FACING THE STUDENT-DEBT CRISIS: RESTORING THE INTEGRITY OF THE FEDERAL STUDENT LOAN PROGRAM

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"A man in debt is so far a slave."
—Ralph Waldo Emerson[1]

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1. RALPH WALDO EMERSON, *Wealth*, *in* THE CONDUCT OF LIFE (1890).

INTRODUCTION

About twenty-one million Americans are enrolled in colleges, universities, and other postsecondary educational institutions,[2] and a majority of these people are forced to take out student loans to pay for their postsecondary schooling.[3] In 2012, seventy-one percent of graduates from all four-year institutions had student loans averaging $29,400.[4] At public institutions, two-thirds of the graduates had federal loans, and their average debt was $25,500; at private, nonprofit colleges and universities, three-quarters of the graduates had borrowed and had an average debt of $32,300, while eighty-eight percent of the graduates at proprietary (for-profit) institutions had student-loan debt averaging $39,950.[5]

Currently, more than thirty-seven million people have outstanding college or university loans,[6] and the total amount of student loan debt has reached $1.2 trillion.[7] About $1 trillion of the total indebtedness represents outstanding loans in the federally funded student-loan program.[8] Another estimated $165 billion is owed to private banks and financial institutions that are outside the federal student-loan program.[9]

In recent years, it has become increasingly evident that a great many former students are having difficulty repaying their student loans. According to the Office of the Student Loan Ombudsman of the Consumer Financial Protection Bureau (a federal agency), over fifteen million people have either defaulted on their student loans or are not making payments due to the fact that they obtained an economic hardship deferment or another federally approved forbearance.[10] In fact, only sixty percent of student loan borrowers were making scheduled payments on their loans one year after beginning the loan-repayment period.[11]

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2. Laura G. Knapp et al., *Enrollment in Postsecondary Institutions, Fall 2009; Graduation Rates, 2003 & 2006 Cohorts; and Financial Statistics, Fiscal Year 2009: First Look*, NAT'L CTR. FOR EDUC. STAT. 7 (Feb. 2011), *available at* http://nces.ed.gov/pubs2011/ 2011230.pdf.

3. *Student Loan Debt Statistics*, AM. STUDENT ASSISTANCE, http://www.asa.org /policy/resources/stats/ (last visited June 21, 2014).

4. Beckie Supiano, *Borrowers' Average Debt at Graduation Climbs to $29,400*, CHRON. HIGHER EDUC. (Dec. 4, 2013), http://chronicle.com/article/Borrowers-Average-Debt-at/143381/.

5. *Id.*

6. *Student Loan Debt Statistics, supra* note 3.

7. Rohit Chopra, *A Closer Look at the Trillion*, CONSUMER FIN. PROT. BUREAU (Aug. 5, 2013), http://www.consumerfinance.gov/blog/a-closer-look-at-the-trillion/ [hereinafter *A Closer Look at the Trillion*].

8. *Id.*

9. Rohit Chopra, *Student Debt Swells, Federal Loans Now Top a Trillion*, CONSUMER FIN. PROT. BUREAU (July 17, 2013), http://www.consumerfinance.gov/news room/student-debt-swells-federal-loans-now-top-a-trillion/.

10. *A Closer Look at the Trillion*, *supra* note 7.

11. David A. Bergeron, Elizabeth Baylor & Joe Valenti, *Resetting the Trillion-*

We may think of delinquent student-loan debtors as people in their twenties, but not everyone who is behind on a student-loan payment is young.[12] Researchers for the Federal Reserve Bank of New York recently examined the loan status of thirty-seven million student-loan borrowers.[13] Fourteen percent of these borrowers—approximately 5.4 million people—had at least one past-due student-loan account.[14] Of eighty-five billion dollars in total past due balances on student loans, only about twenty-five percent of those past-due balances was owed by borrowers under the age of thirty; forty percent was owed by borrowers at least forty years old; almost one sixth (16.9 percent) of the total outstanding debt was owed by borrowers fifty years old or older; borrowers at least sixty years old owed about five percent of the total outstanding debt.[15]

Student-loan default rates have gone up relentlessly in recent years. In 2007, the United States Department of Education ("DOE") reported a two-year default rate of just 4.6 percent on loans from the Fiscal Year 2005 cohort of students.[16] In 2013, the DOE reported a two-year default rate for students who began paying back loans in October 2010 of ten percent, more than double the rate reported in 2007.[17] According to the DOE's most recent report, 14.7 percent of student-loan debtors defaulted on their loans within three years after their repayment obligations began.[18] For students who borrowed money to attend for-profit institutions, the rate is 21.8 percent.[19] And, as this article later explains, the DOE's official student-loan default rate dramatically understates the true number of student-loan debtors who are defaulting on their loans.[20]

Many factors have contributed to the escalating student-loan default rate

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Dollar Student-Loan Debt Problem, CTR. FOR AM. PROGRESS 2 (Nov. 21, 2013), *available at* http://www.americanprogress.org/wp-content/uploads/2013/11/TrillionDollarLoans-5.pdf.

12. Meta Brown et al., *Grading Student Loans*, *Liberty Street Economics*, FED. RES. BANK OF N.Y. (Mar. 5, 2012), http://libertystreeteconomics.newyorkfed.org/2012/03/grading-student-loans.html#.U0B7VPk7um4.

13. *Id.*

14. *Id.*

15. *Id.*

16. Press Release, U.S. Dep't of Educ., Student Loan Defaults Remain Low (Sept. 12, 2007), *available at* http://web.docuticker.com/go/docubase/20636.

17. Andy Thomason, *Student-Loan Default Rates Continue Steady Climb*, CHRON. HIGHER EDUC. (Oct. 11, 2013), http://chronicle.com/article/Student-Loan-Default-Rates/142009/.

18. *Id*.

19. *Id.*

20. *See also* Richard Fossey & Robert C. Cloud, *From the Cone of Uncertainty to the Dirty Side of the Storm: A Proposal to Provide Student-Loan Debtors Who Attended For-Profit Colleges with Reasonable Access to the Bankruptcy Courts*, 272 EDUC. L. REP. 1 (2011) [hereinafter Fossey & Cloud, *Dirty Side of the Storm*] (arguing that student-loan default rates are probably double the rate reported annually by the U.S. Department of Education).

in recent years. Students are borrowing more money to attend colleges or universities than they did a few years ago, and many are finding it difficult to repay these larger loan obligations.[21] A struggling economy has also contributed to the problem, as young people have struggled to find jobs that pay enough to service their student loan obligations.[22]

Indeed, a 2013 study by the Center for College Affordability and Productivity reported that nearly half of working college graduates held jobs that did not require a bachelor's degree and thirty-seven percent held jobs that required no more than a high school diploma.[23] "Student-loan programs and federal assistance programs are based on some sort of implicit assumption that we're training people for the jobs of the future," a scholar associated with the Center observed, "[i]n reality, a lot of them are not."[24]

Finally, students attending for-profit colleges and universities account for a disproportionate share of student-loan defaults because many of the students who enroll in for-profit institutions drop out before completing their postsecondary programs, which tend to be much more expensive than comparable programs at public institutions.[25] Numerous studies confirm that students who attend for-profit institutions pay higher tuition on average than students who attend public institutions and have much higher student-loan default rates.[26]

Some overburdened student-loan debtors have attempted to discharge their student loans in federal bankruptcy courts, but they have faced major

21. Tamar Lewin, *Student Loan Default Rates Rise Sharply in Past Year*, N.Y. TIMES, Sept. 13, 2011, at A14.

22. *See* Sheila Dewan, *In Jobless Youth, U.S. Said to Pay High Price*, N.Y. TIMES, Jan. 7, 2014, at B3. The unemployment rate in the sixteen to twenty-four age bracket was fifteen percent in January 2014. *Id.*

23. Allie Bidwell, *Millions of Graduates Hold Jobs that Don't Require a College Degree, Report Says*, CHRON. HIGHER EDUC. (Jan. 28, 2013), https://chronicle.com/article/Millions-of-Graduates-Hold/136879/.

24. *Id.*

25. U.S. SENATE HEALTH, EDUC., LABOR AND PENSION COMM., FOR PROFIT HIGHER EDUC.: THE FAILURE TO SAFEGUARD THE FED. INVESTMENT & ENSURE STUDENT SUCCESS 73 (2012), *available at* http://www.help.senate.gov/imo/media/for_profit_report/PartI.pdf (examining thirty for-profit institutions and finding that fifty-four percent of students who started at these colleges in 2008–2009 left without a degree by 2010) [hereinafter HARKIN COMMITTEE REPORT].

26. *See, e.g.*, U.S. GOV'T. ACCOUNTABILITY OFFICE, GAO-10948T 17, FOR-PROFIT COLLEGES: UNDERCOVER TESTING FINDS COLLEGES ENCOURAGED FRAUD & ENGAGED IN DECEPTIVE & QUESTIONABLE MARKETING PRACTICES (2010) (finding "that tuition for certificates at for-profit colleges was often significantly more expensive than at a nearby public college") [hereinafter GAO, FOR-PROFIT COLLEGES]; Amy E. Sparrow, *Unduly Harsh: The Need to Examine Educational Value in Student Loan Discharge Cases Involving For-Profit Trade Schools*, 80 TEMP. L. REV. 329, 335 (2007) ("[F]or-profit trade schools cost significantly more than public community colleges and public four-year universities . . . .").

obstacles.[27] For one, Congress has passed a series of laws making it increasingly difficult for student-loan debtors to obtain bankruptcy relief.[28] Unless they can show that their student loans constitute an "undue hardship," student-loan debtors cannot obtain a discharge of their student-loan obligations.[29] The federal courts have adopted a strict standard for determining when the "undue hardship" requirement has been met, with most courts following the so-called *Brunner* test.[30]

Moreover, federal guarantee agencies—the entities charged with collecting student loans in default—have attempted to persuade federal bankruptcy courts to deny bankruptcy relief altogether to student-loan defaulters who file for bankruptcy.[31] These agencies have argued that defaulters should enroll in income-based repayment plans rather than seek a discharge of their student loans. These plans require debtors to make monthly payments on their student loans based on a percentage of their income for an extended period of time—typically twenty to twenty-five years.[32]

This article is organized into six parts and closes with conclusions and recommendations. Part I provides a brief history of the federal student-loan program, including legislative initiatives, public policy, and court decisions impacting the student-loan program since 1958. It also identifies and discusses Congressional actions ensuring easy access to federal student loans, as well as federal legislation mandating the repayment of student loans. Additionally, Part I addresses the United States Supreme Court's unanimous 2005 decision in *Lockhart v. United States,*[33] in which the Court allowed the offset of Social Security benefits to repay defaulted student loans.[34]

Part II reviews the United States Bankruptcy Code and the six amendments to the Code made between 1976 and 2007 that have made it difficult for insolvent student-loan debtors to discharge their student-loan obligations in bankruptcy. This section also summarizes the *Brunner* test that is used to determine when insolvent student-loan debtors are entitled to have

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27. *See* discussion *infra* Part II.

28. *See In re* Pelkowski, 990 F.2d 737, 742 (3d Cir. 1993) (quoting 124 CONG. REC. 1793, 1798 (1978)). *See also infra* Part II.

29. 11 U.S.C. § 523 (a)(8) (2012).

30. *In re* Brunner, 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

31. *See, e.g., In re* Halverson, 401 B.R. 378, 382 (Bankr. D. Minn. 2009) (creditors unsuccessfully arguing that the debtor should enroll in an income-based repayment plan rather than have student-loan debt discharged in bankruptcy). *But see In re* Stevenson, 463 B.R. 586, 599 (Bankr. D. Mass. 2011) (creditor successfully arguing that a bankrupt student-loan debtor with a history of homelessness should participate in an income-based repayment plan rather than have student-loan debt discharged in bankruptcy).

32. *See, e.g., In re Halverson*, 401 B.R. at 382; *In re Stevenson*, 463 B.R. at 592.

33. Lockhart v. United States, 546 U.S. 142 (2005).

34. *Id.* at 144.

their debts discharged under the Bankruptcy Code's "undue hardship" standard.[35]

Part III argues that student-loan default rates are much higher than the rates reported annually by the DOE. The student-loan default rate for the for-profit college and university sector may be twice as high as the 21.8 percent rate reported by the DOE in October 2013, which only measured defaults that occur within the three years after a student begins repayment.[36]

Part IV examines the for-profit college and university sector, which has a higher default rate on federal student loans than any other sector of postsecondary education. Widely reported instances of fraud, abuse, and misrepresentation in this sector make the for-profit college and university industry a particular concern in terms of its impact on the integrity and solvency of the federal student-loan program.

Part V discusses efforts by the Obama administration to adopt regulations designed to cut down on abuses in the for-profit college and university sector. Under President Obama, the DOE has adopted two sets of comprehensive regulations to this end: the "program integrity rules" issued in October 2010,[37] and the "gainful employment rule" in June 2011.[38] Both sets of regulations triggered litigation by the Association of Private Sector Colleges and Universities. Ultimately, the Association was able to persuade the federal courts to invalidate parts of the Obama administration's reform regulations.[39]

In Part VI, the authors argue that growing student-loan indebtedness—now totaling $1.2 trillion—undermines the nation's economy and may lead to a national economic crisis. A recent study by the American Institute of Certified Public Accountants ("AICPA") documents the fact that many former postsecondary students are postponing major purchases such as cars and homes due to their heavy student-loan indebtedness and are also postponing plans to marry and have children.[40]

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35. 11 U.S.C. § 523 (a)(8) (2012).

36. *See* Fossey & Cloud, *Dirty Side of the Storm*, *supra* note 20, at 4–10 (analyzing data from numerous sources and concluding that the student-loan default rate is much higher than reported by the United States Department of Education).

37. Program Integrity Issues, 75 Fed. Reg. 66382, 66932–66975 (Oct. 29, 2010) (to be codified at 34 C.F.R. pt. 600, 602, 603, 668, 682, 685, 686, 690, & 691).

38. Program Integrity: Gainful Employment—New Issues, 75 Fed. Reg. 66665 (Oct. 29, 2010) (to be codified at 34 C.F.R. pt. 600).

39. Ass'n of Private Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 137 (D.D.C. 2012) (invalidating portions of the Department of Education's gainful employment regulations); Career Coll. Ass'n v. Duncan, 796 F. Supp. 2d 108 (D.D.C. 2011) (invalidating portions of the U.S. Department of Education's program integrity rules), *aff'd in part, rev'd in part*, Ass'n of Private Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012).

40. *New AICPA Survey Reveals Effects, Regrets of Student Loan Debt*, AM. INST. OF CPAS (May 9, 2013), http://www.aicpa.org/press/pressreleases/2013/pages/aicpa-

This essay concludes with some proposals for reforming the federal student-loan program and restoring the program's integrity. Specifically, we recommend that the DOE publicly report a more transparent student-loan default rate, that the bankruptcy code be amended to provide relief to insolvent student-loan debtors who have no reasonable prospect of ever paying off their student loans, and that the federal government continue and intensify its efforts to better regulate the for-profit college and university industry in order to reduce fraud and abuse.

I. CONGRESS, THE STUDENT-LOAN PROGRAM, AND STUDENT DEBT

The history of the federal student-loan program began in 1958 through the passage of the National Defense Education Act.[41] Under this Act, Congress created a program of National Defense Student Loans ("NDSL"), which opened the door to educational opportunity, economic security, and social mobility for many needy and deserving students.[42]

Prompted by the success of NDSL, Congress passed the Guaranteed Student Loan Program ("GSLP") in 1965 as a part of the Higher Education Act.[43] Also known as Stafford Loans, Guaranteed Student Loans increased access to higher education for students from the lowest income levels, but strict income qualifications on aid recipients precluded the eligibility of many students from middle-income families.[44] Students from middle-income families who did not qualify for financial aid under GSLP provisions were hard pressed to pay for tuition, fees, room, and board because the cost of postsecondary education increased by approximately seventy-seven percent between 1965 and 1975.[45] Middle-income parents with college-aged children appealed to Congress for help, and the access to federal student loans quickly became a political issue.[46]

United States Representatives and Senators alike concluded that it was unfair and discriminatory, not to mention politically naive, to deny federal loans to students whose parents were paying taxes to fund the loan pro-

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survey-reveals-effects-regrets-student-loan-debt.aspx.

41. National Defense Education Act of 1958, Pub. L. No. 85–864, 72 Stat. 1580 (1958) (repealed 1970).

42. For a detailed history of the National Defense Education Act and National Defense Student loans, see Pamela Ebert Flattau et al., *The National Defense Education Act of 1958: Selected Outcomes*, IDA SCI. & TECH. INST. (2006), *available at* https://www.ida.org/~/media/Corporate/Files/Publications/STPIPubs/ida-d-3306.ashx.

43. Higher Education Act of 1965, Pub. L. No. 89–329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of 20 and 42 U.S.C.).

44. *See* 20 U.S.C. § 1078(A)(2)(B) and (D) (1976) (imposing a family income eligibility ceiling of $25,000).

45. H.R. REP. NO. 95–951, at 2 (1978).

46. Robert C. Cloud, *Offsetting Social Security Benefits to Repay Student Loans: Pay Us Now or Pay Us Later*, 208 EDUC. L. REP. 11, 14 (2006) [hereinafter, Cloud, *Offsetting Social Security Benefits*].

gram.[47] Consequently, Congress responded with the Middle-Income Student Assistance Act of 1978,[48] which relaxed income requirements, enabling a great majority of students to qualify for federal loan assistance.[49] As a result, the number of loans increased dramatically, and disbursements under the student-loan program tripled within three years.[50] Congress expanded the loan program again in the Higher Education Amendments of 1992,[51] extending the GSLP to include the Federal Family Education Loan Program ("FFELP"),[52] PLUS loans for parents,[53] and the Federal Direct Loan Program.[54]

Over the years, Congress has modified the student-loan program when necessary to meet the changing needs of students, parents, and institutions, always with the intent of ensuring access to postsecondary education for all citizens regardless of economic background. Therefore, federal law and policy have made it easy for most students to borrow money for higher education. To ease the burden of loan repayment, Congress has provided low interest rates, minimum monthly payments, economic hardship deferments, and income-based repayment plans for students who qualify.[55] The student-loan program has enjoyed generous, enthusiastic, and bipartisan support from Congress for more than fifty-five years—support which will likely continue because of the increasing costs of college and university attendance and an abiding faith in the economic and social benefits of affordable postsecondary education.[56] However, there is one important consideration: Congress expects student borrowers to repay their loans.

While underwriting the federal student-loan program and accommodating debtors' repayment efforts for more than half a century, Congress has made it clear that educational loans should be repaid on time and in full for

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47. *Id.*

48. Middle-Income Student Assistance Act, Pub. L. No. 95-566, 92 Stat. 2402 (1978).

49. *Id.*

50. MICHAEL MUMPER, REMOVING COLLEGE PRICE BARRIERS: WHAT GOVERNMENT HAS DONE AND WHY IT DOESN'T WORK 90 (1996). *See also* Angelica Cervantes et al., *Opening the Doors to Higher Education: Perspectives on the Higher Education Act 40 Years Later*, TEX. GUARANTEED STUD. LOAN CORP. (2005), *available at* http://www.tgslc.org/pdf/hea_history.pdf.

51. Higher Education Amendment of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992).

52. *Federal Family Education Loan Program*, U.S. DEP'T OF EDUC., http://www2.ed.gov/programs/ffel/index.html (last visited June 21, 2014).

53. *Plus Loans, Federal Student Aid*, U.S. DEP'T OF EDUC, http://www.studentaid.ed.gov/PORTALSWebApp/students/english/parentloans.jsp (last visited June. 21, 2014).

54. *Direct Loans: William D. Ford Federal Direct Loan Program,* U.S. DEP'T OF EDUC., http://www2.ed.gov/programs/wdffdl/index.html (last visited June 21, 2014).

55. Cloud, *Offsetting Social Security Benefits*, *supra* note 46, at 20.

56. C. Aaron LeMay & Robert C. Cloud, *Student Debt and the Future of Higher Education*, 34 J.C. & U.L. 79, 86 (2007).

several reasons.[57] Student loans are easy to obtain; they require no collateral or co-signers and are funded by the taxpayers as an investment in the individual student and the nation's future.[58] Historically, repayment of student loans depended on the debtor's honesty, good health, and future income based on completion of his or her education.[59] However, students who default on loans threaten the solvency of the loan program, potentially compromising the rights of future borrowers to benefit from participating in the program.[60]

For these reasons, Congress and the courts have made it quite difficult for student-loan debtors to discharge their student-loan obligations in bankruptcy.[61] Congress has passed a number of laws since 1978 to reduce the possibility of discharge through bankruptcy, including the following: Section 523(a)(8) of the Bankruptcy Code,[62] which precludes discharge of a student loan unless the debtor can show undue hardship (a difficult standard to meet in most courts); the Debt Collection Act of 1982;[63] the Higher Education Technical Amendments of 1991;[64] and the Debt Collection Improvement Act of 1996.[65]

Congress did not clarify in Section 523(a)(8) of the Bankruptcy Code exactly what it meant by the term *undue hardship*; therefore, defining the term is a question of law subject to *de novo* review.[66] Consequently, courts have responded with a number of judicial tests to determine whether a debtor can be expected to repay a student loan.[67] However, decades of case law have failed to create a universally accepted test that can be used to determine whether a student debtor is entitled to loan discharge. Many bankruptcy courts have interpreted undue hardship narrowly and harshly, ruling that debtors cannot discharge student loans unless they demonstrate "a certainty of hopelessness" about their long-term financial situation.[68] Histori-

57. Cloud, *Offsetting Social Security Benefits*, *supra* note 46, at 14.

58. *Id.* at 11.

59. H.R. REP. NO. 95–595, at 133 (1978).

60. *In re* Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993).

61. Cloud, *Offsetting Social Security Benefits*, *supra* note 46 at 21.

62. 11 U.S.C. § 523 (a)(8) (2012).

63. Debt Collection Act of 1982, Pub. L. No. 97–365, 96 Stat. 1749 (1982) (codified as amended in scattered sections of 5, 18, 21, 28, & 31 U.S.C.).

64. Higher Education Technical Amendments of 1991, Pub. L. No.102–26, 105 Stat. 123 (1991) (codified as amended in scattered sections of 20 U.S.C.).

65. 31 U.S.C. § 3716 (c)(3)(A)(i) (2012). Social Security benefits were made subject to offset (garnishment) to recover defaulted student-loan debts.

66. *In re Roberson*, 999 F.2d at 1132.

67. *See* Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship*? 186 EDUC. L. REP. 783, 791–96 (2004) [hereinafter, Cloud, *Repaying a Student Loan*] (discussing in detail the *Johnson*, *Bryant* Poverty, Totality of Circumstances, and *Brunner* tests for determining undue hardship).

68. Richard Fossey, *The Certainty of Hopelessness: Are Courts Too Harsh Toward Bankrupt Student Loan Debtors*?, 26 J.L. & EDUC. 29, 32–33 (1997) [hereinafter Fossey, *The Certainty of Hopelessness*] (arguing that bankruptcy courts are too harsh in

cally, undue hardship meant more than temporary, severe financial difficulty; it meant a permanently hopeless economic condition which few debtors could prove.[69] Consequently, few student-loan debtors have been able to meet the high burden of proof required for discharge of a federal student loan.

The Debt Collection Act of 1982 authorized the federal government to offset unpaid loan debts from some federal payments, but not from Social Security benefits.[70] It also specified a ten-year limitation on collection of student-loan debts.[71] Then in 1991, the Higher Education Technical Amendments removed all time limitations on government actions to collect defaulted student loans.[72] As of 1991, therefore, the statute of limitations in the 1982 Act no longer prevented the recovery of long-delinquent student loans, and the only major restriction the government faced in collecting delinquent loans was that Social Security benefits could not be garnished under provisions in the 1982 Debt Collection Act.[73] Accordingly, Congress passed the Debt Collection Improvement Act in 1996 authorizing the federal government to recover delinquent loan debt by offsetting Social Security benefits when necessary.[74] As a result of these Congressional actions, federal law now empowers the government to use all legal means to collect defaulted student loans, no matter how old or delinquent the debt, and federal courts consistently approve government efforts to collect on those debts. For example, in 2005 the Supreme Court ruled unanimously in *Lockhart v. United States* that the DOE can offset Social Security benefits to collect overdue student loans and that there are no time limits on those collection efforts.[75] Clearly, the legislative and judicial branches of government now agree that able-bodied debtors must repay their student loans in good faith unless they can show the court that repayment would cause undue hardship on them and their dependents—a difficult task indeed.[76]

II. BANKRUPTCY, STUDENT-LOAN DEFAULTS, AND THE *BRUNNER* TEST

The United States Constitution authorizes Congress "to establish . . . uniform laws on the subject of bankruptcies throughout the United

determining undue hardship in student-loan bankruptcy proceedings).

69. *See* Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished To Discharge Educational Loans?*, 71 TUL. L. REV. 139, 150-53 (1996).

70. Pub. L. No. 97-365, 96 Stat. 1749 (1982).

71. *Id.*

72. Higher Education Technical Amendments of 1991, Pub. L. No.102–26, 105 Stat. 123 (1991) (codified as amended in scattered sections of 20 U.S.C.).

73. 96 Stat. at 1749.

74. 31 U.S.C. § 3716 (2012).

75. Lockhart v. United States, 546 U.S. 142, 146 (2005).

76. *Id.* at 146–47.

States."[77] Accordingly, Congress passed the Bankruptcy Act of 1898, which included two public policy priorities: (1) to provide honest debtors with a fresh start, free from oppressive debt, and (2) to guarantee fair treatment for all debtors and creditors.[78] To meet those priorities, Congress enacted the Bankruptcy Reform Act of 1978 which provided debt relief through either Chapter 7 or Chapter 13 of the Bankruptcy Code.[79] Chapter 7 proceedings provide rapid relief to honest, but over-extended, debtors because the debtor relinquishes non-exempt assets to a trustee who sells the assets, distributes the proceeds to creditors, and then discharges all remaining debt. The straightforward and expeditious discharge of debt under Chapter 7 makes it an attractive option for some debtors.[80] Conversely, debtors who file Chapter 13 actions must submit to the court a formal plan for repaying all or a specified portion of their debt, including interest, within three to five years.[81] After the debtor complies with all repayment plan provisions, the court discharges any remaining debt.[82] Chapter 7 proceedings are viewed as debtor-friendly because they facilitate quick relief, while Chapter 13 actions are considered to be creditor-friendly because they require debtors to commit all disposable income to the repayment plan and repay at least a portion of their debt.[83] Petitioners in student-loan bankruptcy proceedings may file under either Chapter 7 or Chapter 13 provisions but must prove undue hardship in either action.[84]

The Higher Education Act of 1965, which authorized the federal student-loan program, originally imposed no restrictions on student-loan debtors filing for bankruptcy.[85] Based on the perception that too many student-loan recipients were filing for bankruptcy soon after graduation with fraudulent intentions to avoid repaying taxpayer-funded loans, Congress passed six laws between 1976 and 2007 to preclude abuse of the student-loan program.[86] The Education Amendments of 1976 prohibited debtors from discharging student loans at any time prior to five years after the repayment period had begun, unless failure to discharge the loan would create "undue

77. U.S. CONST. art. I, § 8, cl. 4.

78. Thomas J. Jackson, *The Fresh Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1420 (1985).

79. Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549, 2591 (1978) (codified as amended in scattered sections of 11 & 20 U.S.C.).

80. 11 U.S.C. § 527 (10)(b) (2012).

81. 11 U.S.C. § 1301–28 (2012).

82. *Id*.

83. Cloud, *Repaying a Student Loan*, *supra* note 67, at 783, 786.

84. Salvin, *supra* note 69, at 145 (1996).

85. Nancy H. Kratzke, *The Disparate Treatment of Student and Family Farmer Debtors: Suggestions for Reform of Bankruptcy Policy*, 16 N. ILL. U. L. REV. 25, 27 (1995).

86. *In re* Pelkowski, 990 F.2d 737, 742 (3d Cir. 1993) (quoting 124 CONG. REC. 1793 (1978)).

hardship" for the debtor.[87] In 1978, Congress passed the Bankruptcy Reform Act, which folded the five-year ban on loan discharge, absent proof of undue hardship, directly into the Bankruptcy Code.[88] In 1990, Congress extended the prohibition against discharging student loans in bankruptcy from five to seven years after the beginning of the repayment period.[89] Then, in 1998, Congress eliminated the seven-year ban on discharge of student loans altogether, imposing the undue hardship burden on all debtors no matter when they sought to discharge a student loan.[90] In 2005, Congress passed legislation requiring student-loan debtors who borrowed from *private* lenders, rather than the federal government, to prove undue hardship as well before their loans could be discharged.[91] Finally, Congress passed the College Cost Reduction and Access Act ("CCRAA") in 2007.[92] CCRAA increased financial aid and services to students while introducing an income-based repayment option and a loan forgiveness program for loan recipients who qualified.[93]

As noted previously, Congress did not define the term "undue hardship" in the Bankruptcy Reform Act of 1978.[94] In the absence of a clear statement of Congressional intent, many courts have interpreted undue hardship in such a way as to make it extremely difficult for debtors to discharge student loans.[95] Responding to a perceived need, bankruptcy courts developed four judicial tests between 1979 and 1987 to determine whether a given student-loan debtor demonstrated undue hardship.[96] The three-pronged *Brunner* test has emerged as the most frequently used of the four tests.[97] Under the *Brunne*r test, student-debtors must prove: (1) that they cannot, based on current income and expenses, maintain a minimal standard of living for themselves and their dependents, if forced to repay their loan(s); (2)

87. Education Amendments of 1976, Pub. L. No. 94-482, tit. I § 127(a), 90 Stat. 2081, 2141 (1976) (codified at 20 U.S.C. § 1087–3) (repealed 1978).

88. Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549, 2591 (1978) (codified as amended in scattered sections of 11 & 20 U.S.C.).

89. Crime Control Act of 1990, Pub. L. No. 101–647, § 3621(1), 104 Stat 4789, 4964 (1990) (amending 11 U.S.C. § 523(a)(8)(A)).

90. Higher Education Amendments of 1998, Pub. L. No. 105–244, § 971(a), 112 Stat. 1837 (1998) (amending 11 U.S.C. § 523(a)(8) to eliminate the seven-year repayment exception).

91. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109–8, § 220, 119 Stat. 23, 59 (2005) (codified at 11 U.S.C. § 523(a)(8)(B) (2012).

92. College Cost Reduction and Access Act of 2007, Pub. L. No. 110–84, 121 Stat. 784 (2007) (codified as amended in scattered sections of 20 U.S.C.).

93. *Id.*

94. Bankruptcy Reform Act of 1978, Pub. L. No. 95–598, 92 Stat. 2549, 2591 (1978) (codified as amended in scattered sections of 11 & 20 U.S.C.).

95. Fossey, *The Certainty of Hopelessness*, *supra* note 68.

96. Cloud, *Repaying a Student Loan*, *supra* note 67, at 791–96.

97. *In re* Brunner, 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987) (per curiam). Most courts have endorsed the three-pronged *Brunner* test. *See infra* note 100.

that their precarious financial situation is likely to persist for a significant portion of the repayment period; and (3) that they made good faith efforts to repay their loan(s) evidenced by the number of payments already made on the loan, previous attempts to negotiate alternative repayment plans, and efforts to maximize income and minimize expenses.[98] In all instances, the burden of proof is on the debtor to prove undue hardship to the court.[99]

The Third, Seventh, and Ninth Circuits have adopted the *Brunner* test in adjudicating student-loan discharge claims, while the Sixth Circuit has applied it in previous bankruptcy proceedings.[100] Finally, *Brunner* has also been cited by the Fifth, Tenth, and Eleventh Circuits on occasion, although none of these three courts has adopted *Brunner* as the sole standard in considering undue hardship claims.[101]

In sum, Congress has amended the Bankruptcy Code repeatedly to make it more difficult for student-loan debtors to discharge their student loans in bankruptcy, and the federal courts have interpreted the "undue hardship" requirement in such a way that makes it very difficult for student-loan debtors to obtain bankruptcy relief. Obtaining relief is made even more complicated by the fact that, in order to obtain a discharge of their student loans, debtors are required to file an adversarial proceeding against their creditors, "which is, in essence, a separate lawsuit within the debtor's underlying bankruptcy case."[102] Since few student-loan debtors have the resources to pursue litigation against their creditors, it seems likely that many insolvent student-loan borrowers do not even try to obtain a discharge of their student loans through the bankruptcy process.[103]

Scholars have argued that this draconian response to insolvent student-loan debtors is not justified by the fear that college and university graduates will abuse the student-loan program by financing their education and then using the bankruptcy courts to shed their loan obligations. In a 1981 law review article, Janice Kosol observed that only seventeen million dollars had been paid out by the federal government on student-loan bankruptcy claims between 1969 and 1975, which represented only three-tenths of one percent of the seven billion dollars that had been loaned at that time.[104]

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98. *Id.* at 752–58.

99. *Id*.

100. B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89 (2002).

101. *Id.*

102. Raul I. Pardo & Michelle R. Lacey, *Real Student-Loan Scandal: Undue Hardship Discharge Litigation.* 83 AM BANKR. L.J. 179, 188 (2009).

103. *Id*. at 191. "Those debtors who are in the most dire need of relief—that is, those for whom repayment will certainly impose an undue hardship—will likely lack the resources to pursue such relief in the first instance." *Id.*

104. Janet Kosol, *Running the Gauntlet of "Undue Hardship"—The Discharge of Student Loans in Bankruptcy*. 11 GOLDEN GATE U. L. REV. 457, 462 (1981).

Likewise, Raul Pardo and Michelle Lacy, writing in 2009, concluded that there was little evidence of bankruptcy abuse among student-loan debtors:

> Tragically, Congress disregarded empirical evidence from a General Accounting Office study which found that less than one percent of all federally insured and guaranteed student loans were discharged in bankruptcy. Simply put, the discharge of student loans in bankruptcy was too minor to threaten the economic viability of the student-loan program.[105]

III. THE STUDENT-LOAN DEFAULT RATE: HIGHER THAN IS COMMONLY BELIEVED

The DOE reports annually on the student-loan default rate, providing figures on the percentage of people who default on their student loans within two years (and now within three years) of beginning the repayment phase on their student loans.[106] The default rate has crept up in recent years. The DOE's most recent report indicated that 14.7 percent of students who began repayment between October 1, 2009 and September 30, 2010 defaulted under the three-year measurement standard.[107] For students who attended for-profit institutions, the rate was considerably higher: 21.8 percent defaulted within three years of beginning repayment.[108]

These figures are alarming, but they understate the true number of people who are not making payments on their student loans—whether or not they are technically considered to be in default. As Senator Tom Harkin's Senate Committee report ("Harkin Committee report") on for-profit colleges and universities outlined in detail, many for-profit colleges and universities have undertaken aggressive "default management" initiatives to keep their institutional default rate down.[109] They do this, of course, because institutions that have two-year student-loan default rates of twenty-five percent or more for three consecutive years are barred from participating in the federal student-loan program.[110]

How do the for-profit institutions manage their default rates? According to the Harkin Committee report, for-profits commonly contact former students and encourage them to apply for economic hardship deferments. These deferments are easy to get; sometimes they can be obtained simply by making a telephone call to the appropriate loan servicer.[111] Once a former student has obtained an economic hardship deferment, that individual is temporarily relieved of the obligation of making monthly loan pay-

105. Pardo & Lacey, *supra* note 102, at 181.
106. *See supra* notes 16–20.
107. Thomason, *supra* note 17.
108. *Id*.
109. HARKIN COMMITTEE REPORT, *supra* note 25.
110. *Id*. (citing 34 C.F.R. § 668.187(a) (2010)).
111. *Id*. at 153.

ments.[112] More importantly, an individual who is not making student-loan payments due to an economic hardship deferment is not counted in an institution's student-loan default rate.[113]

As the Harkin Committee report points out, encouraging former students to apply for economic hardship deferments may not be in the students' best interest. This is because interest accrues on the unpaid balance during the forbearance period when payments are not being paid. For example, a person who accepts an economic forbearance for 36 months will end up owing about 20 percent more over the life of his or her loan.[114]

Of course, it is impossible to say how many people who have economic hardship deferments will eventually begin making monthly loan payments and ultimately pay off their loans. It is clear, however, that a lot of people who have economic hardship deferments are seeing their loan balances increase due to accruing interest. For example, in *In re Halverson*, a 2009 bankruptcy case, Stephen Lee Halverson, a man in his sixties, filed for bankruptcy seeking to discharge almost $300,000 in student-loan debt.[115] According to the court, Halverson only borrowed $132,000 to pursue his studies.[116] Unfortunately, a series of negative life circumstances prevented him from paying off his student loans. Nevertheless, he was never in default, having applied for a series of economic hardship deferments over a period of many years.[117] Accruing interest on Halverson's loans caused the loan balance to more than double by the time Halverson filed for bankruptcy.[118]

The *Halverson* case starkly illustrates the consequences of obtaining economic hardship deferments: those who are relieved from making student-loan payments due to economic hardship deferments may find it very difficult, if not impossible, to ever pay off their loans because their loan balances will have ballooned over the years due to accruing interest. According to a recent report issued by the Consumer Financial Protection Bureau, about 6.5 million people are currently in default on their student loans, but an additional 8.9 million people are not making loan payments because they obtained an economic hardship deferment or have loans in forbearance status.[119] Undoubtedly, an unknown percentage of those nine million people have in fact defaulted on their loans in the sense that they will never pay back the full amount of what they borrowed.

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112. Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. TIMES, July 30, 2012, at A12.

113. *Id.*

114. *Id.*

115. *In re* Halverson, 401 B.R. 378 (Bankr. D. Minn. 2009).

116. *Id*. at 381.

117. *Id*. at 383.

118. *Id.* at 382.

119. *A Closer Look at the Trillion*, *supra* note 7.

Similarly, approximately 1.6 million people are making student-loan payments under some form of income-based repayment plan, and these payments may not be large enough to cover accruing interest.[120] Thus, even if people faithfully make their loan payments over the extended payment period (twenty or twenty-five years), some people making income-based payments will find their loan balances growing rather than shrinking when their loan payment obligations come to an end.[121]

This phenomenon is illustrated by Haley Schafer, a veterinarian who was profiled in 2013 by the *New York Times*. Schafer borrowed $312,000 to attend a veterinary school in the Caribbean.[122] She was fortunate to find a job in her chosen field at a salary that is typical for veterinarians with similar practices.[123] To pay off her enormous debt, Schafer elected an income-based repayment plan that bases her monthly payments on a percentage of her income.[124]

Unfortunately for Schafer, her monthly payments have been insufficient to cover accruing interest on her enormous student-loan debt.[125] According to a *New York Times* calculation, Schafer will owe about $600,000 on her student loans at the completion of her twenty-five-year repayment period, even if she makes every monthly payment.[126] Obviously, Dr. Schafer is not a student-loan defaulter. By all accounts, she is faithfully meeting her repayment obligations. However, a debtor who ends up owing twice what she borrowed after completing her repayment obligations is not truly paying off her loans even though she will never be counted as a student-loan defaulter.

Finally, the DOE does not announce how many people default on their student loans after the three-year measurement period has passed, but the overall default rate would be much higher if the measurement period were extended from three years after the repayment period begins to ten years. A DOE study of student-loan borrowers who graduated from four-year colleges and universities in 1993 had a student-loan default rate of 9.7 percent ten years after graduation.[127] This is double the two-year default rate that the DOE reported for that cohort of borrowers.[128] Among four-year college and university graduates who borrowed $15,000 or more in student loans,

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120. Tamar Lewin, *U.S. to Contact Borrowers With New Options for Repaying Loans*, N.Y. TIMES, Sept. 25, 2013, at A20.

121. David Segal, *The Vet Debt Trap*, N.Y. TIMES, Feb. 24, 2013, at BU1.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id*.

127. Susan B. Choy & Xiaoia Li, *Dealing with Debt: 1992–93 Bachelor's Degree Recipients 10 Years Later: Postsecondary Education Descriptive Analysis Report*, NAT'L CTR. FOR EDUC. STAT. 43 (June 2006), *available at* http://nces.ed.gov/pubs2006/200 6156.pdf.

128. *Id.*

almost one in five had defaulted within ten years.[129]

Another indication that student-loan default rates are alarmingly high can be gleaned from an examination of the private student-loan industry. According to a recent story in the *New York Times*, ITT Educational Services created a separate entity to loan money to its students beyond what they borrowed from the federal student-loan program.[130] That entity recently projected a default rate of fifty-nine percent.[131] The same story reported that private lenders were retreating from the student-loan market.[132] Private student-loan volume shrank from $22.9 billion in 2008 to only $6.4 billion in 2013—an indication that private lenders view the student-loan market as becoming riskier for creditors.[133]

When all these factors are taken into account, it seems likely that the student-loan default rate is probably double the three-year default rate reported by the DOE. For students attending for-profit institutions, it seems reasonable to presume that the student-loan default rate is at least forty percent and perhaps higher when measured over the lifetime of students' loan repayment periods.[134] Indeed, according to a *New York Times* article, an independent analysis by the DOE concluded that the repayment rate for students who attended for-profit postsecondary institutions was only thirty-six percent, which indicates a default rate of sixty-four percent—three times the default rate that the DOE reported for for-profit institutions in 2013.[135]

IV. THE FOR-PROFIT SECTOR: WHERE STUDENT-LOAN DEFAULT RATES ARE HIGHEST

In 2012, the Senate Health, Education, Labor, and Pensions Committee issued a report on student debt and loan default rates at thirty leading for-profit organizations.[136] The for-profit college and university industry documented significant abuse. Chaired by Senator Tom Harkin, the Senate Committee's two-year investigation found that the for-profit colleges and universities that it examined spent more money on marketing and recruiting than on instruction, showed little concern for the educational needs of non-traditional and vulnerable students, and focused on maximizing shareholder profits above all else.[137]

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129. *Id*.

130. Gretchen Morgenson, *Inspecting a Student Loan Spigot*, N.Y. TIMES, Jan. 19, 2014, at BU1.

131. *Id.*

132. *Id.*

133. *Id*.

134. *See* Fossey & Cloud, *Dirty Side of the Storm*, *supra* note 20, at 4–10.

135. Tamar Lewin, *Low Loan Repayment Is Seen at For-Profit Schools*, N. Y. TIMES, Aug. 14, 2010, at A13.

136. HARKIN COMMITTEE REPORT, *supra* note 25.

137. Michael Stratford, *Senate Report Paints a Damning Portrait of For-Profit Higher Education*, CHRON. HIGHER EDUC. (July 30, 2012), https://chron

Although the Harkin Committee Report is the most comprehensive study of the for-profit college and university industry, numerous studies and newspaper accounts have reported on fraud, abuse, and poor student outcomes in the for-profit college and university sector. Drake College of Business, a New Jersey for-profit institution, was accused of recruiting students from homeless shelters, signing them up for federal student aid to cover tuition costs, and then paying them stipends to attend classes.[138] According to a number of 2013 newspaper reports, the CEO of Dade Medical College, a high school dropout, stepped down from his leadership position after being charged with perjury for failing to report his conviction of a sex offense.[139] At the time of this incident, Dade Medical College, a for-profit entity, received the vast majority of its operating revenues from federal student aid funds and had low pass rates on the state's nursing exams.[140] Finally, in late 2013, the Colorado Attorney General's Office imposed a $3.3 million fine on Argosy University, another for-profit institution, for making misrepresentations to students who enrolled in a graduate-level program in psychology.[141]

A 2010 study by the General Accounting Office ("GAO") reported numerous instances of fraud and misrepresentation at the for-profit colleges and universities it investigated. The GAO conducted undercover testing of fifteen for-profit institutions and found that "all 15 colleges made some type of deceptive or otherwise questionable statement to undercover applicants, such as misrepresenting the applicant's likely salary after graduation

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icle.com/article/A-Damning-Portrait-of/133253/. In fiscal year 2009, the thirty for-profit organizations examined by the committee spent $4.2 billion on marketing, advertising, and recruiting, and $3.2 billion on instruction. *Id.* Ninety-six percent of the students at those institutions took out federal student loans to attend, and more than half of them had withdrawn by mid-2010. *Id.*

138. Kelly Heyboer & Bob Considine, *U.S. Agency Probes N.J.'s Drake College of Business for Paying Homeless Students*, STAR LEDGER (May 5, 2010), http://www.nj.com/news/index.ssf/2010/05/drake_college_to_stop_recruiti.html.

139. Michael Vasquez. *Amid Criminal Charges, CEO of Dade Medical College Resigns*, MIAMI HERALD (Oct. 23, 2013), http://www.miamiherald.com/2013/10/23/3706821/ernesto-perez-resigns-as-head.html.

140. David Halperin, *$33 Million Per Year of Your Tax Money to For-Profit College Whose CEO Hid Criminal Record*, HUFFINGTON POST (Oct. 21, 2013), http://www.huffingtonpost.com/davidhalperin/33-million-per-year-of-yo_b_4136451.html; Francisco Alvarado, *Dade Medical College Has Powerful Friends but Struggling Students*, BROWARD/PALM BEACH NEW TIMES (Aug. 29, 2013), http://www.browardpalmbeach.com/2013-08-29/news/dade-medical-college-has-powerful-friends-but-struggling-students/.

141. Anthony Cotton, *Argosy University Denver Fined $3.3 Million for Deceptive Practices*, DENVER POST (Dec. 5, 2013), http://www.denverpost.com/news/ci_24663345/argosy-university-denver-fined-3-3-million-deceptive; L. Wayne Hicks. *Argosy University to Pay $3.3M to Settle Colorado Lawsuit*, DENVER BUS. J. (Dec. 5, 2013), http://www.bizjournals.com/denver/news/2013/12/05/argosy-university-pays-colorado-33m.html?page=all.

and not providing clear information about the college's graduation rate."[142]

For-profit colleges and universities generally charge higher tuition than public institutions. According to the Harkin Committee's report, bachelor's degrees from for-profit institutions were twenty percent more expensive than degrees from analogous flagship public colleges and universities; and two-year associate degrees were four times more expensive than degrees from comparable community colleges.[143] Consequently, ninety-six percent of students who attend for-profit colleges and universities take out student loans compared to thirteen percent of students attending community colleges and forty-eight percent of students who attend four-year public institutions.[144]

Student-loan default rates in the for-profit sector are quite high: according to the DOE's most recent report, more than one in five students who take out student loans default within three years of beginning repayment.[145] The default rate over the lifetime of a student's loan repayment period is undoubtedly much higher, probably at least forty percent.[146] In fact, although loan recipients from for-profit colleges and universities represented only about thirty-two percent of all borrowers beginning repayment in fiscal year 2011, for-profit students accounted for forty-three percent of all defaults in the student-loan program in that particular time frame.[147]

Advocates for the for-profit industry argue that for-profit colleges and universities have higher student-loan default rates because of the challenging student population they serve—disproportionately low-income and minority students.[148] However, a study published in the *Journal of Economic Perspectives* concluded that default rates among students who attend for-profit colleges and universities are significantly higher than for students attending public institutions even when adjustments are made for student demographics.[149] Furthermore, completion rates for students who attend for-profit institutions are low compared to completion rates for students who attend public institutions. At the thirty for-profit institutions studied by the Harkin Committee, fifty-four percent of students who were enrolled during a one-year period between 2008 and 2009 left a college or a univer-

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142. GAO, FOR-PROFIT COLLEGES, *supra* note 26, at 7.

143. HARKIN COMMITTEE REPORT, *supra* note 25, at 3.

144. *Id*. at 7.

145. Thomason, *supra* note 17.

146. Fossey & Cloud, *Dirty Side of the Storm*, supra note 20 at 4–10.

147. Thomason, s*upra* note 17.

148. *See, e.g.*, Judah Bellin, *The Unacknowledged Value of For-Profit Education*, MANHATTAN INST. FOR POL'Y RES. (April 2013), *available at* http://www.manhattan-institute.org/pdf/ib_20.pdf (observing that for-profit colleges and universities serve students who do not thrive at traditional institutions, including minority and low-income students).

149. David Deming, Claudia Goldin & Lawrence Katz. *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?* 26 J. ECON. PERSP. 139, 153 (2012) [hereinafter *Nimble Critters*].

sity without obtaining a degree by mid-2010.[150]

The Harkin Committee report's overall negative assessment of the for-profit college and university industry finds support in other independent studies. In the *Journal of Economic Perspectives*, scholars at Harvard University observed the following about student-outcomes at for-profit institutions:

> In terms of economic outcomes in the medium-run, for-profit students are more likely to be idle (that is, not working and no longer enrolled in school) six years after starting college. Among students who left school by the 2009 wave of the BPS survey, those from for-profits are more likely to be unemployed and to have experienced substantial unemployment (more than three months) since leaving school.[151]

Without question, the for-profit college and university industry could not survive without federal student aid money. Most receive the vast majority of their revenues from federal student loans or students' Pell Grants.[152] Although the for-profits only enroll about eleven percent of all postsecondary students, they receive about twenty-five percent of federal student aid money—about 32 billion dollars a year.[153]

V. THE DEPARTMENT OF EDUCATION'S INTEGRITY RULES AND LITIGATION BY FOR-PROFITS

The Obama administration has recognized problems with the federal student-loan program arising from the for-profit sector and has made repeated efforts to rein in abuses.[154] In October 2010, the DOE issued regulatory guidelines for colleges and universities participating in the federal student-loan program.[155] Although private, non-profit colleges and universities and public postsecondary institutions were also affected by the new regula-

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150. HARKIN COMMITTEE REPORT, *supra* note 25, at 5.

151. *Nimble Critters*, *supra* note 149, at 159.

152. *Id.* at 145.

> Because for-profits often cater to independent students and those from low-income families who finance college through Pell grants and federal student loans, they have an intricate relationship with the federal government to ensure they maintain eligibility to receive Title IV federal student aid. The for-profits, like public institutions of higher education, receive an extremely large fraction of their revenues from government sources.

Id.

153. *Id. See also* HARKIN COMMITTEE REPORT, *supra* note 25, at 15.

154. See Editorial, *Who Profits? Who Learns?* N.Y. TIMES, July 29, 2010, at A28 (praising the Obama administration for issuing tighter rules for regulating for-profit colleges and universities and vigilantly monitoring them).

155. Press Release, U.S. Dep't of Educ., Department of Education Establishes New Student Aid Rules to Protect Borrowers and Taxpayers (October 28, 2010), *available at* http://www.ed.gov/news/press-releases/department-education-establishes-new-student-aid-rules-protect-borrowers-and-tax.

tions, these new regulations were targeted toward the for-profit college and university industry.[156] Indeed, in a press release explaining the new regulations, the DOE highlighted problems in this sector, pointing out that students at for-profit institutions represented only eleven percent of all higher education students, but they accounted for twenty-six percent of all student loans and forty-three percent of student-loan defaulters.[157]

The new regulations addressed fourteen topics including misrepresentation about program content and aggressive recruiting practices "resulting in students being encouraged to take out loans they could not afford or enroll in programs where they were either unqualified or could not succeed."[158] A full discussion of these regulations, which totaled 143 pages,[159] is beyond the scope of this article, but they address a wide range of abuses that had been identified in various independent reports.[160]

In June 2011, the DOE published additional regulations requiring certain postsecondary institutions to meet "gainful employment" standards as a condition of participating in the federal student-loan program.[161] According to the DOE's "Dear Colleague" letter on the topic, the following postsecondary programs would be subject to the new gainful employment regulations: "all non-degree educational programs offered by public and nonprofit institutions and virtually all academic programs offered by proprietary institutions."[162]

The gainful employment rule is quite complex.[163] In essence, however, the gainful employment rule requires for-profit institutions (and other higher education institutions that offer non-degree programs) to meet one of three metrics in order to remain eligible for participation in the federal student-loan program:

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156. *Id*. (noting rapid growth of default rates at for-profit institutions). *See also* Stephanie J. Gold & Elizabeth B. Meers, *U.S. Department of Education Program Integrity Rules—Part I: State Authorization, Incentive Payments, and Misrepresentation*, 9 NACUA NOTES 13 (June 23, 2011), *available at* http://counsel.cua.edu/nacuanotesprogramintegrityrulespartI.cfm. New Department of Education program integrity rules were "largely directed toward for-profit postsecondary education institutions." *Id.*

157. *Id.*

158. *Id.*

159. Program Integrity Issues, 75 Fed. Reg. 66932 (Oct. 29, 2010).

160. *See, e.g.*, HARKIN COMMITTEE REPORT, *supra* note 25; GAO, FOR-PROFIT COLLEGES, *supra* note 26.

161. Program Integrity: Gainful Employment—Debt Measures, 76 Fed. Reg. 34386 (June 13, 2011) (promulgating 34 C.F.R. § 668.7(2012)).

162. U.S. Department of Education, *Dear Colleague Letter, Implementation of Regulatory Requirements Related to Gainful Employment Programs* (April 20, 2011), *available at* http://www.nacua.org/documents/GEN1110_042011.pdf.

163. As one commentary pointed out, the DOE required 157 pages to explain the gainful employment rule. *See* Anthony J. Guida, Jr. & David Figuli, *Higher Education's Gainful Employment and 90/10 Rules: Unintended "Scarlet Letters" for Minority, Low-Income, and Other At-Risk Students*, 79 U. CHI. L. REV. 131, 145 (2012).

(1) a twelve percent debt-service-to-total-earnings ratio applied to graduates of a program

(2) a thirty percent debt-service-to-discretionary-income ratio applied to graduates of a program; or

(3) a thirty-five percent loan-repayment-rate test for any student who attended the program.[164]

An institution that fails all three of these tests for three out of four years would become ineligible for receiving federal student-loan funding.[165]

Both sets of federal regulations—the program integrity rules issued in October 2010 and the gainful employment rule issued in June 2011—were finalized after intense negotiations with the for-profit college and university industry, which was well represented by its attorneys and lobbyists.[166] Some critics maintained that the rules were watered down due to pressure from the for-profit sector.[167] Nevertheless, after the regulations were put in place, an organization representing for-profit institutions sued in federal court seeking to have some aspects of the new regulations overturned.

In *Association of Private Sector Colleges and Universities v. Duncan*,[168] an association of for-profit postsecondary institutions located in Washington, D.C., sued Secretary of Education Arne Duncan and the DOE, arguing that some of the program integrity rules that the DOE had issued in October 2010 violated the Administrative Procedure Act,[169] as well as the United States Constitution. Specifically, the group challenged three categories of the DOE's regulations: compensation, misrepresentation, and state authorization.[170]

The district court rejected most of the Association's claims. In particular, the court rejected the Association's attack on the DOE's compensation regulations, which were intended to stop for-profit institutions from paying bonuses to employees based on the number of students they recruited.[171] As the court noted, the DOE had adopted its compensation regulations because it was concerned about "recruiters who sweet talk unqualified students into

164. *Id*. at 145–46.

165. *Id.* at 146. *See* 34 CFR § 668.7(i).

166. Charles M. Smith & Dina Rasor, *For-Profit College Reform: How Democratic Power Lobbyists Helped Water It Down*, TRUTH-OUT.ORG (June 7, 2012), http://truth-out.org/news/item/9633-for-profit-college-reform-how-democratic-power-lobbyists-helped-water-it-down (reporting on lobbying efforts by for-profit lobbyists that resulted in weakening federal regulations addressing abuses in for-profit college and university industry).

167. *Id*.

168. Ass'n of Private Sector Colls. & Univs. v. Duncan, 796 F. Supp. 2d 108 (D.D.C. 2011), *aff'd* in part, *rev'd* in part, Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012).

169. 5 U.S.C. §§ 553, 701–706 (2012).

170. *Duncan*, 796 F. Supp. 2d, at 115–17.

171. *Id.*

applications for courses and federal loans when there is no realistic chance that the student will gain from the coursework or be able to repay the loan."[172] In the court's view, the regulations were not arbitrary, capricious, or contrary to statute; and they did not prohibit for-profit institutions "from rewarding recruiters' success through other indicia, such as seniority, job knowledge and professionalism, dependability, or student evaluations."[173] However, the court concluded that the DOE had failed to provide notice and opportunity to be heard with regard to one of the regulations: a rule requiring institutions that offer distance or online educational programs to obtain permission from the states where the institutions are physically located.[174] Accordingly, the court vacated this regulation.[175]

On appeal, the D.C. Circuit affirmed the trial court's judgment in part but reversed in part.[176] The appellate court concluded that the DOE had not adequately explained its reasoning with respect to two aspects of the compensation regulations, and it instructed the lower court to remand certain parts of those regulations to the DOE for further consideration.[177]

In addition, the D.C. Circuit ruled that the DOE's misrepresentation regulations exceeded the department's authority under the Higher Education Act by giving the Secretary of Education the power to take enforcement actions against the Association's member institutions without adequate procedural safeguards.[178] Further, in the appellate court's view, the regulations sanctioned misrepresentations that were not covered by the Act and improperly punished misrepresentations that were merely confusing.[179] Finally, the D.C. Circuit upheld the lower court's determination that the distance education regulation had been adopted without giving the Association's member institutions adequate notice and opportunity to be heard.[180]

In a separate lawsuit, the Association of Private Sector Colleges and Universities challenged the legality of the DOE's gainful employment regulations.[181] Title IV of the Higher Education Act requires postsecondary

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172. *Id.* at 121.

173. *Id.*

174. 34 C.F.R. § 600.9(c) (2011).

175. *Duncan*, 796 F. Supp. 2d at 135.

176. Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012).

177. *Id*. at 449. In particular, the D.C. Circuit Court of Appeals directed the Department of Education to "better explain its decision to eliminate the safe harbor based on graduation rates," and to "offer a reasoned response to the comments suggesting that the new regulations might adversely affect diversity outreach." *Id*.

178. *Id*. at 451.

179. *Id*. at 451–53.

180. *Id*. at 462–63.

181. Ass'n of Private Colls. and Univs. v. Duncan, 870 F. Supp. 2d 133 (D.D.C. 2012). Apparently, the court mistakenly omitted the word "Sector" from the plaintiff's name. In a subsequent order, the Association's name was correctly stated. Ass'n of Private Sector Colls. and Univs. v. Duncan, 930 F. Supp. 210 (D.C.C. 2013).

institutions offering non-degree programs to "prepare students for gainful employment in a recognized occupation" as a condition for receiving federal student aid money.[182] In issuing its Gainful Employment regulations in 2011, the DOE maintained that it was acting pursuant to this statutory language.

The Association challenged the gainful employment regulations on a variety of grounds. First, it argued "that 'gainful employment' unambiguously means 'a job that pays.'"[183] Thus, in the Association's view, the DOE had exceeded its statutory authority in measuring gainful employment against a debt-to-income ratio.[184] However, the court rejected the Association's argument. "The gainful employment regulations," the court held, "are a reasonable interpretation of an ambiguous statutory command: that the DOE provide Title IV funding only to schools that 'prepare students for gainful employment in a recognized occupation.'"[185]

Next, the Association argued that the DOE's debt-to-earnings ratio,[186] as well as its loan repayment test for determining whether an institution's programs were preparing students for gainful employment[187] were promulgated in an arbitrary and capricious manner in violation of the Administrative Procedure Act.[188] Here, the Association found a sympathetic court. Although the court ruled that the DOE's debt-to-earnings ratio was the product of rational decision making,[189] it held that the DOE had not engaged in "reasoned decision making" when it promulgated the debt repayment rate.[190] Since the debt repayment test and the debt-to-income test had been designed together and were "intertwined," the court invalidated the entire debt measure rule.[191]

In order to enforce its debt measure rule, the DOE had promulgated an additional regulation that would have required for-profit institutions to report personally identifiable student information that would be put in a federal database.[192] Since the debt measure rule had been vacated, the court saw little need for the DOE's disclosure rule, so it vacated this measure as

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182. *Duncan,* 870 F. Supp. 2d at 149.

183. *Id.* at 145.

184. *Id*.

185. *Id*. at 149.

186. 34 C.F.R. § 668.7(a)(1)(ii)((A) & (B)) (2012).

187. 34 C.F.R. § 668.7(a)(1)(i) (2012).

188. *Duncan,* 870 F. Supp. 2d at 149.

189. *Id*. at 153–54 (*citing* Consumer Alert v. United States Dep't of Transp., 463 U.S. 29, 43 (1983)). The debt to income standards were the product of a "'rational' connection between the facts found and the choice 'made', and the APA demands no more." *Id.*

190. *Id*. at 154.

191. *Id.*

192. 34 C.F.R. § 668.6(a) (2011).

well.[193] Nine months after the court issued its ruling, the court denied the DOE's motion to amend the judgment.[194]

In summary, the Association of Private Sector Colleges and Universities brought two separate lawsuits in an effort to invalidate the DOE's gainful employment rule and portions of its program integrity rule. Although both sets of regulations survived, certain parts were invalidated, which hindered the DOE's efforts to rein in abuses in the student-loan program that were centered in the for-profit college and university sector. In one case, the court invalidated regulations intended to rein in abusive compensation practices and institutional misrepresentation;[195] in the other case, the court thwarted the DOE's efforts to enforce the Higher Education Act's "gainful employment" requirement by invalidating its debt measure rule.[196]

In March 2014, the DOE issued new gainful employment regulations, which had been revised to resolve the issues raised by the courts.[197] Secretary Duncan made it clear that the DOE was determined to address problems among for-profit colleges and universities, notwithstanding the sector's successes in the courts. "Higher education should open up doors of opportunity," Duncan said, "but students in these low-performing programs often end up worse off than before they enrolled: saddled by debt and with few—if any—options for a career."[198] Secretary Duncan emphasized that the new regulations would "address growing concerns about unaffordable levels of loan debt for students enrolled in these programs by targeting the lowest-performing programs, while shining a light on best practices and giving all programs an opportunity to improve."[199]

According to the DOE's press release, the regulations were designed so that "career programs would need to meet key requirements to establish that they sufficiently prepare students for gainful employment."[200] Specifically, under the new regulations, for-profit institutions would be required to certify that all gainful employment programs met applicable accreditation standards as well as state and federal licensure standards.[201] In addition, all gainful employment programs would be required to pass certain metrics to

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193. *Duncan*, 870 F. Supp. 2d at 155.

194. Ass'n of Private Sector Colls. & Univs. v. Duncan, 930 F. Supp. 2d 210 (D.D.C. 2013).

195. Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012).

196. *Duncan*., 870 F. Supp. 2d at 133.

197**.** Press Release, U.S. Dep't of Educ., Obama Administration Takes Action to Protect Americans from Predatory, Poor-Performing Career Colleges (Mar. 14, 2014), *available at* http://www.ed.gov/news/press-releases/obama-administra tion-takes-action-protect-americans-predatory-poor-performing-ca.

198. *Id.*

199. *Id.*

200. *Id*.

201. *Id*.

remain eligible for participation in the federal financial aid program. The metrics would include a requirement that graduates' estimated annual loan payments would not exceed twenty percent of their discretionary earnings or eight percent of their total earnings, as well as that the default rate for former students would not exceed thirty percent.[202] Finally, institutions would need to publicly disclose information about their program costs, debt, and performance of their gainful employment programs so that students could make informed decisions before enrolling in a gainful employment program.[203]

Like the previous gainful employment regulations, the DOE's new regulations are quite long, totally over eight-hundred pages.[204] It seems likely that these revised regulations will be the subject of intense lobbying pressures from the for-profit college and university industry and may even engender further litigation.[205]

VI. STUDENT-LOAN DEBT AND A NATIONAL ECONOMIC CRISIS

The federal student-loan program is now the predominant method of financing higher education in the United States—with about two-thirds of all students borrowing money to attend a college or a university.[206] Unfortunately, it is also the second largest financial balance owed by American citizens, trailing only home mortgage debt.[207] Student debt tripled between 2004 and 2012 with the number of borrowers and average debt per borrower both increasing by seventy percent (an average annual increase of seven percent) for at least four reasons.[208] First, postsecondary education costs continued to increase rapidly, frustrating students' efforts to fund their educational expenses through part-time or even full-time employment.[209] Sec-

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202. *Id*.

203. *Id*.

204. Michael Stratton, *Obama Administration's Proposed Gainful Rewrites Sets Stage for Another Lobbying Blitz*, INSIDE HIGHER EDUC. (Mar. 17, 2014), http://www.insidehighered.com/news/2014/03/17/obama-administrations-proposed-gainful-rewrite-sets-stage-another-lobbying-blitz.

205. *Id*.

206. Jeffrey J. Williams, *Academic Freedom and Indentured Students: Escalating Student Debt is a Kind of Bondage*, 98 ACADEME 12 (2012).

207. Meta Brown et al., *Measuring Student Debt and Its Performance, Staff Report No. 668*, FED. RES. BANK OF N.Y. 8 (2014), *available at* http://www.newyorkfed.org/research/staff_reports/sr668.pdf.

208. Donghoon Lee, *Household Debt and Credit: Student Debt*, FED. RES. BANK OF N.Y. 9 (Feb 28, 2013), *available at* http://www.newyorkfed.org/news events/mediaadvisory/ 2013/Lee022813.pdf. Student-loan debt was the only kind of household debt that increased between 2004 and 2012. *See* Brown, *supra* note 207, at 8.

209. *See* Michelle Jamisko & Ilan Kolet, *Cost of College Degree Soars 12 Fold: Chart of the Day*, BLOOMBERG (August 15, 2012), http://www.bloomberg.com/news/2012-08-15/cost-of-college-degree-in-u-s-soars-12-fold-chart-of-the-day.html (last visited Jan. 28, 2014). According to a Bloomberg News report, "college tuition

ond, because of work schedules and changing curricular requirements, many undergraduates took five or more years to complete their baccalaureate degrees.[210] Third, the number of students enrolled in graduate school increased, possibly due to the weak job market.[211] Fourth, the federal government offered loan forbearances, economic hardship deferments,[212] and income-based repayment plans to ease the burden of loan repayments, perhaps lulling some students into complacency about the reality of prolonged and heavy debt.[213] Consequently, average student-loan balances increased across all age groups between 2004 and 2012 with average debt levels soaring thirty-three percent for borrowers in the twenty to thirty year-old range.[214]

At the same time, the inflated housing market and related high default rates in the savings and loan industry caused an economic recession. Lending agencies responded by tightening underwriting standards for credit in the economic recovery effort that followed.[215] Already burdened with heavy student-loan debt, many debtors with college or university degrees did not qualify for consumer loans to purchase homes and new automobiles or to invest in business and commercial ventures. Without easy access to credit in a depressed job market, prudent debtors reduced spending on everything except absolute necessities.[216] Consumption of goods and services declined significantly, with disastrous effects on an already weak national economy. In 2011 for example, the number of first-time homebuyers, with a median age of thirty-one, fell to the lowest percentage of homebuyers since 2006, *prima facie* evidence of a stagnant economy.[217]

Without question, the nation's total accumulated student-loan indebtedness is having a significant impact on the nation's economy, forcing millions of Americans to postpone major purchases and delay major life decisions.[218] According to a 2013 survey conducted by the American Institute

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and fees have surged 1,120 percent since records began in 1978, four times faster than the increase in the consumer price index." *Id.*

210. Brown, *supra* note 207, at 8.

211. *See* Leila M. Gonzales et al., *Graduate Enrollment and Degrees 2002–2012*, COUNCIL OF GRAD. SCHS. (2013), *available at* http://www.cgsnet.org/ckfinder/userfiles/files/GEDReport_2012.pdf.

212. 20 U.S.C. § 1087e(f)(2)(D) (2012) (providing for loan repayment deferments of up to three years for borrowers experiencing "economic hardship").

213. *See* 20 U.S.C. § 1087e(e) (2012) (authorizing the U.S. Department of Education to provide income-based repayment plans).

214. Meta Brown, *Student Debt Overview, Postsecondary National Policy Institute*, FED. RES. BANK OF N.Y. 7 (Aug. 14, 2013), *available at* http://www.newyorkfed.org/regional/Brown_presentation_GWU_2013Q2.pdf.

215. *Id.* at 21.

216. *Id.*

217. *Student Loan Debt Statistics*, *supra* note 3, at 5.

218. Press Release, Am. Inst. of CPAs, New AICPA Survey Reveals Effects, Regrets of Student Loan Debt (May 9, 2013), *available at* http://www.aicpa.org/press/pressreleases/2013/pages/aicpa-survey-reveals-effects-regrets-student-loan-

of CPAs (AICPA), forty-one percent of respondents with student-loan debt reported that they had delayed contributions to retirement plans.[219] Forty percent postponed the purchase of a car, twenty-nine percent put off buying a house, and fifteen percent postponed marriage plans.[220] Perhaps the AICPA's most troubling finding was that sixty percent of student-loan borrowers had some regret about the amount of debt they had incurred.[221]

What is at stake if the federal government and higher education leaders do not stabilize and then reduce student-loan debt? At this writing, the United States government has accumulated a national debt in excess of $17.3 trillion, due in large part to irresponsible fiscal policies and practices, growing entitlement obligations, and deficit spending.[222] Some would argue that the current student-loan reality is a microcosm of the federal fiscal situation and that it could easily lead to another economic crisis.[223] Only time will tell in that regard. It does seem clear, however, that a substantial percentage of Americans may not be able to buy homes and automobiles, start businesses, invest in capital ventures, educate their children, or save for a secure and dignified retirement because they are overly burdened with debt incurred in completing their postsecondary educations.[224]

Changing current policies and practices that compel millions of students to borrow heavily in order to attend colleges and universities will not be easy. Many students do not have the resources to cover college or university expenses on a pay-as-you-go basis, even those who work part-time (or full-time) while attending classes.[225] Furthermore, most colleges and universities, whether public or private, could not survive financially without the revenue generated through the federal student-loan program.[226] As the student-loan program now goes, so goes the solvency of many postsecondary institutions.[227]

Nevertheless, the time has come to address the issue of student indebt-

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219. *Id.*

220. *Id.*

221. *Id*.

222. Elizabeth Williamson, *Lack-of-Color Commentary: Chairwoman Delivers 'Meh'*, WALL ST. J., Feb. 12, 2014, at A4.

223. *See* Richard Fossey & Robert C. Cloud, *Borrowing Money to Attend College: Could the Rising Level of Student Indebtedness Lead to a National Financial Crisis?* TCHR COLL. REC, July 16, 2008. *But see* Eric Kelderman, *Student Debt Is Growing but Is Not a National Crisis, Speakers Say*, CHRON. HIGHER EDUC. (Aug. 9, 2012), http://chronicle.com/article/Student-Debt-Is-Growing-but-Is/133517/.

224. Jayne O'Donnell, *Consumer Protection Chief Talks About Student Loans*, USA TODAY, Aug. 15, 2013, at 3B.

225. *See Student Loan Debt Statistics*, *supra* note 3 (noting that close to sixty percent of all college students borrow annually to cover the costs of postsecondary education).

226. Cloud, *Repaying a Student Loan*, *supra* note 67, at 786–787.

227. *Id.* at 788.

edness. Otherwise, heavy student debt could lead to untenable financial problems for millions of Americans and the nation as a whole. For individual debtors, changes to policy and practice are critically important for their quality of life and peace of mind. In a 2012 article for *Academe* magazine, Jeffrey Williams described escalating student debt as "a kind of bondage, shackling students . . . with long-term loan payments [and] constraining their freedom of choice of jobs and career."[228] Ironically, the student-loan program was introduced to expand educational opportunities for all United States citizens, liberate minds, and free the human spirit—not shackle college and university graduates with staggering debt that constrains personal freedom and career choices. Clearly, it is time to review the student debt issue.

CONCLUSIONS AND RECOMMENDATIONS

The federal student-loan program was implemented in 1965 for the purpose of "keeping the college door open to all students of ability" regardless of socioeconomic background.[229] Consequently, student loans have been easy to obtain and have featured low interest rates, minimum monthly payments, economic hardship deferments, and, more recently, income-based repayment plans.[230] Because the student-loan program lends money to applicants without assessing their risk of default, students who are poor credit risks have received federal loans to pursue postsecondary educational opportunities. The consequences of these altruistic and well-intentioned policies were predictable—heavy student debt and unacceptably high default rates. Clearly, there is now a troubling disconnect between the original purpose of the student-loan program to democratize American higher education and the fiscal policies that are necessary to ensure program solvency and protect borrowers from enslaving debt and inevitable default.

Several higher-education policy institutions have made comprehensive proposals for reforming the federal student-loan program. One proposal, which has been endorsed by several higher-education policy groups, is to extend the student-loan repayment period from ten years to twenty or twenty-five years, with loan payments based on a percentage of the borrower's income.[231] The Brookings Institute recently made a similar recommenda-

228. Williams, *supra* note 206, at 11, 15.

229. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of 20 U.S.C.).

230. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007) (codified as amended in scattered sections of 20 U.S.C.).

231. *See, e.g.*, NAT'L ASSOC. OF STUDENT FINANCIAL AID ADMINISTRATORS, REIMAGINING FINANCIAL AID TO IMPROVE STUDENT ACCESS & OUTCOMES 3 (2013), *available at* http://www.nasfaa.org/radd-event/ (recommending automatic income-based repayment plan for all borrowers); EDUC. TRUST, DOING AWAY WITH DEBT 6 (2013), *available at* http://www.edtrust.org/sites/edtrust.org/files/Doing_Away_With_Debt.pdf.

tion and further recommended that income-based repayment plans with twenty-five year repayment periods be the default option for all students participating in the federal student-loan program.[232]

A discussion of these policy initiatives is beyond the scope of this article, although we are skeptical of proposals that contemplate a future in which millions of former postsecondary students make student-loan payments over twenty-five years—the majority of most people's working careers. Instead we make three modest proposals that are designed to give a clearer picture of the student-loan crisis and to provide some relief for the millions of people who have become overwhelmed by staggering levels of student-loan debt.

First, we recommend that the DOE develop and publicize a student-loan default rate that provides a clearer indication of just how many people have defaulted on their student loans. As we argued earlier in this article, the DOE's three-year window for measuring defaults fails to capture the number of people who default after the three-year measurement period ends and fails to take into account the number of people who are not making loan payments due to economic hardship deferments or other loan forbearance options. We believe the true student-loan default rate, when measured over the lifetime of students' loan repayment periods, is at least double the DOE's most recently reported three-year default rate, which is ten percent. We believe the student-loan default rate for the for-profit college sector is alarmingly high—forty percent or even higher.

In our view, a more transparent student-loan default rate would highlight the fact that the federal student-loan program is in crisis and threatens to undermine the national economy. Moreover, a more accurate student-loan default rate would underscore the fact that millions of people are burdened by unmanageable student-loan debt levels. The current reported rate may be lulling Congress and higher education leaders into believing the student-loan program is basically healthy, which it is not.

Second, we believe Congress and the Executive Branch should take affirmative steps to relieve the suffering of millions of Americans who are struggling with high levels of student-loan debt—debt that many will never be able to repay. This high level of indebtedness not only threatens the economic futures of the indebted former students but also the economic wellbeing of the nation as a whole.

What should be done? First and foremost, we believe the "undue hardship" provision in the Bankruptcy Code should be repealed, which would allow insolvent student-loan debtors to discharge their student loans in bankruptcy like any other non-secured debt. This is by no means a radical

232. Susan Dynarski & Daniel Kreisman, *Loans for Educational Opportunity: Making Borrowing Work for Today's Students*, HAMILTON PROJECT, BROOKINGS INSTITUTE (2013), *available at* http://www.brookings.edu/~/media/research/files/papers/2013/10/21%20student%20loans%20dynarski/thp_dynarskidiscpaper_final.pdf.

proposal. The National Bankruptcy Review Commission made this recommendation more than fifteen years ago.[233] No evidence has been presented that indicates that student-loan debtors would abuse the bankruptcy process if the "undue hardship" provision were eliminated. Moreover, bankruptcy courts have the authority to deny discharge if they conclude that a student-loan debtor is using the bankruptcy process for fraudulent purposes.[234]

Third and finally, the DOE should continue its efforts to stamp out fraud and abuse in the for-profit college and university industry, which is plagued by low student-completion rates, high levels of student-loan indebtedness, and high student-loan default rates. As the Harkin Committee report concluded, federal aid to the for-profit sector, which totaled thirty-two billion dollars in 2009–10, is being "squandered" by for-profit institutions that "failed to graduate a majority of their students and poorly prepared them for jobs" and economic security.[235]

To its credit, the DOE passed program integrity regulations intended to cut down on fraud and abuse in the for-profit college and university industry,[236] and the department also passed a gainful employment rule intended to remove institutions from the federal student-loan program whose graduates did not get jobs that paid well enough to allow them reasonably to pay back their student loans.[237] Although federal courts invalidated important parts of those regulations,[238] the DOE issued revised regulations in March of 2014.[239]

The DOE's continued efforts to regulate the for-profit college and university industry are commendable. Clearly, the federal student-loan program requires major reforms if it is going to continue fulfilling its original purpose of providing Americans with the opportunity to acquire postsecondary education regardless of their economic circumstances. In our view, three major reforms are imperative: a more transparent measurement of student-loan default rates by the DOE, bankruptcy relief for insolvent and

233. NAT'L BANKRUPTCY REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS (1997). "Section 523(a)(8) should be repealed." *Id. See also* Huey, *supra* note 100, at 127 (arguing that "Congress should repeal section 523(a)(8) and enable student loans to be dischargeable debts under the Bankruptcy Code").

234. 11 U.S.C. § 727(a)(4) (2012) (authorizing bankruptcy courts to deny discharge to debtors who make fraudulent misrepresentations or false claims in connection with a bankruptcy proceeding).

235. Stratford, *supra* note 137.

236. Program Integrity Issues, 75 Fed. Reg. 66932–66975 (Dep't of Educ. Oct. 29, 2010) (final rule).

237. 75 Fed. Reg. 66665 (Oct. 29, 2010) (promulgating 34 C.F.R. § 668.7 (2012)).

238. Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427 (D.C. Cir. 2012) (invalidating portions of program integrity rules); Ass'n of Private Sector Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133 (D.D.C. 2012).

239. Chris Kirkham, *For-Profit Colleges That Bury Students in Debt Face Second Obama Crackdown*, HUFFINGTON POST (March 13, 2014), http://www.huffingtonpost.com/2014/03/13/for-profit-colleges-obama_n_4961163.html.

overburdened student-loan debtors, and better regulation of the for-profit college and university industry.