gouging Student Loan Borrowers on the Taxpayer Dime*, NAT'L CONSUMER LAW CTR. (2013), <http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/brief-pca-2013.pdf> [<http://perma.cc/2WCH-U62S>].

lief.”<sup>91</sup> These determinations are not called for by the Code.<sup>92</sup> Other studies have found that discharge is not impossible, but that it is unclear whether many students facing financial difficulty know that bankruptcy may be an available pathway forward; students in distress may instead assume that discharge is impossible and consequently allow themselves to slip into default.<sup>93</sup>

With bankruptcy discharge at least perceived as unavailable, student debt becomes an enduring punishment imposed on the borrower. The benefit of investment in higher education must be that much greater and more certain in order to overcome this risk. Nonetheless, criticisms of the treatment of education debt in bankruptcy have not included arguments that borrowing should be limited because of the difficulty of discharge. It is an intuitively appealing claim, that access to education loans should be limited to those most likely to be able to manage repayment, because the potential harm to others is simply too great. To limit the availability of credit in this way is to exercise a degree of paternalism that federal aid policy has so far avoided. It would mean engaging in a predictive exercise that is likely impossible because education outcomes are not perfectly knowable ahead of time. And it would be regressive, because those best able to manage repayment obligations are those who need credit least.

#### D. *The Risk a Bubble Poses to Colleges and Universities*

Buyers, who in this context are students, are not the only parties affected by a growing bubble or its potential bursting. Also vulnerable are the sellers: the colleges and universities whose educational product students are purchasing. And there are indeed signs that the financial model pursued by some sellers is not sustainable. Sweet Briar College, a 114-year-old institution in Virginia with an endowment of about \$85 million, in 2014 announced plans to close as a result of financial concerns,<sup>94</sup> though as of this writing, the college has reached an agreement to remain open for at least one more

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<sup>91</sup> Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 520 (2005). The authors conclude that courts evaluate the availability of discharge inconsistently “based on differing perceptions of the meaning of the law” and that as a result, the standard for discharge must be clarified. *Id.* at 509.

<sup>92</sup> *Id.* at 520.

<sup>93</sup> See Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 507 (2012) (arguing that “bleak reports” of the difficulty of student loan discharge “have produced a chilling effect that deters debtors”).

<sup>94</sup> Sheryl Gay Stolberg, *Anger and Activism Greet Plan to Shut Sweet Briar College*, N.Y. TIMES (Mar. 22, 2015), <http://www.nytimes.com/2015/03/23/education/sweet-briars-imminent-closing-stirs-small-uprising-in-a-college-idyll.html> [<http://perma.cc/CEW8-ZQAL>]. The article reports that two other colleges had closed in Virginia since 2013: Virginia Intermont College in Bristol and St. Paul’s College in Lawrenceville. *Id.*

year.<sup>95</sup> The college reported \$28 million in deferred maintenance costs and \$25 million in debt, and according to the institution's president, outside consultants "determined [that] Sweet Briar would need a \$250 million endowment to survive."<sup>96</sup> Although news coverage of the college's planned shutdown has not provided great detail on its finances, it appears that tuition revenue alone is not sufficient to cover its cost of operations.<sup>97</sup>

In the classic model of a bubble, an asset's price rises and optimistic investors, believing the trend will persist, borrow to buy more of the asset.<sup>98</sup> Easy credit from lenders reassured by rising prices enables further investment. The bubble bursts when some "exogenous shock" leads buyers to question whether prices will continue to rise and leads lenders to reduce the availability of credit.<sup>99</sup> Prices decline in the absence of new buyers, leaving prior buyers holding assets now of lesser value and those who borrowed possibly owing more than their asset is worth. This is one way that the financial crisis of 2008 has been viewed.

In the context of higher education, the lender is the federal government,<sup>100</sup> which has powerful abilities to collect on student loans and is backed by taxpayers. It is difficult to imagine a great impact of borrower default on the government, which has the ability to tax, borrow, and print money, given the amount of student debt currently outstanding.<sup>101</sup> The buyers are students. Colleges, then, are the sellers. For the bubble story to work, colleges must be incurring costs to manufacture more product. The bubble expands as students take advantage of available credit to pay for college, and colleges invest in expanding capacity and improving the product on offer. This bubble pops when the value of the degree falls as levels of optimism about the worth of a college degree decline, perhaps as a result of graduates' difficulty finding employment.

The classic bubble story posits a connection between the availability of credit and price because easy credit puts higher education within reach of more potential buyers. Credit constraints would shrink the number of potential buyers and so reduce demand for college. Therein lies the challenge in asserting the existence of a bubble in higher education, because it is not clear that these relationships hold.

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<sup>95</sup> Sheryl Gay Stolberg, *Sweet Briar Reaches Deal to Stay Open*, N.Y. TIMES (June 21, 2015), [http://www.nytimes.com/2015/06/21/us/sweet-briar-reaches-deal-to-stay-open.html?\\_r=0](http://www.nytimes.com/2015/06/21/us/sweet-briar-reaches-deal-to-stay-open.html?_r=0) [<http://perma.cc/P3YF-SM4J>].

<sup>96</sup> Stolberg, *supra* note 94.

<sup>97</sup> Sheryl Gay Stolberg, *Sweet Briar College is Saved but is Not in the Clear*, N.Y. TIMES (June 24, 2015), <http://www.nytimes.com/2015/06/24/us/sweet-briar-collegeis-saved-but-not-in-the-clear.html> [<http://perma.cc/H8PN-KB9V>].

<sup>98</sup> CHARLES P. KINDLEBERGER & ROBERT Z. ALIBER, *MANIAS, PANICS AND CRASHES: A HISTORY OF FINANCIAL CRISES* 25 (6th ed. 2011).

<sup>99</sup> *Id.*

<sup>100</sup> At least, since Congress shut down the guaranteed student loan program in 2010.

<sup>101</sup> See *infra* Part III.B.

Overall demand for higher education shows few signs of declining despite tuition increases at public colleges and universities.<sup>102</sup> Secondly, while some studies have found that the availability of credit may enable price increases by colleges,<sup>103</sup> others have concluded that college costs and competition drive pricing.<sup>104</sup> The fact that college prices generally fall into ranges also suggests that the setting of tuition is constrained.<sup>105</sup> After all, it is very likely that some elite institutions could charge tuition higher than their current sticker prices and still fill their classes—some of these colleges spend more on educating each student than even the sticker price covers.<sup>106</sup> Yet elite colleges do not charge much more than less elite institutions. Indeed, less elite institutions may charge as much as the most highly selective colleges and universities. This may be because bellwether colleges themselves seek to promote accessibility and their conduct constrains competitors, for example, or more generally because colleges are maximizing something other than profit.

Whatever the mechanism at work, college pricing suggests that tuition does not play precisely the same role in the market for higher education that prices typically do in markets for other goods.<sup>107</sup> Further, even if there is a provider-side bubble, its bursting—for example, if many students were to decide that college is not worth the price and so stopped going—would not harm students, but colleges and universities, which have greater financial resources to absorb the impact.

#### *E. The Threat Posed to the Financial System by Student Loans*

A relatively new concern about greater student debt involves the possibility that increases in borrower defaults could contribute to a future financial crisis as mortgage loan defaults contributed to the financial crisis of 2008. Although few articles have attempted to describe exactly how defaults on student loans could have serious repercussions among financial firms, the analogy creates a specter of a disastrous chain reaction.<sup>108</sup> The allure of crit-

<sup>102</sup> Put another way, demand for higher education overall appears to be relatively inelastic in response to price increases, although some potential college students—especially poorer students—are more sensitive to price.

<sup>103</sup> This is the famous “Bennett Hypothesis,” attributed to a 1987 op-ed in *The New York Times* by the Secretary of Education at the time. Bennett, *supra* note 67.

<sup>104</sup> RONALD G. EHRENBERG, TUITION RISING: WHY COLLEGE COSTS SO MUCH 265 (2002).

<sup>105</sup> *Id.* at 265–66 (noting that elite institution pricing constrains what less-elite institutions can charge).

<sup>106</sup> Jonathan D. Glater & Alan Finder, *In Tuition Game, Popularity Rises with Price*, N.Y. TIMES (Dec. 12, 2006), <http://www.nytimes.com/2006/12/12/education/12tuition.html?ref=education&r=0> [<http://perma.cc/DQ9S-WB4L>].

<sup>107</sup> *Id.* (suggesting that the reason is “institutions of higher learning watch one another” when setting prices).

<sup>108</sup> Several writers critical of federal student lending policy mention the possibility of a student loan “bubble.” See Edel, *supra* note 19, at 1559; Grant & Anglin, *supra* note 19, at 88; Gregory, *supra* note 19, at 482; Howard, *supra* note 19, at 511 (“[t]he college inflation paradigm follows the same paradigm of the housing bubble”); Wimberg, *supra* note 19, at 178.

ics' arguments rests on the impact of the bursting of the housing bubble: mortgage loan defaults played a role in the worst recession in the U.S. since the Great Depression of the 1930s. The chain of events that could lead to a similar outcome with student loans is complex, contingent on other events and, this Article argues, unlikely. This doomsday scenario is explored in detail in Part III below.

If the analogy between borrowing for college and borrowing for real estate prior to the 2008 crisis holds, it implies that an appropriate remedy would be the adoption of limits on student lending or of less explicit deterrents to borrowing, both of which result in reduced access. Some such proposals include:

- Better loan counseling for student borrowers so that they appreciate the implications of borrowing for college and, presumably, are deterred from borrowing as much.<sup>109</sup> This would deter poorer students from pursuing higher education.
- Tying loan availability to student and institution performance characteristics, like grades or graduation rates.<sup>110</sup> This would impose higher costs on students attending less elite schools.
- Reducing federal student lending and correspondingly allowing an increase in private student lending, resulting in application of traditional evaluations of creditworthiness to student borrowers.<sup>111</sup> This would raise the cost of college for poorer students whom federal aid programs seek to help.
- Allowing student borrowers to purchase an option requiring a lender to forgive the balance of indebtedness after a specific period of time, if the borrower's income fell below a certain level.<sup>112</sup> This could lead to greater lender selectivity, which would restrict access to college for student borrowers deemed more likely to default—again, poorer students.

What these proposals share is a focus on adoption of market-based principles, such as disclosure and borrower riskiness. They also have the effect of limiting access, either by discouraging poorer students from seeking to enroll or by making college more costly for them.

### III. THE DIFFERENCES BETWEEN STUDENT DEBT AND MORTGAGE DEBT

Growth in student borrowing has been phenomenal. Since 2005, the amount of student debt outstanding has increased from \$363 billion<sup>113</sup> to

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<sup>109</sup> Cooley, *supra* note 59, at 153.

<sup>110</sup> Wimberg, *supra* note 19, at 198.

<sup>111</sup> See Edel, *supra* note 19, at 1574; Gregory, *supra* note 19, at 489.

<sup>112</sup> Macchiarola & Abraham, *supra* note 60, at 120.

<sup>113</sup> *Student Loan Debt by Age Group*, FED. RESERVE BANK OF N.Y. (Mar. 29, 2013), <http://www.newyorkfed.org/studentloandebt/> [<http://perma.cc/XC8W-KQV6>].

\$1.2 trillion.<sup>114</sup> The average amount of debt owed by a student who borrows has risen in that period from \$20,800 to \$25,000 for graduates of public institutions and from \$23,800 to \$29,900 for graduates of private, nonprofit institutions.<sup>115</sup> The rate of default on student loans has also risen since the financial crisis, a development that should not surprise, because finding work grew much more difficult for students who graduated in 2008 and for a time thereafter.<sup>116</sup> At the same time, while greater borrowing reflects the rising cost of college, it also may reflect the fact that more students—and more students of lesser means—are enrolling,<sup>117</sup> which would be a sign of the success of a financial aid regime based on lending. Relatively few students graduate with large debt burdens. According to the College Board, seventy percent of undergraduate and graduate student borrowers owe less than \$25,000, while four percent owe \$100,000 or more.<sup>118</sup> Moreover, most students, even those who default, do, in fact, repay their loans.<sup>119</sup>

This Part compares the roles of mortgage debt and education debt in financial markets in order to assess whether growth in student debt poses the risk that mortgage debt has in recent years. If it does, that finding could justify reconsideration of the HEA's purpose, to make higher education more broadly accessible: the cost of achieving that goal might be too high. However, the analysis below concludes that the two kinds of debt differ in critical ways. Studies of the so-called mortgage meltdown found that the trading of securities backed by mortgage borrowers' repayment obligations spread excessive risk across financial institutions and contributed to the financial crisis. A critical question to ask about student debt is whether securities whose

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<sup>114</sup> Seth Frotman, *Tell Us About Your Student Debt Stress*, CONSUMER FIN. PROT. BUREAU: STUDENT LOANS (May 14, 2015), <http://www.consumerfinance.gov/blog/category/student-loans/> [<http://perma.cc/GBG9-THPH>].

<sup>115</sup> COLLEGE BOARD, *supra* note 4, at 21.

<sup>116</sup> According to the Federal Education Department, 14.7 percent of student borrowers who entered repayment defaulted before the end of the second following fiscal year. *Three-year Official Cohort Default Rates for Schools*, U.S. DEP'T OF ED., FEDERAL STUDENT AID, <http://www2.ed.gov/offices/OSFAP/defaultmanagement/cdr.html> [<http://perma.cc/JDP6-WUZP>]; *Briefing on FY 2010 3-Year National Default Rates*, U.S. DEP'T OF ED., FEDERAL STUDENT AID, <http://www.ifap.ed.gov/eannouncements/attachments/2013OfficialFY103YRCDRBriefing.pdf> [<http://perma.cc/AB7Q-PC25>]. However, the statistics measuring default rates do not accurately capture the difficulty students encounter in repayment. See Glater, *supra* note 31, at 62.

<sup>117</sup> For example, the share of college students receiving Pell grants, provided to the neediest students, has increased. In the 1999–2000 academic year, approximately 22 percent of students in the United States (excluding Puerto Rico) received Pell grants, while in 2011–12, more than 41 percent did. NICOLE IFILL & JUSTINE HUFFORD, TRENDS IN PELL GRANT RECEIPT AND THE CHARACTERISTICS OF PELL GRANT RECIPIENTS: SELECTED YEARS, 1999-2000 TO 2011-12 6 tbl.1.1, <http://nces.ed.gov/pubs2015/2015601.pdf> [<http://perma.cc/59VJ-UZNV>].

<sup>118</sup> COLLEGE BOARD, TRENDS IN STUDENT AID 2013, at 21 (2013), <http://trends.collegeboard.org/sites/default/files/student-aid-2013-full-report-140108.pdf> [<http://perma.cc/W9XB-VQMF>].

<sup>119</sup> J. Fredericks Volkwein et al., *Factors Associated with Student Loan Default Among Different Racial and Ethnic Groups*, 69 J. HIGHER EDUC. 206, 225 (1998) (finding that “[f]or most borrowers, loan default appears to be temporary; as their situations improve defaulters are able to repay”).

value is determined by education loans are similarly traded on financial markets; the answer is yes, but on nowhere near the scale of securities tied to mortgage loans. Another important question concerns the role of government insurance of federal student loans made by private lenders before 2010, when Congress shut down the federal guaranteed loan program. The existence of an explicit guarantee from the federal government distinguishes student debt from mortgage debt.

### A. *The Role of Mortgage Debt in the Financial Crisis*

The financial crisis's causes<sup>120</sup> are myriad, investigators have found.<sup>121</sup> Members of a majority<sup>122</sup> of the independent commission that investigated the origins of the crisis distributed blame across a number of financial market actors, such as commercial banks, investment banks, insurance companies, mortgage brokers, federal regulators, and individual purchasers of residential real estate.<sup>123</sup> For present purposes, a subset of the lattermost group is most relevant: home loan borrowers. This section returns to the definition of a speculative "bubble," identifies the period of rapidly rising residential real estate prices shortly after the turn of the millennium as a bubble, and explains the role that mortgage debt played in the ensuing financial crisis.

A market bubble exists when the price of an asset appreciates beyond its "fundamental economic value."<sup>124</sup> Such price appreciation may be fueled by investor enthusiasm, as "high expectations for further price increases support very high current prices."<sup>125</sup> The bubble "bursts" because the high prices are not sustainable indefinitely and decline, sometimes sharply.<sup>126</sup> Investors may bid up the price of an asset in the belief that its price will continue to rise and when the ever-higher price results in an ever-smaller number of buyers, the price eventually declines rapidly. Between 2000 and

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<sup>120</sup> Of course, the financial crisis did not begin on a date certain but developed, agonizingly, over time. Certain critical events, such as the collapse of the investment firm Lehman Brothers and the near-collapse of the insurance conglomerate American International Group, or AIG, have come to be associated with the onset of "crisis," and those events occurred in the fall of 2008.

<sup>121</sup> Much of the discussion in this section is based on the findings of the official report mandated by Congress. FIN. CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT (2011) [hereinafter FCIC], [http://fcic-static.law.stanford.edu/cdn\\_media/fcic-reports/fcic\\_final\\_report\\_full.pdf](http://fcic-static.law.stanford.edu/cdn_media/fcic-reports/fcic_final_report_full.pdf) [http://perma.cc/LD9E-4C83].

<sup>122</sup> Members of the Commission did not agree on everything, and the Commission Report includes dissenting views of the minority. *See id.* at 411, 441. These disagreements are not relevant for the purposes of this Article.

<sup>123</sup> *See id.* at xix (concluding that "[i]n the years leading up to the crisis, too many financial institutions, as well as too many households, borrowed to the hilt").

<sup>124</sup> *See* Adam J. Levitin & Susan M. Wachter, *Explaining the Housing Bubble*, 100 GEO. L. J. 1177, 1182 (2012).

<sup>125</sup> Robert J. Shiller, *From Efficient Markets Theory to Behavioral Finance*, 17 J. ECON. PERSP. 83, 91 (2003).

<sup>126</sup> *Id.*

2005, residential real estate prices rose at an annual rate of 11.5%, more than double the rate of the five prior years.<sup>127</sup> The rate of price increases was a symptom of the bubble. In their investigation of the causes of the crisis, Professors Adam J. Levitin and Susan L. Wachter report that housing price increases through 2003 were not irrationally inflated, but “can be explained by . . . the cost of purchasing a home relative to renting and interest rates,” suggesting that homes were not then overvalued.<sup>128</sup> In subsequent years, however, rising house prices could not be attributed to these fundamentals, suggesting the advent of a bubble.<sup>129</sup>

For the purpose of identifying similarities between mortgage lending and student lending, one must consider the following potential contributors to the housing price bubble: the availability of credit, the intervention of the government to promote home ownership, and the greed and/or short-sightedness of some number of purchasers of real estate. Each of these is useful because each has an analogue in the context of student lending. This limited list has determined the summary of financial history below.<sup>130</sup>

Shortly after the turn of the millennium and before the crisis, low interest rates encouraged both new purchases and refinancing of previously purchased homes.<sup>131</sup> This increased demand for homes and home financing contributed to the rise in real estate prices. When interest rates rose, prices did not level off, however; borrowing against residential real estate continued to expand. One reason was the loosening of underwriting standards applicable to borrowers: lenders offered credit to people who might not have qualified for a loan in years past, often using relatively novel loan structures.<sup>132</sup> Another reason was the perception that buying real estate was a no-lose proposition even in the short term, given the pace of price increases.<sup>133</sup> This perception fueled demand for credit until prices reached an unsustainable level and buyers grew scarce, pushing prices down and leaving many homeowners holding an asset worth less than the price paid.<sup>134</sup> Rates of default on home loans rose.<sup>135</sup> The effects of rising default rates, in turn, rippled across the financial system; understanding how this occurred requires following the life of a mortgage loan after the borrower has obtained credit.

After a lender extends credit to a borrower, the lender can retain the loan and accept repayment over time,<sup>136</sup> or sell the right to receive future

<sup>127</sup> FCIC, *supra* note 121, at 83.

<sup>128</sup> Levitin & Wachter, *supra* note 124, at 1182.

<sup>129</sup> For the purposes of this Article, dating the start of the bubble is not relevant.

<sup>130</sup> For a concise summary of potential causes of the financial crisis identified by various scholars, *see id.* at 1179–81.

<sup>131</sup> *See* FCIC, *supra* note 121, at 83.

<sup>132</sup> *See id.*

<sup>133</sup> *See id.* at 7 (“Some speculators saw the chance to snatch up investment properties and flip them for profit.”).

<sup>134</sup> *See id.* at 213 (describing falling home prices and their effects).

<sup>135</sup> *Id.*

<sup>136</sup> And indeed, until the 1970s, this is what typically happened when families obtained a mortgage loan. PERM. SUBCOMM. ON INVESTIGATIONS OF THE S. COMM. ON HOMELAND SEC.



borrower payments to a third party and use the cash from this sale to make additional loans or other investments.<sup>137</sup> For decades, lenders have sold home loans, encouraged by the existence of federal government-sponsored enterprises (“GSEs”) that purchased the obligations, provided that the loans met the GSEs’ criteria.<sup>138</sup> The GSEs then resold them with their own guarantees. In the years immediately before the crisis, banks, thrifts, and investment banks had also begun buying and selling loans on a massive scale without the imprimatur of the GSEs,<sup>139</sup> offering bundles of loans to investors that in turn sold portions of the purchased loans to other investors. Various scholars have noted potential incentive problems inherent in this arrangement: because the lender is unaffected by a borrower’s nonperformance after the lender sells the borrower’s loan, the lender has less reason to verify that the borrower can in fact repay.<sup>140</sup>

As a result of the sale of home loans by lenders to investors and by initial investors to other investors, a wide variety of institutions was ultimately vulnerable to the effects of rising default rates. Institutions with significant exposure could find themselves holding assets less valuable than anticipated. The loss of asset value could, and did, make it harder for some investors to perform their financial obligations, thus spreading the impact of defaults further throughout the financial marketplace. Complicating matters, many investors entered into contracts that functioned as insurance and expected to receive payments from their counterparties in the event that too many borrowers defaulted on home loans.<sup>141</sup> One of the largest sellers of this protection did not anticipate how great the demands of purchasers could be<sup>142</sup> and that payment on protection policies could potentially destroy the

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AND GOV’T AFF., WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE 17 (2011), <http://www.hsgac.senate.gov/download/report-psi-staff-report-wall-street-and-the-financial-crisis-anatomy-of-a-financial-collapse> [<http://perma.cc/MU33-CYB2>].

<sup>137</sup> Initially, government-sponsored enterprises created by Congress purchased home loans from lenders, to support the mortgage market. See FCIC, *supra* note 121, at 38. But over time, other investors expanded their purchases of securities backed by home loans. See *id.* at 44.

<sup>138</sup> Among these were the Federal National Mortgage Association (“Fannie Mae”), the Federal Home Loan Mortgage Corporation (“Freddie Mac”), and the Government National Mortgage Association (“Ginnie Mae”). The GSEs were authorized by legislation to purchase conventional, fixed-rate mortgages. *Id.* at 39. The size of the loans was limited, as was the ratio of the borrower’s debt to income (an indicator of ability to repay). *Id.*

<sup>139</sup> “In 2004, commercial banks, thrifts, and investment banks caught up with Fannie Mae and Freddie Mac in securitizing home loans. By 2005 they had taken the lead.” *Id.* at 102.

<sup>140</sup> See KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 40 (2011).

<sup>141</sup> See Jennifer Taub, *The Sophisticated Investor and the Global Financial Crisis*, in CORPORATE GOVERNANCE FAILURES: THE ROLE OF INSTITUTIONAL INVESTORS IN THE GLOBAL FINANCIAL CRISIS 192–93 (James P. Hawley, Shyam J. Karnath & Andrew T. Williams eds., 2011).

<sup>142</sup> The insurance provider AIG, for example, sold to investors credit default swaps, transactions through which the company guaranteed payment of debt obligations held by other investors. FCIC, *supra* note 121, at 140. “In exchange for a stream of premium-like payments, AIG Financial Products [of which AIG was the parent entity] agreed to reimburse the investor in such a debt obligation in the event of any default.” *Id.* While insurance is regulated and

company.<sup>143</sup> Potential failure of protection provided another mechanism for the widespread impact of home loan defaults, because if sellers of protection could not honor their obligations, institutions depending on the sellers of protection would be affected, whether those dependent institutions had themselves purchased protection or had some other financial relationship with the sellers. The complex web linking different kinds of financial institutions and all manner of investors provided a devastatingly effective transmission mechanism.<sup>144</sup>

This chain of events helps to explain why defaults on home loans had such broad effects on so many different entities. The volume of mortgage debt in turn explains the scale of those effects. In 2006, aggregate housing debt in the United States exceeded \$8 trillion, and in 2008 rose to a peak of nearly \$10 trillion, more than triple the combined amount of all other forms of debt outstanding in the United States.<sup>145</sup> Investors in 2006 purchased more than \$800 billion in mortgage-backed securities<sup>146</sup> the value of which depended on payment of relatively high-risk home loans.<sup>147</sup> Rates of delinquency—meaning the share of loans on which borrowers missed payments for ninety days or more<sup>148</sup>—on these relatively risky home loans rose sharply

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insurers are required to keep a reserve to pay on a policy, credit default swaps were not regulated like insurance, and no reserve was required. *Id.*

<sup>143</sup> An additional challenge for AIG was the requirement that the company provide collateral to purchasers of credit default swaps. *See id.* at 243, 268. In the fall of 2008, AIG informed regulators that it needed access to liquidity to manage its obligations and that “[w]ithout a solution, there was no way this conglomerate, despite more than \$1 trillion in assets, would survive another week.” *Id.* at 345.

<sup>144</sup> This abbreviated description of the financial crisis leaves out certain critical parties, most notably federal regulators that, later investigators concluded, had the power to intervene and prevent the expansion of the bubble that precipitated the crisis, *id.* at xvii; the rating agencies, which graded the financial strength of securities whose value depended on home loan borrowers’ repayment of their obligations; and the government-sponsored enterprises that purchased mortgage loans from the lenders that made them. These groups are not relevant to a comparison of student loans and home loans.

<sup>145</sup> FED. RESERVE BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 3 (2014) [hereinafter 2014 Q1 HOUSEHOLD DEBT AND CREDIT REPORT], [http://www.newyorkfed.org/householdcredit/2014-q1/data/pdf/HHDC\\_2014Q1.pdf](http://www.newyorkfed.org/householdcredit/2014-q1/data/pdf/HHDC_2014Q1.pdf) [<http://perma.cc/4UC5-BTKF>]; *see also Household Debt and Credit Report*, FED. RESERVE BANK OF N.Y. (2014), <http://www.newyorkfed.org/microeconomics/hhdc.html#2014/q1> [<http://perma.cc/BTS2-5A26>] (for an interactive chart showing national aggregate mortgage balances). While there was nearly \$10 trillion in mortgage debt outstanding, in 2006 there were \$3.8 trillion in GSA-issued securities backed by residential home loans (i.e., 1–4 family homes). SEC. INDUS. AND FIN. MKTS. ASS’N, U.S. MORTGAGE-RELATED SECURITIES OUTSTANDING, at Sheet 2 (2015), <http://www.sifma.org/uploadedFiles/Research/Statistics/StatisticsFiles/SF-US-Mortgage-Related-SIFMA.xls?n=00202> [<http://perma.cc/JHP7-TFNA>].

<sup>146</sup> Levitin & Wachter, *supra* note 124, at 1193.

<sup>147</sup> By “relatively high risk,” I refer to loans classified as “subprime” or “Alt-A.” *Id.* at 1192. These terms have specific meanings. A subprime loan is made to a borrower deemed riskier than a “prime” borrower; a subprime borrower may have defaulted on an obligation in the past, for example, or have suffered another negative credit event. FCIC, *supra* note 121, at 102. An Alt-A loan has characteristics that make it riskier than a traditional loan to a “prime” borrower; Alt-A loans included mortgages on which the borrower paid only interest, for example. *Id.* at 105.

<sup>148</sup> FCIC, *supra* note 121, at 215.

in late 2006 and early 2007; on subprime adjustable rate mortgages, the delinquency rate rose to twenty percent in 2007 and reached forty percent in 2009.<sup>149</sup> While losses on such subprime loans would eventually total about \$300 billion,<sup>150</sup> the effect of their poor performance was far greater than that figure suggests because many of the loans had been sold in pools of home loans that backed securities held by investors of all sorts.<sup>151</sup> Investors did not know how widespread the impact of defaults might be and the value of these securities fell as delinquency rates increased. Thus, home loan delinquencies and later defaults led to a widespread financial crisis affecting critical financial institutions across the national and global economies.

The role of the federal government in home lending is the last relevant piece of the puzzle. Before the crisis, the government intervened in housing markets in different ways, seeking to promote home ownership by, for example, creating the government-sponsored enterprises that bought loans from lenders.<sup>152</sup> Critics asserted that particular policies helped bring the crisis about and worsened its effects: the Community Reinvestment Act of 1977 (the “CRA”) “require[d] banks and savings and loans to lend, invest, and provide services in the neighborhoods from which they t[ook] deposits, consistent with bank [financial] safety and soundness”;<sup>153</sup> the GSEs purchased home loans from lenders; and finally, the Federal Reserve lowered interest rates in part in an effort to promote home purchases.<sup>154</sup> By one measure, the various strategies were successful: 69.2% of households owned a home in 2004.<sup>155</sup>

Some critics claimed *ex post* that in the absence of these policies, the financial crisis would not have occurred or would have been far less severe.<sup>156</sup> They argued that the federal government, in an effort to promote home ownership by people who had historically encountered difficulty in accessing credit, directed the GSEs to purchase mortgages of low- and mod-

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<sup>149</sup> *Id.* at 216–17. Rates of delinquency on loans purchased or guaranteed (and resold) by the GSEs were much lower than on other mortgage loans sold by other financial institutions. *Id.* at 217–18.

<sup>150</sup> *Id.* at 227.

<sup>151</sup> *Id.* As Ben Bernanke, then chairman of the Federal Reserve, put it, “[W]hat created the contagion . . . was that subprime mortgages were entangled in these huge securitized pools.” *Id.* And the effects of the falling value of home loans grew as financial institutions began to fear that other financial institutions that were parties to transactions might be unable to perform, and therefore refrain from investments that suddenly looked much riskier than they had. *Id.* at 228.

<sup>152</sup> *Id.* at 41 (describing efforts to facilitate home borrowing by low- and moderate-income purchasers).

<sup>153</sup> *Id.* at xxvii.

<sup>154</sup> *Id.* at 88.

<sup>155</sup> *Id.* at 86. To put that in perspective, from the mid-1960s through the mid-1990s, the home ownership rate was about 64 percent. *Id.* at 457.

<sup>156</sup> *See, e.g., id.* at 451 (Dissenting Statement of Peter J. Wallison) (“[T]he housing bubble of 1997-2007 would not have reached its dizzying heights or lasted as long, nor would the financial crisis of 2008 have ensued, but for the role played by the housing policies of the United States government over the course of two administrations.”).

erate-income borrowers who should not have and might not otherwise have obtained loans.<sup>157</sup> This meant that the GSEs lowered the underwriting standards applicable to loans they could purchase.<sup>158</sup> Critics' argument, then, is that lower-income homebuyers who would not have qualified for credit absent government intervention took out loans that they could not afford to repay, contributing to rising default rates.<sup>159</sup> The veracity of these claims about the causes of the 2008 financial crisis does not matter for present purposes;<sup>160</sup> what is relevant is that the same causes are implicated in claims of a future crisis caused by student loan defaults.

Critics attempt to draw an analogy between federal education and housing policies. They blame the CRA for compelling banks to make loans that they would not have made in the absence of legislation.<sup>161</sup> They also argue that the borrowers were too risky, and that if lenders had relied on conventional evaluations of creditworthiness, many borrowers would not have obtained the loans that they did. Further, critics contend, when lenders covered by the CRA made loans intended to satisfy the requirements of the law, they charged lower interest rates than the borrowers should have received based on their risk profile.<sup>162</sup> These borrowers then defaulted. In short, government policy resulted in loans to borrowers who should not have been able to get them, or at least not on the terms they received them, and critics blame defaults on those loans for the crisis.

It is worth emphasizing that many analyses of the causes of the bubble have concluded that widespread and short-sighted pursuit of profit, regulatory lapses, and policy failures all share the blame. In that policy environment, characterized by low interest rates and lax regulation, consumers responded to the accessibility of credit in rational fashion by borrowing more. According to the findings of the Financial Crisis Inquiry Commission, "captains of finance and the public stewards of our financial system ignored warnings and failed to question, understand, and manage evolving risks."<sup>163</sup>

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<sup>157</sup> *Id.* at 453 (Dissenting Statement of Peter J. Wallison).

<sup>158</sup> *Id.*

<sup>159</sup> *See id.* at 470 (Dissenting Statement of Peter J. Wallison).

<sup>160</sup> Indeed, most members of the Financial Crisis Inquiry Commission and several scholars who have looked in depth into the causes of the financial crisis have concluded that federal housing policy was not at fault. *See, e.g., id.* at 123 (finding that the GSEs did not need to purchase mortgage-backed securities that were not riskier, subprime loans to meet affordable housing goals); *id.* at 183 (citing interviews with former Fannie Mae employees who said that purchases of riskier home loans were not driven by reach for affordable housing goals); *id.* at 220 (citing findings of economists that lenders made few subprime loans to satisfy the CRA); JENNIFER TAUB, OTHER PEOPLE'S HOUSES: HOW DECADES OF BAILOUTS, CAPTIVE REGULATORS, AND TOXIC BANKERS MADE HOME MORTGAGES A THRILLING BUSINESS 273–83 (2014) (identifying and debunking "myths" about the causes of the financial crisis and the role that mortgage loans played); Levitin & Wachter, *supra* note 124, at 1215 (finding "little evidence that the CRA contributed directly to the bubble" and that "CRA-subject institutions made a disproportionately small share of subprime-mortgage loans").

<sup>161</sup> FCIC, *supra* note 121, at 444 (Dissenting Statement of Peter J. Wallison).

<sup>162</sup> *Id.* at 525 (Dissenting Statement of Peter J. Wallison).

<sup>163</sup> *Id.* at xvii.

Thus, although borrowers have been vilified, their behavior was an effect rather than a cause; the preceding history has focused on borrowers because the analogy between mortgage lending and student lending likens home loan borrowers to student borrowers. Borrowers played a role but were not the underlying culprit.

For those who liken student loans to mortgage loans, the critical characteristics of mortgage lending which led to the crisis are the following:

- Borrowers' debts grew sharply, both in the aggregate and per borrower. This increased financial pressure on borrowers, because the larger a borrower's debt burden, the greater the adverse effect of a decline in prices;
- The government had intervened in the market, buying home loans through the government-sponsored enterprises, aimed at making home ownership more broadly accessible;
- Lenders in the pre-crisis years extended credit to borrowers who in the past would not have qualified for the loans they obtained; and
- Mortgage loans were sold to investors and so served as conduits for systemic risk.

The next section addresses whether and to what extent student loans have these same characteristics.

### *B. Differences Between Mortgage Debt and Education Debt*

The argument that student borrower defaults could contribute to a financial crisis turns on the validity of two assertions about mortgage lending and student lending: that the government's interventions in each sector are comparable and that the effects of student loan defaults would be similar to those of mortgage loan defaults. This section illustrates the ways in which student lending differs from pre-crisis mortgage lending and argues that because of these differences, defaults by student loan borrowers are unlikely to have the same effects as the defaults on home loans. The discussion below makes three claims: first, federal tactics to promote college access through student lending intentionally and appropriately differ from those promoting home lending, undermining the first assertion; second, undermining the second assertion, there is no education "bubble" analogous to the housing bubble, such that defaults would have the same effects as mortgage defaults had; and third, student loans consequently do not pose the same systemic risk as home loans because the amount of outstanding student debt is neither large enough nor sufficiently widely-distributed.

#### *1. Differences Between Federal Tactics to Promote College Access and Tactics to Promote Home Ownership*

Although lawmakers have sought to promote both participation in higher education and home ownership, they have adopted very different

means of achieving those ends. Federal student aid eligibility generally does not turn on creditworthiness of the student borrower, which a commercial lender would evaluate. Additionally, the terms of federal student loans do not vary with borrower characteristics but are instead set by statute.<sup>164</sup> Mortgage borrowers, in contrast, face different loan terms based on credit history. The different interventions by the government to promote availability of higher education, on the one hand, and of residential real estate, on the other, make plain that lawmakers in the former context prioritized access for all, regardless of background. The whole point of federal aid offered irrespective of traditional measures of creditworthiness is to help people who might otherwise be unable to borrow for college.<sup>165</sup> While the government's gambit to promote home ownership has leveraged the private sector, providing liquidity to banks and other lenders to make more loans to homebuyers, in student lending the trend has gone in the opposite direction.<sup>166</sup> The typical practices of the private sector in extending credit are incompatible with the goals of federal aid policy.

## 2. *The Value of Higher Education*

Recall that a financial bubble exists when the price of an asset exceeds its fundamental, economic value by too much, for too long.<sup>167</sup> Any claim of a higher education bubble enabled by the availability of credit to students thus is a claim that the price of college exceeds by too great a margin the fundamental value of going to college. Assuming, for purposes of this argument, that the only value of a college education is enhanced earnings, which are tangible, the relationship of price and value has been analyzed in the past.<sup>168</sup>

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<sup>164</sup> Bipartisan Student Loan Certainty Act of 2013, Pub. L. 113–28, 127 Stat. 506 (2013) (setting the interest rate on the most widely used federal student loan at a fixed increment above the federal government's cost of borrowing).

<sup>165</sup> See, e.g., 111 CONG. REC. S22, 692 (daily ed. Sep. 2, 1965) (statement of Sen. Yarborough) (warning that “commercial credit is frequently available only at high interest rates” and arguing that the HEA’s program with a “reasonable rate of interest” on loans could give “every college student in the nation . . . access to low interest loans with a reasonable period of repayment”).

<sup>166</sup> The government makes the loans itself and does not resell them. There is no longer an entity equivalent to Fannie Mae or Freddie Mac, which both purchase home loans from originators like banks and thrifts and then resell them with a guarantee of payment of interest and principal. The Education Department holds onto federal student loans after origination. Federal student loans made through the FFEL program prior to 2010 carry the explicit government guarantee of repayment.

<sup>167</sup> See Levitin & Wachter, *supra* note 124.

<sup>168</sup> In making this point and discussing the literature on the income effects of college education, by no means do I concede that the only measure of a successful, post-college outcome is a higher income. As I have observed elsewhere, a successful college graduate may choose to pursue a career that is less—or not—lucrative, in order to pursue a particular vision of the good, useful and/or productive life. Glater, *supra* note 8. While discussion of higher education as an “investment” may be commonplace, see, e.g., HANS JOHNSON ET AL., PUB. POLICY INST. OF CALIFORNIA, STUDENT DEBT AND THE VALUE OF A COLLEGE DEGREE 1 (2013), [http://www.ppic.org/content/pubs/report/R\\_613HJR.pdf](http://www.ppic.org/content/pubs/report/R_613HJR.pdf) [<http://perma.cc/T3KX-NS>]

While it is clear that education debt can undermine the personal financial success of an individual student who graduates, and certainly of a student who does not graduate, most studies have found that the cost of higher education would have to rise significantly more than it has in order to nullify the average lifetime income enhancement correlated with possession of a college degree.<sup>169</sup> The cost of an undergraduate degree from a selective four-year college or university in the United States may exceed \$200,000 for a student who receives no financial aid.<sup>170</sup> But a recent United States Census Bureau report estimated that the lifetime income earned by a college graduate exceeds \$2 million, an amount nearly double the income of a high school graduate.<sup>171</sup> The difference suggests that college is a good investment despite its high price. Other studies of the return on education find a similar correlation between education attainment and earnings.<sup>172</sup> Research on earnings and education level consistently finds that those with more education earn more. The Bureau of Labor Statistics reports that the median, weekly wage paid to a college graduate in 2013 was \$1,108, while the median wage paid to a high school graduate was \$651.<sup>173</sup> Further, the size of the gap between the in-

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Q5], and I indulge in it throughout this Article, I do not thereby mean to suggest that college has no other meaning, impact or significance.

<sup>169</sup> See Leonhardt, *supra* note 43. Of course, causal claims are notoriously difficult to support: is it that college degrees confer economic benefits, or is it that those likely to be successful go to college? Constructing a counterfactual presents obvious difficulties.

<sup>170</sup> See COLLEGE BOARD, *supra* note 2, at 3. The net price, taking into account financial aid, paid by an average, full-time undergraduate student at a private, nonprofit college or university was \$23,290 in 2012–13. (This figure includes the cost of room and board.) *Id.* at 21.

<sup>171</sup> JENNIFER CHEESEMAN DAY & ERIC C. NEWBURGER, U.S. CENSUS BUREAU, THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS 4 (2002), <https://www.census.gov/prod/2002pubs/p23-210.pdf> [<https://perma.cc/AJ5C-PU5W>]. See also M. BETH AKERS & MATTHEW CHINGOS, IS A STUDENT LOAN CRISIS ON THE HORIZON? 14 (2014), <http://www.brookings.edu/~media/research/files/reports/2014/06/24-student-loan-crisis-akers-chingos-is-a-student-loan-crisis-on-the-horizon.pdf> [<http://perma.cc/U5BF-FF2Y>] (finding that increasing debt burdens were more than outweighed by income growth experienced by student borrowers).

<sup>172</sup> Measuring the return on education presents certain clear difficulties because education itself may not cause the higher earnings. Rather, more able individuals may tend to pursue higher education, and those individuals might experience higher earnings regardless. NATALIA A. KOLESNIKOVA, FED. RESERVE BANK OF ST. LOUIS, THE RETURN TO EDUCATION ISN'T CALCULATED EASILY (2010), <http://www.stlouisfed.org/publications/re/articles/?id=1866> [<http://perma.cc/9PXZ-7PR8>]; David Card, *The Causal Effect of Education on Earnings*, in 3 HANDBOOK OF LABOR ECONOMICS 1801 (Orley Ashenfelter & David Card eds., 1999), [http://david-card.berkeley.edu/papers/causal\\_educ\\_earnings.pdf](http://david-card.berkeley.edu/papers/causal_educ_earnings.pdf) [<http://perma.cc/36AT-86PA>]. Professor Card provides an overview of empirical studies of the relationship between educational attainment and earnings; see Card, *supra* note 172, at 1834–55.

<sup>173</sup> *Earnings and Unemployment Rates by Educational Attainment*, BUREAU OF LAB. STAT (Apr. 2, 2015), [http://www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm) [<http://perma.cc/8QRM-GYG8>]. The chart also illustrates that unemployment rates are lower for those with more education, a finding confirmed in other studies. See, e.g., DAVID B. GRUSKY ET AL., PEW CHARITABLE TRUSTS ECON. MOBILITY PROJECT, HOW MUCH PROTECTION DOES A COLLEGE DEGREE AFFORD? THE IMPACT OF THE RECESSION ON RECENT COLLEGE GRADUATES (2013) (finding that graduates of four-year colleges experienced a smaller decline in employment during the recession that followed the financial crisis of 2008), [http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes\\_assets/2013/pewcollegegradsrecessionreportpdf.pdf](http://www.pewtrusts.org/~media/legacy/uploadedfiles/pes_assets/2013/pewcollegegradsrecessionreportpdf.pdf) [<http://perma.cc/7MF2-R6ZU>].

comes of the more- and less-educated has grown.<sup>174</sup> One survey of studies of education and earnings concluded that each additional year of schooling is associated with a ten percent increase in annual earnings.<sup>175</sup>

Further, data collected by the government and many academic studies do not take into account the social return on higher education, reaped by the community to which the college graduate belongs.<sup>176</sup> Professor Walter W. McMahon has found that more education produces social benefits including: higher taxes paid by higher-paid college graduates; educational institutions' contributions to the economy; and lower health care expenses for the better educated.<sup>177</sup> These and other findings suggest that the price of higher education, even at the most costly institutions, has not risen beyond a level sustainable by the fundamental economic value of a college degree.

Second, the growth in and growth rate of student borrowing do not match the scale of the increases in mortgage borrowing in the years before the financial crisis. At the individual level, according to the College Board, bachelor's degree recipients who borrowed graduated with \$17,550 in federal student debt in 2013–14, actually a decline from \$19,550 in 2003–04.<sup>178</sup> In the aggregate, between 2004–05 and 2008–09—during the pre-crisis period of increasing home borrowing activity—the annual amount borrowed by students rose nearly 36%, to \$91.9 billion from \$67.6 billion.<sup>179</sup> In contrast, between 2004 and 2008 the amount of aggregate mortgage debt outstanding increased 61.3%, from \$6.2 trillion to \$10 trillion.<sup>180</sup>

Third, the growth rate of the cost of higher education does not approach that of residential real estate prices in the years leading up to the crisis, undermining claims that rising costs are evidence of a bubble. Again according to the College Board, the cost of attending<sup>181</sup> a public, four-year college

<sup>174</sup> David H. Autor, *Skills, education and the rise of earnings inequality among the "other 99 percent,"* 344 *SCI.* 843, 847 (2014), <http://www.sciencemag.org/content/344/6186/843.full?ijkey=75Wfa.Upt6b6&keytype=ref&siteid=sci> [<http://perma.cc/NNB2-M3HN>].

<sup>175</sup> DOUGLAS C. SMITH, FED. RESERVE BANK OF ST. LOUIS, *EDUCATION AND EARNINGS 1* (2009), <http://research.stlouisfed.org/pageone-economics/uploads/newsletter/2009/200908.pdf> [<http://perma.cc/9PXZ-7PR8>].

<sup>176</sup> See WALTER W. McMAHON, *HIGHER LEARNING, GREATER GOOD: THE PRIVATE AND SOCIAL BENEFITS OF HIGHER EDUCATION* 216 (2009).

<sup>177</sup> WALTER W. McMAHON, TIAA-CREF INSTITUTE, *THE PRIVATE AND SOCIAL BENEFITS OF HIGHER EDUCATION: THE EVIDENCE, THEIR VALUE, AND POLICY IMPLICATIONS* 11 fig.5. (2010), [https://www.tiaa-crefinstitute.org/public/pdf/institute/research/advancing\\_higher\\_education/ah\\_e\\_privatesocial0310c.pdf](https://www.tiaa-crefinstitute.org/public/pdf/institute/research/advancing_higher_education/ah_e_privatesocial0310c.pdf) [<http://perma.cc/GR9J-3H6B>].

<sup>178</sup> COLLEGE BOARD, *supra* note 4, at 18 fig.8A. Total debt burdens, including nonfederal loans, have increased, rising to \$25,600 per borrower in 2012–13 from \$21,300 in 2002–03 at public, four-year institutions, and to \$31,200 from \$25,900 at private, nonprofit four-year institutions. *Id.* at 22 figs.13A & 13B.

<sup>179</sup> COLLEGE BOARD, *supra* note 4, at 10 tbl.1.

<sup>180</sup> This figure represents the peak of mortgage borrowing in the third quarter of 2008. *Household Debt and Credit Report*, *supra* note 145 (for an interactive chart showing national aggregate mortgage balances). Of course, the meaning of these figures is not necessarily clear; these rates of change do not reveal a precise rate of increase indicative of a bubble.

<sup>181</sup> Cost of Attending indicates the total of the published tuition, fees, and cost of room and board.



rose 13.6% between 2003–04 and 2007–08, to \$15,200 from \$13,380 in the years encompassing the real estate bubble.<sup>182</sup> The cost of attending a private, nonprofit institution between 2003–04 and 2007–08 rose 8.4% to \$35,880 from \$33,100.<sup>183</sup> In contrast, nominal housing prices rose 45.6% between 2003 and 2006.<sup>184</sup> The growth rate of the cost of a college education has not approached that of the price of residential real estate.<sup>185</sup> The rate of growth in higher education cost, which has been higher at public colleges and universities and which has certainly exceeded the rate of general price inflation, does not look like that of an asset bubble—at least, not yet.

Fourth, there is the distinct issue of the role of the federal government, which some critics contend has contributed to the creation of a bubble by providing credit to purchasers.<sup>186</sup> Without access to credit, buyers of real estate or of higher education would be more limited in their ability to bid up prices. In the context of residential real estate finance, the government created enterprises that purchased loans from lenders that made them, provided the loans met the GSEs' criteria.<sup>187</sup> Thus, the government facilitated the availability of private financing for homebuyers. In the context of higher education, the government extends loans directly to students and their families, and in the past has guaranteed loans made by lenders.<sup>188</sup> Traditional underwriting criteria do not apply. To promote the accessibility of higher education, the government ensures availability of credit.

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<sup>182</sup> COLLEGE BOARD, *supra* note 2, at 21 fig.10 (source data for Figure 10 is available at <http://trends.collegeboard.org/sites/default/files/college-pricing-2013-source-data-131219.xls> [<http://perma.cc/X4XB-2NZA>]). These figures are based on the published prices, not the average net price (which takes into account financial aid that reduces the cost of college). Using the net price figures, the cost of attending a public, four-year college rose 13.5% between 2003–04 and 2008–09, to \$10,670 from \$9,400 in that time period. *Id.*

<sup>183</sup> *Id.* at 22 fig.11 (source data for fig.11 is available at <http://trends.collegeboard.org/sites/default/files/college-pricing-2013-source-data-131219.xls> [<http://perma.cc/X4XB-2NZA>]). These figures are based on the published prices, not the average net price that takes into account financial aid that reduces the cost of college. Using the net price figures, a private, nonprofit four-year college rose 5.8% between 2003–04 and 2007–08, to \$23,940 from \$22,630 in that time period. *Id.*

<sup>184</sup> The percentage increase in housing prices is based on the Case-Schiller National Home Price Index. In March 2003, the index stood at 130.48, and it subsequently rose to 189.93 in June 2006, before declining to 139.41 by the end of 2008. S&P/CASE-SCHILLER U.S. NATIONAL HOME PRICE INDEX, <http://www.spindices.com/indices/real-estate/sp-case-shiller-us-national-home-price-index> [<http://perma.cc/GPP6-QXST>]. Thus, home prices increased sharply in a very short time.

<sup>185</sup> Professor Levitin and Professor Wachter found that between 1997 and 2006, housing prices rose by 135%, after taking inflation into account. Levitin & Wachter, *supra* note 124, at 1179.

<sup>186</sup> This is an argument made by Peter Wallison, one of the dissenting members of the Financial Crisis Inquiry Commission, for example. FCIC, *supra* note 121, at 487 (Dissenting Statement of Peter J. Wallison).

<sup>187</sup> See FCIC, *supra* note 121 and accompanying text.

<sup>188</sup> Congress put an end to the guaranteed loan program in 2010. Glater, *supra* note 31, at 56.

### 3. Student Loans and Systemic Risk

The total dollar value of student loans outstanding as of this writing is a fraction—a little more than ten percent—of that of home loans outstanding at the onset of the financial crisis. For defaults on student loans to have the kind of systemic effects that defaults on home loans had in the period leading up to the 2008 financial crisis, rates of default would have to rise quite high and the effect of defaults would have to spread through the financial system by some means, such as securities backed by student loans. This section shows that neither of these conditions is met: student loan default rates are not high enough to pose the threat that defaults on home loans did and, because securities backed by student loans are not as widely distributed as were mortgage-backed securities, the likelihood of defaults having systemic effects is low.

First, the total amount of student loans outstanding is just about \$1.2 trillion, making the loans the largest form of consumer debt other than home loans. However, that qualification is very significant: the total amount of home loans as of March 2014 was \$8.2 trillion,<sup>189</sup> and at the peak of the housing market reached \$9.3 trillion.<sup>190</sup> The total of home loans outstanding, then, is currently more than seven times greater than the total of student loans. This difference in size does not necessarily mean that, to have a comparable impact on the financial system, defaults on student loans would have to reach the dollar value that mortgage defaults did. Still, the Financial Crisis Inquiry Commission put the dollar amount of defaulted home loans at about \$300 billion,<sup>191</sup> and other estimates concluded the total was between \$600 and \$800 billion,<sup>192</sup> or between about one-third and two-thirds of the total amount of student loans outstanding. These statistics suggest that student loan default rates would have to be much higher than they are, given that no measure of overall default rates reported by the federal Education Department has reached twenty percent.<sup>193</sup>

It is true, however, that rates of delinquency and default are higher for student loans than for home loans overall. The delinquency rate on home loans, defined as the share of borrowers more than ninety days behind on

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<sup>189</sup> *Household Debt and Credit Report*, *supra* note 145, data available at Tab 3, [http://www.newyorkfed.org/householdcredit/2014-q1/data/xls/HHD\\_C\\_Report\\_2014Q1.xlsx](http://www.newyorkfed.org/householdcredit/2014-q1/data/xls/HHD_C_Report_2014Q1.xlsx) [<http://perma.cc/L3XX-53JJ>]. This figure does not include home equity lines of credit.

<sup>190</sup> 2014 Q1 HOUSEHOLD DEBT AND CREDIT REPORT, *supra* note 145. Again, this figure does not include home equity lines of credit.

<sup>191</sup> See FCIC, *supra* note 121.

<sup>192</sup> See, e.g., Jim Haughey, *How Did \$600–800 Billion of US Mortgage Defaults Cause a Worldwide Economic Crisis?*, CONSTR. MKT. DATA (Oct. 13, 2008), <http://www.cmdgroup.com/market-intelligence/articles/how-did-600-800-billion-of-us-mortgage-defaults-cause-a-worldwide-economic-/> [<http://perma.cc/A28Y-V4RU>] (offering an explanation of how home loan defaults tied to \$600–800 billion in securities could help precipitate a financial crisis).

<sup>193</sup> U.S. DEP'T OF EDUC., DEFAULT RATES 1 (2013), <http://www.ifap.ed.gov/eannouncements/attachments/060614DefaultRatesforCohortYears20072011.pdf> [<http://perma.cc/R764-CZS9>].

payments, peaked at nearly 9% early in 2010,<sup>194</sup> and the rate at which banks charged off home loans—that is, classified the loans as defaulted and reported losses because of nonpayment—reached a high of 2.75% at year-end 2009.<sup>195</sup> Student loan delinquency rates, also defined as those more than ninety days past due, have risen to nearly 12% since the onset of recession.<sup>196</sup>

The official student loan default rate, defined as the percentage of borrowers who enter repayment in a given fiscal year and default before the end of the second following fiscal year, reached ten percent for the 2011 fiscal year.<sup>197</sup> The three-year rate was higher: 13.7%.<sup>198</sup> Both rates may well climb in the future. The Education Department estimates that the default rate on loans originated in 2011 will reach 18.4% over twenty years.<sup>199</sup> However, because the vast majority of student loans are either made<sup>200</sup> and held<sup>201</sup> by the federal government, or were made by commercial lenders under the now-defunct Federal Family Education Loan Program (“FFELP”) and are guaranteed by the federal government,<sup>202</sup> it is unlikely that the effects of defaults will spread. Securities backed by student loans are not nearly as

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<sup>194</sup> *Household Debt and Credit Report*, *supra* note 145, data available at Tab 9, [http://www.newyorkfed.org/householdcredit/2014-q1/data/xls/HHD\\_C\\_Report\\_2014Q1.xlsx](http://www.newyorkfed.org/householdcredit/2014-q1/data/xls/HHD_C_Report_2014Q1.xlsx) [<http://perma.cc/L3XX-53JJ>]. There are other definitions of delinquency; the share of borrowers more than 30 days behind on payments on loans by commercial banks has exceeded 11 percent. BD. OF GOVERNORS OF THE FED. RESERVE SYS., CHARGE-OFF AND DELINQUENCY RATES ON LOANS AND LEASES AT COMMERCIAL BANKS (2015), <http://www.federalreserve.gov/releases/chargeoff/delallsa.htm> [<http://perma.cc/3SCN-JPML>].

<sup>195</sup> BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 194.

<sup>196</sup> FED. RESERVE BANK OF N.Y., *supra* note 145, data available at Tab 9, [http://www.newyorkfed.org/householdcredit/2014-q1/data/xls/HHD\\_C\\_Report\\_2014Q1.xlsx](http://www.newyorkfed.org/householdcredit/2014-q1/data/xls/HHD_C_Report_2014Q1.xlsx) [<http://perma.cc/L3XX-53JJ>].

<sup>197</sup> U.S. DEP’T OF EDUC., *supra* note 193. To be sure, the two-year cohort default rate is an imperfect measure, reflecting only defaults within two years of entering repayment; many students may default in later years. The Education Department has shifted to reporting a three-year cohort default rate.

<sup>198</sup> *Id.* It has since declined to 11.8%. *Three-year Official Cohort Default Rates for Schools*, U.S. DEP’T OF EDUC. (Nov. 11, 2015) <http://www2.ed.gov/offices/OSFAP/defaultmanagemnt/cdr.html> [<http://perma.cc/5SY5-WAYR>].

<sup>199</sup> *Id.* at 2. This prediction means that the Department anticipates that more than 18% of loaned amounts will default; as a separate matter, the Department estimated that more than 10% of borrowers would default. *Id.* The predictions vary widely, with predicted default rates reaching nearly 50% for students at two-year, for profit institutions. *Id.*

<sup>200</sup> In 2012–13, according to the College Board, the federal government loaned students \$101.5 billion, while private lenders, such as banks, made just \$7.2 billion in student loans. COLLEGE BOARD, *supra* note 4, at 10 tbl.1. The federal government’s role in student lending dwarfs that of the private sector.

<sup>201</sup> The government reports these loans as an income-producing asset; according to the Treasury Department, the federal government held \$613.9 billion in direct student loans as of 2013. U.S. TREAS. DEP’T, FINANCIAL REPORT OF THE U.S. GOVERNMENT FOR FISCAL YEAR 2013 68 n.4 (2013), <http://www.fms.treas.gov/fr/13frusg/FR-Summary-2013.pdf> [<https://perma.cc/P8UW-ZJ3D>]. The total principal amount of loans guaranteed by the government through the FFELP program outstanding was \$264 billion. *Id.* at 69.

<sup>202</sup> Congress shut down the guaranteed loan program in 2010. Glater, *supra* note 31, at 14.

ubiquitous as those securities backed by home loans were prior to the financial crisis.<sup>203</sup>

The government's role does not mean that students who do not repay their loans impose no costs. Taxpayers are exposed to losses<sup>204</sup> when called upon to pay on the guarantees of student loans made before the shutdown of FFELP<sup>205</sup> and when students do not repay "direct loans" made by the government through the William D. Ford Federal Direct Loan Program.<sup>206</sup> But the important question when investigating systemic risk is, how might those losses be distributed and amplified? Again, the government does not sell student loans<sup>207</sup> and so the payment streams associated with these loans do not support the value of securities that could spread losses among financial institutions as securities backed by home loans did during the financial crisis. Securities backed by guaranteed loans made through FFELP prior to the program's end in 2010 exist and the total dollar value in 2013 of these securities and of private education loans,<sup>208</sup> which have no government guarantee, was \$228.4 billion,<sup>209</sup> less than the lowest estimate of the value of losses on securities backed by the riskiest residential mortgages alone during the financial crisis.<sup>210</sup>

The above discussion neither shows nor attempts to show that growth in student lending is not significant. Rather, it suggests that defaults on student loans are unlikely to have the systemic effects that defaults on home loans had in 2007–08. Although default rates on student loans have risen, the total

<sup>203</sup> Securities backed by student loans, known as student loan asset backed securities or "SLABS," generated \$25 billion in 2012, according to one report. Chadwick Matlin, *Student Loan Bubble Babble*, REUTERS (Mar. 7, 2013), <http://blogs.reuters.com/great-debate/2013/03/07/student-loan-bubble-babble/> [<http://perma.cc/5SB6-P4WJ>]. To put that in the context of the market for mortgage-backed securities, \$25 billion was the profit alone when the federal Treasury Department sold \$225 billion in mortgage-backed securities to mitigate the effects of the 2008 financial crisis. Annie Lowrey, *U.S. Completes Sale of Mortgage-Backed Securities, Earning \$25 Billion*, N.Y. TIMES (Mar. 19, 2012), <http://www.nytimes.com/2012/03/20/business/us-completes-sale-of-mortgage-backed-securities.html> [<http://perma.cc/2GDJ-WHTV>].

<sup>204</sup> Or, alternatively put, benefit from lower profits on student lending.

<sup>205</sup> See 20 U.S.C. § 1071(a)(1)(B) (2012) (authorizing the federal government guarantee of FFELP loans).

<sup>206</sup> See 20 U.S.C. § 1087a (2012) (authorizing the federal government to make student loans directly to students).

<sup>207</sup> See *supra* note 201.

<sup>208</sup> The private loan market, not included in the \$1.2 trillion estimate of the amount of federal student loans outstanding, has never exceeded twenty-five percent of total federal loans made in any given year and for several years contracted. COLLEGE BOARD, *supra* note 4, at 17 fig.6. According to the College Board, lenders made less than \$9 billion in private student loans in 2012–13, or eight percent of the total of all student loans made in that academic year. *Id.* While defaults on private student loans could be distributed quickly through securities dependent on borrower payments, the total amount of such loans is relatively small, so the systemic effects would likely be manageable. Contagion, or at least contagion likely to affect multiple and sizeable financial institutions adversely, appears unlikely.

<sup>209</sup> SEC. INDUS. AND FIN. MKTS. ASS'N, *supra* note 145, at tbl.2.1 (source data at <http://www.sifma.org/uploadedFiles/Research/Statistics/StatisticsFiles/SF-US-ABS-SIFMA.xls> [<http://perma.cc/SZ89-G9C8>]).

<sup>210</sup> See FCIC, *supra* note 121.

value of student loans outstanding is a fraction of residential mortgage debt outstanding. Securities backed by student loans are far less prevalent than were securities backed by home loans, meaning that even as student borrower defaults become more frequent, the effects of defaults are less likely to undermine major financial institutions. Securities backed by student loan repayments are not plentiful enough to function as a transmission mechanism through the financial system. Instead, the federal government holds the overwhelming share of student loan debt. The harm of defaults could ultimately be borne by taxpayers if the Education Department's estimate of its ability to recover on defaulted loans is itself faulty, but defaults are unlikely to harm investors.

#### IV. THE SIREN SONG: THE DANGEROUS IMPLICATIONS OF THE ANALOGY BETWEEN STUDENT LENDING AND PRE-FINANCIAL CRISIS MORTGAGE LENDING

The objective similarities and differences between student loans and mortgage loans are only a part of the argument. This Article is also driven by concern over a more subtle and pernicious effect of comparing student borrowers and mortgage borrowers, in light of the fierce criticism leveled at mortgage borrowers after the financial crisis.<sup>211</sup> Some pundits commenting

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<sup>211</sup> For example, then-presidential candidate Senator John McCain pointedly criticized government policies that would aid borrowers facing unmanageable mortgage payment obligations, stating that "it is not the duty of government to bail out and reward those who act irresponsibly, whether they are big banks or small borrowers." John Sullivan, *McCain Warns against Hasty Mortgage Bailout*, N.Y. TIMES (Mar. 25, 2008), <http://www.nytimes.com/2008/03/25/us/politics/25cnd-mccain.html?hpm> [<http://perma.cc/2BL5-QVRA>]. Even appearing to bail out mortgage borrowers who might have engaged in irresponsible speculation gave policymakers pause, given voter opposition to rewarding such ostensibly reprehensible investment conduct:

[Bush] Administration officials have long insisted that they do not want to rescue speculators who took out no-money-down loans to buy and flip condominiums in Miami or Phoenix. And even Democrats like Representative Barney Frank of Massachusetts, chairman of the House Financial Services Committee, have said the government should not help those who borrowed more than they could ever hope to repay.

Edmund L. Andrews, *A 'Moral Hazard' for a Housing Bailout: Sorting the Victims from Those Who Volunteered*, N.Y. TIMES (Feb. 23, 2008), <http://www.nytimes.com/2008/02/23/business/23housing.html?pagewanted=all> [<http://perma.cc/6M7U-2GX7>]. As one commentator put it, "there are plenty of folks who oppose a bailout of any kind. They argue that letting borrowers off the hook penalizes lenders and sets a bad precedent." Daniel McGinn, *Bush's Mortgage Bailout*, NEWSWEEK (Dec. 5, 2007), <http://www.newsweek.com/bushs-mortgage-bailout-94945> [<http://perma.cc/X25Y-NGLU>]. Glenn Beck summed up reasons for popular opposition pithily:

Do we need to help the people who would legitimately be out on the street if they lost their home? Absolutely. But those programs are already in place. We have strict bankruptcy laws, unemployment benefits, welfare programs and health care plans—all financed by taxpayers.

Why should there be a taxpayer-funded mortgage bailout program on top of it all? Whether one person loses a home, or a million do, it isn't a tragedy, it's a lesson.

on the causes of the financial crisis vilified homebuyers they characterized as greedy and shortsighted. Critics charged that these borrowers took on obligations they had no intention of repaying, or no ability to repay, and warned of the danger of government programs that made credit available to people who in the absence of federal policy intervention might not have been able to borrow. This Article identifies the dangerous implications of importing perceptions of borrower culpability into the context of student lending at a time when the value of a college degree may never have been higher.<sup>212</sup>

That rising debt loads borne by student borrowers provoke concern and criticism should not come as a surprise. Perhaps critics seek to create a sense of urgency around the problem of college costs by invoking a recent financial disaster. Perhaps some of those drawing the analogy have not taken their own project sufficiently seriously and investigated the extent to which student lending resembles mortgage lending. And perhaps some seek the media and scholarly attention that reward those who warn of crises.<sup>213</sup>

Yet the analogy has sinister implications for advocates of greater access to higher education and for the institutions that provide that education. This Part argues that the analogy between student lending and mortgage lending and the corresponding warnings of a student loan bubble are dangerous and should be resisted. The comparison invites incorporation of ideas about the causes of the financial crisis into the context of student loans, justifying policy responses like those adopted in response to the crisis, such as imposing more restrictive underwriting requirements.<sup>214</sup> Similar policy responses in the education context would adversely affect more vulnerable students—typically poorer students and minority students.<sup>215</sup>

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Glenn Beck, *Commentary: McMahon Shouldn't Be the Face of Foreclosure*, CNN (June 5, 2008), <http://www.cnn.com/2008/US/06/11/beck.foreclosures/index.html> [<http://perma.cc/ZJ2Y-FK4U>]. The official inquiry into the causes of the financial crisis, the Financial Crisis Inquiry Commission, was more measured but still critical of home mortgage borrowers, describing an “erosion of standards of responsibility and ethics that exacerbated the financial crisis” and noting that a number of home mortgage borrowers “likely took out mortgages that they never had the capacity or intention to pay.” FCIC, *supra* note 121, at xxii.

<sup>212</sup> See PEW RESEARCH CENTER, *supra* note 51.

<sup>213</sup> Bryant G. Garth, *Crises, Crisis Rhetoric and Competition in Legal Education: A Sociological Perspective on the (Latest) Crisis of the Legal Profession and Legal Education*, 24 STAN. L. & POL'Y REV. 503, 504 (2013) (observing that “[t]hose producing the current generation of jeremiads have become famous in the legal profession”).

<sup>214</sup> For example, the Dodd Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111-203, 124 Stat. 1376 (2010), passed in the wake of the financial crisis, required lenders to assess borrowers’ ability to repay a loan before extending credit for purchase of a home. Regulation Z, 78 Fed. Reg. 6408 (Jan. 30, 2013) (describing 12 C.F.R. § 1026.43(c) (2013)).

<sup>215</sup> This is not to say that there are not specific instances in which the analogy may be warranted, for example with respect to particular practices demonstrably common in both home lending and student lending. Some scholars have described “robo-signing” in the context of student lending, much like the phenomenon in home lending in which lenders failed to document properly the ownership of loans, without making additional claims about the danger of financial crisis. Susan Dynarski, *Remember the Problems with Mortgage Defaults? They're Coming Back with Student Loans*, N.Y. TIMES (June 12, 2014), [http://www.nytimes.com/2014/06/13/upshot/student-loan-woes-echo-mortgage-crisis.html?\\_r=0](http://www.nytimes.com/2014/06/13/upshot/student-loan-woes-echo-mortgage-crisis.html?_r=0) [<http://perma.cc/B8UD->

Comments on the causes of the financial crisis attributed the runaway real estate market and the ensuing collapse in prices to speculation by irresponsible and foolish investors. In this narrative of boom and bust, the greedy and the foolish took advantage of easy availability of credit to buy residential real estate that they could not afford. Credit, in turn, was too readily available as a result of a combination of weak incentives for lenders to scrutinize borrower finances, as discussed previously, and lax regulation, as found by the Financial Crisis Inquiry Commission.<sup>216</sup>

In a comparable narrative about student lending, overly optimistic, would-be college students borrow more than they should through federal loan programs that do not take into account their creditworthiness. These borrowers then find themselves weighted down by repayment obligations that they cannot manage. As a result of default, taxpayers are exposed to losses. Again, applying the analogy to mortgage borrowing, students purchased more education than they could afford given their post-college earnings: students went to college who should not have done so, and they did it because it was too easy to borrow.

This story of the overconsumption of higher education suggests that too many people and/or the wrong people are going to college, because it is too easy to find a way to pay for it. Policy solutions involve restricting credit to pay for higher education, for example by tying the availability or terms of credit to characteristics or choices of the borrower, such as borrower creditworthiness;<sup>217</sup> to student decisions that might affect postgraduate earnings, such as choices about what to study;<sup>218</sup> and to institutional characteristics, such as the frequency of poor outcomes as measured by postgraduate job placement and/or loan default rates.<sup>219</sup>

Such restrictions on the availability of credit would adversely affect students historically excluded from higher education opportunity in the United States, namely those with lower incomes and less wealth.<sup>220</sup> African-American and Latino students, who are more likely to come from lower-income families and correspondingly are disproportionately likely to need to borrow to pay for higher education, would experience the effects to a greater

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Z3DT]. That kind of identification of specific conduct without overclaiming about potential systemic effects is not so fraught.

<sup>216</sup> FCIC, *supra* note 121, at xxi. Based in part on this recent history, Professor A. Mechele Dickerson has offered the provocative argument that not everyone should strive to own a home. Mechele Dickerson, *Public Interest, Public Choice and the Cult of Homeownership*, 2 U.C. IRVINE L. REV. 843, 868–69 (2012).

<sup>217</sup> Howard, *supra* note 19, at 508.

<sup>218</sup> Simkovic, *supra* note 58, at 604.

<sup>219</sup> Through rules on “gainful employment,” the federal Education Department has attempted to put some restrictions on student loan availability to students at for-profit schools whose graduates experience poor education or employment outcomes. 34 C.F.R. § 668.403 (2015).

<sup>220</sup> See Phyllis C. Smith, *The Elusive Cap and Gown: The Impact of Tax Policy on Access to Higher Education for Low-Income Individuals and Families*, 10 BERKELEY J. AFR.-AM. L. & POL'Y 181, 184–85 (2008) (describing uneven distribution of wealth and income by race and the difficulty lower-income families face in paying for college).

degree.<sup>221</sup> Deployment of traditional credit criteria to assess financial aid applicants would result in harsher loan terms or outright denial of credit. Such a change in financial aid policy would be a radical move in that it would abandon the goals of lawmakers who, when they approved the HEA, sought to enable students to attend college regardless of their family wealth or income.<sup>222</sup> Promoting access to education serves a material goal in that it enables upward socioeconomic mobility and all that higher lifetime earnings can provide; providing access to education regardless of financial means bolsters the American aspiration toward equal opportunity for all.<sup>223</sup>

Each of the policy moves described below, driven by concern over a student loan bubble and potential crisis, may enable policy changes effectively restricting access to college for students who historically have been excluded from or underrepresented on campuses. Discourse of a higher education bubble or a student loan bubble may also lead colleges and universities to change their spending patterns in ways that undermine their accessibility.<sup>224</sup>

#### A. *Tying the Cost of Credit to Borrower Characteristics*

Taking into account traditional indicators of borrower creditworthiness in the context of federal student aid would represent a radical break from decades of government policy and, although no one is explicitly advocating this course of action, it is possible. For example, students whose families hold fewer assets or earn lower incomes could be charged higher interest rates or higher loan origination fees, or they could be required to earn higher grades as a condition of maintaining access to loans.

Such a lending regime would penalize poorer students, making it harder for them to go to college, and reward higher income students who need less financial assistance. Extending credit without regard to the financial circumstances of the borrower was the point of the federal legislative intervention in higher education finance, in the view of lawmakers and the presidential

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<sup>221</sup> See NAT'L CTR. FOR EDUC. STATISTICS, DEBT BURDEN: A COMPARISON OF 1992-93 AND 1999-2000 BACHELOR'S DEGREE RECIPIENTS A YEAR AFTER GRADUATING 10 (2005) <http://nces.ed.gov/pubs2005/2005170.pdf> [<http://perma.cc/TW3X-M3HQ>].

<sup>222</sup> See Glater, *supra* note 8 (describing the goals of the Higher Education Act of 1965, Pub. L. 89-329, 79 Stat. 1219). Indeed, to remain in keeping with the goals of the Higher Education Act, it would make more sense to ease the terms of loans for lower-income students and toughen them for wealthier students likely to have other options in obtaining credit. The goals of the HEA are discussed *infra* in Part V.

<sup>223</sup> As President Johnson put it when signing the Higher Education Act of 1965. See Johnson, *supra* note 41.

<sup>224</sup> The pressure to make these changes would vary depending on the institution. Wealthier institutions could draw on endowment income, for example, to try to avoid having to make hard choices involving spending cuts.



administration that championed it.<sup>225</sup> That aspect of the aid system was not a mistake in need of correction.

### B. *Tying the Cost of Credit to Borrower Choices*

Lawmakers could choose to vary terms of loans based on criteria other than creditworthiness. For example, Professor Michael Simkovic has proposed tying interest rates on education loans to students' choice of major, with higher rates charged to those who pursue courses of study associated with lower-income careers.<sup>226</sup> Such a policy would penalize those students, with potentially pernicious effects to the extent that those students disproportionately belong to historically excluded groups.<sup>227</sup> If effective, the policy would encourage students to pursue jobs that pay well and ignore jobs that, though poorly compensated, are societally useful. However, it is also possible that the price signal would not be received by students, and so the result would be higher debt burdens on students in lower-pay careers, an outcome that would be far from ideal.

A number of states already offer grants to students based on their past performance in high school or on standardized tests,<sup>228</sup> a policy choice that rewards students who in many cases would enroll in college regardless of aid offered to them and whose families enjoy higher levels of wealth and income.<sup>229</sup> As with application of traditional credit criteria to education loan applicants, discriminating on the basis of performance in school or on standardized tests in many cases could reinforce inequality among students. Standardized test scores in particular have been found to track quite closely the wealth of the students taking them.<sup>230</sup> Thus, tying aid terms or availability to test scores would be regressive in effect and contrary to the goals of the HEA.

### C. *Raising the Cost of Borrowing for All Students*

A seemingly more neutral step would be to raise the cost of debt for all students, regardless of borrower career plans, academic performance, or

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<sup>225</sup> President Lyndon B. Johnson stated that the HEA “means that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States [sic] and not be turned away because his family is poor.” Johnson, *supra* note 41.

<sup>226</sup> Simkovic, *supra* note 58, at 630.

<sup>227</sup> For a fuller elaboration of this critique of Professor Simkovic's proposal, see generally Jonathan D. Glater, *The Unsupportable Cost of Variable Pricing of Student Loans*, 70 WASH. & LEE L. REV. 2137 (2013).

<sup>228</sup> See 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 26, 27–28 (Donald E. Heller and Patricia Marin eds., 2002).

<sup>229</sup> Heller & Rasmussen, *supra* note 228, at 30–35.

<sup>230</sup> See LANI GUINIER, *THE TYRANNY OF THE MERITOCRACY: DEMOCRATIZING HIGHER EDUCATION IN AMERICA* 21 (2015).

other characteristics. This too would reinforce rather than undermine preexisting inequality among students. Wealthier students' college decision-making processes would continue unaffected by loan terms, while poorer students might be deterred from pursuing higher education at all as a result of the higher cost. There is some evidence that particular groups of students—recent immigrants, for example, and Asian and Hispanic students<sup>231</sup>—are more likely to be deterred by the prospect of debt.<sup>232</sup> To the extent that potential college students from these groups choose to forego college because of aversion to debt, raising the cost of borrowing could well “undermine one of the explicit goals of federal student aid programs: to put higher education within reach of students desiring it.”<sup>233</sup>

Nonetheless, legislative steps to raise the cost of student borrowing are not purely hypothetical. Federal lawmakers' decision to peg interest rates charged to student borrowers to the federal government's cost of credit is a recent example.<sup>234</sup> Some supporters of the legislation worried that students used federal aid programs to borrow too much.<sup>235</sup> Indeed, the Congressional Budget Office estimated that declines in borrowing activity would reduce federal spending on student loans by \$3.7 billion between 2013 and 2023.<sup>236</sup> Some of those supporting the legislation must have reasoned that less borrowing is good. It is a belief that may not be appropriate in this context. More students consuming more higher education using federal loans may represent the kind of investment that policymakers want, or should want, to encourage.

#### *D. Restricting the Availability of Student Loans at Bad Institutions*

Lawmakers and regulators have considered denying federal education loans to students who attend institutions with particular, undesirable characteristics.<sup>237</sup> Regulations already include some requirements for institutional eligibility to participate in federal aid programs,<sup>238</sup> which are governed by Title IV of the HEA. Regulations adopted in 2014 focus on students' ability

<sup>231</sup> Sara Goldrick-Rab & Robert Kelchen, Making Sense of Loan Aversion: Evidence from Wisconsin 9–10 (Oct. 2013) (presentation at University of Michigan Conference on Student Loans), <http://www.upjohn.org/stuloanconf/Goldrick-Rab%20and%20Kelchen%20Loans%20Oct%205.pdf> [<http://perma.cc/43TK-E52W>].

<sup>232</sup> See Glater, *supra* note 31, at 24.

<sup>233</sup> See *id.* at 24–25.

<sup>234</sup> See *id.*

<sup>235</sup> 113 CONG. REC. S5,880 (daily ed. Jul. 24, 2013) (statement of Sen. Alexander) (expressing concern that “[s]ome students are borrowing too much money”).

<sup>236</sup> *Id.*

<sup>237</sup> See 34 C.F.R. § 668.403 (2015) (describing new rules restricting availability of federal student loans to students at institutions whose graduates experience poor education and/or employment outcomes).

<sup>238</sup> Obama Administration Announces Final Rules to Protect Students from Poor-Performing Career College Programs, U.S. DEP'T OF EDUC. (Oct. 30, 2014), <http://www.ed.gov/news/press-releases/obama-administration-announces-final-rules-protect-students-poor-performing-career-college-programs> [<http://perma.cc/TB7P-TZ88>].

to repay loans after they leave the institution that provided their education, for example.<sup>239</sup> However, regulatory efforts have met strong resistance especially from for-profit colleges, which serve more students who are poor and who are members of minority groups.<sup>240</sup> Restricting access to credit for students at the for-profit institutions consequently restricts credit disproportionately for the kinds of students that federal legislation sought to assist.<sup>241</sup>

### E. Cutting Institutions' Costs

The availability of credit is only part of a bubble; asset prices must also exceed their natural, justifiable level. Criticism of a higher education “bubble” implies that the prices charged by colleges and universities significantly exceed the value of the education provided and correspondingly implies that costs should be lowered. Consequently another solution to rising debt levels involves cutting costs at higher education providers, which would affect the quality of students’ education experience in ways that are beyond the scope of this Article, though others have written insightfully about the impact of reducing costs.<sup>242</sup> Those efforts may play out differently in different campus settings, depending on each school’s major cost drivers—faculty salaries or technology, for example. For present purposes, it is enough to note that talk of a bubble in the context of higher education suggests not only that credit is too easy, but also that prices are too high.

But attacking tuition pricing has implications for higher education access that are more directly relevant, too. One reason tuition is high is financial aid. Put simply, when publicly stated tuition rises, financial aid must rise commensurately to assist those who do not pay the sticker price.<sup>243</sup> The need to maintain aid presses stated tuition upward.<sup>244</sup> Aid is one expense, along with faculty salaries, that could prove vulnerable to cost cutting.<sup>245</sup> Institutional efforts to lower prices in response to the bubble critique could consequently and somewhat paradoxically reduce access to higher education for those of lesser means.

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<sup>239</sup> Program Integrity: Gainful Employment, 79 Fed. Reg. 64890 (Oct. 31, 2014).

<sup>240</sup> Robert C. Cloud & Richard Fossey, *Facing the Student Debt Crisis: Restoring the Integrity of the Federal Student Loan Program*, 40 J. COLL. & UNIV. L. 467, 485–86 (2014).

<sup>241</sup> See *infra* Part IV (describing the history and goals of federal higher education law and policy).

<sup>242</sup> See, e.g., EHRENBERG, *supra* note 71, at 267–68.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> As Professor Ehrenberg puts it in his analysis of the options facing even some of the nation’s most selective colleges and universities, “Some [institutions] will be unable to afford to simultaneously maintain their academic quality, the socioeconomic diversity of their students, their faculty salaries, and the research support that they provide for faculty members. Something will have to give.” *Id.* at 268.

## V. STUDENT LENDING AND THE GOALS OF FEDERAL AID

Any policies that have the effect of limiting student borrowing to pay for college run counter to the goals of the legislation that established federal student aid programs. For decades, the federal intervention in higher education finance has sought to enable more students to go to college. This Part briefly summarizes the legislative history of those interventions and describes their rationale.

During and after World War II, the federal government's role in higher education expanded dramatically in two senses. First, federal resources devoted to higher education increased sharply and the form of federal support changed, with direct funding of research declining<sup>246</sup> and aid to students expanding.<sup>247</sup> Second, under the HEA, federal resources became available to all college students, not just those who were veterans as was the case immediately after World War II, and not just those studying in particular fields of national need, as during the Cold War.<sup>248</sup> This expansion offered financial aid that is portable and available for use at all manner of institutions. The expansion has enabled not just college access but college choice. A student today may well expect not only to draw upon federal aid to go to college, but to attend a particular institution, public or private, nonprofit or for-profit, chosen by that student.<sup>249</sup>

Policy choices underlying these trends reflect pragmatic compromises between views of higher education as a national asset, a public good requiring federal investment to enable greater access, or a private asset, an individual student's investment generating a personal benefit. The former view may explain the easy availability of student loans, for example, while the latter may justify the provision of loans rather than grants, the setting of interest

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<sup>246</sup> Michael S. McPherson & Morton Owen Schapiro, *Changing Patterns of Institutional Aid: Impact on Access and Education Policy*, in *CONDITION OF ACCESS: HIGHER EDUCATION FOR LOWER INCOME STUDENTS* 73, 73–94 (Donald E. Heller ed., 2002).

<sup>247</sup> Lawrence E. Gladieux, *Federal Student Aid in Historical Perspective*, in Heller, *supra* note 246, at 45, 45–57.

<sup>248</sup> CHRISTOPHER P. LOSS, *BETWEEN CITIZENS AND THE STATE: THE POLITICS OF AMERICAN HIGHER EDUCATION IN THE 20TH CENTURY* 175–76 (2012) (describing HEA's reach beyond veterans to "untold millions of students").

<sup>249</sup> Aid need not have been made available in this way; participation in federal programs could have been limited to public institutions, for example. Now that choice has been enabled for decades, movement in another direction would certainly meet with resistance from students and from private nonprofit and for-profit institutions. Yet choice need not complement and, given tuition demands at colleges and universities that are not public, may indeed undermine access.

rates to limit the size of the subsidy effectively given to borrowers,<sup>250</sup> and the restrictions on discharge of student loans via bankruptcy proceedings.<sup>251</sup>

The Servicemen's Readjustment Act of 1944 (the "G.I. Bill")<sup>252</sup> provided access to higher education to a generation of returning soldiers whose college years were spent waging war. The National Defense Education Act of 1958,<sup>253</sup> passed in response to the Soviet Union's launch of the Sputnik satellite, sought to identify those promising students who were most capable of assisting in the advance of the nation and who otherwise might not seek higher education at all, and provided aid to less promising students as a collateral benefit. The HEA and subsequent amendments through the 1970s reflected a push toward putting higher education within reach of all, regardless of their means; and subsequent amendments of the HEA reveal greater concern for helping families in the middle class manage the cost of higher education. Throughout this period and until very recently, the goal of federal intervention in higher education was to assist an ever more broadly defined student population. Only after the financial crisis of 2008 has rising student indebtedness begun to be cited as a reason to curtail the availability of federal student loans.

The legislation that tied student loan interest rates to market rates followed a pair of hearings before the House Committee on Education and the Workforce in 2013 at which several witnesses discussed the need to shift away from rates set by Congress.<sup>254</sup> That system, witnesses warned, imposed rates higher than those charged by the market on borrowers and exposed the government to rising costs should its cost of funds rise.<sup>255</sup> Representative was the concern of Jason Delisle of the New America Foundation, who told members—intending it as a criticism—that “[c]urrently, the program charges borrowers the same fixed interest rates no matter what happens to the interest rates in the economy.”<sup>256</sup> Because the rates are set by lawmakers over time, the fixed-rate regime “provide[s] very different levels of subsi-

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<sup>250</sup> Congress ended the Family Federal Education Loan Program, through which the federal government guaranteed loans made to students by non-government lenders including for-profit financial institutions, in 2010. David M. Herszenhorn & Tamar Lewin, *Student Loan Overhaul Approved by Congress*, N.Y. TIMES (Mar. 25, 2010), <http://www.nytimes.com/2010/03/26/us/politics/26loans.html> [<https://perma.cc/4XBE-8GLD>] (reporting on elimination of the guaranteed loan program as part of health care legislation). Prior to that policy shift, whether student loan programs generated a profit for the government was fiercely contested. Glater, *supra* note 31, at 40. For the purposes of this article, it is enough that the decision to base student loan rates on the government's cost of funds reflects the desire, at least, to avoid losing money by extending credit to college and graduate students.

<sup>251</sup> See 11 U.S.C. § 523(a)(8) (2012) (according student loans exceptional treatment under the Bankruptcy Code by prohibiting discharge of education debt unless repayment would cause a borrower “undue hardship”).

<sup>252</sup> Pub. L. 78-346, 58 Stat. 284 (1944).

<sup>253</sup> Pub. L. 85-864, 72 Stat. 1580 (1958).

<sup>254</sup> Bipartisan Student Loan Certainty Act of 2013, Pub. L. 113-28, 127 Stat. 506 (2013).

<sup>255</sup> *Id.*

<sup>256</sup> H. R. REP. NO. 113-082, pt. 1, at 6 (2013) (quoting statement of Jason Delisle).

dies to borrowers depending on when they take out their loans.”<sup>257</sup> This argument presaged the assertion of the majority that “[p]oliticians should not be in the business of setting student loan interest rates”<sup>258</sup> and that such responsibility, impacting students’ ability to finance a college education, should belong to the market.

There are responses to this framing of the issue, though they are absent from the committee report on the legislation.<sup>259</sup> While some borrowers at the time had to pay rates higher than those charged by lenders in other contexts because interest rates were generally low, financial market conditions change. Students will face different rates at different times depending on market conditions, making higher education more risky for some by accident of timing over which they may have no control.<sup>260</sup> Most importantly, market rates do not answer to the underlying question of how much the federal government and, behind it, the polity, should subsidize access to college. There is no empirical reason why the rate charged to student borrowers should be 2.05 percentage points above the ten-year Treasury rate. That is a normative judgment.

This underlying question of the appropriate subsidy to promote access was not lost on participants in debate over the legislation, at least in the Senate. As Senator Angus King put it, “I am perfectly willing to have the debate, to have the discussion about, A, what do we do about college costs, and, B, should the Federal Government be playing a greater role in terms of support for students? I think that is a very honest discussion.”<sup>261</sup>

But that is not the debate that occurred. Instead, lawmakers on both sides of the aisle focused on cost: providing loans with fixed, low rates, as had been done in the past, was deemed too expensive.<sup>262</sup> Lawmakers were

<sup>257</sup> *Keeping College Within Reach: Examining Opportunities to Strengthen Federal Student Loan Programs: Testimony before the H. Comm. on Educ. and the Workforce*, 113th Cong. (Mar. 13, 2013) (written testimony of Jason Delisle, Director, Federal Education Budget Project, New America Foundation), [http://edworkforce.house.gov/UploadedFiles/Delisle\\_Written\\_Testimony\\_.pdf](http://edworkforce.house.gov/UploadedFiles/Delisle_Written_Testimony_.pdf) [https://perma.cc/55G7-NMX5].

<sup>258</sup> 127 Stat. 506.

<sup>259</sup> Instead, opponents focused on the potential rising costs to students, as a result of tying rates to market conditions, and on the fairness of reducing the federal deficit thereby. *Id.* However, Senator Reed and others did speak against government earning a profit on student loans. 159 CONG. REC. S5,871 (daily ed. July 24, 2013) (statement of Sen. Reed).

<sup>260</sup> To be clear, the rate on loans is fixed at origination, based on the ten-year Treasury rate. However, the rate varies over time, so that a loan taken out one year would have a different fixed rate than a loan taken out another year.

<sup>261</sup> 159 CONG. REC. S5,877 (daily ed. July 24, 2013) (statement of Sen. King). Senator Reed was more eloquent, lamenting: “We are essentially adopting a new approach to Federal policy on higher education. We are not subsidizing it; we are not making it below market rates. We are shifting the costs on to students. That is because one of the premises in this proposal, quite obviously, is that there will be no cost to the government.” *Id.* at S5,887 (statement of Senator Reed).

<sup>262</sup> *Id.* at S5,889 (statement of Sen. Durbin) (“I happen to like the National Defense Education Act. I like holding interest rates at 3 percent. I like the payback terms. But the number of students taking out loans and the cost of higher education have reached a point where we cannot do that.”).

unwilling to take on the risk of continuing to lend to students at fixed rates.<sup>263</sup>

Lawmakers have recognized market conditions and events affecting student borrowers in other ways over the years. For example, both state and federal legislators have created loan forgiveness programs aimed at encouraging graduates to pursue careers in particular fields, such as education,<sup>264</sup> and in particular places, such as rural communities.<sup>265</sup> These moves represented rejection of the determinations of the market in pursuit of a particular vision of the greater good. Members of Congress in 2013 decided to reinforce the market's incentives in order to control government costs, to reduce the government's risk by shifting one component of that risk onto borrowers. It is in this way that Congress's act constitutes acceptance of arguments that education debt poses a threat to the nation as a whole, much as rapid growth in mortgage debt did. In lawmakers' eyes, this threat could manifest itself not through harmful effects on individual borrowers but to the public fisc, and that threat had to be mitigated.

## VI. CONCLUSION

The preceding pages have sketched the fears expressed by federal student aid's critics that rising student indebtedness and default rates could lead to a financial crisis in the future, much as rising mortgage debt contributed to a financial crisis in the not-so-distant past. The Article has argued that these fears may be used to justify restrictions on the availability of student loans and, indeed, that lawmakers already took a step in that direction when they tied student borrower interest rates to the government's cost of funds in 2013.<sup>266</sup> The Article has suggested that the comparison of student loan debt to residential mortgage debt, a comparison some have made explicitly, is pernicious in its implication that access to credit for higher education should be curtailed, because imposing such limits on credit availability would likely reduce access to higher education for poorer students.<sup>267</sup> The Article compared student loan debt to mortgage debt and concluded that defaults on student loans are unlikely to cause the ripple effects caused by defaults on home loans in the period leading up to the 2008 crisis.

In offering a critique of the analogy between student lending and mortgage lending, this Article does not mean to suggest that the nation does not

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<sup>263</sup> Subsequent legislative action did not modify the method of calculation of interest rates.

<sup>264</sup> See, e.g., *Teacher Loan Forgiveness*, U.S. DEP'T OF EDUC. FED. STUDENT AID, <https://studentaid.ed.gov/repay-loans/forgiveness-cancellation/teacher#teacher-loan-forgiveness> [<https://perma.cc/8UTG-3S7S>].

<sup>265</sup> See, e.g., *Loan Repayment Programs*, GA. BD. FOR PHYSICIAN WORKFORCE, <http://gbpw.georgia.gov/loan-repayment-programs> [<http://perma.cc/6WBP-28M3>].

<sup>266</sup> See *supra* Part IV.C.

<sup>267</sup> Or, depending on the proposal, for students with worse grades and/or scores on standardized tests, who also are, disproportionately, poorer students and students of color. See *supra* notes 219–228 and accompanying text.

face a crisis in higher education finance. We do, but as I have argued elsewhere,<sup>268</sup> it is a very different crisis. It is precisely a crisis of access: federal aid policies intended to facilitate higher education access have failed to provide grant aid commensurate with rising costs of attendance, forcing students to take on debt that for some proves devastating. The proper solution is expanded grant aid to students *ex ante* or expanded forgiveness *ex post*, to enable students to attend college without taking on a potentially unmanageable repayment burden.

Trends in higher education participation and borrowing do not make imminent a financial crisis of the sort the nation experienced in 2007–2008. Rather, they portend a decline in college participation by those with lower incomes or less wealth—a decline that should hardly be reinforced by restricting availability of federal loans. Rising tuition and debt burdens threaten access for students of lesser means, not the financial system. The federal aid programs that put college within reach should not be curtailed in response to a misguided argument about financial stability, no matter how seductive that argument is.

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<sup>268</sup> Glater, *supra* note 8.