TO THE RICH GO THE SPOILS: MERIT, MONEY, AND ACCESS TO HIGHER EDUCATION

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Abstract

Although student aid from the federal government has provided grants and loans allowing more students to pursue higher education, meaningful access remains elusive for those of lesser means. Students who belong to historically excluded groups lag in rates of matriculation and graduation. Too often they take on debt burdens that hurt their educational experience and constrain their subsequent careers, while aid allocated on the basis of academic achievement too often is regressive in effect. This Article analyzes the impact of different, and at times conflicting, models guiding federal aid policy. The Article advocates re-establishment of access as the paramount goal, a move that would restore coherence to the student aid regime and enhance college accessibility.

I. Introduction

Financial aid from the federal government helps put higher education within reach of aspiring college students and plays a critical role in determining who has meaningful access to opportunity in the United States. Increasingly, this system works to undermine the success of poorer students and, disproportionately, African American and Latino students[1] who need and receive financial aid. This outcome has occurred not because federal aid policy has failed but because of how it has succeeded: Government-provided credit enables students to finance college. The rising cost of college[2] has led more students to borrow larger amounts

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1 More than 50 percent of African American undergraduate students use federal student loans to help pay for higher education while overall, about 40 percent of undergraduate students do. Education Department, Digest of Education Statistics 2014 ("Digest"), Table 331.10 ("Percentage of undergraduates receiving financial aid, by type and source of aid and selected student characteristics: 2011-12"), available at http://nces.ed.gov/programs/digest/d14/tables/dt14_331.10.asp. About 40 percent of white students take out federal loans, 34 percent of Latino students, and 27 percent of Asian students. Id.

2 Growth in tuition and fees (and tuition, fees, room and board) at both public and private, four-year colleges has exceeded the rate of growth in consumer prices for decades, although it has been declining in recent years. College Board, Trends in College Pricing 2014 16 (Fig. 5: "Average Annual Percentage Increase in Inflation-Adjusted Published Prices by Decade, 1984-85 to 2014-15"). Between the 1984-85 and 2014-15 academic years, the average published tuition and fees at private four-year institutions rose by 146%, from $12,716 (in 2014 dollars) to $31,231. The average published price for in-state students at public four-year institutions increased by 225%, from $2,810 to $9,139. Id.

and that debt can undermine academic success[3], career choice[4], and socioeconomic mobility[5] – the very goals lawmakers sought to promote. Access is less meaningful to the extent that those who use federal aid are constrained to a greater degree than those students who do not. Meaningful access, enabling students to pursue careers regardless of how they finance higher education, is undermined by debt. Growing indebtedness is the product of conflicting legislative efforts,[6] declining direct financial support of public colleges and universities,[7] and corresponding growth in tuition that has exceeded growth in household incomes.[8] This Article identifies distinct models that have guided policy interventions affecting the accessibility of higher education in the United States and develops a critique of their effects.

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3 Nearly one-third of students who started college in the 2003-04 academic year and who subsequently dropped out reported that they did so for financial reasons. Terris Ross, Grace Kena, Amy Rathbun, Angelina KewalRamani, Jijun Zhang, Paul Kristapovich, Eileen Manning, Higher Education: Gaps in Access and Persistence Study 190 (2012) (Table 38-1: "Percentage of 2003-04 beginning postsecondary students who left school by 2004 without completing a program and the reported reasons for leaving, by sex and race/ethnicity: 2004").

4 Jesse Rothstein and Cecilia Elena Rouse, *Constrained after College: Student Loans and Early Career Occupational Choices*, National Bureau of Economic Research Working Paper 13117 (2007), at 26, available at http://www.nber.org/papers/w13117.pdf (finding that when a highly selective college eliminated loans from financial aid awards, students made different career choices: "[S]tudents with more debt are less likely to accept jobs in low-paying industries and accept higher paying jobs more generally").

5 For example, there is some evidence that indebted college graduates have less opportunity to start their lives and careers: they may postpone buying a house. Wenli Li, *The Economics of Student Loan Borrowing and Repayment*, Federal Reserve Bank of Philadelphia Business Review at 9(2013); *see also* Andrew Martin and Andrew Lehren, *A Generation Hobbled by the Soaring Cost of College*, N.Y. Times, May 13, 2012 at A1 (reporting that student debt led borrowers to put off major purchases, in some cases to move in with relatives and even to cease to continue pursuit of education).

6 *See infra* Part III.

7 The amount of money that states have provided to public colleges and universities per student enrolled has declined for years. College Board, Trends in College Pricing 2014 27 (Fig. 16B: "Total and Per-Student State Funding for Higher Education in 2013 Dollars, and Public FTE Enrollment, 1983-84 to 2013-14"); *see also* Wenli Li, *The Economics of Student Loan Borrowing and Repayment*, Federal Reserve Bank of Philadelphia Business Review at 4 (2013) (reporting that "state appropriations for colleges and students sank by 7.6 percent in 2011-12, the largest such decline in at least half a century").

8 According to the Federal Reserve Bank of San Francisco, average household income in 2012 reached $71,274 and the median household earned $51,017. Federal Reserve Bank of San Francisco, *U.S. Household Incomes: A Snapshot*, available at http://www.slideshare.net/fullscreen/FRBSFWeb/income-snapshot-final20140204/2. Ten years earlier, the median family earned more: $54,127. Federal Reserve Bank of San Francisco, *Median Household Income: Life in the Middle*, available at http://www.frbsf.org/education/files/MedianIncome_Final_2014-02-04.pdf. These figures take into account inflation. *Id.* The current median household income figure is nearly identical to that earned in the mid- to late 1980s, although incomes did rise through the 1990s before falling. *Id.* "A household includes the related family members and all the unrelated people, if any, such as lodgers, foster children, wards, or employees who share the housing unit." Census Bureau, *Current Population Survey – Definitions*, available at https://www.census.gov/cps/about/cpsdef.html, last visited August 29, 2014. The financial crisis of 2008, not surprisingly, had an adverse effect on household incomes; one study found that real median household income fell by 11 percent between 2007 and 2010. Wenli Li, *The Economics of Student Loan Borrowing and Repayment*, Federal Reserve Bank of Philadelphia Business Review at 4-5 (2013).

The regime that enables access to higher education is a regulatory system. This characterization may run counter to popular perceptions of what matters in achieving college access and success. Merit is supposed to determine these outcomes,[9] perhaps with federal aid playing a supporting but subordinate role by reducing or eliminating financial obstacles. No central authority dictates who attends a particular college or university, let alone what happens to a student afterward. Rather, a web of institutions and practices in concert–and sometimes in conflict–functions as regulator. The evolution of federal programs illustrates that regulatory systems may come into being in the absence of a formal agency and indeed in the absence of planning. In the mid-1960s, when federal lawmakers established the early version of the aid regime that students rely on to this day, they saw what they did as intervening in a market to promote access;[10] they corrected an imperfection.[11]

Processes including the provision and setting of terms of education loans, the award of need-based and non-need-based grant aid, and the application of a conservative and simplistic definition of merit all determine higher education opportunity.[12] The system directly implicates questions of law, because Congress created aid programs,[13] federal legislation sets the terms of federal loans and grants,[14] and federal courts have repeatedly addressed the question of what criteria selective institutions may consider when deciding whom to admit.[15] The education of the citizenry has for centuries been a concern of law as well as politics and civil rights battles over access to classrooms have raged in courts, state legislatures and the Capitol. Consequently, policies and practices that restrict access to higher education are proper subjects of legal, scholarly analysis, which may advance and enhance potential proposals for reform.

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10 111 Cong. Rec. – Senate 22,692 (Sept. 2, 1965) (statement of Sen. Yarborough) ("[S]ince commercial credit is frequently available only at high interest rates and must be repaid in the same year in which it is borrowed, it seems advisable to have a program in which loans can be secured at a reasonable rate of interest and be paid back over a longer period of time").

11 Milton Friedman, typically an advocate of markets unfettered, noted the possibility of this particular imperfection in Capitalism & Freedom, more than 50 years ago: in the absence of government action, there could be underinvestment in human capital, perhaps because "market investment in human beings cannot be financed on the same terms or with the same ease as investment in physical capital." Milton Friedman, Capitalism & Freedom 88 [tk confirm cite] (2002). However, higher education need not be perceived as a commodity sold by colleges and universities in order to accept the argument of this Article. This commodification of education has been lamented by many within the academy. *See, e.g.*, Derek Bok, Universities in the Marketplace: The Commercialization of Higher Education 6 (2004) (warning of the danger of commercialization to the traditional mission of the university).

12 This Article, however, will focus on federal student aid. Others have addressed the consequences of traditional measures of merit; *see, e.g.*, Lani Guinier, The Tyranny of the Meritocracy: Democratizing Higher Education in America 13 (2015).

13 National Defense Education Act of 1958 ("NDEA"), Pub. L. 85-864, §201 et seq. ("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").

14 20 U.S.C. §1091.

15 The federal Supreme Court has addressed the consideration of race in the admissions processes of selective institutions of higher education more than once, most recently permitting the practice under limited circumstances in *Fisher v. Texas*. Fisher v. Texas, No. 14-981 (slip op.). It is likely that the Court will take up the question again.

This Article is motivated by concern over–and seeks to address–persistent gaps in enrollment in and graduation from degree-granting institutions by students who are members of groups historically excluded from higher education opportunity in the United States, especially African American students, Latino students, and poorer students.[16] The proposals contemplated below also respond to the uneven distribution of debt affecting those who do pursue higher education: It is poorer students who need to borrow.[17] The increasing use of aid not awarded on the basis of financial need exacerbates the problem, as described further below.[18]

The analysis in this Article builds and expands upon prior work that recognized the effect of rising college costs and growing student indebtedness to be redistribution of risk onto students and families, who bear a larger share of the cost of higher education now than in past years and who must borrow to manage it.[19] As that essay noted, the allocation of risk is a tool to influence behavior in pursuit of policy goals; the riskier the conduct, the less attractive it is and, presumably, the fewer people engage in it.[20] Risk is only one of the regulatory mechanisms at work in the context of higher education and this Article encompasses others. In doing so, the Article identifies different models federal higher education policy has adopted and the ways in which they are in tension; this contribution to the conversation over access ties more abstract critiques of education's role in perpetuating inequality[21] to concrete legislative acts.

The discussion that follows has four parts. Part II analyzes federal student aid and explains how it both (a) constrains meaningful access to higher education for aspiring students of lesser means and for students who belong to groups historically excluded from college and (b) facilitates access for others who enjoy more privileged backgrounds. One driver of this trend and a particular target of the critique developed in this Article is increased use of financial aid awarded to students not

16 *See, e.g.,* Jeremy Ashkenas, Haeyoun Park, and Adam Pearce, *Even With Affirmative Action, Blacks and Hispanics Are More Underrepresented at Top Colleges Than 35 Years Ago*, N.Y. Times, Aug. 24, 2017, available at https://www.nytimes.com/interactive/2017/08/24/us/affirmative-action.html (reporting on widening gaps in enrollment by black and Hispanic students at various selective, four-year colleges and universities); Education Department, *Higher Education: Gaps in Access and Persistence* xii (Fig. 6) (Aug. 2012), available at http://nces.ed.gov/pubs2012/2012046.pdf (showing gaps in college attendance among students of different racial/ethnic backgrounds, with fewer black and Latino students enrolled); see also Education Department, *Digest of Education Statistics* Table 302.30 (Percentage of recent high school completers enrolled in 2-year and 4-year colleges, by income level: 1975 through 2013), available at http://nces.ed.gov/programs/digest/d14/tables/dt14_302.30.asp?current=yes (showing that a greater share– about 64 percentof students from high-income families enrolled in college, while about half of students from low-income families did).

17 Among students who borrow, debt burdens are also uneven across students of different racial and ethnic backgrounds. African Americans are more likely to need to borrow to pay for college, for example. Abbye Atkinson, *Race, Educational Loans & Bankruptcy*, 16 Mich. J. Race & L. 1, note 99 and accompanying text (2010).

18 *See infra* Part II.C.

19 Jonathan D. Glater, *Student Debt and Higher Education Risk*, forthcoming 103 Cal. L. Rev. 1561 (2015).

20 *See, e.g.*, Tom Baker, *Health Insurance, Risk, and Responsibility after the Patient Protection and Affordable Care Act*, 159 U. Pa. L. Rev. 1577, 1621 (2011) (noting that adjusting cost of care to the patient through insurance policy terms may change behavior).

21 *See infra* note 23.

on the basis of need but on the basis of test scores and/or grades. The critique in Part II concludes that the system regulating access increasingly favors those who have greater privilege and so is regressive; it reinforces preexisting inequality.[22]

Part III steps back to provide a brief history of the evolution of federal policies that have enabled students and families to pay for college. These interventions have grown increasingly conflicted, pursuing multiple goals that may be in tension and serving those who face the highest barriers to college less effectively. This Part identifies models of access that guided major post-World War II federal legislation intended to promote access to higher education, beginning with the Servicemen's Readjustment Act of 1944 ("GI Bill")[23] and the National Defense Education Act of 1958 ("NDEA").[24] These two landmark laws set the stage for but differ from the Higher Education Act of 1965 ("HEA"),[25] which dramatically expanded preexisting student aid programs and made grants and loans more widely available. This Part then analyzes the evolution of the HEA, identifying critical modifications that in combination have come to undermine the goals of the law, and makes the case that restoring access as the primary objective that federal policy should pursue would restore coherence to aid policy.

To develop proposals to increase accessibility, Part IV applies lessons from analyses of more formal and explicit regulatory regimes and identifies reforms with potentially broad and expansive impact. Although viewing access to higher education as governed by a regulatory system is helpful by redirecting attention to basic principles–the evaluation of a system turns on a normative assessment of the outcomes it produces–it is not necessary to agree with that characterization to appreciate the reforms the Article recommends. This Article aspires above all else to stimulate a more precise and informed debate on the question of how best to promote access.

Part V offers a brief conclusion.

II. Inequality in Access

Would-be college students must clear a variety of hurdles in order to matriculate. They must have access to information about college in order to begin the process of applying; they usually must satisfy entry requirements by showing completion of high school or its equivalent; they must complete application and financial aid forms disclosing details of their lives; and they must amass the financial resources to pay whatever their chosen higher education provider will charge them. These requirements limit and thereby regulate access, making it more difficult for

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22 This critique is advanced by sociologists who have studied the institution of higher education. *See, e.g.*, Rajani Naidoo, *Fields and institutional strategy: Bourdieu on the relationship between higher education, inequality and society*, 25 British J. of Soc. of Educ. 457, 460 (2004) (describing the argument that higher education "acts as a 'relay' in that it reproduces the principles of social class and other forms of domination under the cloak of academic neutrality").

23 Pub. L. 78-346 (1944).

24 Pub. L. 85-864 (1958).

25 Pub. L. 89-329 (1965).

those who are less well-informed, less successful in their high school years, less comfortable with paperwork, and less well-off to complete the process. Some of these difficulties arise because students do not receive sufficient support while enrolled, too; while the focus of this Article is the regulation of access defined as gaining admission, this is not to suggest that attention need not be paid to retention efforts for those who do matriculate. The existence and quality of policies and practices that can improve rates of retention and, ultimately, graduation, also regulate who successfully completes a course of study.

Intangible obstacles loom. Uninformed perceptions may affect students' interest in, or willingness to, pursue higher education. The more expensive and difficult the process of gaining access looks, the less likely some students are to expend the effort. The riskier the decision to invest in higher education appears, the more likely some will be deterred. The allocation of risk deters some from college entirely and burdens others who use loans, thereby increasing the penalty of a lower-than-expected post-graduate income and reducing the financial benefit [26]of the investment in higher education.

Hurdles to access are erected by institutional actors empowered by the structure of higher education in the United States. Colleges and universities may disseminate information about admissions widely or narrowly, they may set standards for admission that are difficult or easy for different kinds of students to meet, they set the price to be charged, and they may pick both criteria for and size of discounts provided to particular, desirable candidates in the form of financial aid. Lawmakers, through decisions about how much to fund public institutions and through legislation that governs state and federal aid programs, may make it more or less costly for students to attend college.

If lawmakers' goal is greater equity in access to college, then the results produced by the complex system they created should cause concern. Although decades of policy interventions have put higher education within reach of a greater number of students of more varied backgrounds, the access granted is less meaningful, the greater the debt burden carried by students; meaningful access would ensure that students of lesser means enjoy opportunity to reap the benefits of higher education on par with that enjoyed by students with greater resources. And gaps persist. The paragraphs that follow analyze two dimensions of inequality, along lines of class and along lines of race, and then tie these gaps to the trend toward offering financial aid on the basis of past academic performance, to highlight the broader implications of these disparities.

A. Class and access

Socioeconomic status is a powerful predictor of enrollment in an institution of higher education. Students who are wealthy or whose parents earn high incomes

26 There are many reasons to pursue a college degree, beyond the income effects related to it. In this Article by no means do I mean to endorse a purely mercenary motive. However, a growing share of college students believes that the chief virtue of a college degree is financial. Kevin Eagan, Ellen Bara Stolzenberg, Joseph J. Ramirez, Melissa C. Aragon, Maria Ramirez Suchard and Sylvia Hurtado, The American Freshman: National Norms Fall 2014 37, available at http://heri.ucla.edu/monographs/TheAmericanFreshman2014.pdf.

overwhelmingly populate college campuses. According to the federal Education Department, nearly 79 percent of students from high-income families enrolled in 2013 in two- or four-year college, while less than half of students from low-income families did.[27] A study by *The New York Times* found that at the nation's elite institutions, the share of lower-income first-year students[28] does not exceed 25 percent. [29] If the process that puts these students at these institutions truly rewards ability rather than money, then low numbers of poorer students are justifiable if ability tracks wealth and income[30]–a proposition that has dubious normative validity and that is undermined by the development recently of solid evidence to the contrary.[31]

Lower-income students disproportionately enroll in institutions, especially for-profit institutions, that report higher dropout rates, higher debt burdens and higher student loan default rates.[32] One review of federal data on student matriculation found that 19 percent of poor students enroll at for-profit institutions, while just 5 percent of higher income students do.[33] Choice of institution matters greatly for poorer students, who are more likely to complete a course of study the more selective the institution attended.[34] Some research has found that poorer students who do graduate from college earn lower incomes than their higher-income classmates,[35] and poorer students are less likely to pursue graduate or professional school after

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27 National Center for Education Statistics, Education Department, *Digest of Education Statistics* Table 302.30, available at http://nces.ed.gov/programs/digest/d14/tables/dt14_302.30.asp?current=yes. For purposes of understanding these figures, "low income" refers to families in the bottom 20 percent of all family incomes and "high income" refers to families to those in the top 20 percent of all family incomes. Id. About 64 percent of students from families in the middle 60 percent of all family incomes enrolled.

28 The *Times* used the share of students eligible for federal Pell Grants, scholarship aid awarded to the neediest students, to determine the number of low-income students. The study also only evaluated colleges with a four-year graduation rate of at least 75 percent. *The Most Economically Diverse Top Colleges*, N.Y. Times, Sept. 8, 2014, available at http://www.nytimes.com/interactive/2014/09/09/upshot/09up-college-access-index.html?_r=0&abt=0002&abg=1.

29 Id.; *see also* David Leonhardt, *Measuring Colleges' Success in Enrolling the Less Affluent*, N.Y. Times, Sept. 9, 2014, at A3 (article accompanying graphic cited *supra* note Error! Bookmark not defined.), available at http://www.nytimes.com/2014/09/09/upshot/top-colleges-that-enroll-rich-middle-class-and-poor.html?abt=0002&abg=1.

30 SAT scores certainly are consistent with this hypothesis; scores rise with family income. College Board, Total Group Profile Report: 2016 College-Bound Seniors 4 (tbl. 10) (showing average SAT scores by income quintile of test-takers' family). But this may be cause to question what the SAT measures and its normative relevance.

31 Caroline Hoxby & Christopher Avery, *The Missing "One-Offs": The Hidden Supply of High-Achieving, Low-Income Students*, Brookings Papers on Economic Activity (Spring 2013), available at http://www.brookings.edu/~/media/projects/bpea/spring%202013/2013a_hoxby.pdf.

32 *See infra* notes 100-102.

33 Institute for Higher Education Policy, Initial College Attendance of Low-Income Adults 3 (Fig. 1) (June 2011), available at http://www.ihep.org/research/publications/portraits-initial-college-attendance-low-income-young-adults?id=145.

34 Id. at 1.

35 MaryBeth Walpole, Socioeconomic Status and College: How SES Affects College Experiences and Outcomes, 27 Rev. Higher Educ. 45, 56 (2003).

college.[36] These findings suggest that access alone is not necessarily enough[37] to ensure equality of opportunity. What colleges do after admitting students matters greatly[38]: Students who are relatively more disadvantaged, perhaps by poverty or by lack of information about what success in college requires, benefit from a variety of resources, including academic advising and more general counseling. Increasing graduation rates from such students requires greater attention to these forms of support.

Poorer students who must borrow to pay the cost of college suffer potentially devastating consequences if they drop out, but even for those who graduate, student loans constitute a heavy burden. For those fortunate enough to have career options, the obligation to repay may constrain career choice[39] and may reduce the financial benefits of employment by continuing to siphon off income. The effects of prior inequality thus persist through college even for those who complete a course of study. One study found evidence that indebted students make career choices to maximize starting income and that those who did so subsequently enjoyed smaller raises over time.[40] Higher debt burdens also are correlated with a lower likelihood of applying to and pursuing graduate or professional study, meaning that debt undermines efforts to put poorer students on the path to careers that require postgraduate training, such as law, medicine, or research in science, technology, engineering, and mathematics.[41] Thus student loans, while enabling access, can also circumscribe the realm of possibility for students who benefit from that access.

B. Race and access

Disparities in higher education access also exist along lines of race: in 2013, while nearly 69 percent of white high school graduates continued to enroll in either two-

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36 Id.

37 The findings of studies of education outcomes are invariably unsatisfying. Some students facing tremendous handicaps as a result of prior education experiences, financial burdens, family crises or health issues, manage to excel, while others with every benefit may struggle and fail. Education is a complicated experience and outcomes cannot be attributed simply to student characteristics as observed *ex ante* nor to institutional procedures and policies, but must instead be recognized as the produce of the interplay of background and experience and, relatedly, effort.

38 *See, e.g.,* John Bound, Michael Lovenheim, and Sarah Turner, *Why Have College Completion Rates Declined? An Analysis of Changing Student Preparation and Collegiate Resources* 5, National Bureau of Economic Research Working Paper 15566 (Dec. 2009) (finding that college student preparation only partially explains different outcomes).

39 *See, e.g.*, Jesse Rothstein and Cecilia Elena Rouse, *Constrained After College: Student Loans and Early Career Occupational Choices*, National Bureau of Economic Research Working Paper No. 13117 (May 2007) (finding that elimination of loans from student financial aid packages affected students' career choices, making them more likely to pursue public interest careers that earned relatively lower salaries).

40 Alexandra Minicozzi, *The Short-term Effect of Educational Debt on Job Decisions*, 24 Econ. of Educ. Rev. 417, 425 (2004). The study included only men, however, and that conceivably could have affected the findings.

41 Catherine M. Millett, How Undergraduate Loan Debt Affects Application and Enrollment in Graduate or First Professional School, 74 J. Higher Educ. 386, 406 (2003). These are the so-called STEM fields.

or four-year colleges, about 57 percent of African American students and about 60 percent of Latino students did.[42] The share of students from these groups at the most selective colleges and universities is also small, research has found: at the 468 most selective colleges in the United States, white students accounted for 75 percent of the student body, Asian Americans for 10 percent, African American students for 7 percent and Latino students for 8 percent.[43] African American and Latino students are also less likely to complete a course of study. About half of black students and slightly more than half of Latino students who started at a four-year college in 2003-04 obtained a bachelor's degree by 2009, compared to more than 70 percent of white students and Asian students.[44] Black and Latino students disproportionately enroll at for-profit institutions, which have lower rates of completion,[45] higher levels of undergraduate student indebtedness[46] and higher rates of student loan default.[47] Of approximately 1.4 million undergraduate students who enrolled at for-profit institutions in 2013, about 28 percent were black and 16 percent were Latino, while at public institutions, blacks accounted for 13.2 percent of enrolled students and Latinos, 17.8 percent.[48]

C. Merit aid and its regressive effect on access.

Access to college for an ever-greater number of students depends on financial

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42 National Center for Education Statistics, Education Department, *Digest of Education Statistics* Table 302.20, available at http://nces.ed.gov/programs/digest/d14/tables/dt14_302.20.asp?current=yes. In contrast, more than 80 percent of Asian students enrolled in college.

43 Anthony P. Carnevale and Jeff Strohl, *Separate & Unequal: How Higher Education Reinforces the Intergenerational Reproduction of White Racial Privilege* 19 and Tbl. 5, Appendix B, available at https://cew.georgetown.edu/wp-content/uploads/2014/11/SeparateUnequal.FR_.pdf. The report also found that white students formed a smaller share of the population at open-access colleges and universities, falling by 12 percentage points between 1995 and 2009. Id. at 17-18.

44 Terris Ross, Grace Kena, Amy Rathbun, Angelina KewalRamani, Paul Kristapovich, Eileen Manning, Higher Education: Gaps in Access and Persistence Study 184 (Fig. 37-1) (Aug. 2012) ("Gaps").

45 At four-year, private, nonprofit institutions, 63.1 percent of students who started in 2007 finished within five years; at public institutions, 52.3 percent, and at for-profit institutions, 27.8 percent. Education Department, Digest of Education Statistics, Table 326.10 (Graduation rate from first institution attended for first-time, full-time bachelor's degree-seeking students at 4-year postsecondary institutions, by race/ethnicity, time to completion, sex, control of institution, and acceptance rate: Selected cohort entry years, 1996 through 2007), available at http://nces.ed.gov/programs/digest/d14/tables/dt14_326.10.asp. The outcomes at two-year programs are better for for-profits. Id. at Table 326.20.

46 College Board, Trends in Student Aid 2014 22.

47 The default rate at for-profit, or proprietary, institutions exceeded 19 percent, while at private nonprofit institutions it was 7.2 percent and at public institutions, 12.9 percent. Education Department, *Comparison of FY 2011 Official National Cohort Default Rates to Prior Two Official Cohort Default Rates* (July 2014), available at http://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf. According to the College Board, for-profit institutions accounted for 44 percent of students who entered repayment in 2010-11 and defaulted by the end of September 2013. College Board, Trends in Student Aid 2014 4.

48 Education Department, Digest of Education Statistics, Table 306.5 (Total fall enrollment in degree-granting postsecondary institutions, by control and level of institution, level of enrollment, and race/ethnicity of student: 2013), available at http://nces.ed.gov/programs/digest/d14/tables/dt14_306.50.asp?current=yes. These figures include undergraduates at all types of public institutions– two-year and four-year, for example.

aid. Institutions' prices, their allocations of financial aid, and the transparency of admission and aid decisions shape the college population. Student loans and potential borrower attitudes toward debt help determine who attends college. Grant aid, which does not need to be repaid, matters greatly for poorer students.

Federal student loans, created by Congress decades ago,[49] account for slightly more than one-third of all undergraduate aid; federal, need-based grants for 18 percent; and institutional grants for 21 percent.[50] Aid may be offered to address demonstrated financial need or to recognize prior academic achievement. Non-need-based aid, or "merit aid," awarded to students who have earned higher grades in high school and/or achieved high scores on standardized tests,[51] has formed an increasing share of grant aid in recent decades.[52] Many colleges and universities blend the two types of aid, making it more difficult to determine how often factors other than financial need play a role in the decision to discount price.[53]

Grant aid reduces the impact of cost on a student, reducing the height of that barrier to access. Because grant aid reduces the amount that a student may need to borrow, it also reduces the riskiness of the investment in higher education. Thus, the allocation of grant aid directly promotes access, and studies suggest that grant aid significantly affects students' decisions about college.[54] If provision of financial

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49 Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More through Federal Aid Programs*, 14 N.Y.U. J. Legis. & Pub. Pol'y 11, 37 (2011) ("The guaranteed student loan program took as its model preexisting state programs and loans offered under the National Defense Education Act… passed in 1958 in reaction to the launch of the Sputnik satellite by the Soviet Union").

50 The College Board, Trends in Student Aid 2014 12 (Fig. 2A), available at http://trends.collegeboard.org/sites/default/files/2014-trends-student-aid-final-web.pdf. The balance of aid came in the form of federal education tax credits and deductions, grants (other than the Pell grant), private and employer grants, state grants, and federal work-study. Id.

51 *See, e.g.*, the terms of the Georgia HOPE Scholarship, which awards money to students to attend college or university in the state and requires that high school students to have maintained a 3.0 grade point average. Georgia's Hope Scholarship Program Overview, available at https://secure.gacollege411.org/Financial_Aid_Planning/HOPE_Program/Georgia_s_HOPE_Scholarship_Program_Overview.aspx.

52 The College Board, Trends in Student Aid 2014 at 34 (Fig. 26A). The data reflected here may understate the frequency of use of non-need-based aid, because The College Board treated as need-based all aid that took into account a student's financial circumstances, and colleges and universities will package need-based and non-need-based aid into a single financial aid award.

53 Ronald G. Ehrenberg and Daniel R. Sherman, *Optimal Financial Aid Policies for a Selective University*, 19 J. Hum. Resources 202, __ (1984); *see also* College Board, Trends in Student Aid 2016 29 (Fig. 21A and fig. 21B), available at https://trends.collegeboard.org/sites/default/files/2016-trends-student-aid_0.pdf (showing share of student aid awarded on basis of factors other than need; note that the data here most likely understate the share of non-need-based aid because the College Board treats as need-based an aid award any fraction of which is based on need).

54 *See, e.g.*, Christopher Avery and Caroline Minter Hoxby, *Do and Should Financial Aid Packages Affect Students' College Choices?*, in Caroline Minter Hoxby, ed., College Choices: The Economics of Where to Go, When to Go, and How to Pay for It 262 (2004), available at http://www.nber.org/books/hoxb04-1 (describing empirical study that found that additional grant aid correlated with a greater likelihood of matriculation at the college providing the grant aid than did provision of loans). Grant aid also may lead students to pursue different career choices by freeing them from concern over finding jobs paying high enough incomes to cover debt obligations. Glater, *supra* note 49 at 61.

aid seeks to encourage and enable poorer students to pursue careers requiring higher education that would otherwise be out of reach, then loans undermine that goal; debt scares away potential students.

The form of aid and the amount of aid provided encourages or discourages enrollment at particular colleges and universities. Students rationally respond to grant aid and are more likely to matriculate, the more such aid they receive.[55] Students' willingness to borrow may vary unevenly across the applicant population, with greater resistance among students whose families earn low incomes, who attend college part-time, and who attend public institutions.[56] Black students appear less averse to student debt than white students, and Asian and Hispanic students appear more averse to debt than white students.[57] So while it may be true that the more an institution requires a prospective student to borrow, the less likely that student is to enroll, the probabilities vary with student characteristics.[58] Black students may be more likely to enroll despite the incurrence of a larger debt, for example. In this way decisions about grants and loans help determine who attends particular colleges.[59]

The more grant aid a particular institution chooses to give a particular student, the more likely that student is, all else equal, to matriculate. So colleges may pursue those admitted applicants they deem most valuable, such as students whose academic profile in the form of test scores may bolster institutional ranking in important publications like *U.S. News & World Report*. The media organizations that produce rankings function as an indirect or ancillary regulator of opportunity because rankings reward particular statistics. Colleges also allocate grant aid to students who bring other, intangible benefits to the institution, such as athletic prowess, artistic talent, or parental political and cultural capital.[60] In an effort to preserve institutional culture, some colleges and universities also reward alumni by

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55 Christopher Avery and Caroline M. Hoxby, *Do and Should Financial Aid Packages Affect Students' College Choices?*, NBER Working Paper No. 9482 (2003), at 19. Professor Avery and Professor Hoxby also find that additional spending by colleges on "student-related activities" like instruction and student services also makes matriculation more likely, giving wealthier institutions an automatic advantage in recruiting applicants.

56 One study defined "significant unmet need" at $2,000. Sara Goldrick-Rab and Robert Kelchen, *Making Sense of Loan Aversion: Evidence from Wisconsin*, Univ. of Michigan Conference on Student Loans, at 9 (2013).

57 Id.

58 This can explain two trends that otherwise appear paradoxical: a rising premium to college graduates and college participation rates that have increased by just a few percentage points. Kartik Athreya and Janice Eberly, *The College Premium, College Noncompletion, and Human Capital Investment*, Federal Reserve Bank of Richmond Working Paper No. 13-02R, at 3. The more a student must borrow and the less certain a sufficiently high postgraduate income seems, the riskier—and less likely—the decision to enroll. Id. at 18.

59 There are consequences for the student, of course. The more indebted the student is, the more the student will be constrained after graduation or after dropping out. Thus, debt may put college within reach, but access is less meaningful—less empowering and less rewarding—the greater the debt burden is.

60 *See generally* Daniel Golden, The Price of Admission (describing instances of college admissions of students from wealthy, politically connected, or otherwise highly privileged families).

disproportionately accepting their children. Such decisions valorize certain student characteristics, reward members of certain groups, and shape the populations on college campuses—disproportionately those who were already privileged.[61]

Increasingly, academic performance, measured by high school grades and scores on standardized tests, is the basis of grant aid instead of or in addition to financial need.[62] Colleges and universities, as well as some states, offer this non-need-based aid.[63] Such aid is consistent in spirit with one goal of student aid: rewarding stars.[64] However, because students from higher-income families disproportionately earn higher grades and perform better on standardized tests,[65] using such measures of academic performance almost certainly diverts aid dollars from students with financial need and/or students who have historically been underrepresented or excluded outright from colleges and universities.[66] Though the close relationship between test performance and socioeconomic status has been evident for considerable time, the efforts of scholars to promote alternative definitions of merit or alternative tests to measure it have not succeeded. Still, admissions officers at selective institutions already take into account evidence that students have overcome obstacles, for example, or otherwise have shown that

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61 *See supra* Part II.B. (describing who advances in the regulatory system).

62 In 2011-2012, according to the College Board, 26 percent of grants were distributed by states without regard to financial need. College Board, *Trends in Student Aid 2013* 28, fig. 17B. This figure understates the total amount of non-need-based aid because the College Board classified financial aid as "need-based" if any portion is allocated on the basis of need. According to a more recent report by the College Board, 9 percent of full-time students at public, four-year institutions and 12 percent at private, nonprofit, four-year institutions received grant aid in excess of need. College Board, *Trends in Student Aid 2015* 29, Fig. 20. At public institutions, nearly one-third of the full-time students whose parents reported the highest incomes received grant aid in excess of need and at private, nonprofit institutions, so did nearly half of the students whose parents were in that income bracket. Id. (This appears to be the most recent data available from the College Board.)

63 Using the term "merit aid" when discussing scholarship money allocated on the basis of high school grades and standardized test scores begs a conversation about what constitutes merit. Such measures of past performance may or may not reveal a student's intrinsic aptitudes or capabilities. Further, use of the term "merit" suggests that somehow a student with good grades and high scores deserves the scholarship money provided, a potentially pernicious attitude given that some evidence suggests that those who feel merit has entitled them to aid rather than indebted to its provider may be less likely to engage in public service or other forms of civic participation. Lani Guinier, *Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113, 149 (2003).

64 *See infra* Part III.B. Some lawmakers at the time of adoption of the HEA opposed provision of federal aid dollars on the basis of academic performance entirely, describing as unfair a situation in which two students of comparable financial need might nevertheless receive different amounts of aid based on their high school grades. This statement shows the sharply contrasting views of the purpose of federal financial aid to students–and it is difficult to imagine a similar statement being made in Congress fifty years later.

65 College Board, *2015 College-Bound Seniors Total Group Profile Report* 4, Table 10: Student Background and Characteristics (2015), available at https://secure-media.collegeboard.org/digitalServices/pdf/sat/total-group-2015.pdf.

66 Susan Sturm and Lani Guinier, *The Future of Affirmative Action: Reclaiming the Innovative Ideal*, 84 Cal. L. Rev. 953, notes 8-10 and accompanying text (1996). High-achieving students who also demonstrate financial need may benefit from merit-based aid, but such students presumably would have received financial assistance even if they lacked coveted scores.

they have desirable attributes. To take into account more qualitative indicators of a broader, more sophisticated idea of merit presents logistical but not conceptual difficulty. Similarly, design of a test that does not reproduce preexisting inequality is a practical but not a theoretical challenge.[67] And at least one institution has experimented with assessments that are contextual, assessing student applicants' performance in light of the schools they attend rather than in absolute terms.[68]

It is likely that money allocated to non-need-based aid would go to poorer students, were financial need the sole criterion or if merit were differently conceived.[69] To the extent that aid is intended to promote college attendance by students who, in the absence of government or institutional action, would not seek higher education, non-need-based aid is money wasted when paid to higher income students who would have matriculated regardless.[70]

Inequity in the distribution of college access has wider, societal implications. The population of college graduates increasingly and disproportionately enjoys both tangible and intangible benefits of opportunity. While causation is difficult to establish, studies show that college graduates earn higher incomes,[71] live longer and healthier lives,[72] participate more extensively in politics,[73] and are more content with their lives[74] than their high school classmates who do not graduate from college. People in positions of power in politics, business and the arts have benefitted from undergraduate and, often, graduate educational experiences. While a few individuals are exceptional and achieve success, even fame and fortune, without higher education, statistics collected by the government and analyzed by researchers are unequivocal: college matters. It follows that for most students, access to higher education constitutes access to opportunity. For poorer students in particular, to the extent that class mobility exists in the United States–and the phenomenon is less prevalent than many believe[75]–education is a significant driver.

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67 For example, scholars at the University of California, Berkeley, developed a test to take the place of the LSAT for would-be lawyers. Jonathan D. Glater, *Study Offers New Test of Potential Lawyers*, N.Y. Times, Mar. 10, at A22. Unlike the LSAT, the new test, which was informed by extensive interviews of lawyers about the qualities that a good lawyer should have, "did not produce a gap in scores among different racial or ethnic groups." Id.

68 *See* Matthew N. Gaertner and Melissa Hart, *Considering Class: College Access and Diversity*, 7 Harv. L. & Pol'y R. 367 (2013) (describing an effort to design alternative applicant assessment methods at the University of Colorado).

69 As various scholars have proposed. See, e.g., Lani Guinier, Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals, 117 Harv. L. Rev. 113, 149 (2003).

70 Lawrence E. Gladieux, *Federal Student Aid in Historical Perspective*, in Donald E. Heller, ed., *Condition of Access* 51 (2002). *See also* note 92 and accompanying text.

71 David Leonhardt, *Is College Worth It? Clearly, New Data Say*, N.Y. Times, May 27, 2014, at A3.

72 Walter W. McMahon, Higher Learning, Greater Good 119 (2009).

73 McMahon, *supra* note 114, at 206.

74 McMahon, *supra* note 114, at 146 (describing evidence for both indirect effects, given the correlation between education and higher income, and direct effects).

75 Raj Chetty, Nathaniel Hendren, Patrick Kline, Emmanuel Saez and Nicholas Turner, *Is the United States Still a Land of Opportunity? Recent Trends in Intergenerational Mobility*, 104(5) American Economic Review Papers and Proceedings 141, (2014), available at http://www.equality-of-opportunity.org/

Gaps in access that have persisted despite the expansion of federal interventions in higher education finance are the result of a conundrum: Even though resources exist to put college within reach of more students, potential college students face a daunting array of costs that complicate completion and may deter them entirely, and poorer students who complete a course of study carry a burden that constrains their future options. Policies adopted to achieve multiple goals, from supporting stars to enabling anyone to matriculate to helping upper-middle-class students spread the cost of tuition over time, have come into tension with each other. Aid policy has grown more incoherent as a result of these tensions, which would matter less had the cost of college not risen as high as it has and had a greater share of those costs not been passed on to students. The next Part traces the development of this policy confusion over time.

III. The Corrosion of Good Intentions

For at least 150 years, the United States has experienced nothing close to a pure market for college education. Federal and state governments have long intervened. A complex set of interacting institutions and rules works to allocate higher education opportunities, and a prerequisite to development of a normative argument for reform of this system is an understanding of how it arose.

A complete history could begin at the time of the founding. George Washington proposed the creation of a national university, an idea not adopted by Congress.[76] Yet higher education has not been provided solely or even primarily by private, profit-seeking actors; far from it. In 1862, Congress passed the Morrill Act,[77] which provided land for the first public universities, the "land grant" institutions.[78] But for the purposes of this Article, four major, phases of federal involvement in higher education finance matter: the period immediately after World War II, the Cold War years from the 1950s to the early 1960s, the civil rights era from the 1960s into the 1970s, and the "Reagan revolution" that followed and continues to shape federal policy today. In each of these phases, Congress has pursued a different goal and cited a different rationale to justify its approach.

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images/mobility_trends.pdf (reporting that the chances of upward socioeconomic mobility for poorer children have remained stable for decades but noting that because income inequality has increased, the consequences of the socioeconomic status of a child's parents' are greater).

76 Martin Paul Claussen Jr., *The Fate of Washington's Bequest to a National University*, George Washington University, available at http://encyclopedia.gwu.edu/index.php?title=The_Fate_of_Washington%E2%80%99s_Bequest_to_a_National_University.

77 37 Cong. Ch. 130, 12 Stat. 503 (1861).

78 An overview of the involvement of the federal government in financing higher education prior to the enactment of the Servicemen's Readjustment Act, Pub. L. 78-346, can be found in Christopher P. Loss's Between Citizens and the State: The Politics of American Higher Education in the 20th Century. Christopher P. Loss, Between Citizens and the State: The Politics of American Higher Education in the 20th Century 91-120. Professor Loss provides both a nuanced description of the development of government policy and a theory explaining the goals of the government. *[PLEASE NOTE: several footnotes in this Article refer to "locations" within Kindle editions of books cited. These are in the process of being updated to refer to the published, hard copy editions.]*

The discussion that follows analyzes changing priorities driving federal intervention in higher education finance. Overall, the focus of policy has shifted from providing aid to students who otherwise would not enroll to providing a financing tool to students likely to enroll no matter the aid provided. This shift has occurred as legislators have grown more concerned about helping the middle class pay for college and as college has come to be viewed as a private good primarily or solely conferring an economic benefit upon individual students.[79] As a result, while aid programs still enable access to college for poorer students, the debt these students incur undermines the goals that aid sought to achieve.[80]

A. Rewarding and Reabsorbing Veterans: The GI Bill

The federal aid regime has its roots in the GI Bill. With this legislation, the federal government for the first time attempted to enable access to college for millions of people by providing them, rather than the public institutions they attended, with money to pay for their education. Ultimately more than 8 million veterans took advantage of benefits provided by the GI Bill.[81] These benefits were not evenly distributed: the beneficiaries were overwhelmingly white men,[82] even though veterans who were not white were eligible to participate.

Title II of the GI Bill contains the provisions relevant for this discussion. Here, lawmakers provided education benefits including support to cover the cost of education or training, including costs of library or other fees, for at least one year at any of a wide variety of primary, secondary and postsecondary institutions, as well as a "subsistence allowance" to help cover the cost of living.[83]

Notable from the perspective of the present day is the absence in the GI Bill of a significant student lending program.[84] Lawmakers could have created such a program and did create one to help veterans finance the purchase of homes.[85] Perhaps because the legislation had its roots in gratitude and a determination to help returning warriors make a successful transition to a domestic, peacetime existence, lawmakers did not go this route in the context of education. Not for nothing was this legislation dubbed the "Readjustment Act." Debt was integral to the program, but it was not a debt owed by students to a beneficent government; it was the obligation of a grateful nation to its returning soldiers, many of whom

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79 David F. Labaree, *Public Goods, Private Goods: The American Struggle Over Educational Goals*, 34 Am. Educ. Res. J. 39, 73 (1997) (lamenting the "increasing hegemony of the [socioeconomic] mobility goal and its narrow consumer-based approach to education [that] have led to the reconceptualization of education as a purely private good").

80 *See supra* note 40**.** and accompanying text.

81 Department of Education, *The Federal Role in Education: Overview*, available at http://www2.ed.gov/about/overview/fed/role.html (last visited April 15, 2013).

82 Loss, *supra* note 26, at 116.

83 GI Bill at §400(b).

84 The home loan program does show that lawmakers knew of the possibility of subsidizing credit and could have chosen to use that policy tool instead of providing federal funding of education directly.

85 Id. at §500 *et seq.*

had given up years of their lives and suffered hardships of combat.[86] The federal intervention to put college within reach of millions who otherwise might not have pursued higher education was not about achieving a vision of the ideal democracy–although helping soldiers return to civilian life certainly was preferable to the alternative. Nor was the GI Bill about promoting socioeconomic mobility or national competitiveness. The modern federal student aid regime began with the idea of a debt owed by the state to particular people and not the other way around.

B. Chasing Sputnik: The National Defense Education Act

Student debt took root in the National Defense Education Act (the "NDEA"), the next major piece of legislation that involved the federal government in higher education finance. The NDEA was adopted by Congress largely as a response to the launch of the Sputnik satellite by the Soviet Union.[87] Certain students could borrow money from the government; this was the modest start of a reallocation of cost and, consequently, the risk of higher education onto students and families. The NDEA provided funds to states for acquisition of equipment and facilities for teaching of science, mathematics and foreign languages[88]; funding of fellowships for graduate students, provided that students' course of study had as its objective the production of university-level teachers[89]; grants to states to pay for counseling of students and for testing to identify students with intellectual promise[90]; and, most importantly for present purposes, an early version of the loan program with which millions of college students today are familiar.[91]

The decision to use debt is significant. Debt is a complex instrument that implicates deeply conflicting views.[92] Payment of one's debts is a moral imperative and failure to repay can draw harsh criticism; one reason that some lawmakers approved of providing credit, rather than grant aid, to students was a desire to teach borrowers the meaning of fiscal responsibility.[93] Decades after the GI Bill, lawmakers worried that students were irresponsible borrowers and imposed tough restrictions on discharge of loans in bankruptcy.[94]

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86 Loss, *supra* note 26, at 112.

87 Jonathan D. Glater, The Other Big Test: Why Congress Should Allow College Students to Borrow More through Federal Aid Programs, 14 N.Y.U. J. Legis. & Pub. Pol'y 11, 37 (2011).

88 Pub. L. 85-864, §301 *et seq.*

89 Id. at §403(a).

90 Id. at §501 *et seq.*

91 The loan program is described in Title II of the NDEA and, importantly, provided that education loans be made "without security." Pub. L. 85-864, §205(b)(5). The guaranteed student loan program in the NDEA was modeled on the housing loans provided to veterans under the GI Bill. 1958 Cong. Rec.–House 16,712 , Aug. 8, 1958, statement of Rep. Ayres.

92 David Graeber, Debt: The First 5,000 Years 9 (2011). Professor Graeber wrote that debt causes "profound moral confusion" because of the contradictory attitudes we hold toward it. Id.

93 1965 Cong. Rec.-H 21,932, Aug. 26, 1965 (statement of Rep. Jones).

94 Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 185 Educ. L. Rep. 783 (2004) ("There was a perception in Congress that an unacceptable number of student debtors were filing for bankruptcy after graduation (and on the eve of lucrative careers) seeking to discharge their federal loans").

Arguably, student borrowers have two obligations: the financial debt to the government or the financial institution extending credit,[95] and the intangible, moral debt to the government for its role in making credit more affordable to the student. The former obligation may be satisfied by earning enough money to pay off the loan, while the latter may be satisfied by spending some time in public service, perhaps, or otherwise fulfilling a national need. In the minds of students, though, the moral obligation and any accompanying sense of gratitude may be swamped by the financial one.[96] The presence of a lender, whether a for-profit entity like a bank or the federal government itself,[97] obscures the fact that the availability of credit on favorable terms at all is the result of government action. Indeed, the expansion of federal debt forgiveness programs to encourage borrowers is a direct effort to counter the pressure to make life choices based on the financial debt. Loan forgiveness seeks to leverage financial debt to encourage public service.

Borrowing puts within reach investments that otherwise would be unattainable, thereby increasing potential earnings. When things go well, borrowing results in profit to the borrower and to the lender. But debt amplifies risk: If an investment loses money, then the debtor still faces an obligation to repay. Thus, to pay for higher education with debt is to engage in a leveraged transaction and for students without financial resources of their own, it can be a highly leveraged transaction. Education is an unusual investment, though, in that the potential upside is the same no matter how much a student borrows. Only the potential downside worsens.

The NDEA enabled access to college for students who would have been unable to attend, but universal access was not the primary goal. Rather, lawmakers emphasized the importance of identifying talented young people–stars–and ensuring that they received the education necessary to permit them to contribute to the security of the nation. Lawmakers feared that hidden within the population of high school students lay diamonds in the rough, young women and men whose potential to enhance the public good was hindered by financial need. The nation could not afford to squander such human resources, even if the difficulty of identification of these diamonds meant that taxpayers would bear the cost of educating students who might promise less. In remarks typical of those made by supporters of the legislation, one congressman stated:

> The legislation before us, although providing for large numbers of grants, does not have its most important value in the number of Americans who will be the recipients of the scholarships, but rather in the hope that out of this number will develop the one or more great minds which will provide us with the genius brainpower that we need.[98]

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95 Until 2010, commercial lenders could make federal student loans that were guaranteed by the federal government. Glater, *supra* note 32, at 14.

96 A sense of moral obligation to help the community may be further undermined if students believe they deserve their success, suggests Professor Lani Guinier. Lani Guinier, *Comment: Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113, 149 (2003).

97 Prior to 2010, commercial lenders made federally guaranteed loans through the Family Federal Education Loan Program, while now only the federal government itself makes federal student loans. *See infra* note 43**.** (the elimination of federally guaranteed loans made by commercial lenders).

98 1958 Cong. Rec.–House 16,685, Aug. 8, 1958, statement of Rep. Zelenko. Others expressed similar views:

While the GI Bill, driven by a sense of obligation to potential students, sought to enable returning soldiers to adjust to and succeed in private life, the NDEA sought to find and put to use the brightest young people in service to the nation.[99]

Lawmakers did not discuss the debt that borrowers would owe to the government, which in retrospect is striking because both loans and grants had as a goal the development of particular skills viewed as necessary to national defense: science, mathematics, technology and foreign languages.[100] If students studied those subjects but then did not offer them in service to the government after graduating, lawmakers could conclude that the students did not perform their side of the bargain. Yet, the concern did not surface that student aid might, from the aid provider's perspective, be a poor investment: that fear is of more recent vintage. Rather, during debate over the NDEA several lawmakers argued that federal aid should not be limited to funding students studying fields directly and clearly related to national defense, that the government should not discriminate at all on the basis of students' choice of major, for example.[101] They contended that study of science, technology, engineering and mathematics, today referred to as the STEM fields, was not all that beneficiaries of aid should pursue nor all that the nation would need.[102]

> In this great, rich country, there must be an opportunity for every capable, worthy boy or girl to secure higher education. This has special significance in the case of exceptionally talented students, and it is imperative that Congress and the States move as rapidly as possible to eliminate actual and potential waste of the intellectual resources and abilities of our young people and insure for them proper educational training.

1958 Cong. Rec. – House 16,684 (Aug. 8, 1958), statement of Rep. Philbin.

99 In the opening moments of debate of the NDEA, for example, Rep. Edmondson called the legislation "one of the most far-sighted pieces of legislation we have had the opportunity to consider this session." 1958 Cong. Rec. – House 16,683 (Aug. 8, 1958), statement of Rep. Edmondson.

100 1958 Cong. Rec. – House 16,686 (Aug. 8, 1958), statement of Rep. Elliott; *see also* 1958 Cong. Rec. – Senate 17,246 (Aug. 13, 1958), statement of Sent. Allott (also emphasizing the importance of the sciences, mathematics and foreign languages to national defense and prosperity and warning that shortages of graduates in these fields would be "dangerous to the national welfare itself").

101 Even some of the law's critics endorsed this view. Rep. Keating, who thought the dollar amounts to be provided in loan and scholarship programs were too great and expressed other misgivings about the NDEA, still argued that "[i]t will indeed be money well spent if we can establish a nationwide program to give full rein to the potential leaders of tomorrow in their necessary training, not just in the scientific fields, but in all areas of endeavor where their desire and capacities lead them." 1958 Cong. Rec.–House 16,721, Aug. 8, 1958, statement of Rep. Keating. In debate in the Senate, similar views were expressed. *See, e.g.,* 1958 Cong. Rec.–Senate 17247, Aug. 13, 1958, statement of Sen. Allott ("the American citizen is neither as well-educated as we like to think he is, nor as well informed as he should be. The problem certainly goes beyond science, mathematics, and foreign languages"). Others, in particular those concerned about federal overreaching, seized on the flexibility afforded to students by the law to argue that the act did not ensure that beneficiaries of loan and grant programs actually pursued careers in the national interest. *See, e.g.,* 1958 Cong. Rep.–House 16735, Aug. 8, 1958, statement of Rep. Saylor ("instead of requiring a student to study a subject which might assist in the development of missiles, the harnessing of atomic energy, or the conquering of outer space, one might receive a [student] loan and become an accredited fly-fisherman which I assure you will add nothing to the national defense of this country"); 1958 Cong. Rec.–Senate 17271, Aug. 13, 1958, statement of Sen. Thurmond (challenging a supporter of the NDEA by asking whether "under the pending bill, [is] … the student loan program … limited in any way to persons undertaking a course of study considered to be critical to our national defense?").

102 The sentiments of Rep. Porter are representative: "Certainly we need outstanding students

The idea that government should facilitate access to higher education for those students who stand to provide the most benefit to the public persists to this day, alongside and at times in tension with other rationales. The transaction between student and the state is *quid pro quo* in nature: the state invests in providing the student with education because the state has concluded that this particular student possesses attributes valuable to the nation. In this model, students lacking such promise, on the other hand, merit no such investment; they benefit only because of the lack of an effective screening mechanism.

C. Civil rights and access for all: The Higher Education Act

A radically broad view of national need provided the foundation for the next major step in the development of federal aid policy, the HEA.[103] Lawmakers emphasized that access to higher education was not just an instrument to bolster national defense or economic competitiveness or another geopolitical goal: "[T]here is increasingly an element of national policy that this Congress is trying to state – that any qualified American should not be denied the opportunity for a college education by reason of lack of financial means."[104] This and other statements[105] by lawmakers show a new focus on fairness, an adoption of the view that the nation should ensure that income and wealth do not limit opportunity because leveling the playing field was a worthy end in itself.[106] This perspective reflected events of the years between the NDEA and HEA. The struggle to advance civil rights on behalf of African Americans, women and members of other minority groups had put equity at the center of the debate over the proper role of the federal government in higher education finance.[107]

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in the field of humanities as well as in the physical science area." 1958 Cong. Rec.–House 16,742, Aug. 8, 1958, statement of Rep. Porter.

103 Pub. L. 89-329 §101 (1965) (stating that the purpose of the legislation was to "assist[] the people of the United States in the solution of community problems such as housing, poverty, government, recreation, employment, youth opportunities, transportation, health and land use").

104 1965 Cong. Rec.–House 21,892, Aug. 26, 1965, statement of Rep. Reid.

105 *See, e.g.,* 1965 Cong. Rec –House 21898, Aug. 26, 1965, statement of Rep. Mink ("There must be no question that any youngster, regardless of his family circumstance has the right to fullest opportunity to develop his intellect for the good of both himself and the Nation"); 1965 Cong. Rec.–House 21,901, Aug. 26, 1965 (statement of Rep. Fogarty) ("It is time to implement… [a] century-old commitment with further measures to assure that every qualified high school graduate may attend and graduate from college").

106 Representative Brademas, speaking in favor of the bill, presented a chart showing that among high-achieving students, nearly 20 percent from low-income families did not attend college, while for higher income families, the comparable figure was 6 percent. 1965 Cong. Rec.–House 21,887, Aug. 26, 1965, statement of Rep. Brademas. The congressman described "almost a straight-line correlation between your family income in this country and your prospects for getting into college." Id.

107 Brian K. Fitzgerald and Jennifer A. Delaney, *Educational Opportunity in America*, in Donald E. Heller, ed., *Condition of Access: Higher Education for Lower Income Students* 5 (2002). This is not to say that lawmakers analyzed fairness in a vacuum; since the end of World War II, policymakers knew that domestic segregation and continuing discrimination undermined the United States government's advocacy of democracy and human rights. Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* 60 (2005) ("the continuation of segregation posed a contradiction for the self-proclaimed exemplar of freedom and democracy"). National security and equity were thus linked.

The HEA provided funds directly to states to support public colleges' and universities' community service programs, defined as university extensions or research intended to solve a community problem[108]; grants to colleges and universities to support acquisitions of books, periodicals and other materials for their libraries[109]; funds for "developing institutions," defined as institutions that faced financial difficulty and were "isolated from the main currents of academic life"[110]; scholarship aid to needy students[111]; education loan insurance to encourage lending to students[112]; grants to support campus work-study programs[113]; funding of a national Teacher Corps program to direct experienced teachers and recent college graduates pursuing careers in teaching to work in underserved communities[114]; funds to the states to purchase equipment for use on campus[115]; and grants to institutions for construction of academic facilities.[116] The legislation may properly be characterized as sweeping.

As part of the effort to widen the distribution of educational opportunity to historically underrepresented and/or excluded students, the scholarship program, called the Basic Educational Opportunity Grant in the original authorizing legislation, was the dominant intervention. The scale and scope of the program grew when the HEA was reauthorized and amended in 1972.[117] Between 1965 and 1976 the maximum amount of a grant grew in size to cover more than three-quarters of the cost of attending a public, four-year institution.[118] The loan program authorized by the HEA, on the other hand, simply was not essential to promoting access for poorer students, and wealthier students were not eligible to use it.

D. Corrosion: The decline of grants and rise of loans

In the decades after the enactment of the HEA, popular and legislative attention shifted increasingly from the goal of promoting higher education access to all to the goal of keeping college affordable for the middle class. This meant making student

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108 HEA §102.

109 Id. at §201.

110 Id. at § 301 *et seq.* This language reflects concern for higher education providers in geographically isolated areas, for example, as well as for those serving students who belong to historically excluded groups, especially black students. Advisory Council on Developing Institutions, Strengthening Developing Institutions: Title III of the Higher Education Act of 1965 Annual Report 12-13 (1978).

111 HEA § 401 *et seq.*

112 Id. at §421 *et seq.*

113 Id. at §441 *et seq.*

114 Id. at §501 *et seq.*

115 Id. at §601 *et seq.*

116 Id. at §701 *et seq.*

117 Suzanne Mettler, Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream 61-2 (2014).

118 Lawrence E. Gladieux, *Federal Student Aid in Historical Perspective*, in Donald E. Heller, ed., Condition of Access: Higher Education for Lower Income Students 51 and fig. 3.4 (2002).

loans available to middle-income families, as well as providing loans and grants to poorer students.[119] Funding of Pell grants, as the Basic Educational Opportunity Grant was renamed, did not keep pace with tuition increases.[120] Amendments to the HEA and other legislative action, such as creating tax-favored investment vehicles to encourage the accumulation of savings for college,[121] reflected this change in emphasis, making more federal resources available to students regardless of family income.[122] Lawmakers focused less on enabling students to attend college who would not have done so in the absence of federal intervention.[123]

For example, in 1978 Congress passed the Middle Income Student Assistance Act,[124] which amended the HEA to eliminate a provision that had restricted how much the family of a student borrower could earn and still be eligible.[125] This move made federal student loans available to students whose families earned higher incomes. In a sense, the tide rose and lifted all boats, but people in bigger, faster boats retained their advantages. This change was consistent with a view of higher education as an individual, private investment rather than a shared, community one.[126]

Amendments to the HEA in 1992, while generally clarifying existing law, included another change that in retrospect proved significant: they changed how the wealth of a student's family was calculated, excluding the value of equity in a home.[127] For students whose families rent their homes or whose families' homes are not a significant source of wealth, the exclusion of home equity from aid calculations matters little. This modification is evidence of the legislative shift in priorities from promoting access to attempting to help mitigate, or at least manage, the rising cost of college for students who would likely have matriculated no matter what. The move made more students from higher income families eligible to use federal loans. In the years following implementation of this change, use

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119 Growing numbers of students enrolling in college also meant that institutions received federal support, for example under Title III and Title VI of the HEA, an important component of the legislation that has received less attention than have aid programs providing funds directly to students under Title IV.

120 Gladieux, supra note 118, at 51.

121 Michael A. Olivas, State College Savings and Prepaid Tuition Plans: A Reappraisal and Review, 32 J. L. & Educ. 475, 477 (2003).

122 See *infra* note 67 and accompanying text.

123 Suzanne Mettler, Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream 61-2 (2014).

124 Pub. L. 95-566 (1978).

125 Congressional Research Service, *Summary for the Middle Income Student Assistance Act*, available at https://www.govtrack.us/congress/bills/95/s2539/summary. [tk full cite]

126 Suzanne Mettler, Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream 64-5 (2014) (describing policy "drift" that allowed funding levels for grant aid to languish while tuition costs rose and blaming political polarization).

127 Report 102-630 of the House of Representatives, Higher Education Amendments of 1992, Conference Report (June 29, 1992) at 490.

of federal loans increased dramatically, with total amounts borrowed rising from $20.7 billion to $49.1 billion[128] in ten years[129] and to $101.5 billion[130] in 2012.[131]

Congress effected another significant change in the legislative treatment of student loans through the Bankruptcy Code. Lawmakers did not define the standard that borrowers had to meet if they sought to discharge their loans in bankruptcy proceedings.[132] For present purposes, the special treatment of student loans in bankruptcy is less important than the reasons underlying lawmakers' action. Members of Congress feared that students might exploit federal aid programs, obtaining an education without paying for it and reaping economic benefits in the form of employment opportunities to which they were not morally entitled.[133]

Two other trends in higher education finance undermine efforts to promote access for students of more modest means. First, more scholarship funds are now awarded on the basis of criteria other than financial need, as discussed above.[134] Second, lawmakers acted to help middle-class families manage the rising cost of higher education through the tax code by providing favored status to college savings plans and allowing deduction of some college expenses.[135] The law allowed families to deduct education expenses of up to $1,500 from their taxes, and the amount was increased in later years.[136] These benefits were costly, accounting for $5.4 trillion in lost federal revenue by 2000, according to Suzanne Mettler. That is nearly three-fourths of federal spending on Pell grants, she notes,[137] yet these tax benefits are less effective at enabling poorer students to attend college. Providing

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128 In constant 2002 dollars.

129 That is, between 1992-93 academic year and the 2002-2003 academic year.

130 This figure is in 2012 dollars.

131 College Board, *Trends in Student Aid 2013* at 10 and College Board, *Trends in Student Aid 2003*, available at http://trends.collegeboard.org/sites/default/files/SA_2003.pdf, at 7.

132 11 U.S.C. §523(a)(8). Lawmakers accorded special bankruptcy treatment to federal student loans with the Education Amendments Act of 1976, and have toughened the Code's provisions on education debt for years since. Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 Santa Clara L. Rev. 329, 363-364 (2013).

133 Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 Santa Clara L. Rev. 329, note 258 and accompanying text (2013).

134 See supra Part II.C.

135 The Taxpayer Relief Act of 1997, Pub. L. 105-34. A discussion of the appeal of these programs is beyond the scope of this Article, but Professor Gladieux notes that subsidizing higher education through the tax code requires no annual reauthorization, consequently functions as an entitlement and is unlikely to be reduced or repealed. Lawrence E. Gladieux, *Federal Student Aid in Historical Perspective*, in Donald E. Heller, ed., Condition of Access 54 (2002). Pell grants, in contrast, require financing from year to year. Id. *See also* Michael A. Olivas, *State College Savings and Prepaid Tuition Plans: A Reappraisal and Review*, 32 J.L. Educ. 475, 501 (2003) (discussing the equity implications of adopting tax-favored college savings plans).

136 Suzanne Mettler, Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream 80 (2014).

137 Id. [Mettler at 80]

higher education subsidies as the tax code currently does[138] is inherently regressive and for that reason encountered strong opposition when proposed prior to the 1990s.[139] Only families with higher incomes or greater wealth can afford to set aside funds in a tax-favored college savings plan.[140] Because the tax incentive affects students whose families earn relatively high incomes and who consequently would likely have obtained higher education regardless of government subsidies,[141] the incentives once again do little to encourage or enable access.

Why, recognizing the drawbacks of debt as a means of enabling greater access to higher education, have lawmakers increasingly emphasized such a double-edged tool? Some lawmakers have praised the disciplining effects of debt, which they suggest forces students to take their education more seriously.[142] There are student loan borrower bogeymen who lurk around the edges of congressional debate over federal education loans: students who fraudulently seek to avoid their debts, for example, or who perhaps benefit from grant aid, do very well for themselves and could easily satisfy student debts. Lawmakers' fear rests on the conception of college as a private good, the benefits of which accrue to the student. If this is how society views education, the rationale for any federal role in financing higher education is vulnerable.

Lawmakers took steps toward restoring access in the Higher Education Opportunity Act of 2008, which reauthorized and amended the HEA. The law provided matching funds to states to provide grants to low-income students on the basis of need, for example.[143] The law also added to the list of careers entitling indebted graduates to loan repayment assistance.[144] And the law added disclosure requirements for loan terms, intended to improve potential borrowers' ability to engage in comparison-shopping. With the exception of raising Pell grant amounts, most of these changes did not aim directly to promote greater access for poorer students.[145]

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138 If the subsidy extended to include a credit to the student and/or family paying for college, like the Earned Income Tax Credit, then the regressivity problem could be cured. Michael S. McPherson and Morton Owen Schapiro, *Opportunity in American Higher Education*, in Advisory Committee on Student Financial Assistance, *Reflections on College Access and Persistence* (2006) at 25. As is, however, the tax deduction is of little use to a low-income student and/or family that pays little or nothing in taxes. Id.

139 Suzanne Mettler, Degrees of Inequality: How the Politics of Higher Education Sabotaged the American Dream 79 (2014).

140 Michael S. McPherson and Morton Owen Schapiro, *Opportunity in American Higher Education*, in Advisory Committee on Student Financial Assistance, *Reflections on College Access and Persistence* (2006) at 25.

141 Michael A. Olivas, State College Savings and Prepaid Tuition Plans: A Reappraisal and Review, 32 J.L. Educ. 475, 501 (2003).

142 1965 Cong. Rec.–House 21,932, Aug. 26, 1965 (statement of Rep. Jones of Missouri).

143 Pub. L. 110-315, §415E(a)(2), amending 20 U.S.C. §1070c-3a.

144 Pub. L. 110-315, §428K(b), amending 20 U.S.C. §1078-11.

145 Julie Margetta Morgan, Consumer-Driven Reform of Higher Education: A Critical Look at New Amendments to the Higher Education Act, 17 J.L. & Pol'y 531, 533 (2009).

IV. Restoring Access

Across the legislative interventions shaping federal student aid, access has been the unifying theme. Even if the immediate motivation of lawmakers in enacting the GI Bill and the NDEA–and even reauthorizations of the HEA in the 1980s and more recently–was to put higher education to use in service of other national ends, the consistent and related intent was to ensure that students who might otherwise not have enrolled in college, could do so. Concern about rising tuition and rising indebtedness should not obscure the fundamental objective of aid. Yet, the preceding discussion illustrated how the evolution of federal policy has undermined the efficacy of mechanisms that put college within reach of poorer students. The goal of promoting access has come into tension with the achievement of other ends; re-emphasizing access is essential to making federal policy in this area both more coherent and effective. This Part develops a framework for reform aimed at putting access first.

Thinking of higher education access as subject to–and a subject of–regulation forces reflection upon the goal that such regulation seeks. Merely aiding students to finance the acquisition of a credential that may confer a higher lifetime income may not justify a national policy intervention, while enabling the public to benefit from such an investment certainly should. And there is good evidence that higher education indeed confers benefits beyond the student who receives it, in the form of better health, lower crime, longer life, and even greater happiness.[146] Some states, like New York[147] and Tennessee[148], are already acting in a manner consistent with this insight, reducing or eliminating the cost of college at public institutions, for example, to make it easier for students to attend. The stated ambition is to keep graduates, and all the good things they do and bring, in the state.[149]

Recognition that access to higher education and corresponding personal, financial, social and political empowerment is governed by a regulatory system also offers two critical advantages to the analyst. First, it offers a way to understand both the causes of counterproductive effects of policies pursued and the persistence of those effects. Second, it enables the reformer to develop policy proposals informed by an awareness of how each intervention may impact other aspects of the system and result in unexpected consequences. The discussion that follows analyzes federal student aid as such a regulatory system and so draws on insights of the scholarly literature on regulatory design to develop proposals aimed at enhancing higher education access. The first section below analyzes the impact of aid decisions, the second offers a framework for developing reform proposals, and the third uses that framework develop modest modifications that could have broad effects.

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146 Jonathan D. Glater, *Law and the Conundrum of Higher Education Quality*, forthcoming, tk Univ. of Calif., Davis L. Rev. __ at note 142 and accompanying text (2018)

147 Jesse McKinley, Cuomo Proposes Free Tuition at New York State Colleges for Eligible Students, N.Y. Times, Jan. 4, 2017 at A1.

148 David W. Chen, *Free Tuition? Tennessee Could Tutor New York*, N.Y. Times, May 15, 2017, at A1.

149 Id. Under the New York plan, students who benefit must remain in-state after they complete their course of study.

For years, scholars evaluating regulatory systems have focused on particular regulatory failures. Some criticize the costs created by regulations and, more importantly, question whether the benefits obtained are worth the price.[150] Regulatory procedures may be unfair or arbitrary[151] and unpredictable in their effects.[152] Some critics complain that the processes creating regulations are "fundamentally undemocratic and lacking legitimacy."[153] Regulatory processes may be "captured" by interested parties seeking to use the regulatory apparatus to advance their own ends.[154] Capture, when used by legal scholars in the context of regulatory design, is the "result or process by which regulation (in law or application) is, at least partially by intent and action of the industry regulated, consistently or repeatedly directed away from a defeasible model of the public interest and toward the interests of the regulated industry."[155] It is this last critique, invoking a more general theory of how regulations are produced, that is helpful in developing possible reforms in the context of higher education. The regulated industry is not exactly the college, but the analogy is useful as a justification for taking a closer look at reforms considered by scholars in other contexts. Scholars who have studied regulatory design suggest two general tactics for resisting or undermining capture: Empowering an actor motivated by a different set of interests or removing the ability of a regulator to provide whatever the regulated parties want. Scholars have developed other critiques and reform proposals, but they are less relevant to higher education.[156]

Capture theory is controversial, and with reason. If regulatory agents are subject to capture, why then are rules hostile to the interests of the powerful ever adopted?[157] And might not regulatory systems evolve over time, regardless of and at times in spite of the efforts of parties subject to its authority?[158] Fortunately, this section need not assess the validity of a theory of regulatory capture. The interest this Article takes in scholarship on regulatory design is pragmatic: Prescriptions for

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150 Stephen Breyer, Regulation and Its Reform 2 ("Second, and more important, critics charge that too little is obtained…") (1982).

151 Id.

152 Id. at 3.

153 Id.

154 Id. at 10.

155 Daniel Carpenter, *Detecting and Measuring Capture*, in Daniel Carpenter and David A. Moss, eds., Preventing Regulatory Capture: Special Interest Influence and How to Limit It 60-61.

156 For example, Professor Rachel Barkow has pointed out the significance of agency officers' qualifications, relationships among agencies, and restrictions on their jobs after leaving the agency in insulating a formally constituted regulatory agency. Rachel Barkow, *Insulating Agencies: Avoiding Capture through Institutional Design*, 89 Tex. L. Rev. 15, 42 (2010). Setting agency A against agency B to counter the possibility of A's capture has a certain appeal, but again, there is no higher education regulator to be reined in. Id. at 23.

157 Breyer, Regulation and Its Reform at 10.

158 Richard A. Posner, *The Concept of Regulatory Capture: A Short, Inglorious History*, in Daniel Carpenter and David A. Moss, eds., Preventing Regulatory Capture: Special Interest Influence and How to Limit It 49 (2014). I am paraphrasing the idea expressed by Judge Posner here, because his discussion is directed to formal regulatory agencies rather than the more elaborate web of institutions that determines access to higher education.

policies that could help to ensure that regulatory systems do what they are supposed to do, are what matter. Scholars have identified a few, generally applicable steps to improve a regulatory system.

A. Follow, and intercept, the money

Agencies funded by the industries they regulate are, not surprisingly, subject to capture because agency funds constitute a potential hostage, especially if the industries can choose among a set of regulators competing for business.[159] Although in the higher education context there is not a single regulator depending on fees or assessments paid by colleges and universities, this is an intriguing insight to ponder. While the wealthiest institutions supplement tuition revenue with income generated by an endowment, most colleges depend on students who pay to keep themselves operating and so must appeal to those who can afford to do so.[160]

Selective colleges with resources offer discounts both to poorer students and to students who can afford to pay the full, stated or "sticker" price. A student from a wealthy or high-income family might receive a non-need-based scholarship intended to entice that student into enrolling and paying almost full-freight in cash. Non-need-based aid, which conservatively defined[161]–accounts for about one-quarter of grant aid provided to students,[162] is an institutional practice that rewards the privileged. About one-third of grant aid provided by private, nonprofit, four-year institutions is not need-based,[163] and more than half of grant aid provided to dependent students by public, four-year institutions is not need-based.[164] This aid is not characterized as buying revenue but as rewarding merit: The recipients of these scholarships may have the ability to pay but they have desirable indicia of success.[165] So-called merit aid discounts tuition for wealthier and/or higher-income families in order to assure a stream of revenue.[166]

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159 Rachel Barkow, *Explaining and Curbing Capture*, 18 N.C. Banking Instit. 17, 22 (2013) (describing the competition among banking regulators and concluding that "I could not have devised a more ill-considered scheme if you had asked me to think about it and try").

160 At even the most elite universities, whose endowments are measured in the tens of billions of dollars (for example, Harvard University's endowment is valued at more than $35 billion; that of Stanford University, more than $21 billion. Boston College, *Top 50 Endowments*, available at http://www.bc.edu/offices/endowment/top50endowments.html (last visited Aug. 1, 2015)), tuition matters. Harvard does not compete on price against rivals and does not charge less than other institutions operating without the benefit of an enormous endowment, although it could.

161 *See supra* note 51.

162 *See supra* note __ [College Board, *Trends in Student Aid 2015* 29, Fig. 20].

163 College Board, *Trends in Student Aid 2015*, Institutional Grant Aid by Tuition Level and Family Income at Private Nonprofit Four-Year Institutions, 2011-12, online at http://trends.collegeboard.org/student-aid/figures-tables/institutional-grant-aid-tuition-level-family-income-private-nonprofit-four-year-2011-12.

164 College Board, *Trends in Student Aid 2015*, Institutional Grant Aid by Dependency Status and Family Income at Public Four-Year Institutions, 2011-12, online at http://trends.collegeboard.org/student-aid/figures-tables/institutional-grant-aid-dependency-status-family-income-four-year-2011-12.

165 Ronald G. Ehrenberg and Daniel R. Sherman, *Optimal Financial Aid Policies for a Selective University*, 19 J. of Hum. Resources 202, 223 (1984).

166 Note that this practice creates an incentive to raise the publicly stated tuition by a larger

The move away from need-based aid is analogous to regulatory action favoring particular industry groups. One simple, if controversial, solution is to eliminate the power to reward the students who do not need the aid. Participation by colleges and universities in federal aid programs administered under Title IV of the HEA could be limited to those that pledge to provide only need-based aid. The Education Department has the authority to set terms colleges and universities must meet in order to participate in the Direct Loan Program,[167] which provides the most popular federal student loans. A ban on non-need-based aid would mean that students attending a college or university that offered such aid would not have access to federal loan or grant programs at all. This would raise the cost of using so-called merit aid far too high; it is unlikely that any institution would want to risk shutting its students out of federal aid programs.

An effective prohibition on non-need-based aid would limit at least one aspect of the costly arms race among colleges competing for prominent placement in rankings like that produced by *U.S. News & World Report*. Currently, so-called merit aid offers a way to improve an institution's statistical profile: a college can offer scholarship aid to high-scoring students whose matriculation in turn makes the institution more impressive when evaluated. To the extent that college officials resent this kind of gamesmanship, as many claim to, the elimination of non-need-based aid would come as a welcome relief.[168] Of course, to institutions that may lack the appeal of the most elite universities and depend on merit-based scholarships to attract high-achieving students, a ban on merit aid could hurt placement in the rankings. Colleges might have to find other ways to compete–perhaps by demonstrating the quality of the education provided, rather than relying on that of the students admitted.

B. Student empowerment

In a setting in which a regulated industry may attempt to dictate the behavior of a regulator, empowering the customers of that industry to resist its efforts can

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amount than an institution otherwise might, to reduce the impact of the discount.

167 20 U.S.C. §§1082, 1087a, and 1087c. Only a few cases have involved challenges to the authority of the Secretary of Education to regulate under Title IV of the HEA. *See, e.g., Windsor University v. Secretary of Health, Ed. and Welfare*, 550 F.2d 1203 (9th Cir. 1977) (upholding the secretary's authority to regulate to protect the financial integrity of the student loan program); *Association of Private Sector Colleges and Universities v. Duncan*, 681 F.3d 427 (2012) (upholding certain regulations promulgated by the Department but finding others beyond the scope of the language of the HEA); *Association of Proprietary Colleges v. Duncan*, 107 F.Supp.3d 332 (2015) (upholding federal Education Department regulations that may exclude from federal programs those institutions whose students do not achieve "gainful employment").

168 There is a huge obstacle to this reform: college athletics. Massive alumni resistance to abolition of scholarship aid to student athletes attending highly competitive universities would be very difficult to overcome. While popular support of access should overcome the desire to field a competitive team, as a matter of practical politics a carve-out of athletic scholarships may be inevitable. And, indeed, some amount of athletic scholarship funds certainly enable students of lesser means to enroll–not all athletes hail from wealthy families. Nevertheless, restricting athletic scholarship aid to needy students would likely result in a less regressive distribution of financial aid. Perhaps a compromise could be reached, preserving scholarships for athletes in specific sports–but this is beyond the scope of the discussion here.

be effective. For example, a government agency could be tasked with advocacy on behalf of students, who are the consumers in this paradigm.[169] Consumer groups could be invited to participate in regulatory hearings, offering testimony and evidence of the effects of rule changes sought (or opposed) by the regulated industry. This is a form of "new governance" giving consumers a direct role in regulatory decision-making.[170] These mechanisms are, of course, still subject to capture themselves, in that interested stakeholders other than members of the regulated industry may manipulate a formal advocate or gain access to the most powerful roles in regulatory proceedings.[171]

For student borrowers and their families, empowerment could be enabled through expansion of the powers of the federal Education Department.[172] Currently the Department's student loan ombudsman, in the Office of Federal Student Aid, mediates disputes between borrowers and lenders, but the role could be considerably broader. Perhaps the Department could undertake an education effort aimed at enabling students to navigate more effectively the financial aid process and assess aid packages they receive, for example. Students and families could, for example, take concerns over colleges' financial aid packages to an aid review officer, who could review the grant and loan components to assure affordability and fairness.[173] This officer would have the advantage of knowledge of the composition of aid packages–the amount that is need-based and the amount that is not–that are awarded to other students, the kind of information rarely, if ever, available to students.

Such an outside review regime, which would entail abandonment of the ombudsman model in favor of a more aggressive role, would face at least two serious hurdles. First, given the scale of student borrowing–the millions of students taking advantage of aid programs every year–reviewing college aid decisions would be logistically demanding. Second, given colleges' and universities' prized autonomy, any governmental authority to demand changes to institutional decisions would create ongoing and serious tension. Could an official of the Education Department effectively veto the decisions of a college about aid? Historically, courts have been most reluctant to step into such a role and there is every reason to think that an

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169 Daniel Schwarcz, *Preventing Capture through Consumer Empowerment Programs: Some Evidence from Insurance Regulation*, in Daniel Carpenter and David A. Moss, eds., PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 368 (in the insurance rate-setting context, "[p]roxy advocates wield their influence primarily by providing information and a consumer perspective to an Administrative Law Judge... in technical rate-setting hearings, or negotiating settlements in connection with those hearings").

170 Id. at 368.

171 Id. at 369.

172 Currently, the role of the ombudsman at the Education Department is not as broad as it might be; the ombudsman response to resolving disputes over loans, rather than institutional decisions over aid. Education Department, *Getting Prepared before Seeking Help*, available at https://studentaid.ed.gov/sa/repay-loans/disputes/prepare (last visited August 2, 2015).

173 Colleges and universities used to share information on financial aid packages but ran afoul of federal antitrust enforcement. Anthony DePalma, *Ivy Universities Deny Price-Fixing But Agree to Avoid It in the Future*, N.Y. TIMES, May 23, 1991, at http://www.nytimes.com/1991/05/23/us/ivy-universities-deny-price-fixing-but-agree-to-avoid-it-in-the-future.html.

executive effort in this direction would encounter fierce resistance. Litigation would almost certainly raise challenges arguing that the federal government lacks the authority to intervene in the affairs of education institutions within a state.

C. External review

The formal actions of administrative agencies may be subject to review by courts or an executive,[174] which could curb potential capture. Members of regulated industries can and do mount challenges to rules proposed and enforced by their regulators.[175] Yet this check on agency authority[176] does not obviously lend itself to policing a system characterized by the operation of a diffuse set of actors, including colleges and universities, students, lenders and the government–which is at once both a lender and a regulator. Even if courts could review decisions dispositive of college accessibility, they might choose not to. Courts generally are reluctant to second-guess in this area, as they are reluctant to review decisions about grades.

More radically, current student borrowers or alumni who borrowed could be given a role in reviewing financial aid decisions at their (or other) institutions, much as current students have a role in admissions processes at some colleges and universities.[177] This would sidestep the challenges created by federal government oversight, but it would represent a shift in how colleges and universities currently relate to students and alumni. As colleges have come increasingly to be viewed as purveyors of a service and students as their customers,[178] envisioning a role for students in critical management decisions is quite difficult. But the roles of students and–perhaps more importantly–the roles of alumni could change, if the education enterprise were conceived differently. Not only would this provide a check on college decisions, it might also bolster a bulwark against the further commercialization of higher education by ensuring that values prized by students and alumni had formal advocates with a place in the institutional structure. Naturally, such a check would not be welcomed by the previously unchecked party; this, too, is consistent with the insights of scholarship on regulatory design.

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174 The Office of Information and Regulatory Affairs ("OIRA"), housed within the Executive Office of the President, reviews regulatory agency decisions, for example. Michael A. Livermore and Richard L. Revesz, *Can Executive Review Help Prevent Capture?*, in Daniel Carpenter and David A. Moss, eds., Preventing Regulatory Capture: Special Interest Influence and How to Limit It 429.

175 To take one relatively recent example, in *Business Roundtable v. Securities and Exchange Commission,* 647 F.3d 1144 (2011), an industry group successfully challenged a rule adopted by the Securities and Exchange Commission.

176 The ability of courts to rein in capture is not automatic even when a formal regulatory agency is available as a defendant. M. Elizabeth Magill, *Courts and Regulatory Capture*, in Daniel Carpenter and David A. Moss, eds., Preventing Regulatory Capture: Special Interest Influence and How to Limit It 398 ("As a result of [their] formal authority, courts *might* be in a position to police regulatory capture" (emphasis in original)).

177 At the University of California, Irvine School of Law, where I have on a few occasions served on the Admissions Committee, the student member of the group has often provided invaluable advice and perspective. The student is far closer to the education experience from the user's end than the faculty or professional admissions officers, after all.

178 *See* Labaree, supra note 79.

D. The shortcomings of prior reform efforts

The reforms proposed above go beyond past efforts to reduce the adverse effects of indebtedness on students, such as those implemented by the Obama Administration and proposed by the Trump Administration[179] to promote college access by gradually expanding federal repayment assistance programs.[180] These efforts seek to counter some of the ways that aid can favor students who are more privileged and undermine those who are less so. However, plans that limit students' monthly repayment obligations to a fraction of their income operate after students are already enrolled and indebted, and so may be less effective at overcoming some of the obstacles confronting poorer students prior to matriculation.

The narrative of the striving, indebted student has no doubt fueled support for expansion of loan forgiveness programs. But these programs also sidestep a difficult legislative debate over the proper role of the federal government in facilitating access to higher education. Because loan forgiveness under new programs, which tie monthly payment obligations to students' income, may occur twenty-five years into the future, their cost is uncertain. Critics warn that as more students take advantage of the flexible repayment options, the cost could balloon and contribute to federal indebtedness.[181]

How much the government should spend to support college access is a normative question that is beyond the scope of this Article; but the question of the proper form support should take is quite relevant. Loan forgiveness counters the burden imposed on students by debt, which they incur because their financial resources and financial aid in the form of grants fail to match the cost of attending college. Yet institutions that can promote wider higher education access may respond to income-based repayment in ways not necessarily evident ahead of time. While wider exploitation of federal programs could increase government costs, more disturbing is the possibility that other components of the system may adjust their conduct, too.

Consider: The existence of forgiveness reduces the incentive for institutions to provide grant aid to students or to attempt to control costs. Colleges may shift resources away from grant aid, aware that the government will help borrowers manage their debt burdens. In the absence of limits on non-need-based aid, status-seeking, selective institutions will redirect need-based aid to applicants with higher grades

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179 For a discussion of the Trump Administration's proposed reforms, *see* Jonathan D. Glater, *Public Service Loan Forgiveness in the Administration's Crosshairs*, Education Law Prof Blog, May 24, 2017, available at http://lawprofessors.typepad.com/education_law/2017/05/public-service-loan-forgiveness-in-the-administrations-crosshairs-by-jonathan-d-glater.html.

180 For example, the federal Education Department recently expanded access to repayment programs for indebted students, making more borrowers eligible for eventual forgiveness of their loans Michael Stratford, *Income-Based Repayment Expansion Advances*, Chron. of Higher Educ., May 1, 2015, available at https://www.insidehighered.com/news/2015/05/01/federal-rule-making-panel-oks-plan-expand-income-based-repayment-program.

181 *See, e.g.*, Kevin Carey, *Flip Side of Reducing Student Debt Is Increasing the Federal Deficit*, N.Y. Times, Feb. 11, 2015, at http://www.nytimes.com/2015/02/11/upshot/calculating-the-price-to-taxpayers-of-easing-the-student-debt-burden.html?abt=0002&abg=0.

and test scores, bolstering that recruitment tactic. Colleges could also raise tuition more sharply than they otherwise would.[182] Such potentially undesirable responses to policy innovation could reduce the efficacy of both aid and raise the cost of forgiveness. Thus, recognition of the ways in which components of the higher education regulatory system interact is critical to ensuring success. Policy interventions should be designed to create positive rather than negative incentives.[183]

Both Democratic presidential candidates in the 2016 campaign proposed providing funds directly to states that reduce or eliminate tuition for college students.[184] These plans would certainly have enhanced access and would represent a historic shift away from the high-price, high-aid model that many colleges have adopted. These plans would also have marked a shift away from equal treatment of higher education providers that are public and private, nonprofit or for-profit,[185] and away from provision of federal student aid to students rather than institutions. The Trump Administration has not endorsed such a shift, but has proposed expanding general loan forgiveness after 15 years of repayments.[186] The new administration has also signaled a different attitude toward for-profit higher education providers, attempting to slow or freeze implementation of regulations aimed at making such institutions accountable for poor student outcomes.[187] Reforms like those described here appear unlikely as a matter of federal policy or legislative action, as of this writing, though institutions could take steps independently to promote greater equity in access.

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182 Whether college and university administrators do in fact raise tuition in response to more generous federal aid programs, consistent with fear expressed in the "Bennett hypothesis" outlined by William J. Bennett, the former secretary of education, is unclear; this article takes no position that question. William J. Bennett, *Our Greedy Colleges*, N.Y. Times, Feb. 18, 1987, available at http://www.nytimes.com/1987/02/18/opinion/our-greedy-colleges.html; *but see* Ronald G.Ehrenberg, Tuition Rising: Why College Costs So Much 265 (2002) (finding that colleges and universities raise prices for reasons unrelated to the availability of aid).

183 Forgiveness could be made contingent on some aspect of institutional conduct, such as the pace, of tuition increases, so that institutions would face pressure from students and alumni to keep costs low. Critics of higher education pricing have noted the consistency with which tuition has grown more quickly than inflation, so the rate of inflation could be the benchmark for such a limitation. *See* College Board, Trends in College Pricing 2014 16 (Fig. 5), available at http://trends.collegeboard.org/sites/default/files/2014-trends-college-pricing-final-web.pdf (illustrating pace of tuition increases in inflation-adjusted dollars over ten-year periods beginning in 1984).

184 Senator Sanders' proposal is described in S. 1373 (2015), the "College for All Act," introduced in 2015. S. 1373, available at https://www.congress.gov/114/bills/s1373/BILLS-114s1373is.pdf. Hillary Clinton's proposal is summarized in a briefing document, Hillary Clinton, *New College Compact* (2015), available at https://www.hillaryclinton.com/briefing/factsheets/2015/08/10/college-compact-costs/ and on file with author.

185 Although Hillary Clinton's plan would address the provision of federal support to nonprofit institutions. *See* Hillary Clinton, supra note 187.

186 *See supra* note 173.

187 Stacy Cowley and Patricia Cohen, *U.S. Halts New Rules Aimed at Abuses by For-Profit Colleges*, N.Y. Times, June 15, 2017, at B8.

IV. Conclusion

Access to higher education is governed by a complex, dynamic and interacting set of institutions, policies and practices. Sociologists studying college access have recognized this. This Article has developed this insight in the context of legal scholarship, illustrating the complexity of the regime and the resulting difficulty of predicting the effects that any modifications might have. The goal of the Article has in a sense been modest: To inform debates over potential reforms by drawing attention to the effect they may have on the accessibility of higher education and on life opportunity. In offering proposals to broaden access, the Article has applied insights of scholars who have studied the effects of particular regulatory designs. Thus the Article has used a critical perspective on higher education to develop pragmatic, legal recommendations.

Animating this Article's analysis of federal policy in higher education is a profound concern that meaningful access to educational opportunity has become more and more restricted. This is so even though the system created to enable students to matriculate regardless of wealth persists largely in the same form that it has had for five decades.[188] This Article thus belongs to a larger critique of dynamic societal structures and processes that advantage people who already enjoy benefits in the form of wealth, education, social or other forms of capital, and that disadvantage those lacking such assets. This is not a new story; critical scholars have noted other ways that legal doctrines and regulatory regimes have resisted policies promoting greater equity with "retrenchment" rather than acceptance.[189] Higher education is not a purely private good and discussions of how to allocate it should not be shaped by the assumption that it is. Fulfilling the ideals that led to adoption of legislation that sought to put college within reach of all requires reconsideration of the financial aid and admissions system students and colleges rely on, as both the political and the economic contexts change.

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188 The current structure of federal aid in the United States was established in the Higher Education Act of 1965, which was signed into law by President Lyndon Baines Johnson on Nov. 8, 2015. Pub. L. 89-329 (1965).

189 Richard Delgado, *On Taking Back Our Civil Rights Promises: When Equality Doesn't Compute*, 1989 Wis. L. Rev. 579, 580 (1989); *see also* Derrick Bell, *Racial Realism*, 24 Conn. L. Rev. 363, 373-374 (1992) ("Even those herculean efforts we hail as successful will produce no more than temporary 'peaks of progress,' short-lived victories that slide into irrelevance as racial patterns adapt in ways that maintain white dominance"); Richard Delgado and Jean Stefancic, *The Social Construction of Brown v. Board of Education: Law Reform and the Reconstructive Paradox*, 36 Wm. & Mary L. Rev. 547, 551 (1995) ("For social reform to happen, 'everything must change at once,' but in the law, doctrines such as stare decisis, standing, mootness, ripeness, and political question mean that the law cannot change everything at once"); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 Stanford L. Rev. 1111, 1142 (1997) ("status-enforcing state action is mutable in form, evolving in rule structure and justificatory rhetoric as it is contested"). Many more articles could be included in this list.