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The Unsupportable Cost of Variable Pricing of Student Loans

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The Unsupportable Cost of Variable Pricing of Student Loans

Jonathan D. Glater*

Table of Contents

I. Introduction	2138
II. Of Uncertain Efficacy and Undesirable Effects	2141
A. Changes in Interest Rates May Not Affect Borrower Behavior	2142
B. Rather than Deterring Borrowers, Higher Interest Rates May Drive Up Rates of Default.....	2146
C. Predicting Student Outcomes Is Difficult and the Attempt May Result in Unfairness.....	2149
D. There Are Better Ways to Direct Students to Study in Particular Areas—If We Want To.....	2154
III. How Big Is the Problem?	2158
A. There Is Weak Evidence of “Mismatch” Between What College Students Study and What Employers Need.....	2159
B. Students’ Choices of Major Do Not Determine Likelihood of Student Loan Default	2165

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IV. Education Is Different	2167
A. Lawmakers Have Adopted Policies that Promote Access to Education Generally on the Basis of a Broad View of What Is in the National Interest.....	2168
B. Education Plays a Critical Societal Role.....	2173
C. Education Finance Policy Should Respect Student Autonomy.....	2177
V. Conclusion.....	2179

I. Introduction

A financial aid regime that requires students to shoulder ever more of the cost of higher education represents a decision to treat education more like a consumer investment. Access to credit enables students to meet the rising costs of college; students borrow through federal aid programs and from private lenders. Yet determining the extent to which federal student loans should resemble loans in other contexts is a difficult task. It is also a necessary and important one, and thoughtful proposals that take it on should be welcomed and carefully considered. Michael Simkovic's recent Article in these pages is at once a sophisticated, constructive, and provocative contribution to ongoing debates over how to pay for college.

In *Risk-Based Student Loans*,¹ Professor Simkovic addresses the terms of student loans and proposes setting interest rates on federal student loans² based on the likelihood of repayment: the less likely a student is to have a job paying enough to cover repayment obligations, the higher the interest rate that the student should be required to pay.³ Such loan pricing, used in some other credit markets, imposes a higher cost of borrowing on those who are determined to be more likely to default than those

1. Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527 (2013).

2. Throughout this Article, the focus is federal student loans.

3. See Simkovic, *supra* note 1, at 590–91 (explaining the theory of risk-based credit pricing).

who are less likely to default, compensating lenders more when the risk of losing their money is higher.⁴

Professor Simkovic proposes basing federal student loan interest rates on student choices of major.⁵ The proposal would impose higher interest rates on loans to students who pursue majors in which past graduates have tended to default on their federal loans at relatively high rates.⁶ The proposal would charge a lower interest rate to students who pursue majors in which past graduates have defaulted at relatively low rates. While the current system of fixed-rate⁷ federal loans requires a rational, prospective student borrower to bet that a particular choice of college, major, and career will enable repayment, Professor Simkovic's proposal raises the stakes by imposing a higher interest rate on borrowers who choose majors associated with higher rates of default.⁸

The problem that the proposal would solve, Professor Simkovic writes, "is a large mismatch between the skills workers have and employers' needs . . . [which] contributes to structural unemployment, reduced output, and student loan defaults."⁹ Too many students, he suggests, are pursuing courses of study that do not prepare them for employment, let alone particularly

4. *See id.* at 589 ("Risk-based credit pricing involves adjusting the interest rate on loans so that the interest rate compensates the lender not only for the time value of money, but also for the risk that borrowers will default on their debts . . .").

5. *Id.* at 625–26. Professor Simkovic also suggests that other borrower characteristics, such as "class rank, standardized test scores, geographic location, type of school attended, [or] expected debt-to-income ratios at graduation," could play a role in setting interest rates. *Id.* at 596.

6. *See id.* at 625 (stating that risk-based pricing would encourage college students to choose majors and courses "that would better prepare them for post-graduation employment opportunities" and reduce student loan default rates).

7. Actually, Congress in 2013 approved basing rates on the government's cost of funds. Jeremy W. Peters, *Senate Approves College Student Loan Plan Tying Rates to Markets*, N.Y. TIMES, July 25, 2013, at A12. Allowing rates to adjust in this way does not attempt to accomplish a particular policy goal, as Professor Simkovic's proposal does.

8. *Id.*; *see also id.* at 571–72 n.117 (discussing scholarship on wage differentials and debt-to-income ratios across different majors).

9. *Id.* at 530.

lucrative employment.¹⁰ Unemployment and lower pay make repayment more difficult and default more likely. Labor shortages are a result of the failure of the education system to function properly: Wage signals do not have the desired effect of attracting more labor.¹¹ If the cost of borrowing were higher for students choosing college majors that have not led to higher-paying jobs, he argues, then at least some students would respond by changing their major.¹² They would find employment more quickly, earn higher wages, and manage their debt more easily.¹³ The evidence offered includes data on wages earned by graduates with different degrees and unemployment rates for recent graduates with different degrees, to argue that the risk of student loan default is greater for those students who choose certain majors.¹⁴ This idea of varying student loan interest rates has appealed to others in recent months.¹⁵

In this Article, I argue that pricing of student loans based on riskiness of choice of major is a dangerous idea. Such a policy move, I argue, will likely not have the desired effect, will have undesirable ancillary effects, is probably unnecessary, and is

10. See *id.* at 541–42 figs. 2.1, 2.2 (showing graphic material representing higher employment rates at graduation and increased earning potential for certain majors over others).

11. See *id.* at 583–84 (describing students' possible failures to understand or anticipate correctly the wage and employment prospects associated with different fields of study). More recently, evidence has developed that students are acting on their perceptions of the value of different courses of study and are eschewing the humanities. Tamar Lewin, *As Interest Fades in the Humanities, Colleges Worry*, N.Y. TIMES, Oct. 31, 2013, at A1.

12. See *id.* at 630 (arguing that risk-based pricing may change behavior if only "some proportion of students are motivated at least in part by financial incentives").

13. The higher their earnings, the more they would also presumably pay in taxes, giving back to the government, as Professor Simkovic points out. *Id.* at 532–34.

14. See Simkovic, *supra* note 1, at 540–42 figs. 2.1, 2.2, and 2.3 (displaying data regarding salary, job offer rate, and median earnings based on major).

15. In the realm of legal scholarship, for example, see Peter Zuckerman, Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587, 588 (2012). In the realm of online punditry, for example, see Glenn Reynolds, *Should Student Loans Be Priced Differently According to Major?*, INSTAPUNDIT (May 6, 2012, 8:05 AM), <http://pjmedia.com/instapundit/142233/> (on file with the Washington and Lee Law Review).

inconsistent with the values animating decades of federal student aid policy.

The discussion has four parts, each developing one of these arguments. In Part II, I argue that higher interest rates are unlikely to steer students away from particular majors because students may not respond to such price signals. In the same Part, I then identify potential ill-effects, such as raising the repayment burden for those students who pursue majors associated with higher rates of default because they plan to enter lower-wage careers, and describe superior alternatives for encouraging particular courses of study. In Part III, I suggest that the problem justifying the proposal is overstated; even if there is a gap between the needs of employers generally and the skills in the workforce generally, it is simply not clear that choices of major by college graduates play a significant or relevant role. In Part IV, I argue that Professor Simkovic's approach to higher education finance runs counter to that historically adopted by lawmakers, who have endorsed the importance of the freedom to choose what to study and, ultimately, what to do with one's life. Part V concludes.

II. Of Uncertain Efficacy and Undesirable Effects

Scholarship analyzing the effects of different kinds of incentives on human behavior has burgeoned in recent years. Behavioral economists and law professors adopting their methods have documented the efficacy of “nudges” to encourage people to act in a particular way, in accord with a particular policy objective or normative view. For example, more workers may put aside a portion of their wages for retirement if employers automatically deposit a portion of employee earnings in a retirement account rather than doing so only if an employee affirmatively request such deposits.¹⁶ A small change in policy structure results in a significant change in behavior. An evaluation of Professor Simkovic's proposal must ask the following question: will pricing of student loans based on student

16. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH AND HAPPINESS* 110–11 (2009).

choice of course of study—what he calls risk-based pricing—nudge students to make different choices?

In this Part, I warn that variable pricing of student loans is unlikely to affect behavior. I then describe the negative effects such loan pricing would have. I note that it would be very difficult to predict future employment prospects for different majors in order to set interest rates, and voice concern that some indicators of propensity to default may disproportionately and adversely affect borrowers who have historically enjoyed less access to higher education. I also argue that if we do wish to redirect students to particular fields, there exist more effective ways of doing so than through the setting of interest rates.

A. Changes in Interest Rates May Not Affect Borrower Behavior

If students already do not respond to higher wages paid to graduates who major in particular fields—part of the problem Professor Simkovic sets out to resolve¹⁷—it is difficult to see why they would respond to interest rates on their student loans. Professor Simkovic notes that the “empirical literature on whether borrowers react rationally to interest rates is somewhat mixed.”¹⁸ He cites research showing that borrowers make mistakes when weighing interest rates against lender-imposed fees; that some consumers use payday loans even when cheaper borrowing options are available; that some consumers exhibit poor comprehension of the significance of interest rates overall; and that credit card users react to changes in interest rates over time.¹⁹ However, he observes that much of the scholarship addressing the incentive effects of interest rates has focused on subprime borrowers, who may or may not be more sophisticated than college students.²⁰

17. Simkovic, *supra* note 1, at 586 (arguing that “risk-based pricing of student loans could help make wages and employment prospects more transparent and salient to students”). *But see also* Lewin, *supra* note 11 (describing recent evidence that students *are* responding to wage signals, obviating the need to adopt Professor Simkovic’s variable interest rate scheme).

18. Simkovic, *supra* note 1, at 629 n.281.

19. *Id.*

20. *Id.*

Studies of overall borrower comprehension of the terms of various kinds of credit have also suggested that consumers are “imperfectly informed.”²¹ Significantly, one study of the financial literacy of young people in particular found wide variability in capacity to understand basic concepts, including interest rates; the authors concluded that the level of sophistication was “dangerously low.”²² Other research has found that some borrowers consistently pay more than other, similarly situated borrowers,²³ and this may be evidence of differing levels of ability or desire to review loan terms carefully.²⁴

Experts looking at consumer evaluation of offers of credit have attempted to identify the circumstances under which

21. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 30 (2008).

22. Annamaria Lusardi, Olivia S. Mitchell & Vilsa Curto, *Financial Literacy among the Young: Evidence and Implications for Consumer Policy*, 44 J. CONSUMER AFFAIRS 358, 375 (2010), <http://www.councilforeconed.org/wp/wp-content/uploads/2011/11/Financial-Literacy-for-Young-Lusardi.pdf>. The study also found that children of parents who were more engaged in investing were more financially literate, suggesting that changes to student loan interest rates might have a regressive effect, resulting in worse loan terms for those with less educated or less wealthy parents. *See id.* (noting education attainment of parents had some effect, too, on the financial literacy of the young people surveyed).

23. *See* Jeff Sovern, *Preventing Future Economic Crises through Consumer Protection Law or How the Truth in Lending Act Failed the Subprime Borrowers*, 71 OHIO ST. L.J. 763, 788 (2010) (describing one study that found that younger adults and older adults pay higher interest rates and higher fees than do middle-aged adults and another that found that holders of bachelor’s degrees paid brokers less than customers without them).

24. This is an area in which experimentation could prove fruitful. Rather than adjusting interest rates, students could be provided with information on the likely implications of choice of major on income and employment. Payscale.com ranks colleges and universities based on graduates’ earnings. James B. Stewart, *New Metric for Colleges: Graduates’ Salaries*, N.Y. TIMES, Sept. 14, 2013, at B1. Some number of students might pay attention to such disclosure. Professor Simkovic cites a study that found 7.5% of students surveyed would have chosen differently had they known more about their likely future wages. *See* Simkovic, *supra* note 1, at 584 n.136 (citing a study that found that “over 7.5% of students would switch majors if this forecast error was not present” (citation omitted)). Simply *telling* students about their likely future wages is preferable to charging them different interest rates based on choice of major because disclosure alone does not increase the risk of default for students who do not read, understand, or choose to pay attention to the information provided.

disclosures of loan terms help potential borrowers do a better job of weighing costs:

- The consumer has the opportunity to read the disclosures fully;
- The disclosures are unambiguous and understandable;
- The disclosures are true and apply to the entire term of the contract;
- The consumer has the knowledge and sophistication to understand the meaning of the information provided in the disclosures;
- The consumer has the opportunity to make choices based on the information gained through the disclosures.²⁵

Students do receive information on loan terms at origination, and the federal government has attempted to improve students' ability to understand what is disclosed and to compare financial aid packages offered by colleges.²⁶

Students may not read the terms of the loans they use to pay for higher education. Some students, perhaps many of them, may believe that whatever the aggregate data on wages in a particular

25. *Examining the Billing, Marketing, and Disclosure Practices of the Credit Card Industry, and their Impact on Consumers: Hearing Before the H. Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 110th Cong. 21 (2009) (statement of Michael D. Donovan, Partner, Donovan Searles, LLC), <http://judiciary.house.gov/hearings/pdf/Donovan090505.pdf>.

26. The Consumer Financial Protection Bureau has produced a "financial aid shopping sheet" to assist student borrowers to understand and compare financial aid packages. See Consumer Fin. Prot. Bureau, Press Release, *Consumer Financial Protection Bureau and Department of Education Partner on New Financial Aid Shopping Sheet* (Oct. 25, 2011), available at <http://www.consumerfinance.gov/pressreleases/consumer-financial-protection-bureau-and-department-of-education-partner-on-new-financial-aid-shopping-sheet/> (explaining how the financial aid shopping sheet may help students) (on file with the Washington and Lee Law Review). But when it comes to federal student loans, borrowers have no experience comparison shopping because the terms are uniform; there has existed no reason to compare loan terms. Professor Sovern's research suggests that inexperience with comparison shopping may mean that borrowers "lack the experience needed to make sense of loan terms." Sovern, *supra* note 23, at 784. Some students are savvy shoppers when comparing college pricing but others are not—and shoppers who are not savvy will not respond to interest rates or information on future wages. Pricing of student loans based on choice of major could well penalize the unsophisticated higher education consumer, who might be first in family to attend college, for example.

career, they will revolutionize that field and reap outsize rewards. It may be that students feel a calling to pursue a particular path regardless of the cost.²⁷ It would help to know more than we do about how students make career choices.²⁸ A few studies, as Professor Simkovic notes, have found that expected

27. One study of students' choices of major found that significant premiums to natural science and business majors do not explain the sorting of students across majors and concludes that "virtually all sorting is occurring because of differing preferences across abilities for majors either in school or for the jobs associated with those majors in the workplace." Peter Arcidiacono, *Ability Sorting and the Returns to College Major*, 121 J. ECONOMETRICS 343, 374 (2004). This suggests that students choose majors based on preferences rather than wages, and while the preferences of some students may take into account wages, those of others may not. If wages do not affect choice, it is hard to see how interest rates might.

28. Professor Simkovic describes a study of slightly fewer than 600 students that found that expected earnings played a statistically significant role in affecting students' choices of major. Simkovic, *supra* note 1, at 585 n.142 (citing Claude Montmarquette, Kathy Cannings & Sophie Mahseredjian, *How Do Young People Choose College Majors?*, 21 ECON. EDUC. REV. 543, 554 (2002)). The study, which implied that better information on wages could be significant to students, also found that other factors appeared to play a role. The study did not explore the accuracy of student expectations of earnings or the actual salary outcomes experienced by the students upon graduation. The effect of expected income was greater for men than for women, and greater for students who were members of minority groups than for white students. Claude Montmarquette, Kathy Cannings & Sophie Mahseredjian, *How Do Young People Choose College Majors?*, 21 ECON. EDUC. REV. 543, 553–54 (2002). The sample for this study consisted of 562 people. *Id.* at 547. Another study, based on a survey of about 150 Duke University undergraduate, male students, concluded that 7.5% of the students would have chosen another major if they had received more accurate information about post-graduation wages. Peter Arcidiacono, V. Joseph Hotz & Songman Kang, *Modeling College Major Choices Using Elicited Measures of Expectations and Counterfactuals* 22 (Nat'l Bureau of Econ. Research, Working Paper 15729, 2010), available at <http://www.nber.org/papers/w15729>. The study may suggest that the vast majority of students would not change majors. *Id.* Another study suggests that the 7.5% figure may be high among all undergraduates because it included only men; an investigation of differences in the choices made by undergraduate male students and undergraduate female students found that expected incomes mattered more for men than for women, implying that varying interest rates by major may have unintended side-effects on who chooses to do what. See Basit Zafar, *College Major Choice and the Gender Gap* 28 (Fed. Reserve Bank of New York, Staff Report No. 364, 2009), http://www.newyorkfed.org/research/staff_reports/sr364.pdf (explaining the results of a study regarding choice of major that found that "females mostly care about non-pecuniary outcomes" relative to men).

earnings are a significant factor in student choices,²⁹ implying that reliable information about future earnings may be a simple and low-risk way to encourage students to pursue particular courses of study and that adjusting interest rates is unnecessary. Potential “mismatch” between student choice of major and labor market need may be the result of incorrect information, lack of information, or a system maximizing subjective and/or intangible values. If information is the problem, though, adjusting interest rates may not be the solution. Such a subtle signal may reward the more financially savvy student and hurt the less sophisticated consumer of higher education, who is more likely to be middle class or poor,³⁰ the kind of student that defenders of federal aid programs seek to enable to attend college.³¹ For this reason, in addition to the other concerns about efficacy given above, attempting to affect students’ decisions through interest rates could be dangerously counterproductive.

B. Rather than Deterring Borrowers, Higher Interest Rates May Drive Up Rates of Default

While differences in interest rates may not have the intended effect of redirecting students toward career paths that labor markets value most highly, they may have negative effects on

29. See Montmarquette, Cannings & Mahseredjian, *supra* note 28, at 554 (discussing the factors students consider when choosing a college major); Arcidiacono, Hotz & Kang, *supra* note 28, at 22 (explaining that expected earnings, among other factors, play a significant role in choice of major); Richard J. Cebula & Jerry Lopes, *Determinants of Student Choice of Undergraduate Major Field*, 19 AM. EDUC. RESEARCH J. 303, 309–10 (1982) (noting the variables that contribute to a student’s selection of a major). If information on wages does not affect student choices, despite what these studies have found, it is not clear why differences in interest rates would.

30. See Lusardi, Mitchell & Curto, *supra* note 22, at 375 (noting that financial literacy is higher in those whose families invested or saved money).

31. President Obama, arguing for better disclosure of student outcomes at colleges and for stronger controls on tuition hikes, noted that the rising price of higher education disproportionately hinders access to poorer students. Michael D. Shear & Tamar Lewin, *On Bus Tour, Obama Seeks to Shame Colleges into Easing Costs*, N.Y. TIMES, Aug. 23, 2013, at A18. “We can’t price the middle class and everybody working to get into the middle class out of college,” the president told students at the University at Buffalo, part of the State University of New York. *Id.*

students who incur higher interest rates and end up in lower-paying jobs. Higher interest rates in and of themselves could increase the likelihood of default because they make repayment more costly. Studies have found that the likelihood of default goes up, the more a student borrows and the higher the monthly payment a student must make. Higher interest rates increase borrowers' monthly payments.³² Consequently, policies that make borrowers' burdens heavier increase the likelihood of default for affected borrowers.³³

This is a critical problem with the proposal to base interest rates on choice of major: endogeneity. Raising the interest rate on loans to students who decide to major in comparative literature, for example, or some other field not associated with earning a high income, increases the probability of default by those students.³⁴ The higher interest rate in itself will increase the probability of default by increasing the repayment burden; the bad outcome is more likely to occur because the higher rate has a negative effect. The prediction of default becomes self-fulfilling while the counterfactual, whether the student would have defaulted in the absence of the higher, penalty rate, can never be known.³⁵

The burden of varied interest rates is yet higher for those students who choose majors that carry the higher interest rates, and who then drop out. Failure to complete a program of study is already a powerful predictor of default, as Professor Simkovic

32. See Jacob P.K. Gross, Osman Cekic, Don Hossler & Nick Hillman, *What Matters in Student Loan Default: A Review of the Research Literature*, 39 J. STUDENT FIN. AID 19, 24 (2009) ("Research suggests that as debt burden increases so does the likelihood of default."). I have been unable to find a study that looked for a relationship between federal student loan interest rates and rates of default on the loans, perhaps because the rates on the loans have generally been fixed.

33. See *id.* (discussing how debt burden affects the likelihood of default).

34. See *id.* at 23–24 (explaining that many students default because their income is inadequate to make their loan payments).

35. To be clear, this does not and is not intended to take away from Professor Simkovic's point that past default rates among graduates with specific majors may help predict future default rates in those majors. But it does emphasize that higher interest rates may increase the default rate in those majors.

notes,³⁶ but under his proposed regime, those students would bear an even heavier burden than they already do. The cost of the penalty imposed on dropouts must be taken into account in evaluating whether variable pricing of loans based on major is a worthwhile policy.

For multiple reasons, then, using interest rates to try to affect student choice of major is dangerous. First, neither disclosure of future wages nor imposition of varied interest rates may affect student choice.³⁷ Second, students who choose what to study based on factors other than interest rates or prospective wages may find themselves facing a relatively high cost of debt, increasing the risk of default.³⁸ If interest rates do not affect students' decisions, then higher rates for those who choose courses of study associated with lower-pay career paths are more likely to default simply because of the terms of their loans.³⁹ The differences in interest rates may not only fail to achieve the desired outcome, they may worsen the financial situation of students who, for whatever reason, do not choose their majors based on the cost of credit or on anticipated income.

36. See Simkovic, *supra* note 1, at 616 (discussing evidence that those who do not complete a four-year degree are often in a worse financial position than those who never attended college).

37. Professor Simkovic notes that not all students need to respond to better information, or to the differential interest rates; as long as some do, that shift is an improvement. *Id.* at 630. However, the cost of defaults that might not have happened if interest rates were not higher for other borrowers must be taken into account, too.

38. Students pursuing majors in which graduates were relatively more likely to default in the past would face an incrementally greater risk of default under Professor Simkovic's regime. The higher interest rate would augment the effect of lower wages, longer period of unemployment or whatever other factor already had increased the likelihood of default. See *id.* at 602–06 (discussing inherent problems in predicting a career's future earnings).

39. See *supra* notes 32–34 and accompanying text (explaining why the greater the debt burden, the greater the risk of default).

C. Predicting Student Outcomes Is Difficult and the Attempt May Result in Unfairness

One goal of Professor Simkovic's proposal is directing graduates into fields that are more likely to pay well.⁴⁰ But accurate prediction of future salaries presents significant challenges. The duration of the student's schooling creates a problem because the lender must predict, based on current salaries in various fields, what workers will earn years in the future.⁴¹ In the intervening time, salaries may well change, not least because high-wage careers may draw more people into them, depressing pay before a current student has the opportunity to enter the labor force.⁴² Professor Simkovic describes this as a "cobweb cycle": If students make decisions about careers to pursue based on the current wages in those fields, then labor markets experience booms and busts as a result of a "production lag" for development of skilled labor.⁴³

At the start of the cycle, many students seek to study toward a high-income occupation. Years later, when they all simultaneously try to enter the labor force, the large supply of labor causes wages to crash in their occupation. In the second stage of the cycle, students choosing an occupation at the time of the crash then avoid training for the newly low income occupation, and years later, there will be a shortage of labor for that occupation, causing wages to rise and the cycle to repeat.⁴⁴

Perhaps, as Professor Simkovic suggests, sophisticated modeling of workforce composition could take into account these boom and

40. See Simkovic, *supra* note 1, at 590 (explaining how his plan encourages students to study "high-value occupations").

41. See *id.* (arguing that risk-based loan pricing encourages students "to study toward high-value occupations"—a contention that relies on the claim that borrowers respond to interest rates, a claim challenged in Part II of this Article). Professor Simkovic proposes that the federal Education Department or the Bureau of Labor Statistics of the Department of Labor forecast future wages to set interest rates. *Id.* at 605.

42. If students were to respond to information about salaries associated with certain choices of undergraduate major by changing their courses of study, then this effect could be greater, as more students gravitate toward fields in which they expect to earn higher wages.

43. *Id.* at 587.

44. *Id.*

bust cycles.⁴⁵ The lender's interest rate calculation would correspondingly incorporate predictions of the supply of and demand for employees with a particular education experience, using history as a guide to the future.⁴⁶ Unfortunately, this approach does not resolve the problem and indeed, Professor Simkovic acknowledges the role that history-driven predictions play in perpetuating cobweb cycles.⁴⁷ Predicting the most lucrative jobs of the future⁴⁸ requires predicting the future, for which the past may not be a very reliable or consistent guide.⁴⁹ The future wages paid to graduates with certain majors may be affected by the arrival of new types of jobs that do not exist today and require skillsets that future entrepreneurs are developing right now, on their own, drawing on formal higher education experiences in unexpected ways.

The outcome of a student's education experience turns on myriad factors not captured by choice of major. Psychologists who have studied student behavior and education outcomes have concluded that students' beliefs strongly influence their attainment: Effort leads to academic success.⁵⁰ There are various theories of what motivates students to work hard to succeed; factors affecting expenditure of effort include students' belief that they have the necessary ability and that they can affect the

45. See *id.* at 605 (describing how a risk-based pricing model could help the labor market adapt to boom and bust cycles).

46. See *id.* (explaining how past trends in the labor market can be used to predict the future).

47. See *id.* (observing that students do not have good information about future employment and that predictions are difficult, and warning that "students[] app[arent] . . . assum[ption] that the future will resemble the present" lead to cobweb cycles).

48. The most important indicators of default are employment prospects and post-graduation income, Professor Simkovic writes, and that conclusion is most likely correct. *Id.* at 620.

49. The more complex the working of the labor market, the greater the frequency and significance of low-probability events with far-reaching consequences. See NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* 61 (2007) (describing the greater vulnerability of highly complex systems generally to unlikely events that have powerful consequences).

50. See C.S. Dweck & Elaine Elliott, *Achievement Motivation*, 4 *HANDBOOK OF CHILD PSYCHOL.* 643, 646 (1983) (explaining that a child's performance is linked to "how vigorously" an achievement is pursued).

outcome by exerting effort.⁵¹ Motivation and effort matter because students who are motivated, who are disciplined, who correspondingly do well, may prove to be highly successful, whatever their field of study in college.⁵² Such students will be lower-risk borrowers, whatever their field of study.

Some students drop out and found companies that become multibillion-dollar enterprises whose products reshape our lives.⁵³ Other students major in subjects that might not obviously lead to lucrative careers, and then go on to achieve fame and wealth nonetheless, either in the chosen field or some other. Yet other students might choose to major in subjects that do not lead to lucrative careers, but then launch themselves into post-graduate studies in law or business and put themselves on a highly successful path. Most importantly but most difficult to measure, some students may choose what to study not in pursuit of higher wages but in pursuit of a dream of making a difference in the lives of others—perhaps a naïve ambition, perhaps a decision that does not maximize personal wealth, but a choice that we may want federal aid policy to encourage in the face of market incentives to pursue more mercenary life goals.⁵⁴ The goal of higher education finance policy is not the maximization of graduates' income.

Better predictions of student outcomes might be possible if lenders were to take into account more borrower characteristics. Professor Simkovic suggests several candidates, including “class rank, standardized test scores, geographic location, types of school attended, [or] expected debt-to-income ratios at graduation.”⁵⁵ However, there are borrower characteristics that

51. See Jacquelynne S. Eccles & Allan Wigfield, *Motivational Beliefs, Values, and Goals*, 53 ANN. REV. PSYCHOL. 109, 110–11 (2002) (listing and explaining the theories of motivation focused on expectancy including the self-efficacy theory and control theories).

52. See *id.* at 122–23 (explaining research that college students' success is tied to effort while their failure correlates to lack of effort).

53. Steve Jobs, the late chief executive and visionary of Apple Computer, dropped out of Reed College after six months. Steve Jobs, Address at the Commencement of Stanford University (June 12, 2005), available at <http://news.stanford.edu/news/2005/june15/jobs-061505.html>.

54. On this normative question, see *infra* notes 114–18 and accompanying text (describing lawmakers' efforts to encourage careers in public service).

55. Simkovic, *supra* note 1, at 596.

we as members of our civil society do not want lenders to consider, such as race and gender. Professor Simkovic argues that lenders should be prohibited from taking into account such characteristics,⁵⁶ even though the race of a borrower, for example, correlates with the likelihood of default, as does the income of a borrower's family.⁵⁷

Professor Simkovic is correct that the lender should not consider a borrower's race when determining whether that borrower is more or less likely to default on a student loan. However, I am concerned that even if the federal Department of Education serves as the lender, as it currently does for federal student loans,⁵⁸ borrower characteristics that correlate with

56. Professor Simkovic recognizes the risk of discrimination based on borrower characteristics, but suggests that lender consideration of those characteristics could be prohibited. *Id.* at 565 n.98. However, discrimination based on various borrower characteristics, such as race, is already prohibited and examples nevertheless abound of lender conduct imposing higher costs on borrowers who are members of minority groups. *See, e.g.*, Bob Tedesco, *Safeguarding Against Loan Discrimination*, N.Y. TIMES, Jan. 25, 2009, at RE6 (describing a finding that lenders imposed higher costs on home loan borrowers who were members of minority groups); *see also infra* note 59 (describing additional allegations of lenders using discriminatory lending practices). One virtue of the one-rate-for-all student loan is the elimination of the potential for such unfairness.

57. *See* Simkovic, *supra* note 1, at 624–25 (classifying race and “parents’ socio-economic status” as “[t]he most obvious examples of factors that are outside the risk of choice and may predict default risk”). Other borrower characteristics that are not obviously suspect may correlate with both race and risk of default. Use of address information may have the same result as use of race itself. A Note outlining a proposal similar to that offered by Professor Simkovic suggests that the lender should take into account the “quality of the institution attended,” as well as the course of study. Zuckerman, *supra* note 15, at 599. This would reward those students attending the highest quality schools, however measured, which tend to enroll fewer students of modest means. Thus, considering institutional “quality” would run counter to efforts to promote greater socioeconomic diversity of the college-going population. *See also supra* note 56 and accompanying text. A loan pricing regime that rewarded good grades might be more defensible than one based on choice of major, if the goal is production of a more employable labor force—although even that is questionable because rewarding good grades would likely reward and encourage grade inflation.

58. David M. Herszenhorn & Tamar Lewin, *Student Loan Overhaul Approved by Congress*, N.Y. TIMES, Mar. 26, 2010, at A16 (reporting on Congressional vote to shift entirely to direct lending); *see also* Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL’Y

factors that a lender is formally barred from considering could play a role in the calculation of an interest rate.⁵⁹ Certain majors popular with certain populations might experience relatively high default rates, for example.⁶⁰

Even if, as a policy matter, lender use of less obviously suspect borrower characteristics, like income and wealth, is permissible in most contexts, perhaps in education finance they should be excluded. Government policy seeks to promote access to higher education and socioeconomic mobility, as evidenced by the establishment of aid programs like Pell Grants, which serve

11, 14 (2011) (noting the changes made to legislation regarding student loans and lenders in 2008).

59. Quite recently, lenders in other credit markets have paid enormous sums to settle allegations that they discriminated against poor and minority homebuyers by charging them higher interest rates. These settlements suggest that despite threat of criminal enforcement, discriminatory lending practices persist. See, e.g., Charlie Savage, *Wells Fargo Will Settle Mortgage Bias Charges*, N.Y. TIMES, July 13, 2012, at B3 (reporting on the \$175 million settlement resolving federal Department of Justice allegations that “mortgage brokers working with Wells Fargo had charged higher fees and rates to more than 30,000 minority borrowers across the country than they had to white borrowers who posed the same credit risk”); Press Release, Department of Justice, *Justice Department Reaches \$21 Million Settlement to Resolve Allegations of Lending Discrimination by Suntrust Mortgage* (May 31, 2012), available at <http://www.justice.gov/opa/pr/2012/12-crt-695.html> (announcing settlement resolving allegations that SunTrust Mortgage “charg[ed] more than 20,000 African-American and Hispanic borrowers higher fees and interest rates than non-Hispanic white borrowers, not based on borrower risk, but because of their race or national origin”) (on file with the Washington & Lee Law Review); Press Release, Department of Justice, *Justice Department Reaches Lending Discrimination Settlement with GFI Mortgage Bankers Inc.* (Aug. 28, 2012), available at <http://www.justice.gov/opa/pr/2012/August/12-crt-1052.html> (announcing \$3.5 million settlement resolving government allegations that “interest rates and fees that [the lender] charged on mortgage loans to qualified borrowers showed statistically significant disparities between non-Hispanic white borrowers and both African-American and Hispanic borrowers that could not be explained by objective borrower characteristics or loan product features”) (on file with the Washington and Lee Law Review).

60. Studies have found that students with different backgrounds tend to pursue different courses of study. For example, a study of students’ choice of major at three large, public universities in Texas found that white men and Asian men are overrepresented among engineering and computer science majors while Hispanic women and black women are underrepresented; black women are overrepresented in natural and social sciences. See Lisa Dickson, *Race and Gender Differences in College Major Choice*, 627 ANNALS AM. ACAD. POL. & SOC. SCI. 108, 114 (2010) (describing over and underrepresentation of certain ethnicities among various college majors).

poorer students.⁶¹ It would be counterproductive to set student loan terms based on borrower characteristics in a way that undermines the policy goals underlying provision of the loans in the first place.⁶² Concern over the high cost of borrowing from a private lender, like a commercial bank, prompted federal lawmakers' decision to offer education loans on the same terms to all borrowers in the first place.⁶³

D. There Are Better Ways to Direct Students to Study in Particular Areas—If We Want To

Alternative means exist of directing students to pursue specific fields of study. If, as a matter of policy, the allocation of human capital is too important to entrust to teenagers, then wiser heads should undertake the task.⁶⁴ If we do have confidence

61. See Joseph A. Soares, *Private Paradigm Constrains Public Response to Twenty-First Century Challenges*, 48 WAKE FOREST L. REV. 427, 440, 443 (2013) (describing how Pell Grant recipients come from families who are “near the poverty line” and how Pell Grant funds have more than doubled during the Obama administration).

62. A growing body of scholarship, some of it within the law, explores human reliance on heuristics and highlights the ways in which these mental shortcuts may be based on stereotypes and consequently may disadvantage members of the stereotyped population. See, e.g., E. Ericka Kelsaw, *Help Wanted: 23.5 Million Unemployed Americans Need Not Apply*, 34 BERKELEY J. EMP. & LAB. L. 1, 45 (2013) (describing dire effects of prospective employers’ “stigma against the jobless”). It is possible that in addition to errors generated by using the past as a guide to what may be a very different future, a lender will rely on presumptions and assumptions about borrower riskiness that may reflect judgments that are questionable, because they may be inaccurate, because they have counterproductive results, or because they are morally offensive. The risk of discriminatory lending would hopefully be mitigated by the fact that the lender in federal loan programs is the government.

63. See, e.g., 111 Cong. Rec. S22,692 (daily ed. Sept. 2, 1965) (statement of Sen. Yarborough) (“[Because] commercial credit is frequently available only at high interest rates and must be repaid in the same year. . . , it seems advisable to have a program in which loans can be secured at a reasonable rate of interest and be paid back over a longer period of time . . .”).

64. It is unclear why only students who borrow—presumably students who tend to be less well-off—should be subject to incentives to choose particular career paths. See *infra* subpart III.A. According to the most recent data from the Department of Education, 38.5% of undergraduates in 2007–2008 took out some type of student loan; 52.9% of undergraduates enrolled full-time did so. *Fast Facts*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=31> (last visited Sept. 16, 2013) (on file with the Washington and

in the ability of the Department of Education to predict the needs of the economy five years into the future, then simply taking away a student's discretion to choose a course of study makes sense.⁶⁵ Exams in the fall of the first year of college could identify those with particular skillsets, aptitudes, or areas of knowledge, enabling a grand sorting akin to that accomplished by the Sorting Hat for young wizards at Hogwarts, the fictional school of witchcraft and wizardry in J.K. Rowling's books.⁶⁶ Some nations do conduct such a sorting; Singapore's Primary School Leaving Examination assesses not only whether students are ready for postsecondary education, but for what *type* of education, from express or accelerated to normal academic to technical to

Lee Law Review). The average loan amount was \$8,000 for full-time students. *Id.* Other studies, taking into account private loans, have found higher numbers: The Institute for College Access & Success' Project on Student Debt found that in 2011, two-thirds of graduates held student loans, and the average total amount of debt was \$26,600. PROJECT ON STUDENT DEBT, STUDENT DEBT AND THE CLASS OF 2011 4 (2012), <http://projectonstudentdebt.org/files/pub/classof2011.pdf>.

65. The Department of Education also could disclose to students the wages paid in the present, thereby providing students with accurate information. President Obama has proposed just such a move. *See* Shear and Lewin, *supra* note 31. In other contexts in which public policy must balance respect for autonomy against fear of the consequences of misjudgment, bad luck, or both, we have turned to disclosure as a remedy. For example, in the context of securities regulation, courts have consistently cited disclosure as a guiding principle enabling investors to protect themselves. *See* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 195 (1976) ("[T]he Securities Act of 1933 . . . was designed to provide investors with full disclosure of material information concerning public offerings of securities in commerce, to protect investors against fraud and, through the imposition of specified civil liabilities, to promote ethical standards of honesty and fair dealing."). A disclosure regime would require gathering the same information that would be necessary to price loans by perceived riskiness of different careers, as Professor Simkovic's proposal would require, but would render unnecessary any forecast of the financial rewards of those careers in the future. College and university career development offices, as well as individual academic departments and programs, could present this information to students. And if disclosure of probable lifetime income, which should be a powerful incentive affecting student behavior, is insufficient to affect choices of major, that suggests that different interest rates will not work either.

66. *See* J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE 117–18 (1997) (describing how the sorting hat assigns Hogwarts students to different houses). In the Harry Potter books, a magic hat makes the allocation decisions; in the real world, an algorithm taking into account student characteristics and employers' anticipated needs would do the trick.

vocational.⁶⁷ I mention the Sorting Hat and the Singapore examples not because I think only magic can allocate students as well as the former nor because Professor Simkovic's proposal goes so far as the latter, but because I think a better case can be made for adoption of an approach like that of Singapore, which would be more likely to achieve the desired goal of directing students into particular careers, than for adoption of variable interest rates.⁶⁸ Variable interest rates may result in the more sophisticated and better informed consumer of higher education modifying behavior, at the cost of inflicting higher costs of borrowing and potentially higher default rates on less sophisticated students.⁶⁹

67. See SINGAPORE EXAMINATIONS AND ASSESSMENT BOARD, ANNUAL REPORT 2011/2012 7 (2012), http://www.seab.gov.sg/aboutUs/annualReport/annualReport_11_12/pdf/AnnualReport2012.pdf (describing the various tests used to determine what type of education is best for each student).

68. Professor Simkovic touches on another strategy, pursued in several European countries, to promote study of STEM fields. See Simkovic, *supra* note 1, at 644–45 (stating that “[m]ost European and Asian governments that fund higher education through taxation have . . . generally prioritized STEM instruction and labor market needs to a greater extent than have U.S. students and universities” (citing CAROLINE KEARNEY, EFFORTS TO INCREASE STUDENTS’ INTEREST IN PURSUING SCIENCE, TECHNOLOGY, ENGINEERING AND MATHEMATICS STUDIES AND CAREERS 7–10 (2011))). Significantly, the strategies described in the materials upon which Professor Simkovic relies do not involve penalizing students who choose to study the humanities, for example, as would his variable interest rate proposal. Rather, governments have adopted a “holistic approach” aimed at “introducing science and technology learning . . . at primary level, and increasing the number of students enrolling in STEM studies at secondary level.” CAROLINE KEARNEY, EFFORTS TO INCREASE STUDENTS’ INTEREST IN PURSUING SCIENCE, TECHNOLOGY, ENGINEERING AND MATHEMATICS STUDIES AND CAREERS 7 (2011). In France, for example, a “national action plan” for teaching science and technology aims to

improv[e] pupils’ mathematical attainment and arous[e] their curiosity for sciences and technologies at primary school level; deepening curiosity for and interest in scientific and technological subjects through cross disciplinary projects at secondary school level; and encouraging both girls as well as boys to take up STEM studies, providing students with better and more comprehensive STEM career guidance, and developing specialized STEM upper secondary schools.

Id. at 9. Such an approach focuses on carrots, not sticks, to encourage STEM studies.

69. See *supra* Part II.B. (warning of the adverse impact of higher interest rates on specific student populations); see also *supra* note 22 (explaining that there is great variation among students’ capacity to understand financial concepts relating to student loans). A public policy experiment of such scope

Imposing on students the government's vision of the needs of the national economy would mark a sharp break with the historical treatment of education finance, which has allowed students to use federal aid money to pay to attend whatever program they choose, to study what they choose.⁷⁰ Professor Simkovic's proposal does not go so far but instead moves aid policy along a continuum, adding an incentive to augment the signal that is already sent by wages and striking a different balance between student autonomy and employer need.⁷¹ Higher interest rates would potentially lead to more defaults by those students who choose majors not associated with higher wages and lower unemployment rates. Higher interest rates would penalize the less financially sophisticated consumer of student loans.

Historically, lawmakers have not gone so far. They have permitted students to use federal aid to enroll in postsecondary programs that fail to graduate most enrollees, that produce graduates chronically unable to find employment, and that leave borrowers facing a high likelihood of default.⁷² I will address the issue of autonomy below,⁷³ but I mention here the possibility of directing students' choices of major to drive home the point that

must be preceded by more thorough study of what the effects might be. An incremental step that does not impose such risks on certain borrowers might involve better, more accurate disclosure of wages associated with particular majors, to determine whether postgraduate wage information would impact students' decisions. Indeed, a ranking system for colleges proposed by President Obama may take into account graduates' earnings. *See* Shear & Lewin, *supra* note 31.

70. *See* *Choosing a College to Receive Your Information*, FAFSA, <https://fafsa.ed.gov/help/fotwf.htm> (last visited Aug. 31, 2013) (explaining how students applying for federal aid money can choose which colleges students want to receive their information) (on file with the Washington and Lee Law Review). Change is not inherently bad. Change that creates a significant risk of adverse effects on students who will not have the option of re-financing their college education, however, should not be embarked upon lightly.

71. *See* Simkovic, *supra* note 1, at 530 (outlining Professor Simkovic's proposal to implement "risk-based pricing in federal student loans" and describing the perceived benefits of this proposal).

72. *See, e.g.*, William D. Henderson & Rachel M. Zahorsky, *The Law School Bubble: How Long Will it Last if Law Grads Can't Pay Bills?*, A.B.A. J., Jan. 2012, at 30, 32–33 (describing how law students who have small chances of landing jobs after graduating from law school still receive significant amounts of federal student aid and predicting that the inability of graduates to pay back loans makes this trend unsustainable).

73. *See infra* Part IV.

whether the mechanism is indirect, using interest rates as a nudge, or direct, through command, the animating philosophy is the same: the government knows better than the student what the student should study and ultimately, do and be.

III. How Big Is the Problem?

Pricing of student loans based on choice of major purports to address a “mismatch” between the courses of study pursued by undergraduates, on the one hand, and the needs of employers, on the other. This mismatch results, Professor Simkovic writes, in higher unemployment rates, lower wages, and more frequent student loan defaults by graduates in certain majors.⁷⁴ In the previous Part, I suggested that the gap he describes may be the result of students’ insensitivity to financial signals like wages and interest rates. I argued that such insensitivity may itself be evidence that his proposal to base interest rates on choice of major will not succeed and, in addition, will have undesirable effects.⁷⁵ In this Part, I question both the extent to which the phenomenon of mismatch exists and the strength of any causal relationship to choices of undergraduate major, and argue that in the absence of stronger evidence, Professor Simkovic’s proposal lacks justification.

This Part has two sections. First, I argue that the evidence of a gap between employee education and employer need is weak: some expressing concern have significant economic reasons to claim there is a problem and most references to “mismatch” cover the workforce overall and do not purport to comment on choices of undergraduate major. Second, even if there were “mismatch,” choice of major is not the obvious culprit.

74. See Simkovic, *supra* note 1, at 530 (explaining the results of the mismatch and how these results could be fixed with risk-based student loans).

75. See *supra* Part II.

A. *There Is Weak Evidence of “Mismatch” Between What College Students Study and What Employers Need*

The severity of the “mismatch” problem, which adjusting student loan interest rates purports to address, is open to question. The perception of a skilled labor shortage has been fueled in recent years by reports in the popular press⁷⁶ that have typically quoted executives of high technology companies complaining of a lack of home-grown, potential employees who have the educational background required to do cutting-edge work.⁷⁷ But other media reports have pointed out that it is cheaper for these employers to hire highly skilled employees from overseas, giving them an economic incentive to hire from abroad.⁷⁸ Such hiring might be cast as unpatriotic, were it not for the explanation that these companies offer.⁷⁹ In addition, employers have “repeatedly demonstrated a preference for immigrants over native workers . . . based on their beliefs that immigrants are hardworking, subservient, easier to control, and so on.”⁸⁰ At least one study found that employers’ difficulty

76. Typically these media reports have reported on a gap between employee skills and employer needs in the context of a national debate on immigration reform. Technology companies have consistently sought the ability to hire more highly skilled workers from overseas. *See, e.g.*, Letter from Am. Council of Eng’g Cos. et al. to Members of the United States House of Representatives (July 12, 2012), <http://judiciary.house.gov/news/pdfs/STEM.pdf> (calling on Congress to adopt legislation enabling American companies to hire more foreign workers with advanced degrees in science, technology, engineering, and mathematics).

77. *See, e.g.*, MICROSOFT CORP., A NATIONAL TALENT STRATEGY: IDEAS FOR SECURING U.S. COMPETITIVENESS AND ECONOMIC GROWTH 3, <http://www.microsoft.com/en-us/news/download/presskits/citizenship/MSNTS.pdf> (warning of a “substantial and increasing shortage of individuals with the skills needed to fill the jobs the private sector is creating”).

78. *See, e.g.*, Charles Duhigg & Keith Bradsher, *How the U.S. Lost Out on iPhone Work*, N.Y. TIMES, Jan. 21, 2012, at A1 (describing how Apple is forced to employ overseas employees because of the cost and efficiency of foreign labor).

79. *See* Jordan Weissmann, *The Myth of America’s Tech-Talent Shortage*, ATLANTIC, Apr. 29, 2013, available at <http://www.theatlantic.com/business/archive/2013/04/the-myth-of-americas-tech-talent-shortage/275319/> (observing that employers hiring highly skilled workers from abroad “are required to pay them on par with U.S.-born professionals . . . [but t]hanks to an array of legal loopholes in the way appropriate wages are calculated . . . it doesn’t necessarily work out that way”).

80. Jennifer Gordon, *Tensions in Rhetoric and Reality at the Intersection of Work and Immigration*, 2 U.C. IRVINE L. REV. 125, 136–37 (2012). Employers

finding workers to hire has resulted from too much selectivity by companies.⁸¹ And an examination of the information technology labor market and the pipeline of students in technology-related fields concluded that the “United States has more than a sufficient supply of workers available to work in [science, technology, engineering and mathematics] occupations.”⁸²

While unemployment rates do vary among graduates who major in different fields,⁸³ unemployment rates decline as

thus can be expected to adopt rhetoric, including lamentations of a skills shortage in the domestic workforce, which enables them to continue to draw on immigrant labor.

81. See Paul Davidson, *Study Says Shortage of Skilled Workers Not That Severe*, USA TODAY, Oct. 15, 2012, available at <http://www.usatoday.com/story/money/business/2012/10/14/jobs-skills-gap-study/1630359/> (citing a study by the Boston Consulting Group that found that the United States is short by 80,000 to 100,000 highly skilled manufacturing workers, or less than 1% of the nation’s manufacturing workers and less than 8% of its highly skilled manufacturing workers) (citing Press Release, Bos. Consulting Grp., Skills Gap in U.S. Manufacturing Is Less Pervasive Than Many Believe (Oct. 15, 2012), available at <http://www.bcg.com/media/PressReleaseDetails.aspx?id=tcm:12-118945> (on file with the Washington and Lee Law Review)).

82. Hal Salzman, Daniel Kuehn & B. Lindsay Lowell, *Guestworkers in the High-Skill U.S. Labor Market: An Analysis of Supply, Employment and Wage Trends* 2 (Econ. Pol’y Inst. Briefing Paper No. 359, Apr. 24, 2013), <http://www.epi.org/files/2013/bp359-guestworkers-high-skill-labor-market-analysis.pdf> (emphasis omitted).

A survey of 704 employers by the *Chronicle of Higher Education* found that nineteen percent of employers overall and twenty-nine percent of employers in the science, technology, or health care sectors looked for specific majors in potential hires. THE CHRON. OF HIGHER EDUC., THE ROLE OF HIGHER EDUCATION IN CAREER DEVELOPMENT: EMPLOYER PERCEPTIONS 14 (Dec. 2012), <http://chronicle.com/items/biz/pdf/Employers%20Survey.pdf>.

83. Variances often exist in interesting ways, according to a report drawing on Census Bureau data. Unemployment among architects who recently graduated is more than double the rate among graduates with degrees in education, reflecting the fact that the recent downturn in the economy adversely and severely affected the construction and real estate sectors. See ANTHONY P. CARNEVALE, BAN CHEAH & JEFF STROHL, GEORGETOWN UNIV. CTR. ON EDUC. & THE WORKFORCE, HARD TIMES, COLLEGE MAJORS, UNEMPLOYMENT AND EARNINGS: NOT ALL COLLEGE DEGREES ARE CREATED EQUAL 7 (Jan. 4, 2012), available at <http://cew.georgetown.edu/unemployment> (using Census Bureau data to identify the often surprising and interesting ways in which employment rates differ). This Georgetown study also found that even within general major fields, certain specialized areas enjoyed lower unemployment rates: Graduates who majored in mechanical engineering and who have some experience, for example, face a lower unemployment rate than do computer science majors with experience. *Id.*

experience levels increase.⁸⁴ This forces a value judgment about what level of unemployment should drive policy decisions, the rate at graduation or subsequently, and about what rate of unemployment is indicative of mismatch. The lowest unemployment rates identified in one post-recession study of Census Bureau wage and employment data were enjoyed by graduates who had some work experience and who majored in life science, education, health, or agriculture and natural resources.⁸⁵ Comparable graduates who majored in computer science and mathematics, engineering, or business all had higher rates of unemployment, but all rates were under 5%.⁸⁶ Earnings and unemployment do not necessarily move together; those who majored in education earned less than those who majored in engineering, for example.⁸⁷ This pattern raises a question: which indicator of default should matter, the unemployment rate experienced by graduates in a particular major or the wage paid to them?

If choosing different courses of study results in a greater chance of employability, using data on overall employment to draw conclusions about the experiences of college graduates is somewhat misleading.⁸⁸ A better question might be: is the unemployment rate among college graduates higher—and if so, by how much and for how much longer—because *too many graduates* have chosen to pursue majors in fields that do not lead to employment? Professor Simkovic cites the differences in wages paid to graduates with different majors and unemployment rates

at 11–12. Those with degrees in elementary education face lower unemployment rates than either. *Id.*

84. *See id.* at 7–15 (noting that those graduates with some experience in their fields of study generally enjoy lower rates of unemployment than those graduates who merely earn a degree).

85. *Id.* at 4, 7–15.

86. *Id.* at 7–15.

87. *Id.* at 11–12.

88. *See id.* at 4–6 (demonstrating that the employment rates of college graduates are affected by multiple factors, including major field of study as well as experience in said field). Professor Simkovic contends that higher rates of unemployment and lower wages for graduates in specific majors are evidence of mismatch. Simkovic, *supra* note 1, at 530. However, studies of mismatch do not draw that conclusion. *See infra* note 92 (describing the scope of research on mismatch between workforce skills and employer need).

at time of graduation.⁸⁹ Earning less and/or being unemployed both help predict default, but so do other factors, including parental education and family income, for example.⁹⁰ Higher interest rates in addition to a lower salary and a higher risk of unemployment punish the graduate who is least able to manage that higher monthly loan payment, to say nothing of the student who does not complete a course of study.⁹¹

Whether there is a “mismatch” in the workforce overall says little about the significance of undergraduate choice of major.⁹²

89. See Simkovic, *supra* note 1, at 540–42 (noting, for example, that in 2011, engineering majors received significantly higher starting salary offers than visual and performing arts majors). However, Professor Simkovic also cites to a study suggesting that students are rational in choosing majors that put them on a path to higher lifetime earnings, rather than those that produce the highest wages initially. *Id.* at 571 n.117 (citing Mark C. Berger, *Predicted Future Earnings and Choice of College Major*, 41 INDUS. & LAB. REL. REV. 418, 427 (1988)). If this finding is true, then variable pricing of student loans—if it were to have a significant effect at all, which I argue it would not, *see supra* Part II—could skew students toward pursuing the major associated with the quickest.

90. See Thomas A. Flint, *Predicting Student Loan Defaults*, 68 J. HIGHER EDUC. 322, 341 (1997) (stating that evidence regarding family wealth, for example whether or not a family has a bank account, is often an unmeasured influence on student loan repayment).

91. Failure to complete a course of study is a powerful predictor of loan default. See Gross, Cekic, Hossler & Hillman, *supra* note 32, at 25 (surveying research and concluding that “completing a postsecondary program is the strongest single predictor of not defaulting regardless of institution type”).

92. It may indicate, however, that more workers need more postsecondary education or better preparation in particular skills. See Simkovic, *supra* note 1, at 588 (discussing the structural unemployment that results when employment opportunities are available, but graduates do not have the particular skills needed). Professor Simkovic cites a comment by Narayana Kocherlakota, the president of the Federal Reserve Bank of Minneapolis, to the effect that “[f]irms have jobs, but can’t find appropriate workers.” Narayana Kocherlakota, President, Fed. Res. Bank of Minneapolis, President’s Speech at Missoula, Montana: Back Inside the FOMC (Sept. 8, 2010), http://www.minneapolisfed.org/news_events/pres/kocherlakota_speech_09082010.pdf. However, the comment purported to describe the workforce overall, not college graduates only. See *id.* (making no mention of college graduates in particular). A study of mismatch found that workers who were mismatched—that is, whose jobs were only partially or not at all related to their areas of study—earn less than graduates who are matched, but, significantly, found that the effect on wages was smaller for graduates in particular fields of study. John Robst, *Education and Job Match: The Relatedness of College Major and Work*, 26 ECON. EDUC. REV. 397, 405–06 (2007). So while liberal arts majors were more likely to experience mismatch, the costs of that mismatch were relatively low. *Id.* The

One study that examined the effect of mismatch by major suggested that the impact on wages of working in an area less closely related to major field of study was less, the less that major

author of the study concluded that mismatch exists in an efficient labor market, meaning that it “does not necessarily imply a substantial imbalance in the college education market.” *Id.* at 406. Professor Simkovic also cites findings of a McKinsey Global Institute study as evidence of mismatch, but that study did not focus on the question of whether students were majoring in fields associated with low wages and high unemployment (and certainly did not address student loan default). See Simkovic, *supra* note 1, at 570 n.112 (“[E]mployers still have trouble finding workers with specific skills. And many students lack a clear picture of which jobs and skills will be in high demand.” (citing BYRON AUGUSTE ET AL., MCKINSEY GLOBAL INST., AN ECONOMY THAT WORKS: JOB CREATION AND AMERICA’S FUTURE 57 (2011))). Rather, the McKinsey study focused on the lack of needed skills in the workforce generally, as well as among college students. See BYRON AUGUST ET AL., MCKINSEY GLOBAL INST., AN ECONOMY THAT WORKS: JOB CREATION AND AMERICA’S FUTURE 57 (2011) (claiming that despite the billions of dollars spent annually on postsecondary education and job training programs, too few Americans have skills employers said they sought). Further, the study does not make clear whether this skills gap is related to potential workers’ lack of subject-specific knowledge or whether the skills gap reflects a more basic lack in generally applicable skills, such as critical thinking or writing. See *id.* (referring solely to “skills”). Although the McKinsey study elsewhere reports that student choices of major may not reflect employer needs, *id.* at 40, the reason that employers most frequently gave for not hiring a job applicant was insufficient job experience (45% of 1,285 employers responding to the survey), not lack of educational qualifications (16% of employers). *Id.* at 78 app. B, exhibit B5. The study calls for better disclosure of wages paid and skills sought, *id.* at 57, as I have proposed. The other source cited by Professor Simkovic similarly refers to a lack of “applied skills” among college students. See Simkovic, *supra* note 1, at 570 n.112 (quoting ERIN SPARKS & MARY JO WAITS, NAT’L GOVERNORS ASS’N CTR. FOR BEST PRACTICES, DEGREES FOR WHAT JOBS? RAISING EXPECTATIONS FOR UNIVERSITIES AND COLLEGES IN A GLOBAL ECONOMY 8 (2011)). Interestingly, that study goes on to describe a shortage of nurses, rather than engineers or other graduates with majors in STEM fields that Professor Simkovic generally focuses on. See ERIN SPARKS & MARY JO WAITS, NAT’L GOVERNORS ASS’N CTR. FOR BEST PRACTICES, DEGREES FOR WHAT JOBS? RAISING EXPECTATIONS FOR UNIVERSITIES AND COLLEGES IN A GLOBAL ECONOMY 8 (2011) (noting that forty-six out of fifty states face a shortage of nurses). Finally, a study of “mismatch” by an economist whom Professor Simkovic cites does develop a model offering explanations of gaps between employees and jobs, but it does not evaluate the role of education, let alone choice of major, on the ability to find employment. See Robert Shimer, *Mismatch*, 97 AM. ECON. REV. 1074 (2007) (arguing that unemployment can persist when job vacancies exist because of mismatch at any given time between unemployed workers’ location and skillset, on the one hand, and employers’ location and needs, on the other hand).

taught occupation-specific skills.⁹³ The national unemployment rate among college graduates,⁹⁴ 3.8% as of this writing, is less than half the unemployment rate overall, 7.4%.⁹⁵ For some majors it is higher, for some majors it is lower, sometimes for purely cyclical reasons.⁹⁶ Neither the aggregate nor the specific data can answer the question of when the difference in unemployment rates across fields or majors is sizable or long-lasting enough that corrective action is appropriate.

93. See Robst, *supra* note 92, at 406 (“The balance between supply and demand is less of an issue in college majors teaching general skills, since such skills transfer to other occupations.”).

94. The government lumps together those with a bachelor’s degree or more. News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, The Employment Situation (Aug. 2013), <http://bls.gov/news.release/pdf/empisit.pdf>.

95. *Id.* The unemployment rate among *recent* college graduates, ages twenty to twenty-nine, is much higher: 13.5% in 2011. Thomas Luke Spreen, *Recent College Graduates in the U.S. Labor Force: Data From the Current Population Survey*, MONTHLY LABOR REV., Feb. 2013, at 9 tbl. 5, <http://www.bls.gov/opub/mlr/2013/02/art1full.pdf>. In that age bracket in the labor force overall, the unemployment rate was 12.6%. *Id.* Nonetheless, the overall lower unemployment rate for those with at least a bachelor’s degree suggests that these recent graduates will find employment and, if the past remains a reliable guide, should enjoy an earnings boost as a result of their higher education. In a recession, it is reasonable to expect the unemployment rate to rise for new labor market entrants; as of this writing, it is far from clear whether the unemployment rate among recent college graduates is cyclical and soon to fall, or whether it is structural and likely to persist. Historically, low unemployment among holders of college degrees is the norm. *Data Retrieval: Labor Force Statistics*, BUREAU OF LABOR STATISTICS, bls.gov/webapps/legacy/cpsatab4.htm (scroll to the bottom of the page and under the “Bachelor’s Degree and Higher” section, click the box where “Unemployment Rate” intersects with the “Not Seasonally Adjusted” row; click “Retrieve Data;” then change the “Output Options” at the top of the page by scrolling up to “1992” in the first date range; then click “Go”) (last visited Sept. 23, 2013) (listing unemployment rates for holders of bachelor’s degrees or higher from 1992–2013) (on file with the Washington and Lee Law Review).

96. See CARNEVALE, CHEAH & STROHL, *supra* note 83, at 5 (suggesting that the growth or collapse of an industry can affect the employment rates for associated majors).

B. Students' Choices of Major Do Not Determine Likelihood of Student Loan Default

A second problem offered to justify the proposal is the cost of borrower defaults.⁹⁷ The argument is, because students choose majors in fields associated with lower pay, they graduate with low-value degrees and significant debt burdens, and are more likely to default on their loans, pay less in taxes, suffer unemployment, and consume more public resources.⁹⁸ In the case

97. Whether the cost of defaults has exceeded revenue generated by student loan borrowers who have made payment is a subject of debate. Senator Elizabeth Warren has criticized student lending, saying that the federal government would earn tens of billions of dollars in profit from aid programs and that such earnings were “obscene.” Ruth Tam, *Warren: Profits From Student Loans are ‘Obscene,’* WASH. POST. (July 17, 2013, 11:23 AM), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/07/17/warren-profit-s-from-student-loans-are-obscene/> (last visited Dec. 2, 2013) (on file with the Washington and Lee Law Review). In recent years default rates—which I have noted elsewhere are an imperfect measure of repayment, Glater, *supra* note 58, at 63—have risen, no doubt as a result of a combination of events, most notably the recession that began with the financial crisis of 2008. See Press Release, U.S. Dep’t of Educ., Student Loan Default Rates Increase (Sept. 13, 2010) (concluding that the increasing default rates amongst students are a result of “very difficult economic times”) (on file with the Washington and Lee Law Review). No one has yet shown conclusively that the federal government is losing, has lost, or is in danger of losing money as a result of a rising default rate on education loans in general, let alone as a result of students’ choices of major. To date, the government has consistently reported making money off of student lending. See Simkovic, *supra* note 1, at 530 (noting that federal student loan programs have generated a profit for the government). Student lending could be intended to maximize government revenue, in which case the interest rate charged should be set at the highest possible rate consistent with maximizing future tax revenue from the higher incomes earned by graduates. Student lending could seek to maximize national competitiveness or societal welfare, meaning terms of loans should fluctuate with national needs as determined by lawmakers. Or student lending could seek to achieve the best student outcome, perhaps maximizing student earnings, student happiness, the odds of repayment of loans, or some combination of these three factors. Policymakers have not limited themselves to just one goal, but have focused broadly on promoting access. See, e.g., Arne Duncan, Sec’y, Dep’t of Educ., Address at the 91st Annual Meeting of the American Council on Education (Feb. 9, 2009), available at <http://www2.ed.gov/news/speeches/2009/02/02092009.html> (emphasizing the importance of “ensur[ing] that federal loans continue to be available to every student and parent that qualifies—and . . . [of] keep[ing] college affordable”) (on file with the Washington and Lee Law Review).

98. See Flint, *supra* note 90, at 330 (“[S]ome studies show that majoring in more academically rigorous disciplines related to science and technology (such as engineering) decreases the probability of default.”).

of federal loans, taxpayers are thus potentially exposed to losses.⁹⁹ But academic studies have not concluded that choice of major is a powerful predictor of default, with some finding evidence of an effect, and others not.¹⁰⁰ Some evidence exists that grades are a better predictor of likelihood of default.¹⁰¹ So is wealth: a graduate who is independently wealthy is a good risk even after choosing a low-pay career, while a poor graduate who plans to become a doctor may be more likely to default despite career ambitions.¹⁰²

Assuming that choice of major determines risk of default precludes consideration of other factors that studies have found

99. See *id.* at 322 (“Failures to repay student loans result in enormous costs to the federal government, which covers the losses to lenders.”).

100. See Gross, Cekic, Hosler & Hillman, *supra* note 32, at 25 (describing one study that found the effects on default of choice of major disappeared after controlling for total debt and postgraduate earnings, and another study finding a higher probability of difficulty with repayment among students entering fields with lower expected earnings).

101. See Flint, *supra* note 90, at 343 (noting that “higher GPAs are associated with avoidance of default”). The article does find that “greater incongruence between undergraduate major and current employment are risk factors” for default, *id.*, but this finding must be considered in light of other research on congruence between major and employment that concluded that congruence matters more in some fields and less in others. See Robst, *supra* note 92, at 405–06 (noting, for example, that while liberal arts majors experience higher mismatch, the cost of this mismatch is “insignificant”). Importantly, the Robst study concluded that where the penalty for a mismatch between job and degree field is higher, less risk of mismatch exists in that field. *Id.* at 406. So, for example, an engineer would pay a steeper wage penalty for working as something other than an engineer, while a liberal arts major would pay an insignificant premium for working in another field. *Id.* at 405. These results, the author observed, “are suggestive that this type of mismatch exists in an efficient labor market.” *Id.* at 406; see also J. Fredericks Volkwein & Bruce P. Szelest, *Individual and Campus Characteristics Associated with Student Loan Default*, 36 RES. HIGHER EDUC. 41, 52 (1995) (concluding that the “lowest default rates are associated with academic performance above 3.0, a major in one of the Biglan pure/hard/nonlife subjects like chemistry, geology or mathematics, and attending a specialized institution such as a business college, engineering school or seminary”).

102. See Gross, Cekic, Hosler & Hillman, *supra* note 32, at 23 (“Families with more money are able to provide a financial safety net unavailable to students from lower-income families, who are more likely to need such a resource given their greater levels of debt. This safety net also helps students to meet their loan obligations through fluctuations in personal income.”).

relevant.¹⁰³ Consider a student who chooses to major in art history, presumably a low-pay field, but who does very well in school and becomes an appraiser for an auction house. Should that student face a higher interest rate *ex ante* than a student who, responding to differences in loan pricing, abandons a major in English literature to become a very mediocre business administration student and ends up in a job that pays less than that obtained by the graduate with the art history degree?¹⁰⁴ Basing the interest rate of a student loan on choice of major, which may or may not correlate with the value of the job ultimately taken by that student, makes less sense than does making an adjustment to the interest rate *ex post*, with the benefit of knowing the career choices the student actually made.

IV. Education Is Different

In the Introduction to this Article, I suggested that deciding the extent to which tools of the marketplace should play a role in the setting of education policy is a difficult task. We have already adopted the use of credit, we allow families to save for college through tax-advantaged accounts,¹⁰⁵ and the interest rate on federal loans was recently pegged to the government's cost of borrowing.¹⁰⁶ These moves tie education finance more closely to

103. See *id.* at 21 (listing factors such as family income, race/ethnicity, type of institution, field of study, students' financial aid and the amount of debt they incur, and students' employment and income after college).

104. Using loan forgiveness and income-based repayment assistance programs avoids having to make such choices at all and effectively enables loan prices to be set *ex post*, on the basis of what graduates actually do and on what they actually earn. Such back-end programs do not undermine success stories that look improbable when the criterion for evaluation is choice of major. This is also the approach that lawmakers have taken. See *infra* Part IV.A (suggesting that lawmakers are attempting to make particular fields of study more attractive despite the associated low wages).

105. See *529 Plans: Questions and Answers*, IRS, <http://www.irs.gov/uac/529-Plans:-Questions-and-Answers> (last visited Aug. 9, 2013) (describing the 529 plan and discussing its benefits and drawbacks) (on file with the Washington and Lee Law Review).

106. See Jeremy W. Peters & Ashley Parker, *An Unusual Feat in Congress: Student Loan Bill Breezes On*, N.Y. TIMES, Aug. 1, 2013, at A10 (noting that "Congress set a cap on all loans: 8.25[%] for undergraduates, 9.5 for graduate students and 10.5 for PLUS recipients").

financial markets. Should access to higher education further reflect markets, for example by allowing interest rates to vary with students' choices of major? That far, I argue, we should not go because education differs fundamentally from other investments.

In this Part, I demonstrate that this recognition of the special character of education is well-established and that freedom to make choices about higher education is a protected and essential personal liberty. In the first section, I describe lawmakers' determination to promote and protect access to education generally, as an end in itself, on the basis of a broad conception of what is in the national interest. In the second section, I describe the special role that education plays in our society, as a public good and an engine of social mobility. Finally, I briefly note the importance that the Supreme Court has attached to education.

*A. Lawmakers Have Adopted Policies that Promote Access to
Education Generally on the Basis of a Broad View of
What Is in the National Interest*

Drawing on the history of the legislation that created the earliest form of the modern federal student loan finance system, Professor Simkovic concludes that funding of higher education was intended to achieve three goals: increasing the supply of skilled labor, promoting economic and technological development, and promoting social mobility.¹⁰⁷ As I have noted elsewhere,¹⁰⁸ the legislation that led to federal student lending represented a response to the perceived advances of the Soviet Union in science and technology; members of Congress sought to enable more students to develop knowledge and expertise in those fields deemed most essential to securing and defending both national defense and economic preeminence.¹⁰⁹

107. Simkovic, *supra* note 1, at 530.

108. See Glater, *supra* note 58, at 37 (discussing the National Defense Education Act in relation to the launch of the Sputnik satellite).

109. See *id.* (discussing the push for education in scientific and technical fields). Concern over national competitiveness animated expansion of federal student aid programs in the 1960s, as I have pointed out elsewhere, because the

Yet lawmakers did not adopt a strategy akin to that advocated by Professor Simkovic. They avoided using aid programs to transmit labor market signals to students, because they did not view wages as a reliable sign of value. Lawmakers sought to encourage students to pursue fields of study deemed essential to the nation. Perceptions have not changed much in the ensuing years: lawmakers then as now worried about drawing more students into teaching, the study of foreign languages, as well as STEM fields.¹¹⁰ Lawmakers have explicitly rejected a narrow focus on specific areas of study to be singled out for special government support:

There is danger too in gearing our educational system to the development of a race of supermen and superwomen concerned only with intellectual pursuits, exclusive scientific horizons, and social experiments. American education must never be allowed to become lopsided on one side or another. It must provide broad, adequate facilities for all our young citizens and at the same time it must scrupulously avoid Federal regimentation and over-emphasis upon science, technology or purely intellectual activities alone.

It is quality, not quantity alone, that we must seek in our higher education, but that quality must extend to and embrace all educational fields and not just science and mathematics. As important as these subjects are, they must be part of a composite picture, which includes all fields of learning and particularly those fields that relate to the welfare and betterment of man as an individual being endowed with a human soul rather than as a robot responsive to the tick of some scientific gadget. The spiritual must ever prevail as the dominant feature of our system.¹¹¹

launch of Sputnik by the Soviet Union raised fears of an education gap between that country and the United States. *Id.*

110. See Simkovic, *supra* note 1, at 591 (“Indeed, the original NDEA emphasized the importance of training more teachers as well as STEM specialists, and current student loan programs include special loan forgiveness provisions for teachers.” (citing *Teacher Loan Forgiveness*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/repay-loans/forgiveness-cancellation/charts/teacher#what-are-the-eligibility> (last visited Feb. 3, 2013) (on file with the Washington and Lee Law Review))).

111. 1958 CONG. REC. H16684-5 (daily ed. Aug. 8, 1958) (statement of Rep. Elliott) (voicing support of the National Defense Education Act, which created the early version of the federal student loan programs).

Lawmakers chose to make aid broadly available and then selected particular fields that they believed were of special importance and attempted to make those fields more attractive *in spite of* low wages¹¹²—fighting incentives created by labor markets rather than reinforcing them.¹¹³

When creating the guaranteed student loan program that is the ancestor of current federal programs, lawmakers “provided for improved elementary and secondary school teaching in science, mathematics, and foreign languages, as well as funding . . . for higher education.”¹¹⁴ But their views of what the nation needed extended beyond fields in which critics decry an employee shortfall.¹¹⁵ In debate over the Higher Education Act of

112. See Glater, *supra* note 58, at 31–32 (describing federal incentives that aim to encourage students to select particular majors of national importance—for example, public safety—regardless of the likely low wages). One could make a case that given the higher salaries that students pursuing particular courses of study might be expected to earn, those students should pay higher interest rates on their loans, in order to subsidize the educations of those launching themselves on less lucrative career paths. What Professor Simkovic contends is a “perverse” cross-subsidy under the current, fixed interest rate system—students likely to command high wages pay an interest rate that is higher than they otherwise might and students likely to earn lower wages pay an interest rate that is lower than they otherwise might, Simkovic, *supra* note 1, at 590—others might contend is one of the current regime’s virtues. See *id.* at 590–92 (discussing those scholars who advocate for this redistributive model). Professor Simkovic’s variable interest rate regime would create its own inequity, giving students of more limited means less freedom to choose a particular course of study.

113. In fact, lawmakers have gone so far as to single out professions generally perceived as highly compensated for tougher treatment: Congress has made it more difficult for medical school graduates to discharge student loans in bankruptcy than ordinary student loans, penalizing rather than rewarding students who pursue courses of study likely to lead to more lucrative employment. See 42 U.S.C. § 292f(g) (2012) (requiring a bankruptcy judge to find that “nondischarge of such debt would be unconscionable” when a borrower attends an “eligible institution,” defined as a “school of medicine, osteopathic medicine, dentistry” (42 U.S.C. § 292o(1))).

114. Glater, *supra* note 58, at 37.

115. It is instructive that lawmakers saw foreign languages as essential to national competitiveness, thus evincing a view of national needs that extends well beyond the needs or desires of employers. More recently, governors have voiced concern not only about the technical skills of workforces in the states, but also about the role of the arts and culture in generating economic growth. ERIN SPARKS & MARY JO WAITS, NAT’L GOVERNORS ASS’N, NEW ENGINES OF GROWTH: ARTS, CULTURE AND DESIGN 3 (Nancy Geltman ed., 2012),

1965,¹¹⁶ which expanded the system of guaranteed student loans made by private lenders on terms set by the government, members of Congress did not limit their justifications of a government role in financing postsecondary education to economic considerations,¹¹⁷ or even to national defense.¹¹⁸ Nor did they focus solely on science, technology, engineering and mathematics—the STEM disciplines.¹¹⁹ And they did not focus on maximizing graduates’ earnings; their vision was broader.

In general,¹²⁰ neither federal grants nor federal loans are contingent on study of subjects deemed most important for the national defense or the national economy. Instead, lawmakers have created programs designed to encourage graduates to pursue careers deemed particularly valuable, creating loan repayment assistance programs that effectively lower students’ cost of credit *ex post*.¹²¹ Such moves make sense because it is the

<http://www.nga.org/files/live/sites/NGA/files/pdf/1204NEWENGINESOFGROWTH.PDF>.

116. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 129 (codified as amended in scattered sections of 20 U.S.C.).

117. Simkovic, *supra* note 1, at 531. Professor Simkovic explains his decision to avoid discussion of “moral or philosophical views about the ideal purpose of education or its proper role in society” because “government support for higher education in the United States has primarily been driven by economic considerations.” *Id.*

118. Many contemporary policymakers have adopted a broader view of the role of postsecondary education, too. A recent report of the National Governors Association, for example, offers examples of states using “arts, culture, and design [as] a compelling part of their economic solutions.” SPARKS & WAITS, *supra* note 115, at 3.

119. See *Higher Education Act of 1965: Hearings Before the Spec. Subcomm. on Educ. of the Comm. on Educ. and Labor*, 89th Cong. 83 (1965) (“A student could use a guaranteed loan at any accredited institution of higher education or at an accredited business, technical, or vocational school which offers postsecondary programs designed to fit students for useful employment.”).

120. There are exceptions, such as the federal Teacher Education Assistance for College and Higher Education or “TEACH” Grant, which provides scholarships for students pursuing teaching careers. FED. STUDENT AID, TEACH GRANT PROGRAM FACT SHEET 1 (2013), studentaid.ed.gov/sites/default/files/teach-grant_0.pdf.

121. Such incentives are so popular that not only do they exist under the aegis of the federal Department of Education but also within numerous states. At the federal level, the Public Service Loan Forgiveness Program is available to graduates who work for a public service organization, such as a not-for-profit, tax-exempt organization, a government organization, or other organization. FED. STUDENT AID, PUBLIC SERVICE LOAN FORGIVENESS PROGRAM FACT SHEET 2–3 (2013), <http://studentaid.ed.gov/sites/default/files/public-service-loan-forgiveness.pdf>. At the

career actually embarked upon, rather than the major selected, that determines both the contribution to society and the ability to repay. There is no reason to impose on a student borrower a penalty for selecting a particular course of study at the front end if the same effect can be achieved at the back end, when better information is available on jobs actually taken, unless the threat of imposition of the penalty will redirect students—and there is not strong evidence that variable student loan pricing will have the desired effect.¹²²

Lawmakers extended early loan forgiveness programs to teachers working in poorer communities, expanded construction grants to support institutions investing in buildings for the arts and humanities, and provided funding for study of foreign languages.¹²³ They also established a National Teacher Corps to send college graduates into primary and secondary schools.¹²⁴ Lawmakers discussed the riskiness of requiring students to pursue particular courses of study in the debate over the legislation creating the Corps, but they concluded that “it [wa]s unwise for the Federal Government to induce people to go into a particular occupation as though that occupation were more important than other occupations.”¹²⁵

Lawmakers’ decisions reflect societal values. More recently, Congress expanded loan forgiveness for people working in any “area of national need,” which federal legislation identified as

state level, California has a program to assist loan repayment by health professionals who work in underserved areas. *California State Loan Repayment Program*, STATE OF CAL. OFF. OF STATEWIDE HEALTH PLANNING & DEV., <http://www.oshpd.ca.gov/HWDD/SLRP.html> (last visited Sept. 13, 2013) (on file with the Washington and Lee Law Review).

122. *Supra* Part II.

123. 111 CONG. REC. 22,666 (1965) (statement of Sen. Javits).

124. 111 CONG. REC. 27,695 (1965) (statement of Rep. Meeds). Congress did not specify those fields that teachers were supposed to teach in the classroom; the goal was encouraging college graduates to go into teaching at all. *Id.* at 27,592.

125. 111 CONG. REC. 21,885 (1965) (statement of Rep. Quie). Representative Quie went on to propose, unsuccessfully, that loan forgiveness for teachers not be included in the legislation. *Id.* More recently, in approving legislation that pegged federal student loan interest rates to the government’s cost of funds, lawmakers made a similar observation, although in a different context, stating bluntly that “[p]oliticians should not be in the business of setting student loan interest rates.” H.R. REP. NO. 113-82, pt. 1, at 9 (2013).

including early childhood educators, nurses, foreign language specialists, librarians, many types of schoolteachers, child welfare workers, school counselors, medical specialists, mental health professionals, dentists, and physical therapists, among others.¹²⁶ Lawmakers have not tried to advance national competitiveness by augmenting market pressures that already exist, in the form of higher wages, to draw students into particular fields.¹²⁷

B. Education Plays a Critical Societal Role

Increasing access to education increases the benefits that education confers on a society. This is so because education has characteristics of a private and public good—private because those with more education tend to enjoy a higher quality of life,¹²⁸ and public because education can benefit people other than the beneficiary.¹²⁹ Education appears to promote happiness¹³⁰ and to

126. 20 U.S.C. § 1078-11(b) (2012).

127. Some colleges have adopted differential pricing for different degrees. Jonathan D. Glater, *Certain Degrees Now Cost More at Public Universities*, N.Y. TIMES, July 29, 2007, at A1. However, the pricing adopted by some universities reflects higher costs rather than higher postgraduation salaries, such that tuition is higher for students pursuing business and engineering degrees, for example. *Id.* These pricing schemes thus could discourage students from pursuing these courses of study. Some college and university officials interviewed in the article worried that students paying different amounts would not feel “part of the larger college,” undermining one of the goals of the undergraduate experience, and would not take courses outside of their major fields of study. *Id.*

128. Not least because more education typically translates into higher lifetime income. *See* Glater, *supra* note 58, at 18 (“For individual students, access to education helps in realizing life ambitions and may also lead to material rewards, as students capture the benefit of the application of their trained intellects.”).

129. *See id.* (“While for these financially successful beneficiaries of higher education college was clearly a private good, the fruits of their labors still benefit the many who use their inventions or learn from their ideas.”).

130. *See* Richard Florida, Charlotta Mellander & Peter J. Rentfrow, *The Happiness of Cities*, 47 REGIONAL STUD. 613, 623 (2013) (suggesting that the effect of income on happiness at the metropolitan level is driven more by human capital than by income); Catherine Rampell, *Does Education Make You Happy?*, N.Y. TIMES ECONOMIX BLOG (Feb. 18, 2010, 7:10 PM), <http://economix.blogs.nytimes.com/2010/02/18/does-education-make-you-happy/> (last visited Nov. 20, 2013) (noting that “educational attainment can help explain a lot of the

confer health advantages on the educated.¹³¹ The more educated citizen benefits the larger community through provision of goods and services produced by the educated worker and, in a democracy, the contribution of the educated worker's intellect to resolution of problems confronting that community.¹³² These benefits extend beyond the contribution of highly paid workers to the public fisc in the form of income taxes, although that adds to the justification of a federal role in education finance, too.¹³³ As I have argued elsewhere, citing founders of the Republic, education offers a bulwark protecting the nation against the threat of tyranny.¹³⁴

Education also promotes social and socioeconomic mobility; those without much wealth can, if they are able to take

variation in well-being levels across American cities") (on file with the Washington and Lee Law Review).

131. See, e.g., Fiona E. Matthews et al., *A Two-Decade Comparison of Prevalence of Dementia in Individuals Aged 65 Years and Older from Three Geographical Areas of England: Results of the Cognitive Function and Ageing Study I and II*, *THE LANCET* 1, 2 (2013), available at [http://dx.doi.org/10.1016/S0140-6736\(13\)61570-6](http://dx.doi.org/10.1016/S0140-6736(13)61570-6) (describing a reduction in prevalence of dementia over time and attributing a portion of the decline to increased education levels in the populations studied); Kaare Christensen et al., *Physical and Cognitive Functioning of People Older than 90 Years: A Comparison of Two Danish Cohorts Born 10 Years Apart*, *THE LANCET* 1, 5 (2013), available at [http://dx.doi.org/10.1016/s0140-6736\(13\)60777-1](http://dx.doi.org/10.1016/s0140-6736(13)60777-1) (finding that the group of ninety-year-olds born ten years earlier performed worse on cognitive evaluations than did the group born later, although the individuals in the later-born group were on average older and attributing a portion of the difference to higher levels of education in the second group); see also Gina Kolata, *Dementia Rate Is Found to Drop Sharply with Better Health and Education*, *N.Y. TIMES*, July 16, 2013, at A8 (summarizing studies on declining frequency of dementia in the elderly as confirming that "dementia rates would fall and mental acuity improve as the population grew healthier and better educated").

132. *Id.*

133. Professor Simkovic recognizes this contribution in his analysis, using it as a reason that pricing of student loans based on riskiness would yield benefits for the government: more people in high-pay jobs means higher tax revenues, Simkovic, *supra* note 1, at 533 n.8, at least until the labor market corrects and wages in a particular field decline.

134. See Thomas Jefferson, Preamble to a Bill for the More General Diffusion of Knowledge (1778), in 2 *THE PAPERS OF THOMAS JEFFERSON*, 526–27 (Julian P. Boyd ed., 1950) (highlighting the importance of education). I would go further; as I have stated elsewhere: "[E]nabling young people to achieve their ambitions, to pursue careers that most appeal to them, to realize themselves as fully as they can, is a good in itself." Glater, *supra* note 58, at 19.

advantage of educational opportunities, find more lucrative employment than their parents had. Education facilitates realization of other aspirations, helping graduates achieve positions of influence in the realms of politics, business, and academia, to name a few paths.¹³⁵ Education enables members of historically disempowered groups both to improve their own lives and to advance the causes of their communities,¹³⁶ while denial of access to education hinders access to the corridors of power.¹³⁷ Discriminating among students on the basis of choice of major may similarly restrict opportunity for certain students.¹³⁸ In all these ways, education is not like other goods and services whose provision the government regulates.¹³⁹

Perhaps an argument can be made that raising the cost of higher education some modest amount by setting interest rates by choice of major does not constitute interference with personal autonomy to such a degree that it is objectionable; the burden is incidental.¹⁴⁰ To the extent that penalizing particular choices of

135. See Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 HARV. L. REV. 113, 115 (2003) (stating that graduates from institutions of higher education “graduate to become citizens who shape business, education, the arts, and the law for the next generation”).

136. The Supreme Court recognized one form of this advantage provided by primary and secondary education in *Plyler v. Doe*, 457 U.S. 202, 222 (1982) (noting that “depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority”), but it is no less true of postsecondary education.

137. *Id.* at 221 (“[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence.” (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 221 (1972))).

138. And that may be self-fulfilling, as argued above. *Supra* notes 32–33 and accompanying text.

139. Separately, I have argued for expansion of federal student aid programs to reduce or eliminate the need for private student loans. Glater, *supra* note 58, at 58. The terms of private student loans, which are generally worse than those of federal loans, do turn on borrower characteristics. *Id.*

140. Professor Michael C. Dorf has questioned the whole notion of “incidental” infringements of rights. See generally Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 HARV. L. REV. 1175 (1996). Professor Dorf noted, however, “[f]rom the perspective of a rightholder, the severity of a law’s impact has no necessary connection to whether the law directly or incidentally burdens the right’s exercise.” *Id.* at 1177. Professor Dorf consequently argues

courses of study hurts anyone, and to the extent that student borrowers take note of interest rates at all,¹⁴¹ those deterred from pursuing particular courses of study will likely be students of limited financial means, and in the context of education, discrimination on the basis of wealth is not necessarily unconstitutional.¹⁴² However, both in the popular press¹⁴³ and on university campuses,¹⁴⁴ interest has increased in recent years in promotion of socioeconomic diversity,¹⁴⁵ out of concern both about declining class mobility in the United States and about achieving greater racial and ethnic diversity without considering race or ethnicity in college admissions decisions. But pursuit of socioeconomic diversity in various fields becomes more difficult if wealth is unevenly distributed across the student population and access to credit is more costly for students who choose particular majors. If economic barriers to higher education matter—and they do—then any policy that would exacerbate the effects of

that courts should apply heightened scrutiny to laws that incidentally hamper the exercise of fundamental rights. *Id.* at 1179. However, I do not concede that hampering a student's freedom to choose a career by raising the cost of particular choices constitutes an "incidental" infringement.

141. *Supra* Part II.

142. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 23–24 (1973) (“[I]f the children in districts having relatively low assessable property values . . . [complain of] receiving a poorer quality education than . . . children in districts having more assessable wealth . . . a sufficient answer to [their] argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality . . .”).

143. *See, e.g.*, David Leonhardt, *Rethinking Affirmative Action*, N.Y. TIMES, Oct. 14, 2012, at SR4 (arguing that socioeconomic class should be a factor in college admissions decisions).

144. *See, e.g.*, Matthew N. Gaertner & Melissa Hart, *Considering Class: College Access and Diversity* 35 (Univ. of Colo. Law Legal Studies Research Paper No. 12-18, 2013), available at http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2256159_code509970.pdf?abstractid=2137126&mirid=1 (finding that use of class-based criteria in admissions could contribute to racial diversity in college admissions). For example, a study of the effects of shifting to emphasizing socioeconomic class, rather than race, in admissions decisions could enhance overall diversity along different axes. *Id.* at 5.

145. *See, e.g.*, Leonhardt, *supra* note 143, at SR4 (“But simple discrimination seems to have become a relatively smaller obstacle over the last few decades, whole socioeconomic disadvantage has become a larger one.”).

those barriers should be greeted with considerable skepticism.¹⁴⁶ Public policy should promote access to education, not hinder it.

C. Education Finance Policy Should Respect Student Autonomy

The Supreme Court has long recognized that under the Constitution, decisions about education must receive special deference.¹⁴⁷ Although the Court has determined that the constitution does not provide a fundamental right to education,¹⁴⁸ the Justices have recognized that, like the decisions whether to marry or to have children, decisions about education “involve[] the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment.”¹⁴⁹ In a case involving the right to terminate a pregnancy, the Court went on to explain the basis for the concern of the Fourteenth Amendment in powerful terms: “At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”¹⁵⁰ What is at stake in choosing a course of study and subsequent career is freedom to pursue

146. If particular populations tend to major in specific subjects, see *supra* note 60 and accompanying text, members of those populations could be harmed more by higher interest rates applicable to loans to students in those majors.

147. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (“Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education.” (citation omitted)).

148. See *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (noting that publicly provided “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution . . . [and] we [do not] find any basis for saying it is implicitly so protected”). However, a distinction can be drawn between government’s provision of education at all—the issue in *Rodriguez*—and a student’s choice of the sort of education to pursue.

149. *Casey*, 505 U.S. at 851. While the case involved the right to terminate a pregnancy, the Court carefully placed the decision in the context of other protected rights. See *id.* at 915 (framing the issue in terms of the rights to privacy and bodily integrity).

150. *Id.*

happiness¹⁵¹ because education is a means to that end.¹⁵² Students should be able to make their own choices.¹⁵³

151. While a student may state that earning potential is a major factor in choice of major, other factors may be, too. Professor Simkovic cites a study by Amanda Thorson, who studied earnings of graduates with different majors, for the point that “choice of field of study affects wages and employment,” Simkovic, *supra* note 1, at 539 (citing Amanda Thorson, *The Effect of College Major on Wages*, 13 PARK PLACE ECONOMIST 45 (2005)), and that study concluded that graduates in more specialized, technical majors, like engineering, earned more than those in more general majors, like communications. Amanda Thorson, *The Effect of College Major on Wages*, 13 PARK PLACE ECONOMIST 45, 54–56 (2005). But not all specialized majors were STEM fields. *Id.* at 55. Further, the Thorson study noted a tradeoff for students, because more specialized majors were less transferable and so less enabling of career changes. *Id.* at 56. That observation makes the value judgment that students should pursue the highest-earning jobs less certain: Students may rationally prefer to earn less but enjoy more flexibility. Another article cited by Professor Simkovic suggested that some students’ choices of major were part of a rational plan to improve the odds of gaining admission to graduate school. *See* Simkovic, *supra* note 1, at 582 n.133 (citing Eric Eide & Geetha Waehrer, *The Role of the Option Value of College Attendance in College Major Choice*, 17 ECON. EDUC. REV. 73, 74 (1998)). Whether students are choosing to preserve flexibility or to pursue graduate education, it is unclear why their choice of major should be penalized. This claim is bolstered by the argument that individual students know their strengths and should not be penalized for choosing courses of study that play to those strengths. *See* Morton Paglin & Anthony M. Rufolo, *Heterogeneous Human Capital, Occupational Choice, and Male-Female Earnings Differences*, 8 J. LAB. & ECON. 123, 126 (1990) (discussing how, given different ability endowments, students “may be better off choosing to produce a type of human capital that has less value per unit because the student could produce more units in a given amount of time”). Professor Simkovic cites this study, Simkovic, *supra* note 1, at 571–72 n.117, but does not take into account its implications for student autonomy.

152. Professor Simkovic argues that the current regime of fixed interest rates on student loans force students majoring in certain fields, those that produce graduates less likely to default on their loans, to subsidize the loans made to students majoring in fields producing graduates with higher odds of default. Simkovic, *supra* note 1, at 590. This is either a normative argument, that it is unfair that the interest rate students in the former group must pay is higher than they should have to, or it is an argument about efficiency. Because the interest rate historically has been set by Congress and has had no relationship to riskiness of the loan, *id.* at 560, the logical argument rests on inefficiency: too many students pursue high-risk majors because the cost is artificially low, and too few students pursue low-risk majors because the cost is artificially high. If, however, interest rates do not play a role in student choice of major, as I have argued above (and Professor Simkovic concedes that the evidence is “somewhat mixed,” *id.* at 629 n.281), then this asserted cross-subsidy does not cause students to pursue the wrong courses of study.

153. Even if institutions were to adopt testing to determine aptitudes, tests could not capture the student’s level of interest, and interest in a field motivates

V. Conclusion

Valid criticisms have been launched at higher education finance; the system that we have is profoundly unsatisfying. Students graduate saddled with debt that burdens borrowers and constrains their career choices. Loan terms do not create incentives for academic performance. Low salaries in certain fields have prompted government intervention to assist in loan repayment. In other words, serious issues remain outstanding. Professor Simkovic has made an invaluable contribution to our ongoing national debate about how we, collectively and individually, should pay for college. But his proposal to vary interest rates based on choice of major does not address the core problems we face and would make some borrowers worse off than they are under the current regime.

Professor Simkovic and others have advocated that interest rates on federal student loans should be higher for those who choose courses of study associated with lower wages and higher rates of unemployment.¹⁵⁴ Correspondingly, he has suggested that interest rates should be lower for those students who choose more lucrative paths.¹⁵⁵ In this Article, I have argued that the underlying premise of his argument—that students are graduating having completed educational programs that do not enable them to obtain jobs that pay higher salaries—may be incorrect, and that student choices resulting in earning particular wages may not be evidence of a problem requiring government intervention. I have challenged the feasibility and the efficacy of

effort and achievement. At a less practical level, there is value in enabling a student to study what that student wants to study and do what that student wants to do. Studies of human happiness suggest that, not surprisingly, those who feel that they control their destiny are happier, Florida, Mellander & Rentfrow, *supra* note 130, at 623. However, there are those who argue that happiness is not in itself a worthy goal. *See, e.g.*, Jim Holt, *Against Happiness*, N.Y. TIMES MAG. (June 20, 2004), <http://www.nytimes.com/2004/06/20/magazine/20WWLN.html> (last visited Nov. 20, 2013) (noting the discrepancy across cultures between happiness and social progress, freedom, education, and low suicide rates) (on file with the Washington and Lee Law Review).

154. *See* Simkovic, *supra* note 1, at 625–26 (noting that a risk-based pricing system would make borrowers internalize the risk associated with their choice of major).

155. *See id.* at 589–90 (stating that this risk internalization will encourage students to choose majors that will lead them to “high-value occupations”).

the proposal, warned of the adverse effects on particular borrowers, and suggested that the proposal is inconsistent with our collective beliefs about the significance and role of higher education in society. Government should not infringe upon students' freedom to choose a way in the world.