

Student Debt Is a Racial Justice Issue: Could Antitrust Law Provide a Legal Avenue for Relief?

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ABSTRACT

*The student loan crisis is a racial justice issue. Race/ethnicity is one of the strongest predictors of federal student loan default. Compared with other racial demographics, Black students are more likely to default and less likely to resume repayment after defaulting. Similarly, Black students are more likely to have student loan debt than White, Hispanic, and Asian undergraduate students.¹ Overall, the student loan crisis disproportionately affects Black students compared to students of other races. My objective in this Note is to show why Black students are disproportionately impacted by the student loan crisis and to illuminate moral hazards posed by current federal student aid policies. Through the pending class action lawsuit *Henry v. Brown University*, this Note will also illustrate how even the most elite colleges and universities may be tempted to increase profit margins on the backs of the United States' poorest students. This Note will also discuss legislative, administrative, and private remedies to the student loan crisis, with a particular focus on whether antitrust law can provide a viable legal avenue for student debt relief.*

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1. As part of grammatical justice and equity, this author is deliberately choosing to capitalize all references to race in this Note. See Kristen Mack and John Palfrey, *Capitalizing Black and White: Grammatical Justice and Equity*, MacArthur Found. (Aug. 26, 2020) <https://www.macfound.org/press/perspectives/capitalizing-black-and-white-grammatical-justice-and-equity> (last accessed Feb. 20, 2024).

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I. INTRODUCTION

The student loan crisis is a racial justice issue. Race is one of the strongest predictors of federal student loan default: Black borrowers have worse outcomes compared to other racial demographics.² Compared with other racial demographics, Black students are more likely to default and less likely to resume repayment after defaulting.³ Similarly, Black undergraduate students are more likely to have student loan debt than White, Hispanic, and Asian undergraduate students.⁴ Black undergraduate students are more likely to carry greater amounts of student loan debt than students of other races.⁵ Black undergraduate students are also twice as likely to receive grants designated for exceptionally needy students with no prior bachelor's degree, such as the Federal Pell Grant (Pell Grant).⁶ Overall, the student loan crisis disproportionately affects Black undergraduate students compared to students of other races.

Unfortunately, the United States economy depends in part upon student loan debt. Student loan debt is the second largest debt in the United States behind mortgages.⁷ Federal student loan debt in the United States has increased by 144% since the Great Recession, growing from \$642 billion in 2007 to \$1.566 trillion in 2020.⁸ Prior to the COVID-19 pandemic, approximately “11% of the total

2. Jacob P.K. Gross et al., *What Matters in Student Loan Default: A Review of the Research Literature*, 39 J. STUDENT FIN. AID 19, 21–22 (2009) (internal citations omitted).

3. *Id.*

4. See *Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, WHITE HOUSE, (Aug. 24, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/> (referencing Biden's plan to provide targeted relief to borrowers with the highest economic need) (“[S]tudent debt burden also falls disproportionately on Black borrowers.”); see NAT'L ASS'N OF STUDENT FIN. AID ADM'RS, NATIONAL STUDENT AID PROFILE: OVERVIEW OF 2018 FEDERAL PROGRAMS 45 (2018), https://www.nasfaa.org/uploads/documents/2018_National_Profile.pdf [hereinafter AID PROFILE]; Michael D. King et al., *COVID-19 Adds to Economic Hardship of Those Most Likely to Have Student Loans*, U.S. CENSUS BUREAU (Aug. 18, 2021), <https://www.census.gov/library/stories/2021/08/student-debt-weighed-heavily-on-millions-even-before-pandemic.html> (“Racial differences in student debt holding are stark. Non-Hispanic Black adults were particularly likely to have student debt.”); JENNIFER LEE, GA. BUDGET & POL'Y INST., *HOW STUDENT DEBT WORSENS RACIAL INEQUALITY* 6 (Nov. 2020), <https://gbpi.org/wp-content/uploads/2020/12/20201202-update2.pdf> (“Borrowing rates are lowest among Asian students and highest among Black or African American students.”).

5. AID PROFILE, *supra* note 4.

6. WHITE HOUSE, *supra* note 4 (“Black borrowers are twice as likely to have received Pell Grants compared to their white peers.”); see *Federal Pell Grants*, FED. STUDENT AID, U.S. DEP'T EDUC., <https://studentaid.gov/understand-aid/types/grants/pell> (last accessed Feb. 20, 2024).

7. Melanie Hanson, *Student Loan Debt vs Other Debts*, EDUC. DATA INITIATIVE (Oct. 12, 2021), <https://educationdata.org/student-loan-debt-vs-other-debts> (“Student loan debt makes up the 2nd largest amount of debt in the nation behind mortgages.”); Press Release, House Committee on the Judiciary, Nadler & Cicilline Introduce the Student Borrower Bankruptcy Relief Act (Oct. 6, 2022), <https://democrats-judiciary.house.gov/news/documentsingle.aspx?DocumentID=5066> [hereinafter Press Release].

8. *Compare* SEAN RUDDY ET AL., BIPARTISAN POL'Y CTR., *STUDENT DEBT AND THE FEDERAL BUDGET* 4 (Nov. 2021), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2021/11/Student-Debt-and-the-Federal-Budget.pdf> (“Federal student loan debt in the United States has ballooned since the Great Recession, growing from \$642 billion in 2007 to \$1.566 trillion in 2020, a 144%

outstanding federal student loan portfolio was in default and another 6% was more than 30 days delinquent.”⁹ At the beginning of the pandemic, student loan defaults were on the rise and it was estimated that 40% of the entering class of 2003’s federal student loan borrowers would default by 2023.¹⁰ This debt supports millions of jobs and until the United States restructures educational financing to create alternative employment, resistance will continue and the debt will grow.

The United States cannot afford to continue passing student debt onto the next generation. No one plan will address the student loan crisis perfectly, which is why the United States needs to tackle the student loan crisis both inside and out of Congress. The Biden-Harris Student Debt Relief Plan (the Plan) presented a potential first step to addressing this crisis, but more needs to be done. In the wake of the pandemic, the Plan intended to alleviate the student loan crisis by cancelling up to \$20,000 of federal student loan debts for middle and lower-class borrowers.¹¹ Under the Plan, the Secretary of Education would have cancelled student debt using the enhanced executive emergency powers derived from the COVID-19 national emergency declaration and the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act).¹² If it had been enacted, the Plan would have cost taxpayers \$30 billion a year for the next ten years.¹³ The Plan was a one-time solution with no long-term strategy for addressing the United States’ unsustainable student debt.¹⁴ However, the Supreme Court vitiated the plan before it could be implemented. On June 30, 2023, in *Biden v. Nebraska*, the Supreme Court held that the Secretary of Education did not have the authority to cancel \$430 billion in student debt through the HEROES Act.¹⁵

This Note endeavors to show how and why Black students are disproportionately impacted by the student loan crisis and to discuss possible remedies to the burgeoning student loan crisis. To illustrate this point, this Note is structured as follows: Part II discusses how the student loan crisis harms individual borrowers

increase.”), with Press Release, *supra* note 7 (“Forty-eight million Americans owe more than \$1.75 trillion in student loan debt.”).

9. RUDDY ET AL., *supra* note 8, at 15; see generally FED. STUDENT AID, U.S. DEP’T EDUC., *Federal Student Loan Portfolio Summary*, <https://studentaid.gov/data-center/student/portfolio> (last accessed Feb. 20, 2024) (series of reports on the federal student loan portfolio).

10. RUDDY ET AL., *supra* note 8, at 15.

11. U.S. DEP’T EDUC., *U.S. Department of Education Estimate: Biden-Harris Student Debt Relief to Cost an Average of \$30 Billion Annually Over Next Decade* (Sept. 29, 2022), <https://www.ed.gov/news/press-releases/us-department-education-estimate-biden-harris-student-debt-relief-cost-average-30-billion-annually-over-next-decade> [hereinafter *Biden-Harris Student Debt Relief*].

12. EDWARD C. LIU & SEAN M. STIFF, CONG. RSCH. SERV., *STUDENT LOAN CANCELLATION UNDER THE HEROES ACT 1* (2023), <https://crsreports.congress.gov/product/pdf/R/R47505>.

13. *Biden-Harris Student Debt Relief*, *supra* note 11.

14. See WHITE HOUSE, *supra* note 4 (referencing Biden’s plan to provide targeted relief to “borrowers with the highest economic need”); see also FED. STUDENT AID, U.S. DEP’T EDUC., *The Biden-Harris Administration’s Student Debt Relief Plan Explained*, <https://studentaid.gov/debt-relief-announcement> (last accessed Feb. 20, 2024) (explaining mechanics of Biden-Harris student debt relief plan in step-by-step process).

15. *Biden v. Nebraska*, 600 U.S. 477, 502–07 (2023).

and the United States as a whole, and how the student loan crisis disproportionately harms Black student loan borrowers. Part III gives an overview of the United States' federal financial system by discussing the origins of the United States' higher education system and the current higher education financing model. Part IV diagnoses the causes behind the student loan crisis. Part V specifically discusses how higher education costs have outpaced grant aid; how a lack of underwriting creates a risk that students will borrow more than they can realistically pay back; the inefficiencies within income-driven repayment plans; the stringent rules against discharging student loan debt in federal bankruptcy actions; the lack of institutional accountability; and the need for additional training for financial aid auditors. Part V discusses legislative and administrative solutions to the student loan crisis. Part VI discusses the potential for antitrust litigation to address the student loan crisis through the lens of the pending class action case *Henry v. Brown University*. In conclusion, this Note discusses what measures the United States can take to allow federal funding to better serve higher education students while alleviating the nation's student loan debt burden.

II. AN OVERVIEW OF THE UNITED STATES' FEDERAL FINANCIAL AID SYSTEM

The United States has a debt-based higher education financing system, as compared to a fully publicly funded system.¹⁶ Congress passed the Higher Education Act of 1965 to create a federal financial aid system for students who lack the financial resources to pay their educational expenses upfront.¹⁷ The complex regulatory scheme created by the Act is still in effect today. Between 2010 and 2020, approximately 83.1% of first-time, full-time undergraduate students in the United States utilized some form of financial aid.¹⁸

Contrary to the colloquial understanding of financial aid as scholarships, “financial aid” is a specific term of art within federal financial aid law. To the United States government, “financial aid” is any funding designated to help pay for higher education costs.¹⁹ This means that student loans are considered “financial aid” even though the student is required to pay an origination fee, the principal payment, and interest for these funds after the student stops school.²⁰ This Part will show how student loans came to be considered “financial aid” by exploring the historical circumstances that led to the United States' debt-based higher

16. JASON N. HOULE & FENABA R. ADDO, *A DREAM DEFAULTED: THE STUDENT LOAN CRISIS AMONG BLACK BORROWERS*, vii (2022).

17. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (The Act seeks “to provide financial assistance for students in postsecondary and higher education.”).

18. *Table 331.20*, NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T EDUC., https://nces.ed.gov/programs/digest/d21/tables/dt21_331.20.asp (last accessed Feb. 20, 2024) (providing the annual percentage of first-time undergraduate students receiving financial aid; 83.1% is the percentage generated by finding the average of the “Percent awarded aid column” for all institutions from 2009-2010 to 2019-2020).

19. FED. STUDENT AID, U.S. DEP'T EDUC., *Glossary: Financial Aid Definition*, <https://studentaid.gov/help-center/answers/topic/glossary/article/financial-aid> (last accessed Feb. 20, 2024).

20. FED. STUDENT AID, U.S. DEP'T EDUC., *Types of Financial Aid: Loans, Grants, and Work-Study Programs*, <https://studentaid.gov/understand-aid/types> (last accessed Feb. 20, 2024).

education system. First, Part II.A will explore the history of higher education financing. Second, Part II.B will examine the present higher education financing system, the problems within the system, and how these problems disproportionately impact Black students.

A. The History Behind the United States' Higher Education System

Black students were not considered in the formation of the United States' higher education landscape.²¹ Prior to the conclusion of the Civil War in 1865, during slavery, educational opportunities for Black students were extremely limited.²² Many Southern states had laws that criminalized teaching Black people how to read or write.²³ Following Emancipation, White citizens continued to have greater access to educational opportunities through de facto and de jure segregation. Parts II.A.1–5 discuss the long history of unequal educational opportunities in the United States and how the past continues to impact the present.

1. Historically Black Colleges and Universities

In the period after Emancipation, the Black community prioritized the establishment of schools for freed slaves.²⁴ At this time, Black communities viewed education as the “ultimate emancipator,” a crucial step toward upward social mobility, and the embodiment of citizenship and personhood.²⁵ Students usually attended school at night or during the day in the winter when less work was available.²⁶ Black communities founded Historically Black Colleges and Universities (HBCUs) for the explicit purpose of educating students of African American descent.²⁷ Many of these institutions still exist today. The funding for the earliest HBCUs came primarily from churches and typically supported the teachers' salaries, room, and board.²⁸ To survive financially, many HBCUs relied on White

21. See generally Cally L. Waite, *The Segregation of Black Students at Oberlin College after Reconstruction*, 41 HIST. EDUC. Q. 34 (2001) (discussing how Oberlin was an anomaly in Black educational history because it accepted Black students pre-Civil War, which indicates that Black students were generally not accepted at most institutions pre-Civil War).

22. *Id.*

23. *Id.*

24. Walter R. Allen et al., *Historically Black Colleges and Universities: Honoring the Past, Engaging the Present, Touching the Future*, 76(3) J. NEGRO EDUC. 263, 267 (2007).

25. *Id.*

26. *African Americans and Education During Reconstruction: The Tolson's Chapel Schools*, NAT'L PARK SERV. (June 22, 2021), <https://www.nps.gov/articles/african-americans-and-education-during-reconstruction-the-tolson-s-chapel-schools.htm>; PETER IRONS, JIM CROW'S CHILDREN: THE BROKEN PROMISE OF THE BROWN DECISION 10 (2002) (explaining that additional barriers to effective learning included the need for Black children to plant, hoe, and harvest crops, which cut weeks and even months from already short school years).

27. HBCU, OXFORD ENGLISH DICTIONARY (20th ed. 2014).

28. Allen et al., *supra* note 24, at 267; NAT'L PARK SERV., *African Americans and Education During Reconstruction: The Tolson's Chapel Schools* (June 22, 2021), <https://www.nps.gov/articles/african-americans-and-education-during-reconstruction-the-tolson-s-chapel-schools.htm> (last accessed Feb. 20, 2024).

philanthropic organizations and missionaries.²⁹ White donors often stipulated that HBCU curricula focus on etiquette and dress, manual trades, and religious education.³⁰ White donors were more supportive of vocational curricula for HBCUs over liberal arts education.³¹

2. Predominantly White Institutions

In the late nineteenth and early twentieth centuries, many students at predominantly White higher education institutions (PWIs) went to school for free.³² At PWIs, individual donors and local communities funded college education with the understanding that graduates would go on to provide essential social services.³³ In addition, religious organizations, like churches and synagogues, sometimes funded scholarships.³⁴ Other times, wealthy families would pay for a scholarship subscription to ensure that the subscriber's relatives could attend the school at a later date.³⁵

The sale of scholarship subscriptions was a significant financial risk for early PWIs, mainly because the PWIs engaging in these sales did not have long-term financial plans.³⁶ Schools would immediately spend the "scholarship money" on present expenses instead of investing the capital.³⁷ Additionally, early PWIs did not set limits on the number of subscriber relatives that could attend the school for free in the future.³⁸ The lack of limits on the number of subscriber relatives that could attend was a problem for two reasons. First, the PWi would inherit a lasting financial liability because a subscriber relative could attend without paying at any time in the future.³⁹ Second, the PWi had a difficult time selling additional scholarship subscriptions with the lack of a cap on subscriber relatives that could attend under the early subscriptions terms and conditions.⁴⁰

PWIs began to charge higher rates of tuition to try to curb some of the negative effects of selling scholarship subscriptions.⁴¹ This rise in tuition co-occurred with a shift in the public's perception of higher education.⁴² By 1910, the public viewed higher education as a private affair that only benefitted the student, not

29. Allen et al., *supra* note 24, at 267.

30. *Id.*

31. *Id.*

32. THOMAS ADAM, THE HISTORY OF COLLEGE AFFORDABILITY IN THE UNITED STATES FROM COLONIAL TIMES TO THE COLD WAR 9–10, 23, 70, 81, 89–90 (2020).

33. *Id.* at 9–10, 23, 51.

34. *Id.* at 10, 51.

35. *Id.* at 35–36.

36. *Id.* at 35, 45.

37. *Id.*

38. *Id.* at 35.

39. *Id.* at 30, 35, 42–43.

40. *Id.* at 23 (perpetual scholarships entitled families who could prove that their ancestor had bought a subscription to free college education for centuries to attend).

41. *Id.* at 44–45 (describing that buying a tuition waiver if there is no tuition charged does not provide an incentive to prospective donors).

42. *Id.* at 13–15, 25, 120.

society.⁴³ By the 1920s, students were expected to pay or get a student loan to fund their education; scholarships were only considered a third tier of support.⁴⁴ Thus, PWIs transformed from an economically inclusive to an economically exclusive endeavor for the White economic elite.⁴⁵

3. School Segregation

Jim Crow laws formalized the racial apartheid system in the Southern United States from the 1890s to the 1960s by enforcing de jure segregation.⁴⁶ The maxim “separate but equal” was the driving force behind Jim Crow laws.⁴⁷ In the context of education, separate but equal meant that Black students and White students would be at separate schools but, purportedly, have equal educational facilities and opportunities.⁴⁸

In 1954, the Supreme Court formally acknowledged that “separate but equal” was a fallacy.⁴⁹ *Brown v. Board* held that separate educational facilities for Black and White children were inherently unequal.⁵⁰ On a national scale, Jim Crow school boards spent three times less on Black students than they did on White students.⁵¹ In areas of the Deep South where Black students often outnumbered White students, the financial disparities along racial lines were even worse.⁵² “Alabama spent \$37 on each White child in 1930 and just \$7 on those who were Black; in Georgia the figures were \$32 and \$7, in Mississippi they were \$31 and \$6, and those in South Carolina were \$53 and \$5, a disparity of more than ten-to-one.”⁵³ Additionally, Jim Crow schools limited Black students’ education by restricting the curriculum to the skills needed to work in agriculture or domestic service.⁵⁴ Black students also had trouble accessing books compared to White

43. *Id.* at 14–15, 25, 120.

44. *Id.* at 66–67, 120.

45. *Id.* at 121.

46. ELIZABETH SCHMERMUND, *READING AND INTERPRETING THE WORKS OF HARPER LEE 27* (2017); *American Experience: Jim Crow Laws*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/freedom-riders-jim-crow-laws/> (last accessed Feb. 20, 2024). *De jure* segregation is segregation that is authorized by law. *Segregation*, BLACK’S LAW DICTIONARY (11th ed. 2019). *De facto* segregation, by contrast, is segregation that occurs without state authorization. *Id.*

47. Schmermund, *supra* note 46, at 27; PBS, *supra* note 46.

48. Schmermund, *supra* note 46, at 27; PBS, *supra* note 46.

49. See *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954); see also *Plessy v. Ferguson*, 163 U.S. 537, 540 (1896). In *Plessy*, the 7-1 majority declared that it was constitutional for Louisiana state law to enforce “equal but separate accommodations for the white and colored races.” 163 U.S. at 540, 552. However, *Plessy* was overruled in 1954 by *Brown v. Board*, which quoted Justice Harlan’s “separate but equal” phrase from his dissent in *Plessy*. *Id.* at 552 (Harlan, J., dissenting); *Brown*, 347 U.S. at 487.

50. *Id.*

51. IRONS, *supra* note 26, at 33; see Hilary Herbold, *Never a Level Playing Field: Blacks and the GI Bill*, 6 J. BLACKS HIGHER EDUC. 106 (1994–1995) (further supporting the notion that Black public schools received significantly less funding than white public schools during the Jim Crow era).

52. IRONS, *supra* note 26, at 33.

53. *Id.*

54. *Id.* at 31.

students because Black students were banned from public libraries.⁵⁵ Therefore, while education was not explicitly banned as it had been in the past, Black students did not have nearly the same educational opportunities as White students.

The Jim Crow legacy did not end with *Brown v. Board*. Twenty years later, in *Milliken v. Bradley*, the NAACP filed a class action to address de jure segregation in the Detroit Public School system in Detroit, Michigan.⁵⁶ In the court proceedings leading up to the Supreme Court case, the District Court found that the Detroit Board of Education (Detroit Board) had enacted three policies that created and perpetuated segregation in Detroit.⁵⁷ First, the Detroit Board established optional school attendance zones in Detroit's racially transitioning neighborhoods, which created a "'natural, probable, foreseeable and actual effect' of allowing White pupils to escape identifiably Negro schools."⁵⁸ Second, the Detroit Board drew school attendance boundary lines from north to south "despite the Detroit Board's awareness that drawing boundary lines in an east-west direction would result in significantly greater desegregation."⁵⁹ Third, the Detroit Board bused Black students to predominately Black schools instead of placing them in closer, predominately White schools with available space, even though White students were never bused farther away to predominately Black schools.⁶⁰ The District Court's findings in *Bradley* indicate that de jure segregation also occurred in northern states because the school system discussed is in the northern state of Michigan. In addition, *Bradley* shows that educational segregation continued to plague school districts well after *Brown*.

The same harmful effects of de jure segregation can also occur in school systems that practice de facto segregation. In *Sheff v. O'Neill*, forty-two years after *Brown v. Board*, the Connecticut Supreme Court found that de facto racial and ethnic segregation existed in the Hartford public school district when compared to the surrounding suburban public school districts.⁶¹ Under the Connecticut State Constitution, the Connecticut Supreme Court noted that:

Despite the initiatives undertaken by the Defendants to alleviate the severe racial and ethnic disparities among school districts, and despite the fact that the Defendants did not intend to create or maintain these disparities, the disparities that continue to burden the education of the Plaintiffs infringe upon their fundamental state constitutional right to a substantially equal educational opportunity.⁶²

55. Richard Wright, *My Jim Crow Education: "Please Let This Nigger Boy Have a Book"*, 30 J. BLACKS HIGHER EDUC. 97 (2000) (adapted from *The Ethics of Living Jim Crow*, AMERICAN STUFF: WPA WRITERS' ANTHOLOGY (1937)).

56. *Milliken v. Bradley*, 418 U.S. 717, 722 (1974).

57. *Id.* at 725.

58. *Id.*

59. *Id.*

60. *Id.* at 725–26.

61. *Sheff v. O'Neill*, 678 A.2d 1267 (Conn. 1996).

62. *Id.* at 1267, 1288–89.

As a consequence of this segregation, Hartford schoolchildren had significantly worse standardized test scores compared to those in the surrounding suburban towns.⁶³ Ultimately, the court found that the Connecticut Constitution imposed an affirmative obligation on the state legislature to provide the minority schoolchildren with an educational opportunity substantially equal to that enjoyed by other schoolchildren and that this obligation exceeded any based on the federal constitution. *Sheff* illustrates how Black students' educational opportunities have still been restricted compared to White students even in states didn't adopt as many Jim Crow laws, and even decades after *Brown v. Board* was decided.

4. Inequality in GI Bill Benefits

In 1944, during the Jim Crow period, Congress passed the G.I. Bill to provide government aid to returning World War II veterans.⁶⁴ Congress intended for the G.I. Bill to provide World War II veterans with “funds for college education, unemployment insurance, and housing.”⁶⁵ While the G.I. Bill was a federal law, the administration of the benefits occurred at a local level through local banks and schools, which often refused to honor Black veterans' G.I. bill benefits.⁶⁶ Additionally, even if Black veterans managed to find an institution that would honor their G.I. Benefits, Black veterans still struggled to take advantage of this form of indirect compensation for several reasons.

First, Black veterans' unemployment benefits would be terminated if Black veterans refused to take a job at wages below subsistence level.⁶⁷ Second, it was difficult for Black veterans to forgo working to access the G.I. Bill education benefits.⁶⁸ Third, the almost entirely White Veterans Administration frequently denied the grant claims of Black veterans.⁶⁹ Fourth, local banks frequently denied home loans to Black veterans despite the G.I. Bill's guarantee of these loans, thereby denying many Black families one of the most straightforward paths to building wealth: homeownership.⁷⁰ Fifth, it was difficult for Black veterans to access tuition aid because HBCUs were overcrowded or Black veterans were systematically disenfranchised from merit scholarship eligibility at PWIs due to the subpar public education provided to Black citizens at this time.⁷¹ Even though

63. *Id.* at 1273.

64. G.I. Bill, Pub. L. No. 78-346, 58 Stat. 284 (1944).

65. *Servicemen's Readjustment Act (1944)*, NATIONAL ARCHIVES (May 3, 2022), <https://www.archives.gov/milestone-documents/servicemens-readjustment-act#:~:text=Roosevelt%20on%20June%202022%2C%201944,WWII%20and%20later%20military%20conflicts> (last accessed Feb. 20, 2024).

66. Quil Lawrence, *Black Vets Were Excluded From GI Bill Benefits — A Bill in Congress Aims to Fix That*, NPR (Oct. 18, 2022), <https://www.npr.org/2022/10/18/1129735948/Black-vets-were-excluded-from-gi-bill-benefits-a-bill-in-congress-aims-to-fix-th> (last accessed Feb. 20, 2024).

67. Herbold, *supra* note 51, at 105.

68. *Id.*

69. *Id.* at 106.

70. Lawrence, *supra* note 66; *Understanding Your Home's Equity*, FREDDIE MAC, <https://myhome.freddiemac.com/owning/equity-and-appreciation> (last accessed Feb. 20, 2024) (explaining how homeownership is an avenue for building wealth over time).

71. Herbold, *supra* note 51, at 106.

G.I. benefits applied to both Black and White veterans in Jim Crow America, segregationist principles in higher education effectively barred Black veterans from achieving a college degree.⁷² Consequently, a majority of Black veterans were limited to using their G.I. benefits at vocational training programs and trade schools.⁷³ On top of these administrative difficulties, economically successful Black veterans faced a real threat of retaliatory lynching from White Southerners.⁷⁴ Overall, Black veterans received fewer benefits from the G.I. Bill than White veterans due to racial discrimination and segregation.

5. The Civil Rights Movement

Many of the Civil Rights Movement's major victories came in the form of legislation.⁷⁵ In particular, the Civil Rights Act of 1964 (the 1964 Act), Executive Order 11246, and the Higher Education Act of 1965 had profound impacts on educational equality.⁷⁶ The 1964 Act was the most comprehensive civil rights legislation in United States history.⁷⁷ In addition to ordering desegregation in schools and places of public accommodation, it prohibited discrimination on the basis of race, national origin, sex, and religion by employers and companies receiving federal assistance.⁷⁸ Through the 1964 Act, the federal government gained the power to enforce civil rights provisions.⁷⁹ For example, the 1964 Act empowered the Attorney General to sue school districts that did not comply with the Supreme Court's desegregation mandate in *Brown v. Board*.⁸⁰ Overall, the 1964 Act played a crucial role in ending segregation and improving Black citizens' access to education.

In 1965, President Lyndon Johnson issued Executive Order 11246.⁸¹ The order required all federal government contractors to "take affirmative action to ensure that applicants are employed, and employees are treated during employment, without regard to their race, creed, color, or national origin."⁸² Over time, higher education institutions began to willingly apply affirmative action policies,

72. *Id.* at 107.

73. *Id.*

74. *Id.* at 105.

75. See, e.g., *The Modern Civil Rights Movement 1954-1964*, NAT'L PARK SERV., <https://www.nps.gov/subjects/civilrights/modern-civil-rights-movement.htm> (last accessed Feb. 20, 2024).

76. Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 1971 et seq.); Executive Order No. 11246, 30 Fed. Reg. 12319 (Sep. 24, 1965); Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified at 20 U.S.C. § 1001 et seq.) (amended 2022).

77. NAT'L PARK SERV., *supra* note 75.

78. See Civil Rights Act of 1964, P.L. 88-352, 78 Stat. 241.

79. Allison Brown, *Equity in Education: The Present and Future of the Civil Rights Act of 1964*, in *THE PURSUIT OF RACIAL AND ETHNIC EQUALITY IN AMERICAN PUBLIC SCHOOLS*, 128 (Kristi L. Bowman ed., 2015).

80. *Id.* at 128.

81. Executive Order No. 11246, 30 Fed. Reg. 12319; *History of Executive Order 11246*, OFF. FED. CONT. COMPLIANCE PROGRAMS, U.S. DEP'T EDUC., <https://www.dol.gov/agencies/ofccp/about/executive-order-11246-history> (last accessed Feb. 20, 2024).

82. Executive Order No. 11246, 30 Fed. Reg. 12319; OFF. FED. CONT. COMPLIANCE PROGRAMS, *supra* note 81.

likely due to the impact of Executive Order 11246.⁸³ In the higher education context, affirmative action is the notion that college admissions should provide “affirmative” help to racial minorities by preferencing those races.⁸⁴ Through affirmative action policies, racial minorities gained unprecedented access to White higher education institutions.⁸⁵

A year after the 1964 Act was enacted, Congress passed the Higher Education Act of 1965. Together, Title IV of the Higher Education Act of 1965 and Title VI of the 1964 Act provided extraordinary educational funding and opportunities for low-income students of all races. Title VI of the 1964 Act stipulated that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”⁸⁶ Together, these two acts laid the foundation for the present higher education financing system.

6. How the History of Higher Education Funding Affects the Present

Slavery was not the only injury that White society inflicted upon Black people.⁸⁷ After Emancipation, many Black families lived in poverty, and the legacy of segregation and discrimination negatively impacted Black citizens’ ability to build and transfer wealth to the next generation.⁸⁸ Black citizens’ education received less funding than White citizens’ education.⁸⁹ The curricula supported by White HBCU donors was not designed to train Black citizens for well-paying work.⁹⁰ Discrimination and segregation prevented Black citizens’ access to taxpayer funded social services like public libraries and the G.I. Bill. Black veterans lost the path to homeownership and equity afforded to White veterans when local banks refused to honor their G.I. Bill guaranteed veteran home loans.⁹¹ Lastly, Black veterans did not receive the same benefit of a G.I. Bill funded education because Black veterans did not have the same opportunity to attend college as White veterans.⁹²

With less wealth accumulated by Black Americans, there was less wealth to transfer from one Black generation to the next, especially when compared to

83. Peter Arcidiacono & Michael Lovenheim, *Affirmative Action and the Quality-Fit Trade-Off*, 54 J. ECON. LITERATURE 3–4 (2016).

84. *Id.*

85. *Id.* at 3.

86. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

87. See RICHARD ROTHSTEIN, *COLOR OF THE LAW* 237 (2017); Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (Jun. 14, 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/> (last accessed Feb. 20, 2024).

88. ROTHSTEIN, *supra* note 87, at 237; Coates, *supra* note 87.

89. IRONS, *supra* note 26, at 33; Herbold, *supra* note 51, at 106.

90. IRONS, *supra* note 26, at 31.

91. Wright, *supra* note 55, at 97; Herbold, *supra* note 51, at 106.

92. Herbold, *supra* note 51, at 107.

White generations.⁹³ Consequently, the legacy of segregation and discrimination did not just affect the Black people of the past, but continues to affect Black people today.⁹⁴ Critical Race Theory scholars call this the “engineered wealth gap.”⁹⁵ Since Black families have less wealth overall, Black students are forced to rely more heavily upon student loan funding than students of other races. This increased reliance upon student loan funding then disproportionately exposes Black students to the flaws within that system. While the historical effect of the engineered racial wealth gap would be enough on its own to explain why Black students are disproportionately impacted by the student loan crisis, this Note’s objective is to illuminate hidden structural biases against Black students and how these structural biases widen the engineered wealth gap between White and Black students today.⁹⁶

B. The United States’ Current Higher Education Financing Model

The Higher Education Act of 1965 established four main types of financial aid: scholarships, grants, work-study, and student loans.⁹⁷ Scholarships and grants are forms of financial aid that the student does not need to repay.⁹⁸ The terms and conditions of scholarship and grant funding are dictated by the fund provider, whether that be the government or a private source.⁹⁹ Work-study is a program where students’ wages for part-time jobs are partially or fully funded by the federal government.¹⁰⁰

Student loans are borrowed money that the student must pay back with interest.¹⁰¹ The government backs student loans with fixed terms and conditions that are set by law.¹⁰² The Department of Education charges an origination fee, which is a percentage of the loan amount, for processing the loan.¹⁰³ The origination fee

93. THOMAS N. SHAPIRO, *THE HIDDEN COST OF BEING AFRICAN AMERICAN: HOW WEALTH PERPETUATES INEQUALITY* 33–34 (2004).

94. ROTHSTEIN, *supra* note 87, at 237; Coates, *supra* note 87.

95. Coates, *supra* note 87.

96. *Id.*

97. *Types of Financial Aid: Loans, Grants, and Work-Study Programs*, FED. STUDENT AID, U.S. DEP’T EDUC., <https://studentaid.gov/understand-aid/types> (last accessed Feb. 20, 2024); Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified at 20 U.S.C. § 1001 et seq.) (amended 2022).

98. *Types of Financial Aid: Loans, Grants, and Work-Study Programs*, *supra* note 97.

99. *Id.*

100. Higher Education Act of 1965, Pub. L. No. 89-329; 2022-2023 FSA HANDBOOK, FED. STUDENT AID, U.S. DEP’T EDUC. Vol. 6, https://fsapartners.ed.gov/sites/default/files/2023-2024/2023-2024_Federal_Student_Aid_Handbook/_knowledge-center_fsa-handbook_2023-2024_vol6.pdf [hereinafter 2022–2023 FSA HANDBOOK].

101. *Types of Financial Aid: Loans, Grants, and Work-Study Programs*, OFF. FED. STUDENT AID, U.S. DEP’T EDUC., <https://studentaid.gov/understand-aid/types> (last accessed Feb. 20, 2024).

102. *See When It Comes to Paying for College, Career School, or Graduate School, Federal Student Loans Can Offer Several Advantages Over Private Student Loans*, FED. STUDENT AID, U.S. DEP’T EDUC., <https://studentaid.gov/understand-aid/types/loans/federal-vs-private> (last accessed Feb. 20, 2024) [hereinafter *Federal Loans v. Private Loans*].

103. *What Is an Origination Fee?*, FED. STUDENT AID, U.S. DEP’T EDUC., <https://studentaid.gov/help-center/answers/article/what-is-origination-fee> (last accessed Feb. 20, 2024).

is charged and subtracted prior to the application of the loan to the student's account.¹⁰⁴ Although the federal government backs federal student loans, the government assigns a private company, known as a loan servicer, to handle the billing, repayment, and collection of federal student loan payments.¹⁰⁵ These loan servicers earn a fee for every federal student loan serviced, so they have a financial interest in the proliferation of as many federal student loans as possible.¹⁰⁶ Students may also utilize private student loans and credit cards to pay for education costs, but these educational financing options are not federal financial aid.¹⁰⁷ State governments, schools, and private sources may also provide non-federal student aid to students through grants, scholarships, work-study, and loans, but these non-federal aid sources may come with different terms and conditions.¹⁰⁸

The federal government regulates what can be charged within a college or universities' cost of attendance (COA).¹⁰⁹ Under 20 U.S.C. § 10871l, higher education institutions may include tuition, fees, equipment costs, books, supplies, transportation, room, board, disability related expenses, loan fees, and one-time professional licensure costs in a given educational program's COA.¹¹⁰ Under this statute, the institution has a lot of flexibility to make the COA as high or low as the institution sees fit, given that the COA methodology is applied consistently to all students in the same course of study.¹¹¹

1. FAFSA: Free Application for Federal Student Aid

Higher education students may apply for federal financial aid by completing a Free Application for Federal Student Aid (FAFSA).¹¹² The primary details the student needs to provide are general demographic information, tax information from two years prior, household information, and additional asset information.¹¹³ Upon submission, the FAFSA goes to the central processing system (CPS) where an Estimated Family Contribution (EFC) is calculated based off the provided

104. *Id.*

105. *Who's My Student Loan Servicer?*, FED. STUDENT AID, U.S. DEP'T EDUC., <https://studentaid.gov/manage-loans/repayment/servicers> (last accessed Feb. 20, 2024).

106. *See* Oma Seddiq & Ayelet Sheffey, *Student-Loan Companies Have Spent Millions Fighting Efforts Like Biden's \$10,000 Debt-Cancellation Pledge, and So Far They're Winning*, BUSINESS INSIDER (Feb. 12, 2022), <https://www.businessinsider.com/student-loan-forgiveness-biden-stalling-lobbying-cancellation-debt-2022-1>.

107. *See Federal Loans v. Private Loans*, *supra* note 102; *African American College Students Appear to Be Swimming in a Sea of Credit Card Debt*, 64 J. BLACKS HIGHER EDUC. 39, 39 (2009).

108. *Who Gives Financial Aid?* NAT'L ASS'N OF STUDENT FIN. AID ADM'RS, https://www.nasfaa.org/Who_Gives_Financial_Aid (last accessed Feb. 20, 2024); *see Accepting Financial Aid*, FED. STUDENT AID, U.S. DEP'T EDUC., <https://studentaid.gov/complete-aid-process/accept-aid> (last accessed Feb. 20, 2024).

109. 20 U.S.C. § 10871l.

110. *Id.*

111. *See id.*

112. *See* 20 U.S.C. § 1090 (describing the structure and purpose of FAFSA); *see generally* 2022–2023 FSA HANDBOOK, *supra* note 100, at Application and Verification Guide (providing a detailed guide to completing FAFSA).

113. *See* 2022–2023 FSA HANDBOOK, *supra* note 100, at Applicable and Verification Guide, ch. 2.

application information.¹¹⁴ The EFC is an index number used to determine a student's eligibility for federal aid.¹¹⁵ The government does not provide underwriting for FAFSA.¹¹⁶ Therefore, when a student gets federal student loans there is no financial risk analysis as to whether the borrower is likely to repay the loans after graduation.

2. Verification

The government uses verification procedures to ensure students do not provide incorrect information on the FAFSA to achieve more grant aid. A random number of FAFSAs are selected for verification every year, which requires the higher education institution and the student to submit additional documentation designed to corroborate the information listed within the FAFSA.¹¹⁷ Before aid can be awarded or disbursed, the higher education institution must collect, review, record, and process the additional verification documentation.¹¹⁸ Any corrections or updates may be submitted by the student via a Student Aid Report or on the web by the school using the Financial Aid Administration access to CPS.¹¹⁹ Without the usual underwriting process for loans, the FAFSA verification process serves as one small oversight method to prevent an individual student from misrepresenting their assets on the FAFSA.

3. Calculating Student Aid Awards

Every dollar of federal student aid money awarded to a student is subject to many overlapping regulations and laws. To calculate the student's financial aid award, the Student Financial Aid Administrator collects and stores the student's Institutional Student Information Record, National Student Loan Data System, Financial Aid History, proof of Master Promissory Note completion, proof of Entrance Counseling, Academic Program, and the student's course selection.¹²⁰ A student financial aid administrator refers to the current Federal Student Aid (FSA) Handbook for awarding guidance and reference to the relevant statutes and

114. *Id.* at ch. 3.

115. *Id.*; see generally *What Is My Expected Family Contribution (EFC)?*, FED. STUDENT AID, U.S. DEP'T EDUC., <https://studentaid.gov/help-center/answers/article/what-is-efc> (last accessed Feb. 20, 2024) (providing general background information about EFC).

116. Jeffrey P. Naimon et al., *Recent, Development: School of Hard Knocks: Federal Student Loan Servicing and the Looming Federal Student Loan Crisis*, 72 ADMIN. L. REV. 259, 263 (2020). Underwriting is the "process by which a lender assesses a potential borrower's ability to repay and creditworthiness and adjusts the terms of the loan to align with the risk of repayment." *Id.* For a fuller explanation of the problems resulting from the lack of underwriting of student financial aid, see Part IV.B.

117. *How To Review and Correct Your FAFSA Form*, FED. STUDENT AID, U.S. DEP'T EDUC., <https://studentaid.gov/apply-for-aid/fafsa/review-and-correct> (last accessed Feb. 20, 2024) (explaining that some people are selected for verification at random; and some schools verify all students' FAFSA forms); see 34 C.F.R. § 668.56 (2023); 2022–2023 FSA HANDBOOK, *supra* note 100, at Application and Verification Guide, ch. 4.

118. *Id.*

119. *Id.* at 17.

120. 2022–2023 FSA HANDBOOK, *supra* note 100, VOL. 3, CH.3-4.

regulations governing federal financial aid.¹²¹ For example, if a student is eligible for Pell Grant funding, this funding is always awarded first, followed by other need-based grant funding such as Federal Supplemental Educational Opportunity Grant (FSEOG) and subsidized loans.¹²² Unsubsidized loan funding should be awarded after need-based grant funding like Pell Grant, FSEOG, and subsidized student loans.¹²³ The FSA Handbook specifically stipulates the order in which Student Financial Aid Administrators should apply federal student aid awards to a student's account.¹²⁴ Award order may not seem important, but if a Student Financial Aid Administrator applies financial aid awards in the wrong order, an otherwise eligible student may lose thousands of dollars of grant funding.¹²⁵

Which financial aid programs apply to a given student and the award order utilized varies from student to student based on eligibility for certain forms of financial aid. This variation in eligibility for each individual student introduces a great deal of complexity for financial aid administrators, students, and auditors. As the financial aid process is so complex and varies so much between students, higher education institutions are incentivized to operate in manners that augment profits because the institutions are unlikely to face consequences. This is a moral hazard in the economic sense where an economic actor is incentivized to increase their exposure to risk because the economic actor does not think they will bear the full costs of that risk.

4. Auditing Standards

Schools' federal financial aid records may undergo two different types of audits: program reviews conducted by the government, or a standard audit conducted by an ordinary accountant. Higher education institutions must maintain federal financial aid records for three years following the close of a federal fiscal year for future program reviews and financial aid audits.¹²⁶ Records may be kept digitally or physically.¹²⁷

121. See 2022–2023 FSA HANDBOOK, *supra* note 100, at Application and Verification Guide, ch. 4.

122. See 20 U.S.C. § 1070; 2022–2023 FSA HANDBOOK, *supra* note 100, at VOL. 3, CH. 7, 3-181, 3-183, 3-189. Figure 1 in the appendix is an example of what financial aid calculations look like. The hypothetical student in this example is an in-state, independent undergraduate student; taking classes at half time (6 credits); their expected family contribution (EFC) is 0 per semester; Hypothetical University's half-time tuition is set at \$5,000; the general student fee is \$300; technology fee is \$200; books are \$300; room and board is \$5,516; transportation is \$1,803; and \$3,288 is allotted for miscellaneous expenses. The student's COA at Hypothetical University was calculated at \$32,814.

123. See 20 U.S.C. § 1070; 2022–2023 FSA HANDBOOK, *supra* note 100, at VOL. 3, CH. 7, 3-181, 3-183, 3-189; Figure 1 in Appendix.

124. See 20 U.S.C. § 1070; 2022–2023 FSA HANDBOOK, *supra* note 100, at Vol. 3, Ch. 7 3-181, 3-183, 3-189; Figure 1 in Appendix.

125. Compare Figure 1 in Appendix with Figure 2. Figure 1 illustrates correct award order. Figure 2 shows how changing award order to apply the maximum amount of federal subsidized and unsubsidized student loans before the FSEOG grant is applied can cause the same student to lose out on approximately \$2000 of FSEOG funding.

126. 34 C.F.R. § 668.24; 2022–2023 FSA HANDBOOK, *supra* note 100, at Vol. 2, Ch. 7, 4-5.

127. 34 C.F.R. § 668.24; 2022–2023 FSA HANDBOOK, *supra* note 100, at Vol. 2, Ch. 7, 4-5.

The Secretary of Education is required by law to conduct program reviews of all higher education institutions receiving federal student aid money to ensure compliance with FSA rules and regulations on a “systematic basis.”¹²⁸ Reviews are conducted by the Department of Education’s School Participation Division (SPD).¹²⁹ However, the SPD does not conduct program reviews consistently but is more likely to do so if a school has a default rate, a significant fluctuation in loans or grants, a high dropout rate, or another sign of risk.¹³⁰ Similar to audits, program reviews cover things like fiscal operations, accounting procedures, and compliance with regulations.¹³¹

In addition, the Secretary of Education requires schools to conduct annual independent audits by an independent public accountant or a government auditor.¹³² Audits are required every year, unless the school submits and qualifies for an annual federal student aid audit waiver.¹³³ If a higher education institution qualifies for a waiver, the school may be exempt from submitting audit proof for up to three years.¹³⁴

Auditors are not required to have any formal training or education on financial aid statutes or regulations.¹³⁵ The lack of training and accountability for those auditors creates space for inconsistency. Without training in federal financial aid laws, auditors will be apt to misinterpret federal student aid regulations and each audit will vary. The lack of oversight makes it possible for inequities in the system to slip through the cracks. Additionally, when auditors are presented with the documentation for an audit, the financial aid calculations are not required.¹³⁶ Without the details on how a financial aid calculation was made, it becomes significantly more difficult—particularly for an untrained auditor—to identify whether federal funding is being misappropriated. This combination of inconsistent program reviews, untrained auditors, and lack of any requirement for institutions to present financial aid award calculations creates a significant moral hazard.

128. 20 U.S.C. §1099c-1(b).

129. FED. STUDENT AID, U.S. DEP’T EDUCATION, 2017 PROGRAM REVIEW GUIDE FOR INSTITUTIONS, CH. 1 DEPARTMENT PREPARATION FOR A PROGRAM REVIEW, 1-5, 1-6, <https://fsapartners.ed.gov/sites/default/files/attachments/programrevguide/2017ProgramReviewGuide.pdf> (last accessed Feb. 20, 2024).

130. 2022–2023 FSA HANDBOOK, *supra* note 100, at VOL. 2, CH. 8.

131. *Id.*

132. 34 C.F.R. § 668.23; 2022–2023 FSA HANDBOOK, *supra* note 100, at Vol. 2, Ch. 4.

133. *Id.*

134. *Id.*

135. 20 U.S.C. § 1094(c)(1)(A)(i)-(iii); U.S. GOV’T ACCOUNTABILITY OFF., U.S. GOVERNMENT AUDITING STANDARDS: 2018 REVISION TECHNICAL UPDATE APRIL 2021, <https://www.gao.gov/products/gao-21-368g> (last accessed Feb. 20, 2024) [hereinafter ACCOUNTABILITY] (providing requirements for auditors and auditing standards; notably, auditors are not trained in financial aid statutes or regulations).

136. EXEC. OFFICE OF THE PRESIDENT, OFF. FED. FIN. MAN. & BUDGET, 2 C.F.R. PART 200, APPENDIX XI: COMPLIANCE SUPPLEMENT (July 2021) 1, 1594-1668, https://www.Whitehouse.gov/wp-content/uploads/2021/08/OMB-2021-Compliance-Supplement_Final_V2.pdf, (last accessed Feb. 20, 2024) [hereinafter PRESIDENT] (showing auditors would be given financial aid award letters, ISIRS, SARS, NSLDS, COD, and verification documents, but that financial aid administrators’ calculations are not required).

5. Black Students are More Vulnerable to the Moral Hazards Posed by the Federal Financial Aid System

Black students and their families have diminished economic resources compared to those of other races due to the engineered wealth gap.¹³⁷ The diminished economic resources of Black students, as well as the diminished resources of low-income students, make such students more reliant upon need-based federal financial aid.¹³⁸ Since Black students rely more upon need-based financial aid, they are disproportionately impacted by the problems within the system.¹³⁹ Consequently, Black students are significantly impacted by the following problems within the financial aid system: insufficient oversight, the moral hazards posed by the current system, and the student loan debt crisis.

III. THE HARMS CAUSED BY THE STUDENT LOAN CRISIS

The ramifications of the student loan crisis are not limited to a single borrower. While individual borrowers experience numerous psychological, physical, and socioeconomic harms, the United States as a whole faces significant financial harm from the escalating crisis. The following section will discuss the impacts of student loans upon individual borrowers, the impact of the student loan crisis upon the nation, and how Black undergraduate students face greater harm from student loan debt than students of other racial demographics.

A. *The Harms to Individual Borrowers*

The individual harm caused by the student debt crisis is significant. Student loan debt is correlated with disparities in psychological well-being over time, with higher outstanding student loan balance being explicitly linked to higher distress.¹⁴⁰ Students with high debt burdens are less likely to have the resources for

137. LEE, *supra* note 4, at 5 (“The racial wealth gap both contributes to and is exacerbated by student debt . . . With fewer family resources to pay for college, Black students are more likely to turn to loans to finance higher education, and they borrow more on average.”).

138. Phillip Levine and Dubravka Ritter, *The Racial Wealth Gap, Financial Aid, and College Access*, BROOKINGS INST. (Sept. 27, 2022), <https://www.brookings.edu/articles/the-racial-wealth-gap-financial-aid-and-college-access/>.

139. *See id.*

140. Adam Eric Greenberg & Cassie Mogilner, *Consumer Debt and Satisfaction in Life*, 27 J. EXPERIMENTAL PSYCH. 57, 57, 60 (2021) (“The type of debt most strongly associated with lower levels of life satisfaction is student loans . . . The synthesized results revealed a significant negative relationship between student loan debt and life satisfaction, both for having student loan debt . . . and for the amount of student loan debt.”); Qun Zhang & Hyungsoo Kim, *American Young Adults’ Debt and Psychological Distress*, 40 J. FAM. & ECON. ISSUES 22, 31 (2019) (“Student loans are shown as a factor explaining disparities in psychological well-being over time, with higher outstanding student loan balance linked to higher distress.”); Katrina M. Walsemann et al., *Sick of our Loans: Student Borrowing and the Mental Health of Young Adults in the United States*, 124 SOC. SCI. & MED. 85, 91 (2015) (“Our data indicate that student loans are associated with poorer psychological functioning. This association is seen both for the cumulative amount of student loans borrowed across the course of schooling, as well as for the yearly amount of student loans borrowed while in college.”); Stuart Heckman et al., *Factors Related to Financial Stress Among College Students*, 5 J. FIN. THERAPY 19, 33 (2014) (“Students with larger amounts of expected debt were increasingly more likely to feel financially stressed. This provides

stress and anxiety management interventions.¹⁴¹ For example, socializing can be a key intervention in reducing stress and anxiety, but students with high debt burdens are less likely to have the time and resources to socialize. Such students are more likely to attend school part-time and are more likely to spend nonacademic time working.¹⁴² They are also less likely to live in dormitory settings with peers.¹⁴³ Altogether, these factors increase students' risk for social isolation and distress.¹⁴⁴ The worst psychological harm posed by a high student loan debt burden is an increased risk of borrower suicide.¹⁴⁵ Similar to other types of debt burden, the high levels of economic frustration caused by student loan debt contributes to a higher risk of suicide, particularly if the borrower is delinquent in student loan payments.¹⁴⁶ In summation, the psychological impact of student loans on borrowers is statistically significant. Compared to non-borrowers, student loan borrowers have an increased risk of psychological distress, social isolation, and suicide.

Student debt has also been connected with healthcare evasion and bad physical health.¹⁴⁷ Student debt holders have a heightened risk for cardiovascular disease and other morbidities compared to the general population.¹⁴⁸ If a student

evidence that the increase in student loan debt is having a negative impact on student wellness.”); Alisia G. T. T. Tran et al., *At What Costs? Student Loan Debt, Debt Stress, and Racially/Ethnically Diverse College Students' Perceived Health*, 24 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 459, 465 (2018) (“[Seventy five percent] of the participants in our study’s sample report that they were at least somewhat concerned about their student loan debt, which is consistent with previous research finding that approximately 75% of students experienced financial stress ‘at least some of the time.’”); Monique Simone Pisaniello et al., *Effect of Medical Student Debt on Mental Health, Academic Performance and Specialty Choice: A Systematic Review*, BMJ OPEN 1 (July 2, 2019) (“Medical student debt levels are negatively associated with mental well-being and academic outcomes, and high debt is likely to drive students towards choosing higher paying specialties.”).

141. See Tran et al., *supra* note 140, at 466.

142. *Id.*

143. *Id.*

144. *Id.*

145. See Roderick W. Jones, *The Impact of Student Loan Debt and Student Loan Delinquency on Total, Sex-, and Age-Specific Suicide Rates During the Great Recession*, 89 SOCIO. INQUIRY 677, 694 (2019).

146. *Id.*

147. Blain Pearson & Jae Min Lee, *Student Debt and Healthcare Service Usage*, 33 J. FIN. COUNS. & PLAN. 183, 188 (2022) (suggesting that, when compared to those without student debt, student debt holders have a lower likelihood of filling prescriptions for medicine, going to a doctor or clinic when they have a medical problem, and going to medical tests, treatments, and follow-up appointments); Adam M. Lippert et al., *Student Debt and Cardiovascular Disease Risk Among U.S. Adults in Early Mid-Life*, 63 AM. J. PREVENTATIVE MED. 151, 151 (2022) (“As student debt accumulates, within-cohort disparities in cardiovascular disease and related morbidities may undermine the health benefits of postsecondary education.”); Michael Babula & Alp Idil Ersoy-Babula, *Falling Behind: The Role of Student Loans on Forgoing Healthcare*, 30 HEALTH & SOC. CARE CMTY. 1944, 1948 (2021) (finding that student loan borrowers who were behind or in collections were “significantly more likely to forgo mental healthcare and counselling, seeing a doctor or specialist, follow-up care, prescriptions and dental care when adjusted for sociodemographic variables, childcare and eldercare expenses, health insurance, and medical debt”); Tran et al., *supra* note 140, at 464–465 (finding that the appraisal of debt as stressful was linked to poorer general health and more depressive symptomatology).

148. Lippert et al., *supra* note 147, at 151.

borrower perceives their debt as stressful, it increases the likelihood that the student will have poorer general health and depressive symptomology.¹⁴⁹ Student debt holders are less likely to fill prescriptions, receive medical treatments or complete medical tests.¹⁵⁰ A higher prevalence of healthcare avoidance is found among student debt holders, even when sociodemographic variables are controlled.¹⁵¹ Overall, student loan borrowers are more likely to forgo healthcare of any kind, particularly when student loans are delinquent or in default.¹⁵²

Student loan borrowers are also more likely to postpone or forgo traditional adulthood milestones.¹⁵³ The slang “boomeranging” was specifically created to describe the occurrence where an adult college graduate returns to the parental home after graduation.¹⁵⁴ Due to the student loan crisis, boomeranging is common among recent college graduates.¹⁵⁵ This is particularly true for Black undergraduate students, for whom there is a statistically significant association between student debt and returning to the parental home.¹⁵⁶ In addition to delaying the establishment of one’s own household in general, student loan debt has also been attributed as a preventative or a delayed factor in attaining home ownership later in life.¹⁵⁷ Student loan financial concerns also influence borrowers to postpone or forgo marriage.¹⁵⁸ Overall, the student loan crisis poses significant harm to individual borrowers due to an increased risk for mental health issues, poorer physical health, and delayed or forgone adult milestones.

B. *The Harms to the Nation*

In addition to causing harm to individual borrowers, the student loan crisis also threatens the financial health of the entire nation. The fallout from the student debt crisis is only beginning to unfold. Until recently, most of the issues in the higher education system and the student loan crisis were attributed to corrupt, for-profit institutions.¹⁵⁹ Today, the endemic issues within the educational system are becoming more transparent as the higher education market and the student

149. Tran et al., *supra* note 140, at 464–465.

150. Pearson & Lee, *supra* note 147, at 183, 188.

151. Babula & Ersoy-Babula, *supra* note 147, at 1948.

152. *See id.* at 1949.

153. Jason N. Houle & Cody Warner, *Into the Red and Back to the Nest? Student Debt, College Completion, and Returning to the Parental Home Among Young Adults*, 90 SOCIO. EDUC. 89, 103 (2017); Press Release, *supra* note 7 (“Americans across the nation are facing crushing student loan debt that is preventing them from purchasing homes and living the true American dream.”).

154. *See* Houle & Warner, *supra* note 153, at 89.

155. *Id.*

156. *Id.* at 103.

157. Press Release, *supra* note 7.

158. *See* Victoria J. Haneman, *Marriage, Millennials, and Massive Student Loan Debt*, 2 CONCORDIA L. REV. 103, 103 (2017).

159. Lauren Camera, *The Higher Education Apocalypse*, U.S. NEWS & WORLD REP. (Mar. 29, 2019), <https://www.usnews.com/news/education-news/articles/2019-03-22/college-closings-signal-start-of-a-crisis-in-higher-education>; Clayton M. Christensen & Michael B. Horn, *Innovation Imperative: Change Everything*, N.Y. TIMES (Nov. 1, 2013), <https://www.nytimes.com/2013/11/03/education/edlife/online-education-as-an-agent-of-transformation.html> (“[F]ederal financial aid seems to have gummed up

loan market approach collapse.¹⁶⁰ Student enrollment is the financial lifeblood that keeps college and university doors open. If enrollment drops too drastically, there will be colleges and universities who can no longer afford to operate.¹⁶¹ Prior to the COVID-19 pandemic, there was a devastating drop in college and university enrollment.¹⁶² In the fall of 2023, higher education enrollment increased for the first time in ten years; however, this increase in college enrollment is not expected to last.¹⁶³

The growth of federal student loan debt has outpaced the economy and created significant cash demands and outstanding debt on the federal purse.¹⁶⁴ Student loans account for 7.3% of the U.S. annual gross domestic product.¹⁶⁵ Since 2006, student debt has increased by 263% and has become the fastest growing segment of U.S. household debt.¹⁶⁶ As of October 6, 2022, cumulative student loan debt has surpassed credit card debt, making it the second largest type of private consumer debt after mortgages.¹⁶⁷ The main concern behind the federal student loan crisis is that the government—and therefore taxpayers—funds these loans.¹⁶⁸ Repayment rates for federal student loans are low and have declined further in recent years.¹⁶⁹ For student borrowers who stop going to college, repayment rates are 20% lower than students with completed college credentials.¹⁷⁰ Although the government has many methods to recover defaulted debt, such as “[S]ocial Security benefits, wage garnishment, and loan consolidation out of default,” it would be difficult for the national budget and the economy to recover if large numbers of borrowers default.¹⁷¹ Thus, the student loan crisis is not

the disruption: the easy revenue has encouraged some schools to indiscriminately enroll, often at the expense of quality, and has discouraged cost reduction.”).

160. Camera, *supra* note 159.

161. See NAT’L STUDENT CLEARINGHOUSE RSCH. CTR., *Stay Informed With the Latest Enrollment Information* (Oct. 26, 2023), <https://nscresearchcenter.org/stay-informed/>; Camera, *supra* note 160; Christensen & Horn, *supra* note 159.

162. See NAT’L STUDENT CLEARINGHOUSE RSCH. CTR., *supra* note 161; Camera, *supra* note 159; Christensen & Horn, *supra* note 159.

163. See NAT’L STUDENT CLEARINGHOUSE RSCH. CTR., *supra* note 161; Camera, *supra* note 159; Christensen & Horn, *supra* note 159; Alejandra O’Connell-Domenech, *College Enrollment Could Take a Big Hit in 2025. Here’s Why*, THE HILL (Jan. 10, 2024), <https://thehill.com/changing-america/enrichment/education/4398533-college-enrollment-could-take-a-big-hit-in-2025-heres-why/>.

164. RUDDY ET AL., *supra* note 8, at 8 (“[S]tudent debt on the federal balance sheet grew much faster than the economy, posing a greater risk to taxpayers . . . Nonetheless, these disbursements continue to place considerable cash demands on the federal purse and grow the total amount of debt outstanding.”).

165. *Id.* at 6.

166. Press Release, *supra* note 7 (referencing how student loan debt is becoming one of the fastest growing household debts in the U.S.).

167. *Id.*

168. See *Federal Loans v. Private Loans*, *supra* note 102.

169. RUDDY ET AL., *supra* note 8, at 12.

170. *Id.* at 12.

171. U.S. CONG. RSCH. SERV., R47196, *Federal Student Loan Debt Cancellation: Policy Considerations* (July 27, 2022), Text in: Congressional Research Digital Collection, Accessed Nov. 26, 2022, at 29.

merely a problem for individual borrowers but an impending financial crisis for the whole nation.

C. Jim Crow Debt: The Disproportionate Harm to Black Student Loan Borrowers

Though the student loan crisis is a problem for all Americans, Black undergraduate students face greater harm from student loan debt than students of other racial demographics.¹⁷² In the immediate aftermath of Emancipation, the United States did not offer reparations to partially repair the economic harm caused by slavery.¹⁷³ As a result, the descendants of enslaved people did not inherit generational wealth.¹⁷⁴ Additionally, the discriminatory policies that followed slavery further harmed the economic welfare of Black citizens.¹⁷⁵ Together, both of these factors created an engineered racial wealth gap where Black citizens have fewer economic resources than citizens of other races. Because Black students have fewer economic resources, they are forced to rely more heavily upon the federal financial aid system for education financing. As a result of this greater reliance, Black students are more likely to experience the harms created by the federal financial aid system. In addition, as a consequence of the lackluster underwriting for financial aid, Black Americans are more likely to borrow more debt than they will ever be able to pay off.¹⁷⁶ Thus, the student loan crisis and its corresponding harms are both a financial crisis and a racial justice issue.

The cumulative harm Black citizens experience because of the racial wealth gap is so embedded within the fabric of the United States that it is difficult to identify an individual source of harm. In the context of the student loan crisis, identifying an individual source of harm is particularly difficult because students of all races face a high debt burden.¹⁷⁷ Nonetheless, the data suggest that the student loan crisis disproportionately affects Black students.¹⁷⁸

Compared to other racial and ethnic groups, Black and Hispanic students are more likely to borrow to pay for their education.¹⁷⁹ Black students also borrow at a higher rate than other racial demographics and rely more heavily upon loans to finance their educational costs.¹⁸⁰ Relative to White students, Black students reported significantly more stress about student loan debt.¹⁸¹ Black students also

172. JALIL B. MUSTAFFA & JONATHAN DAVIS, THE EDUCATION TRUST, *JIM CROW DEBT: HOW BLACK BORROWERS EXPERIENCE STUDENT LOANS 3* (October 20, 2021), https://edtrust.org/wp-content/uploads/2014/09/Jim-Crow-Debt_How-Black-Borrowers-Experience-Student-Loans_October-2021.pdf.

173. *Id.*; SHAPIRO, *supra* note 93, at 33-34.

174. Coates, *supra* note 87.

175. *Id.*; SHAPIRO, *supra* note 93, at 33.

176. Naimon et al., *supra* note 116, at 263; RUDDY ET AL., *supra* note 8, at 20.

177. See King, *supra* note 4 (“Ballooning student debt was already a concern prior to COVID-19.”).

178. See, e.g., MUSTAFFA & DAVIS, *supra* note 172, at 4.

179. RUDDY ET AL., *supra* note 8, at 11.

180. *Id.* at 12; HOULE & ADDO, *supra* note 16, at 11, 13–65; *Aid Profile*, *supra* note 4, at 45, Figure 49.

181. Tran et al., *supra* note 140, at 465.

had poor sleep due to student loan stress, whereas no association has been found for White or Hispanic/Latino American students.¹⁸² In general, the risks associated with student loan debt are higher for Black and Hispanic/Latino Americans.¹⁸³ Black, African American, Hispanic, and Latino American students are more likely to leave college without completing a degree and to report greater student loan hardship compared to White and Asian American students.¹⁸⁴

After graduation, Black students leave with double the amount of debt as their White counterparts, and Black borrowers have more difficulty paying this debt off.¹⁸⁵ Black and Hispanic borrowers repay student loans at lower repayment rates and are more likely to access Income-Driven Repayment plans than White borrowers.¹⁸⁶ Black and Hispanic borrowers are also more likely to be delinquent on their student loans compared to White and Asian borrowers.¹⁸⁷ The worst harm that Black borrowers are disproportionately exposed to is student loan default. Black borrowers are five times more likely to default on their student loans than White borrowers.¹⁸⁸ Black borrowers' increased likelihood for default holds regardless of what institution type the borrower attended.¹⁸⁹ Overall, Black students suffer more from the negative effects of the student loan crisis than students of other racial demographics.

IV. DIAGNOSING THE CAUSES BEHIND THE STUDENT LOAN CRISIS

The United States' debt-based financing model for higher education, coupled with several inefficiencies within the federal financial aid system, has resulted in the present student loan crisis. The following section will discuss seven factors that contributed to the student loan crisis. First, the lack of reparations for the engineered wealth gap made Black students and their families less able to financially support Black college students today. Second, higher education costs have outpaced grant aid. Third, the federal student loan system has no underwriting standards for undergraduate students. Fourth, there are several inefficiencies within the Income-Driven Repayment plans offered by the federal government. Fifth, student loans are non-dischargeable under bankruptcy law. Sixth, there is a

182. *Id.* at 461 (internal citations omitted).

183. *Id.* at 465; Baum et al., *College on Credit: How Borrowers Perceive Their Education Debt*, 33 J. STUDENT FIN. AID 7, 7–19 (2003); Chen et al., *Investigating the Impact of Financial Aid on Student Dropout Risks: Racial and Ethnic Differences*, 81 J. HIGHER EDUC., 179, 179–208 (2010).

184. Tran et al., *supra* note 140, at 465; Baum et al., *supra* note 183, at 7–19; Chen et al., *supra* note 183, at 179–208.

185. HOULE & ADDO, *supra* note 16, at 67–83; RUDDY ET AL., *supra* note 8, at 16 (“Black borrowers were more than three times as likely to default on their student loans as White borrowers.”).

186. RUDDY ET AL., *supra* note 8, at 16.

187. *Id.* at 16 (“58% of Black and 42% of Hispanic borrowers who completed their bachelor’s degree in 2016 had at least one late loan payment within a year of graduating compared to 38% and 34% of White and Asian borrowers, respectively.”).

188. HOULE & ADDO, *supra* note 16, at 2 (stating that Black borrowers are five times more likely to default than White borrowers); Tran et al., *supra* note 140, at 460 (showing that racial and ethnic minority students are more likely to default on student loan debt than White students).

189. Gross et al., *supra* note 2, at 22.

lack of institutional accountability within the current financial aid system. Seventh, financial aid statutes and regulations do not require auditors to have specialized knowledge or training in financial aid law. Altogether these factors contribute to and exacerbate today's student loan crisis.

A. Higher Education Costs Have Outpaced Grant Aid

Grant aid has not kept pace with higher education costs, forcing students to rely more heavily upon educational loans.¹⁹⁰ In 1975, the maximum Pell Grant award was enough to cover approximately 80% of the attendance costs at a public four-year university.¹⁹¹ Today, the maximum Pell Grant covers only 29% of those costs.¹⁹² Since Black students are more likely to receive Pell Grants than White students, they are disproportionately impacted by the reduced value of Pell Grants.¹⁹³ This decline in Pell Grant value also forces minority students to rely more heavily upon Federal Student Loans.¹⁹⁴

B. No Underwriting

To make federal financial aid as accessible as possible, the legislature opted to remove nearly all forms of underwriting from federal student loans.¹⁹⁵ Underwriting is the method by which a moneylender assesses a potential borrower's ability to repay and then adjusts the loan terms to match the risk of repayment.¹⁹⁶ The only underwriting requirement created for student loans was that the student must attend a Title IV-approved school.¹⁹⁷ In comparison to other extensions of consumer credit, the government does not assess a student loan borrower's ability to repay, creditworthiness, risk of repayment, or if the loan terms align with the risk.¹⁹⁸ There is no consideration of the student's assets, preexisting creditworthiness, prospects for graduation, evaluation of the student's area of study, or any other factor.¹⁹⁹ This lack of underwriting combined with the inherent uncertainty of income after graduation makes it predictable that many student borrowers struggle to repay. Once students enter repayment, the disparities between low-income and high-income borrowers continue through inefficiencies within the government's Income-Driven Repayment plans.

190. RUDDY ET AL., *supra* note 8, at 16 ("Rising college costs have outpaced access to grant aid.").

191. *Id.* at 19.

192. *Id.*

193. WHITE HOUSE, *supra* note 4 ("Black borrowers are twice as likely to have received Pell Grants compared to their White peers."); RUDDY ET AL., *supra* note 8, at 16 (discussing the reduced value of Federal Pell Grants today).

194. WHITE HOUSE, *supra* note 4 ("Black borrowers are twice as likely to have received Pell Grants compared to their white peers."); RUDDY ET AL., *supra* note 8, at 19 ("As the relative value of Pell Grants has declined, low-income students have relied more heavily on federal student loans.").

195. Naimon et al., *supra* note 116, at 263.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

C. Inefficiencies Within Income-Driven Repayment Plans

Income-Driven Repayment (IDR) plans base monthly student loan payment amounts on a student's income and family size.²⁰⁰ Though IDR plans provide a viable debt management solution for struggling families, the current IDR structure is inefficient. IDR plans disproportionately benefit borrowers with the highest loan balances, who also tend to be the borrowers with the highest income.²⁰¹ IDR payments are 10–20% of any discretionary income, which may be defined anywhere from 100% to 225% above the federal poverty line.²⁰² Under IDR repayment, high-income borrowers can prolong their repayment and receive a higher subsidy from eventual loan forgiveness than low-income borrowers.²⁰³

Taxpayers pay a significant price for the administration of IDR plans. The equivalent of 21% of IDR plan loans will be completely forgiven through the built-in subsidy, which amounts to a \$40 billion cost to the federal government (i.e. taxpayers).²⁰⁴ Furthermore, the IDR repayment model costs taxpayers more money than need-based grants because the IDR program provides aid after the student incurs the additional cost of loan origination fees and interest. There are more efficient ways to use taxpayer money and restructuring the current IDR plans would be a positive first step.

In addition to being an inefficient use of taxpayer money, IDR plans also disincentivize marriage.²⁰⁵ Pursuant to the current financial aid laws, married couples pay higher student loan payments under IDR plans than cohabitating couples with the same income.²⁰⁶ This occurs because cohabitating couples' finances are evaluated separately and it is presumed that the cohabitating individuals are separately responsible for two household expenses.²⁰⁷ This leads to a lower rate for monthly student loan payments for both students.²⁰⁸ By contrast, for married couples, the household expenses are presumed to be shared.²⁰⁹ Consequently, the amount of presumed discretionary income is higher.²¹⁰ Overall, the current IDR framework creates a distinct marriage penalty for student loan borrowers enrolled in IDR plans.

200. *Income-Driven Repayment Plans*, FED. STUDENT AID, U.S. DEP'T EDUC., <https://studentaid.gov/manage-loans/repayment/plans/income-driven> (last accessed Feb. 20, 2024).

201. RUDDY ET AL., *supra* note 8, at 32.

202. *Income-Driven Repayment Plans*, *supra* note 200 ('Compare IDR Plans' chart provides the 10-20% income statistic); *Discretionary Income*, FED. STUDENT AID, U.S. DEP'T EDUC., <https://studentaid.gov/help-center/answers/article/discretionary-income> (last accessed Feb. 20, 2024).

203. RUDDY ET AL., *supra* note 8, at 23 (discussing how IDR plans are structured to be more beneficial for high-income borrowers).

204. *Id.* at 22 (\$40 billion figure applies to undergraduate debt; the amount of graduate debt forgiven is likely even more substantial).

205. Haneman, *supra* note 158, at 110–111.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

D. Federal Bankruptcy Law: Nondischargeable Student Loan Debt

Prior to 1976, student borrowers could discharge federal and private student loan debt during bankruptcy proceedings.²¹¹ Today, students can only discharge “qualified educational loans” in bankruptcy filings in extremely rare circumstances.²¹² Qualified education loans are only discharged in extremely rare circumstances.²¹³ To seek discharge of educational loans, a student loan debtor would need to file a separate adversary proceeding.²¹⁴ To succeed in the adversary proceeding, the student loan debtor has the burden of proving that the nondischargeable educational loans would pose “undue hardship on the debtor and the debtor’s dependents.”²¹⁵ If the bankruptcy court does not grant the discharge, the student loan borrower is still responsible for their higher education loans after filing for bankruptcy.

E. Lack of Institutional Accountability

The flaws within the United States’ higher education financing system allows “low-quality colleges to be financed by taxpayer dollars without providing students with a strong return on investment.”²¹⁶ The Department of Education utilizes cohort default rates (CDR) and financial responsibility scores to determine higher education institutions’ eligibility for federal student aid programs, like student loans.²¹⁷ At a minimum, a school’s CDR cannot exceed 40% for a single cohort or 30% for three consecutive cohorts.²¹⁸ The financial responsibility score evaluates the school’s financial health, with lower scores representing worse health.²¹⁹ As part of this evaluation, institutions “must provide financial assurance to the federal government that they will cover a specified portion of the costs associated with

211. Press Release, *supra* note 7 (referencing the history of student loan bankruptcy discharges).

212. 11 U.S.C. § 523(a)(8); Press Release, *supra* note 7; *see also* 26 U.S.C. § 221(d)(1) (statutory definition of qualified educational loans).

213. 26 U.S.C. § 221(d)(1) (“Qualified education loan. The term ‘qualified education loan’ means any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses—(A) which are incurred on behalf of the taxpayer, the taxpayer’s spouse, or any dependent of the taxpayer as of the time the indebtedness was incurred, (B) which are paid or incurred within a reasonable period of time before or after the indebtedness is incurred, and (C) which are attributable to education furnished during a period during which the recipient was an eligible student.”); Press Release, *supra* note 7.

214. FED. STUDENT AID, U.S. DEP’T EDUC., *Discharge in Bankruptcy*, <https://studentaid.gov/manage-loans/forgiveness-cancellation/bankruptcy> (last accessed Feb. 20, 2024).

215. *Id.*; 11 U.S.C. § 523(a)(8).

216. RUDDY ET AL., *supra* note 8, at 17 (“[L]ackluster and gameable accountability metrics also allow low-quality colleges to be financed by taxpayer dollars without providing students with a strong return on investment.”).

217. *Id.* at 24–25; *see also* 34 C.F.R. § 668.217 (regulation on default prevention plans).

218. RUDDY ET AL., *supra* note 8, at 24; *see generally* *Official Cohort Default Rates for Schools*, FED. STUDENT AID, U.S. DEP’T EDUC. (Nov. 20, 2023), <https://fsapartners.ed.gov/knowledge-center/topics/default-management/official-cohort-default-rates-schools>. For CDR purposes, a school’s “cohort” is the group of student borrowers who enter who received Federal Family Education Loans or on Direct Loans and entered repayment in a single fiscal year. Program loans during a given federal fiscal year. Cohort default rates are based on the percentage of those borrowers that default before the end of the second following federal fiscal year.

219. RUDDY ET AL., *supra* note 8, at 25.

student loan discharges should the school close.”²²⁰ The Department of Education may place schools with failing financial responsibility scores onto heightened cash monitoring for the purpose of limiting the government’s exposure in the event of a school closure.²²¹

Both the CDR and the financial responsibility scores are flawed measurements for an institution’s financial health. The CDR is an imperfect measurement for an institution’s repayment rate.²²² Since the CDR only measures the default rate for specific cohorts, and not the cumulative default rate for a school’s borrowers, the CDR rate does not accurately show whether an institution’s borrowers are making repayment progress.²²³ The financial responsibility score is also imperfect because it is based on two-year-old data that frequently does not provide an accurate picture of the institution’s finances.²²⁴ Taken as a whole, the two accountability metrics utilized do not guarantee that higher education institutions are financially sound or that students receive a return on their investment.

F. Insufficient Auditor Training

As discussed in Part II.B.4, auditors of higher education institutions’ financial aid finances are not required to have any formal training or education on financial aid statutes or regulations.²²⁵ This is particularly alarming given the high degree of complexity in the federal financial aid system resulting from every number in a student’s financial aid award being determined by several interwoven regulations.²²⁶ Additionally, if auditors are not provided with the individual calculations for each student’s financial aid awards, it is difficult to determine whether the institution is applying their financial aid award methods correctly.²²⁷ This insufficiency in financial aid audit requirements creates a situation where higher education institutions do not receive proper oversight over their administration of federal student aid funds. This lack of oversight creates a circumstance where institutions could augment profits through the misapplication of federal student aid funds. In summation, these insufficiencies in financial aid audit requirements create a significant moral hazard.

220. *Id.* at 25.

221. *Id.* at 25; *Heightened Cash Monitoring*, FED. STUDENT AID, U.S. DEP’T EDUC., <https://studentaid.gov/data-center/school/hcm> (last accessed Feb. 20, 2024).

222. RUDDY ET AL., *supra* note 8, at 24–25 (“[A] large share of an institution’s borrowers may be failing to make progress on paying down their loans, yet the school can pass the test with flying colors because of CDR’s narrow view. CDR therefore provides an incomplete picture of borrower outcomes and produces minimal institutional accountability.”).

223. *Id.*

224. *Id.* at 25.

225. See 20 U.S.C. §§ 1094I(1)(A)(i)-(iii); ACCOUNTABILITY, *supra* note 135.

226. See 20 U.S.C. §§ 1094(c)(1)(A)(i)-(iii); ACCOUNTABILITY, *supra* note 135.

227. See EXEC. OFFICE OF THE PRESIDENT, *supra* note 136 (showing auditors would be given financial aid award letters, ISIRS, SARS, NSLDS, COD, and verification documents, but that financial aid administrators’ calculations are not required).

V. NEXT STEPS TO ADDRESS THE STUDENT DEBT CRISIS

The United States' higher education model is not working. As shown in Part III, a large student debt burden significantly harms individual student loan borrowers, especially Black students. To address this burgeoning crisis, the United States needs to restructure higher education financing and triage the damage caused by the current model. There are three kinds of remedies the United States could pursue to address the burgeoning student loan crisis: legislative, administrative, and litigative. Parts V.A and V.B address legislative and administrative solutions to the problem, while Part VI discusses a potential litigative solution.

A. Legislative Solutions

In an ideal world, Congress would attend to the student loan crisis by addressing the harms created by the current system and redesigning the higher education financing system. One bill that would achieve both goals is the Student Borrower Bankruptcy Relief Act of 2022, which is sponsored by House Judiciary Chairman Jerrold Nadler and Congressman David N. Cicilline.²²⁸ If passed, this bill would eliminate the section of the bankruptcy code that makes private and federal student loans nondischargeable.²²⁹ Bankruptcy is a last resort for those who are financially struggling. It is unlikely that student loan borrowers would abuse the bankruptcy filing system.²³⁰ This bill could eliminate one of the most severe harms of student loans by allowing borrowers to access the bankruptcy processes that are available to nearly all other forms of consumer debt.²³¹

Congress should also redesign financial aid programs like the subsidized student loan program. The current subsidized student loan program does not maximize taxpayer investment.²³² Subsidized loans are need-based student loans that do not accrue interest while the borrower is in school at least half-time or during deferment periods.²³³ While subsidized federal student loans help middle- to lower-income students access higher education, taxpayer resources would be better spent on providing additional need-based grant aid.²³⁴ Need-based grant aid is more likely to promote retention and degree attainment than subsidized.²³⁵ With subsidized loans, taxpayers are paying for the subsidized loan interest while the

228. Press Release, *supra* note 7.

229. *Id.*; Student Borrower Bankruptcy Relief Act of 2022, H.R.9110, 117th Cong. (2022) (if passed, the bill would amend 11 U.S.C. §523(a) by striking paragraph 8).

230. Press Release, *supra* note 7.

231. *Id.*

232. *Reduce or Eliminate Subsidized Loans for Undergraduate Students*, CONG. BUDGET OFF. (Dec. 9, 2020), <https://www.cbo.gov/budget-options/56821> (last accessed Feb. 20, 2024)[hereinafter CONG. BUDGET OFF.]; see also RUDDY ET AL., *supra* note 8, at 31.

233. *The U.S. Department of Education Offers Low-Interest Loans to Eligible Students to Help Cover the Cost of College or Career School*, FED. STUDENT AID, U.S. DEP'T EDUC., <https://studentaid.gov/understand-aid/types/loans/subsidized-unsubsidized> (last accessed Feb. 20, 2024).

234. CONG. BUDGET OFF., *supra* note 232; see RUDDY ET AL., *supra* note 8, at 31.

235. RUDDY ET AL., *supra* note 8, at 31.

student is in school.²³⁶ If the student then defaults on a subsidized loan after graduation, the taxpayer then incurs the cost of the loan and the interest. As previously discussed, federal student loan defaults are on the rise.²³⁷ When students default on their loans, taxpayers spend more than they otherwise would on a need-based grant program. If more taxpayer funds were funneled into need-based grant programs instead of paying interest on subsidized student loans, taxpayers could save \$19 billion over ten years.²³⁸ Ultimately, converting subsidized student loan funding to grant funding would make for a cheaper and more effective education funding model.

Additionally, automatic enrollment in a progressive IDR plan could address the default risk that the Biden Administration hopes to address.²³⁹ The standard repayment plan currently has a default rate of 14% while the IDR plans have a default rate of less than 1%.²⁴⁰ Even without any changes to the current IDR repayment plan options, automatic enrollment in IDR instead of standard repayment would reduce the default rate and, consequently, the cost incurred by taxpayers.²⁴¹ The savings and benefits of an automatic IDR repayment system could be further augmented by a progressive IDR scheme.²⁴² In a progressive IDR scheme, the standard repayment cap would be removed and high-income borrowers would be required to pay their loans more quickly.²⁴³ These two changes would ensure that the IDR scheme maximizes benefits for borrowers who need relief while reducing costs to taxpayers. The Bipartisan Policy Center estimates that taxpayers could save \$10 billion over ten years by making either of these changes.²⁴⁴ These relief methods could provide greater efficiency than blanket debt forgiveness.

While legislative remedies to the student loan crisis would be the most democratic solution, such relief is unlikely to happen. The 2022 midterm elections resulted in a divided Congress where the Republican party controls the House and the Democratic party controls the Senate.²⁴⁵ Given the current party division within the 118th Congress, it is unlikely that a bipartisan bill will emerge to provide student loan debt relief.²⁴⁶ Accordingly, United States citizens should pursue other avenues for student loan debt relief.

236. CONG. BUDGET OFF., *supra* note 232 (explaining that the U.S. Department of Education pays the interest on direct subsidized loans).

237. RUDDY ET AL., *supra* note 8, at 15.

238. *Id.* at 31.

239. *Id.* at 32.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. Alex Seitz-Wald, *Republicans Win Control of the House, NBC News Projects, Overtaking Democrats by a Slim Margin*, NBC (Nov. 16, 2022), <https://www.nbcnews.com/politics/2022-election/republicans-win-control-house-nbc-news-projects-overtaking-democrats-s-rcna57223>.

246. Peter Zampa, *118th Congress Brings New Majorities, Old Divisions*, GRAY TELEVISION WASH. NEWS BUREAU (Dec. 29, 2022, 9:46AM), <https://www.graydc.com/2022/12/29/118th-congress-brings-new-majorities-old-divisions/> (“Congress will now consist of a Democrat-controlled Senate and a

B. Administrative Solutions

As discussed in Part I, President Biden attempted to use his enhanced executive powers from the COVID-19 national emergency declaration and the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to enact the Biden-Harris Student Debt Relief Plan (The Plan).²⁴⁷ In this plan, the Secretary of Education would use his powers under the HEROES Act to cancel approximately \$430 billion in student loans.²⁴⁸ On September 29, 2022, in *Nebraska v. Biden*, six states filed an action for declaratory and injunctive relief against President Biden, Secretary of Education Miguel Cardona, and the U.S. Department of Education.²⁴⁹ The plaintiff-states involved in this action stated that they, as well as their higher education student loan authorities, would be financially injured by The Plan through the loss of income created and maintained through student loan fees and interest payments.²⁵⁰ Ultimately, The Plan never came to fruition. On June 30, 2023, the Supreme Court held in *Biden v. Nebraska* that the emergency powers granted to the Secretary of Education through the HEROES Act did not authorize the cancellation of approximately \$430 billion in student loans.²⁵¹

On the same day, the Supreme Court also held in *Department of Education v. Brown* that two individual student loan borrowers did not have standing under Article III to assert a procedural challenge to The Plan.²⁵² In *Brown*, the student borrowers alleged that The Plan's attempt to circumvent the legislative process injured them by removing the student borrowers' ability to advocate for a student loan forgiveness plan that could suit their individual needs. The Supreme Court dismissed their claim stating that the respondents' injury was not "fairly traceable" to The Plan because the student borrowers did not establish a direct link between the HEROES Act plan and their desired outcome of a more favorable loan-forgiveness program under the Higher Education Act of 1965.

Many student borrowers were disappointed by the outcome of *Biden v. Nebraska* and *Department of Education v. Brown*, but the one-time relief proposed by The Plan would not have resolved the systemic issues within the United States' higher education financing system. As shown in the facts of *Biden v. Nebraska*, several states have built large portions of their economies around the continued proliferation and management of student debt. In fact, the Supreme

Republican-controlled House. The question looming is whether division or bipartisanship will dominate the narrative. 'The first three months of next year, we should all just kind of avert our eyes. There's a tremendous amount of pent-up aggression,' said Jason Grumet, president of the Bipartisan Policy Center.'").

247. LIU & STIFF, *supra* note 12, at 1.

248. *Biden v. Nebraska*, 600 U.S. 477, 482 (2023).

249. *Nebraska v. Biden*, 636 F. Supp. 3d 991, 995 (E.D. Mo. 2022).

250. *Id.* at 998–99.

251. *Biden*, 600 U.S. at 482.

252. *Dep't of Educ. v. Brown*, 600 U.S. 551, 556 (2023).

Court acknowledged that the outright cancellation of student debt would result in financial injury to these states' economies.²⁵³ While one-time student loan forgiveness is better than no relief at all, there are more economical and targeted forms of relief that the executive branch could adopt. Recent changes to the student loan bankruptcy review process from the Department of Justice and the Department of Education suggest an alternative.

On November 17, 2022, the Department of Justice (DOJ) and the Department of Education (DOE) collaborated to create transparent, consistent expectations for the discharge of student loan debt in bankruptcy.²⁵⁴ In the new bankruptcy procedure for federal student loans, both the DOJ and the DOE will review each case for undue hardship factors and assess whether the factors support a partial or complete discharge of the loans.²⁵⁵ In assessing whether student loans should be discharged in bankruptcy, the DOJ and the DOE will assess factors that go towards the debtor's present ability to pay, future ability to pay, and good-faith efforts the debtor has made towards payment to date.²⁵⁶ This reform of federal bankruptcy procedure is well within the executive branch's role in government and such relief would ultimately create more targeted, economical relief to borrowers who need the most assistance. Moving forward, executive agencies should take measures to provide similar student debt relief.

VI. THE POTENTIAL FOR ANTITRUST LITIGATION TO ADDRESS THE STUDENT LOAN CRISIS: *HENRY V. BROWN UNIVERSITY*

Individual borrowers may pursue antitrust litigation to achieve student loan relief. Antitrust litigation addresses and disincentivizes anticompetitive conduct.²⁵⁷ If successful, plaintiffs in an antitrust action are entitled to treble damages, the cost of the suit, and reasonable attorney's fees.²⁵⁸ Pursuing litigation after student loans are originated, disbursed, and in repayment is not the most effective method for dealing with the crisis; however, antitrust litigation does provide potential relief to suffering borrowers. One case that illustrates the potential of antitrust law as a remedy to the student loan crisis is *Henry v. Brown University*.²⁵⁹ The following section will analyze antitrust law as a potential

253. See *Biden*, 600 U.S. at 490.

254. Press Release, U.S. Dep't Justice, Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers (Nov. 17, 2022), <https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-fairer-and-more-accessible-bankruptcy>.

255. *At a Glance: Department of Justice's New Process for Student Loan Bankruptcy Discharge Cases*, U.S. DEP'T JUSTICE, https://www.justice.gov/d9/pages/attachments/2022/11/17/student_loan_discharge_guidance_-_fact_sheet_0.pdf (last accessed Feb. 20, 2024).

256. *Id.*

257. EARL W. KINTNER ET AL., *The Legislative History of the Sherman Act*, in FED. ANTITRUST LAW, vol. 1, ch. 4, § 4.1 (2021).

258. *Id.*

259. *Henry v. Brown Univ.*, No. 1:22-cv-00125, (N.D. Ill July 25, 2022).

solution to systematic issues within the United States' higher education financing system.

On January 9, 2022, five former students from elite, private national universities filed a class action complaint in an Illinois federal district court.²⁶⁰ The plaintiffs allege that the defendants—the higher education institutions in the 568 Presidents Group—violated §1 of the Sherman Act by forming a “price-fixing cartel” that was calculated to reduce or eliminate financial aid as a focal point of competition.²⁶¹ The 568 Presidents Group derives its name from the 568 Exemption within the Improving America’s Schools Act of 1994 (the 568 Exemption).²⁶² Under the 568 Exemption, higher education institutions have anti-trust law immunity as long as the collaborating schools accept students on a strictly need-blind basis.²⁶³ The plaintiffs contend that the 568 Exemption of the Improving America’s Schools Act of 1994 does not apply to the defendants—the 568 Presidents Group—because the collaborating schools did not accept students on a strictly need-blind basis.²⁶⁴ The Amended Complaint describes how the higher education institutions in the 568 Presidents Group shared confidential financial aid and admissions data to formulate and apply a common formula for the purpose of artificially restraining trade and inflating net price attendance.²⁶⁵ The next section will further explain the plaintiffs’ allegations.

A. *The Allegations*

The Amended Complaint alleges that the defendants do not qualify for the 568 Exemption because the defendants have not admitted all students on a need-blind basis. The plaintiffs reference the Varsity Blues scandal as well as other circumstances where the defendants did not admit all students on a need-blind basis.²⁶⁶ If these

260. Complaint, *Henry v. Brown Univ.*, No. 1:22-cv-00125, ¶ 2 (N.D. Ill. Jan. 9, 2022).

261. Amended Complaint, *Henry v. Brown Univ.*, No. 1:22-cv-00125, ¶¶ 12 (N.D. Ill. July 25, 2022). ¶ 1 (elite universities listed as defendants in this class action complaint include Brown University, California Institute of Technology, University of Chicago, The Trustees of Columbia University in the City of New York, Cornell University, Trustees of Dartmouth College, Duke University, Emory University, Georgetown University, Massachusetts Institute of Technology, Northwestern University, University of Notre Dame du Lac, The Trustees of the University of Pennsylvania, Rice University, Vanderbilt University, and Yale University).

262. Amended Complaint, *supra* note 261, ¶ 2; *see* Improving America’s Schools Act of 1994, Pub. L. No. 103-382, § 568, 108 Stat. 4060.

263. Amended Complaint, *supra* note 261, ¶ 2; *see* Improving America’s Schools Act of 1994, Pub. L. No. 103-382, § 568, 108 Stat. 4060.

264. Amended Complaint, *supra* note 261, ¶¶ 9, 134, 138, 141, 142, 144, 145, 149, 150, 155, 157, 158, 161, 166, 180, 184, 204, 208, 219, 247, 248, 267.

265. *Id.* ¶ 5.

266. *Id.* ¶¶ 9, 134, 138, 141, 142, 144, 145, 149, 150, 155, 157, 158, 161, 166, 180, 184, 204, 208, 219, 247, 248, 267. “Varsity Blues” is law enforcement’s code name for the 2019 investigation and prosecution of the college admissions bribery scandal, which involved allegations that certain universities gave admissions preference to the children of wealthy parents in exchange for bribes. *See* Alanna Durkin Richer, *Convictions, Prison Time: A Look at College Admissions Scam*, ASSOCIATED PRESS (Jan. 4, 2023, 4:01 PM) <https://apnews.com/article/college-admissions-scheme-timeline-e929d3f91e3b9dde2e7a4c73c64fcc82>.

allegations are true and the defendants did not admit on a need-blind basis, the plaintiffs assert that the defendants do not qualify for the 568 Exemption.²⁶⁷ If the defendants do not qualify for the 568 Exemption, then antitrust laws would apply to them.

The plaintiffs further allege that the defendants systemically fixed the higher education market through the application of its “Consensus Methodology” and that this methodology was a violation of U.S. antitrust laws. The Consensus Methodology is a common formula that the defendants designed to calculate an applicant’s ability to pay.²⁶⁸ The figure derived from the common formula was then used by the higher education institutions in the 568 Presidents Group as a “substantial determinant” for net price.²⁶⁹ The plaintiffs allege that the 568 Presidents Group’s use of the Consensus Methodology artificially inflated the net price of attendance for students receiving financial aid.²⁷⁰ More specifically, the Amended Complaint contends that the defendants colluded to create artificially inflated net price attendance for over 200,000 financial aid recipients at the defendants’ higher education institutions for close to twenty years, thereby violating antitrust laws.²⁷¹ Furthermore, the plaintiffs allege that this violation of antitrust laws was intentional.²⁷² The plaintiffs allege that the defendants do not qualify for the 568 Exemption because the defendants did not apply need-blind admissions practices to *all* students.²⁷³

The Amended Complaint further describes how the defendants colluded to restrain trade within the elite, private higher education market.²⁷⁴ Member institutions met regularly “to devise, agree upon, and collectively implement common principles and a uniform method for analyzing, offering, and providing financial aid to admitted students.”²⁷⁵ The 568 Presidents Group monitored and enforced member institutions’ application of the Consensus Methodology by requiring each institution to submit a certificate of compliance, require university professionals to receive training in the application of the Consensus Methodology; impose a “common calendar for the collection of data from students’ families;” and conduct an “annual or biannual meeting every year since 2007.”²⁷⁶

The Amended Complaint alleges that since 2003, the defendants controlled approximately 61–78% of the undergraduate slots within the elite, private university market.²⁷⁷ Therefore, the plaintiffs contend that the defendants exercised their significant market control to enter into a “continuing agreement, understanding,

267. Amended Complaint, *supra* note 261, ¶¶ 3, 4.

268. *Id.* ¶ 5.

269. *Id.*

270. *Id.* ¶¶ 1, 5.

271. *Id.* ¶ 7.

272. *Id.* ¶¶ 7, 267.

273. *Id.* ¶ 3.

274. *Id.* ¶¶ 9, 10.

275. *Id.* ¶ 6.

276. *Id.* ¶ 121.

277. *Id.* ¶ 252.

and conspiracy to restrain trade artificially to fix, raise, stabilize, and reduce the amount of financial aid” paid to the class action members.²⁷⁸ In conclusion, the plaintiffs claim that the defendants’ 568 Presidents Group is a price fixing cartel that colluded to restrain trade and competition within the elite higher education market.²⁷⁹

B. The Potential Implications of Henry v. Brown University

The implications of *Henry v. Brown University* are numerous. First, if the defendants do control between 61% and 78% of the elite, private higher education market, it is likely that the entire market was affected.²⁸⁰ An entire market can be affected by a cartel’s artificially raised prices when the non-participating market members raise their net prices in response to the cartel’s prices. If the 568 Presidents Group did operate like a price fixing cartel, it is likely that all financial aid recipients in the elite, private higher education market have been injured by the artificially high net prices. Second, the injuries sustained by the financial aid recipients include the loss of a competitive marketplace, suppressed financial aid, artificially inflated net prices of attendance, and a greater student loan debt burden.²⁸¹ If the plaintiffs’ allegations are found to be true, the defendants’ 568 Presidents Group contributed to the student loan crisis by increasing 200,000 financial aid recipients’ student loan debt burden.²⁸² Third, if elite, private higher education institutions are artificially restraining trade and reducing financial aid paid to students, it indicates that financial aid manipulation is endemic to the higher education market. Fourth, Black students are more likely to be harmed by artificial price fixing than other racial demographics because Black students have less wealth and they rely more heavily upon need-based financial aid than other demographics.²⁸³ This increased reliance on federal financial aid, combined with more limited financial resources, makes Black students more vulnerable to the harms posed by artificially high net prices in the higher education market. Consequently, Black students are disproportionately impacted by the effects of the 568 Cartel Price Fixing.

Overall, *Henry v. Brown University* reveals that white-collar crime could be a significant factor in the student loan debt crisis. The following section will discuss how this situation may be addressed by the courts and raise critical questions about the viability of such claims under the Sherman Act. My focus is on the strength of the plaintiffs’ allegations in the Amended Complaint, but it should be

278. *Id.* ¶ 262.

279. *Id.* ¶ 5.

280. *Id.* ¶ 252.

281. *Id.* ¶ 9.

282. *Id.* ¶ 7.

283. Phillip Levine and Dubravka Ritter, *The Racial Wealth Gap, Financial Aid, and College Access*, BROOKINGS INST. (Sept. 27, 2022), <https://www.brookings.edu/articles/the-racial-wealth-gap-financial-aid-and-college-access/>; SHAPIRO, *supra* note 93, at 33–34; WHITE HOUSE, *supra* note 4 (“Black borrowers are twice as likely to have received Pell Grants compared to their white peers.”).

noted at the outset that the plaintiffs have survived the defendants' motions to dismiss after U.S. District Judge Matthew F. Kennelly issued an order denying the defendants' motions.²⁸⁴

C. Did the 568 Presidents Group Fail to Meet the 568 Exemption?

To prove that the *Henry v. Brown University* defendants (the higher education institutions in the 568 Presidents Group) violated antitrust law, the plaintiffs must first prove that the defendants are not eligible for the 568 Exemption under Section 568 of the Improving America's Schools Act of 1994.²⁸⁵ The 568 Exemption gives antitrust law immunity to higher education institutions that practice need-blind admissions.²⁸⁶ Under Section 568, "need-blind" is defined as "without regard to the financial circumstances of the student involved or the student's family."²⁸⁷ This first allegation will be difficult for the plaintiffs to prove. The 568 Presidents Group (the defendants) presented itself as a faction of higher education institutions that were specifically organizing under the 568 Exemption.²⁸⁸ The group's name is directly derived from Section 568 of the Improving America's Schools Act of 1994.²⁸⁹ The 568 President Group website (the defendants' website) also states that the group is an affiliation of colleges and universities who admit students on a need-blind basis.²⁹⁰ To succeed, the plaintiffs will have to counter the 568 Presidents Group's public image.

To establish that the 568 Presidents Group does not qualify for the 568 Exemption, the plaintiffs must prove that the defendants did not practice need-blind admissions.²⁹¹ To do so, the plaintiffs allege that the defendants considered the financial circumstances of students and their families in deciding whether to admit waitlisted and transfer students.²⁹² The plaintiffs also contend that several of the defendants have favored students of wealthy past or potential donors and offered a secretive, preferential, and alternative admissions route to wealthy applicants.²⁹³ They even allege that defendant Columbia University explicitly considered the financial circumstances of students and families in its admissions decisions for the School of General Studies.²⁹⁴

If the following allegations are found to be true, the plaintiffs argue that the defendants are not entitled to the 568 Exemption under the Improving America's

284. See Memorandum Opinion and Order, *Henry v. Brown Univ.*, No. 1:22-cv-00125, 2 (N.D. Ill. Aug. 15, 2022).

285. Amended Complaint, *supra* note 261, ¶ 114.

286. *Id.*; Improving America's Schools Act of 1994, § 568(a), Pub. L. No. 103-382, § 568(a), 108 Stat. 4060.

287. Improving America's Schools Act of 1994, Pub. L. No. 103-382, § 568(c)(6), 108 Stat. 4061.

288. Amended Complaint, *supra* note 261, ¶ 114.

289. *Id.*

290. *Id.*

291. *Id.* ¶ 3.

292. *Id.* ¶ 8.

293. *Id.*

294. *Id.*

Schools Act of 1994 because the defendants did not apply “need-blind” admissions practices to all students.²⁹⁵ In his order on the defendant’s motion to dismiss, Judge Kennelly found that the plaintiffs had sufficiently alleged that the defendants were not covered by the 568 Exemption.²⁹⁶

The next allegation the plaintiffs must prove is that the defendants violated antitrust laws. Within the complaint, the plaintiffs allege that the defendants violated antitrust laws by engaging in a price fixing conspiracy, which is a *per se* violation of the Sherman Act.²⁹⁷ In the alternative, the plaintiffs allege that a violation of the Sherman Act occurred under the Rule of Reason “quick look” analysis.²⁹⁸ The plaintiffs accuse the defendants of violating the Sherman Act by creating and utilizing a common formula to calculate an applicant’s ability to pay and by using this figure as a substantial determinant for net price (“net price” here is the tuition and fees at the involved colleges and universities).²⁹⁹ The plaintiffs allege that the defendants’ conspiracy resulted in a net price of attendance that has been fixed, increased, maintained, and stabilized at artificially high, non-competitive levels for all Class Members (students at the involved institutions).³⁰⁰ In summation, the plaintiffs allege that Class Members were economically injured by the illegal anti-competitive behavior of the defendants and that the defendant’s behavior does not qualify for antitrust immunity. The plaintiffs and the other Class Members seek an injunction to stop the defendants’ activities, treble damages, costs, and attorney fees.³⁰¹

D. *The Merits of the Plaintiffs’ Antitrust Claim*

In addition to finding that the defendants in the 568 Presidents Group do not meet the 568 Exemption, the court in *Henry v. Brown University* must also find that the defendants in the 568 Presidents Group violated §1 of the Sherman Antitrust Act. The Sherman Act of 1890 was intended to promote the general principle of full and free competition in interstate and foreign commerce.³⁰² §1 of the Sherman Act provides:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.³⁰³

295. *Id.* ¶ 267.

296. Memorandum Opinion and Order, *supra* note 284, at 2.

297. Amended Complaint, *supra* note 261, ¶ 268.

298. *Id.*

299. *Id.* ¶ 5.

300. *Id.* ¶ 265.

301. *Id.* ¶ 270, § XIII(e)–(f).

302. See KINTNER, *supra* note 257, at vol. 1, ch. 4, § 4.1.

303. Sherman Antitrust Act of 1890, 15 U.S.C. § 1.

The broad language used within the Sherman Act was deliberate. Congress made the Sherman Act broad so that the courts could “create, in common-law fashion, pretty much the entire body of antitrust law.”³⁰⁴

The plaintiffs must prove three elements to prevail in a claim under the Sherman Act. First, the conspiracy must be knowingly formed and in existence at the time alleged.³⁰⁵ Here, the defendants met the first element of the Sherman Act when defendants knowingly conspired to create, apply, and enforce the 568 Presidents Group Consensus Methodology where an applicant’s ability pay was a “substantial determinant” for the institutions’ net price (tuition and fees). Second, the defendant needed to knowingly join the charged conspiracy.³⁰⁶ The defendants met the second element of the Sherman Act when they knowingly agreed to the terms of 568 Presidents Group membership, completed a certificate of compliance, and engaged with other members to amend and utilize the Consensus Methodology.³⁰⁷ Third, the conspiracy must either substantially affect interstate commerce or be within the flow of interstate commerce.³⁰⁸ Here the defendants affected interstate commerce when the defendant institutions admitted students around the country; engaged in transactions with parties residing in different states; and when the defendant institutions engaged in business across state lines.³⁰⁹ These facts within the Amended Complaint suggest that the conspiracy substantially affected the flow of interstate commerce.

In addition to the three elements of the Sherman Antitrust Act, the plaintiffs must clearly identify the scope of the conspiracy and the conspiracy participants.³¹⁰ Here, the Amended Complaint identifies the scope of the conspiracy to be from the year 2007 to 2022, and it names the universities and colleges involved in the conspiracy. Overall, the plaintiffs’ claim is likely to succeed because the Amended Complaint meets all three elements of the Sherman Act test, identifies the scope of the conspiracy, and identifies the conspiracy participants.

The Amended Complaint in *Henry v. Brown University* alleges that the 568 Presidents Group’s Consensus Methodology was a *per se* violation of the Sherman Act.³¹¹ *Per se* violations are defined as automatic, unreasonable restraints of trade that require no further analysis of factors like reasonableness or economic justification.³¹² Price fixing, bid rigging, and market allocation are automatically defined as *per se* violations.³¹³ Price fixing is defined as “an

304. FREDERICK SCHAUER, THINKING LIKE A LAWYER 148 (2009).

305. Sherman Antitrust Act of 1890, 15 U.S.C. § 1; *Elements of the Offense*, U.S. DEP’T JUST. ARCHIVES, <https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement> (last accessed Feb. 20, 2024) [hereinafter *Offense Elements*].

306. Sherman Antitrust Act of 1890, 15 U.S.C. § 1; *Offense Elements*, *supra* note 305.

307. Amended Complaint, *supra* note 261, ¶¶ 263, 264.

308. *Offense Elements*, *supra* note 305.

309. Amended Complaint, *supra* note 261, ¶ 16.

310. *Offense Elements*, *supra* note 305.

311. Amended Complaint, *supra* note 261, ¶ 240.

312. *Offense Elements*, *supra* note 305.

313. *Id.*

agreement (written, verbal, or inferred from conduct) among competitors to raise, lower, maintain, or stabilize prices or price levels.”³¹⁴ The plaintiffs allege that the Consensus Methodology is price fixing because the methodology is a written agreement among elite private university competitors to raise, lower, maintain, or stabilize the net prices of their universities’ tuition and fees. Therefore, if the facts alleged are found to be true, it is likely that the 568 Presidents Group committed a *per se* violation of the Sherman Act by engaging in price fixing.

E. What Happens if the Plaintiffs in Henry v. Brown University Prevail?

To survive a motion to dismiss, a Sherman Act claim must contain enough factual matter to suggest that discovery will reveal evidence of an illegal agreement to restrain commerce.³¹⁵ The complaint must identify enough facts to render a §1 conspiracy plausible.³¹⁶ A mere allegation of parallel conduct and a bare “assertion of conspiracy [does] not suffice.”³¹⁷ Proof of a written agreement, for example, could provide sufficient basis for a complaint.³¹⁸ Due to the enormous expense of antitrust discovery, courts take particular care to dismiss §1 claims that do not have a “reasonably founded hope that the [discovery] process will reveal relevant evidence.”³¹⁹ If the complaint has sufficient factual support, the court must then determine whether the plaintiff is entitled to relief if the fact finder discovers the facts to be true. If the facts are ultimately found to be true in a §1 Sherman Act claim, plaintiffs are entitled to “threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”³²⁰

Here, the *Henry v. Brown University* Amended Complaint provides evidence of a conspiracy beyond parallel conduct. The facts in the Amended Complaint show that the 568 Presidents Group compromised an agreement, understanding, or meeting of the minds between at least two competitors with the effect of unreasonably restraining trade in the elite, private higher education market through the creation and enforced application of the Consensus Methodology.³²¹ According to the Amended Complaint, the defendant’s 568 President’s Group created and

314. *Price Fixing*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing> (last accessed Feb. 20, 2024).

315. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007).

316. *Id.*

317. *Id.* at 556.

318. *Id.* at 557.

319. *Id.* at 559.

320. 15 U.S.C. § 15(a).

321. Amended Complaint, *supra* note 261, ¶¶113, 115–117, 120; *The 568 Presidents Group Consensus Methodology Policy Guidelines*, 568 PRESIDENTS GROUP (Nov. 2015), https://web.archive.org/web/20220116101221/http://www.568group.org/home/sites/default/files/CM_Public_Manual-Final%203.1.16.pdf [hereinafter 568 PRESIDENTS GROUP] (explaining that the 568 Presidents Group higher education institutions have agreed on a series of common need analysis standards designed to be included in a Consensus Methodology); Shevani Jaisingh, *28 Colleges Alter Financial Aid Packages*, THE DARTMOUTH (July 17, 2001), <https://www.thedartmouth.com/article/2001/07/28-colleges-alter-fin-aid-packages>.

agreed to follow a Consensus Methodology.³²² In this methodology, the group agreed to common elements of need analysis, a common calendar for collecting data from families, a uniform training program for the application of the methodology, and oversight to review and modify the methodology as needed.³²³ Together, the defendants shared confidential financial aid and admissions data from all their respective higher education institutions and used this data to make changes to the Consensus Methodology.³²⁴ The defendants, all members of the 568 Presidents Group, then swore to uphold this Common Methodology through a Certificate of Compliance.³²⁵ The facts alleged in the Amended Complaint raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.³²⁶ Accordingly, Judge Kennelly held that the plaintiffs' legal conclusions accusing the defendants of a price fixing conspiracy are sufficiently supported by factual allegations within the *Henry v. Brown University* Amended Complaint.³²⁷

If the plaintiffs in *Henry v. Brown University* ultimately prevail on the merits and the court finds that the defendants formed a price fixing cartel to create automatic, unreasonable restraints within financial aid, the Sherman Act allows the injured class action members to recover three times the damages they prove they have suffered.³²⁸ Treble damages could help alleviate class action members' inflated student loan debt caused by the artificially high prices engineered by the 568 Presidents Group.

VII. CONCLUSION & NEXT STEPS

There are many causes for the federal student loan crisis. The fallout from the student loan crisis disproportionately impacts Black student loan borrowers compared to students of all other racial demographics. The main reason Black students face a greater impact from the student loan crisis than other racial demographics is the engineered wealth gap between White and Black individuals. This wealth gap, along with the increased cost of higher education, forces Black students to rely upon federal student aid programs more than students of other races. This increased reliance disproportionately exposes Black students to the flaws within the federal financial aid system.

322. Amended Complaint, *supra* note 261, ¶¶ 113, 115–117, 120; 568 PRESIDENTS GROUP, *supra* note 321; Jaisingh, *supra* note 321.

323. Amended Complaint, *supra* note 261, ¶¶ 113, 115–117, 120; 568 PRESIDENTS GROUP, *supra* note 321; Jaisingh, *supra* note 321.

324. Amended Complaint, *supra* note 261, ¶¶ 113, 115–117, 120; 568 PRESIDENTS GROUP, *supra* note 321; Jaisingh, *supra* note 321.

325. Amended Complaint, *supra* note 261, ¶¶ 113, 115–117, 120; 568 PRESIDENTS GROUP, *supra* note 321; Jaisingh, *supra* note 321 (as of February 9, 2024, the 568 Presidents Group website has been taken down, the original site can be accessed at <https://web.archive.org/web/20221026230722/http://www.568group.org/home/>); 568 PRESIDENTS GROUP, *supra* note 321 (*the 568 Presidents Group Consensus Methodology Policy Guidelines* cited in the complaint can still be found on The Internet Archive).

326. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007).

327. Memorandum Opinion and Order, *supra* note 284, at 17–18.

328. EARL W. KINTNER ET AL., 11 FED. ANTITRUST LAW § 79.1 (Matthew Bender 2023).

If the plaintiffs in *Henry v. Brown University* prevail, the treble damages provided by the Sherman Act could help alleviate the class action members' inflated student loan debt caused by the artificially high prices engineered by the 568 Presidents Group. While the outcome of *Henry v. Brown University* remains to be seen, antitrust suits provide a potential legal remedy for student borrowers wronged by inherent flaws in the modern student loan system.³²⁹ For future research into legal remedies for the student loan crisis' disproportionate impact on Black students, scholars should look into anti-discrimination law and "reverse redlining" in the context of higher education.³³⁰ Reverse redlining is the practice of targeting borrowers of color for loans on unfavorable terms.³³¹ Given the high interest rates and the secretive practices of the private student loan market, it is entirely possible that private students loans are subprime loans that may operate similarly to the mortgage crisis' subprime loans.³³² Future scholars should look at the application of anti-discrimination law to reverse redlining in higher education, but a complete survey of legal techniques on this topic is beyond the scope of this Note.³³³

Ultimately, pursuing litigation after student loans are originated, disbursed, and in repayment is not the most effective method for dealing with the student loan crisis. In addition to providing legal remedies for wronged student borrowers, policymakers should focus on restructuring the financial aid regulatory scheme. The U.S. should introduce more progressive programs by prioritizing IDR over standard loan repayment, student borrower bankruptcy relief and expanding need-based grants in lieu of the subsidized student loan program. By enacting these measures, future generations will not be as burdened by student loans and federal funding will better serve higher education students.

329. As of February 10, 2024, the parties seem to be moving toward settlement. See Notification of Docket Entry, *Henry v. Brown Univ.*, No. 1:22-cv-00125, (N.D. Ill. Jan. 30, 2024) (scheduling video motion for hearing on the plaintiffs' motion for preliminary approval of settlements on February 12, 2024).

330. See *Carroll v. Walden Univ., LLC*, 650 F. Supp. 3d 342 (D. Md. 2022) (a new higher education reverse redlining class action case in Baltimore); HOULE & ADDO, *supra* note 16, at 54 (discussing reverse redlining in higher education); Louise Seamster & Raphael Charron-Chenier, *Predatory Inclusion and Rethinking Education Debt: Rethinking the Racial Wealth Gap*, 4 SOC. CURRENTS 199–200 (2017) (providing a definition of "predatory inclusion" and an early source for educational redlining).

331. HOULE & ADDO, *supra* note 16, at 54; Seamster & Charron-Chenier, *supra* note 330, at 199–200.

332. See generally Raymond H. Brescia, *Subprime Communities: Reverse Redlining, the Fair Housing Act and Emerging Issues in Litigation Regarding the Subprime Mortgage Crisis* 2 ALB. GOV'T L. REV. 164 (2009) (providing more information about reverse redlining and how subprime mortgages disproportionately harm communities of color).

333. *Carroll*, 650 F. Supp. 3d at 342; HOULE & ADDO, *supra* note 16, at 54; Seamster & Charron-Chenier, *supra* note 330, at 199–00.

