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ABSTRACT

The notion of a student debt jubilee has begun its march from the margin of policy debates to the center, yet scholarly debate on the value of canceling student debt is negligible. This article attempts to jump start such debate in part by presenting a novel policy proposal for implementing a jubilee. In addition to reviewing the history of student debt and the arguments for canceling much or all of it, it presents a detailed legal argument that canceling public student debt (which accounts for 95% of student debt outstanding) could be undertaken by the Executive Branch without further legislation. The Secretary of Education has already been given the authority to "modify" and to "compromise, waive, or release" its claims against students. There is a strong argument under current case law that this authority is a grant of prosecutorial discretion, which would be unreviewable by courts. Even if a court were to rule otherwise, at least some cancellation plans would likely survive "arbitrary and capricious" review. In any case, this litigation risk is not a good enough reason for a President not to try to relieve the burdens of student debt if Congress cannot agree on a bill that will do so.

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INTRODUCTION

A student debt jubilee is an idea whose time is coming. Only a few years ago, talk about canceling student debt was confined to the radical fringes. Today there are two competing bills that would cancel different amounts of student debt bouncing around the Senate, both introduced by prominent progressive politicians during their runs for President. Things are moving so fast that between the time this Article was accepted for publication and was actually published, its proposal to cancel student debt via Executive Action was adopted by one of these candidates as part of her platform. The rapidly unfolding COVID-19 crisis seems only to have accelerated the mainstreaming of the idea. Even centrist Democrats are now getting behind the idea of canceling $10,000 of student debt as part of a relief package. The non-Progressive presumptive Democratic nominee has committed to at least some student debt cancellation.[1]

Meanwhile, scholarly work on student debt cancellation remains thin to nonexistent. This Article begins to fill the gap. It discusses why such a jubilee would be desirable and how it might be implemented. After reviewing the history of student debt and the arguments for cancellation, the last section of the Article presents the possibility that a substantial amount of public student debt cancellation could be undertaken without further legislation. The Secretary of Education has already been given the authority to "modify" or "compromise, waive, or release" its claims against students. Under current law, at least some uses of these authorities would be treated as an exercise of "prosecutorial discretion," which are unreviewable by courts (apart from Constitutional challenges). Although a court might be inclined to narrow the authority, current law provides ample

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

room for maneuver and, in any case, the risk of having debt cancellation reversed by an increasingly unpopular judiciary is worth taking.

Part of the reason that student debt cancellation has long been excluded from mainstream policy debates, is that the common wisdom is that student debt is mostly harmless. The logic goes that higher education is a high-yield investment in individual productivity and wage-earning potential, so high-yield that the cost of borrowing to fund this investment is well worth it. Part I of this Article traces how this way of thinking about student debt came to be. Student debt was originally a compromise device to fill in small gaps in public subsidy while avoiding charged political debates. At the beginning of the postwar period, using federal spending to universalize public higher education was not far from enactment. Southern segregationist concerns about federal usurpation of state power, Catholic concerns about undermining parochial education, and a widespread assumption that one could work one's way through college without much of a problem (and that doing so was virtuous) presented the main obstacles. Having the federal government subsidize students rather than institutions avoided some of these obstacles, and having it do so through lending rather than grants avoided others. Encouraging banks to lend by guaranteeing their return used an accounting trick to avoid concerns about an expanding federal budget in the guns-and-butter 1960s.

For the first decade after the Higher Education Act first created a permanent student loan program, federal grants for low-income students managed to hold back the growth of the industry, reserving it primarily as a supplement for middle class students. But college costs continued to rise and political support for public subsidy waned. Student loans were always there as a compromise to fill in the gap. Meanwhile, the student loan industry came into its own as a lobbying force, and the idea of "democratizing credit" took on its own momentum. Student debt truly began to grow in the

1990s. It was then that for-profit colleges consolidated into big businesses designed to suck in as much federal student aid as possible, that Sallie Mae went private and began to develop innovative techniques for expanding student lending, and that state governments began cutting higher education budgets in earnest. Students, colleges, and policymakers all began to view higher education primarily as an investment in future employability, as "human capital." Student debt came to seem a natural part of the lifecourse.

Unique among varieties of household debt, the growth of student debt continued unabated through the 2008 crisis. It has continued its growth since. Yet the financial crisis also began to undermine the legitimacy of student debt and to loosen the grip of the student debt industry on politicians. Although some economists continue to insist that there *is* no student debt crisis, the rapidly growing default rate, the overwhelming evidence of systematic fraud at many for-profit colleges, the increasing evidence of student debt's role in deepening the racial wealth gap, and the undermining of the "skills gap" theory of growing income inequality, among other things, have made that an increasingly untenable position. Organizing by student debtors themselves combined with a dawning realization among politicians that the misery caused by student debt could be harnessed for political gain has pushed the possibility of canceling student debt and restructuring the higher education system so it no longer generates more of it into the mainstream.

Part II describes the burdens that student debt creates. As debt is negative wealth, those who have it are necessarily that much less wealthy. This wealth gap is felt most strongly by those who already have little wealth to begin with (of course, those with a good deal of wealth are unlikely to take out debt). Student debt deepens the racial wealth gap as well as the class divide. Student debt has also been shown to increase anxiety and even to worsen health outcomes, while preventing people from making major investments such as buying a house or a car, or getting married or having kids.

These effects channel through families and communities, further deepening race and class divides. Even for the relatively well off, taking on debt pushes people into more lucrative but less socially valuable and less individually rewarding work, furthering the ongoing "Meritocracy Trap" by which the highly educated work themselves ragged as facilitators of extraction.[2] As well, the aggregate effect of reduced ability to spend on anything but paying down debt presses down demand. In our demand-driven economy, that has the knock-on effect of lowering productivity and employment—again, deepening class and racial divides.

Student debt also has knock-on social and political effects. It changes the way individuals, institutions, and policymakers think about the role of higher education in society—making it appear to all as fundamentally an investment in worker productivity, with a cost to be borne primarily by individuals. The idea of education as a collective good gets erased. And as more and more institutions—from servicers to for-profit colleges to public universities—come to be dependent on the student debt system, student debt creates its own political inertia.

With these burdens in mind, Part III explores some arguments for canceling student debt. The main argument is that student debt creates unjustifiable burdens on individuals while distorting our political and higher education systems in unacceptable ways. There is no reason to force individuals to take out debt to finance their own educations that is not a better reason to make higher education free for all while implementing a progressive income (and wealth) tax. Canceling student debt would remove this unjustified burden. It would also end the pernicious influence that student debt has had on the institutional structure of and public consciousness about higher education. If done in combination with a program to render public higher education free to all who want to access

2. DANIEL MARKOVITS, THE MERITOCRACY TRAP (2020).

it, it would contribute to the reconstruction of higher education in a formation more fitting for a democratic society. Canceling student debt would also have major positive effects on many peoples' lives, including those whose debts would be relieved, along with the debts of their friends, family, and communities. That relief would have a macroeconomic effect that would increase employment as well as opening up fiscal space for more productive investment.

After a brief review of current legislative proposals to cancel student debt (sure to become rapidly out of date), Part IV lays out the argument for a jubilee without further Congressional action. The core argument is that the Secretary of Education has absolute—that is, unreviewable—discretion to determine when not to enforce a claim over which it has jurisdiction. In the leading case of *Heckler v. Chaney*, the Supreme Court declared that an agency's non-enforcement decision could only be reviewed if a statute created "law to apply" of sufficient specificity to be a "meaningful standard against which to judge [an] agency's exercise of discretion."[3] And the Higher Education Act contains no such standard. Though recent case law has complicated the *Chaney* test somewhat, the law as it stands now is still solidly on the side of judicial deference.

The Department of Education's prosecutorial discretion only applies to loans over which it has a claim, so only public loans (which now account for 95% of those outstanding) and only those already in the books would qualify for such relief. For Direct Loans, which account for approximately 80% of public student loans, this is not a problem. For the FFELP and Perkins Loans that remain outstanding, on the other hand, the Department would have to use its powers creatively to obtain possession. As well, the Department would have to consult with the Department of Justice to comply with its own regulations, the Office of Management

3. 470 U.S. 821, 830 (1985).

and Budget to dodge or eliminate the requirements of so-called "Administrative PAYGO," and the Treasury to ensure that the canceled debt is not taxed as income. Clearly, then, the White House would have to initiate and guide the debt cancellation program for it to be carried out effectively.

I. THE POLITICAL ECONOMY OF STUDENT DEBT

A. *Federal Higher Education Policy Before the Higher Education Act*

Student loans have come to seem a natural part of the U.S. higher education system, a right of passage for all but the luckiest people who attend college. Until very recently, all the debates about student loans among national policymakers and the academics they listen to revolved around how to make loans work more effectively as an investment instrument. The idea that funding higher education through student debt might be fundamentally misguided—even inhumane—was hardly considered. There is a deep irony here. None of the people who originally designed the student debt system thought that student debt should be a right of passage. Few of them even thought about higher education as primarily an individual investment. Rather, student debt was a compromise between competing visions, most potently between those who sought to expand higher education to all and those who wanted to limit access to a privileged few. To fully see the problems with student debt, it will be fruitful to explore how we got to the present from these origins.

We must remember that before the National Defense Education Act of 1958, student loans were almost unheard of. At that time—and for many years after—banks were reluctant to offer unsecuritized loans to pay for an education. Indeed, in an era where commercial banks were highly decentralized, when credit scores did not yet exist, let alone follow everyone everywhere, and where there was plenty of money to be made lending to businesses, banks were reluctant to offer *any* unsecuritized loans for *any* non-business expense.[4] It was thought to be too risky (the debtor

4. *See* LOUIS HYMAN, DEBTOR NATION: THE HISTORY OF AMERICA IN RED INK 69–88 (2011); Luke Herrine, *Credit Reporting's Vicious Cycles*, 40 N.Y.U. REV. L. & SOC. CHANGE 305, 310–14 (2016) (on the history of credit reporting); Martha Poon, *Scorecards as Devices for Consumer Credit: The Case of Fair, Isaac &*

could just skip town!). When they were offered at all, student loans were offered only at prohibitively high interest rates after extensive background checks or as a loss-leading perk for wealthy customers.[5]

When Congress created the market for student loans, it was as a grudging compromise. Nobody was particularly thrilled with the arrangement (aside, perhaps, from the neoclassical labor economists excitedly developing the concept of "human capital" and attempting to inject it into policy discussions),[6] nor did anybody have any notion that it would take on the size and importance it has. Loans were the way that those who supported expanding higher education through federal subsidy could get enough votes from those who were skeptical of the project.

Legislative discussion of federal higher education policy began after the GI Bill had opened the possibility of using federal fiscal power to expand access to higher education beyond the elite.[7] Previously, the federal government had mostly left it to the states to finance and regulate every level of the educational system.[8] (The Land Grant Acts of 1862 and

Company Incorporated, 55 SOC. REV. 284, 288 (2007).

5. *See* Elizabeth Popp Berman & Abby Stivers, *Student Loans as a Pressure on Higher Education*, *in* THE UNIVERSITY UNDER PRESSURE 129, 134–35 (Elizabeth Popp Berman & Catherine Paradeise eds., 2016); SUZANNE METTLER, DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM 61 (2014).

6. *See* Laura Holden & Jeff Biddle, *The Introduction of Human Capital Theory into Education Policy in the United States*, 49 HIST. OF POL. ECON. 537, 537–38 (2017).

7. *See* METTLER, *supra* note 5, at 56–59.

8. *See* METTLER, *supra* note 5, at 115–16. Christopher Loss has shown that the project of expanding higher education began in the aftermath of World War I, but only really took form after the G.I. Bill. *See* CHRISTOPHER LOSS, BETWEEN CITIZENS AND THE STATE: THE POLITICS OF AMERICAN HIGHER EDUCATION IN THE 20TH CENTURY 19–93 (2011). We might also note that history might have gone otherwise. Lawrence Gladieux and Thomas Wolanin pointed out that "[a]t the Constitutional Convention of 1787, several proposals were advanced to give the federal government authority to establish institutions of higher education," but they all failed. LAWRENCE E. GLADIEUX & THOMAS R. WOLANIN, CONGRESS AND THE COLLEGES 3 (1976).

1890 are the notable exceptions).[9] But the Servicemen's Readjustment Act of 1944—the GI Bill—guaranteed a free college or trade school education to returning (and qualified) World War II veterans, and a quarter of all veterans, 2.6 million men, took advantage of the opportunity.[10]

Men's college graduation rates had tripled by 1950.[11] Expanding higher education was widely seen as a success, by policymakers, by the ex-soldier beneficiaries, and by much of the population more broadly.[12] The notion that people from working class backgrounds could not cut it in college had become difficult to defend.[13] Indeed, as universal high school education had only recently become a national reality, the quelling of similar doubts about the ability of poor and working class students to make it past eighth grade was a living memory.[14] The bounds of the possible seemed worth prodding. Many intellectuals and politicians began to imagine the possibility of expanding universal—though still racially segregated—education beyond the twelfth grade.

In 1946, two years after the GI Bill became law, President Truman convened "outstanding civic and educational leaders" to "reexamine our system of higher education in terms of its objectives, methods, and facilities; and in the light of the social role it has to play" as part of a Commission on Higher Education.[15] The Commission issued a six-volume report. It recommended:

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9. METTLER, *supra* note 5, at 41.

10. *Id.* at 6; *see also* Loss, *supra* note 8, at 124.

11. METTLER, *supra* note 5, at 6.

12. Loss, *supra* note 8, at 95.

13. *See generally* CLAUDIA GOLDIN & LAWRENCE F. KATZ, THE RACE BETWEEN EDUCATION AND TECHNOLOGY 247–84 (2008).

14. *Id.* at 158–62, 195–99.

15. PRESIDENT'S COMMISSION ON HIGHER EDUCATION, HIGHER EDUCATION FOR AMERICAN DEMOCRACY, VOLUME I: ESTABLISHING THE GOALS v (1947) [hereinafter TRUMAN COMMISSION RPT.: VOL. I]. For background on the Commission, especially with respect to the changing attitudes about the role of higher education in the immediate postwar/early Cold War period, see Loss, *supra* note 8, at 133–39.

> American people should set as their ultimate goal an educational system in which at no level—high school, college, graduate school, or professional school—will a qualified individual in any part of the country encounter an insuperable economic barrier to the attainment of the kind of education suited to his aptitudes and interests.[16]

Although it acknowledged that "equal educational opportunity [could not] be attained immediately," it envisioned that the "phenomenal increases in productivity per worker" that were already underway promised to generate enough social surplus to "be able to support education at all levels far more adequately in the future than we could in the past," so long as political and social institutions prioritized doing so.[17]

Accordingly, the Commission recommended immediately allocating the funds necessary to make thirteenth and fourteenth grade totally tuition and fee free at public universities for all who qualified, to reduce tuition and fees to nominal amounts for fifteenth and sixteenth grades, and to increase the availability of adult education.[18] These funds would come both in the form of subsidies to states to increase their support for public universities and as a combination of scholarships and fellowships to fill in the gap for under-resourced students. The Commission also recommended a program of federal grants to cover costs of living for under-resourced students starting in tenth grade.[19] All of this

16. TRUMAN COMMISSION RPT.: VOL. I., *supra* note 15, at 36.

17. *Id.* at 37.

18. *See id.* at 37–38; PRESIDENT'S COMMISSION ON HIGHER EDUCATION, HIGHER EDUCATION FOR AMERICAN DEMOCRACY, VOLUME V: FINANCING HIGHER EDUCATION 3–4 (1947) [hereinafter TRUMAN COMMISSION RPT.: VOL. V]. After examining the finances and expected enrollment numbers in detail, the Commission concluded that "[t]he wide variation in the ability of the various States to support higher education makes a program of equalization imperative if a defensible minimum program of higher education is to be provided on a Nation-wide [sic] basis." TRUMAN COMMISSION RPT.: VOL. V, *supra* note 18, at 38.

19. PRESIDENT'S COMMISSION ON HIGHER EDUCATION, HIGHER EDUCATION FOR AMERICAN DEMOCRACY, VOLUME II: EQUALIZING AND EXPANDING INDIVIDUAL OPPORTUNITY 38 (1947) [hereinafter TRUMAN COMMISSION RPT.: VOL. II].

would be provided on a non-discriminatory basis: indeed (a decade before *Brown*, and half a decade before *Sweatt*)[20] the Commission also included extensive recommendations on desegregation, on ending religious quotas, on increasing women's enrollment (ending "antifeminism," as the Commission put it), and on creating more flexible admission standards to account for ability rather than access to resources.[21]

In sum, the so-called "Truman Commission" recommended striving for universality in higher education primarily through expanding public schools, with the federal government playing a large and growing role in financing. However, "advocates of broader federal support for higher education unrelated to military service faced an uphill struggle. In fact, aid-to-education proposals of all kinds repeatedly ran aground in Congress, blocked by civil rights and church-state controversies and fear of federal control of education."[22] In a familiar pattern, white supremacists only wanted federal funds if conditions of funding did not threaten segregation, and antiracists wanted to undermine segregation or at least avoid having the federal government support it. "Battle lines were also drawn between northern Catholic Democrats, who insisted on the inclusion of religious colleges, and others who viewed such an approach as a violation of the separation of church and state."[23] Moreover, "[m]any members of Congress at that time had worked their way through college" and found the notion of non-veterans getting a "free ride" distasteful.[24]

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20. Brown v. Board of Ed., 347 U.S. 483 (1954); Sweatt v. Painter, 339 U.S. 629 (1950).

21. *See* TRUMAN COMMISSION RPT.: VOL. II, *supra* note 19, at 25, 39.

22. Lawrence E. Gladieux, Federal Student Aid Policy: A History and Assessment, U.S. DEP'T EDUC. (Oct. 1995), https://www2.ed.gov/offices/OPE/PPI/FinPostSecEd/gladieux.html [hereinafter Gladieux, *Federal Student Aid*]; *see also* METTLER, *supra* note 5, at 59–60.

23. METTLER, *supra* note 5, at 59.

24. Gladieux, *Federal Student Aid, supra* note 22.

Sputnik launched a panic that jogged the loggerheads open, but only enough for student loans to slip through.[25] Desperate not to fall behind the USSR's military technology or international prestige, politicians sought to expand investment in the sort of research and education that could lead to innovations in mass destruction or advantages in espionage.[26] Yet "suspicion of giving students a 'free ride'" remained powerful enough to cool the Cold War fervor.[27] The Eisenhower Administration's and the Democratic Party's bills would have created federal scholarships for undergraduates, but the program was "deleted on the House floor and cut back in the Senate, then abandoned entirely in the House-Senate conference."[28] A student-lending program made it through. After all, debt brings the moral individual responsibility along with it.[29] The resulting National Defense Education Act of 1958 (NDEA) thus simultaneously created the federal government's first direct aid to non-veteran college students and the first student loan program.

But the suspicion of free riding and usurping states' rights ran deep.[30] The National Defense Education Loans (NDEL) program was temporary and highly conditional. The loans were made available only to students who demonstrated financial need and potential in science, math,

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25. *See* Loss, *supra* note 8, at 156 ("Proposals for increased federal funding for the nation's education system had been circulating around the Capitol for nearly two decades, but it took the Sputnik crisis to secure the political support needed to move the legislation through Congress. The handful of liberals who inhabited the 'small world of education politics,' as one leading historian on the topic has described it, seized their opportunity to increase federal support for elementary, secondary, and higher education.").

26. *See* GLADIEUX & WOLANIN, *supra* note 8, at 8–9; METTLER, *supra* note 5, at 58.

27. GLADIEUX & WOLANIN, *supra* note 8, at 9.

28. *Id.*

29. On the "political lightness" of federally financed debt programs as compared with direct federal subsidy, see SARAH QUINN, AMERICAN BONDS: HOW CREDIT MARKETS SHAPED A NATION (2019).

30. *See* Loss, *supra* note 8, at 157–58.

engineering, or foreign languages—that is, only those students whose educations could serve the interests of staffing the growing Cold War military and espionage apparatus.[31] They "reached only about 25,000 students."[32] And rather than having the federal government directly lend to students, Congress set up a system whereby each state had access to a pool of federal money to allocate among colleges. The colleges then issued the loans subject to terms dictated by Congress and the regulations of the Department of Health, Education, and Welfare (from which the Department of Education eventually split off).[33] NDEL eventually became part of the Federal Perkins Loan Program, which was more generally focused on providing low-interest loans to students that demonstrated financial need.[34] Although NDELs were phased out in 1972, Perkins Loans inherited NDEL's basic structure and maintained it until the Perkins Loan program was terminated in 2015.[35] The details of this structure will become important later.

B. *The Higher Education Act Lays the Foundation for the Modern Regime*

If it took the Cold War to bring student loans into

31. National Defense Education Act of 1958, Pub. L. No. 85-864, § 204(4)(B), 72 Stat. 1580, 1584. On the role of Cold War thinking in designing higher education funding, see Loss, *supra* note 8, at 121–60.

32. Berman & Stivers, *supra* note 5, at 134. This was not seen as a small number at the time and, indeed, created the foundation for more federal involvement in higher education funding. *See* Loss, *supra* note 8, at 159.

33. Berman & Stivers, *supra* note 5, at 134; Loss, *supra* note 8, at 158 (discussing the growth of the Commissioner's office as a result of the NDEA). On the transfer of the Commissioner's responsibilities to the Secretary, see Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979).

34. *See Volume 6—The Campus-Based Programs*, FED. STUDENT AID HANDBOOK 6–3 (Oct. 5, 2015), https://ifap.ed.gov/fsahandbook/attachments/1516FSAHbkVol6Master.pdf.

35. *See* Kelly Field, *Perkins Loan Program, a Federal Stalwart Since 1958, Meets its Demise*, CHRONICLE HIGHER ED. (Oct. 1, 2015), https://www.chronicle.com/article/Perkins-Loan-Program-a/233527.

existence, it took the War on Poverty to make them an indefinite fixture of federal higher education policy. President Johnson attributed his own rise from poverty to power to the access to education he received. So he saw federal funds for primary, secondary, and postsecondary education as crucial for equalizing empowerment.[36] Meanwhile, the mobilizations of the black freedom struggle, the campus free speech movement, and other progressive groups and the overwhelming Democratic victory in 1964 created momentum for a wave of social democratic legislation.[37] Yet the familiar segregationist and parochial countercurrents against democratizing higher education remained. And grants without conditions, especially for middle-class students, were still met with suspicion from the members of the elite preoccupied with the ideology of bootstraps.[38] As well, the sense that tradeoffs and prioritization were necessary was acute even among progressive voices. The Beltway was abuzz with concerns about the size of the federal government's balance sheet while domestic spending expanded alongside investment in foreign regime change in the increasingly hot Cold War.[39]

As in 1958, student loans were hit on as a way to get

36. *See* Loss, *supra* note 8, at 168–71; GLADIEUX & WOLANIN, *supra* note 8, at 17; METTLER, *supra* note 5, at 51.

37. *See* Loss, *supra* note 8, at 169–75.

38. *See* GLADIEUX & WOLANIN, *supra* note 8, at 20; Loss, *supra* note 8, at 175 ("Democratic leaders . . . agreed to a Guaranteed Student Loan Program for the middle-class—guaranteed because the federal government insured the loans on behalf of the private banks and lending agencies that financed them—in order to garner Republican support for federal aid to students with 'exceptional financial need.' Democrats considered the guaranteed loan provision a small price to pay for the achievement of federal grants for needy students.").

39. On the parallel role that this environment played on federal mortgage policy and the creation of the financial technique of securitization, see Neil Fligstein & Adam Goldstein, *A Long Strange Trip: The State and Mortgage Securitization, 1968-2010*, *in* THE OXFORD HANDBOOK OF THE SOCIOLOGY OF FINANCE 339, 345–46 (Karin Knorr Cetina & Alex Preda, eds., 2012); Sarah Quinn, *"The Miracles of Bookkeeping": How Budget Politics Link Fiscal Policies and Financial Markets*, 123 AM. J. SOC. 48 (2017).

doubters on board (which is not to say that student loans were the only, or even the most important, program created by the HEA!). And, though creating a direct lending program surely would have had lower administrative and agency costs, the concerns about the size of the government's balance sheet turned the Johnson Administration away from that path. The accounting rules in effect at the time placed direct loans on the liability side of the government's balance sheet (as an up-front cost paid down over time), making their immediate cost similar to a grant, though reduced once repayment began.[40] However, these same rules treated loan *guarantees* as creating no up-front cost: they would only show up as liabilities if and when the guarantee had to be paid out.[41] The Higher Education Act of 1965 took advantage of this accounting trick to create a program that insured private agencies' guarantees on student loans issued by approved financial institutions, calling it the Federal Family Education Loan Program (FFELP).[42] The idea was to make lending to students as low risk as possible to encourage banks to lend in exchange for doing so on government-dictated terms.

As with the NDEA, the politicians responsible for the original HEA understood student loans as gap-fillers. They assumed that most of the cost of higher education would be borne by states, endowments, and parental wealth.[43] This was, after all, the era that political scientist Suzanne Mettler refers to as "the zenith of mass public higher education."[44] Most students without substantial family wealth could cover the cost of tuition, fees, supplies, room, and board by working a summer job.[45]

40. *See* Berman & Stivers, *supra* note 5, at 135.

41. *Id.*

42. Higher Education Act of 1965, Pub. L. 89-329, § 431, 79 Stat. 1219, 1245.

43. *See* GLADIEUX & WOLANIN, *supra* note 8, at 17–20.

44. *See* METTLER, *supra* note 5, at 118–23.

45. *Id.*

The post-GI Bill expansion of higher education had begun to increase its relative cost, putting the possibility of full affordability just out of reach for many middle class families. Policymakers understood student loans as a way to cover that difference without fully committing to making higher education universal—a compromise position acceptable to those who did not believe in universalism. In the few years surrounding the HEA, student loans accounted for only *five percent* of federal aid to higher education students.[46] Moreover, since wages had consistently gone up for two decades and upward mobility over the life course seemed almost inevitable, especially for college graduates, it did not seem to be that much to ask of students pay back the little bit of money they would have to borrow to supplement for their summer wages. Nobody conceived that loans would become central to higher education finance.

Those familiar with the state of higher education debate will recognize that this is precisely the inverse of the now-standard human capital story in which individuals are primarily responsible for financing their own education and, because those with educations earn much more over the long term than they cost in the short term, it makes sense to borrow money to do so.[47] From the perspective of human capital theory, the government's main task is to encourage that socially beneficial investment. It can do so by facilitating lending as much as possible and directly subsidizing only as necessary to supplement for the poorest borrowers.[48] Midcentury politicians, on the other hand, operated within a

46. Gladieux, *Federal Student Aid*, *supra* note 22.

47. *See Investing in Higher Education: Benefits, Challenges, and the State of Student Debt,* EXECUTIVE OFF. PRESIDENT U.S. 10 (July 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160718_cea_student_debt.pdf [hereinafter *Investing in Higher Educ.*]; *see also* Sherwin Rosen, *Human Capital*, *in* THE NEW PALGRAVE DICTIONARY OF ECONOMICS (2d ed., Steven N. Durlauf & Lawrence E. Blume, eds., 2008). *But see* Blair Fix, *The Trouble with Human Capital Theory*, REAL-WORLD ECON. REV., Dec. 10, 2018, at 15.

48. *See Investing in Higher Ed.*, *supra* note 47, at 13.

reality in which financing education was primarily a *collective* responsibility except perhaps for the very wealthy. Loans were introduced to supplement for those who slipped through the cracks when consensus could not be reached on the value of *universal* higher education. And loans were understood to exist in a broader education policy apparatus focused on shaping not just workers, but citizens.

C. *Entrenchment and Metastasis*

In another strange inversion from today's bonanza, the initial problem with FFELP was that not enough banks were willing to issue loans. Indeed, the banking lobby initially *opposed* FFELP, because they did not want the government dictating the terms of their loans, even if the government was taking all the risk.[49] Apparently, creating a primary market was not enough to sweeten the pot. So, in the 1972 reauthorization of the HEA, Congress created Sallie Mae—i.e. the Student Loan Marketing Association—to get a secondary market in government-guaranteed student loans going. Subsequent reforms over the years made student loans more and more liquid and the deepening of the markets for collateralized debt increased supply of loans.[50]

The 1972 reauthorization proved fateful for two other reasons. First, it also expanded federal *grant* funding for low-income students, which eventually became the Pell Grant program. This was a crucial step for moving the federal role in making higher education affordable beyond subsidizing lending. Yet it was also a crucial step away from the idea that affordability in higher education should be achieved through subsidy to public schools. "During the debate leading up to this legislation, the higher education community urged Congress to enact formula-based, enrollment-driven federal aid to institutions. But legislators decided that funding aid to students was the more efficient and effective way to

49. *See* Berman & Stivers, *supra* note 5, at 135; METTLER, *supra* note 5, at 61.

50. *See* Berman & Stivers, *supra* note 5, at 135–36.

remove financial barriers for needy students."[51]

In a pattern of thinking that would become increasingly common, "Congress also viewed student aid as a way to harness market forces for enhancing the quality of higher education. Students, voting with their feet, would take their federal aid to institutions that met their needs; less satisfactory institutions would wither."[52] Here is when the notion of higher education as fundamentally a marketplace begins to take hold. Here is where it becomes increasingly mainstream to think of the federal government's role as subsidizing the consumer-investors of that marketplace instead of "picking favorites" among "sellers" of education (i.e. colleges).[53]

Second, the 1972 reauthorization opened up federal aid to so-called "proprietary institutions of higher education," that is, for-profit colleges.[54] Though the GI Bill had provided funding to trade and vocational schools, some of which were for-profit, the fly-by-night frauds that had ensued had discouraged policymakers from repeating the experiment.[55] Reincorporating for-profits into federal higher education policy was part of an effort to emphasize "postsecondary

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51. Gladieux, *Federal Student Aid*, *supra* note 22; *see also* GLADIEUX & WOLANIN, *supra* note 8, at 44–49.

52. Gladieux, *Federal Student Aid*, *supra* note 22.

53. This shift had a number of causes. It was partially in response to efforts on behalf of economists to frame things in this way, most influentially through the "Rivlin Report" of 1969 and through Milton Friedman's more radical popularizations. *See* GLADIEUX & WOLANIN, *supra* note 8, at 25–27 (on Friedman's role), 52–53 (on the Rivlin Report). It was also partly a result of the emerging backlash against student radicalism and the connected backlash against taxes and partly a result of structural changes that had made higher education into a "buyer's market." *Id.* at 23–25, 28–29. These shifts must be understood in light of broader shifts towards offloading distributional conflict onto "the market." *See* GRETA KRIPPNER, CAPITALIZING ON CRISIS: THE POLITICAL ORIGINS OF THE RISE OF FINANCE 58–85 (2012).

54. *See* A.J. ANGULO, DIPLOMA MILLS: HOW FOR-PROFIT COLLEGES STIFFED STUDENTS, TAXPAYERS, AND THE AMERICAN DREAM 85–91 (2016); METTLER, *supra* note 5, at 92–93; Gladieux, *Federal Student Aid*, *supra* note 22.

55. *See* ANGULO, DIPLOMA MILLS, *supra* note 54, at 85–91.

education" rather than "higher education" in order to de-stigmatize educational programs beyond the traditional four-year degree. As such, for-profits were swept in alongside increased funding to community colleges, part-time students, and non-profit vocational programs.[56]

From another angle, the inclusion of for-profits and the more general move from "higher education" to "postsecondary" education was part of the emerging understanding of the higher education field as a market. More "sellers" of education—or, rather, easier entry into the market that the government was in the process of creating—meant more competition as well as more variety. Both competition and variety ensure greater choice, with means higher consumer welfare/surplus.

Unbeknownst to legislators, they had prepared the body politic for a metastasis of student debt. By 1973, student loans already accounted for over 20% of aid to higher education students, four times the share from a decade before.[57] That number grew to 40% by 1983 and to 60% by 1993.[58] Over that same twenty years, federal grants followed the inverse pattern: going from almost half of aid to students to around 20%.[59] Indeed, in 1986 the Reagan Administration nearly torpedoed all federal student aid to college students, along with the very existence of the Department of Education.[60] Meanwhile tuition's creep picked up the pace. In a time of unprecedented inflation, the price of college rose much faster than inflation. Increased enrollments put pressure on existing facilities. Increased productive

56. Gladieux, *Federal Student Aid*, *supra* note 22.

57. *See id.*

58. *See id.* This growth was not uniform, as Berman & Stivers point out "the rapid expansion of federal *grant* aid in the 1970s limited demand for loans[, but] [t]his changed after 1978, when Congress removed the income cap from the GSL program." Berman & Stivers, *supra* note 5, at 135 (emphasis added).

59. *See* Gladieux, *Federal Student Aid*, *supra* note 22.

60. *See id.*

efficiency in sectors other than higher education also made the relative cost of higher education increase (since education has not become more "efficient"), a process known as "Baumol's Cost Disease."[61] This put increasing pressure on states' budgets, and state governments began to waver in their commitment to making public colleges and universities free or affordable for all.[62] Hesitation to fund public goods adequately was in part due to a growing crisis of legitimacy connected to stagflation and in part due to the growing conservative campaign against "campus radicals" (initially led by Reagan himself in his California gubernatorial campaigns) and the "taxpayer revolt" against spending on public goods, especially those that had begun to benefit black and brown people who had previously been excluded.[63]

Student loans maintained their role as gap fillers as the gap they had to fill stretched wider. Political deadlock on whether to expand or to contract federal aid for higher education could always be resolved by the compromise option of making student loans easier to access. And as student lending became big business, it grew a big-business-sized lobbying arm. Student debt was no longer just a pressure valve to avoid resolving debates about the role of public higher education in a pluralistic democratic society. It now

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61. *See* GLADIEUX & WOLANIN, *supra* note 8, at 21–23 (on rising costs); METTLER, *supra* note 5, at 67–68 (same). *See generally* ROBERT B. ARCHIBALD & DAVID H. FELDMAN, WHY DOES COLLEGE COST SO MUCH? (2011) (making the cost disease argument for higher education); WILLIAM J. BAUMOL, THE COST DISEASE: WHY COMPUTERS GET CHEAPER AND HEALTH CARE DOESN'T (2012) (elaborating on the theory of a "cost disease").

62. *See* Gladieux, *Federal Student Aid, supra* note 22. *See generally* David A. Tandberg, *Politics, Interest Groups and State Funding of Public Higher Education*, 51 RES. HIGHER EDUC. 416 (2010).

63. *See* GLADIEUX & WOLANIN, *supra* note 8, at 23–25 (on the role of campus radicalism). *See generally* Aaron Bady & Mike Konczal, *From Master Plan to No Plan: The Slow Death of Public Higher Education*, 59 DISSENT 10 (Fall 2012) (on Reagan's role and its larger significance to California's public higher education system in particular); CAMILLE WALSH, RACIAL TAXATION: SCHOOLS, SEGREGATION, AND TAXPAYER CITIZENSHIP, 1869–1973 (2018) (on the role of tax politics and taxpayer identity in the reinforcement of segregation and racial hierarchy).

created its own political pressure.[64]

D. *Student Debt Becomes Natural*

By the 1990s, the student loan market, and higher education more generally, had already become something entirely different from that envisioned by the drafters of the HEA, let alone the NDEA. Yet, in retrospect, it was not until that point that student debt *really* began to take off.

Sociologists Beth Popp Berman and Abby Stivers argue that three legal changes account for this turning point. First, Congress changed the federal accounting rules both to reduce the cost of direct loans based on expected repayment amount, and to require counting loan guarantees as a liability from the date of the guarantee based on their expected payout. This change made it such that federal accounts would reflect the cost savings that would result by cutting out the for-profit middlemen, which almost immediately led to calls for replacing the convoluted FFELP program with a direct lending program.[65] Direct Loans were first created as a pilot in 1992.[66] Private lenders, having switched from reluctant to enthusiastic, lobbied heavily against direct lending, while simultaneously ramping up lending in an attempt to crowd out the government.[67] At least some members of Congress welcomed this competition as a way to test out the Direct Loan program against the "market" alternative.

Second, faced with this possibility of extinction, Sallie Mae lobbied successfully to "go private," i.e. to no longer be subject to even the minimal rules that came with being a government-sponsored entity.[68] It then began to issue both

64. On this dynamic, see Berman & Stivers, *supra* note 5, at 137–41 and METTLER, *supra* note 5, at 67–82.

65. *See* Berman & Stivers, *supra* note 5, at 138.

66. Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448, 569 (1992).

67. Berman & Stivers, *supra* note 5, at 138–39.

68. *See id.* at 139–40.

federally guaranteed and non-guaranteed "private" student loans. The first company to do business solely in student loans contributed greatly to their accelerating growth.

Third, the competition that came with the creation of Direct Loans generated lobbying momentum for the development of so-called "unsubsidized" loans. Unlike the "subsidized" loans previously offered to undergraduates, the federal government did not pay the interest on these loans while borrowers were enrolled. Unsubsidized loans were not means tested, so they enabled higher-income students to enter the market.[69]

These higher income students, and indeed every other student, were increasingly interested in loans because the price of college continued to rise. Even adjusting for inflation, the sticker price for a college degree increased by 120% between 1987 and 2010.[70] After netting out institutional aid, the increase is still 92% over and above general inflation.[71] Economists Grey Gordon and Aaron Hedlund helpfully point out that this inflation greatly exceeds that of "much maligned healthcare costs": had the average price of college risen at the rate of the average price of healthcare, it would have only grown by 32%.[72] Added on top of the increase in costs from the 1970s and 80s, and higher education has risen five times faster than inflation.[73] As only the wealthiest families in a world of mostly stagnant incomes can afford to pay these prices out of pocket, student debt has gushed

69. *See id.* at 139.

70. *See* Grey Gordon & Aaron Hedlund, *Accounting for the Rise in College Tuition*, *in* EDUCATION, SKILLS, AND TECHNICAL CHANGE: IMPLICATIONS FOR FUTURE U.S. GDP GROWTH 357, 357 (Charles R. Hulten & Valerie A. Ramey eds., 2019).

71. *See id*.

72. *Id.*

73. Tyler Kingkade, *Pell Grants Cover Smallest Portion of College Costs in History as GOP Calls for Cuts*, HUFFPOST (Aug. 29, 2012, 8:56 AM), https://www.huffpost.com/entry/pell-grants-college-costs_n_1835081.

accordingly.[74]

The 1990s also saw the transformation of for-profit colleges from small vocational schools occasionally plagued by scandal to increasingly consolidated corporate behemoths that oriented their business strategy around maximizing access to student loans and, to a lesser degree, other forms of federal higher education aid.[75] For most of these schools, students were merely the conduit for federal aid, and "education" was the thing to pretend to do in order to gain access to that aid. They spent big on marketing and lobbying while reducing the cost of all other expenditures through returns to scale and a new focus on "efficiency."[76] Using legally questionable practices to convince students to convert their eligibility for federal student loans into shareholder profits in exchange for increasingly questionable "educations," for-profit colleges brought new, "non-traditional," lower-income, borrowers into the market and made sure they borrowed as much as possible.[77] When the

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74. Also worthy of mention is the fact that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") made private student loans ineligible for bankruptcy protection, which seems to have increased loan volume while making holding debt more burdensome. *See generally* Alexei Alexandrov & Dalié Jiménez, *Lessons From Bankruptcy Reform in the Private Student Loan Market*, 11 Harv. L. & Pol'y Rev. 175 (2017).

75. *See* Berman & Stivers, *supra* note 5, at 140–41; METTLER, *supra* note 5, at 92–110; Charlie Eaton et al., *The Financialization of U.S. Higher Education*, 14 SOCIO-ECON. REV. 507, 525–27 (2016) [hereinafter Eaton et al., *Financialization*]; Charlie Eaton, *Agile Predators: Shareholder Value and the Transformation of U.S. For-Profit Colleges* SOCIO-ECON. REV. (forthcoming) (draft on file with author) [hereinafter Eaton, *Agile Predators*]. *See generally* TRESSIE MCMILLAN COTTOM, LOWER ED: THE TROUBLING RISE OF FOR-PROFIT COLLEGES IN THE NEW ECONOMY (2017).

76. *See generally* Eaton et al., *Financialization*, *supra* note 75. Some of these enormous FPCUs are publicly traded and some are owned private equity companies and investment banks. Many go back and forth between these two ownership structures. Eaton, *Agile Predators*, *supra* note 75.

77. *See* Gregory D. Katz, *For-Profit Colleges: Undercover Testing Finds Colleges Encouraged Fraud and Engaged in Deceptive and Questionable Marketing Practices*, U.S. GOV'T ACCOUNTABILITY OFF. (Aug. 4, 2010, 10:00 AM), http://www.gao.gov/new.items/d10948t.pdf; S. COMM. ON HEALTH EDUC., LABOR, AND PENSIONS, FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE

financial crisis crashed the job market, for-profits had developed finely-oiled machines to profit off of the desperation.

In 2010, in the aftermath of the financial crisis, Congress finally eliminated FFELP. One reason for the shift, cited by Berman and Stivers, was that policymakers saw private lending dry up and realized that making students dependent on financial institutions to fund college put those students at the mercy of financial cycles even if interest rates were regulated.[78] Surely at least as important was the fact that finance was weakened and delegitimized, leaving it unable to exert the same sway over Congress it had during neoliberal boom times. The Obama Administration, wanting to do *something* in higher education, saw an opportunity and took it. In stark contrast from 1965, finance lobbyists fought tooth and nail to be able to continue lending (and to avoid regulations). They kept the private student loan market, but that has become increasingly irrelevant. Today 95% of outstanding student loans are public.[79]

FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS, S. PRT. NO. 112-37 (2012), https://www.help.senate.gov/imo/media/for_profit_report/Contents.pdf [hereinafter *HELP Report*]; David Halperin, *Law Enforcement Investigations and Actions Regarding For-Profit Colleges*, REPUBLIC REPORT (Apr. 9, 2014), https://www.republicreport.org/2014/law-enforcement-for-profit-colleges/ (last updated Jan. 9, 2020); Adversary Complaint, Villalba v. ITT Educ. Servs., Inc., No. 16-0727 (Bankr. S.D. Ind. filed Jan. 3, 2017), http://www.legalservicescenter.org/wp-content/uploads/2012/10/1-Adversary-Complaint.pdf; Molly Hensley-Clancy, *Lower Education: How a Disgraced College Chain Trapped its Students in Poverty*, BUZZFEED NEWS (Nov. 13, 2014), https://www.buzzfeed.com/mollyhensleyclancy/lower-education?utm_term=.lmQDqN8DY#.hsQRJepR4; Annie Waldman, *Who's Regulating For-Profit Schools? Execs from For-Profit Colleges*, PRO PUBLICA (Feb. 26, 2016), https://www.propublica.org/article/whos-regulating-for-profit-schools-execs-from-for-profit-colleges.

78. *See* Berman & Stivers, *supra* note 5, at 141–42.

79. Author's calculation based on data from *Federal Student Loan Portfolio,* FEDERAL STUDENT AID (last visited Feb. 17, 2020), https://studentaid.ed.gov/sa/about/data-center/student/portfolio and Zack Friedman, *Student Loan Debt Statistics In 2018: A $1.5 Trillion Crisis*, FORBES (June 13, 2018, 8:32 AM), https://www.forbes.com/sites/zackfriedman/2018/06/13/student-loan-debt-statistics-2018/#5221dccc7310.

Although the financial crisis did occasion the elimination of FFELP—and eventually of Perkins, too[80]—it did not stop the growth of student debt. Student debt, indeed, was the only type of household debt that was completely unaffected by the collapse in credit markets and its reverberations onto the balance sheets of businesses and households.[81] Just between 2003 and 2017, the total level of student debt outstanding grew by a factor of *seven*, from around $200 billion to around $1.4 trillion. And the growth accelerates: as of 2018, outstanding student debt was around $1.52 trillion.[82] In 1993, this number was still countable in millions.[83]

80. *See* Kelly Field, *Perkins Loan Program, a Federal Stalwart Since 1958, Meets its Demise*, THE CHRONICLE OF HIGHER EDUC. (Oct. 1, 2015), https://www.chronicle.com/article/Perkins-Loan-Program-a/233527.

81. *See* FED. RESERVE BANK OF N.Y., HOUSEHOLD DEBT & CREDIT REPORT (Q3 2019), https://www.newyorkfed.org/microeconomics/hhdc.html.

82. Friedman, *supra* note 79.

83. *See* FED. RESERVE BANK OF ST. LOUIS, STUDENT LOANS (Q3 2019), https://fred.stlouisfed.org/series/FGCCSAQ027S.

II. THE PROBLEMS WITH STUDENT DEBT

A. *Direct and Indirect Burdens on Debtors, Communities, and Society*

Taking on enormous amounts of debt to pay for higher education has become so routine and widespread that it has transformed our higher education system, the political system that structures it, and much of our society more generally. By one measure, as of 2017, approximately 45% of white households headed by people between 25 and 40 years old and about 50% of black households headed by people between 25 and 40 years old had student debt.[84] Those numbers in 1990 were 10% of white households and 25% of black households.[85] In that same time period the median debt burden doubled, from $10,000 to $20,000 (the average among indebted students is now around $27,000).[86] And these are certainly undercounts, since young people burdened by student debt are increasingly forced to live with parents or relatives, unable to form the "independent households" that the dataset (the Survey of Consumer Finances) counts.[87] According to Department of Education data, 69% of all students graduating with a bachelor's degree had student debt in 2016, in an average amount of nearly $30,000.[88] Those numbers in 1996 were 58% and $13,000.[89]

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84. JULIE MARGETTA MORGAN & MARSHALL STEINBAUM, THE STUDENT DEBT CRISIS, LABOR MARKET CREDENTIALIZATION, AND RACIAL INEQUALITY: HOW THE CURRENT STUDENT DEBT DEBATE GETS THE ECONOMICS WRONG (2018).

85. *Id.*

86. *See id.* at 10.

87. *Id.* at 14; Mike Konczal, *The Devastating, Lifelong Consequences of Student Debt*, THE NEW REPUBLIC (June 24, 2014), https://newrepublic.com/article/118354/brookings-study-student-debt-misses-lifelong-consequences.

88. *Quick Facts about Student Debt*, THE INSTITUTE FOR COLLEGE ACCESS AND SUCCESS (Apr. 2019), https://ticas.org/files/pub_files/qf_about_student_debt.pdf.

89. *Id.*

1. Burdens on Individuals and Communities

The most immediate impact of student debt is on debtors and their loved ones. Inability to form an "independent household" is not only or primarily a problem for demographers studying debtors, after all. This so-called "failure to launch" can be attributed to the fact that student debt burdens have risen most precipitously during a time when incomes for all but the wealthiest have plateaued or plunged.[90] While those with college educations make significantly more on average than those without, all but the elite do worse than their counterparts from a generation ago.

As Julie Morgan and Marshall Steinbaum have pointed out, this dynamic indicates that the "college premium" is not so much a measure of college graduates being rewarded for their superior skills (their "human capital") as it is an indication of the increasing power of the capitalist and managerial class to suppress wages for workers across the board while demanding more education credentials from the workers they recruit.[91] As a result, in the U.S. we now have, to borrow independent researcher Matt Bruenig's phrase, "the most educated poor in history."[92]

This "credentialization" dynamic increases the burden of holding the same amount of student debt, because the same amount of education is rewarded less. A growing burden for the same amount of debt multiplied by the ballooning amount of debt has come to mean that student debt is a constraint of individual freedom throughout the life course and a growing collective weight on families and communities. Needless to say, this is quite the opposite of what the drafters of the HEA had in mind.

Default rates are up, as are uses of income-based

90. *See* MORGAN & STEINBAUM, *supra* note 84, at 21.

91. *Id.* at 26–27.

92. Matt Bruenig, *Why Education Does Not Fix Poverty*, DEMOS (Dec. 2, 2015), https://web.archive.org/web/20160529205902/http://www.demos.org/blog/12/2/15/why-education-does-not-fix-poverty.

repayment plans that draw out repayment over a longer period of time.[93] In addition to the aforementioned fact that increased student debt burdens leads people to delay marriage and other varieties of family or household formation, it reduces wealth both in the short and long terms,[94] decreases entrepreneurship and business formation,[95] and forces many to put off major purchases and investments like houses and cars.[96] And all of this is during "normal" times—during a massive economic crisis of the sort that has now occurred twice in the span of less than 20 years, debts become even more crippling burdens.

Unsurprisingly to any student of stratification, some individuals, families, and communities feel these burdens disproportionately. A growing literature indicates that low-income households and Black and Latino households have more burdensome debts, leading to higher delinquency rates and higher concentrations of the other ills that come along

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93. *See Casualties of College Debt: What Data Show and What Experts Say about Who Defaults and Why*, INST. FOR COLL. ACCESS & SUCCESS (June 2019), https://ticas.org/wp-content/uploads/legacy-files/pub_files/casualties_of_college_debt_.pdf; MORGAN & STEINBAUM, *supra* note 84, at 25.

94. Robert Hiltonsmith, *At What Cost? How Student Debt Reduces Lifetime Wealth*, DEMOS (Aug. 2013), https://www.demos.org/sites/default/files/publications/AtWhatCost.pdf; Richard Fry, *Young Adults, Student Debt, and Economic Well-Being*, PEW RESEARCH CTR. (May 14, 2014), http://www.pewsocialtrends.org/2014/05/14/young-adults-student-debt-and-economic-well-being/; William Elliott & IlSung Nam, *Is Student Debt Jeopardizing the Short-Term Financial Health of U.S. Households?*, FED. RESERVE BANK OF ST. LOUIS REV. (Sep./Oct. 2013), https://research.stlouisfed.org/publications/review/13/09/Elliott.pdf.

95. Konczal, *supra* note 87.

96. Meta Brown & Sydnee Caldwell, *Young Student Loan Borrowers Retreat from Housing and Auto Markets*, LIBERTY ST. ECON. (Apr. 17, 2013), http://libertystreeteconomics.newyorkfed.org/2013/04/young-student-loan-borrowers-retreat-from-housing-and-auto-markets.html#.U6mTeJSwIvI; Meta Brown, Sydnee Caldwell, & Sarah Sutherland, *Just Released: Young Student Loan Borrowers Remain on the Sidelines of the Housing Market in 2013*, LIBERTY ST. ECON., http://libertystreeteconomics.newyorkfed.org/2014/05/just-released-young-student-loan-borrowers-remained-on-the-sidelines-of-the-housing-market-in-2013.html#.U3KfrOZdXoU.

with relatively heavy debt loads.[97] This is in part due to the fact that for-profit colleges, which produce unusually high amounts of indebtedness for unusually low benefits, target "non-traditional students." It is also in part because students from disadvantaged backgrounds face more challenges—financial and otherwise—even when they attend public and non-profit colleges.[98] Recent work indicates that indebtedness among Black households has increased at higher rates than among White or Hispanic households (to use the crude categories of the census).[99] Morgan and Steinbaum estimate that *70 percent* of Black student debtors who left school in 2004 will default.[100]

These findings jibe with the long line of research showing that families that are struggling economically and who have been subject to systematic racialized dispossession have experienced the burdens of any type of indebtedness disproportionately. They can also be contextualized by findings that racial wealth disparities make it such that "black families whose members study and work hard are still hindered in their efforts to generate the resources necessary for their own security and to ensure the well-being of their children."[101]

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97. *See* MORGAN & STEINBAUM, *supra* note 84; Kavya Vaghul & Marshall Steinbaum, *How the Student Debt Crisis Affects African Americans and Latinos*, WASH. CTR. FOR EQUITABLE GROWTH (Feb. 17, 2016), http://equitablegrowth.org/research-analysis/how-the-student-debt-crisis-affects-african-americans-and-latinos/; Mark Huelsman, *The Debt Divide: The Racial and Class Bias Behind the "New Normal" of Student Borrowing*, DEMOS (May 19, 2015), http://www.demos.org/publication/debt-divide-racial-and-class-bias-behind-new-normal-student-borrowing; *Ending the Debt-For-Diploma System*, DEMOS (Aug. 2013), http://www.demos.org/publication/ending-debt-diploma-system.

98. *See generally* COTTOM, *supra* note 75; SARA GOLDRICK-RAB, PAYING THE PRICE: COLLEGE COSTS, FINANCIAL AID, AND THE BETRAYAL OF THE AMERICAN DREAM (2016).

99. *See* Monnica Chan et al., *Indebtedness Over Time: Racial Differences in Student Borrowing*, 20 EDU. RESEARCHER 558, 558 (2019).

100. MORGAN & STEINBAUM, *supra* note 84, at 30.

101. Darrick Hamilton et al., *Umbrellas Don't Make It Rain: Why Studying and Working Hard Isn't Enough for Black Americans*, INSIGHT CTR. FOR CMTY. ECON.

2. Macroeconomic Effects

The burdens of student debt inevitably resonate from individual debtors to families and communities. When parents are co-signers, of course, their children's debts are a burden, but even without such formal co-obligation, every individual depends on the support of family, friends, co-workers, and others when they face hardship. People with less individual wealth to draw upon are especially likely to depend on community for financial difficulties.

Beyond these social network effects, a society that places massive debts on a growing amount of its population at the beginning of adulthood creates a massive demand-suppression program that suppresses employment, especially among the most vulnerable.[102] Debts force individuals to divert income from spending on goods and services to paying down bills. The increased employment in the loan servicing and debt collection industries are not enough to fill in for the decreased demand, which thus depresses investment, which reduces job creation and wage increases, which holds back aggregate demand further, which reduces investment further, etc.

As will be discussed in more detail below, student debt's effects on demand are enough to reduce production and employment by non-trivial amounts.[103] As well, those burdened with student debt are more likely to take high-paying jobs that they do not like rather than relatively lower-paying jobs that involve giving back to their communities.[104]

DEV. (Apr. 2015), http://www.insightcced.org/wp-content/uploads/2015/08/Umbrellas_Dont_Make_It_Rain_Final.pdf.

102. *See* Neil Irwin, *How Student Debt May Be Stunting the Economy*, N.Y. TIMES (May 14, 2014), http://eee.nytimes.com/2014/05/15/upshot/the-role-of-student-debt-in-stunting-the-recovery.html.

103. SCOTT FULLWILER ET AL., LEVY ECON. INST., THE MACROECONOMIC EFFECTS OF STUDENT DEBT CANCELLATION (Feb. 2018), http://www.levyinstitute.org/pubs/rpr_2_6.pdf [hereinafter "MACROECONOMIC EFFECTS"].

104. *See* Jesse Rothstein & Cecilia Elena Rouse, *Constrained After College: Student Loans and Early Career Occupational Choices*, 95 J. PUB. ECON. 149 (2011); Konczal, *supra* note 87.

And "[t]hese directly measurable effects of student debt cancellation would be complemented by unmeasured social benefits like greater social mobility and quality of life."[105] An initial study confirms intuition and anecdotal evidence that student loans take a toll on mental health, which can filter through to physical health as well (and this does not take into account the fact that student debt might make paying for healthcare more difficult).[106]

3. But What About the Benefits of Student Debt?

All of this only presents one side of the ledger. Student loans are not just impositions of burdens, after all. They are used to pay for *educations*. It is a perfectly plausible reading of the history of higher education policy to say that millions and millions of people would not have obtained educations without student debt to help them.

It is such an appreciation for the increased access that student debt has enabled that has prevented student debt cancellation from being taken seriously for so long. It is not hard to find economic policy writing explaining how people with college educations tend to be better off than those without, due to the aforementioned "college premium." The increased earnings that come with a college education are much greater, on average, than the (financial) cost of student debt over the course of a lifetime. For many, perhaps most, households, paying student debt is more an inconvenience than a burden—like paying the gas bill. Moreover, an educated population tends to produce more "value"—output measured in money—for every hour of labor, which (at least in theory) increases the "social surplus" that all can share (at least in theory). Put them together, and you have the

105. MACROECONOMIC EFFECTS, *supra* note 103, at 13.

106. *See* Katrina Walsemann, Gilbert C. Gee & Danielle Gentile, *Sick of Our Loans: Student Borrowing and the Mental Health of Young Adults in the United States*, 124 SOC. SCI. & MED. 85, 92 (2015); Elizabeth Sweet et al., *The High Price of Debt: Household Finance and its Impact on Mental and Physical Health*, 91 SOC. SCI. & MED. 94 (2013).

standard "human capital" argument, where a college education is understood as an investment in an individual's capacity to produce "value," which makes that individual more valuable to capitalists oriented towards earning profits by maximizing value, thus allowing an individual to earn more money on the labor market.

But one need not restrict one's account of the value of higher education to wages and productivity to appreciate the fact that a student debtor uses their loan to buy something of value. Indeed, one can reject the story of the "college premium" (for reasons discussed below) and still believe that the benefits to both individuals and to society of subsidizing higher education well outweigh the costs of doing so through loans.

While there is no doubt that one cannot account for the burdens of student debt without accounting for the benefits, there are several reasons to doubt that this is the right way to think about the balancing.

First, for many people it is not even clear that they *are* made better off by exposure to the combination of a college education plus student debt. For-profit colleges have played an especially pernicious role in this regard. As mentioned, these institutions focus on attracting "non-traditional" college students, i.e. those who are already worse off economically than other college students. They encourage these students to take on as much debt as they can, either obscuring the amount of debt or assuring them that it will be easily paid off (why else would everybody else be doing it and the government approving of it?). Thus, for-profit college students take on the most debt relative to income, and they have the least likelihood of paying it off.[107] Given their backgrounds (the racial discrimination many of them face,

107. *See* Robert Howarth & Robert Lang, *Debt and Disillusionment: Stories of Former For-Profit College Students as Shared in Florida Focus Groups*, CTR. FOR RESPONSIBILITY LENDING (Aug. 29, 2018), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-florida-debt-disillusionment-l-aug2018.pdf.

the lack of social capital, the lack of family income support, etc.), these debtors are already likely to do less well in the labor market.[108] And credentials from for-profit colleges generally do not improve their lot much, if at all. A 2012 study found that for-profit students did worse than comparable students who went to community colleges, while a 2016 study found that, on average, students who attended for-profits actually made less money than before they enrolled—i.e. that their college premiums were *negative*.[109] Indeed, some former students have reported that the for-profit college they attended served as an anti-credential: something that they leave off their resume if they want to increase their chances of employment. With disproportionately high debts and disproportionately low wealth and income, it should be no surprise that default rates on student loans among for-profit students are so high that they have pushed up the average default rate of the entire federal student loan portfolio.[110] The burden of student debt compounded on top of other forms of financial precariousness has caused anxiety, depression, and even suicide.[111]

Similar considerations apply to students who attended college at non-profit or public schools, but who failed to complete their studies. These students, often with relatively

108. *See* COTTOM, *supra* note 75, at 157–77.

109. *See* David J. Deming, Claudia Goldin & Lawrence F. Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, 26 J. ECON. PERSPS. 139 (2012); Stephanie Riegg Cellini & Nicholas Turner, *Gainfully Employed? Assessing the Employment and Earnings of For-Profit College Students Using Administrative Data* (Nat'l Bureau of Econ. Research, Working Paper No. 22287, 2016), http://www.nber.org/papers/w22287?utm_campaign=ntw&utm_medium=email&utm_source=ntw.

110. *See* Deming, Goldin & Katz, *supra* note 109; Adam Looney & Constantine Yannelis, *A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Loan Defaults* (Brookings Institute, Working Paper, 2015), https://www.brookings.edu/wp-content/uploads/2016/07/ConferenceDraft_LooneyYannelis_StudentLoanDefaults.pdf.

111. Adversary Complaint, *supra* note 77.

low student debt amounts, do less well financially and default disproportionately. And many others face negative college premiums.

Even for people for whom post-college incomes justify the amount of debt taken on in terms of lifetime balance sheets (that is, the lifetime amount of debt payments is less than the lifetime amount of the college premium), the cost may not be worth it. That is both because people experience their balance sheets moment by moment rather than over the course of a lifetime—making the cost of debt relative to income at any given time more relevant for which opportunities are available and for resilience in the face of exogenous shocks—and because the other costs of debt should be accounted for. Those with substantial debts that are nevertheless well below their lifetime income may be worse off on net due to high stress levels, physical health deterioration, "failure to launch," and other non-financial costs.[112]

Second, even were the advantages of a college education to clearly outweigh the burden of debts for all who took on student debt, that fact in itself does not make financing higher education through individual indebtedness good policy. There is still the question of the relevant baseline to judge reality from. Suppose that we assume, along with the prevailing human capital framework, that college graduates are paid for their marginal productivity, which increases because of skills gained at college. Even if that were so, one could just as well finance human capital development by making public higher education free or creating a voucher program or some other alternative to individual indebtedness. Human capital development plus debt, and no human capital development at all do not exhaust the possible arrangements. One would need an account of why student debt is the superior form of higher education finance given other possible alternatives, not just why it is better than

112. *See generally* GOLDRICK-RAB, *supra* note 98.

fewer people going to college.

Responding to this challenge, some have argued that student debt makes sense at least for those who earn high incomes and/or who come from families with high wealth (thus, "income-based repayment" makes sense), since these individuals who have benefited the most from education "pay it forward" to those who might benefit.[113] One obvious problem with this response is that the current distribution of the debt burden does not come close to representing a world in which those who benefit most from education (on the human capital framework—i.e. those who earn most after college).[114] But suppose one could correct for that. A deeper challenge is that the wealthiest (and luckiest—including recipients of financial aid, both "merit" and means based) beneficiaries of college do not take on debt, and never will. So they will not "pay it forward" under this logic. They might "pay it forward" via taxation,[115] but then that raises a further point. It is not clear why one's goal should be to have those who could not afford college without some sort of financial aid and then make a lot of money after college be the most on the hook for the cost of education. If the goal is to develop a scheme in which the payors are those who are the most able

113. *See, e.g.*, Monica Potts, *Paying it Forward on Student Debt*, AM. PROSPECT (Aug. 13, 2013), https://prospect.org/article/paying-it-forward-student-debt; *see* Susan Dynarski, *An Economist's Perspective on Student Loans in the United States* (Economic Studies at Brookings, Working Paper, 2014), https://www.brookings.edu/wp-content/uploads/2016/06/economist_perspective_student_loans_dynarski.pdf.

114. This is taking the human capital theory for granted and ignoring the fact that people's incomes after college might reflect social capital, cultural capital, and the like. Even if one were to correct for that fact, it is not clear why, unless one is fully committed to the investment market metaphor, one would want those who experience the greatest difference between what they would have earned without a college degree and what they would have earned with it to pay the most for education.

115. This is speaking loosely, setting aside the question of whether taxes "pay for" spending. For currency issuers like the federal government, they do not; *see* Stephanie Bell, *Do Taxes and Bonds Finance Government Spending?*, 34 J. ECON. ISSUES 603 (2000). For currency users like state governments, they (plus bonds) do.

to pay (which would include those who benefit most from higher education, even if they did not themselves get one, since they receive the benefits of engineers, poets, etc.), then progressive taxation based on wealth and/or income is much superior.

In any case, there is also strong reason to doubt that human capital theory, and the "skills gap" explanation it provides for income differences, accounts for what is going on with the college premium. As noted above, recent research has demonstrated that the college premium is largely explicable in terms of credentialization rather than skill differences.[116] And many authors have pointed out that subsidizing education does not reduce inequality on its own. So emphasizing its role in equalizing income or wealth has the pernicious effect of drawing resources away from more effective programs for doing so, while also providing a way to blame the relatively worse off for their socio-economic standing. (Which is not to gainsay the value of higher education, only to question whether its value is properly comprehended as a replacement for industrial policy, labor regulation, redistribution of wealth, etc.).[117]

What is more, a focus on the benefits of student debt to individuals and even to productivity fails to account for the reverberating burdens beyond individuals to families and communities. It fails to account for the collective loss—the reduction in goods and services, the increase in

116. *See*, *e.g.*, Morgan & Steinbaum, *supra* note 84; David Card & John E. DiNardo, *Skill-Biased Technological Change and Rising Wage Inequality: Some Problems and Puzzles*, 20 J. LABOR ECON. 733 (2002); David Autor, *How Long Has This Been Going On? A Discussion of "Recent Flattening in the Higher Education Wage Premium: Polarization, Skill Downgrading, or Both?" by Robert G. Valletta* (Nat'l Bureau of Econ. Research, Response Paper, 2017); *Labor Market Monopsony: Trends, Consequences, and Policy Responses*, COUNCIL OF ECONOMIC ADVISERS (Oct. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20161025_monopsony_labor_mrkt_cea.pdf; Marshall Steinbaum, *How Widespread is Labor Monopsony? Some New Results Suggest It's Pervasive*, ROOSEVELT INST. BLOG (Dec. 17, 2017), https://rooseveltinstitute.org/how-widespread-labor-monopsony-some-new-results-suggest-its-pervasive/.

117. *See, e.g.*, Hamilton et al., *supra* note 101.

unemployment—that results from the dampening of aggregate demand. It fails to account for the diversion of people from socially valuable but low-paying work (teaching, social work, artmaking) into extractive but high-paying work (flash trading, private equity firm-flipping, engineering fracking equipment). A full accounting of the costs and benefits of student debt cannot be reduced to comparison of the aggregate of individual's loan payments over a lifetime compared with the aggregate of their incomes above what they might have expected to earn without a college degree. And the accounting would have to specify the alternatives against which the costs and benefits are to be compared: student debt looks different when compared to restricting higher education to the elites than it does when compared to providing universal public higher education.

More on such accounting will come out below, and no single article can cover its full scope. For now, it is enough to point out that the nature of the accounting is not a mere measuring of lifetime earnings versus debt burdens. It is not a matter of whether student debt is bearable or not. The question of what counts as an unjustified burden requires drawing moral baselines. It requires reasoning about the value of education to a good society and how the burden of payment ought to be divided in such a society. One cannot undertake a full accounting without something to say about when, if ever, charging individuals for the cost of education is justified and when such charges ought to force individuals to take on debt.

B. *Distortions of Higher Education*

Student debt has also contributed to the restructuring of higher education. The more higher education is funded by debt, the more transactional the relationship between students and college becomes. The fact that students will be on the hook for tens of thousands of dollars of tuition makes them more likely to ask whether they're getting their "money's worth" and, specifically, to think of that value in terms of how much it increases their ability to earn money in the future. Students come to view themselves as customers relative to institutions of higher education, and as investors (in "human capital") relative to the education itself. Colleges that depend increasingly on tuition—mostly funded through debt—come to view students as present and potentially future income streams, and education as a service that is being sold to these customers.[118] Policymakers, who started out thinking of higher education as primarily a public charge with debt filling the gaps, have come to understand higher education in the same terms—as investment in human capital.

Although modern (i.e. neoclassical) human capital theory was originally developed in the late 1950s, it only really began to influence discussions of higher education outside of economics departments when student debt became a mass phenomenon.[119] The felt reality of higher education as leveraged investment made the financial metaphor less abstract, more plausible. Thus, the most influential policy voices for the past twenty years or so have understood the role of policy as that of facilitating profitable investments through access to credit (with some subsidy for lower-income students and some credit insurance via income-based repayment) and consumer protection regulation that forces students and colleges to "internalize" the cost of their actions.[120]

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118. *See* Berman & Stivers, *supra* note 5, at 145–51; WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 175–200 (2015).

119. *See* Elizabeth Popp Berman, *How College Became an Investment in Human Capital* (unpublished draft chapter, on file with author).

120. *See, e.g.*, CEA Report; Dynarski, *supra* note 113; Beth Akers & Matthew M. Chingos, *Is a Student Loan Crisis on the Horizon?*, BROOKINGS (June 24, 2014), https://www.brookings.edu/research/is-a-student-loan-crisis-on-the-horizon/; Nicole Allan & Derek Thompson, *The Myth of the Student-Loan Crisis*, THE ATLANTIC (Mar. 2013), https://www.theatlantic.com/magazine/archive/2013/03/myth-student-loan-crisis/309231/; Diane Harris, *The Truth About Student Debt: 7 Facts No One is Talking About*, NEWSWEEK (Aug. 8, 2019, 12:44 PM), https://www.newsweek.com/2019/08/23/student-debt-loans-truth-facts-cover-story-1453057.html. S*ee generally* GARY S. BECKER, HUMAN CAPITAL (1993).

The notion that education might have value to individual or society beyond increasing an individual's ability to compete on an increasingly monopsonistic job market (or, according to human capital theory, through increased worker "productivity") fades into the background. Why would we care whether our fellow Americans have knowledge of, say, the basics of climate science or the history of racialized domination in the United States if this knowledge does not produce returns on the labor market? Why would we care if colleges decide who to hire and fire based on desire to meet job-focused student demand and to adjunctify the college workforce, undermining investment in research and academic freedom?

Indeed, focusing on a return on investment at the retail level obscures the *social* value of investing in the sorts of skills that are useful for doing particular types of labor. Individual students will make "investment" decisions based on the current state of the labor market, with perhaps some information about what the near future will look like. But the labor market can be subject to rapid changes, and society can suddenly need particular types of skills that were not well remunerated previously. The COVID-19 crisis has made abundantly clear how suddenly skills such as knowledge of infectious disease, ability to produce medical devices, ability to design a fiscal and monetary response to a sudden collapse in supply and demand, and the like become highly valuable while others suddenly collapse in market value. As with other areas of investment, it makes sense to have the state fund long-term investments in knowledge and skills that may not produce immediate returns or even be of obvious use in the short term to ensure that such investments are made rather than leaving it to profit-maximizing individuals to invest in the skills most likely to produce returns over their lifetime based on present information.[121]

121. *See generally* MARIANNA MAZZUCATO, THE ENTREPRENEURIAL STATE: DEBUNKING PUBLIC VS. PRIVATE SECTOR MYTHS (2013).

The focus on short-term employability has been most explicit in the for-profit sector, where the colleges explicitly sell themselves in terms of return on investment and charge as much as possible to maximize revenue from students.[122] Students, meanwhile, understand education almost entirely in terms of how it will increase their job prospects (and then, only in relatively low-wage job markets). Policymakers understand their role as ensuring for-profits actually produce the return on investment that they advertise, whether through disclosure regulation, consumer fraud enforcement, or more "intrusive" ways of forcing for-profits to internalize bad job market outcomes.[123]

Much as the suffering of for-profit college students provides an extreme example of the negative impacts that student debt can have on people's lives, the success of for-profit colleges provides an extreme example of the negative structural dynamics engendered by funding education through student debt. Although generally less explicitly transactional, many more "traditional" colleges have begun to sell themselves in terms of return on investment as students increasingly view themselves as consumers of educational (investment) services.[124] Manifestations of this tendency include adding more specialized terminal masters degree programs that charge high tuition and advertise professionalization of one type or another (often without the promised return on investment), changing undergraduate curricular offerings to tilt away from purportedly "useless" low-demand disciplines like history, philosophy, and art, and

122. *See* ANGULO, *supra* note 54, at 114–46 (2016); COTTOM, *supra* note 75, at 113–56; HELP Report, *supra* note 77; ITT Educ. Svcs. Inc., Annual Report (Form 10-K) 3 (Feb. 23, 2007) (describing the business model as "to increase student enrollment without incurring a proportionate increase in fixed costs.").

123. *See* ANGULO, *supra* note 54, at 114–32; Rebecca Schulman, *"This is Your Money": Why For-Profit Colleges are the Real Welfare Queens*, SLATE (June 4, 2015, 5:14 PM), https://slate.com/human-interest/2015/06/for-profit-colleges-and-federal-aid-they-get-more-than-90-percent-of-their-funding-from-the-government.html.

124. *See* Berman & Stivers, *supra* note 5, at 145–51.

towards more "useful" high-demand disciplines like exercise science and business management.[125]

C. *A Self-Reproducing Political Economy*

Funding through student debt also creates a political dynamic in which more and more entities depend on how the government manages its student debt programs, and on how they can attract investment from non-governmental actors. In the process of what sociologist Charlie Eaton and his co-authors have called "the financialization of higher education," running a college becomes more and more like running a business.[126] Administrators have to spend more time with budgets, donors, investors, and lobbyists than with curricula, professors, and students. Mutual dependence on student debt among colleges, financial companies, servicers, guaranty agencies, etc. creates a powerful lobby for the expansion of debt with as little accountability as possible (or, when accountability is non-negotiable, it should be measured in terms of return on investment so that colleges can take credit for the college premium that results from wage repression and everybody that makes money from student debt can stay in business). We have seen that non-profit and public colleges had initially opposed funding through debt—favoring funding directly to them instead, but, as they have become more dependent on debt and the possibility for anything else has faded into the background, their lobbying arms have mostly come around as advocates for more loans.[127] In the face of policy disagreement and immobilization among students and faculty, concentrated

125. *See* Yoni Appelbaum, *Why America's Business Majors Are in Desperate Need of a Liberal-Arts Education*, THE ATLANTIC (June 28, 2016), http://www.theatlantic.com/business/archive/2016/06/why-americas-business-majors-are-in-desperate-need-of-a-liberal-arts-education/489209/. *See generally* Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. &. LEE L. REV. 527 (2013) (justifying this outcome in human capital terms).

126. Eaton et al., *Financialization*, *supra* note 75.

127. *Supra* [discussion of the 1972 amendments].

interests, the existence or profitability of which depend on colleges remaining unaffordable and debt remaining plentiful, kept the gravy train rolling.[128] Berman and Stivers refer to this effect as the creation of a "policy field" in student debt, which caused student debt to become "a pressure on higher education."[129]

Again, for-profits provide an extreme illustration of the general dynamic. Higher education expert Bob Shireman has identified a cyclical politics of for-profit colleges, which he refers to as "scandal, regulate, forget, repeat."[130] This cycle goes all the way back to the GI Bill, when for-profit vocational schools first received access to federal aid, but it took on a more regular rhythm after the 1972 amendments to the HEA first granted for-profit colleges access to student loans and other Title IV aid. Every half decade or so since then, amongst a steady trickle of lawsuits, out comes an excoriating report from one or another branch of the federal government or from enterprising investigative journalists about widespread fraud in the for-profit sector. These reports lead for calls for accountability, which are fought tooth and nail by for-profits until they result in some more-or-less tepid regulatory action. Some of these regulations have limited the outright fraud and stemmed the tide of odious debt, but only somewhat and only until a new deluge wipes them away. Once the fury dies down and the news cycle rolls elsewhere, for-profits' lobbyists continue their usual business of neutralizing or eliminating unfavorable regulations and, when enough Republicans are in Congress, gaining new regulatory favors.[131]

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128. *See* METTLER, *supra* note 5, at 51–60.

129. Berman & Stivers, *supra* note 5, at 137. The concept of "field" Berman and Stivers employ comes from NEIL FLIGSTEIN & DOUG MCADAM, A THEORY OF FIELDS (2015).

130. Robert Shireman, *The For-Profit College Story: Scandal, Regulate, Forget, Repeat*, CENTURY FOUND. (Jan. 24, 2017), https://tcf.org/content/report/profit-college-story-scandal-regulate-forget-repeat/.

131. *See id.*; METTLER, *supra* note 5; ANGULO, *supra* note 54 at 58–84 (on the

Not infrequently, for-profit lobbyists work alongside the lobbyists for more "traditional" colleges. And, of course, Sallie Mae and others that profit most directly from student loans have fought for their own regulatory favors with a similar ability to win when the light does not shine too brightly on them. As discussed above, even common sense policy like cutting out the middlemen in student lending took nearly thirty years of fighting once the first pilot program was created, and then the victory only came because of a world-historical financial crisis.[132]

Most perniciously, the Department of Education (DOE) itself, the federal administrative agency responsible for regulating higher education, has come to think like a student debt profiteer. This is both because it *is* one—that is, it is directly responsible for the issuance and collection of nearly all student debt and subject to multiple incentives to maintain its budget in the black—and because many of its appointed staff come through the revolving door from these concentrated interests who profit from student debt.[133] So

early scandals); *Id.* at 85–132 (on subsequent scandals). Earlier parts of Angulo's book discusses the development of for-profit colleges and other vocational schools before the GI Bill, but in this earlier era federal funds were not at issue and so the scandal process was not quite the same. For a recent example of the lengths to which for-profits will go to stop regulations, see Eric Lichtblau, *With Lobbying Blitz, For-Profit Colleges Diluted New Rules*, N.Y. TIMES (Dec. 9, 2011), https://www.nytimes.com/2011/12/10/us/politics/for-profit-college-rules-scaled-back-after-lobbying.html. For the current state of affairs, with the Secretary of Education totally in the bag for for-profit colleges, see David Dayen, *Betsy DeVos Quietly Making it Easier for Dying For-Profit Schools to Rip Off a Few More Students on the Way Out*, THE INTERCEPT (Apr. 12, 2019, 9:55 AM), https://theintercept.com/2019/04/12/betsy-devos-for-profit-colleges/; Erica L. Green & Stacy Cowley, *Emails Show DeVos Aides Pulled Strings for Failing For-Profit Colleges*, N.Y. TIMES (Jul. 23, 2019), https://www.nytimes.com/2019/07/23/us/politics/dream-center.html.

132. *See infra* note 67 and accompanying text.

133. *See, e.g.*, David Halperin, *Another For-Profit College Lobbyist to Join DeVos Education Department*, REPUBLIC REPORT (Mar. 6, 2018, 11:33 AM), https://www.republicreport.org/2018/another-profit-college-lobbyist-join-devos-education-department/; Scott Jaschik, *Breaking: Apollo Sold to Investors with Obama Ties*, INSIDE HIGHER ED (Feb. 8, 2016), https://www.insidehighered.com/quicktakes/2016/02/08/breaking-apollo-sold-investors-obama-ties.

each time DOE considers what to do about abuses among for-profit colleges, student loan servicers, accreditors, or some other branch of the student loan complex, it is subject both to external and internal lobbying to keep the gravy train rolling.

Student debt, in other words, creates the conditions for its own perpetuation, transforming the higher education system and many other aspects of our society along with it.

For many years, the only opponents of increased student debt with any voice in Washington were non-profit advocacy groups without mobilized bases, and thus without much political capital to throw around. In addition to the general difficulty of mobilizing a mass group of people without a common identity, many student debtors have internalized the morality of individual responsibility that comes with the legal obligation to repay and had been preoccupied with taking the sorts of risks—political or otherwise—that might put them out of a job and behind on their payments. Some observers have posited that the increase in student debt contributed to the de-mobilization of college students, both by preoccupying students with worries about bills (forcing them to get jobs when they might have spent that time organizing, adding mental stress and thus reducing the capacity to take creative and risky political action) and by socializing students into the consumerist role discussed above.[134] On this theory, student debt functioned as a form of social control, whether intentionally or not.

In recent years, there have been some signs that more and more student debtors have begun to understand their plight not as an individual responsibility but as a collective failure.[135] As these debtors have started to mobilize,

134. *Cf.* Interview by Edward Radzivilovskiy with Noam Chomsky, (Feb. 27, 2013), https://chomsky.info/20130227/; Chris Maisano, *The Soul of Student Debt*, JACOBIN (Dec. 27, 2012), https://www.jacobinmag.com/2012/12/the-soul-of-student-debt/.

135. *See, e.g.*, James Ceronsky, *Five Ways Student Debt Resistance is Taking Off*, TRUTHOUT (Oct. 28, 2013), https://truthout.org/articles/five-ways-student-

politicians have begun to take notice. For the first time since student debt first became part of federal higher education policy, members of Congress and plausible candidates for President have proposed bills containing structural reform of federal higher education policy that includes cancellation of student debt and policies that would prevent further accumulation by making college broadly affordable. The COVID-19 crisis has only heightened the contradictions and made calls for debt cancellation louder.

The sorts of policies that Truman's Commission on Higher Education concluded were necessary more than seventy years ago may finally be on the horizon. There is a certain irony here: the introduction of student debt pulled federal higher education policy away from the Truman Commission's vision, but the misery that debt brought into being may have contributed to the mobilization that would bring federal higher education policy back in line with it.

debt-resistance-is-taking-off/; Astra Taylor, *A Strike Against Student Debt*, N.Y. TIMES (Feb. 27, 2015), https://www.nytimes.com/2015/02/28/opinion/a-strike-against-student-debt.html. I should mention that I was involved in organizing the debt strike mentioned in this article. *See also* DEBT COLLECTIVE, https://debtcollective.org (last visited Mar. 20, 2020) (I was formerly legal director of this organization); STUDENT DEBT CRISIS, https://studentdebtcrisis.org/ (last visited Mar. 20, 2020).

III. REASONS TO CANCEL STUDENT DEBT

Canceling student debt would make individual debtors wealthier and end ongoing extractive or coercive relationships between debtors and their creditors, servicers, or collectors. Both the wealth transfer and the elimination of indebtedness (the same thing in accounting terms, but not in every way) would make debtors' lives—and the lives of the families, friends, and communities on which debtors depend—easier. Since student debts' burdens are skewed along race and class lines, these impacts would disproportionately benefit relatively disadvantaged people—though not the *most* disadvantaged (on average, those who have not attended college are worse off). Eliminating trillions of dollars of liabilities would increase aggregate demand, stimulating investment and employment and redirecting both towards more socially beneficial forms of work. These knock-on macroeconomic effects would also make many peoples' lives better (and likely a much smaller number of other peoples' lives worse) in not entirely predictable ways.

But blanket student debt cancellation is a sideways—or, at best, partial—approach to the problems of wealth inequality and of demand/investment shortfalls. Regarding the former, many student debtors are relatively quite well off, and for the student debtors who are struggling the most it is not always clear that student debt cancellation is the most effective way to make their lives better (or, at the least, student debt cancellation would have to be part of a broader relief package). Regarding the latter, student debt cancellation does not provide the biggest stimulus effect.

What student debt cancellation is *not* a sideways approach to, though, is removing a burden on individuals and society that has no good justification. Student debt cancellation makes the most sense as a form of restitution and revitalization. It is best situated in a program that wipes our collective hands clean of a way of financing higher education that places the primary burden on individuals, with racist, anti-egalitarian, and anti-democratic effects.

Canceling student debt repudiates the legitimacy of this allocation of burdens. When paired with a plan to de-commodify and democratize higher education, and especially when paired with a series of reforms of the way we organize wealth distribution, labor, and investment, it contributes to rebuilding a higher education system on the principle of collective responsibility for investing in skills, forms of knowledge, and ways of knowing that benefit all of us. It would be part of building a system more along the lines envisioned by the Truman Commission, before student debt was invented.

That doing so would *also* make millions of peoples' lives better both directly and indirectly cannot be counted against it. That its distributional consequences would be ambiguous in the short term provides reason to pair it with other reforms to make our society more equal, not a reason not to undertake an otherwise worthy plan.

A. *Student Debt as Illegitimate*

The most fundamental argument for canceling student debt begins from the proposition that student debt burdens individuals and distorts higher education and political systems in ways that are unjustified. Put differently: there is no good reason to force people to take out debt to get an education or to keep people in debt because they got an education. When there is no good reason to keep people in debt, there is a good reason to cancel their debt.

The simplest form of this argument is the most extreme: student debt is fundamentally misguided and should not exist at all. This is the view for those who believe education of all levels is a collective responsibility—whether understood as a public good, a right, or in some other terms—and to make individuals pay for their own educations is to fail to meet that responsibility. It is to treat education as a privilege. Rather, we should all chip in, whether according to our ability to do so, according to the degree to which we have been benefited by a society with these educational institutions, or according to some other principle of shared burden. The notion of collective responsibility for education can be supported instrumentally (we all benefit from living among highly educated people in a way that cannot be measured at retail), deontologically (each of us has a right to a certain amount of education), social-contractually (reasonable people would agree to providing a certain amount of education), or in some combination. It could be grounded in a political theory of a free and democratic society, in which education plays the role of socializing people for self-governance, providing skills the value of which can be collectively determined, and facilitating the sort of critical thinking that enables collective freedom to be exercised. Fleshing out the details of these views and how they might line up to different sorts of financing structures is beyond the scope of this Article. But it is worth noting that this general way of thinking is familiar for K-12 education in the United States. Even primary and secondary education are not actually funded in accordance with a belief in collective responsibility (i.e. they are highly unequally funded, with advantages going to the already wealthy, and especially to white families), the discussion usually begins from the premise of collective responsibility rather than individual investment.

The simple anti-debt view can also be grounded in a more pragmatic, and potentially complementary, set of reasons. The basic way of thinking here would be that creating a market for individual indebtedness to finance education *might* have been a justifiable compromise to expand access to higher education during a time when higher education was still seen by many as a privilege and as primarily a responsibility of the several states and when there was no reason to believe student debt would be anything but a minor burden on a few people. But we live in a time when higher education has become increasingly necessary, when the higher education system would collapse without continued federal government support, and when student debt has come to transform our whole way of viewing higher education. Canceling student debt would eliminate the political coalition that continues to privatize and financialize higher education, causing worse consequences for those who have already been failed by our educational system and are duped by for-profit colleges. For that matter, it would eliminate the scam industry built on pretending to help people make student debt payments easier—because there would be no such payments to help people make. A whole slew of grifters would be out of business. A full repudiation of student debt would reorient the way people think about the role of higher education. It would give students more autonomy in determining what to study and what sort of work to do. (This autonomy would be *more*, not *maximal*: the job market's pressures would still loom large absent other reforms.) It would create less pressure on institutions to teach narrowly "practical" classes, to produce a "return on investment," and/or to satisfy financiers and donors, opening up space for more academic freedom.

Less full-throated versions of these ways of thinking could provide reasons for a middle ground view in support of some but not all debt cancellation. How far the anti-debt argument goes depends on the circumstances in which one thinks it is justifiable to have individuals who cannot afford the upfront cost be financially responsible for their own educations. At the level of principle, one might think that, for instance, we collectively owe it to each other and to ourselves as a society to make education, and more specifically higher education, easily accessible, but not necessarily free or even debt-free. Perhaps so long as most of the cost of education is collectively borne, then *affordability* is enough. Affordability does not inherently exclude the need to take on debt to pay—suppose the debt is easily paid off as soon as a student receives her first year's worth of post-college paychecks, for instance—and so forcing people to take on student debt does not inherently violate this type of right to education. One might pair this view with at least a partial endorsement of the importance of price signaling—i.e. of internalization of cost—such that an individual should bear more of the cost of her education when she learns something that produces less social benefit. Or perhaps when she goes to school without actually learning anything—using up social resources on education without actually being educated—or when she reaches some pre-determined limit of schooling (as a way of rationing social resources).

At a pragmatic level, one might take the view that lower amounts of student debt (both in the aggregate and individually relative to income/wealth) do not produce the sorts of burdens on individuals or the political system that higher amounts do. So *full* cancellation would not be necessary to achieve the goals of cancellation. On this view, the original view for student debt as a gap-filler made sense and should be preserved, but this time with a policy apparatus more focused on keeping it in check. The benefit of hindsight would become a form of foresight.

One can calibrate up or down, and a full discussion goes well beyond our purposes here. The basic principle to get across is that there is a link between one's view about the wisdom of individual responsibility for higher education at a political, moral, and practical level and one's view about whether current student debt burdens are justifiable. The less justifiable current burdens are, the better the reason for canceling student debt.

This way of justifying a student debt jubilee treats it as a way to right a (social and individual) wrong. It is morally justified for that reason, independently of welfare/distributional effects of cancellation, just as providing a remedy for an intentional tort or a violation of property rights is justified (to the extent it is!) regardless of the relative resources of the plaintiff and the defendant. This is not to say that the distributional effects of student debt may not provide part of the reason to think that student debt is (or is not) a wrong that merits a remedy, just as a tort or property rule might be justified in part on net distributional terms. But finding student debt unjustified—and the cancellation of it justified—in part because of the distributional implications of funding higher education through individual indebtedness is not the same thing as finding the cancellation of student debt justified only insofar as it is a means to increase the material wellbeing—as a transfer of wealth—of those who are currently worst off.

B. *Eliminating the Burdens of Student Debt*

Whatever the reason for canceling student debt, doing so would remove student debtors' need to set aside a certain portion of their income to pay off their debts, thereby freeing up income streams for other uses. This increase in purchasing power can be thought of as equivalent to a cash transfer. Increased purchasing power benefits former student debtors and their intimates by giving these beneficiaries access to more goods and services, by increasing their willingness to make big purchases like houses and cars, by making it more financially sensible to start a family, by increasing emotional and physical well-being, and in any number of other ways that having more money is beneficial in a society where money increases access to nearly anything. It would, in other words, make less likely at least some of the negative life outcomes associated with student debt discussed above. Recent research suggests that these benefits would contribute to narrowing the Black-White wealth gap, because Black households tend to hold relatively more student debt for a given level of income or wealth than do white households.[136] There is some debate, however, over

136. *See generally* Marshall Steinbaum, *Student Debt and Racial Wealth Inequality* (Aug. 7, 2019) (unpublished manuscript) (on file with Jain Family Inst.); Louise Seamster, *How Should We Measure the Racial Wealth Gap? Relative vs. Absolute Gaps in the Student Debt Forgiveness Debate*, SCATTERPLOT (July 27, 2019), https://scatter.wordpress.com/2019/07/27/how-should-we-measure-the-racial-wealth-gap-relative-vs-absolute-gaps-in-the-student-debt-forgiveness-debate/. *But see* Adam Looney, *How Progressive is Senator Warren's Loan Forgiveness Proposal?*, BROOKINGS (Apr. 24, 2019), https://www.brookings.edu/blog/up-front-/2019/04/24/how-progressive-is-senator-elizabeth-warrens-

the optimal design of a debt cancellation policy if one's goal is narrowing this gap.[137]

Increasing the purchasing power of many people at once also has knock-on macroeconomic effects when the people with increased purchasing power use that to buy goods and services, stimulating business investment, increasing employment, etc. in the familiar Keynesian virtuous cycle. A study published by the Levy Institute of Economics at Bard University found that "the positive feedback effects of [full] student debt cancellation could add on average between $86 billion and $108 billion per year to the economy," which would "create 50 percent to 70 percent as many jobs in its peak year as the current economic expansion creates in an average year, and could continue to sustain about one-third of the job creation seen in the cancellation's peak years throughout the duration of the cancellation."[138] At least given the state of the macroeconomy in 2017, this expansion would have negligible inflationary effects.[139]

The main source of objection raised by that way of thinking is that a transfer payment just to student debtors—and a transfer payment that takes the form of debt cancellation rather than cash transfers—is not the best way to target such payments.[140] If one's goal is macroeconomic

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loan-forgiveness-proposal/.

137. *See* Seamster, *supra* note 136; Steinbaum, *supra* note 136; Naomi Zewde & Darrick Hamilton, *Cancel All the Student Debt: It's About Economic and Racial Justice*, Rewire News (Oct. 14, 2019); Mark Huelsman, *Only One Candidate's Student Debt Plan Narrows the Black-White Wealth Gap*, Rewire News (June 8, 2019).

138. FULLWILER ET AL., *supra* note 103, at 8, 41.

139. *Id.* at 45.

140. *See, e.g.*, Looney, *supra* note 136; Matt Bruenig, *The Student Debt Forgiveness Muddle Continues*, PEOPLE'S POLICY PROJECT (June 24, 2019), https://www.peoplespolicyproject.org/2019/06/24/the-student-debt-forgiveness-muddle-continues/; David Leonhardt, *Eliminating All Student Debt Isn't Progressive*, N.Y. TIMES (Nov. 18, 2018), https://www.nytimes.com/2018/11/18/opinion/student-debt-forgiveness-college-democrats.html; Eric Levitz, *Critics of a Student Debt Jubilee Are Right (and Wrong)*, INTELLIGENCER (Nov. 20, 2018), http://nymag.com/intelligencer/2018/11/eliminate-all-student-debt-leonhardt-

stimulus, one could generate a greater multiplier effect by targeting spending differently: to infrastructure, to the poorest, etc. If one wants to target macroeconomic stimulus according to some sort of industrial policy—i.e. to develop certain areas of investment, skills development, and innovation, rather than letting financiers decide where to spend the money based on profitability projections—then one should direct spending towards the area in which one wants to create the investment. Thus, investment in green tech, in high-speed trains, in public housing, in reparations for slavery and native genocide, and the like would be a better macroeconomic program than canceling student debt.

From a distributional angle, there is reason to doubt that student debtors should get a benefit that people who have had to reduce their consumption to pay off their student debt should not.[141] Or, rather, if one's sole goal is to increase purchasing power for those where that increase would do the most good, one should simply pay cash to people in the most need of it: i.e. those with the least income and/or wealth.[142] Student debtors tend to be relatively well off, since a majority of the population does not go to college at all, gaining not even the college premium that student debtors benefit from. And a substantial fraction of student debtors are quite well off: highly paid doctors, lawyers, financiers, and the like have large debts if they recently graduated. Paying cash rather than canceling debt would have the added advantage that it would not mandate how recipients of the transfer payment must spend it: they could direct income streams according to their own priorities.

None of these arguments address the sorts of reasons for

new-york-times-ocasio-cortez.html.

141. *See* Lukas Mikelionis, *Warren's Massive $640 Billion Student Loan Cancellation Questioned Over Fairness to Students Who Paid Off Their Debts*, FOX NEWS (Apr. 23, 2019), https://www.foxnews.com/politics/warrens-massive-640-billion-student-loan-cancellation-questioned-over-fairness-to-students-who-paid-off-their-debts.

142. *See* Bruenig, *supra* note 140; Levitz, *supra* note 140.

canceling student debt discussed above. Assuming that one does not find these arguments convincing—that one thinks that student debt does not distort higher education, because, say, one thinks that student debt is fundamental for producing productive workers according to whatever the market demands—each of these arguments has some merit. But, even on that assumption, they all implicitly assume that there is a trade-off between student debt cancellation and other transfers from the government. Without such a trade-off, they are not arguments against the value of increasing the purchasing power of the population of people who happen to have student debt (by canceling their debts), but rather arguments that other ways of increasing purchasing power would be even better. Put differently: why not (assuming one shares these priorities) enact student debt cancellation *in addition to* antipoverty programs, a Green New Deal, reparations, etc.?

Here's one potential reason: there is only so much fiscal space in which the government can operate, whether due to a concern about raising taxes, about inflation, about "the national debt," or some combination. But it is doubtful that student debt cancellation would have much impact on the fiscal space in which the federal government can operate. The national debt is not something to worry about in the abstract, and the national deficit is to be celebrated, especially during recessionary periods—especially during the current crisis. There is little reason to be concerned about inflation in the contemporary environment (this was so even before the COVID-19 crisis). But even if there were a need to create fiscal space for other priorities, there are plenty of ways to do so: plenty of places in the budget could do with trimming (most notably the military budget could be cut by hundreds of billions of dollars while harming only defense contractors and arms dealers and by tens of trillions of dollars with enormous benefits for humanity), and there is plenty of room to raise taxes both to stave off inflation and to remove power from the rich.[143]

Another potential worry is that there is a limited supply of "political capital" for progressive priorities, and policies like universal healthcare, expanding public housing, strengthening unions, restructuring the criminal legal system, or even equalizing resources for *K–12* education should be in line before student debt cancellation (perhaps even if it's understood as part of a program of de-commodification). But even accepting that student debt cancellation should not be a high priority in terms of its relative contribution to social justice and even accepting that limits on political capital make setting priorities necessary, there is a problem with treating political capital as only usable for (as it were) consumption goods. Less cryptically: some expenditures of political capital are *investments*. They create or strengthen or grow a political base, or make a tit-for-tat exchange easier, or put political opponents on the back foot, or otherwise make enacting other priorities easier in the future.

It seems at least plausible that canceling student debt would function in this way. Student debt cancellation would benefit tens of millions of people in a direct and tangible way, and more indirectly. It would both disproportionately benefit young people, perhaps encouraging them to vote and even motivating them to engage more deeply with progressive politics, and benefit highly educated people, who are more likely to vote. Combined with a package of other policies, it could contribute to building a broad political coalition, rather than shrinking the pie. Perhaps it would go otherwise, perhaps student debtors would pull up the ladder. But that is not obvious in the abstract: whether that would be so would surely depend on the details of the policy and the circumstances of its enactment.

The most elemental potential trade-off derives from the fact that enacting policies takes time. One cannot do

143. *See* Levitz, *supra* note 140.

everything at once, and the further in the future one plans to do something the more certain it is. So one must set priorities for what should be done first. It cannot be denied, of course, that some things have to be done before others. Time marches ever onward. And so we come to the root of these worries about badly targeted benefits: the worry that student debtors just are not that deserving relative to others.

Certainly it is true that, if one's priority is to determine who most deserves an increase in purchasing power and how that increase would most stimulate the macroeconomy, other distributional considerations are more important. And it is also true that, even if one's priority is relieving the burdens of student debt (or, more narrowly, relieving the burdens of those who were made worse off by taking on student debt, even accounting for the benefits of some college education), a means-tested intervention that also includes payments to some people who have paid off their debts but are worse off because they had to divert resources to do so would be better targeted. But even if those things are true, they do not undermine the point that canceling student debt would have beneficial effects, which, even purely understood in terms of purchasing power, are reason to give it *some* priority. And there are other reasons in its favor, some of which have just been reviewed. Distributive implications could be accounted for in the details of the design of the plan.

There remains the question of what to do for people who already paid off their student debt or what to do about the fact that canceling student debt would not prevent future people from taking it on. The latter question would be directly addressed if student debt cancellation were paired with a plan to make higher education free/affordable, as it should be and (as we will discuss) as the leading plans do.[144] The former I will not address at any length: any removal of

144. There are some complications here: nobody is proposing to make all higher education free, so graduate level education and private higher education would still generate debt.

an injustice always fails to benefit those who have already experienced the injustice. In any case, canceling student debt does not in itself preclude paying those who paid theirs off early or who scrimped and saved to avoid taking it on.

Finally, concerns about the distributional implications of debt cancellation do not in themselves provide a reason not to cancel *any* student debt. They provide a reason to apply some sort of limitation on a jubilee, likely via some sort of means test. Doing so might be a good idea, but it would have to be weighed against the difficulty of coming up with the right way of targeting relief and the administrative burden that such means testing inevitably creates, which often creates conditions that prevent the most vulnerable from accessing relief. Others have begun to hash out these details.

C. *Debt Cancellation as Jubilee*

A jubilee is not exactly the same thing as a transfer of cash or benefits in kind. It is a different way of increasing wealth. It ends a particular type of obligation, a claim on a flow of income over time. Doing so has effects that are not entirely reducible to increasing purchasing power. It ends the need to come up with liquidity (i.e. cash) to pay off a debt, which makes the pressure to find employment less intense and increases one's ability to pay other bills. This is especially important in when, say, incomes suddenly freeze up. Canceling debt also reduces a household's leverage and eliminates creditors' power over their debtors. Reducing leverage makes households less vulnerable to business cycle downturns (or full-blown economic crises) and makes it less risky to do things that might result in losses of income or increases in costs. It is also likely to improve credit scores (on average), which increases opportunities to take on other debt on better terms, to get approved for an apartment, to get a lower rate on insurance, and even to get a job. Reducing aggregate leverage enables more productive borrowing and/or decreases the potential for debt deflationary effects in a downturn.

Eliminating the relationship between debtor and creditor makes it such that a debtor does not have to worry about the debt or anything associated with it anymore: staying on top of payments, signing up for the right repayment plan, dealing with errors or predatory practices from servicers and collectors, avoiding scams, etc. It makes one freer to make choices without having to think about how they will impact one's ability to pay a debt: to take time off from work, to do less lucrative work (or more lucrative work without being worried about falling into the cracks of repayment plans), to go back to school, etc. It also prevents the creditor from setting conditions on what a debtor can do. In the case of public student debt, that means, for instance, being able to do work that does not qualify for the public service loan forgiveness plan or to take a year off from doing that type of work without facing a huge penalty. Jubilees have been traditionally undertaken for both of these reasons. In sum, they create a clean slate, a form of rough justice that allows debtors to move on with their lives and reduces total leverage.

A recent study has demonstrated how canceling student debt can have knock-on deleveraging effects.[145] Researchers examined what happened to individuals who suddenly found their private student debts canceled because a collector could not establish chain of title.[146] These borrowers were already in default—so they were already not paying on these debts, so none of the effects had to do with increased cash flow.[147] Yet they reduced their total indebtedness by an average of $4,000 beyond the amount of student loan cancellation they received.[148] They did both by borrowing less on existing accounts (i.e. they had less need to take on a credit card

145. Marco Di Maggio, Ankit Kalda, & Vincent Yao, *The Effects of Debt Relief on the Student Loan Market*, VOX CEPR POLICY PORTAL (Sept. 7, 2019), https://voxeu.org/article/effects-debt-relief-student-loan-market.

146. *Id.*

147. *Id.*

148. *Id.*

balance for routine purchases) and by taking out fewer debts.[149] Less debt meant they were significantly less likely to go into delinquency or default on their other debts.[150] Some of the results may be attributable to the fact that these borrowers increased their income on average, apparently because they were able to find better jobs.[151]

D. *Conclusion*

In sum, there are multiple overlapping reasons to cancel student debt. How these reasons fit together will depend on one's view about the role of higher education in society and about the virtues of means-testing programs, among other things. Different combinations of the above considerations will lead to support for debt jubilees with different scopes. And the onset of a world historical economic crisis that suddenly makes paying student debt impossible for many may well make much of the foregoing obsolete. This Article takes no position on the optimal design for a debt jubilee, but the foregoing should provide enough reasons in favor of *some sort* of jubilee that it will make sense to explore how one might be implemented.

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149. *Id.*

150. *Id.*

151. *Id.*

IV. CANCELING STUDENT DEBT WITHOUT CONGRESS

Two competing bills for a student debt jubilee, both promoted by Democratic Party leaders who were candidates for that party's Presidential nomination, have been drafted and lay waiting for the right political moment.[152] Although they vary in their scope and in some details, both would run debt cancellation through the Department of Education—instructing it to take possession of outstanding FFELP and Perkins Loans, to purchase outstanding private student loans, and to cancel them alongside outstanding Direct Loans.[153] Both would make debt cancellation tax-free and both are paired with bills that would make at least public undergraduate education free for all.[154]

For the first time since the federal government created student debt, it is well within the realm of possibility that the next President would be ready to sign a student debt jubilee into law. And more and more members of Congress seem likely to vote in favor of sending such a bill to the President's desk. Indeed, it is not out of the question that at least some student debt cancellation could come out of the current crisis, with Democratic leaders discussing a write-

152. *See* Student Debt Cancellation Act of 2019, H.R. 3448, 116th Cong. (2019), https://www.congress.gov/116/bills/hr3448/BILLS-116hr3448ih.pdf ("Omar Bill"); Student Loan Debt Relief Act of 2019, H.R. ___, 116th Cong. (2019) ("Cornyn Bill"), https://www.warren.senate.gov/imo/media/doc/Student%20Loan%20Debt%20Relief%20Act%20(Legislative%20Text).pdf; Bernie Sanders, *This is How We Will Cancel All Student Debt*, MEDIUM (June 24, 2019), https://medium.com/@SenSanders/this-is-why-we-should-cancel-all-student-debt-6ea987d02ce2; College for All and Cancel All Student Debt, BERNIE, https://berniesanders.com/issues/college-for-all/; Team Warren, *I'm Calling for Something Truly Transformational: Universal Free Public College and Cancellation of Student Debt*, MEDIUM (Apr. 22, 2019), https://medium.com/@teamwarren/im-calling-for-something-truly-transformational-universal-free-public-college-and-cancellation-of-a246cd0f910f.

153. Clyburn Bill §§ 101(c), (e), (g); Omar Bill §§ 2(c), 3.

154. Omar Bill §§ 2(e), 3(e); Clyburn Bill § 101(d); College for All Act of 2017, https://www.sanders.senate.gov/download/college-for-all-act?inline=file; Summary of Sen. Sanders' College for All Act, https://www.sanders.senate.gov/download/collegeforallsummary/?inline=file.

down of $10,000 or more as part of ongoing relief efforts.[155]

Still, another possibility is worth considering: one that avoids a notoriously deadlock-prone Congress. This section will argue that the Executive Branch already has the power to cancel student debt. The Higher Education Act (HEA) gives the Secretary of Education a broad discretionary authority to "modify" or "compromise, waive, or release" DOE's claims against student debtors.[156] This settlement authority has only ever been used in a narrow set of circumstances, consistent with DOE's longstanding practice of treating student debtors primarily as revenue streams. But nothing in the statute requires DOE to continue to use these powers narrowly. A Secretary committed to student debt cancellation, working in an administration with the same commitment, could cancel some or all public student debt, which, recall, is 95% of outstanding student debt.

Doing so would involve using an authority in an unprecedented way. And the broader the cancellation, the more in tension it would be with the continued existence of student debt collection under the HEA. So a court given a chance to review an Executive jubilee undertaken via an exercise of prosecutorial discretion, especially a court with the sort of anti-novelty, anti-administrative-state, and anti-progressive tendencies as those that increasingly dominate the federal judiciary, would likely have some serious doubts. The Supreme Court been fairly explicit that Congress does not "hide elephants in mouseholes,"[157] and that courts and agencies should exercise "common sense as to the manner in

155. Michael Stratford, *Student Loans Emerge as Sticking Point in Stimulus Debate*, POLITICO (Mar. 23, 2020).

156. 20 U.S.C. §§ 1082(a)(4), (6) (2018).

157. This phrase comes from *Whitman v. American Trucking Associations*, 531 U.S. 457, 468 (2001), and has taken on the status of ritual incantation since. *See, e.g.*, Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund, 138 S. Ct. 1061, 1071 (2018); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1626–27 (2018); Puerto Rico v. Franklin Cal. Tax-Free Tr., 136 S. Ct. 1938, 1947 (2016); EPA v. EME Homer City Generation, L.P., 572 U.S. 489, 528 (2014); Gonzales v. Oregon, 546 U.S. 243, 267 (2006).

which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[158] And the Debt Collection Improvement Act does require all agencies to "try to collect" debts to the federal government as they become due, which must be read in light of an HEA that provides quite detailed instructions for how the Department of Education is to collect on student debt.[159]

There are responses to each of these doubts, and they will be discussed in turn. The following will argue that governing law provides strong support for the proposition that DOE has absolute discretion to determine when to stop collections, when to collect less than the full amount, and when to release claims debtors' *in toto*. And, aside from the law (and assuming any potential challenger would have standing), there is some reason to doubt whether a federal court, especially in a moment of plummeting legitimacy, would be inclined to take a controversial legal position to reverse what is sure to be wildly popular massive economic relief for tens of millions of people.

Predicting outcomes is impossible. What follows is an argument in favor of the Secretary of Education's broad discretion to cancel student debt paired with a discussion of the legal and operational obstacles to be overcome.

A. *The Law of Prosecutorial Discretion at Administrative Agencies*

1. Prosecutorial Discretion, Generally

It is a longstanding principle of Anglo-American law

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158. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000); *see also id.* at 132 ("[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

159. 31 U.S.C. § 3711(a)(1) (2018) ("The head of an executive . . . agency—(1) shall try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency."); *see also* Salazar v. King, 822 F.3d 61, 83 (2d Cir. 2016) (stating in dictum that § 3711(a)(1) gives DOE "the non-discretionary mandate to collect on federal student loans").

that, as stated in *Marbury v. Madison*, "[w]here the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will . . . any application to a court to control, in any respect, his conduct, would be rejected without hesitation."[160] Executive discretion takes multiple forms. One of them—the one at issue here—is prosecutorial discretion (sometimes also referred to "enforcement discretion"). An agency (acting via its officer) exercises such discretion when it determines whether or not to enforce a right it has (or may have) against a private party. This type of decision is not reserved for agents of the state. The common law barred courts from reviewing *any* litigant's decisions about whether, when, and how to bring or dismiss a case, whether civil or criminal.[161] A *right* to bring a case is not an *obligation* to do so. This rule has applied time out of mind to private litigants and public officials alike.

With respect to public officials in particular, court deference derives in part from this principle common to all potential litigants and in part out of respect for the constitutional separation of powers. To the extent discretion is part of what it means to *execute* the laws, for the Judiciary to second guess such discretion would be for it to "invade a special province of the Executive."[162] Since prosecutorial discretion is at least to some degree inherent in the execution of a law, when the Constitution vests "[t]he executive Power" in the office of the President and commands her to "take Care that the [l]aws be faithfully executed," it vests the President

160. 5 U.S. (1 Cranch) 137, 170–71 (1803).

161. *See* The Confiscation Cases, 74 U.S. (7 Wall) 454, 457–59 (1868); *see also* Powell v. Katzenbach, 359 F.2d 234, 234 (D.C. Cir. 1965); United States v. Salinas, 693 F.2d 348, 350 (5th Cir. 1982); *In re* Richards, 213 F.3d 773, 782 (3d Cir. 2000). Rule 48(a) of the Federal Rules of Criminal Procedure now requires leave of court to dismiss a criminal case, though generally a prosecutor's "discretion . . . should not be . . . disturbed unless clearly contrary to manifest public interest" or in bad faith. United States v. Cowan, 524 F.2d 504, 513 (5th Cir. 1975), *cert. denied*, 425 U.S. 971 (1976).

162. Reno v. Am.-Arab Anti-Discrimination Comm., 525 U.S. 471, 489 (1999).

and her officers with the discretion to determine how to go about executing the law.[163] When Congress makes a law enforceable by an instrumentality of the executive, it does so against this constitutional background, implicitly delegating discretion in enforcement.

The common law baseline is absolute discretion, but, because Congress creates the laws that the Executive Branch is charged with enforcing, Congress can alter the common law baseline by creating standards for an officer's discretion.[164] At least as a default, prosecutorial discretion is commonly referred to as absolute and can only be challenged with "clear evidence" that an official has engaged in selective prosecution that violates one or more individual's constitutional rights.[165] In practice, this has meant that, at least with respect to criminal prosecutors, courts will never interfere with a non-enforcement decision (as long as constitutional rights are not violated). As the Supreme Court put it in *Bordenkircher v. Hayes*, "so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[166]

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163. U.S. CONST. art. II, § 1, cl. 1 (Vesting Clause), art. II, § 3, cl. 4 (Take Care Clause); *see also* Printz v. United States, 521 U.S. 898, 922 (1997) ("The Constitution does not leave to speculation who is to administer the laws enacted by Congress."); Heckler v. Chaney, 470 U.S. 821, 832 (1985) (discussing the role of the Take Care Clause in vesting prosecutorial discretion); Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1046–47 (2013) (discussing the constitutional basis for the President's enforcement power).

164. *See, e.g.*, Fed. R. Crim. Pro. § 48(a).

165. United States v. Armstrong, 517 U.S. 456, 463–65 (1996); *Reno*, 525 U.S. at 488–91; s*ee also* Oyler v. Boles, 368 U.S. 448, 456 (1962); Bolling v. Sharpe, 347 U.S. 497 (1954).

166. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). Theoretically, exceptions exist for cases in which a prosecutor's discretion infringes on another Constitutional right, but these rarely make an impact in practice. *See Armstrong*, 517 U.S. at 464–65; Oyler, 368 U.S. at 456; Bolling, 347 U.S. at 497. For recent discussion on the problems with the discretionary power this creates, see EMILY BAZELON, CHARGED: THE NEW MOVEMENT TO TRANSFORM AMERICAN PROSECUTION AND END MASS INCARCERATION (2018); Issa Kohler-Hausmann, *Managerial*

Prosecutors have used this discretion as a form of de facto lawmaking, for both good and ill. In the latter category, prosecutors have developed "pre-trial diversion" programs without any statutory authorization and, in recent years, have openly refused to prosecute certain victimless crimes, the enforcement of which has contributed mightily to racial injustice.[167] In the former, the Department of Justice categorized some financial firms as "too big to prosecute" in the wake of the financial crisis. Where these decisions have been challenged, they have been resoundingly upheld.[168] Even where courts of first instance have the explicit responsibility to review consent judgments, they have been rebuked by appellate courts when they came close to usurping an agency's judgment as to whether, and how far, to pursue a case.[169]

The name should not be misleading: prosecutorial discretion does not apply only to criminal prosecutions, or only to cases (criminal or civil) brought by the DOJ or state-level office that employs "prosecutors." The foundational cases on prosecutorial discretion focus on the power of the Attorney General and other Department of Justice (DOJ) officials.[170] These cases have sometimes been said to establish that the Attorney General has an "inherent authority" to exercise prosecutorial discretion,[171] but they

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Justice and Mass Misdemeanors, 66 STAN. L. REV. 611 (2014); William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548 (2004); Steven J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

167. *See* Texas v. United States, 809 F.3d 134, 197 (5th Cir. 2015) (King, J., dissenting) (discussing pre-trial diversion programs), https://www.motherjones.com/crime-justice/2018/03/philadelphias-new-da-found-an-innovative-way-to-legalize-pot-and-other-cities-should-pay-attention/.

168. For many years, prosecutors in states controlled by white supremacists declined to prosecute murders, assaults, and other acts of brutality if committed against Black people.

169. *See, e.g.*, S.E.C. v. Citigroup Global Mkts. Inc., 673 F.3d 158 (2d Cir. 2014).

170. *See* Swift & Co. v. United States, 276 U.S. 311, 331–32 (1928); The Confiscation Cases, 74 U.S. (7 Wall) 454, 454 (1868).

171. *E.g.*, U.S. Att'y's Manual 4-3.100 (1994) ("The Attorney General has the

actually relied on the logic just articulated. Congress granted the Attorney General broad enforcement authority with the Judiciary Act, which, read against the common law baseline of absolute prosecutorial discretion for both private and public litigants, should be understood as a grant of broad prosecutorial discretion.[172] In other words, these cases provide no reason to treat the Attorney General's (or the DOJ's, or any prosecutor's) prosecutorial discretion as unique, aside from the fact that the grant of discretion extends to a particularly broad variety of cases. Moreover, nothing in these decisions restricted prosecutorial discretion to the DOJ's criminal functions: the foundational *Confiscation Cases* explicitly treated civil and criminal litigation as on a par.[173]

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inherent authority to dismiss any affirmative action and to abandon the defense of any action insofar as it involves the United States of America, or any of its agencies, or any of its agents who are parties in their official capacities.").

172. *See Armstrong*, 517 U.S. at 464–65 (US Attorneys have broad "latitude because they are *designated by the statute* as the President's delegates to help him discharge his constitutional responsibility to 'take Care that the Laws be faithfully executed.'") (emphasis added); *Confiscation Cases*, 74 U.S. at 456–59. *See generally* Rebecca Krauss, *The Theory of Prosecutorial Discretion in Federal Law: Origins and Developments*, 6 SETON HALL CIR. REV. 1, 9–11 (2012) (discussing circuit court cases).

173. *See Confiscation Cases*, 74 U.S. at 457–59. This includes "[p]ower to release or otherwise dispose of the rights and property of the United States," even though that power is "lodged in the Congress by [Article IV of] the Constitution." Royal Indemnity Co. v. U.S., 313 U.S. 289, 294 (1941) (citing U.S. CONST. art. IV, § 3, cl. 2). That is because Congress can confer that power to an official in the executive branch (and confer the power to delegate it), including by giving an official the power to dispose of federal property, to enter into contracts, to settle claims, and the like. *See id.*; Alcoa, Inc. v. Bonneville Power Admin., 698 F.3d 774, 791–92 (9th Cir. 2012). Moreover, it is not entirely clear whether *Royal Indemnity* applies to cabinet-level officials, since it only concluded that "*[s]ubordinate officers* of the United States are without [the power to dispose of the rights and property of the United States], save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted." *Royal Indemnity Co.*, 313 U.S. at 294 (emphasis added); *but see* Warren v. United States, 234 F.3d 1331, 1337–38 (D.C. Cir. 2000) (citing *Royal Indemnity* for the proposition that "the Government cannot abandon property without congressional authorization" and applying that proposition to the Coast Guard); Rio Grande Silvery Minnow (Hybognathus amarus) v. Bureau of Reclamation, 599 F.3d 1165, 1185 (10th Cir. 2010) (citing *Warren* and applying it to the Bureau

Early focus on the DOJ seems to be merely an artifact of the Judiciary Act's vesting primary enforcement power in that office and the ability of the DOJ to handle nearly all cases on behalf of the federal government. As the administrative state grew, so did the number of offices in the Executive Branch with enforcement powers. For some years, there was uncertainty about the authority of these officials to exercise discretion to settle even the most trivial of cases, and common practice was to refer every potential non-enforcement or compromise determination to the DOJ for approval unless the agency had an explicit grant of settlement authority.[174]

As will be discussed further below, the resulting burden on the DOJ eventually led it to encourage Congress to pass the Federal Claims Collection Act (FCCA), which granted a default settlement authority to all administrative agencies.[175] But subsequent case law has made clear that the FCCA was unnecessary to create such authority, and the uncertainty that preceded it was unfounded.

As with the Judiciary Act, the Administrative Procedure Act enacted the common law presumption that an official charged with the enforcement of a particular set of claims has absolute discretion to determine whether and how to do so.[176] Prosecutorial discretion is implicit in the power to enforce a law, whether that power is vested in an employee

of Reclamation); U.S. General Accountability Office, Principles of Federal Appropriations Law (3d ed. 2008): The Government's Duty and Authority to Collect Debts Owed to it, 2008 WL 6969346, at *1 ("It follows [from *Royal Indemnity*] that, without a clear statutory basis, an agency has no authority to forgive indebtedness or to waive recovery.").

174. *See Improvement of Procedures in Claims Settlement and Government Litigation*, 89th Cong. 23 (1966); Sidney B. Jacoby, *The 89th Congress and Government Litigation*, 67 COLUM. L. REV. 1212, 1223–24 (1967); *see generally* H.R. REP. NO. 89-533 (1965) (discussing this practice).

175. Federal Claims Collections Act of 1966, Pub. L. No. 89-508, 80 Stat. 308 (1966).

176. *Heckler*, 470 U.S. at 831–32 (citing 5 K. Davis, Administrative Law § 28:6 (1984)); *see* Webster v. Doe, 486 U.S. 592, 607–10 (1988) (Scalia, J., dissenting) (discussing the common law baseline in more detail).

of the DOJ or another administrative agency. Their prosecutorial discretion is of the same nature and subject to the same principles of (non-)review.[177]

2. Prosecutorial Discretion of Administrative Agencies: The *Heckler* Framework

The leading case on administrative agencies' prosecutorial discretion is *Heckler v. Chaney*. In that case, death row inmates had petitioned the FDA to take enforcement action against companies that were producing and selling the drugs used for lethal injections. Although these drugs had all been approved as "safe and effective" for some uses, they had not been tested or approved for use in executions.[178] The Food, Drug, and Cosmetics Act (FDCA) prohibited (and continues to prohibit) unapproved uses, and mandates that those who violate this prohibition be punished by fine or imprisonment.[179] The FDA's own published rules carried out this mandate by requiring the agency to "investigate . . . thoroughly and to take whatever action is warranted to protect the public" from unapproved uses.[180] The FDCA contained (and still contains) a grant of permission to exercise discretion to refrain from initiating proceedings, but only in the case of "minor violations."[181] The inmates argued that the FDA was thus required to at least temporarily ban the use of these drugs while an investigation into their safety and effectiveness for use in executions was undertaken. The FDA claimed it had "inherent discretion" to determine whether such enforcement action was warranted

177. *See Armstrong*, 517 U.S. at 464 (citing *Heckler* in determining not to review a criminal prosecutor's discretion, thus implicitly treating them as on a par); *Heckler*, 470 U.S. at 831 (drawing explicitly on the case law regarding the DOJ's prosecutorial discretion to declare the FDA's discretion absolute).

178. *Heckler*, 470 U.S. at 823–24.

179. *See* Chaney v. Heckler, 718 F.2d 1174, 1186 n.29 (D.C. Cir. 1984) (discussing the mandatory nature of the FDCA's prohibitions).

180. *Id.* at 1186 (quoting Legal Status for Uses Unapproved by the Food and Drug Administration, 37 Fed. Reg. 16503, 16504 (Aug. 15, 1972)).

181. *See Heckler*, 470 U.S. at 837.

or not, especially given the question of whether it had the authority to regulate the use of such uses.

A divided panel of the D.C. Circuit (with then-Judge Scalia dissenting) found that the language and the structure of the FDCA mandated investigation of unauthorized uses and prosecution of any violations.[182] By that point, it had become well established that there was a strong presumption in favor of reviewability of administrative agencies' actions.[183] After all, the APA "waives the federal government's sovereign immunity in actions brought under the general federal question jurisdictional statute."[184] However, following the common law of judicial review of agency action, the APA reinstates immunity via § 701(a)(2) when "agency action is committed to agency discretion by law."[185] At the time, the only Supreme Court case to have interpreted § 701(a)(2) was *Citizens to Preserve Overton Park, Inc. v. Volpe*. *Volpe* had called the exception it creates "very narrow," only applicable when there is "no law to apply" for the agency or the reviewing court.[186]

In applying this rule, the D.C. Circuit found that the FDCA, combined with the FDA's guidance for implementing it, made some enforcement action against unauthorized uses of drugs mandatory. Writing for the court, Judge Skelly-Wright reasoned that, even though it is difficult to review exercises of discretion, a court must be "responsible for

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182. *Chaney*, 718 F.2d at 1176.

183. *See Block v. Cmty. Nutrition Inst.,* 467 U.S. 340, 349 (1984); *Dunlop v. Bachowski,* 421 U.S. 560, 567 (1975); Abbott Labs. v. Gardner, 387 U.S. 136, 140 (1967) ("[O]ur cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."); *see also* Mach Mining, LLC v. E.E.O.C., 575 U.S. 480, 486 (2015).

184. Lunney v. United States, 319 F.3d 550, 558 (2d Cir. 2003) (citing Califano v. Sanders, 430 U.S. 99, 105 (1977)).

185. 5 U.S.C. § 701(a) (2018).

186. Citizens to Preserve Overton Park, Inc., 401 U.S. 402, 410 (1971) (quoting S. Rep. No. 752, 79th Cong., 1st Sess., 26 (1945)).

ensuring that government officials do not negate or frustrate congressional enactments through bureaucratic arbitrariness."[187] Treating prosecutorial discretion as unreviewable rather than deserving of "a great degree of deference" would be to abdicate judicial responsibility, especially when there was ample "law to apply."[188] In this decision, the D.C. Circuit was building on a series of cases that had begun to chip away at absolute deference for prosecutorial discretion.[189]

The Supreme Court unanimously reversed.[190] Rather than ask whether the statute granted discretion, the Court, in an opinion written by Chief Justice Rehnquist, accepted the FDA's argument that an agency has *inherent* discretion to refuse to take enforcement action. It reasoned that, unless Congress creates explicit rules for how to determine whether to enforce a given type of claim, there is "no meaningful standard against which to judge the agency's exercise" of its enforcement power.[191] In addition, it disagreed with the D.C. Circuit that the FDCA created such a standard or that the FDA's guidance was binding.

187. *Chaney*, 718 F.2d at 1191.

188. *Id.*

189. *See* Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973); Wong Wing Hang v. Immigration & Naturalization Serv., 360 F.2d 715, 718–19 (2d Cir. 1966); *Heckler*, 470 U.S. at 841–49 (Marshall, J., concurring) (discussing some of these cases and arguing that they should have applied).

190. The decision to reverse was unanimous, but there were three opinions in the case. Justice Brennan concurred in the decision and wrote separately to clarify that he read the majority opinion narrowly to leave open room for clarification of its scope. *Heckler*, 470 U.S. at 838–39. Justice Marshall concurred in judgment. *Id.* at 840. He would have found that prosecutorial discretion is not absolute, but, so long as not clearly prohibited by statute, reviewable for abuse. *Id.* at 840–41.

191. *Heckler*, 470 U.S. at 830. For subsequent development of the "no meaningful standard" interpretation of § 701(a)(2), see Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018); Lincoln v. Vigil, 508 U.S. 182, 191 (1993); Franklin v. Massachusetts, 505 U.S. 788, 816–18 (1992); Webster v. Doe, 486 U.S. 592, 599–600 (1988); ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270, 282, (1987).

Even though the FDCA says quite clearly that violators "shall be imprisoned . . . or fined," the Court held that further "case law or legislative history" would have to be adduced to indicate that this language, however mandatory it *seemed*, actually mandated prosecution of every violator.[192] It found that the prohibition of unapproved uses could not serve as "law to apply" because it was "simply irrelevant to the agency's discretion to refuse" to enforce that clear prohibition.[193] It was not even impressed by the argument that Congress's explicit grant of permission to exercise discretion in the case of "minor violations" should lead to the negative inference that Congress did not grant such permission in cases of major violations.[194]

But the Court did not just overrule the D.C. Circuit's application of *Overton Park*. It went on to clarify that courts should be significantly more deferential toward exercises of agency discretion than *Overton Park* itself may have implied. The "common law of judicial review of agency action"[195] has required not just "a great degree of deference," as the D.C. Circuit found, but, rather, that "an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's *absolute* discretion."[196] In other words, the APA's presumption of reviewability should be flipped: "an agency's decision not to take enforcement action should be *presumed immune from review* under § 702(a)(2)" absent a clear statutory indication otherwise.[197]

192. *Heckler*, 470 U.S. at 835.

193. *Id.* at 836.

194. *Id.* at 837.

195. *Id.* at 832.

196. *Id.* at 831 (emphasis added).

197. *Id.* at 832 (emphasis added); *see also id.* at 831 (referring to the flipping of the presumption); *Salazar*, 822 F.3d at 75 (stating that because of *Heckler*, "the opposite presumption [to the strong presumption of reviewability] applies when a plaintiff seeks to require that an agency take an enforcement action"); Montana Air Chapter No. 29, Ass'n of Civilian Technicians, Inc. v. Fed. Labor Relations

The Court justified this presumption in terms of "the general unsuitability for judicial review of agency decisions to refuse enforcement."[198] It pointed out that decisions regarding whether to enforce involve "a complicated balancing of a number of factors which are peculiarly within [an agency's] expertise," and that the question of expertise has long provided justification to defer to agency action.[199] It also noted that decisions not to enforce do not "infringe upon areas that courts often are called upon to protect" because it involves decisions *not* to exercise the "coercive power over an individual's liberty or property rights."[200] Finally, it connected administrative agencies' prosecutorial discretion to that of, well, prosecutors, reasoning that "an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'"[201]

The presumption of unreviewability can be rebutted if Congress has "provided guidelines for exercise of [an agency's] enforcement power . . . either by setting substantive priorities, or by otherwise circumscribing the agency's power to discriminate among the issues or cases it will pursue."[202] In such a situation, Congress should be taken

Auth., 898 F.2d 753, 756 (9th Cir. 1990) (citing *Heckler* for the proposition that "[a]n agency's decision not to take enforcement action generally . . . is presumed to be immune from judicial review"); Robbins v. Reagan, 780 F.2d 37, 44 (D.C. Cir. 1985) (referring to the "shift in the presumption" of reviewability that *Heckler* created).

198. *Heckler*, 470 U.S. at 831.

199. *Id.* at 831–32.

200. *Id.* at 832.

201. *Id.*

202. *Id.* at 833.

to have "withdr[awn] discretion from the agency."[203] This is how the *Heckler* court explained its previous decision in *Dunlop v. Bachowski*, which summarily affirmed the Third Circuit's determination that when a statute "provides that after investigating a complaint, [an agency official] must determine whether there is probable cause to believe that violations" have occurred and to prosecute them if no settlement can be reached, a court can review a decision not to prosecute an alleged violation for arbitrariness.[204]

Rebutting the presumption through explicit statutory language is also how the Court explained the D.C. Circuit's earlier finding in *Adams v. Richardson* that HEW "consciously and expressly adopted a general policy which is in effect an abdication of its statutory duty" when it repeatedly refused to enforce mandatory school integration orders.[205] Although the Supreme Court "express[ed] no opinion" on the *Adams* decision or the general principle that repeated refusal to enforce a statutory scheme could rebut the presumption of unreviewability, it did "note [in a footnote] that in those situations the statute conferring authority on the agency might indicate that such decisions were not committed to agency discretion."[206] In other words, if an agency's discretionary decision to adopt a pattern of non-enforcement is to be reviewable, it is only insofar as that decision undermines the statute's allocation of discretionary authority. With respect to the *Adams* case in particular, it is helpful to note that the relevant statute set forth specific procedures for enforcement, including specific situations in

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203. *Id.* at 834.

204. *See id.* at 833–34. The quote is from the Third Circuit's decision. Bachowski v. Brennan, 502 F.2d 79, 88 (3d Cir. 1974). The Supreme Court reviewed this decision at length—reversing in part and affirming in part—but it treated this particular aspect of the decision summarily in a footnote. *See* Dunlop v. Bachowski, 421 U.S. 560, 567 n.7 (1975).

205. Adams v. Richardson, 480 F.2d 1159, 1162 (1973). The discussion in *Heckler* is at 470 U.S. at 833 n.4.

206. 470 U.S. at 833 n.4 (internal quotations omitted).

which the alternative of "voluntary compliance" could be used.[207] It also involved more than a case of non-enforcement, since HEW was "actively supplying segregated institutions with federal funds, contrary to the expressed purposes of Congress."[208]

In the same footnote, the Supreme Court also held out the possibility that "a refusal by the agency to institute proceedings based solely on the belief that it lacks jurisdiction" might not count as an exercise of prosecutorial discretion.[209]

3. Prosecutorial Discretion of Administrative Agencies after *Heckler*

Heckler continues to provide the guiding framework for determining when a federal agency's decision is too discretionary to be justiciable. Several aspects of the framework have been elaborated in subsequent cases, although the case law is not entirely consistent.

Unsurprisingly, given the number of administrative law cases it hears, the D.C. Circuit has developed the most well paved trail of analysis. "To determine whether a matter has been committed to agency discretion," it first "consider[s] both the nature of the administrative action at issue and the language and structure of the statute that supplies the applicable legal standards for reviewing that action."[210] Although it is not always straightforward to separate out analysis of the nature of the action from the way the statutory scheme treats the type of action at issue, analysis is to begin with the former. As relevant here, "decisions not

207. 480 F.2d at 1163.

208. *Id.* at 1162.

209. 470 U.S. at 833 n.4.

210. Sierra Club v. Jackson, 648 F.3d 848, 855 (D.C. Cir. 2011) (internal quotation marks omitted); *see also* Assoc. of Irritated Residents v. EPA, 494 F.3d 1027, 1037 (D.C. Cir. 2007); Sec. of Labor v. Twentymile Coal Co., 456 F.3d 151, 156 (D.C. Cir. 2006); Steenholdt v. FAA, 314 F.3d 633, 638 (D.C. Cir. 2003); Drake v. FAA., 291 F.3d 59, 70 (D.C. Cir. 2002).

to take enforcement action," which includes settlements, are presumed unreviewable.[211] Non-enforcement decisions are to be distinguished from "routine dispute that federal courts regularly review," as when a private party objects to an agency's determination about that party's rights[212] or when an agency determines whether exhaustion requirements have been met in an appeal of its decision.[213] The presumption of non-justiciability may be rebutted if a review of the statute reveals "meaningful standards to cabin the agency's otherwise plenary discretion."[214] "On the other hand, if the statute in question does not give any indication that violators must be pursued in every case, or that one particular enforcement strategy must be chosen over another and if it provides no meaningful guidelines defining the limits of the agency's discretion, then enforcement is committed to the agency's discretion."[215]

The Supreme Court has clarified that, in addition to "express language" in a statute, the "structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved" can also be considered to determine whether there is "law to apply" in

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211. Sierra Club v. Jackson, 648 F.3d at 856; *Irritated Residents*, 494 F.3d at 1031 (involving settlement agreements); *Schering,* 779 F.2d at 687 (also involving settlement agreement); *see also* Block v. SEC, 50 F.3d 1078, 1082 (D.C. Cir. 1995). Other types of judgments have also been found presumptively non-reviewable. *See, e.g.*, *Locomotive Engineers*, 482 U.S. at 282; *Webster*, 486 U.S. at 601; Lincoln v. Vigil, 508 U.S. 182 (1993); Lunney v. United States, 319 F.3d 550 (2d Cir. 2003).

212. Weyerhaeuser Co. v. United States Fish & Wildlife Serv., 139 S.Ct. 361, 370 (2018).

213. Smith v. Berryhill, 139 S.Ct. 1765, 1777 (2019); *see also Salazar*, 822 F.3d at 75 ("The presumption against judicial review of decisions not to take enforcement action protects agency discretion in allocating its resources to choose their enforcement targets. *See id.* Unlike the plaintiffs in *Chaney,* who asked the court to compel the FDA to take enforcement measures against third parties within the agency's sphere of regulation, the plaintiffs here ask the court to review whether the DOE acted arbitrarily and capriciously in taking enforcement actions *against plaintiffs.*").

214. Sierra Club v. Jackson, 648 F.3d at 856 (quoting *Drake*, 291 F.3d at 70).

215. *Id.*; *see also Irritated Residents*, 494 F.3d at 1033.

reviewing an apparently discretionary act.[216] Again, the nature of the action and the meaning of the statutory scheme are intertwined. Justice Scalia has provided some guidance to sorting them out in an influential dissent in *Webster v. Doe*.[217] There, he argued that courts should look "to such factors as whether the decision involves 'a sensitive and inherently discretionary judgment call,' whether it is the sort of decision that has traditionally been nonreviewable, and whether review would have 'disruptive practical consequences.'"[218] The idea is that whether an action is "committed to agency discretion *by law*," as § 701(a)(2) puts it, depends not just on what the *statute* itself says, but in addition on the "common law of judicial review of agency action" and executive action more broadly, incorporating traditional and contemporary judgments about the wisdom of judicial interference with executive discretion in different circumstances. Whatever a statute says, review is less wise in, say, matters regarding national security than in matters regarding the design of the census.[219] Deferring to how to

216. Block v. Cmty. Nutrition Inst., 467 U.S. 340, 345 (1984). *Block* was interpreting § 701(a)(1), but it has been applied in subsequent cases inquiring into the applicability of § 701(a)(2). *See* Weyerhaeuser Co. v. United States Fish & Wildlife Serv., 139 S. Ct. 361, 370 (2018); *Mach Mining*, 575 U.S. at 490; Webster v. Doe, 486 U.S. 592, 601 (1988); *see also* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125, (2000) ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.") (internal quotation marks omitted).

217. This part of the dissent was not disputed by the majority and was subsequently cited by the unanimous opinion in *Vigil*, 508 U.S. at 191.

218. *Webster*, 486 U.S. at 609 (Scalia, J. dissenting) (citing Department of Navy v. Egan, 484 U.S. 518, 527 (1988); ICC v. Locomotive Engineers, 482 U.S. 270, 282 (1987); Heckler v. Chaney, 470 U.S. 821; Southern R. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 457 (1979)).

219. Justice Stevens has expressed a similar sentiment regarding the wisdom of understanding a statutory grant of discretion against a background understanding of the wisdom of judicial interference in the area at issue. *See* Franklin v. Massachusetts, 505 U.S. 788, 817–18 (1992) (Stevens, J. concurring) ("While the operations of a secret intelligence agency may provide an exception to the norm of reviewability, the taking of the census does not."). This concurrence was also cited approvingly in *Vigil*, 508 U.S. at 191–92.

prioritize resources is wiser than deferring to how to balance competing interests. To give full meaning to § 701(a)(2), and to differentiate from § 701(a)(1)'s limitation to statutes that "preclude judicial review," requires locating a statutory scheme within a broader jurisprudential analysis and exercise of good sense.

Yet the inquiry should not be entirely freewheeling. In the recent case of *Trump v. Hawaii*, the Supreme Court found that when a grant of discretion is clear from the text of the statute, no further inquiry into structure or purpose is required.[220] This decision sits somewhat in tension with some recent Supreme Court cases that have emphasized that the presumption of non-reviewability is to be "quite narrowly" drawn, limited to "those rare circumstances where the relevant statute [provides] no meaningful standard against which to judge the agency's exercise of discretion."[221] However, these cases can be distinguished both on the grounds that they involved statutes that did not clearly leave a decision to agency discretion and that they involved actions that were not of the sort to which courts generally differ.[222] They can best be read as warnings not to extend the presumption of non-reviewability too far beyond situations in which there is truly no law to apply.

Courts are more likely to find that a statute creates law to apply to review a discretionary determination if a statute

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220. *See* Trump v. Hawaii, 138 S. Ct. 2392, 2410 (2018); Lincoln v. Vigil, 508 U.S. 182, 194 (1993) (noting the fact that Congress approved of a particular program funded with lump sum appropriations does not "translate through the medium of legislative history into legally binding obligations" to earmark funds for that program absent express statutory language).

221. *Weyerhaeuser*, 139 S.Ct. at 370 (quoting Lincoln v. Vigil, 508 U.S. 182, 191 (1993)); *see also Mach Mining*, 575 U.S. at 486 ("the agency bears a heavy burden in attempting to show that Congress prohibited all judicial review of the agency's compliance with a legislative mandate.") (internal punctuation omitted).

222. For instance, *Mach Mining* involved a statutory mandate that the EEOC engage in a conciliation process as a "reviewable prerequisite to bringing suit" and *Weyerhaeuser* involved a mandatory procedure that the U.S. Fish and Wildlife service had to go through in determining how much habitat to protect.

creates procedural requirements and/or standards, however bare bones. Regarding procedural requirements, in *Weyerhaeuser* the Supreme Court found that a statute that commanded "the Secretary [of the Interior] to consider the economic and other impacts of" restricting development in a given area to protect a particular species and created factors "to guide the agency in the exercise of its discretion," which invited a court to review whether the Secretary had "appropriately consider[ed] all of the relevant factors" in making any such determination.[223] In *Mach Mining*, the Court found that a statute's direction that the Equal Employment Opportunity Commission "eliminate [the] alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion" created a reviewable "duty to attempt conciliation of claims," even if it also gave the EEOC "abundant discretion . . . to decide the kind and extent of discussions appropriate in a given case."[224] Regarding substantive standards, in *Sierra Club v. Hodel*, a divided panel of the Tenth Circuit found that it could review a decision by the Bureau of Land Management to decline to stop construction on a road that went through federal lands, because the relevant statute provided a "definite standard" for review by requiring the BLM to manage the area in question "in a manner so as not to impair the suitability of such areas for preservation as wilderness" including taking "any action required to prevent unnecessary or undue degradation" and by creating a "duty to define and protect roadless areas of more than 5,000 acres having wilderness characteristics."[225]

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223. 139 S.Ct. at 371.

224. 575 U.S. at 495.

225. Sierra Club v. Hodel, 848 F.2d 1068, 1073–75 (10th Cir. 1988) (internal punctuation and citations omitted). These obligations were actually assigned to the Department of the Interior, of which the BLM is a part. At least one crucial issue in *Hodel* seemed to be that the exercise of discretion enabled private parties to alter the status quo such that statutory provisions would no longer be applicable to them. The statute at issue explicitly required the agency to at least maintain the status quo, even if it did not require taking particular enforcement

Courts are more likely to find a decision beyond the bounds of review if the statute contains permissive rather than mandatory language and/or if there are no discernible procedural requirements or substantive standards to apply. In *Perales v. Casillas*, the Fifth Circuit found that because "[p]re-hearing voluntary departure and employment authorization for the beneficiaries of approved visa petitions are purely creatures of regulation, and nothing in the Immigration and Nationality Act immunizes a deportable alien from deportation when a visa petition filed on his behalf is approved," it had no law to apply to review any decision by the Immigration and Nationality Service to deny such authorizations.[226] It quoted the Seventh Circuit's decision in *Achaeoso–Sanchez v. INS*: "When there are no rules or standards there is neither legal right nor legal wrong. There may be moral or prudential claims, but such claims are the province of other actors, be they administrators or legislators."[227] In *Sierra Club v. Jackson*, the D.C. Circuit found that "Congress's mandate to the Administrator is that she shall 'take such measures, including issuance of an order, or seeking injunctive relief, as necessary [to prevent the construction or modification of a major emitting facility]'" created no "guidance to the Administrator or to a reviewing court as to what action is 'necessary.'"[228] In *Drake v. FAA*, it found that "a provision that allows the Administrator to [dismiss a complaint] when she '*is of the opinion* that the complaint does not state facts that warrant an investigation,' gives the FAA virtually unbridled discretion" to determine when to dismiss a complaint, with or without a hearing.[229]

There is one more twist in the dance between the nature

action. *See also Westchester*, 778 F.3d at 420; Sluss v. United States Dep't of Justice, Int'l Prisoner Transfer Unit, 898 F.3d 1242, 1252 (D.C. Cir. 2018); Friends of Animals v. EPA, 383 F. Supp. 3d 1112, 1117–18 (D. Or. 2019).

226. 903 F.2d 1043, 1048 (5th Cir. 1990).

227. *Id.* at 1047 (quoting 779 F.2d 1260, 1265 (7th Cir.1985)).

228. 648 F.3d 848, 856 (D.C. Cir. 2011).

229. 291 F.3d 59, 70–71 (D.C. Cir. 2002).

of the action and the content of the statutory scheme. As the D.C. Circuit, the Second Circuit, and the Seventh Circuit have all recognized, even if an agency has discretionary authority over an area, its decisions can be reviewed if it cabins its own discretion.[230] Regulations can cabin discretion, of course, since agencies must comply with their own regulations.[231] But even guidance and statements can do so, at least in the D.C. Circuit, so long as "the statements create binding norms by imposing rights or obligations on the respective parties."[232]

Even when confronted with a non-enforcement decision that is presumptively non-reviewable without any evidence to rebut this presumption, "the D.C. Circuit has recognized two exceptions to the general rule of unreviewability."[233] First, "agency nonenforcement decisions are reviewable when they are based on a belief that the agency lacks jurisdiction."[234] Second, "an agency's statutory interpretations made in the course of nonenforcement decisions are reviewable."[235] The latter is hardly an exception, since courts can always review the statutory interpretations of agencies. As for the former, it comes from footnote four of *Heckler* itself. Although *Heckler* only left the

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230. Cardoza v. CFTC, 768 F.2d 1542, 1550 (7th Cir. 1985); Steenholdt v. FAA, 314 F.3d 633, 639 (D.C. Cir. 2003); *Salazar*, 822 F.3d at 76–77.

231. *Cardoza*, 768 F.2d at 1550; *see also* Nat'l Fam. Plan. Reprod. Health Ass'n, Inc. v. Sullivan, 979 F.2d 227, 234 (D.C. Cir. 1992) ("[A]n agency issuing a legislative rule is itself bound by the rule until that rule is amended or revoked.") (citing United States v. Nixon, 418 U.S. 683, 695–96 (1974); United States. ex rel. Bilokumsky v. Tod, 264 U.S. 149, 155 (1923)).

232. *Steenholdt*, 314 F.3d at 639; *see also* Sierra Club v. Jackson, 648 F.3d at 846.

233. Montana Air Ch. 29, Assoc. of Civilian Technicians, Inc. v. FLRA, 898 F.2d 753, 756 (9th Cir. 1990); *see also* Regents of the Univ. of Cal. v. DHS, 908 F.3d 476, 495–97 (9th Cir. 2018), *cert. granted* 193 S.Ct. 2779 (2019).

234. *Montana Air*, 898 F.2d at 756 (citing *International Longshoremen's Ass'n v. National Mediation Bd.,* 785 F.2d 1098, 1100 (D.C.Cir.1986)).

235. *Id.* (citing *International Union, United Automobile, Aerospace & Agricultural Implement Workers v. Brock,* 783 F.2d 237, 245 (D.C.Cir.1986)).

question open as to whether agency non-enforcement actions based on a judgment of lack of jurisdiction would be an exception to the general presumption of non-reviewability, both the Ninth and D.C. Circuits have resolved the issue definitively.

It is this exception to the presumption of non-reviewability that the Ninth Circuit applied in determining that it could review the Trump Administration's decision to repeal the Obama Administration's policy of Deferred Action for Childhood Arrivals ("DACA").[236] In doing so, it merged the two exceptions into one: "an agency's nonenforcement decision is outside the scope of the *Chaney* presumption—and is therefore presumptively reviewable—if it is based solely on a belief that the agency lacked the lawful authority to do otherwise."[237] Applying this rule, that Court found that, because the Trump Administration had repealed the DACA because it thought that it was unlawful (and not just because it wanted to as a matter of policy), a court could review that decision. This decision is currently being reviewed by the Supreme Court.

Ironically, the Fifth Circuit has also found that at least some decisions about deferred action on removal are reviewable, but it did so in *striking down* another Obama Administration policy: Deferred Action for Parents of Americans ("DAPA").[238] The reasoning in the decision is not entirely clear, but it is worth examining because of its potential relevance. "Deferred action" (originally called "nonpriority") is the name for the longstanding practice of immigration enforcement authorities to decline to pursue deportation against certain classes of legally deportable

236. *Regents*, 908 F.3d at 499.

237. *Id.* at 497; *see also* ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270, 283 (1987) ("[I]f the agency gives a 'reviewable' reason for otherwise unreviewable action, the action becomes reviewable.").

238. Texas v. United States, 809 F.3d 134, 166 (5th Cir. 2015), *aff'd by default in* U.S. v. Texas, 136 S. Ct. 2271 (2016).

immigrants "at any stage of the administrative process."[239] This long recognized exercise of prosecutorial discretion has been exercised both "for humanitarian reasons" as well as for more self-interested reasons like avoiding bad publicity.[240] Either way, it has served to effectively reshape immigration laws purely through Executive discretion and "without express statutory authorization" even as Congress has designed the immigration scheme with deferred action in mind—granting certain rights and privileges to those who benefit from it.[241]

In 1997 the Fifth Circuit had ruled that deferred action "is unreviewable under the Administrative Procedure Act because a court has no workable standard against which to judge the agency's exercise of discretion."[242]

It "reject[ed] out-of-hand the State's contention that the federal defendants' alleged systemic failure to control immigration is so extreme as to constitute a reviewable abdication of duty. The State does not contend that federal defendants are doing nothing to enforce the immigration laws or that they have consciously decided to abdicate their enforcement responsibilities. Real or perceived inadequate enforcement of immigration laws does not constitute a reviewable abdication of duty."[243]

The Supreme Court had also declined to review deferred action (absent "clear evidence displacing the presumption that a prosecutor has acted lawfully"),[244] relying on the principle that prosecutorial discretion "is particularly ill-suited to judicial review," as much, *if not more*, in the

239. Reno v. American-Arab Anti-Discrimination Com, 525 U.S. 471, 483–84 (1999).

240. *Id.* at 483 n.8.

241. *Id.* at 484 (quoting 6 C. Gordon, S. Mailman, S. Yale-Loehr, Immigration Law and Procedure § 72.03[2][h] (1998)).

242. Texas v. United States, 106 F.3d 661, 667 (5th Cir. 1997).

243. *Id.*

244. *Reno*, 525 U.S. at 498 (internal quotations omitted).

immigration context as in the criminal context.[245]

However, when the Obama Administration used deferred action to create more systematic processes that enabled certain classes of undocumented immigrants to "come out of the shadows" and apply for a renewable two-year period of deferred action that could ultimately result in eligibility for a work permit, the Fifth Circuit reversed direction and the Supreme Court has indicated that it might as well.[246] In particular, in 2015 a split panel of the Fifth Circuit ruled that DAPA is reviewable because it "is much more than nonenforcement: It would affirmatively confer 'lawful presence'[] and associated benefits on a class of unlawfully present aliens."[247] Having found that DAPA did *not* amount to an exercise of prosecutorial discretion, the majority went on to ask whether the relevant statutes authorized the agency to initiate such a program at all, let alone without rulemaking.[248] It explicitly set aside "the issue of whether the presumption against review of such discretion is rebutted" when used to create a systematic deferred action process.[249]

The dissenting judge pointed out that the benefits associated with deferred action were "a function of statutes and regulations that were enacted by Congresses and administrations long past" that were neither challenged nor challengeable in the action at bar, making the only action challenged the discretionary one as to how to determine who should be eligible for those benefits.[250] Viewed in this light,

245. *Id.* at 490 (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)); *see also* Robeldo-Soto v. Lynch, 845 F.3d 834, 836 (7th Cir. 2017) (discussing *Reno*'s holding).

246. *See* Texas v. United States, 809 F.3d 134 (5th Cir. 2015).

247. *Id.* at 166.

248. *See id.* at 177–82.

249. *Id.* at 168 n.108.

250. *Id.* at 197 (King, J. dissenting); *see also* Texas v. United States, 787 F.3d 733, 770–75 (5th Cir. 2015) (Higginson, J., dissenting) (arguing DAPA was an exercise of prosecutorial discretion in denying a stay).

she argued, DAPA is akin to "pretrial diversion in the criminal context—which also developed over a period of decades without express statutory authorization."[251] Nevertheless, the Supreme Court, in a 4-4 decision without opinion issued after Justice Scalia's death and before Justice Gorsuch's appointment, affirmed the majority's opinion by (non-precedential) default.[252]

One way to square this fragile result with the case law just reviewed is to read it as akin to one aspect of the D.C. Circuit's reasoning in *Adams*. Recall that *Adams* involved a challenge to HEW's non-enforcement of school integration orders. One reason the D.C. Circuit gave for reviewing HEW's decision was that it involved not just non-enforcement because HEW was actively providing benefits to schools that were in open violation of the law HEW was also charged with enforcing.[253] Similarly, the Fifth Circuit reasoned that the Department of Homeland Security was not just declining to enforce immigration laws, but actively changing the immigration status of people who had violated immigration laws, making them eligible for benefits normally available only to people who have not violated immigration laws (to greatly oversimplify). The principle to extract might sound something like: if the decision not to enforce a law is simultaneously a decision that entitles those not subject to enforcement to a government benefit, a court should hesitate to treat it as merely an exercise of prosecutorial discretion.

It is not clear that this principle can be stated in a way that can sustain a defensible distinction among precedents. Every decision not to enforce a law against a violator is a decision to entitle that violator to whatever benefits are

251. *Id.* at 197.

252. *See* United States v. Texas, 136 S. Ct. 2271 (2016). *Neil v. Biggers,* 409 U.S. 188, 192 (1972) (affirmance by an equally divided court has no precedential value).

253. Adams v. Richardson, 480 F.2d 1159, 1159–61 (1973).

available to those who have not violated the law. The FDA's discretion not to enforce the usual rules for controlled substances for lethal injection drugs entitled particular drug manufacturers access to patent protections, to government contracts, and to other benefits. Pretrial diversion and other exercises of prosecutorial discretion in the criminal context entitle beneficiaries access to benefits that people in prison or with criminal records are not entitled to. What arguably made *Adams* different was that the agency's exercise of prosecutorial discretion was also a decision to maintain benefits *delivered by that same agency*. In the case of DAPA and DACA, a decision to grant deferred action to a given individual did not provide any benefits directly to immigrants that the law did not otherwise entitle them to, nor (as the dissent points out) was it even changing their immigration status.

Another potential explanation for the turn in deferred action jurisprudence is that the political valence of the exercise of prosecutorial discretion matters. When prosecutorial discretion is used to further progressive social policies or to undermine conservative legislation, even conservative judges normally in favor of unfettered executive discretion are likely to view it with more suspicion. It has long been liberal judges who have been skeptical of the Executive's arguments in favor of unreviewable discretion: in the domain of prosecution as much as in the domain of national security, of immigration enforcement, of racial integration, etc. As a general matter, that likely remains the case, but as conservative strategies to deadlock Congress has borne fruit, progressive attempts to use the expanded powers of the Executive creatively may have begun to engender a more targeted skepticism from conservative judges.

Having got this far, the reader might be suspicious that a ball has been hidden. Didn't *Heckler* leave open the possibility that an act of prosecutorial discretion could be so dramatic as to amount to an "abdication of [an agency's statutory duty]"?[254] Since that possibility seems relevant to an analysis of using prosecutorial discretion to implement mass debt cancellation, wouldn't it be useful to know how that possibility has been fleshed out in the case law? Well, yes, but unfortunately no case after *Heckler* (or *Adams*, on which *Heckler* relied in raising the possibility of such an exception) has addressed this possibility. It remains undetermined what sort of case would trigger it that would not also be a case in which a court found that the statute limited an agency's discretion, and, if such a case exists, what principles a court would apply in reviewing the discretion at issue.

4. What Happens if Non-Enforcement is Reviewable?

Although the analysis in this Article will only focus on the question of whether the Secretary of Education's authority to modify or waive claims over student debts counts as a form of unreviewable prosecutorial discretion, a brief note on how courts proceed when they find *Heckler* inapplicable. Basically, other sections of the APA apply. Which section applies depends on the nature of the action at issue. Discretionary decisions are reviewed for abuse of discretion under § 706(2)(A).[255] Decisions that amount to policy judgments are reviewed under the standard framework to determine whether an interpretation amounts to a rule and, if so, whether the requisite rulemaking procedures have been followed.[256] The *Chevron* framework for implementing § 706(2), with all of its twists and turns, applies to interpretations of the statute in the process of implementing a regulation.[257]

254. Heckler v. Chaney, 470 U.S. 821, 853 (1985).

255. *See* Weyerhaeuser Co. v. United States Fish & Wildlife Serv., 139 S.Ct. 361, 370 (2018); *see also* Mach Mining LLC v. EEOC, 575 U.S. 480, 495 (2015).

256. *See* Texas v. United States, 809 F.3d 134, 170–78 (2015).

257. *See id.* at 178 (discussing applicability of *Chevron*).

B. *Applying the Law of Prosecutorial Discretion to the HEA*

1. The Nature of the Action

The action proposed here is that the DOE cancel some or all student debt owed to it. This action could be characterized as a modification and/or as a waiver of claims (or potential claims) it has the right to enforce (or attempt to enforce) against each borrower. Writing down some of a given borrower's debt (e.g. turning a $20,000 debt into a $5,000 debt) could be styled a modification of the amount owed (from $20,000 to $5,000) or as a waiver of some of the obligation to pay ($15,000 worth). Eliminating *all* of a given borrower's debt could be styled a modification of the amount owed to $0 or a waiver of the entire obligation. Canceling some or all debt across some or all borrowers could thus be effected by mass modification or mass waiver.

The most natural way to characterize either of these actions is as a decision not to enforce rights that the HEA grants to the DOE. At the retail level, debt cancellation is akin to a settlement agreement or a unilateral decision not to spend resources pursuing a claim is akin to pretrial diversion. It is well established that a decision not to enforce a right against a private party—whether as part of a settlement or otherwise—is an exercise of prosecutorial discretion that is presumptively unreviewable. At the wholesale level, settling multiple claims as part of a plan is akin to pretrial diversion in the criminal context or deferred action in the immigration context. Both of these actions are also presumptively unreviewable exercises of prosecutorial discretion.

Of course, we have seen that at least one form of deferred action has been adjudged *not* an act of prosecutorial discretion. The reason given for this judgment was that the deferred action in question, as characterized by the Fifth Circuit, was not just non-enforcement. It granted positive rights that also created duties in third parties (i.e. the several states).

Assuming the soundness of that judgment, cancellation of student debt can be easily distinguished. The DOE would be entitling (former) student debtors to no additional rights or privileges as a result of debt cancellation. Or, rather, whatever rights and privileges debtors would be entitled to would be incidental to the debt cancellation at issue: the right to have their credit rating amended, for example. This is quite unlike a decision not to deport somebody that simultaneously changes that person's immigration status.

2. What the Statute Says

Nothing in the HEA rebuts the presumption that the DOE has broad discretion to waive or modify claims against students. In fact, the HEA directly grants both powers without any meaningful limits on them.

When Congress first created student loans in the NDEA, it placed the Commissioner of Education (then the head of a division of the Department of Health, Education, and Welfare) in charge of enforcing claims of the government against student debtors. Though the power to enforce implies the power not to enforce, Congress also explicitly granted the Commissioner "power to agree to modification of agreements or loans made under this title and to compromise, waive, or release any right, title, claim or demand, however arising or acquired under" the NDEL program.[258] When Congress passed the HEA, it gave the Commissioner "[i]n performance of, and with respect to, the functions, powers, and duties vested in him [sic] by" the Higher Education Act's student loan provisions to, among other things, "modify" and to "enforce, pay, compromise, waive, or release any right, title,

258. National Defense Education Act of 1958, Pub. L. No. 85-864 § 209(a), 72 Stat. 1580, 1587 (1958). As discussed above, NDEL were eventually merged into Perkins Loans before being discontinued. *See* 20 U.S.C.§ 1087hh(2) (2018) ("In carrying out the provision of this part [regarding Perkins Loans], the Secretary is authorized to enforce, pay, compromise, waive, or release any right, title, claim, lien or demand, however acquired . . . .").

claim, lien, or demand, however acquired."[259] Let us refer to these as the Secretary's "modification" and "settlement" authorities. The HEA further provides that their exercise "shall be final and conclusive upon all accounting and other officers of the government."[260] In 1979, Congress split the Department of Health, Education, and Welfare into the Department of Education and the Department of Health and Human Services. As part of the new DOE, it created the office of the Secretary of Education, endowed with all of the powers of the Commissioner (and then some).[261] As relevant here, all of the Commissioner's settlement authorities carried over.

Recall that both the FFEL and Perkins Loan programs facilitate the creation of loans by parties other than the DOE—financial institutions in the case of FFEL and institutions of higher education in the case of Perkins. Thus, DOE only has direct claims against debtors under these programs if it takes possession of loans created thereunder. Direct Loans, on the other hand, create a direct claim against debtors from the moment they become due. When Direct Loans were first created as a pilot in 1992, the statute did not mention settlement authority, and no subsequent amendment has explicitly done so.[262] However, that statute did—and does—make Direct Loans subject to "the same terms, conditions, and benefits as [FFELP]."[263] DOE has, without objection, interpreted this provision to include prosecutorial discretion.[264] It was right to do so, as argued in

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259. 20 U.S.C. §§ 1082(a)(4), (6) (2018) (Federal Family Education Loan); 20 U.S.C. §§ 1087hh(1), (2) (2018) (Perkins Loans).

260. 20 U.S.C. § 1082(b) (2018).

261. Department of Education Organization Act, Pub. L. No. 96-88, § 301(a), 93 Stat. 668, 677 (1979).

262. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 572 (1992).

263. Higher Education Amendments of 1992, Pub. L. No. 102-325, § 456, 106 Stat. 572 (1992) (codified at 20 U.S.C. § 1087a(b)(2) (2018)).

264. *See* Student Assistance General Provisions, Federal Perkins Loan

the margin.[265]

The last Congressional statement with respect to the DOE's settlement authority came in the Higher Education Opportunity Act of 2008 ("HEOA"), as follows: "The Secretary may not enter into any settlement of any claim [under FFEL or Perkins, or by incorporation, Direct Loans] that exceeds $1,000,000 unless (1) the Secretary requests a review of the proposed settlement of such claim by the Attorney General; and (2) the Attorney General responds to such request."[266] It is unclear whether "settlement" here refers to both DOE's modification and its settlement authority (is modification a form of settlement?) or not.

These provisions do not create any practical limits on DOE's discretion given the current reality of student debt

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Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 39330, 39368 (June 16, 2016) (to be codified at 34 C.F.R. Pt. 30) (discussing authority to issue regulations regarding compromise authority over Direct Loans by invoking "Section 451(b)", i.e. 20 U.S.C. § 1087a(b) (2018)).

265. Consolidating control in the federal government was designed both to eliminate the needless budget line for private lenders' profits and to enable the government to reduce the burden of student loan repayment by making at least some student loans not profitable. It was meant to give the Department of Education *more* authority over student loans. *See* Jonathan 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, 38–40 (2011). Accordingly, the Direct Loan program kept constant all the aspects of FFELP loans that were previously in place, including all of the Secretary's powers regarding them, except those that Congress specifically altered (mostly, but not entirely, to make student debt less burdensome). Eliminating the Secretary's settlement authority through silence is inconsistent with this purpose, especially when there is a provision explicitly putting Direct Loans on a par with FFEL. Certainly there is no indication in the text of the relevant statutes or in the legislative history that Congress meant to *reduce* the Secretary's settlement authority. If it had determined to do so, it is not clear why it would have done so only for Direct Loans and not for FFELP and Perkins. As Eileen Connor, Deanne Loonin, and Toby Merrill have pointed out, if powers related to FFELP did not carry over to Direct Loans, DOE would be unable to issue regulations or sue or be sued with relation to Direct Loans. *See* Ltr. From Eileen Connor, Deanne Loonin, and Toby Merrill to Senator Elizabeth Warren, 3n.5 (Jan. 13, 2020).

266. Higher Education Opportunity Act, Pub. L. No. 110-315 § 433(a), 122 Stat. 3078 (2008) (codified as amended at 20 U.S.C. § 1082(b) (2018)).

levels. It is silent as to when and why and with whom DOE may or must settle a debt. It merely requires the DOE to request the AG's approval for settlements, and then only if the settlement is below a certain amount. And the $1 million ceiling it sets on settlement size is too high to make even this supervisory mechanism have any bite. It is a ceiling on "*any* settlement of *any* claim," which can only be made sense of if read as a *per claim*, i.e. a *per promissory note* limit.[267] If Congress had wanted the limit to be on a collection of claims it could have used "any settlement of any claim *or claims*" or just "any settlement." Similarly, the reference to "the proposed settlement of such claim"—as opposed to "the proposed settlement of such claim or claims" or just "the proposed settlement"—makes little sense except as reference to a limit on each individual claim. That Congress put in "any" twice fairly well emphasizes the fact that the limit is per claim. Read as such, the provision commands only that if the Secretary decides to compromise an obligation of over $1 million, it must consult the Attorney General. If the Department were to compromise multiple claims of less than $1 million that together exceeded $1 million, it would not have to do so. This is how the Department itself has read this provision when it promulgated regulations, and without controversy.[268] This author knows of no evidence that any student loan borrower owes more than $1 million to the Department of Education.[269]

267. 20 U.S.C. § 1082 (2018) (emphasis added). We say "per promissory note" rather than "per borrower" because the Department would have multiple potential claims against a borrower with multiple student loans.

268. 34 C.F.R. § 30.70(e)(2) (2019) (referring to the limit as on "a *debt* that exceeds $1,000,000") (emphasis added).

269. That raises the question of why Congress would have enacted a totally toothless provision, perhaps implicating the principle that statutory interpretation ought to avoid absurdity. *See, e.g.*, Pub. Citizen v. United States Dep't. of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) ("When used in a proper manner, this narrow exception to our normal rule of statutory construction does not intrude upon the lawmaking powers of Congress, but rather demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way."). But the result here is not absurd. It is, firstly,

What, then, is the scope of DOE's settlement authority? Begin with the authority of "modify" claims against debtors. To modify is to change. A debt can be modified any number of ways—by changing the timing of payments, by adding or eliminating conditions, etc. Clearly reducing the amount owed is a modification of a debt. Reducing a debt to nil—i.e. eliminating it—would also seem to fall within the ordinary meaning of "modify." Doubts could surely be raised (would a provision enabling waiver of a claim be rendered surplusage if the modification provision enabled effectively waiving a claim?), but, as Eileen Connor, Deanne Loonin, and Toby Merrill point out, "the Secretary has used the modification power to cancel out, or modify to zero, loan obligations under FFELP and [the Direct Loan Program] in certain circumstances" without even a whiff of objection from courts.[270]

The authority to "compromise, waive, or release" is also about as broad as can be on its face. Each of these terms refer to a litigant's or potential litigant's ability to determine whether and how far to pursue a legal claim without a court's supervision. This broad discretion is clearest in the case of

not absurd in the sense that the text makes no sense whatsoever. *See, e.g.*, United States v. Pabon-Cruz, 391 F.3d 86 (2d Cir.2004) (interpreting a statute that said "[a]ny individual who violates . . . this section, shall be fined under this title or imprisoned not less than 10 years nor more than 20 years, and both . . . .") (emphasis added). Nor does it have absurd or perverse results. *See In re* Kane, 336 B.R. 477, 486 (Bankr. D. Nev. 2006) (making this distinction). Congress may well have meant to place no actual limit in the near term or in the normal run of cases, but may have thought it wise to create a cap on settlement power just in case student debt suddenly ballooned or there was an outré situation in which it made sense to have the Attorney General review the settlement. If the number Congress had chosen had been so high that it was not *conceivable* that it would create any limit, then perhaps avoiding absurdity could be invoked. But then the question would be how to avoid it: to interpret the statute as pertaining to any settlement, including any number of claims? To interpret the $1 million number as a typo, and reading it as $100,000 (as the FCCS prescribes, see *infra*)?

270. Ltr., *supra* note 265, at 5 n.21 (citing Carr et al. v. DeVos, Case No. 19-cv-6597 (S.D.N.Y.), Dkt. No. 15-1 (Decl. of Cristin Bulman), 16 (Stipulation of Dismissal)).

"waive" and "release." Black's[271] defines "release" as "[l]iberation from an obligation, duty, or demand; the act of giving up a right or claim to the person against whom it could have been enforced," and declares it synonymous with "discharge" and "relinquishment."[272] Similarly, to "waive" is "to abandon, renounce, or surrender (a claim, privilege, right, etc.); to give up (a right or claim) voluntarily."[273] Avoiding surplusage might compel us to somehow differentiate between these two words—one possibility is that "waiver" must be voluntary and knowing, while "release" need not[274]—but it is hard to see how that would matter in this context. Both refer to a litigant's or prospective litigant's ability to choose to give up a right to enforce a legal obligation—apparently for any reason or no reason.

Whatever differences between the definitions, they do not relate to the scope of discretion that the person doing the waiving or releasing may exercise. Courts generally do not review waivers or releases of claims, except perhaps for voluntariness.[275] On the other hand, Black's defines "compromise" as "[a]n agreement between two or more persons to settle matters in dispute between them; an

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271. It is now standard Supreme Court practice to refer to multiple dictionaries, sometimes even keying them to the year in which the statute was passed. Both for the sake of brevity and because it seems to us that a legal dictionary is most appropriate for these legal terms of art, we restrict our discussion to the most recent edition of Black's Law Dictionary.

272. *Release*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw.

273. *Waive*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw.

274. This distinction would be related to, but more general than, the waiver/forfeiture distinction in federal procedure. *See* Kontrick v. Ryan, 540 U.S. 443, 458 n.13 (2004) ("Although jurists often use the words interchangeably, forfeiture is the failure to make the timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right.") (internal punctuation and citation omitted); *see also* Hamer v. Neighborhood Hous. Servs. of Chicago, 138 S. Ct. 13, 17 n.1 (2017); Stern v. Marshall, 564 U.S. 462, 482, (2011); United States v. Olano, 507 U.S. 725, 733 (1993). If this is the distinction between the two words, it would have no relevance to our considerations here, and perhaps no impact at all. Surely no Congressional authorization is needed for an administrative agency to be able to *inadvertently* fail to prosecute a claim.

275. *See Olano*, 507 U.S. at 733.

agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to the other" as well as a "debtor's partial payment coupled with the creditor's promise not to claim the rest of the amount due or claimed."[276] On either definition, a "compromise" requires both parties to give up something—perhaps it even requires *consideration*, in the contract law sense.[277] That might make the "compromise" power more fit for debt write-downs (in which the debtor "agrees" to continue to pay *something*)[278] or for cases in which debtors have colorable defenses or counterclaims (such as the defrauded debtors discussed above) than for unilateral decisions not to enforce a debt for any or no reason. Still, a compromise is generally up to the discretion of the parties, and, absent any indication of skullduggery or any rules explicitly constraining the circumstances in which a compromise can be entered into (such as in class action settlements or consent judgments), not generally subject to the review of any court.

What to make of the fact that the DOE's modification and settlement authorities can only be exercised "[i]n performance of, and with respect to, the functions, powers, and duties vested in [the Secretary] by [the relevant parts of the HEA]"?[279] At the most general level, this qualifying clause merely clarifies that the DOE's prosecutorial

276. *Compromise*, BLACK'S LAW DICTIONARY (11th ed. 2019), Westlaw.

277. This would be especially appropriate to the extent that a compromise were an actual contract, as it often is.

278. If a write-down were arrived at through the Department's unilateral decision, it would not really be an agreement. Were an actual agreement required for a settlement to count as a "compromise," it would limit this provision to cases in which borrowers were in a position to bargain—most obviously in cases in which they were engaged in litigation against the Department (whether as plaintiffs or defendants). Insisting on applying a meaning of "compromise" developed originally for private litigants would be absurdly formalistic in this case, however. It would force borrowers to find lawyers (or class action lawyers to find borrowers) in order to obtain a settlement that they would otherwise be entitled to on the merits.

279. 20 U.S.C. § 1082(a) (2018) (Federal Family Education Loan); 20 U.S.C. § 1087hh (2018) (Perkins).

discretion pertains to claims related to the student loans over which it has direct or contingent ownership interests. The clause granting prosecutorial discretion does not itself clarify which sorts of claims it covers; it only makes clear that it covers *any* of the claims it covers, whatever those are. The "in performance of . . ." clause fills in that gap by tying the grant of discretion to the portion of the statutory scheme it covers. That sort of qualification does not add much: it merely establishes that the compromise authority is over the relevant type of student debt: FFELP in the case of § 1082(a), and Perkins in the case of § 1087hh (and Direct via incorporation of FFELP's provision).

Yet the qualifying clause does tie prosecutorial discretion specifically to "the functions, powers, and duties vested in" the Secretary of Education in the HEA with respect to student loans. If the Secretary's "duties" include specific obligations regarding enforcement of student debts and/or how to determine when not to enforce them that are concrete enough to constrain discretion and to guide a court in reviewing that discretion, then it might be argued that Congress created "law to apply" that constrains DOE's discretion, making it reviewable by a court.

What duties might those be? Unlike in the cases in which courts have found non-enforcement decisions reviewable, the HEA does not contain any explicit standard that DOE must apply, any process that the DOE must go through, or any obligations that DOE must fulfill in determining whether to reject enforcement. It *does* have what the Second Circuit called a "non-discretionary mandate to collect on federal student loans" in the sense that it is commanded, like every other "head of an executive . . . agency" to "try to collect a claim of the United States Government for money or property arising out of the activities of, or referred to, the agency."[280] It also has the duty to "protect the United States

280. *See* Salazar v. King, 822 F.3d 61, 83 (2d Cir. 2016); 31 U.S.C. § 3711(a)(1) (2018).

from the risk of unreasonable loss" from FFELP loans and otherwise to supervise the federal loan program to ensure that collections are occurring.[281] As well, the HEA charges DOE with discharging debts under specific circumstances: death, total disability, a school's misbehavior or closure, completing the public service loan forgiveness program, etc.[282] One might draw the negative implication that DOE has the duty to collect in circumstances other than these.[283]

These duties do not seem specific enough to make a non-enforcement decision reviewable under the framework that *Heckler* developed. *Heckler* explicitly rejected drawing negative implications about how much prosecutorial discretion an agency has based on a statutory grant of discretion narrower than that exercised by the agency.[284] More generally, it provided a number of reasons to reject the notion that a broad mandate to collect on claims or to enforce a given area of law provided sufficiently specific "law to apply" to undermine the presumption in favor of prosecutorial discretion, let alone an explicit grant thereof. Recall that in *Heckler* the FDA declined to take any enforcement action with respect to drugs used to execute people even though the drugs at issue had never been tested or approved as "safe and effective" for use in lethal injections.[285] Yet the Food, Drug, and Cosmetics Act (FDCA)

281. 20 U.S.C. § 1078(c)(2)(A) (2018).

282. *See* 20 U.S.C. §§ 1087, 1087e(h), (m)(3) (2018).

283. Legislative history is of no help in clarifying the meaning of these provisions of the HEA. As noted above, settlement power was first introduced in the NDEA. The first version of the bill that became that law—The Federal Scholarship Act of 1957—contains no explicit settlement authority. H.R. 85-4490. It appears in the final version without any prior record; the legislative history available reveals no mention. *See* National Defense Education Act of 1958, H.R. REP. NO. 85-2688 (1958). The HEA's legislative history is similarly vacant. It seems the NDEA's provision was merely transferred over, or perhaps the initial conversations about settlement authorities that led to the passage of the Federal Claims Collection Act in the next year influenced the drafting staffers.

284. Heckler v. Chaney, 470 U.S. 821, 837 (1985).

285. *Id.* at 823–24.

prohibited (and continues to prohibit) such unapproved uses and requires that those who violate this prohibition be punished by fine or imprisonment, which implicitly requires the FDA to take enforcement action.[286] The FDA's own rules made this even more explicit by requiring its officers to "investigate . . . thoroughly and take whatever action is warranted to protect the public" from unapproved uses.[287] The *Heckler* Court held that none of this was enough to undermine the FDA's discretion to decline to enforce the law. To reiterate, it characterized the prohibition on unapproved uses as "simply irrelevant to the agency's discretion to refuse" to enforce it.[288] Creating a scheme of enforcement, making that scheme mandatory, and even creating explicit exceptions thereto are not on their own sufficient to make an agency's prosecutorial discretion reviewable. A general duty to enforce the law (or to "try to collect" on claims) will *always* be violated by a decision not to do so. It is in the nature of prosecutorial discretion that it sits in tension with full enforcement. *Heckler* and its progeny make clear that the tension is generally not for courts to resolve, at least not unless Congress articulates a specific set of standards or a process for how to do so.

And there is no such standard or process here. The clause at issue here is unlike that found in *Mach Mining*, which mandated that the EEOC make the effort to conciliate before taking enforcement action, or *Hodel*, which required the Department of Interior to consider certain factors before determining whether or not to enforce. There is no procedural framework, set of substantive considerations, or even the vaguest standard to employ to sort one discretionary act from another.

286. Chaney v. Heckler, 718 F.2d 1174, 1186 n.29 (D.C. Cir. 1984) (discussing the mandatory nature of the FDCA's prohibitions).

287. *Id.* at 1186 (quoting Legal Status for Uses Unapproved by the Food and Drug Administration, 37 Fed. Reg. 16503, 16504 (Aug. 15, 1972)).

288. *Heckler*, 470 U.S. at 836.

3. Do DOE's Regulations Tie its Hands?

It is not only statutes that can make prosecutorial discretion reviewable. Agency's own regulations and interpretive actions that create "binding norms" can also create "law to apply." DOE has created regulations and interpretive actions, but they leave open ample room for discretion.

DOE has promulgated regulations that limit how it may exercise its settlement authority. It first issued such regulations in 1988—i.e. 33 years after the passage of the HEA.[289] Most of these regulations pertained to *other* settlement authorities (i.e. over programs other than student loans), most of which are governed by the Federal Claims Collection Act ("FCCA") rather than the HEA. But, because DOE gets its settlement authority over student loans from the HEA and the FCCA only governs where an agency does not have a separate grant of settlement authority, the FCCA does not govern DOE's authority over student loans.[290]

289. 53 Fed. Reg. 33,424 (Aug. 30, 1988) (codified at 34 C.F.R. pt. 30 (2019)).

290. One could come to this conclusion as an application of the general principle that the specific governs the general, *see, e.g.*, Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."); RadLAX Gateway Hotel, LLC v. Amalgated Bank, 566 U.S. 639, 645 (2012), but one need not, since Congress explicitly said that "[n]othing in [the FCCA] shall increase or diminish the existing authority of the head of an agency to litigate claims, or diminish his existing authority to settle, compromise, or close claims." Federal Claims Collection Act of 1966, Pub. L. No. 89-508, § 4, 80 Stat. 308 (1966). The Federal Claims Collection Standards reaffirm this principle. 31 C.F.R. § 900.4 (2019) ("Nothing in [the Federal Claims Collection Standards] precludes agency disposition of any claim under statutes and implementing regulations other than [the Federal Claims Collection Act] . . . In such cases, the laws and regulations that are specifically applicable to claims collection activities of a particular agency generally take precedence over [the FCCS]."). DOE is far from the only agency with a separate grant of settlement authority. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, 14 GAO-RB PT. D, S. 2, 2008 WL 6969346, *2, THE GOVERNMENT'S DUTY AND AUTHORITY TO COLLECT DEBTS OWED TO IT (2008) (providing examples of agencies that have such separate authority); 19 U.S.C. § 1505(b) (2018) (customs duties); 15 U.S.C. § 634(b)(2) (2018) (Small Business Administration); 38 U.S.C. § 3720(a)(4) (2018) (Department of Veterans Affairs); 10 U.S.C. § 8823(a) (2018) (the Navy); 42 U.S.C. §§ 2651–52 (2018) (various

Accordingly, regarding the Secretary's *student loan* settlement authority, the 1988 regulations said: "Notwithstanding [other of the Department's settlement authorities] the Secretary may compromise a debt, or suspend or terminate collection of a debt, in any amount if the debt arises under [the FFELP or Perkins Loan Program]."[291] They said nothing further. In sum, they stated that DOE had whatever settlement authority over student loans the HEA gave it without doing anything to clarify, let alone narrow, that authority.

This provision remained stuck in place for nearly two decades, even as Congress created the Direct Loan program and the $1 million limit. It was finally updated in 2016 as part of a regulatory process focused on another set of rules.[292] There was no debate or discussion of the changes to settlement authority among otherwise highly contested regulatory proceedings regarding the conditions in which student debtors who were mistreated by their school can have their debts discharged.[293] The Department presented the changes to prosecutorial discretion regulations as "technical corrections" that would not bring about "significant change in current practices."[294] It explained the

agencies with respect to third-party claims for hospital or medical care); 26 U.S.C. §§ 6321–26, 6331 (2018) (tax liens and tax levy, respectively).

291. 53 Fed. Reg. 33,424, (Aug. 30, 1988) (codified at former 34 C.F.R. § 30.70(h)).

292. Student Assistance General Provisions, 81 Fed. Reg. 39,330, 39,368–69, 39,407–08 (June 16, 2016) (to be codified at 34 C.F.R. pts. 30, 668, 674, 682, 685, 686). The Department is in the process of repealing and rewriting these regulations. The Department's main purpose in doing so is to make it more difficult to cancel student debt even for borrowers who were defrauded, so it seems unlikely that the revised regulations would alter *this* provision. *See* Erica L. Green, *Education Department Has Stalled on Debt Relief for Defrauded Students*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/us/politics/betsy-devos-student-loan-debt-relief.html.

293. The final rule does not note any such comments. *See* Student Assistance General Provisions, 81 Fed. Reg. at 39,330. The author was at all of the negotiating sessions, acting as adviser to the student negotiator, and recalls no discussion of this provision whatsoever.

294. *Id.* at 39,331, 36,397.

changes as merely reflecting the "series of statutory changes [since 1988] that have expanded the Secretary's authority to compromise, or suspend or terminate the collection of, debts."[295]

The new regulations include three noteworthy changes. First, they include Direct Loans as on par with FFELP and Perkins based on the reasoning that the statutory provision that puts Direct Loans on par with FFELP requires it.[296] Second, they seem to restrict the exercise of DOE's authority to "compromise, suspend, or terminate collections" to situations covered "under the provisions of 31 CFR part 902 or 903."[297] Those CFR provisions are the Federal Claims Collections Standards ("FCCS"), which were developed jointly by the DOJ and Treasury to guide agencies that get their settlement authority from the FCCA (but wait? Didn't I say that the FCCA doesn't govern? Yes. All will be revealed shortly).[298] Through the FCCS, the DOJ and Treasury give permission to other Executive Branch officers to "compromise a debt" if they "cannot collect the full amount because:" (1) "a debtor is unable to pay the full amount in a reasonable time," (2) the agency "is unable to collect the debt in full within a reasonable time by enforced collection proceedings," (3) "the cost of collecting the debt does not justify the enforced collection of the full amount" or (4) "there is significant doubt concerning the [agency's] ability to prove its case in court."[299] Agencies that adopt the FCCS may deviate from these conditions "as an aid to enforcement and to compel compliance, if the agency's enforcement policy in terms of deterrence and securing compliance, present and

295. *Id.* at 39,369.

296. 34 C.F.R. § 30.70 (2019).

297. *Id.*

298. Federal Claims Collection Standards, 31 C.F.R. §§ 900–04 (2019).

299. *Id.* § 902.2(a). The FCCS limit *suspending* collection to situations where "(1) the agency cannot locate the debtor, (2) the debtor's financial condition is expected to improve, or (3) the debtor has requested a waiver or review of the debt." *Id.* § 903.2(a).

future, will be adequately served."[300] And, as a general matter, the Attorney General must sign off on any compromises and suspensions of collections on claims above $100,000.[301]

Of these three, only the first and third alteration reflect the "series of statutory changes" since 1988. We have already discussed how the HEOA does not impose any real restrictions on DOE. The second alteration is the only candidate for imposing the sort of "law to apply" that might actually restrict DOE's discretion. It imposes a new set of requirements beyond the statutory baseline. Because the Secretary gets her settlement power from a statute other than the FCCA, DOE is under no obligation to implement the FCCS.[302] Of course the DOE had the option of following the FCCS, but it was not bound to do so before it tied its authority to "compromise, suspend, or terminate collections" to the FCCS.

It seems likely that DOE did not mean to narrow its regulatory authority by promulgating this provision. As noted above, DOE explained these regulations as mere "technical corrections" and did not make any effort to justify the changes during the negotiated rulemaking or comment periods leading up to their enactment. There is no reason to believe that DOE meant to restrict its authority. "To the contrary," Connor, Loonin, and Merrill rightly note, "the regulation was revised so as to reflect expansions in the Secretary's authority."[303] Indeed, it is not at all clear that the 2016 regulatory drafters (unlike the 1988 drafters) realized that DOE is not bound by the FCCA with respect to claims on student debtors. They do not seem to have considered the interaction between HEA and FCCA at any length. Otherwise, why would they have bound themselves to

300. *Id.* § 902.3.

301. *Id.* §§ 902.1, 903.1.

302. *See supra* note 290.

303. Ltr., *supra* note 265, at 5.

regulatory guidelines that require consultation with DOJ for claims over $100,000 while also incorporating the HEOA's aforementioned *$1 million* ceiling?[304]

One way to treat this regulatory change, then, is a massive drafting error. A mistake to be ignored.

Even if we do not do that, there are several reasons to think that this regulation does not constrain DOE's discretion much if at all. First, it does not seem to alter DOE's power to *modify* its claims[305] or its power to compromise, waive, or release claims not in collections (and one might also quibble as to whether release and waiver of claims is the same as "termination" thereof). The regulation that refers to the FCCA only refers to DOE's power to "compromise, suspend, or terminate collections." If "collections" here refers to the procedures DOE (or any debtor) goes through to collect on a *defaulted* claim (including instituting suit), then the regulation would seem to be inapplicable to DOE's decision to release claims over non-defaulted debt. Generally, this is what is meant by "collections" in the world of debt enforcement. If "collections" is read more broadly to include any activity involved in managing claims based on debts still due, then this regulation is more broadly applicable. Either way, *modification* of a claim is distinct from compromise, suspension, or termination of collections. A modification *can* be implemented in the process compromising a claim or to effectively terminate or suspend collections, but it can also be exercised for other reasons and with other effect. Similarly, the FCCS only refer to an agency's power to "compromise" or to "suspend" claims, providing no guidance with respect to when or how modification is appropriate.

As well, if we are to make sense of the interaction

304. Student Assistance General Provisions, 81 Fed. Reg. 39,408 (codified at 34 C.F.R. § 30.70(e)(2)) (2019).

305. As Connor, Loonin, and Merrill have pointed out. *See* Ltr., *supra* note 265, at 6.

between the HEA and the FCCA, we ought to note that, given the context of their enactment, the FCCS are best understood to have an implicit fifth condition when an executive branch official may compromise a debt: whenever the Attorney General says it is okay (so long as the Attorney General does so within statutory and constitutional bounds). If so, the regulation creates merely a procedural hurdle for DOE to jump through—namely, obtaining approval of DOJ. To see why, begin by imagining that the DOE got its authority from the FCCA.

The FCCA was enacted against the background understanding that the Attorney General has authority to exercise full prosecutorial discretion, which includes full discretion in determining whether to bring, to compromise, or to otherwise settle claims. Agencies without explicit statutory grants of prosecutorial discretion would bring claims to the DOJ to borrow the AG's inherent authority. The DOJ drafted the FCCA to make clear that agencies without explicit statutory authority could compromise claims below a certain amount without having to ask permission from the Attorney General, but it conditioned the ability to do so on regulations promulgated by the Treasury and the DOJ.[306] Effectively, then, the FCCA created a form of pre-approval, a blanket permission to settle claims under certain conditions. It did nothing to limit the Attorney General's own authority to compromise (or otherwise settle) claims above the threshold amount or to grant permission to compromise claims below the threshold amount for reasons beyond those explicitly listed in the ex ante permission slip of the FCCS. The FCCS themselves reflect the FCCA's structure, first granting the compromise authority below the threshold amount, then declaring that the "authority to accept compromises" of any claims higher than the threshold

306. 31 U.S.C. § 3711(a)(2) (2018) (unconditioned compromise authority, compare with (a)(3)'s suspension authority, which incorporates an ability to pay condition), (d) (conditioning suspension and compromise authority on agency, Justice, and Treasury regulations and standards).

amount "rests with the Department of Justice," then articulating the conditions under which an agency may exercise its (sub-threshold) authority without having to ask permission.[307] The FCCS say nothing about the conditions under which the Department of Justice can exercise its compromise (or other settlement) authority, nor do they restrict an agency from referring a sub-threshold claim to the Department of Justice for the Attorney General to do what she will. Accordingly, were DOE to have got its prosecutorial discretion from the FCCA, it would merely be borrowing the AG's discretion for sub-threshold amounts subject to the conditions of the FCCS. Nothing in the FCCA or the FCCS would prohibit it from declining to exercise its discretion according to the FCCS and referring a claim to the AG/DOJ to exercise discretion not limited by the FCCS. After all, such referral is what it would have done had it had *no* statutory permission to exercise prosecutorial discretion.

Understood in context, the FCCS constrain the discretion of executive branch agencies on terms created by the DOJ and Treasury, but enable DOJ to override any of those constraints in a case-by-case basis. When the DOE adopted the FCCS, it incorporated this structure into its implementation of the discretion that the HEA granted it. In effect, it outsourced its prosecutorial discretion to the DOJ: tying its hands to compromise only in situations pre-approved by the DOJ (and Treasury) via the FCCS *or* situations in which the AG gives specific approval, subject to whichever other limits the HEA creates.

None of which denies that DOE has constrained *its own* discretion by adopting the FCCS, only the practical importance of that constraint should DOJ and DOE be of the same mind with respect to how much student debt should be canceled. In such a circumstance, the new regulations merely

307. 31 C.F.R. § 902.1(a) (granting sub-threshold authority); § 902.1(b) (reserving supra-threshold authority to Justice); § 902.2 (articulating conditions for exercise of sub-threshold authority).

require DOJ to decide where DOE would have been legally able to do so on its own. In fact, somewhat ironically given the history of the FCCA, it has apparently been normal practice for the DOE to obtain approval from the DOJ before deciding on even the most trivial settlement.[308] This practice apparently developed because Justice represents Education in any litigation and its attorneys want to make sure things go according to their own standards. This regulation merely maintains that peace between these instrumentalities of the Executive.

If all else fails, DOE could avoid any of these limitations by simply repealing and replacing its regulations with an updated version of what it had in place from 1988 to 2016: a regulation that merely reaffirms its full statutory authority. Doing so would require going through a time-consuming negotiated rulemaking proceeding, but it is perfectly permissible.[309]

4. Does DOE's Practice Create a "Binding Norm"?

Setting aside regulations, has DOE's implementation of its settlement and modification authorities created any limitations? In short, no.

Public information on how DOE uses and thinks about these authorities is scarce. Its announced view is that "[s]pecific guidance related to settlements and compromises is confidential, given that publicizing this information is not in the best interest of the government as it could enable borrowers to reduce their repayments below the amount they can legitimately afford."[310] But what information is available

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308. Bergeron, *infra* note 314.

309. Regarding the obligation to follow the same process to amend or repeal a regulation as to promulgate one, see Perez v. Mortgage Bankers Ass'n., 135 S. Ct. 1199, 1206 (2015); F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009). Regarding the Department of Education's obligation to use negotiated rulemaking in addition to notice and comment, see 20 U.S.C. § 6571(b) (2018).

310. FED. STUDENT AID OFF. OF THE U.S. DEP'T OF EDUC., LOAN SERVICING AND COLLECTION – FREQUENTLY ASKED QUESTIONS (2018), https://getoutofdebt.org/wp-

indicates that DOE has consistently understood its settlement authority as something to be used rarely, in cases in which it seemed likely that further collection would not be worth the expense.

In a 1993 guidance document for guaranty agencies, the Department advised that these agencies would not sacrifice their right to the Department's insurance if they exercised their discretion to compromise with borrowers who had defaulted on FFELP loans and were "repeatedly unemployed and have no prospects for future employment," were "repeatedly public assistance recipients," were "chronically ill, partially disabled, or of an age that results in their inability to work," or had "potential for future earnings [that was] limited or non-existent"—that is, so long as they had "no other funds available to them from other sources, such as an inheritance."[311] In other words, it would not require guaranty agencies to draw blood from stones, so long as they really *really* made sure they were dealing with stones. Since the Department only takes possession of FFELP loans once a guaranty agency assigns it over to them (and a guaranty agency only takes possession in case of default or discharge), this guidance document likely reflected the Department's own internal standards for when the Secretary should exercise its settlement authority.

Bolstering this interpretation, as late as 2009 the Department had posted a PCA manual that described similar standards for collections companies it contracts with to pursue borrowers who default on any loan.[312] The Department's most recent statement, in response to queries from the National Consumer Law Center in 2015 is that "[s]ettlements and compromises are only available to

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content/uploads/2018/06/IFAP-Loan-Servicing-and-Collection-FAQ_new.pdf.

311. NAT'L COUNCIL OF HIGHER EDUC. LOAN PROGRAMS, STANDARDIZED COMPROMISE AND WRITE-OFF PROCEDURES (1993), https://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/ex_6.pdf.

312. U.S. DEP'T OF EDUC., PCA PROCS. MANUAL: 2009 DOE COLLECTIONS CONTRACT 71–73, 2009.

defaulted borrowers and are intended as a last resort after other repayment options have been exhausted."[313]

According to David Bergeron, a former acting assistant secretary for postsecondary education, the reason DOE concluded that its prosecutorial discretion only applies to defaulted loans is that, under the FFELP program, DOE only takes possession of loans in case of default.[314] And one can only exercise prosecutorial discretion over debts one owns. As for Direct Loans, DOE has apparently reasoned that, because their settlement discretion derives entirely from the fact that they are available on the same terms as FFELP loans, that discretion only kicks in when the DOE would have been able to exercise it for FFELP loans: i.e. when they default.[315]

This line of practice, inasmuch as it can be discerned, does not seem sufficient to "create binding norms by imposing rights or obligations on the respective parties," as D.C. Circuit precedent requires.[316] DOE keeps its practices confidential precisely because it seeks to avoid altering private parties' behavior. That is, it seeks to avoid even creating expectations about its conduct, let alone creating an enforceable right based on such an expectation.

While the Supreme Court has held that "the longstanding practice of the government can inform [a court's] determination of what the law is" [317] and that "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, can raise a presumption that the action had been taken in

313. FED. STUDENT AID OFF. OF THE U.S. DEP'T OF EDUC., *supra* note 310.

314. Email from David Bergeron, Senior Fellow, Ctr. for Am. Progress, to Luke Herrine, Ph.D. in Law Candidate, Yale Law Sch. (June 18, 2019, 10:05 EST) (on file with author).

315. *Id.*

316. Steenholdt v. FAA, 314 F.3d 633, 639 (D.C. Cir. 2003).

317. Nat'l Labor Relations Bd. v. Canning, 573 U.S. 513, 525 (2014) (internal citations and punctuation omitted).

pursuance of its consent,"[318] the Court has never held that an agency's failure to act in a certain way makes that action prohibited. Put differently: failing to test the limits of a power has never been treated as setting the limits of that power, through some sort of estoppel principle. Such a principle would be hard to justify. When an action of questionable legality has long been performed without objection, it might be presumed legal. But when an action has never been attempted, nobody would have had the chance to object or not. No information about its legality—presumptive or otherwise—is produced. So the justification for the former does not apply to the latter. What is more, limiting officials to staying within the boundaries of prior practice regardless of their paper grant of power would seem to incentivize them to test the limits of their power early and often to avoid losing the opportunity to do so later, which would seem a recipe for nearly constant constitutional crisis.

The substance of DOE's reasoning for a narrow reading of its own discretion is also flawed. First of all, it is not true that the Department only holds defaulted FFELP debts. It also takes possession of FFELP debts by paying off loans on behalf of debtors who are eligible for a discharge under the HEA.[319] And, as we will discuss later, it may have other ways of taking possession of them. But, in any case, the Department need not wait to be the holder of a loan over which it has ultimate enforcement authority in order to make a determination about whether it will enforce or discharge the obligation to pay that loan. There is nothing in the relevant statutes that *prevents* the Department from determining whether it will enforce a FFELP loan should it come in possession before it actually does, and it seems absurd to prevent the Department from planning in advance

318. Medellín v. Texas, 532 U.S. 491, 531 (2008) (internal punctuation omitted).

319. *See* 20 U.S.C. §§ 1087(a)(1), (b), (c)(1), (d) (2018) (requiring Department to pay loan on borrower's behalf and order a discharge); *see also* 34 C.F.R. § 682.402(a) (2019) (developing procedure for discharge).

how it will exercise its rights to collect a debt should it come to hold the debt. Indeed, such an interpretation would undermine the Department's explicit statutory authority to issue ex ante regulations pertaining to how it will manage debts in which it is not in possession should it come into their possession.[320]

But the Department's authority to determine how it will manage debts that it does not yet but may hold is not restricted to those cases in which the Department is granted explicit authority to grant discharges. In particular, the Department has long had the ability to determine that a loan is not or would not be legally enforceable against the holder of the loan due to misconduct in inducing the debtor to take on the loan and to refuse to pay out a guarantee for such loans.[321] As far back as 1973, the Department informed guarantee agencies that it would not pay out insurance on loans taken out to attend for-profit colleges where there was (more likely than not) consumer fraud.[322] In such situations, the Department can determine in advance that no holder of the loan should continue to enforce it because it is not legally owed.

A reasonable extension of this principle would be to enable the Department to pay less than the full claim to the guarantee agency in order to take possession of the debt to ensure that it will be canceled. Doing so would involve a determination that refusing to pay insurance would actually not be the best way to prevent collection of legally non-enforceable debts by parties that have an incentive to maximize collections even when legally questionable. The Secretary would be exercising discretion to pay somewhere

320. *See, e.g.*, 20 U.S.C. §§ 1082(a)(1), 1087(a)(1) (2018).

321. *See* 34 C.F.R. § 684.402(a)(4)–(5) (2019); *see also* Margaret Reiter, Comment on Dep't of Educ. Proposed Rule, Docket ED-2015-OPE-0103, p. 7–10 (Aug. 1, 2016), https://www.regulations.gov/document?D=ED-2015-OPE-0103-10697 (reviewing history of non-payment on non-enforceable notes, going back at least to 1973).

322. Reiter, *supra* note 321, at 7.

in between all and none of its guarantee to ensure the overall purpose of the HEA is fulfilled.

In sum, nothing in DOE's understanding limits its discretion over FFELP loans in its possession (in which case DOE has a claim over the debtor) or that it has the right to bring within its possession (in which case DOE can determine how it would exercise its claim over a debtor were it to obtain one). But, in any case, whatever limits there are on FFELP do not carry over to Direct Loans just because they are subject to "the same terms, conditions, and benefits."[323] That is because Direct Loans are subject to the same terms, conditions, and benefits except insofar as they are not. "Direct Loans" is not merely a new label for FFELP, it is a modification of the student loan program that makes otherwise identical loans available on more uniform terms and subject to more direct control by DOE. Indeed, the main difference between FFELP and Direct Loans is precisely that DOE does not need to take any action or pay any entity to come into possession of Direct Loans. It issues them *directly*. Thus Direct Loans obviously do not inherit the terms and conditions that involve private lenders, guarantee agencies, and insurance arrangements between DOE and these parties. The whole point of creating Direct Loans was to eliminate the complications involved with these particular terms and conditions, such as they are. Since the settlement authority itself says nothing about when it can be exercised, it would be absurd to limit DOE's authority to settle Direct Loans to circumstances when it would have been able to take possession of FFELP loans merely because the structure of FFELP loans created a de facto limitation on the settlement authority.

As for the more general principle that DOE's discretion can *only* be exercised to minimize administrative cost or perhaps in cases where the legality of the claim would be

323. Pub. L. No. 102-325, 106 Stat. 572 (1992) (codified at 20 U.S.C. § 1087a(b)(2) (2018)).

dubious (and thus where collection might generate costly litigation or even be ruled unlawful), there is no HEA provision that even remotely restricts the HEA in that way. And reading that restriction into the HEA would be in tension with the basic principle of presuming prosecutorial discretion to be unreviewable, since it conditions non-reviewability on a court's determination of the proper reasons for which that discretion may be exercised.

5. Is Debt Cancellation an "Abdication of [DOE's] Statutory Duty"?

As noted, *Heckler* left open the possibility that an agency that used its discretion to "consciously and expressly adopt[] a general policy which is in effect an abdication of its statutory duty" would not be entitled to normally applicable deference.[324] This exception is consistent with the general principle of administrative law that "[r]egardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law."[325] As also noted, abdication of duty has never served as a basis for finding an otherwise discretionary agency action reviewable. Would DOE using its prosecutorial discretion to enact a student debt jubilee present the opportunity to develop this possibility?

The most likely scenario in which a court would find that DOE has abdicated its duty by undermining the purpose of the statute would be if it stopped collecting student debt altogether. The argument for abdication of duty would be that, whatever the scope of DOE's discretion, it cannot be so great that it can unilaterally decide that student debt ought no longer be collected. The HEA charges it with creating and enforcing such debts, after all. Congress cannot be said to have granted DOE discretion so broad as to enable it to

324. Heckler v. Chaney, 470 U.S. 821, 855 n.4 (1985).

325. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 125 (2000).

override Congress's decision to have an operational student loan program. The core purpose of prosecutorial discretion, it is often said, is to enable an agency to prioritize some claims over others.[326] Refusing to enforce all claims prioritizes no claims at all. It goes against the structure of the statute. It violates the oft-repeated principle that Congress does not "hide elephants in mouseholes,"[327] not to mention that courts and agencies should exercise "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency."[328]

The main defense of a refusal to collect would be to point to the routine exercises of prosecutorial discretion to refuse to enforce laws perceived as overly harsh or otherwise socially or morally problematic. As William Eskridge has shown, sodomy laws, though universally enacted among U.S. states for most of their history, were "rarely enforced . . . against anyone before 1880, even when such illegal activities were notorious in the community."[329] Recent years have seen several district attorneys refusing to enforce laws that criminalize various drug-related offenses.[330] No court I am

326. *See* Webster v. Doe, 486 U.S. 592, 609–10 (1988) (Scalia, J., dissenting); Ass'n of Irritated Residents v. EPA, 494 F.3d 1027, 1032 (D.C. Cir. 2007) ("These judgments—arising from considerations of resource allocation, agency priorities, and costs of alternatives—are well within the agency's expertise and discretion."); Schering Corp. v. Heckler, 779 F.2d 683, 687 (D.C. Cir. 1985) (describing FDA's decision to settle as a product of "precisely the sort of balancing of agency priorities and objectives, informed by judgments based on agency expertise, that, absent some 'law to apply,' should not be second-guessed by a court").

327. This phrase comes from Whitman v. Am. Trucking Assocs., 531 U.S. 457, 468 (2001), and has taken on the status of ritual incantation since. *See, e.g.*, Cyan, Inc. v. Beaver County Employees Retirement Fund, 138 S. Ct. 1061, 1071 (2018); Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018); Puerto Rico v. Franklin California Tax-Free Trust, 136 S. Ct. 1938 (2016); EME Homer City, 572 U.S. at 528; Gonzales v. Oregon, 546 U.S. 243, 267 (2006).

328. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

329. WILLIAM M. ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA: 1861–2003 21 (2008).

330. *Brooklyn DA Moves to Vacate 1,400 Pot Warrants, Overturn 28 Convictions*, ABC7NY (Dec. 19, 2018), https://abc7ny.com/marijuana-convictions-

aware of has ever ruled that prosecutors' decision not to enforce these and other laws was an abdication of statutory duty reviewable by a court.

But suppose we assume that a total refusal would be reviewable, perhaps by differentiating criminal prosecutions from the efforts of the administrative state. Even so, none of the proposals on the table involve unilateral refusal to ever cancel student debt. Even a full jubilee would only involve eliminating all *current* student debt. Such an action (assuming it happens in the absence of other reforms that would eliminate student debt) is more like a reset of the student debt program than the elimination thereof. It would involve a prioritization of resources towards the future rather than the past, we might say.

We might note as well that even if a court were inclined to rule against a DOE-enacted jubilee, it would likely be given pause by the fact that doing so would surely be a tremendously politically unpopular decision, transcending partisan divides at least somewhat. A court that re-imposed student debt on millions of people who just had the experience of having that debt lifted off their shoulders would at the least have a serious PR problem on its hands. Especially a court worried about its eroding legitimacy might think twice before taking the case.

Something less than total cancellation—say an across-the-board haircut and/or sliding-scale cancellation depending on income—is even more obviously a matter of prioritization rather than total abdication. Indeed, once we are outside the realm of total elimination of debt, it is hard to see what principles could guide a court in determining how much discretion is too much to be beyond court review. So long as the cancellation plan does not go outside the realm of non-enforcement into the realm of granting or eliminating

pot-brooklyn-da-district-attorney/4927578/; Joe Trinacria, *Larry Krasner Sues Big Pharma, Drops All Marijuana Possession Charges*, PHILLYMAG (Feb. 16, 2018), https://www.phillymag.com/news/2018/02/16/krasner-big-pharma-marijuana-possession/.

borrowers' rights (by, say, conditioning debt cancellation on borrowers' waiver of the right to vote), any line drawn between reviewable and non-reviewable discretion would seem to be equivalent to a court substituting its judgment about the appropriate use of discretion for that of the administrative agency charged with exercising such judgment.

6. Even if Reviewable, Debt Cancellation Could Survive Review

Of course, a finding that a given action is reviewable is not a finding that it is unlawful. If a court were to review DOE's use of its discretion to cancel student debt, it would have to apply the APA. I will spare the reader the full analysis of what that would look like, but it could be either review for abuse of discretion or arbitrary and capricious review.

C. *Complications with FFELP and Perkins Loans*

In what remains, we will assume that DOE can cancel student debt and avoid or survive court review. Yet further legal matters remain in designing a debt cancellation plan. As discussed above, not all public student loans are owed directly to DOE, even if DOE has regulatory authority over them. In particular, FFELP and Perkins Loans are initially issued by and owed to non-governmental entities. Eighty-five percent of outstanding FFELP loans—or 16% of all outstanding public student—is held by entities other than DOE. Because DOE can only decline to enforce debts it has the ability to enforce, the fact that DOE does not have direct claims on most FFELP or any Perkins debtors presents a problem. Existing jubilee proposals introduced in Congress address this issue by expressly giving DOE authority to assume the obligation on FFELP and Perkins Loans. (This problem does not pertain to Direct Loans, of course.) How might DOE obtain possession of FFELP and Perkins loans without this additional authority?

1. FFELP

DOE has the authority to take possession of FFELP loans when such a loan has been in default long enough and after enough efforts at collection for a guaranty agency to have paid out its guarantee and to have given up on collection efforts itself. This authority would not be all that helpful unless, perhaps, many debtors refused to pay, whether in protest or in anticipation of a potential jubilee. DOE also has the ability to "compromise[] any claim on, or arising because of" its insurance on the guaranty on FFELP loans.[331] Using this authority, it might announce its plan to exercise its discretion to cancel or write down (i.e. to decline to enforce, to waive or release) some or all FFELP Loans that ultimately come within its possession and then negotiate with guaranty agencies to pay out a lump sum in exchange for assignment of the relevant debts. Debtors would have a lessened incentive to pay these debts, giving holders/lenders an incentive to sell instead of expending further collection costs.

2. Perkins

Similarly, DOE can take assignment of a Perkins Loan from a college where the loan has "been in default despite due diligence on the part of the institution in attempting collection thereon" or where "an institution of higher education determines not to service and collect" it.[332] Once DOE takes possession of a Perkins Loan via assignment from a college, it must "attempt to collect" on it "until all appropriate collection efforts, *as determined by the Secretary*, have been expended."[333] DOE might exercise this authority after encouraging colleges that hold Perkins to "determine[] not to service or collect" Perkins Loans anymore, which

331. 20 U.S.C. § 1082(a)(5) (2018).

332. 20 U.S.C. § 1087cc(a)(4), (c)(5) (2018).

333. 20 U.S.C. § 1087gg(b) (2018) (emphasis added). It is not clear if this is any different than the obligation to "try to collect" any debts owed to the federal government at 31 U.S.C. § 3711(a)(1) (2018).

would then require (and, a fortiori, enable) the colleges to assign the loans to DOE.[334] Loans assigned in this way do not require DOE to make any payments to colleges.[335] Though some colleges might be willing to get on board with such a plan based on a belief in the value of student debt cancellation alone, others might require further incentive. DOE might be able to "compromise" with some sort of incentive, such as providing some form of regulatory relief.

DOE also has the authority to "consent to modification" of the terms of a Perkins Loan and/or to "waive any . . . claim" over colleges who, for instance, write down a loan in a way that runs afoul of the HEA.[336] DOE might coordinate with colleges willing to write down or cancel Perkins loans by committing to exercise one or both of these authorities so that colleges face no consequences for doing so.

3. Conclusion

None of these approaches to resolving the problem of the indirect claims under FFELP and Perkins is foolproof. However, a creative Secretary of Education could potentially find a way to mix them together to ensure as uniform a treatment of different kinds of public student loans as possible under a debt cancellation program.

E. *Budgetary and Tax Implications: Getting OMB and the Treasury's Approval*

Assuming the Secretary were to decide to use her settlement power to cancel a large amount of student debt and setting aside the legal questions of whether doing so would be based on a proper interpretation of the relevant

334. The HEA also enables DOE to authorize colleges to directly compromise with student debtors, but only if the compromise results in the debtor paying a lump sum amounting to at least 90% of the principal and all of the interest and fees. 20 U.S.C. § 1087dd(f) (2018).

335. Indeed, any amount DOE collects on such a loan assigned in this way must be distributed to colleges other than the assignor.

336. 20 U.S.C. §§ 1087hh(1), (2) (2018).

statutory authorities, there are two further potential limitations: the legal implications of the effect of such cancellation on the federal budget and the potential that the IRS could treat the cancellation as a form of income for tax purposes.

1. There are No Budgetary or Separation-of-Powers Limitations on Debt Cancellation

There are three potential legal problems that administrative discretion with a major impact on the federal budget could have: it could contravene the constitutional separation of powers, whether under non-delegation doctrine or the Appropriations Clause; it could violate a statutory restriction on use of appropriated funds; or it could violate an executive directive on how funds can be used.

Non-delegation doctrine is currently in a state of flux. Under current law, as long as Congress provides some minimal "intelligible principle" to guide agency action—i.e. as long as Congress does not create an agency that convenes political coalitions to bargain over the terms of multiple sectors of the economy—a delegation does not undermine the constitutional separation of powers.[337] However, it seems likely that there is now a majority of Supreme Court Justices willing to give non-delegation doctrine more bite.[338] Non-delegation doctrine has never been used to strike down quasi-prosecutorial discretion, although it has never confronted quasi-prosecutorial discretion of the scope envisioned here. And a more aggressive version of the doctrine might at least be used as a background threat of unconstitutionality to counsel a narrower statutory interpretation on constitutional avoidance principles. Speculating further on the matter would be more tedious than interesting, but it is worth noting the risk.

337. *See* Gundy v. United States, 139 S. Ct. 2116 (2019).

338. *See* Ian Millhiser, *The Supreme Court's Covert Plan to Gut the EPA*, THE NEW REPUBLIC (June 21, 2019) https://newrepublic.com/article/154266/supreme-courts-covert-plan-gut-epas-powers.

Constitutional restrictions on appropriations are more easily set aside. The Appropriations Clause of the Constitution provides: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[339] The Supreme Court has understood this clause as quite "straightforward and explicit."[340] "It means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress."[341] This prohibition is strict: it prohibits a President from using the pardon power to "order to repay from the Treasury the proceeds derived from the sale of the convict's forfeited property" and even inadvertent expenditures in excess of appropriations.[342]

But it has no teeth in this case. It has nothing to say about non-collection of debts, since failing to deposit money *into* the Treasury is not the same as withdrawing money *from* the Treasury. So it has nothing to say about settling Direct Loans or FFELP Loans already in the Department of Education's possession. In theory, it might restrict the Department's payout of insurance to guaranty agencies in the case of FFELP loans not already in the Department's possession, but Congress has granted blanket authority for the Department to cover the costs of these loans. FFELP is an entitlement program for which Congress pre-authorized funds to pay out loan guarantees paid out in accordance with law.[343]

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339. U.S. CONST. art. I, § 9, cl. 7.

340. Off. of Personnel Mgmt. v. Richmond, 496 U.S. 414, 424 (1990).

341. *Id.* (quoting Cincinnati Soap Co. v. United States, 301 U.S. 308, 321 (1937)).

342. *Id.* at 425–26 (1990) (citing Knote v. United States, 95 U.S. 149, 154 (1877)); *see also* U.S. Dep't of Navy v. Fed. Labor Rel. Auth., 665 F.3d 1339, 1347 (D.C. Cir. 2012).

343. *See* 20 U.S.C. § 1081 (2018) (creating an ongoing "insurance fund" to cover any costs of insuring FFELP loans and authorizing the Secretary to borrow from the Treasury as appropriate to cover costs); 2 U.S.C. § 661c(c)(1) (2018) (explicitly using "the guaranteed student loan program" as an example of the types of entitlement programs that are exempt from the usual appropriations process).

There also seem to be no statutory restrictions related to budgetary impact. It is difficult to prove a negative, but none of the most likely candidate laws seem to apply. The Antideficiency Act prohibits Executive Branch officers from spending money in excess of Congressional appropriations (as the Constitution does) and of regulatory restrictions.[344] But canceling debt would not authorize expenditures above amounts appropriated, nor would paying off insurance. The Balanced Budget and Emergency Deficit Control Act (BBEDCA) and the Statutory Pay-As-You-Go Act ("Statutory PAYGO") both require Congress to generate revenue to "offset" new expenditures, but neither apply to administrative agencies or even to already authorized expenditures.[345] The Federal Credit Reform Act of 1990 (FCRA), enables loans to be issued only to the extent that their "costs" are annually appropriated by Congress.[346] However, as Connor, Loonin, and Merrill point out, "FCRA specifically exempts any 'direct loan or loan guarantee program'" that "constitutes an entitlement (such as the guaranteed student loan program . . .); from this appropriations requirement. Likewise, subsection (c) exempts mandatory programs such as FFELP and DLP from the requirement that any outstanding direct loan or loan guarantee 'shall not be modified in a manner that increases its cost' unless the cost increase is provided for in an appropriations Act,[347] Congress also anticipated and provided 'permanent indefinite authority' for agencies' 'reestimate' of the cost for a group of direct loans or loan guarantees made in a single fiscal year."[348]

Perhaps this does not prove a negative, since your humble pro-jubilee author does not have a sufficient

344. 31 U.S.C. §§ 1341, 1514, 1517 (2018).

345. 2 U.S.C. § 900–22 (2018); Pub. L. 111-39 (Feb. 12, 2010).

346. 2 U.S.C. § 661c(b) (2018).

347. 2 U.S.C. § 661c(e) (2018).

348. Ltr., *supra* note 265, at 6 (quoting 2 U.S.C. § 661c(c), (e), (f) (2018)).

incentive to find limitations. But take heart. Congresspeople with ideological motivations to find such an authority have failed to do so. In a 2016 letter to the Secretary of Education, Republican Chairmen of the House and Senate Budget Committees expressed concern that: "[t]here are at present no [Congressional] budget control mechanisms to limit the cost of administrative changes to student loan programs made pursuant to current law, however great the cost or departure from long-standing policy."[349]

However, since the George W. Bush Administration, the OMB has imposed budgetary restrictions on administrative agencies under what has become known as "Administrative PAYGO."[350] The details of these restrictions are not fully public, but it is known that they apply to any "discretionary administrative action" by an agency official—apparently including everything from new regulations to increased staffing—that "increase[s] mandatory spending" (i.e. pre-authorized Congressional spending) "relative to the projection in the most recent [President's annual budget request] or Mid-Session Review of what is required, under current law, to fund the mandatory-spending program."[351] Any such increase must be presented to the OMB for approval alongside cost estimates and "one or more proposals for other administrative actions . . . that would comparably reduce mandatory spending," which is to say, an "offset."[352]

349. Letter from Tom Price, Chairman of the House Budget Committee, and Mike Enzi, Chairman of the Senate Budget Comm., and Mike Enzi, Chairman of the Senate Budget Comm., to John B. King, Sec'y of Educ. (Jul. 14, 2016), https://www.budget.senate.gov/imo/media/doc/EnziPriceLetter.pdf.

350. *See* Clinton T. Brass & Jim Monke, *OMB Controls on Agency Mandatory Spending Programs: "Administrative PAYGO" and Related Issues for Congress*, CONGRESSIONAL RESEARCH SERVICE (Aug. 19, 2010), https://nationalaglawcenter.org/wp-content/uploads/assets/crs/R41375.pdf.

351. *Id.* at 1, 3 (quoting Memorandum from Joshua B. Bolten, Director of OMB, to heads of departments and agencies, "Budget Discipline for Agency Administrative Actions," M-05-13, May 23, 2005, at http://www.whitehouse.gov/omb/memoranda_2005/).

352. *Id.* at 4 (quoting Memorandum from Joshua B. Bolten, at ¶ 1).

One might quibble as to whether refraining from collecting debt counts as increasing spending, but ultimately the OMB's interpretation would win the day. And it seems likely that an OMB skeptical of the budgetary impact of student debt cancellation would apply Administrative PAYGO to any exercise of the settlement authority that substantially reduced the Department of Education's revenues, especially if that lack of revenue would require the Department to borrow from the Treasury to maintain other parts of its budget. On the other hand, since Administrative PAYGO only applies if the OMB says it does, it could be repealed entirely (as it should be) or waived for any particular case of "spending" increases. And if the President had prioritized canceling student debt enough to appoint a Secretary of Education willing to employ novel interpretations of existing law to do so, surely that President would appoint an OMB director who would cooperate.

2. Tax Implications

The Treasury would also have to cooperate, because "cancellation of indebtedness" is generally treated as income for tax purposes, and frequently referred to as "COD income."[353] If this general principle were applied to households that benefited from discretionary student debt relief, it would trade their indebtedness to DOE for indebtedness to the IRS. The debt would be smaller as an absolute amount (because it would only be a fraction of the debt relief granted) but would be due as a lump sum immediately, without any of the repayment plan or forbearance options available on student loans. As such, it would likely make most intended beneficiaries worse off.

Any debt cancellation that originates within the executive branch—i.e. without Congress explicitly making it

353. 26 U.S.C. § 61(a)(12) (2018); *see also* INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. NO. 4681, CANCELED DEBTS, FORECLOSURES, REPOSSESSIONS, AND ABANDONMENTS (Jan. 14, 2019), https://www.irs.gov/pub/irs-pdf/p4681.pdf.

such that the cancellation is tax-free—would require coordination with the Treasury's Office of Tax Policy and with the IRS to determine whether and how to ensure favorable tax treatment. Because the COD principle has multiple exceptions and an uncertain scope, there could be several ways to do so, each of which would have distinct implications for the design of the jubilee.

As an initial matter, it is important to note that there is no authoritative definition of COD income and its exceptions, so the IRS has a good deal of leeway in determining its applicability to any given situation. The Internal Revenue Code, as Richard C.E. Beck points out, "does not specify what kinds of obligations are subject to income treatment when canceled, and it speaks ambiguously of 'indebtedness' . . . without any further limitation at all."[354] For its part, "the Treasury has never promulgated any regulations in this all-important area," instead filling out the law case-by-case through Revenue Procedures and a smattering of not really coherent court decisions.[355] Neither of Revenue Procedures or court decisions do much to constrain the IRS's ability to determine that a particular cancellation of indebtedness is non-taxable. Revenue Procedures are not binding on the IRS: the "rules" they announce can be overruled by future revenue procedures (without notice and comment) or by regulation. Court decisions are, of course, binding, but they do not limit the IRS from adopting interpretations (or regulations) that result in *less* tax enforcement, not least since nobody would challenge such interpretations.

Nevertheless, some patterns have emerged, and the IRS tends to treat these patterns as if they were binding, with some flexibility at the joints.[356] These patterns are worth

354. Richard C.E. Beck, *The Tax Treatment of Cancelled Interest and Penalties on Consumer Debt*, 53 N.Y.L. SCH. L. REV. 1025, 1028 (2009).

355. *Id.*

356. It seems that the main reason the IRS does so is to avoid creating rules that would be easily gamed by the wealthy to avoid taxes.

noting as potential grounds the IRS could refer to, but ultimately it seems the IRS has leeway to refer to multiple grounds or simply to decline to pursue taxes, whether due to legal uncertainty or otherwise (After all, who would sue?).

Perhaps the most straightforward approach would be to apply the general welfare exception to COD income. Under this exception, government benefits provided to improve individual and/or social welfare are not includible in gross income. The principle here is similar as the principle in the exception of charitable gifts from taxation: an accession to wealth based on need should not be undermined by the tax code.[357] The test developed by the IRS to determine whether a government benefit qualifies for the general welfare exception has three parts. The benefits must "(1) be made pursuant to a government program, (2) be for the promotion of general welfare (that is, based on need), and (3) not represent compensation for services."[358] For a benefit to be "based on need," it need not be based on *financial* need, or to use policy-speak, "means-tested." Government benefits for the blind, for disabled people, for vocational training, for victims of natural disasters, among others, have been found to be "based on need" for purposes of qualifying for the general welfare exception.[359] As Senator Elizabeth Warren pointed out in a letter to the Treasury while it was determining how to treat cancellations of student debt for students who qualified for defense-to-repayment discharges, educational background has been treated as a need-based category previously.[360] Funding for vocational programs has also been treated as non-taxable, so long as it only includes

357. 26 U.S.C. § 102(a) (2018).

358. Rev. Proc. 2014-35, 2014-26 I.R.B. 1110; *see also* Bailey v. Comm'r, 88 T.C. 1293, 1300 (1987).

359. Rev. Proc. 2014-35 at 4–6; Letter from Senator Elizabeth Warren to Jack Lew, Sec'y of the Treasury, and John Koskinen, Comm'r of the Internal Revenue Service 2–3 (Aug. 11, 2015) [hereinafter "Warren Letter"].

360. *See* Warren Letter, supra note 359, at 3.

"reasonable expenses."[361] Confusingly, the IRS has treated Pell Grants as non-taxable to the extent that they fund education expenses but not room and board, apparently because it applies the "scholarship exception" rather than the "general welfare exception."[362]

As a general matter, loans are not taxable income, so the only question is whether turning loans into grants subject to a discretionary authority to cancel some or all of a repayment obligation would qualify for the general welfare exception. Public student loans are "made pursuant to a government program," and canceling them would be done according to a statutory authority created as part of that program. The loans were provided based on the need for education. That would seem sufficient to establish need. Cancellation functionally turns a loan (non-taxable) into a grant (potentially taxable), so the appropriate question is the purpose for which the grant was provided. It should also be of no object whether any of the loan was spent on room and board, since appropriate funds for room and board have been found to be part of the general welfare exception in job training programs, even if not for Pell Grants, and there is no principled reason to differentiate.

In any case, one could also argue about whether the cancellation was based on need. With respect to some debtors, this argument would be straightforward: those who are facing financial hardships or whose lives are otherwise made much worse by student debt would benefit from a program of cancellation. Even those debtors for whom student debt is relatively less onerous would have that burden lifted, and would be able, for instance, to pursue different careers or to get married or buy a house when they could not before. Either way, neither the initial payment nor

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361. Rev. Proc. 2014-35 at 5.

362. *See* INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUB. NO. 970, TAX BENEFITS FOR EDUCATION (Jan. 17, 2019), https://www.irs.gov/pub/irs-pdf/p970.pdf.

the cancellation would represent compensation for services.

Applying this exception has the advantages that it is well established, it is flexible enough to cover cancellation of nearly any breadth (unless one thinks that "need" should be understood more narrowly), and it, since it is keyed to a specific government benefit, it cannot easily be used as precedent for tax avoiders to game the tax system.

The general welfare exception is an exception to any "accession to wealth." There are also exceptions specifically for COD income. The related "disputed debt" and "purchase price adjustment" doctrines were both created by courts. The former refers to situations in which a dispute between debtor and creditor as to the reality, enforceability, or amount of a debt leads to the creditor accepting less than the original amount claimed. The latter refers to situations in which a creditor agrees to accept less than the original amount owed. As these (hesitantly offered) descriptions suggest, there is some overlap between these two doctrines and no agreement as to how they ought to be differentiated.[363] The most widely cited disputed debt cases involve situations where the legal enforceability of the debt is called into question, but other authorities (pointing out that a settlement on an unenforceable debt is actually a *loss* for the taxpayer) argue for preserving the term "disputed debt" for factual disputes as to the existence or amount of the debt. Some authorities have used purchase price adjustment as the term for cases of dispute over legal enforceability.

For our purposes, it is more important to know how much territory the two of them occupy together than how to draw a boundary between them. What is clear is that, whatever their label, cases where a downward reduction in amount owed due to an "infirmity that clearly relates back to the

363. Even more confusingly, there is also a "contingent liability doctrine" that applies in an overlapping set of cases. *See, e.g.*, Treas. Reg. § 1.1001-2(a)(3) (1980); Central Paper Co. v. Comm'r, 158 F.2d 131 (6th Cir. 1946).

original" transaction are not taxable.[364] Nor are cases in which the reality or amount of the debt is genuinely in dispute. What is less clear is when debt write-downs or write-offs that are not attributable to a legal infirmity or genuine dispute count as non-taxable changes in the price of debt rather than taxable cancellations of indebtedness. It is difficult to see how at least write-offs of interest and fees should not count as price adjustments, but the IRS has tended to insist that the answer is never or almost never and some courts have agreed.[365] Nothing stops the IRS from going further, though the further it goes the more the line between that cancellation and modification of indebtedness fades.[366]

Under existing interpretations, the most natural application to student debt cancellation would be to those whose student debts were issued under legally questionable circumstances. Although its Revenue Procedure was not entirely clear, the former seems to have been the primary justification the IRS gave for declining to tax the "income" generated by canceling the debts of (some) defrauded for-profit college students.[367] This reasoning might apply to millions of others, but it would still only apply to a fraction of debtors and not to any debtors facing hardship who were not subject to fraud. The purchase price adjustment doctrine could also apply to write-downs of interest and fees for any debtor if the IRS modifies its current position on that issue. Of course, broader interpretations would enable broader applicability.

364. Rev. Rul. 92-99, 1992-46 I.R.B. 5; *Sherman*; *Zarin*.

365. *See* Beck, *supra* note 354, at 1033–37.

366. Professor Beck points out that adjustments of the price of services (including educational services) are not treated in the Tax Code's purchase price adjustment provision, and there are even stronger reasons to treat such adjustments as non-taxable adjustments (the equivalent of cash-back bargains) rather than COD income, since when one receives a service one does not obtain an asset that might be re-sold to obtain liquid assets that could be used to pay a tax. *See id.*

367. Rev. Proc. 2015-57, 2015-51 I.R.B. 863.

A potentially broader but less well-established exception might be called the "avoidance of loss doctrine." As Beck puts it, "although the case law is sparse, it seems agreed . . . that canceled debts do not give rise to income if they were originally incurred without loan proceeds—for example such obligations as fines and penalties, tort judgments, alimony, child support, taxes, or pledges to make a gift to charity."[368] Although cancellation of such debts does free assets in the sense that has gained freedom in how to use one's existing assets, it does not result in an "accession to wealth." When such debts were incurred, they did not increase assets but rather imposed a legal obligation that, if complied with, would reduce one's assets. Cancellation of these debts thus does not result in a *gain* but an avoidance of a *loss*. Moreover, as will become more important in a moment, cancellation of such debts does not increase the assets with which a taxpayer might pay a tax. Collection of such taxes thus does not comply with horizontal equity and, in practice, might turn out to be more trouble than it is worth.

Courts have been uneven in the application of this doctrine, but it has been applied in at least some contexts and could be picked up on by the IRS. There are at least two arguments that it could be applied to student debt cancellation. The first would apply to debts incurred as a result of the government's payments to third parties (colleges, bookstores, etc.) rather than as the result of a disbursement of cash to the borrower. The reasoning here would be that the debtor did not actually receive loan proceeds, but rather received a benefit that came with an obligation to repay—effectively a 100% tax, payable in installments with interest. Cancellation of this obligation—effectively transforming it into a government grant—avoids the loss that would have come with paying that tax. A broader application would be to any student debt, used for

368. Beck, *supra* note 354, at 1029 (citing Comm'r v. Rail Joint Co., 61 F.2d 751 (2d Cir. 1932); Eagle Asbestos & Packing Co. v. United States, 348 F.2d 528, 531 (Ct. Cl. 1965)).

any purpose. The reasoning would be that whether the debtor received loan proceeds (i.e. cash) or not does not matter, since the cancellation of the obligation to repay effectively switches the program from a grant with a 100% tax to an unconditional grant. The debtor avoids loss that would have come with the tax but does not (necessarily) gain any assets that could be used to pay a tax.

This last argument shades into the more radical, and more rational, approach suggested by Beck: only tax COD income for individuals when it results in a "realization of gain," i.e. an increase in liquidity with which a tax obligation could actually be paid. The theoretical reason for doing so would be that the tax code generally only treats realized gains as taxable. Appreciation of an asset is only taxed when the asset is sold, and receipt of valuable opportunities that are not themselves fungible assets (such as an introduction to a wealthy friend or a job offer) are not taxable unless and until they result in a gain in assets. Also, treating unrealized gains results in violations of horizontal equity when, for instance, a gratuitous cash refund is not taxed but a gratuitous purchase price adjustment via cancellation of indebtedness is. On a practical level, imposing a tax on a theoretical "freeing of assets" through dis-encumbrance when the taxpayer has not actually gained any assets that could be used to pay the tax (or even sold to gain the liquidity necessary to pay the tax) results in situations in which a tax might not actually be payable, leaving the IRS to expend more on the cost of pursuing a taxpayer than it would actually receive in taxes. In fact, it turns out that this was the approach prior to the IRS's overreading of the Supreme Court's decision in *Kirby Lumber*. *Kirby Lumber* itself involved a situation in which cancellation of indebtedness resulted in a realization of gain, but the IRS used that decision to justify taxation of a broader and broader swath of COD income. Courts and tax lawyers have gone along, but only at the expense of creating a series of not fully thought through exceptions that overlap with each other in confusing ways.

To the extent the IRS would be interested in more broadly reconsidering its approach to COD income in this way, it would have no trouble classifying cancellation of student debt as non-taxable. Such cancellation, after all, results in no realized gain, only an avoidance of loss.

The IRS need not even choose between the above options. It can declare that it will not treat cancellation of student debt as taxable income (and not require the submission of 1099s) by vaguely gesturing at the variety of reasons adduced in the foregoing. This was the approach the IRS took when it decided not to treat as taxable the cancellation of the student debts of debtors who were fraudulently induced to take on such debts. It reasoned as follows:

> The Treasury Department and the IRS believe that most borrowers whose Corinthian student loans are discharged under the Defense to Repayment discharge process would be able to exclude from gross income all or substantially all of the discharged amounts based on fraudulent misrepresentations made by the colleges to the students, the insolvency exclusion, or another tax law authority. However, determining whether one or more of these exceptions is available to each affected borrower would require a fact intensive analysis of the particular borrower's situation to determine the extent to which the discharged amount is eligible for exclusion under each of the potentially available exceptions. The Treasury Department and the IRS are concerned that such an analysis would impose a compliance burden on taxpayers, as well as an administrative burden on the IRS, that is excessive in relation to the amount of taxable income that would result. Accordingly, the IRS will not assert that a taxpayer within the scope of this revenue procedure recognizes gross income as a result of the Defense to Repayment discharge process.[369]

Similarly, the IRS could cite the above doctrines, note the probability that at least the great majority of borrowers would not have taxable income, cite the compliance cost, and simply declare that it will not replace a debt with a tax obligation.

369. Rev. Proc. 2015-57 at 4.

CONCLUSION

The last Part of this Article argues that the law is no impediment to canceling student debt. The first Part argues that doing so would be a great benefit to millions of people, directly and indirectly. But there is something of a disconnect between these parts. Many of the most important benefits of student debt cancellation—those pertaining to the structural reform of the political economy of higher education—could not be realized merely through an Executive Branch jubilee. That is because such a jubilee could not be paired with a program to prevent future student debt from accumulating.

So it may be. But debt cancellation now does not preclude more reforms later. Jubilees can create fresh starts in more ways than one.