STUDENT DEBT AND THE FUTURE OF HIGHER EDUCATION

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"The empires of the future are the empires of the mind."
—Sir Winston Churchill,
Speech at Harvard University,
September 6, 1943

INTRODUCTION

The United States' higher education system is arguably the most comprehensive in the world. There are 4,276 American postsecondary institutions providing educational opportunities to citizens with a broad range of interests, aptitudes, and abilities.[1] For the 17,487,475 students enrolled in colleges and universities, access to postsecondary education is perhaps the one best hope for personal fulfillment, vocational success, social mobility, and economic security.[2]

One of the centerpieces of American higher education is the availability of financial aid to underwrite the cost of a college or university education. In addition to scholarships, grants, and work-study positions, financial aid often takes the form of private and government loans to both students and parents. Historically, student loans have lower interest rates than other types of loans. Also, they come with an added incentive of tax deductible interest payments.[3] In a real sense, student loans and other types of financial aid have facilitated the democratization of American higher education, and services to the masses can only continue if federal financial aid programs remain solvent and accessible.

This paper explores the rise of student loan programs over the past fifty years; legislative changes and court decisions impacting student borrowers;

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1. *The 2007-08 Almanac*, CHRON. HIGHER. EDUC., Aug. 31, 2007, at 3.
2. *Id.*
3. 26 U.S.C. § 221(a) (2000 & Supp. 2005).

characteristics of undergraduate and graduate borrowers and issues they face; and recommendations for enhancing the programs' effectiveness. The past success of federal student loan programs has played a major role in moving the nation towards universal access to higher education; however, with the increased demand, colleges and universities have attempted to meet the needs of all students, which has led to growth that continually outpaces inflation. To pay for added costs, institutions are forced to increase tuition; therefore, students have been required to increase their reliance upon student loans. If the system remains unchecked, the student loan programs and higher education may face a breaking point where the debt burden creates an undue hardship for students and effectively kills the dream of universal access to higher education.

RISE OF FEDERAL STUDENT LOANS

In response to the public desire to increase access to higher education for the masses and a real need to strengthen national defense policy, Congress created the National Defense Student Loan ("NDSL") program in 1958 as part of the National Defense Act.[4] This program, also known as the Perkins Loan Program,[5] continues today, and assists borrowers who plan on careers in public service, the military, or education. Prompted by the success of NDSL, Congress enacted the Guaranteed Student Loan Program ("GSLP") in 1965 as a part of the Higher Education Act.[6] Guaranteed Student Loans, also known as Stafford loans and subsidized loans,[7] were created to increase access to higher education for students from the lowest income levels. Strict income qualifications on aid recipients created a dilemma for students from middle-income families: parental income precluded them from receiving a loan, yet they did not have the money to pay for higher education expenses. These students and their parents began lobbying for federal loan aid as well. In response, Congress passed the Middle Income Student Assistance Act of 1978, which relaxed income requirements and enabled more students to qualify for loan assistance.[8] Within three years of this act, disbursements under the federal student loan programs tripled.[9]

Further expanding the programs, Congress passed the Higher Education Amendments of 1992, which added the Unsubsidized Stafford Program to the

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

5. U.S. Dep't of Educ., Federal Perkins Loan Program, http://www.ed.gov/programs/fpl/index.html (last visited Sept. 29, 2007).

6. 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.).

7. Subsidized loans are loans on which the federal government pays the interest while a student is enrolled in school at least part-time. The student is responsible for all interest on unsubsidized loans, but payments are not required while a student is enrolled in school at least part-time.

8. Middle Income Student Assistance Act, Pub. L. No. 95-566, 92 Stat. 2402 (1978) (codified as amended in scattered sections of 20 U.S.C.).

9. U.S. DEP'T OF EDUC., FY 2007 FFELP GUARANTY AGENCY LOAN DATA, http://www.ed.gov/finaid/prof/resources/data/07q3ffelpga.xls (last visited Oct. 21, 2007).

GSLP.[10] These expansions to the GSLP have taken form in the Federal Family Education Loan Program ("FFELP"), which now encompasses subsidized and unsubsidized loans, PLUS loans for parents (established in 1981),[11] and loan consolidations.[12] The loans under FFELP are available through lenders that contract with the federal government. The third loan program available to students falls under the Federal Direct Loan Program.[13] This program offers the same loans as the FFELP, but the loans come directly from the federal government and are available only to the neediest students.[14] These programs are all used by the Department of Education ("ED") to provide loans to students who meet the need standards established for each respectively.

The addition of unsubsidized loans to the FFELP led to another significant increase in the number of student loans from 1992 to 1994,[15] and student debt increased proportionately. From 2002 to 2006, the FFELP, the largest of the three loan programs, distributed 50.9 million loans valued at $222.75 billion, more than 39% of the total loans ($567.34 billion) distributed by the FFELP over the lifetime of the program.[16] At present, the higher education enterprise is expanding rapidly because of increasing student enrollment, expenditures, and inflationary costs. For the majority of postsecondary institutions that do not have endowments to supplement their budgets, the added costs are passed on to students in the form of tuition and fee increases. Because grants, scholarships, and savings have not kept pace with escalating costs, students are borrowing increasing amounts from all sources (federal and private loans) in order to complete degree requirements in a reasonable period of time.

The FFELP and Direct Loan Programs reported outstanding student loans of $320 billion in 2005.[17] Outstanding loans are those in repayment and not in default or deferment. As the number of student loans accelerated rapidly in the 1970s and 1980s, the number of student defaults increased commensurately.[18] In 1978, Congress made discharging student-debt in bankruptcy extremely difficult

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10. Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992) (codified as amended in scattered sections of 20 U.S.C.).

11. U.S. Dep't of Educ., PLUS Loans (Parent Loans), http://www.studentaid.ed.gov/PORTALSWebApp/students/english/parentloans.jsp (last visited Oct. 8, 2007).

12. U.S. Dep't of Educ., Federal Family Education Loan (FFEL) Program, http://www.ed.gov/programs/ffel/index.html (last visited Sept. 30, 2007).

13. U.S. Dep't of Educ., William D. Ford Federal Direct Loan Program, http://www.ed.gov/programs/wdffdl/index.html (last visited Sept. 30, 2007).

14. U.S. Dep't of Educ., Direct Loans: The William D. Ford Federal Direct Loan Program, http://www.ed.gov/offices/OSFAP/DirectLoan/index.html (last visited Sept. 11, 2007).

15. FY 2007 FFELP GUARANTY AGENCY LOAN DATA, *supra* note 9. The calculated increase was 56.6%.

16. *Id.*

17. U.S. DEP'T OF EDUC., FISCAL YEAR 2006 BUDGET SUMMARY–FEB. 7, 2005, http://www.ed.gov/about/overview/budget/budget06/summary/edlite-section2d.html (last visited Oct. 8, 2007).

18. U.S. Dep't of Educ., National Student Loan Default Rates, http://www.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html (last visited Sept. 25, 2007). The default rates are figured on a cohort basis to create comparable data for each year.

by instituting a requirement of "undue hardship."[19] Then in 1992 and 1996, Congress expanded the authority of the federal government to collect on defaulted loans by removing any federal or state statutory, regulatory, or administrative limitation on loan collections and authorizing the garnishment of wages and Social Security benefits.[20]

Since this time, the federal government has increased its efforts regarding the collection of student loans to ensure the viability of the loan programs. The federal student loan programs were implemented to help all citizens, regardless of economic background, achieve the American dream through postsecondary education. Loans are used to help cover the cost of education when scholarships and personal income do not meet a student's total financial need. Universal access to postsecondary education has been a priority in the United States for a long time, and the federal student loan programs are a primary means to that end. However, this ideal does not prevent negative events that can lead to student loan defaults and bankruptcies.

BANKRUPTCY: STUDENT LOANS

When a former student who still has student loans to pay off declares bankruptcy, the implications have a legal and economic impact that affects both the debtor and future beneficiaries of the student loan programs. Legally, student debt, primarily in the form of federal loans, arises in bankruptcy courts when students attempt to discharge student loans along with other debt. The Bankruptcy Act of 1898 established the policy of (1) providing honest debtors with a fresh start, free from oppressive debt ("fresh start" policy), and (2) ensuring equal and fair treatment for all debtors and creditors.[21] This "fresh start" policy remained unchanged in the 1978 code, and the current bankruptcy code embodies this policy by providing two primary methods of debt relief through filing either Chapter 7 or Chapter 13 bankruptcy.[22]

In Chapter 7 bankruptcies, the debtor receives an immediate fresh start after the proceeds generated from a liquidation of all non-exempt assets are applied to outstanding debts.[23] Chapter 13 is more stringent because it requires a debtor to submit a debt repayment plan specifying the portion of income to be used to pay debts.[24] A court then discharges any uncollectible debt balance after approving the final repayment agreement plan.[25] For obvious reasons, Chapter 7 is considered to be "debtor friendly" while Chapter 13 provides more protection for creditors.

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19. 11 U.S.C. § 523(a)(8) (2000 & Supp. 2005).

20. 20 U.S.C. § 1091(a)(3), 1095(a) (2000 & Supp. 2005); 31 U.S.C. § 3716(c)(3)(A) (2000 & Supp. 2004).

21. LAWRENCE P. KING & MICHAEL L. COOK, CREDITORS' RIGHTS, DEBTORS' PROTECTION, AND BANKRUPTCY 1113 (3d ed. 1997).

22. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended in scattered sections of 11, 20, & 28 U.S.C.).

23. Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 186 EDUC. L. REP. 783, 786 (2004).

24. *Id.*

25. *Id.*

While other debtors can opt for Chapter 7 or Chapter 13 relief to discharge debt, student debtors cannot discharge education loans under these two chapters of bankruptcy. The Bankruptcy Reform Act of 1978 established a five-year time period from the point that repayment begins (or should begin) to the point a student debtor can declare bankruptcy under "undue hardship."[26] Prior to this act, "educational loans were treated like any other form of unsecured debt in bankruptcy and were generally dischargeable."[27] Then, in 1990, Congress extended the time period to seven years making it a longer process for student loans to be discharged.[28] Finally, with the Higher Education Amendments of 1998, the time limitation was completely removed from legislation.[29] Without the time limitation, the government can pursue the collection of a defaulted student loan at anytime, including retirement. Thus, the standard for discharge of student loans became equal to that of debts arising from tax evasion, fraud, embezzlement, child support, alimony, and willful and malicious injury.[30] This level of protection for federal student loans is inconsistent with the historical purpose of bankruptcy.

Discharge of all types of student loans is difficult, if not impossible, to achieve under the congressionally-created discharge standard of "undue hardship." In the enabling legislation, Congress created the "undue hardship" discharge standard, but failed to define the term. The current code under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") states:

> (a) A discharge under section 727, 1141, 1228 (a), 1228 (b), or 1328 (b) of this title [11 USCS § 727, 1141, 1228(a), 1228(b), or 1328(b)] does not discharge an individual debtor from any debt— . . . (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for— (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a government unit or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986 [26 USCS § 221(d)(1)], incurred by a debtor who is an individual.[31]

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26. Richard Fossey, *"The Certainty of Hopelessness:" Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, 26 J.L. & EDUC. 29, 32–33 (1997).

27. B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89, 97 (2002) (citing Education Amendments of 1976, Pub. L. No. 94-482, § 127, 90 Stat. 2081, 2141 (codified as amended in scattered sections of 20 U.S.C.)).

28. Cloud, *supra* note 23, at 786.

29. *Id.*

30. Fossey, *supra* note 26, at 33.

31. 11 U.S.C. § 523(a)(8). It is important to note Congress passed the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, and President Bush signed it into law on April 20, 2005. Pub. L. 109-8, 119 Stat. 23 (codified in scattered sections of 11, 18 & 28 U.S.C.). This law updated the definition of what constitutes a loan. *Id*. The act encompassed the most far reaching changes to the Bankruptcy Code since 1978. *See* John C. Anderson, *Highlights of the*

This new legislation expanded the definition of what constitutes a student loan for bankruptcy purposes; however, Congress failed to provide consumers with a clear definition of its intent with regard to "undue hardship." In the absence of a congressional definition, courts have developed a number of judicial tests to determine whether a debtor can reasonably be expected to repay a student loan. However, student debtors are not ensured the same bankruptcy protection as other bankruptcy debtors even though both may have made poor financial decisions, lost their jobs, failed to find suitable employment, or experienced debilitating health problems. Decades of case law have failed to create a universally accepted test that can be used to determine whether a given student debtor is, in fact, entitled to loan discharge. Currently, four judicial tests are used to determine "undue hardship:"[32] (1) the *Johnson Test*,[33] (2) the *Totality of Circumstances Test*,[34] (3) the *Bryant Poverty Test*,[35] and (4) the *Brunner Test*.[36]

The *Johnson Test*, the first of the four "undue hardship" tests, was first adopted and implemented by the U.S. District Court for the Eastern District of Pennsylvania in 1979.[37] Under this test, a student's debt may be discharged if he or she meets three sub-tests: (1) a mechanical test, (2) a good faith test, and (3) a section 439A policy test.[38] The Johnson case presented a good starting place for determining "undue hardship," but it is burdensome to administer and has since been superseded in most courts by one of the other three tests.[39] Two years after the first use of the *Johnson Test*, the Eighth Circuit, developed a second test that

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Bankruptcy Abuse Prevention and Consumer Protection Act of 2005—Part 1— Consumer Cases, 33 S.U. L. REV 1 (2005).

32. This article will give a brief summary of the different tests. For an in-depth review of these tests, *see* Cloud, *supra* note 23; Edward Paul Cantebury, Comment, *The Discharge of Student Loans in Bankruptcy: A Debtor's Guide to Obtaining Relief*, 32 OHIO N.U. L. REV. 149 (2006).

33. Pa. Higher Educ. Assistance Agency v. Johnson (*In re* Johnson), 5 Bankr. Ct. Dec. 532 (Bankr. E.D. Pa. 1979).

34. Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702 (8th Cir. 1981).

35. Bryant v. Pa. Higher Educ. Assistance Agency, 72 B.R. 913 (Bankr. E.D. Pa. 1987).

36. Brunner v. N.Y. State Higher Educ Serv. Corp. (*In re* Brunner), 831 F.2d 395 (2d Cir. 1987).

37. *In re* Johnson, 5 Bankr. Ct. Dec. 532.

38. *Id*. at 535–59.

39. Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302 (10th Cir. 2004); Ekenasi v. Educ. Res. Inst. (*In re* Ekenasi), 325 F.3d 541 (4th Cir. 2003); U.S. Dept. of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89 (5th Cir. 2003); O'Hearn v. Educ. Credit Mgmt. Corp. (*In re* O'Hearn), 339 F.3d 559 (7th Cir. 2003); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298 (3d Cir. 1995); *In re* Roberson, 999 F.2d 1132 (7th Cir. 1993); Brunner v. N. Y. State Higher Educ. Serv. Corp. (*In re* Brunner), 831 F.2d 395 (2d Cir. 1987); Andrews v. S.D. Student Loan Assistance Corp (*In re* Andrews), 661 F.2d 702 (8th Cir. 1981); Bryant v. Pa. Higher Educ. Assistance Agency, 72 B.R. 913 (Bankr. E.D. Pa. 1987). Nine of the eleven "numbered" circuit courts have adopted the *Brunner Test*. The two other courts, the Armed Forces Circuit and the Federal Circuit, would not hear cases in this matter due to their limitations for appeals.

attempts to analyze all factors impacting a student debtor's ability to repay a loan.[40]

The *Totality of Circumstances Test*[41] requires that "the facts and circumstances surrounding" an individual case be evaluated to determine whether student debt is dischargeable.[42] Emphasis is placed on three prevailing considerations: "1) the debtor's past, present, and reasonably reliable future financial resources; 2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and 3) any other relevant facts and circumstances surrounding each particular bankruptcy case."[43] This test is viewed as the least restrictive of the four because of its case-by-case determination of "undue hardship." While other courts apply this test, it has been used primarily in the Eighth Circuit.[44]

The *Bryant Poverty Test*[45] was created due to "the complicated nature" of the *Johnson Test* and the desire of the U.S. Bankruptcy Court for the Eastern District of Pennsylvania to base its rulings on "objective simplicity."[46] The *Bryant Test* begins by focusing on "the income and resources of the debtor . . . in relation to federal poverty guidelines established by the United States Bureau of the Census."[47] This court compared the definition of "undue hardship" to the definition of "minimal standard of living."[48] The court reasoned that people cannot maintain a minimal standard of living if they are already below the federal poverty line before trying to repay a loan; however, it did acknowledge the possibility for people to live above the poverty line and yet not reach a minimal standard of living.[49] If debtors do not fall below the poverty guideline, the court decided to "look at the totality of circumstances to ascertain the existence of 'unique' or 'extraordinary' circumstances."[50] Therefore, the court created a two-tier system for testing. First, it considers whether a debtor lives below the poverty line.[51] If so, the debt can be discharged. If the debtor does not live below the poverty line, the court then considers the individual student's total financial circumstances before ruling on discharge of the loan.[52]

The *Brunner Test*, developed by a district court in 1985 and adopted by the

40. *In re* Andrews, 661 F.2d at 703–04.

41. *Id.*

42. Wegfehrt v. Ohio Student Loan Comm'n (*In re* Wegfehrt), 10 B.R. 826, 830 (Bankr. N.D. Ohio 1981).

43. Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003) (citing Andresen v. Nebraska Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 132 (8th Cir. 1999)).

44. *Id.*

45. Bryant v. Pa. Higher Educ. Assistance Agency (*In re* Bryant), 72 B.R. 913 (Bankr. E.D. Pa. 1987).

46. *Id.* at 915 n.2.

47. *Id.* at 915.

48. *Id.* at 916.

49. *Id.* at 917.

50. *Id.* at 918.

51. *Id.* at 916.

52. *Id.*

Second Circuit in 1987,[53] is currently used in nine Circuit Courts of Appeal.[54] *Brunner* incorporates some components of the other three tests making it the most comprehensive of the four "undue hardship" tests. The test is a three-pronged review of a debtor's circumstances, and all parts must be proven true for a student's debt to be discharged. The first prong addresses whether the debtor has the capability, based on current income and expense, to maintain "a 'minimal' standard of living for herself and her dependents if forced to repay the loans."[55] The second prong examines whether "this state of affairs is likely to persist for a significant portion of the repayment period of the student loans."[56] The final prong assesses whether "the debtor has made good faith efforts to repay the loans."[57] Student debtors have a difficult time satisfying all three prongs of this test even if extenuating circumstances make repayment burdensome. The *Brunner Test* has become the most widely used test making it the closest operational definition of "undue hardship."

"Because of its popularity, the federal student loan program has enjoyed enthusiastic, generous, and bipartisan support from Congress for almost fifty years, and congressional support for the program will likely continue."[58] However, Congress and the federal courts have become increasingly adamant about the discharge of student loans in recent years. "Congress expects student borrowers to repay their loans on time and in good faith to ensure the integrity and solvency of the loan program."[59] A number of laws have been enacted since 1978 to accomplish that goal, including: Section 523(a)(8)(B)[60] of the Bankruptcy Code (which addressed undue hardship); the Debt Collection Act of 1982;[61] and the Higher Education Technical Amendments of 1991.[62] The result of these changes is that federal law now empowers the federal government to use all legal means to

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53. Brunner v. N.Y. State Higher Educ. Serv. Corp. (*In re* Brunner), 831 F.2d 395 (2d Cir. 1987).

54. *See* Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382 (6th Cir. 2005); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302 (10th Cir. 2004); Ekenasi v. Educ. Res. Inst. (*In re* Ekenasi), 325 F.3d 541 (4th Cir. 2003); U.S. Dept. of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89 (5th Cir. 2003); O'Hearn v. Educ. Credit Mgmt. Corp. (*In re* O'Hearn), 339 F.3d 559 (7th Cir. 2003); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238 (11th Cir. 2003); United Student Aid Funds, Inc. v. Pena (*In re* Pena), 155 F.3d 1108 (9th Cir. 1998); Pa. Higher Educ. Assistance Agency v. Faish (*In re* Faish), 72 F.3d 298 (3d Cir. 1995); *In re* Roberson, 999 F.2d 1132 (7th Cir. 1993); Brunner v. N. Y. State Higher Educ. Serv. Corp. (*In re* Brunner), 831 F.2d 395 (2d Cir. 1987); Andrews v. S.D. Student Loan Assistance Corp (*In re* Andrews), 661 F.2d 702 (8th Cir. 1981); Bryant v. Pa. Higher Educ. Assistance Agency, 72 B.R. 913 (Bankr. E.D. Pa. 1987).

55. *In re Brunner*, 831 F.2d at 396.

56. *Id*.

57. *Id*.

58. Robert C. Cloud, *Offsetting Social Security Benefits to Repay Student Loans: Pay Us Now or Pay Us Later*, 208 ED. LAW. REP. 11, 21 (2006).

59. *Id.*

60. 11 U.S.C. § 523(a)(8)(B) (2000 & Supp. 2005).

61. 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.).

62. 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.).

collect defaulted student loans, no matter how old or delinquent the debt, and federal courts have consistently approved governmental efforts to recover these debts. For example, in *Lockhart v. United States*,[63] the United States Supreme Court ruled that the federal government "can offset Social Security benefits to collect overdue student loans and that there are no time limits on those collection efforts."[64]

LOCKHART V. UNITED STATES: SOCIAL SECURITY & DEFAULTS

In the midst of the discussion about the efficacy of bankruptcy tests, the federal government has started using a new approach to ensure repayment of student loans. In 2001, the Bush administration started garnishing Social Security benefits to recover at least a portion of defaulted student loans.[65] This led to the recent Supreme Court case of *Lockhart v. United States*.[66] In its unanimous ruling, the Court upheld the government's right to garnish or offset Social Security payments to individuals who have failed to repay student loans.[67] Certiorari was granted in this case to resolve a conflict between the Eighth and Ninth Circuits.[68] The Eighth Circuit found, in *Lee v. Paige,*[69] that the garnishment of Social Security payments was contrary to the regulations in the Federal Debt Collection Act of 1982 ("DCA").[70] Conversely, the Ninth Circuit upheld such garnishment in the *Lockhart* case.[71] These opposing opinions led the Supreme Court to consider the issue in 2005.

Lee v. Paige focused on the DCA, which authorized the garnishment "by administrative offset" of unpaid debts from some federal payments.[72] The DCA, however, did not allow the offset of Social Security benefits, despite the Social Security's enabling legislation leaving open the possibility of garnishment of Social Security payments.[73] Also, the DCA instituted a ten year statute of limitation on all federal loan collections, which remained unchanged in subsequent revisions to the DCA.[74] The Department of Education ("ED"), arguing in favor of garnishment, pointed to the removal of this ten year statute of limitation in the Higher Education Amendments of 1991 ("HEA") with regard to educational loans.[75] The Debt Collection Improvement Act of 1996 ("DCIA") also authorized

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63. 546 U.S. 142 (2005).

64. Cloud, *Offsetting Social Security Benefits*, *supra* note 58, at 21.

65. Stephen Burd, *Supreme Court Hears Dispute Over Student-Loan Repayments*, CHRON. HIGHER EDUC., Nov. 11, 2005, at A25.

66. *Lockhart*, 546 U.S. at 142.

67. *Id.*

68. *Id.*

69. Lee v. Paige, 376 F.3d 1179 (8th Cir. 2004), *abrogated by* Lockhart v. United States, 546 U.S. 142 (2005).

70. *Id*. at 1180.

71. Lockhart v. United States, 376 F.3d 1027 (9th Cir. 2004), *aff'd*, 546 U.S. 142 (2005).

72. 31 U.S.C. § 3711(a) (2000); 31 U.S.C. § 3716(a) (2000).

73. 42 U.S.C. § 407(a) (2000).

74. 31 U.S.C. § 3716(e)(1) (2000).

75. Lee v. Paige, 376 F.3d 1179, 1180 (8th Cir. 2004) (citing 20 U.S.C. § 1091(a) (2000)).

the garnishment of federal loan debts from Social Security payments.[76] However, the DCIA perhaps unintentionally did not repeal the ten year limitation from the DCA, prompting Lee to contend that the time limitation still stood on garnishment of Social Security.[77] These opposing federal codes led the district court, and later the Eighth Circuit, to reason:

> A better reading of [the Debt Collection Improvement Act of 1996] and [the Higher Education Act of 1991] would be the following: Congress declared in [the 1991 Act] that there would [sic] no limitations on when student loans could be collected. This statute controls the time for collecting past due amounts. In [the 1996 Act], Congress allowed for Education to reach various sources as a means of offsetting past due claims, but provided that Social Security benefits could not be offset for claims over ten years old. This statute controls the sources of funds to which Education can look to satisfy its claim. [The 1996 Act] . . . limits Education's ability to look to Social Security benefits for repayment. In short, Education is still entitled to pursue it's the [sic] collection of Lee's student loans. It may not however, look to Lee's Social Security benefits to collect. Due to the age of its claims against Lee, Education is not authorized, in this case, to satisfy its claim by offsetting Lee's Social Security benefits.[78]

Subsequently, the Ninth Circuit heard the case of James Lockhart, a sixty-seven year-old disabled man with significant medical expenses.[79] Lockhart owed $85,000 in student loans, which were in default, and his income consisted of $874 in Social Security benefits and $10 in food stamps each month.[80] In 2001, the ED authorized the withholding of $93, or 10.64%, a month from his Social Security benefits, prompting Lockhart to file suit under the Debt Collection Act of 1982 to prevent the offsets.[81] His attorneys argued that because his loans were received between 1984 and 1989, they fell under the ten year statute of limitation on Social Security offset.[82] The facts and arguments in this case were similar to that of the *Lee* case, but the Ninth Circuit came to the opposite conclusion, affirming the district court's decision and concluding:

> A puzzle has been created by the codifiers. But it seems clear that in 1996, Congress explicitly authorized the offset of Social Security benefits, and that in the Higher Education Act of 1991, Congress had overridden the 10-year statute of limitations as applied to student loans. That the codifiers failed to note the impact of the 1991 repeal on [the Debt Collection Improvement Act of 1996] does not abrogate the repeal. Because the Debt Collection Act's statute of limitation is

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76. 31 U.S.C. § 3716(c)(3)(A) (2000).

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

78. Lee v. Paige, 276 F. Supp. 2d 980, 984 (W.D. Mo. 2003), *aff'd*, 376 F.3d 1179 (8th Cir. 2004).

79. Burd, *supra* note 65, at A25.

80. *Id.*

81. *Id.*

82. *Lockhart*, 546 U.S. 142, 143–44 (2005).

inapplicable here, the government's offset is not time-barred.[83]

On November 5, 2005, the Supreme Court heard arguments in *Lockhart v. United States*.[84] The unanimous opinion of the Court, written by Justices O'Connor and Scalia, authorized the offset of Social Security benefits to repay student debt.[85] The Court considered the legality of offsetting Social Security benefits to collect student loans outstanding for more than ten years.[86] While the DCA did give authority to government agencies to garnish federal payouts "by administrative offset,"[87] it instituted a statute of limitation of ten years.[88] As the Court noted, Social Security benefits under the Social Security Act are not "subject to execution, levy, attachment, garnishment, or other legal process."[89] As stated in the Social Security Act, "[n]o other provision of law, enacted before, on, or after April 20, 1983, may be construed to limit, supersede, or otherwise modify the provisions of this section except to the extent that it does so by express reference to this section."[90] However, in 1991, Congress "sweepingly eliminated time limitations as to certain loans" including the student loans at issue here.[91] While this legislation did remove time restrictions, it did not eliminate the restriction on garnishing Social Security benefits, but in 1996 the DCIA expressly referenced the Social Security Act for removing protection on Social Security benefits.[92] The DCIA did not expressly reference the ten year limitation raising this issue to the courts. Lockhart, of course, argued that Congress intended for the statute of limitation to remain on Social Security in spite of conflicting with the HEA.[93] However, the Supreme Court refuted this argument and opined that "the Higher Education Technical Amendments retain their effect as a limited exception to the Debt Collection Act time bar in the student loan context."[94] Consequently, the Supreme Court affirmed the Ninth Circuit's ruling in *Lockhart* and abrogated the Eighth Circuit's decision in *Lee*, paving the way for offsetting Social Security benefits to pay unsettled student debt.[95]

Lockhart leads one to ask why the ED is pursuing new collection strategies on defaulted loans. The answer is found in the size of the federal student loan program, private student loan industry, and the anticipated growth of the federal loan program. As the program grows, the federal funding required to meet the demand will increase drastically. This can already be seen in the amount of new

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83. Lockhart v. United States, 376 F.3d 1027, 1030 (9th Cir. 2004), *aff'd*, 546 U.S. 142 (2005).

84. *Lockhart*, 546 U.S. at 142.

85. *Id.*

86. *Id.*

87. *Id*.

88. *Id*.

89. 42 U.S.C. § 407(a) (2000).

90. 42 U.S.C. § 407(b) (2000).

91. Lockhart v. United States, 546 U.S. 142, 144 (2005).

92. *Id*. at 145.

93. *Id.*

94. *Id*. at 146.

95. *Id.* at 147.

loans and total loans disbursed from 2002 to 2006.[96] These changes make it necessary for the ED to focus on keeping the default rate low and finding new ways to collect defaulted loans. *Lockhart* shows that the ED will pursue all loans that have not officially been declared in default ensuring that students will either "pay us now or . . . pay us later."[97] To this end, it is important to look at the characteristics of those who borrow and the financial issues they currently face and are likely to face in the future. Public policy must reflect the needs of these students and their institutions while at the same time ensuring the solvency of the loan program for generations yet unborn.

CURRENT PICTURE OF UNDERGRADUATE STUDENTS

In 2003, the National Center for Education Statistics ("NCES") studied the characteristics of undergraduate student borrowers during 1999–2000.[98] The study divided borrowers into four categories: high, medium, low, and non-borrowers. At the time of the NCES report, 29% of all undergraduates borrowed money to attend an institution of higher education.[99] That number subsequently increased to 35% during 2003–04.[100] The report defined borrowers as "undergraduate students who have obtained loans from federal, state, institutional, and other sources, including private commercial loans (but excluding federal Parent Loans for Undergraduate Students ('PLUS') and loans from family or friends)."[101] Most borrowers were part-time students working full-time while pursuing associate degrees at two-year institutions where their educational costs were less than $5,000 per year.[102] Ironically, data from the NCES Report indicate that nonborrowers have many of the same characteristics as high borrowers (discussed below), including financial independence and having dependents other than a spouse.[103] Nonborrowers, by definition, do not borrow money to pursue their education; therefore, they do not face the same repayment concerns as borrowers once they graduate or dropout.[104] This group consists primarily of students who have chosen

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96. FY 2007 FFELP GUARANTY AGENCY LOAN DATA, *supra* note 9.

97. Robert C. Cloud, *Offsetting Social Security Benefits to Repay Student Loans: Pay Us Now or Pay Us Later*, 208 ED. LAW REP. 11 (June 15, 2006).

98. NAT'L CTR. FOR EDUC. STATISTICS, CHARACTERISTICS OF UNDERGRADUATE BORROWERS: 1999–2000 (Jan. 2003), http://nces.ed.gov/pubs2003/2003155.pdf [hereinafter CHARACTERISTICS: 1999–2000]. While the data in the NCES report are important, readers need to note that considering increases in cost of attendance since the 1999–2000 year leads to an understatement of these statistics for students attending institutions of higher education in 2006–2007.

99. *Id*. at 3.

100. NAT'L CTR. FOR EDUC. STATISTICS, 2003–2004 NATIONAL POSTSECONDARY STUDENT AID STUDY 5 (June 2005), http://nces.ed.gov/pubs2005/2005163.pdf.

101. CHARACTERISTICS: 1999–2000, *supra* note 98, at 3.

102. *Id*. at 5.

103. *Id*. at 5–6.

104. It is not the scope of this paper to debate whether spreading the cost of education out over more than four years or attaining an associate degree is a better way to attend and pay for higher education. The authors assume administrators, students and parents want to know and are concerned with the implications and issues of attaining a degree in a four-year institution.

to take longer to complete their degrees rather than incur student debt.[105]

The NCES report divided the remaining three borrower classifications by the maximum Stafford borrower limits for one year at that time.[106] Low borrowers were defined as those borrowing less than $2,625 in 1999–2000, which was the maximum amount that dependent student borrowers could receive as a freshman.[107] Medium borrowers received loans between $2,625 and $6,625 in loans during the 1999–2000 academic year.[108] The high amount, $6,625, was the maximum an independent freshman could receive in combined subsidized and unsubsidized loans.[109] High borrowers were defined as those who took out loans above $6,625.[110]

The borrowing limits used for this report changed for the first time since 1992 when the Higher Education Reconciliation Act of 2005 ("HERA") became effective on July 1, 2007.[111] Before HERA, loan limits for first-year students remained static since 1986.[112] HERA adjusted subsidized loans for first year undergraduates from $2,625 to $3,500, and second year students received an increase from $3,500 to $4,500.[113] Unsubsidized loans increased for graduate/professional students from $10,000 to $12,000, preparatory work for enrollment into graduate/professional programs from $5,000 to $7,000, and teacher certification from $5,000 to $7,000.[114] These changes will no doubt be helpful to all student borrowers, but the artificially low limits in recent years have compelled some students to seek additional loans outside the federal program.[115] In addition, these changes have not been in effect long enough to determine the impact, if any, on the characteristics of borrowers.

Annual Borrowing Limits for Dependent Undergraduate Students:

Annual Borrowing Limits for Independent Students:

105. CHARACTERISTICS: 1999–2000, *supra* note 98, at 5–6.

106. *Id.* at 4.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Higher Education Reconciliation Act of 2005, Pub. L. No. 109-71, 120 Stat. 4, 158–60 (2005) (codified as amended in scattered sections of 20 U.S.C.).

112. LAURIE WOLF, DEP'T OF EDUC., REAUTHORIZATION OF THE HIGHER EDUCATION ACT OF 1965 (2003), http://www.ed.gov/policy/highered/reg/hearulemaking/2002/reauthhearing/f-laurie-wolf.html?exp=0 (last modified Sept. 22, 2003).

113. Higher Education Reconciliation Act of 2005, 120 Stat. 4, 158 (2005).

114. *Id.* at 159.

115. U.S. DEP'T OF EDUC., FUNDING EDUCATION BEYOND HIGH SCHOOL: THE GUIDE TO FEDERAL STUDENT AID (2007–2008), *available at* http://studentaid.ed.gov/students/attachments/siteresources/FundingEduBeyondHighSchool_0708.pdf. The following charts are shown to create a picture of what a borrower can take in student debt at each level of education each year and in aggregate. The loan amounts changed as of July 1, 2007, but in the author's opinion, this does not negate the validity of the NCES report.

Grade Level	**Combined Subsidized & Unsubsidized Maximum**
Freshman	$3,500
Sophomore	$4,500
Junior	$5,500
Senior	$5,500

Grade Level	**Subsidized Maximum**	**Combined Subsidized & Unsubsidized Maximum**
Freshman	$3,500	$7,500
Sophomore	$4,500	$8,500
Junior	$5,500	$10,500
Senior	$5,500	$10,500
Graduate	$8,500	$20,500

Aggregate (Lifetime) Borrowing Limits:

Student Type	**Subsidized Maximum**	**Combined Subsidized & Unsubsidized Maximum**
Dependent Undergraduates	$23,000	$23,000
Independent Undergraduates	$23,000	$46,000
Graduate Students	$65,500	$138,500

Low and medium borrowers made up 28% and 51%, respectively, of all borrowers and had loans totaling less than $6,625 in student loans in the 1999–2000 academic year.[116] These two groups can be combined because they are similar in almost every area, according to the study, except that low borrowers were more likely to attend a two-year institution.[117] These borrowers were young, dependent, single, and attended a college or university full-time.[118] They tended to work one to twenty hours per week, and they were likely to complete a four-year college or university degree.[119] Also, the low borrowers often attended institutions costing below $10,000 per year, whereas, 20.3% of the medium borrowers attended institutions costing more than $20,000 a year.[120] Few of the students in these two categories obtained private loans to finance their education.[121] Medium

116. CHARACTERISTICS: 1999–2000, *supra* note 98, at 4.
117. *Id.* at 5–6.
118. *Id.*
119. *Id.*
120. *Id.* at 6.
121. *Id.* at 18.

borrowers were able to fund their expenses at higher-cost institutions because of additional financial aid from grants or scholarships.[122]

The NCES report found that high borrowers, generally, were independent and 24 years-old or older.[123] High borrowers made up 21% of all borrowers[124] and received an average of $9,680 in loan aid in 1999–2000.[125] Dependent students were more likely to borrow relatively more money when they pursued their baccalaureate degree at a four-year, public or private institution as opposed to a two-year college.[126] The NCES study found high borrowers in all types of institutions were more likely to drop out if they had four or more retention risk factors.[127] This group had more than the maximum subsidized and unsubsidized Stafford loans for freshmen. Thus, 27% of high borrowers were also likely to pursue financial aid in the form of private loans.[128] They were more likely than other borrowers to have subsidized, unsubsidized, and private loans.[129] At the same time, they had lower amounts of other financial aid (e.g., grants and scholarships) than low and medium borrowers.[130]

122. *Id*.

123. *Id.* at iv.

124. *Id.* at 4.

125. *Id*. at 17.

126. *Id.* at 21.

127. *Id*. at 16. The study, however, does not address the actual number of students leaving college or university life due to debt, but it does prove that there is increased risk of lower retention when debt is higher. The seven risk factors are delaying enrollment, attending part-time, being financially independent, having dependents other than a spouse, working full-time while enrolled, having no high school diploma, and being a single parent.

128. *Id*. at 18.

129. *Id.*

130. *Id.*

NCES Data by Borrower Classification (in percentages)[131]

	Non-borrower	**Low Borrower**	**Medium Borrower**	**High Borrower**
Dependency Status				
Dependent	45.0	68.6	67.1	35.9
Independent	55.1	31.4	32.9	64.1
Parent Income – Dependent				
Lowest Quartile	23.9	29.4	25.1	29.2
Middle Quartiles	48.2	52.7	54.1	52.2
Highest Quartile	27.9	17.9	20.8	18.6
Student Income – Independent				
Lowest Quartile	19.3	43.2	43.8	36.5
Middle Quartiles	50.4	48.9	48.0	51.5
Highest Quartile	30.3	7.9	8.3	12.0
Attendance Status				
Exclusively Full-Time	39.9	70.2	74.2	71.9
Half-Time	19.5	11.1	6.7	9.1
Less than Half-Time	24.6	3.0	2.0	1.7
Mixed	16.1	15.7	17.2	17.3
Degree Program				
Certificate	9.8	7.3	4.6	9.2
Associate's Degree	48.4	32.0	13.6	17.6
Bachelor's Degree	35.9	59.9	81.1	72.6
No Undergraduate Degree	5.9	0.9	0.8	0.6
Type of Institution				
Private not-for-profit 4-year	10.6	17.1	29.4	33.7
Public 4-year	28.4	47.1	54.7	37.5
Public 2-year	58.5	25.6	7.5	6.0
Private for-profit	2.5	10.3	8.4	22.8

The study provides evidence that students are most likely to borrow if they are attending a private, not-for-profit institution full-time and do not work while attending a higher education institution. Students who work and do not attend full-time are more likely to graduate without any loans. The difference between borrowers and nonborrowers consistently lies in and corresponds with the decision to attend a college or university full-time or part-time. Once the decision is made, the student must decide how to pay for education at the pace desired. An ever increasing number and percentage of students are opting to borrow money from the federal government (i.e., the taxpayers) to pay for their postsecondary education. For some at least, repayment of the loans is not an immediate concern, but something to be dealt with on another day, in the distant future. As Scarlett

131. *Id.* at 5–6. The table is a summary of relevant statistics from the NCES Report.

O'Hara said in the closing scene of *Gone with the Wind*, "I can't think about that now, I'll go crazy if I do. . . . I'll think about it tomorrow. . . . After all, tomorrow is another day!"[132]

CURRENT PICTURE OF COLLEGE AND UNIVERSITY GRADUATES

One of the benefits of the federal student loan program is that students can defer loan payments while attending a college or university. This allows students to pursue their education without the immediate worry of paying on their loan when earnings are potentially low. On the other hand, the deferred payment provision can lull borrowers into a false sense of insulation from their legal responsibility to repay the loan. The following NCES data reflect the borrowing trends of undergraduates between 1992 and 2003. The data reveal that an increasing number of undergraduates are borrowing increasing amounts to cover the cost of education.

Progressive Increase in Borrowing[133]

School Year	Percent Who Borrowed	Average Amount Borrowed
1992–1993	19.2%	$3,186
1995–1996	25.3%	$4,041
1999–2000	29.0%	$5,100
2003–2004	35.0%	$5,800

As of 2005–06, 56% of all student aid came from loans.[134] Moreover, this percentage will likely increase in the future.[135] Private loans increased significantly from $5.6 billion to $17.3 billion between academic years ending 2002 to 2006, respectively.[136] In the 2005 academic year, non-federal loans exceeded total Pell Grant expenditures for the first time in the history of the Pell Grant program.[137] If the current growth rate maintains, data for the 2007 academic

132. GONE WITH THE WIND (Metro-Goldwyn-Mayer 1939).

133. *See* U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, PERCENTAGE OF UNDERGRADUATES WHO BORROWED: ACADEMIC YEARS 1992–93 AND 1995–96, *available at* http://nces.ed.gov/quicktables/Detail.asp?Key=67 (last visited Oct. 3, 2007); Lutz Berkner et al., *Student Financing of Undergraduate Education: 1999–2000*, 4 EDUC. STATISTICS Q. 3 (2003), *available at* http://nces.ed.gov/programs/quarterly/vol_4/4_3/4_2.asp#Figure-A (last visited Oct. 8, 2007); U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, NCES 2005–163, 2003–2004 NATIONAL POSTSECONDARY STUDENT AID STUDY 5, 10 (2005), *available at* http://nces.ed.gov/pubs2005/2005163.pdf. It is important to note that this is annualized instead of an average of a graduate.

134. COLLEGE BOARD, TRENDS IN STUDENT AID 2006, 14 (2006), *available at* http://www.collegeboard.com/prod_downloads/press/cost06/trends_aid_06.pdf [hereinafter COLLEGE BOARD 2006].

135. *Id.*

136. *Id.*

137. *Id.*

year will likely show that the growth of non-federal loans exceeds all federal grants and work-study programs.[138] With the increases in tuition rates, federal aid on average does not pay the same percentage of education costs today as it did five years ago. At no time in the history of the student loan program have so many students sought so many non-federal loans. These private loans have the same protections against default that federal loans have, but do not carry the same low interest rate, making them riskier and more expensive for student borrowers.[139] Therefore, it is important to know what the average graduate will face when his or her education is complete. A profile of prospective graduates will help facilitate discussion on why it is important for the public to remain concerned about the rising cost of higher education. This will help create a picture of whether or not a college or university graduate can achieve a stable average economic status within the immediate year following graduation.

According to the NCES, the average bachelor degree recipient graduates with $19,300 in debt.[140] While this figure reflects the average debt burden, the debt of a particular student fluctuates based on the type of institution he or she attended. For instance, the average student at a public four-year non-doctoral institution had average debt of $15,000, whereas a student at a private four-year doctoral school had an average debt of $28,000.[141] Determining the payment for student debt for professional graduates is more difficult than for undergraduate students. The median loan burden for professional students ranges from public school doctorate students with $29,509 to medical students with $94,932 in debt.[142] Considering this range, an average for professional degree recipient graduates was $61,800 of debt,[143] which creates a minimum payment of $442.75 per month.[144]

Credit cards are an added concern for student debtors. A 2004 study found that the average college or university student carried a credit card balance of $2,169.[145] This credit card study reported that 76% of students had at least one credit card, and 43% had four or more credit cards.[146] One potential bright spot is that undergraduates have lowered their average credit card debt from $2,748[147] in 2000

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138. *Id.*

139. Matthew C. Welnicki, *Dischargeability of Students' Financial Obligations: Student Loans Versus Student Tuition Account Debt*, 31 J.C. & U.L. 665 (2005).

140. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STATISTICS, DEBT BURDEN: A COMPARISON OF 1992–93 AND 1999–2000 BACHELOR'S DEGREE RECIPIENTS A YEAR AFTER GRADUATING 6 (2005), *available at* http://nces.ed.gov/pubs2005/2005170.pdf.

141. *Id.* at 10.

142. Kenneth E. Redd, *Financing Graduate and Professional Education: 2003–2004*, MONOGRAPH, Mar. 2006, at 1, 21.

143. *Id.* The figure was determined by averaging the median debt burden for both public and private students obtaining a doctoral, law, MD, or other medical degree. This is not the perfect way to conclude on the data, but it is the best considering the discrepancies between fields and colleges and universities.

144. This calculation assumes all loans were consolidated at six percent interest rate paid over twenty years.

145. NELLIE MAY, UNDERGRADUATE STUDENTS AND CREDIT CARDS IN 2004 7 (May 2005), *available at* http://nelliemae.com/pdf/ccstudy_2005.pdf.

146. *Id*. at 4.

147. *Id*. at 7.

to the 2004 average of $2,169.[148] The 2004 Nellie May report shows 7% of undergraduates report credit card balances greater than $7,000.[149] The picture changes drastically when the study turned to graduate students. The 2006 Nellie May Report on graduate students reported 92% of graduate students had at least one credit card and carried balances averaging $8,612 in 2006.[150] This is a significant increase, 75%, over the 1998 reported credit card debt of $4,924.[151] The undergraduate and graduate reports determined that the majority of credit card usage for both groups focused on textbooks and school supplies.[152] The main difference between undergraduate and graduate accumulated credit card debt appears to be the additional time in school for graduates to accumulate the debt.

Undergraduates who stay within the average range of credit card debt should not experience major difficulties paying their debt if they keep student loans below the average amount as well. On the other hand, credit card debt exceeding the average for undergraduates and the average amounts reported by graduate students could hinder a student's ability to meet basic needs after graduation, further complicating efforts to achieve financial stability. At a minimum, student loan debt can prevent a new graduate from saving money for emergency purposes and increase the likelihood that credit card debt will continue to accumulate. In summary, college and university graduates will likely face continuing difficulties with their debt, and the mounting debt could have negative consequences for the United States economy.

ECONOMIC ASSESSMENT OF STUDENT DEBT

The major risk confronting the student loan program is defaults on current outstanding loans. Solvency of the program depends on the timely repayment of previous loans by recipients and continual federal funding. The default rate on student loans in 1990 was 22.4% with 551,208 borrowers in default out of a total population of 2,460,102.[153] Seeing the risk for increase of defaults, Congress passed the Higher Education Technical Amendments of 1991[154] and the Debt Collection Improvement Act of 1996[155] removing the previously discussed statute of limitation on debt collections. These acts helped reduce the default rate to 4.6% in 2005.[156] The number of student borrowers in default decreased to 161,951,

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148. *Id.*

149. *Id.* at 8.

150. NELLIE MAY, GRADUATE STUDENTS AND CREDIT CARDS FALL 2006 2 (August 2007), *available at* http://nellimae.com/pdf/ccstudy_2006.pdf.

151. NELLIE MAY, CREDIT CARD USAGE AMONG GRADUATE STUDENTS 2003 1 (May 2004), *available at* http://nellimae.com/library/ccstudy_2003.pdf.

152. UNDERGRADUATE STUDENTS AND CREDIT CARDS, *supra* note 15045, at 6; GRADUATE STUDENTS AND CREDIT CARDS, *supra* note 150, at 7.

153. National Student Loan Default Rates, *supra* note 18. The default rates are figured on a cohort basis to create comparable data for each year.

154. 20 U.S.C. § 1091a (2000).

155. 31 U.S.C. § 3716(c)(3)(A) (2000) .

156. National Student Loan Default Rates, *supra* note 18.

while the total number of borrowers increased to 3,495,584.[157] The ED instituted several programs to lower the default rate including the following: increased borrower contacts, a Cohort Default Rate Guide, improved entrance/exit counseling, flexible repayment options, and strategic identification and intervention in high risk cases.[158] These strategic actions have reduced the default rate, strengthened the solvency of the student loan program, and increased awareness about issues facing students with loans.

However, an audit performed by the Office of Inspector General related the drop in the default rates primarily to two procedural changes in student loan policy.[159] First, the ED changed from a 180-day delinquency period to a 270-day period for determining that a loan has entered default.[160] The default rates are based on a two-year cohort period; therefore, if a student stops making payments halfway through the second year of the cohort group, the student would not be calculated in the default rate percentage. Second, the number of borrowers with loans in forbearance and deferment increased steadily from 1993 to 1999.[161] Students with loans in forbearance or deferment do not get calculated in the cohort default rate, and the risk of their default will not be known until they begin repayment. The audit also pointed out that the dollar value of defaulted loans increased from $18 billion in 1995[162] to $22.6 billion in 1999.[163] The accuracy of these rates is important for determining how much the federal government has to subsidize the loss of payments and related interest by adding more funds to cover the current loans. Also, defaulted loans require added resources for collection; therefore, available funds for the program are diminished.

The added cost of running the student loan program is highlighted even more by the current size and growth of the program. The Federal Family Education Loan Program (FFELP) distributed 7,921,486 loans in 2002 with a total value of $32.75 billion.[164] By 2006, the program grew to 12,006,190 loans at a value of $54.81 billion.[165] In a matter of five years, the ED has faced growth of 51.6% in total loans with a 67.4% monetary growth over that same time period.[166] This amount

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157. *Id.*

158. U.S. DEP'T OF EDUC., BRIEF ON THE NATION DEFAULT RATES, (Sept. 13, 2006), http://www.ifap.ed.gov/eannouncements/attachments/0913CDRBriefingAttach.pdf.

159. OFFICE OF INSPECTOR GEN., U.S. DEP'T OF EDUC., AUDIT TO DETERMINE IF COHORT DEFAULT RATES PROVIDE SUFFICIENT INFORMATION ON DEFAULTS IN THE TITLE IV LOAN PROGRAMS: FINAL AUDIT REPORT ED–OIG/A03–C0017 (Dec. 22, 2003), http://www.ed.gov/about/offices/list/oig/auditreports/a03c0017.pdf.

160. *Id.* at 10.

161. *Id.* at 22.

162. *Id.*

163. *Id.* at 7.

164. U.S. DEP'T OF EDUC., FEDERAL FAMILY EDUCATION LOAN PROGRAMS (FFELP) LOAN VOLUME FOR 12-MONTHS OF FY2003 & 2002, http://www.ed.gov/finaid/prof/resources/data/03q4ffelpstate.xls (last visited Sept. 26, 2007).

165. U.S. DEP'T OF EDUC., FEDERAL FAMILY EDUCATION PROGRAMS (FFELP) LOAN VOLUME FOR 12-MONTHS OF FY2006 & 2005, http://www.ed.gov/finaid/prof/resources/data/06q4ffelpstate.xls (last visited Oct. 21, 2007).

166. The percentage calculations are based on the change from 2002 to 2006.

of growth has not been seen since the first years of the FFELP, when growth could fluctuate from a low of -25.1% to a high of 222.5%.[167] Over this same five years, private and state loans also increased, from $5.6 billion to $17.3 billion, or 208.9%.[168] This growth greatly exceeds the increases students simultaneously have faced in tuition, fees, and cost of living. According to the *Chronicle of Higher Education*, average costs in 2002 for public and private colleges and universities were $11,976 and $26,070 respectively[169] compared to $15,566 and $31, 916 in 2006, an increase of 30.0% and 22.4%, respectively.[170] This demonstrates that a larger percentage of higher education aid is now derived from loans than scholarships or grants.[171]

To understand why these changes have taken place, it is important to note the size of the higher education industry and the growth it has been experiencing. The *Chronicle of Higher Education* reported U.S. expenditures for higher education amounted to $255.39 billion in 2001,[172] an increase of 29.7% from the $196.93 billion spent in 1997.[173] To put this in perspective, as an industry, total U.S. higher education expenditures would rank thirtieth on the international gross domestic product listing right behind Saudi Arabia and ahead of Egypt.[174] The growth of colleges and universities creates added expenses that have to be funded from some revenue source. Federal and state funding, scholarships, and endowments are not keeping pace with the increased cost of operations. So, institutions have turned to tuition-based funding more than any other source. This change places the burden of increased cost on the students and their parents; therefore, recent circumstances in higher education have forced students to take on more debt to help fund their education.[175]

At the historical FFELP growth rate of 9.46% over the past twenty years, the annual loan issuance will top $79.05 billion by 2010.[176] However, if the growth

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167. U.S. DEP'T OF EDUC., FFELP—LOAN VOLUME (COMMITMENTS) BY GUARANTY AGENCY—1ST 9-MONTHS OF FY 2006 AND FY 2005, http://www.ed.gov/finaid/prof/resources/data/06q3ffelpga.xls (last visited Sept. 26, 2007).

168. COLLEGE BOARD 2006, *supra* note 134, at 6.

169. *Average College Costs, 2001-2*, CHRON. HIGHER EDUC., Aug. 30, 2002, at 36.

170. *Average College Cost, 2005-6*, CHRON. HIGHER EDUC., Aug. 31, 2007, at 33; *Average College Cost, 2001-2*, *supra* note 169.

171. COLLEGE BOARD 2006, *supra* note 134.

172. *A Brighter Financial Picture for Colleges*, CHRON. HIGHER EDUC., Aug. 27, 2004, at 3, *available at* http://chronicle.com/free/almanac/2004/nation/nation.htm (last visited Sept. 27, 2007).

173. *Average College Costs, 2001-2*, *supra* note 169, at 12.

174. "Gross domestic product based on purchasing-power-parity (PPP) valuation of country GDP, 2001." INT'L MONETARY FUND, WORLD ECONOMIC OUTLOOK DATABASE (April 2006). To access the report, follow the Data and Statistics Tab on www.imf.org. Next select the World Economic Outlook Database under the heading Global Data. Select the most recent year and select search by Country or Country Groups. Select All Countries, choose report "Gross domestic product based on purchasing-power-parity (PPP) valuation of country GDP." On report details, set the date range to include 2001. Download the report to excel and sort by GDP.

175. COLLEGE BOARD, TRENDS IN COLLEGE PRICING (2005), http://www.collegeboard.com/prod_downloads/press/cost05/trends_college_pricing_05.pdf.

176. U.S. DEP'T OF EDUC., FY 2006 FFELP GUARANTY AGENCY LOAN DATA,

rate of 14.46% over the past five years continutes, the issuance could top $98.82 billion in student loan debt by 2010.[177] Both of these values are above the projected Presidential budget of $73.6 billion for 2010.[178] These statistics are particularly troubling when coupled with historical inflation rate averages of about 3.39%[179] per year, which is considerably lower than the yearly increase for individual student loans. Worse, higher education's total inflation over the past five years is 16.59%[180] making inflation for the higher education sector well above that of national rate. These statistics raise questions about the sustained long-term growth of the loan program and the ability of institutions to meet expenditure needs. With higher education costs accelerating at such a rate, the probability is that many students and parents will not be prepared for the costs they will face in the near future. In addition, those who are saving to attend a college or university at this time will most likely not be able to keep pace with the rapidly accelerating costs of higher education.

Without a doubt, higher education in the United States has become a major part of the economic environment, and the training that is provided to both domestic and foreign students has a worldwide impact on the economies of all countries. Student defaults rose to 4.6% in 2005 from the record low in 2003 of 4.5%, with an increase to 5.1% in 2004.[181] There are both positive and negative signs on the horizon for the economic situation in higher education. At present, the current increase in education costs, which has led to accelerated growth in tuition, room and board, and fee expenses for students, is a cause of concern. Also, student default rate calculations have changed recently, potentially creating a lower figure than the actual future impact on the economy. It may be possible for the government to keep loan defaults low, but the rapid growth of higher education makes it very difficult for prospective students and their parents to prepare for the cost they will face to attain a college or university degree. Students will continue to borrow the money needed to pay for their educations and hope that their increased earning power will ensure a desirable standard of living and the financial means to repay all loan obligations to the federal government.

THE CONSEQUENCES OF HEAVY STUDENT DEBT

Student loans can have both positive and negative consequences. The most obvious positive consequence is that federal loans have enabled millions of Americans to complete a college or university education, practice their chosen

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http://www.ed.gov/finaid/prof/resources/data/06q1ffelpga.xls (last visited Sept. 26, 2007) (serving to calculate the twenty year growth figure, 9.46%).

177. *Id.* (serving to calculate the five year growth figure, 14.46%).

178. U.S. DEP'T OF EDUC., STUDENT LOAN VOLUME TABLES — FY 2008 PRESIDENT'S BUDGET MID-SESSION REVIEW (2007), http://www.ed.gov/about/overview/budget/studentloantables/index.html?exp=2 (last visited Oct. 20, 2007).

179. InflationData.com, Annual Inflation, http://inflationdata.com/inflation/Inflation_Rate/AnnualInflation.asp (last visited Sept. 26, 2007).

180. InflationData.com, Inflation Calculator, http://inflationdata.com/Inflation/Inflation_Rate/InflationCalculator.asp#results (last visited Sept. 26, 2007).

181. National Student Loan Default Rules, *supra* note 18.

profession, rear their families, and enjoy a quality of life that would have been impossible without an education. On the other hand, there are negative consequences related to heavy student loan debt. Students with excessive debt cannot pay for necessary living expenses or save a reasonable amount of monthly income for unforeseen emergencies.

Under current federal guidelines, student loan repayment begins six months following graduation for students who do not apply for a forbearance or economic hardship deferment.[182] When repayment begins, the monthly payment must be factored into a person's budget. Most personal financial experts agree that an individual's debt-to-income payments should stay between 30–40 percent of after-tax income. Within the last ten years, studies are recommending that borrowers limit their student loan debt to eight to twelve percent of projected income.[183] Using the average undergraduate's debt of $19,300, the minimum monthly payment would be $214.27 and require a minimum starting salary of $21,427 (12%) to $32,140 (8%).[184] However, the lower the salary the more likely that this debt-to-income ratio will be unsustainable due to living expenses taking up a larger ratio of the income and making the monthly debt and expense payments unreachable.

As discussed previously, undergraduates have average loan debt of $19,300, which has to be paid back with interest.[185] Using earlier assumptions, the total payments will result in a net pay of principal and interest over 10 years of $25,712.[186] While this amount will not be a burden for most graduates, it will be a significant problem for those in social service fields, including education and social work, where starting annual salaries are often in the $30,000 range. In addition, students who are unable to save for emergencies can be tempted into relying on credit card debt, further compounding their problems.

All debt is recorded on a person's credit report, which lenders use to rate a person's credit worthiness based on debt-to-income rates and debt types. If a payment is missed or the ratio becomes too high, the result will be higher interest rates on necessary house and car loans. The report is also used by insurance, cell phone, and other types of companies in order to determine qualifications and premium charges. As one can see, an endless cycle of despair and hopelessness can be created for those not prepared to repay their student loans.

Students with heavy debt can create an economic burden on the government and taxpayers instead of contributing to economic growth. In this event, society would have to fund defaults, bankruptcies, and retirements. This consequence is

182. U.S. Dep't. of Educ., Repaying Your Loans, http://www.studentaid.ed.gov/PORTALSWebApp/students/english/repaying.jsp (last visited Oct. 8, 2007).

183. Sandy Baum & Saul Schwartz, PROJECT ON STUDENT DEBT AND THE COLLEGE BOARD, *How Much Debt is Too Much? Defining Benchmarks for Manageable Student Debt* (Nov. 10, 2005), http://www.projectonstudentdebt.org/fckfiles/File/Debt_is_Too_Much_November_10.pdf.

184. Because of increases in interest rates after the past few years of historical lows, this calculation assumes $19,300 in student-loans were consolidated at 6% interest rate paid over ten years.

185. Welnicki, *supra* note 139.

186. *See* Baum & Schwartz, *supra* note 183, for basis of calculation.

generated by the failure of students to pay their student loans. Both defaults and bankruptcies force the government to makeup the funding necessary to carry the student loan program into the future. While the program is not now and was never intended to be self-sustaining, excessive loan defaults and discharges could reduce the funds available to future student borrowers.

Another factor to consider in the student debt issue is a person's inability to save for retirement. Currently, debates are raging on the viability of the Social Security program as the baby boomer generation reaches retirement age. All current and future college and university graduates will be contributing to the Social Security program from their income in hopes of retiring with dignity at the end of their career. However, the Social Security program has consistently not met the needs of those who solely depend on the program, forcing people and businesses to fund their own retirement programs to supplement the Social Security program. Individuals with heavy student loan debt will not be able to save adequately for retirement, thereby jeopardizing their standard of living and potentially placing more pressure on the Social Security system.

The consequences of heavy debt can affect a student and society for many years particularly if the student does not receive an economic benefit from his or her degree. Unacceptably high personal debt threatens the individual borrower and the general society alike. At the same time, a college or university degree is becoming more and more of a requirement for success in American society. Educational policy makers must deal with this dilemma for the sake of potential borrowers, the higher education community, and society as a whole.

RECENT DEVELOPMENTS IN STUDENT LOANS

Student debt continues to grow as a major concern for Congress, the administration, program lenders, and college and university officials. Recent revelations regarding conflicts of interest among college and university loan officials and private lenders have prompted numerous investigations, congressional hearings, and concerns about the Department of Education's effectiveness in supervising the federal student loan program.[187] The New York Attorney General's investigation on lenders and institutions, the Student Loan Sunshine Act, bill proposal S. 1561, and the College Cost Reduction and Access Act of 2007 are recent developments that will continue to have an impact on the student loan industry.

The office of New York Attorney General Andrew M. Cuomo is taking the most proactive and public role in the investigation of relationship between lenders and colleges and universities.[188] To date, twenty-six higher education institutions have signed Cuomo's Code of Conduct[189] and ten have agreed to reimburse

187. *See generally*, Jonathan D. Glater, *New Ties Found to Link Lenders and Colleges*, N.Y. TIMES, Sept. 5, 2007, at A21 (giving a summary of a recent Congressional report highlighting evidence of the conflicts of interest).

188. Kelly Field, *Cuomo Takes Aim at Federal Regulators and Education Department*, CHRON. HIGHER EDUC., June 15, 2007, at A20.

189. Press Release, N.Y. State Attorney Gen. Andrew Cuomo, Attorney General Cuomo Announces Agreement with Three Lenders (June 20, 2007), http://www.oag.state.ny.us/press/

students over $3 million for their revenue sharing programs.[190] Twelve student loan companies pledged to contribute $13.7 million to Cuomo's National Education Fund.[191] This fund "is dedicated to educating and assisting the country's high school students and their families about the financial aid process."[192] In addition, Cuomo began investigating forty college and university athletic programs with alleged agreements to receive kickbacks or revenue sharing from promoting loans through Student Financial Services, Inc.[193]

Cuomo further expanded his investigations in October 2007 by subpoenaing thirty-three companies and lenders seeking information about marketing tactics toward student borrowers.[194] These companies have been accused of using misleading and deceptive methods to acquire the business of borrowers.[195] The methods include mailing phony offers written to look like they come from federal government organizations; mailing fake checks or false rebates; mailing gift cards for testimonials and applications; offering gift cards to bring the company more business; holding sweepstakes for taking loans out; and using false advertising through various mass-market medias including television, mail, and internet.[196] These investigations by Cuomo point toward serious abuse of the student loan program that has been vital to the success of students in higher education.

In response to Cuomo's investigation into alleged loan program improprieties, the House of Representatives passed the Student Loan Sunshine Act on May 9, 2007.[197] The Senate's Committee on Health, Education, Labor, and Pensions received the bill on May 10, 2007, but the bill has not been sent to the entire Senate. Subsequently, Cuomo and Bill McCollum, Florida Attorney General, along with thirty other Attorneys General requested support from the Senate leadership in quick passage of the proposed Sunshine Act.[198] This bill is

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2007/jun/jun20a_07.html (last visited Oct. 22, 2007). The code of conduct can be viewed through the New York State Attorney General's website.

190. *Id.*

191. Press Release, N.Y. State Attorney Gen. Andrew Cuomo, Cuomo Expands College Loan Investigation: Scrutinizes Deals Between Student Loan Provider and University Athletic Departments (Aug. 1, 2007), http://www.oag.state.ny.us/press/2007/aug/aug1a_07.html (last visited Oct. 22, 2007). The National Education Fund program established by Cuomo looks like an effective use of the funds; however, the authors were unable to find any other details about the program other than funds were pledged.

192. *Id.*

193. *Id.*

194. Press Release, N.Y. State Attorney Gen. Andrew Cuomo, Attorney General Cuomo Expands College Loan Investigation to Direct Marketing Companies (Oct. 11, 2007), http://www.oag.state.ny.us/press/2007/oct/oct11a_07.html (last visited Oct. 22, 2007).

195. *Id.*

196. *Id.* The authors would like to point out these problems do not exist only in New York. These same tactics have been used against students at both Baylor University and South Texas College of Law where the authors are directly affiliated.

197. Student Loan Sunshine Act, H.R. 890, 110th Cong. (1st Sess. 2007), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR00890:@@@L&summ2=m& (last visited Oct. 22, 2007).

198. Paul Baskin, *Attorneys General Press Senate for New Student-Lending Rules*, CHRON. HIGHER EDUC., *available at* http://chronicle.com/weekly/v53/i43/43a01801.htm (last visited Sept. 29, 2007); Letter to Senators Harry Reid, Mitch McConnell, Edward M. Kennedy, and

particularly important to Cuomo because it encompasses his "College Loan Code of Conduct."[199] The Cuomo Code of Conduct includes seven provisions:

> 1. Ban on Financial Ties. Lenders are prohibited from giving anything of value to any college in exchange for any advantage sought by the lender.
>
> 2. Ban on Payments for Preferred Lender Status. Lenders may not pay or give colleges any financial benefits whatsoever to get on a college's preferred lender list.
>
> 3. Gift and Trip Prohibition. Lenders are prohibited from giving college employees anything of more than nominal value.
>
> 4. Advisory Board Rules. Lenders are prohibited from paying college employees anything of value for serving on the advisory boards of the lenders.
>
> 5. Call-Center and Staffing Prohibition. Lenders must ensure that employees of lenders never identify themselves to students as employees of colleges.
>
> 6. Disclosure of Range of Rates and Defaults. Lenders must disclose to any requesting school the range of rates they charge to students at the school, the number of borrowers at each rate at the school, and the lender's historic default rate at the school.
>
> 7. Loan Resale Disclosure. Lenders shall fully and prominently disclose to students and their parents any agreements they have to sell loans to any other lender.[200]

The overwhelming passage, by a vote of 414–3,[201] of the bill in the House of Representatives gave the impression the Senate would pass it quickly; however, this bill stalled in committee after referral to the Senate. The holdup will likely lead to more students facing the same issues that Cuomo is trying to prevent.

During this same period, Congress began considering increased bankruptcy protection for student borrowers including a softening of the undue hardship provision that has made student loan discharge very difficult, if not impossible, in previous years. Responding to the Congressional discussion, Senator Dick Durbin, a Democrat from Illinois, introduced S. 1561 on June 7, 2007 to amend the bankruptcy code permitting discharge of certain student loans.[202] This bill provides:

> Section 523(a)(8) of title 11, United States Code, is amended by striking 'dependents, for' and all that follows through subparagraph (B) and inserting 'dependents, for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or an

Michael B. Enzi (June 19, 2007) (on file with author), *available at* http://www.oag.state.ny.us/family/student_lending/NY%20Multistate%20Letter%20to%20the%20Senate.pdf.

199. Press Release, N.Y. State Attorney Gen. Andrew Cuomo, *supra* 189.

200. *Id.*

201. *Id*.

202. S. 1561, 110th Cong. (1st Sess. 2007), *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:S.1561: (last visited Oct. 1, 2007).

> obligation to repay funds received from a governmental unit as an educational benefit, scholarship, or stipend.'[203]

In support of his amendment, Durbin described private student loans as "incredible money-makers for loan companies" and expressed concern that teenage borrowers often "do not realize the long-term impact of their loan decisions."[204] Senator Durbin's amendment would leave student loans not guaranteed or insured by the government open for discharge in bankruptcy.[205] This amendment would have to include the deletion of subparagraph (B) for "qualified education loans" to be effective at limiting "undue hardship" just to government related loans.

A recent court decision makes the issue of "qualified educational loans" a more pressing matter.[206] This court considered whether the issue of a loan to a student passing through a college or university merits a "qualified educational loan."[207] In this case, the court held that a loan should be used as "qualified higher educational expense" for the test of "undue hardship" to apply.[208] This ruling could have two impacts on student debt bankruptcy cases. First, before courts determine the application of "undue hardship," they will need to decide the type of loan in question: (1) a loan under 523(a)(8)(A), (2) a loan under 523(a)(8)(B), or (3) some other type of loan. This decision is essential for determining dischargeability of the loan because the code only allows, "qualified educational loans" to fall under "undue hardship" if they were used to pay for "qualified higher educational expenses." Second, a court could characterize credit card debt as a "qualified educational loan" if used to pay for "qualified higher educational expenses" (i.e. tuition). If this is the case, the interest paid on this type of debt would also be deductible as interest on "qualified educational loans" and would only be dischargeable if "undue hardship" applies.

On September 27, 2007, the President signed the College Cost Reduction and Access Act of 2007 into law.[209] The act garnered the most attention for its reduction in lender subsidies by $21 billion to pay for a commensurate increase in student aid primarily through the Pell Grant.[210] The Act did much more than decrease subsidies, increase Pell Grant awards, and decrease the fixed interest rate

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203. *Compare id. with* 11 U.S.C. 523(a)(8).

204. Press Release, Dick Durbin, U.S. Senate Assistant Majority Leader, Durbin Introduces Bill to Make Private Student Loans Dischargeable in Bankruptcy (June 7, 2007), http://durbin.senate.gov/record.cfm?id=275682 (last visited Oct. 8, 2007).

205. *Id.*

206. Rogers v. KeyBank (*In re* Rogers), No. 1-06-42049-dem, Adv. No. 1-06-01459-dem, (N.D.N.Y. Aug. 31, 2007).

207. *Id* at 1-2.

208. *Id* at 13.

209. 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.). Formerly, College Cost Reduction Act of 2007, H.R. 2669, 110th Cong. (1st Sess. 2007), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02669:@@@L&summ2=m& (last visited Oct. 8, 2007).

210. Kelly Field. *Federal Lawmakers Approve Landmark Increase in Student Aid*, CHRON. HIGHER EDUC., Sept. 21, 2007, at A17.

on student loans from 6.8% to 3.4% by 2011.[211] It created an income based repayment plan,[212] established a loan forgiveness program for participants in the Federal Direct Loan Program,[213] and increased the number of students eligible for financial aid programs.[214] In addition to these changes, Congress directed the Secretary of Education to conduct a Competitive Loan Auction Pilot program starting July, 2009.[215] The ED will receive bids from companies based on how much they expect to be paid to provide the loans for a certain state.[216] The lowest two bidders will provide student loans to that state for two years.[217] This program will seek to lower the cost of providing the FFELP. The passage of this bill was a key success for advocates of student loan programs because it increased access to higher education by increasing financial aid, services, and programs to students.

Without doubt, the federal student loan program will remain a topic of great interest and concern for all stakeholders. Amidst all these issues, Congressman Thomas E. Petri (R-Wisconsin) actually called the guaranteed-loan program "a failure—and a costly one at that."[218] There is no doubt that higher education becomes more expensive with each year, and at best, students have seen negligible increases in the total grants and scholarships available to them. The current environment has created a growing dependence on student loans resulting in the rapid expansion of federal and privately funded student loans. For federal financial aid to continue opening new doors to college and university students and facilitating the democratization of American higher education; Congress, the administration, program lenders, and college and university officials must find ways to improve efficiency and effectiveness of the student loan program.

SUMMARY

The focus of this paper has been on issues of student debt within higher education. While this is not the only major issue facing higher education today, it is one issue with implications that reach far into the future both for loan recipients and the institutions that serve them. Therefore, the authors offer the following recommendations that are intended to protect the financial stability of individual borrowers, ensure the solvency of the federal student loan program, and increase accessibility to higher education for millions of deserving students.

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211. College Cost Reduction and Access Act of 2007, § 201.

212. *Id.* at § 203.

213. *Id.* at §401. This program does not include the Federal Family Education Loan Program, which is the program most students use to get their loans. See discussion under section on Rise of Federal Student Loans.

214. *Id.* at § 601-05.

215. *Id.* at § 701.

216. *Id*.

217. *Id*.

218. Thomas E. Petri, *Guaranteed Loans: Just Plain Expensive*, CHRON. HIGHER EDUC., June 22, 2007, at B14.

RECOMMENDATIONS

1. The Supreme Court or Congress needs to establish a universally accepted test of "undue hardship."

The confusion about what constitutes "undue hardship" makes it difficult for student debtors to know their rights relating to bankruptcy. While bankruptcy needs to be a last resort, it should not be a vague, inflexible system that treats students in the same category as thieves and other criminals. Congress failed to take the opportunity to define undue hardship with the most recent legislation in the BAPCPA. The Act did expand the definition of what could be considered a student loan; however, this does little to help courts determine whether a debtor's student loans have created an undue hardship. Actually, with the new definition Congress made the code clear that any money obligated for repayment of qualified education expenses could be considered a student loan.

2. Congress needs to revisit and refine the laws addressing collection of defaulted student loans.

The offsetting of Social Security benefits to collect at least a portion of defaulted student debt, while legal and just, is harsh and damaging to those individuals. The strategy is also inefficient because, by definition, only a small portion of the total debt can be recovered through garnishment of Social Security. Federal law and related regulations should ensure that loan repayment is completed long before Social Security benefits begin. By the time Social Security benefits are garnished, the federal government has missed out on needed funds for a considerable number of years that could have been used to fund additional loans.

3. The government should increase student loan forgiveness programs to include the FFELP.

The College Cost Reduction and Access Act made the first big move toward forgiveness programs.[219] It focused the forgiveness programs on the Direct Loan Program, but did not include the FFELP. The FFELP is the largest of the federal loan programs and distributes most of the money available to students.[220] Students are eligible for the current forgiveness program if they work within the critical areas of public services while they make 120 monthly payments toward their loans.[221] While adding the FFELP program to the current forgiveness program would be expensive for the government to institute, it would provide a societal benefit by increasing the incentive to work in the social services professions where salaries are often not competitive with those in the private sector. Also, this type of program could be used as a catalyst for developing other programs within state and local organizations. At the same time, tax incentives to business for student loan reimbursement would provide another way to assist needy individuals with their educational expenses. Long-term student debt would be reduced commensurately, and the number of defaults and bankruptcies could decline accordingly.[222]

4. Congress should limit the total amount of money that students can borrow to pursue certain degrees, and link the loan limits to entry-level salaries in the student's stated major field of study.

A limit on total debt would help abrogate the economic struggles graduates face in fields like teaching, social work, public health, and other relatively low-paying professions. The downside of such a plan is that it possibly would force the closure of some of these programs on higher tuition based campuses because students could not afford the program over a course of four years. However, students taking loans above the support of their future salaries will face higher risk of defaults, increasing the delay of collection for the federal government.[223]

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219. 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.).

220. FY 2007 FFELP GUARANTY AGENCY LOAN DATA, *supra* note 9.

221. College Cost Reduction and Access Act of 2007, § 401.

222. This recommendation hinges on a direct benefit to the borrower by encouraging work in social related positions and business to increase forgiveness programs. There are other programs that help lessen debt burden such as income contingent, consolidation, and rehabilitation programs. These programs are very beneficial to borrowers, but they do not directly lower the borrower's liability as a forgiveness program would. The income contingent program helps the debtor from entering default, but it does not reduce liability. The consolidation is only beneficial in lowering liability if consolidated at a low interest amount; and the rehabilitation program helps those that have defaulted on their student loans increase their credit rating and get back on track with payments.

223. Republican Presidential candidate Mitt Romney made a similar recommendation while campaigning. Nafeesa Syeed, *Romney: Link College Aid to Occupation*, WASH. POST, Oct. 17, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/10/17/AR2007101701967.html. (last visited Oct. 23, 2007).

5. Congress needs to stabilize interest on student loans at one low rate.

Before July 1, 2005, college and university students could lock in an interest rate for consolidated loans of 2.8 to 3.5%.[224] However, students who consolidated their loans between July 1, 2005 and June 30, 2006 had to pay 5.3% for consolidated loans.[225] After that, the loans previous to July 1, 2006 will increase to a variable rate of 7.14% with a capped rate of 8.5%. With the passage of HERA, student loans received after July 1, 2006 will have a fixed rate of 6.8%.[226] By comparison, a fixed rate of 6.8% for the 2006–2007 academic year will be higher than some house loans during the same time period.[227] Congress passed the College Cost Reduction and Access Act reducing the fixed interest rate from 6.8 to 3.4% by July 2011.[228] These changes only make it more difficult for college and university students to plan and repay their student loans. These reductions definitely help all students; however, what is going to happen after the rate gets to 3.4%? Congress should stabilize the interest rate at one percent and this will allow the ED, parents, and students to plan better for needed funds both to distribute the loans and for repayment of those loans.

6. There should be more regulation of loan default rates among problem sectors of higher education.

The default rate for 2004 was 5.1% for all sectors of higher education.[229] This rate was 4.2% when recalculated *excluding for-profit institutions*.[230] The students in for-profit institutions have a default rate that is nearly twice the rate for private and public institutions.[231] This fact raises serious concerns about the quality and/or marketability of the education received at these institutions, and the for-profit sector's good-faith efforts (or lack thereof) to collect on this debt.

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224. Silla Brush, *Refinancing Frenzy Hits Student Loans*, CHRON. HIGHER EDUC., June 3, 2005, at A1.

225. Anne K. Walters, *Interest Rates for Variable Federal Loans Set to Increase to 7.14% on July 1*, CHRON. HIGHER EDUC., May 31, 2006, (on file with author) *available at* http://chronicle.com/daily/2006/05/2006053102n.htm.

226. Higher Education Reconciliation Act of 2005, Pub. L. No. 109-71, 120 Stat. 4, 158–60 (2005) (codified as amended in scattered sections of 20 U.S.C.).

227. *Mortgage Rates Ease As Inflation Fears Cool*, CNNMONEY.COM, Apr. 19, 2007, http://money.cnn.com/2007/04/19/real_estate/mortgage_rates/index.htm?postversion=2007041911 (last visited Oct. 8, 2007). As of April 19, 2007, the average fixed rate mortgage loan was 6.17%.

228. 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.).

229. National Student Loan Default Rules, *supra* note 18.

230. U.S. DEP'T OF EDUC., INSTITUTIONAL DEFAULT RATE COMPARISON OF FY 2002, 2003, AND 2004 COHORT DEFAULT RATE, Sept. 11, 2006, http://www.ed.gov/offices/OSFAP/defaultmanagement/2004instrates.html (last visited Sept. 29, 2007).

231. *Id.*

7. Congress needs to pass both the Student Loan Sunshine Act and S. 1561.

The Student Loan Sunshine Act and S. 1561 provide needed protection for student borrowers from unscrupulous lenders. Passage of both bills will ensure that lenders and institutions *serve students* first and foremost.