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## The Income-Based Repayment Plans and For-Profit Education: How Does This Combination Affect the Question to Include Student Loans in Bankruptcy?

Kevin J. Smith

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# THE INCOME-BASED REPAYMENT PLANS AND FOR-PROFIT EDUCATION: HOW DOES THIS COMBINATION AFFECT THE QUESTION TO INCLUDE STUDENT LOANS IN BANKRUPTCY?

**Kevin J. Smith\***

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#### INTRODUCTION: FOR-PROFIT EDUCATION AND STUDENT LOAN REPAYMENT PLANS

The year 2014 has concluded, and it was the year of regulation for for-profit schools and, at the same time, expansion for federal student loan repayment plans, especially the Income-Based Repayment (IBR) Plan.<sup>1</sup> The year 2015 looks no different. The relationship between the regulation of for-profit schools and the expansion of federal student loan repayment plans is growing more intertwined and urgent based upon recent events.<sup>2</sup> The liberalization of repayment plans is resulting in more constrained attitudes towards for-profit schools.<sup>3</sup>

The United States' problem with the amount of federal student loan debt, and all other forms of educational loan debt has been a looming problem for decades.<sup>4</sup> The amount of debt that exists is slowly becoming a potentially catastrophic problem for the American economy.<sup>5</sup> The question of what to do with the all of the federal student loan debt is one that lawmakers are avoiding because there

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1. See College Cost Reduction and Access Act, Pub L. No. 110-84, sec. 203, § 493C(b), 121 Stat. 784, 792 (2007) (codified as amended at 20 U.S.C. § 1098e(b) (2012)). The Secretary of Education was given the authority to promulgate this repayment system effective July 1, 2009. See Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, § 451(a)(3), 122 Stat. 3078, 3261–62 (codified at 20 U.S.C. § 1087e(d)(1)(E) (West 2011)). The IBR is a repayment plan that places a cap, or limit, on your monthly federal student loan payments based upon your discretionary income of the previous tax year. Slack, *infra* note 56.

2. See, e.g., Andrew Martin & Andrew W. Lehren, *A Generation Hobbled by College Debt*, N.Y. TIMES, May 13, 2012, at A1; Daniel de Vise, *Student Loans Surpass Auto, Credit Card Debt*, WASH. POST (Mar. 6, 2012), [https://www.washingtonpost.com/blogs/college-inc/post/student-loans-surpass-auto-credit-card-debt/2012/03/06/gIQRfQnuR\\_blog.html](https://www.washingtonpost.com/blogs/college-inc/post/student-loans-surpass-auto-credit-card-debt/2012/03/06/gIQRfQnuR_blog.html).

3. See, e.g., sources cited *supra* note 2.

4. See *id.*

5. See *infra* Part I.A.

are no easy answers.<sup>6</sup> However, every year the problem is getting worse as debt increases, with no real means of repayment.<sup>7</sup>

Along with the increase of the federal student loan debt, the Bankruptcy Code also changed during the same period to increase the difficulty of discharging any kind of student loan debt, whether federally originated and insured or private.<sup>8</sup> There have also been various repayment plans presented to extend, lower, or even negate federal student loan repayments.<sup>9</sup> This approach, however, is just delaying the issue of dealing with the federal student loan debt problem without fixing the system, including the increasing costs of higher education. The goal of the federal government seems to be to provide any avenue to borrowers that enables them to avoid paying much of, if any, student loans without actually using the Bankruptcy Code to accomplish that result. It appears that for-profit schools are the roadblock to resolving federal student loan debt through either bankruptcy or loan forgiveness.

Coinciding with the federal student loan debt issue, the Obama Administration, the Senate's Health, Education, Labor & Pensions (HELP) Committee,<sup>10</sup> the Consumer Financial Protection Bureau (CFPB),<sup>11</sup> and various state attorneys general have all gone after loan servicers and for-profit colleges that have abused student loan borrowers.<sup>12</sup> There has been increasing attention on for-profit schools

6. *See generally* Martin & Lehren, *supra* note 2.

7. *Id.*

8. *See* Education Amendments of 1976, Pub. L. No. 94-482, 90 Stat. 2081 (codified at 20 U.S.C. § 1087-3 (1976)) (repealed by Bankruptcy Reform Act of 1978, ch. 90, § 316, 92 Stat. 2549 (stating the borrower must wait five years before filing for bankruptcy protection unless they could show an undue hardship)); *see also* Pub. L. No. 101-647, 104 Stat. 4789, 4964-65 (1990) (extending the time to seven years); Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837 (eliminating the time-period completely); Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59. (changing the definition of "loans" to include any "qualified educational loan" which included private loans).

9. *See infra* Part I.A.

10. U.S. Senate Committee on Health, Education, Labor and Pension (HELP), Senator Lamar Alexander (R-TN) Chairman, [www.help.senate.gov](http://www.help.senate.gov) (last visited Mar. 10, 2016).

11. CONSUMER FIN. PROTECTION BUREAU, <http://www.consumerfinance.gov> (last visited Mar. 10, 2016).

12. *See, e.g.*, SEC, CORINTHIAN COLLS., INC, CURRENT REPORT (FORM 8-K) (Jan. 27, 2014) (stating that Corinthian Colleges was notified that 13 states' Attorneys General were investigating the company's business practices). Some of the states included the following actions: Complaint, *Massachusetts v. Corinthian Colls., Inc.*, No. 14-1093 (Suffolk Sup. Ct. Apr. 3, 2014),

<http://www.mass.gov/ago/docs/press/2014/everest-complaint.pdf> (alleging that this for-profit school aggressively recruited and misled students by falsely promising high quality, successful training programs, and instead left them with exorbitant student loan debt and without proper training or a well-paying career); Complaint, *Wisconsin v. Corinthian Colls., Inc.*, No. 2014 CX 00006 (Cir. Ct. of Milwaukee Cty. Oct. 27, 2014), <http://www.doj.state.wi.us/sites/default/files/2014-news/complaint-corinthian-colleges-20141027.pdf> (alleging this action against Corinthian Colleges “for its use of false, misleading and deceptive representations to induce students to enroll in its post-secondary school ‘Everest College, Milwaukee’”). The Consumer Financial Protection Bureau also filed suit against Corinthian. SEC, CORINTHIAN COLLS., INC, CURRENT REPORT (FORM 8-K) (Aug. 12, 2014) (investigating to “determine whether for-profit post-secondary companies, student loan origination and servicing providers, or other unnamed persons, have engaged or are engaging in unlawful acts or practices relating to the advertising, marketing, or origination of private student loans”); SEC, CORINTHIAN COLLS., INC, CURRENT REPORT (FORM 8-K) (Aug. 19, 2014) (asserting violations of Corinthian and stating a willingness to negotiate with Corinthian if the following were met: “(i) providing certain financial disclosure materials, (ii) ceasing the sale or transfer of private student loans, (iii) ceasing to engage in certain in-school collection efforts the CFPB considers unlawful, (iv) providing students and prospective students with the same disclosures regarding the potential sale of certain campuses that the Company has provided to California students as part of an agreement with the California Attorney General, and (v) notifying the CFPB of any indications of material interest in purchasing any of the Company’s assets”). *See also* SEC, CORINTHIAN COLLS., INC, CURRENT REPORT (FORM 8-K) (Jan. 24, 2014) (stating that Education Management Corporation received inquiries from twelve states regarding the Company’s business practices including practices relating to the “recruitment of students, graduate placement statistics, graduate certification and licensing results, and student lending activities, among other matters”); Press Release, Colorado Attorney General, Attorney General Suthers Announces Consumer Protection Settlement with Argosy University (Dec. 5, 2013), <http://www.stopfraudcolorado.gov/about-consumer-protection/press-releases/2013-12-05-000000/attorney-general-suthers-announces> (based upon student complaints found that “beginning in 2007, Argosy deceptively marketed its EdD-CP program. Students were led to believe that Argosy was seeking to have the program accredited by the American Psychological Association (APA), which in fact was not the case. Upon graduating, students were moreover told they would be eligible to become licensed psychologists. In reality, the EdD-CP program’s curriculum and requirements were deficient and students were unlikely to obtain Colorado licensure”); SEC, ITT EDUC. SVCS., INC., CURRENT REPORT (FORM 8-K) (Jan. 27, 2014) (stating Attorneys General from 13 states were looking into the Company’s practices, “including marketing and advertising, recruitment, financial aid, academic advising, career services, admissions, programs, licensure exam pass rates, accreditation, student retention, graduation rates and job placement rates, as well as many other aspects of the Company’s business”); SEC, ITT EDUC. SVCS., INC., ANNUAL REPORT (FORM 10-K) (Feb. 22, 2013) (referring to a subpoena from the SEC referring to (a) agreements that ITT entered into with an unaffiliated entity on February 20, 2009 to create a program that made private education loans available to our students to help pay the students’ cost of education that student financial aid from federal, state and other sources did not cover); SEC, ITT EDUC. SVCS., INC., CURRENT REPORT (FORM 8-K) (Sept. 15, 2014) (stating the DOE had determined that “the Company’s institutions are not financially responsible, a determination based solely on [a] missed submission deadline, and not on an assessment of the Company’s financial condition. Based on this determination, the ED, among other things: required the Company’s institutions to submit a letter of credit payable to the ED in amount of \$79,707,879; placed the Company’s institutions on heightened cash monitoring for the receipt of Title IV Program funds”). There were additional companies mentioned in the lawsuits. *See, e.g.*, SEC, CAREER EDUC. CORP., CURRENT REPORT (FORM 8-K) (Jan. 24, 2014); SEC, DEVRY, INC., CURRENT REPORT (FORM 8-K) (Apr. 15, 2013); SEC, APOLLO GROUP, INC., CURRENT REPORT (FORM 8-K) (Oct. 22, 2010); SEC, WASH. POST CO., ANNUAL REPORT (FORM 10-K) (Feb. 29, 2012); SEC, BRIDGEPOINT EDUC., INC., CURRENT REPORT (FORM 8-K) (Oct. 3, 2011); *United States v. Stevens-Henager Coll., Inc.*, No. 1:13-cv-00009-BLW, 2014 WL 3101817, at \*1 (D. Idaho July 7, 2104). There were even more lawsuits filed in 2014

in recent years, and 2014 provided more doubt on the once thriving industry of for-profit colleges.<sup>13</sup> The federal government essentially shutting down Corinthian Colleges for loan fraud is just one example.<sup>14</sup> As a result, the American public is hesitant to forgive student loans.

Additionally, in recent years, there were developments in the repayment of federal student loans. In total, there are now four variations of IBR plans.<sup>15</sup> The implementation of IBR plans has increased scrutiny of for-profit schools. As these plans were implemented, scrutiny has increased because for-profit owners are essentially making free money off the American public. The question is whether this increased scrutiny of for-profit schools is a trend or an anomaly as the ability to repay federal student loan debt becomes more difficult. This Article argues that the increased scrutiny of for-profit schools is not an anomaly and the increased scrutiny will continue as Congress and the President confront the growing federal student loan debt problem.

The amount of federal student loan debt outstanding in America is hovering around one trillion dollars.<sup>16</sup> At what future date will this debt become the next financial crisis?<sup>17</sup> Just in 2010, borrowers incurred another \$100 billion worth of federal student loan debt.<sup>18</sup>

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against for-profit schools, but it would be an article in itself to list every one of them.

13. See, e.g., *For-Profit Schools: Chronology of Coverage*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/f/forprofit\\_schools/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/f/forprofit_schools/index.html) (last visited Mar. 10, 2016) (providing a timeline of events related to for-profit schools).

14. See Kirk Carapezza, *Federal Government Shuts Down For-Profit Corinthian Colleges*, WGBH NEWS (July 10, 2014), <http://wgbhnews.org/post/federal-government-shuts-down-profit-corinthian-colleges> (stating Corinthian was given six months to sell or close all of its campuses); see also Rohit Chopra, *Special Announcement for Corinthian Students*, CFPB (Feb. 3, 2015), <http://www.consumerfinance.gov/blog/special-announcement-for-corinthian-students/> (stating the DOC announced more the \$480 million in forgiveness to borrowers that took out student loans to pay for Corinthian College's for-profit programs).

15. Ryan Lane, *Understand 4 Income-Driven Student Loan Repayment Plans*, U.S. NEWS & WORLD REPORT (Aug 27, 2014, 10:00 AM), <http://www.usnews.com/education/blogs/student-loan-ranger/2014/08/27/understand-4-income-driven-student-loan-repayment-plans>.

16. Dennis Cauchon, *Student Loans Outstanding Will Exceed \$1 Trillion this Year*, USA TODAY (Oct. 25, 2011, 1:23 PM), <http://usatoday30.usatoday.com/money/perfi/college/story/2011-10-19/student-loan-debt/50818676/1>.

17. See Martha C. White, *Is the Student-Loan Debt Crisis Worse than We Thought?*, TIME (Nov. 29, 2012), <http://business.time.com/2012/11/29/is-the-student-loan-debt-crisis-worse-than-we-thought/>.

18. Cauchon, *supra* note 16.

The amount of existing debt for federal student loans is higher than the amount of debt America has in automobiles or even credit cards.<sup>19</sup> In the United States, the amount of federal student loan debt is second only to the amount of mortgage debt.<sup>20</sup> For-profit schools and their non-profit disguises are a large factor behind these increases.<sup>21</sup>

In fact, in 2012 the amount of student loan debt was just under \$1 trillion, auto loans were at \$768 billion, and credit card debt stood at \$674 billion.<sup>22</sup> The gap between these types of debts is only getting wider.<sup>23</sup> The rate of increase for student loan debt in 2012 was at a vigorous 4.6%, while the rate of increase for auto loans were 2.4% and that of credit cards were at a minuscule .3%.<sup>24</sup> During this same period, home equity loans decreased at a 2.7% rate to \$573 billion.<sup>25</sup> In 2013, the amount of student loan debt surpassed \$1 trillion.<sup>26</sup> There is no indication that this trend is going to change or even slow down with the increased scrutiny of for-profit schools.<sup>27</sup> The sheer amount of debt is just one issue concerning the rise of student loan debt in America.

The average debt per student-borrower is also on the rise.<sup>28</sup> Thus, it is not just a few borrowers producing the increase in the total amount of federal student loan debt.<sup>29</sup> From 2005 to 2012, the average student loan debt per borrower increased from \$17,233 to

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19. See Kelly Evans, *Student Loans: The Next Bailout?*, CNBC (Apr. 25, 2012, 8:49 AM), <http://www.cnbc.com/id/47171658>.

20. *Id.*

21. See S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 111TH Cong., EMERGING RISK?: AN OVERVIEW OF GROWTH, SPENDING, STUDENT DEBT AND UNANSWERED QUESTIONS IN FOR-PROFIT HIGHER EDUCATION 3 (2010) (noting that in the 2008–2009 school year approximately 25% of all student loans went to for-profit schools).

22. Carl Horowitz, *Is a Federal Student Loan Bailout on the Horizon?*, NAT'L LEGAL & POLICY CTR. (Mar. 1, 2013, 2:12 PM), <http://nlpc.org/stories/2013/03/01/federal-student-loan-bailout-horizon>.

23. *See id.*

24. *Id.*

25. *Id.*

26. Cory Weinberg, *Federal Student-Loan Debt Crosses \$1-Trillion Threshold*, CHRON. HIGHER EDUC. (July 17, 2013), <http://chronicle.com/article/Federal-Student-Loan-Debt/140427/>.

27. *See* Horowitz, *supra* note 22.

28. Halah Touryalai, *More Evidence on the Student Debt Crisis: Average Grad's Loan Jumps to \$27,000*, FORBES (Jan. 29, 2013, 3:22 PM), <http://www.forbes.com/sites/halahtouryalai/2013/01/29/more-evidence-on-the-student-debt-crisis-average-grads-loan-jumps-to-27000/>.

29. *See id.*

\$27,253.<sup>30</sup> That is an incredible 58% increase during that period.<sup>31</sup> This occurred during the mortgage collapse between 2008 and 2009.<sup>32</sup> During this period, auto and credit card debt were decreasing, but federal student loan debt was skyrocketing.<sup>33</sup> This was in part due to the boom of for-profit schools during this period.<sup>34</sup>

Simultaneously, the default rates among student borrowers increased.<sup>35</sup> In the fall of 2012, the Department of Education (DOE) released the number of borrowers who were already in default from the late 2009 and early 2010 beginning repayment period.<sup>36</sup> The DOE's numbers stated that 9.1% were already in default.<sup>37</sup> That was up from 8.8% from the previous year.<sup>38</sup> For-profit institutions actually saw a decline to 12.9% from a 15% default rate from the previous year.<sup>39</sup> Nonetheless, the three-year default number ballooned to 13.4%.<sup>40</sup> Nearly half of those numbers were still students from for-profit institutions, which gave for-profit institutions a 22.7% three-year default rate.<sup>41</sup>

These defaults have led to additional expenses for the federal government.<sup>42</sup> In the last fiscal year, the DOE paid debt collection

30. *Id.*

31. *Id.*

32. *See id.*

33. *Id.*

34. Michael Stratford, *Pointing a Finger at For-Profits*, INSIDE HIGHER ED. (Sept. 11, 2015), <https://www.insidehighered.com/news/2015/09/11/study-finds-profit-colleges-drove-spike-student-loan-defaults>.

35. *See*, Meghan Hoyer, *More College Students Defaulting on Student Loans*, USA TODAY (Sept. 30, 2012, 10:57 AM), <http://www.usatoday.com/story/news/nation/2012/09/28/college-default/1591933/>.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* This decline is somewhat dubious. Corinthian Colleges have had their employees go door-to-door and give their former students gift certificates to entice delinquent borrowers to inquire about postponing their student loan payments. Chris Kirkham, *For-Profit Colleges Manage Student Loan Default Rates, Senators Call for Investigation*, HUFFPOST BUS. (Dec. 27, 2012, 5:33 PM), [http://www.huffingtonpost.com/2012/12/27/for-profit-colleges-student-loan-default\\_n\\_2371688.html](http://www.huffingtonpost.com/2012/12/27/for-profit-colleges-student-loan-default_n_2371688.html). Other for-profit schools have done similar things. *Id.*

40. *See* Hoyer, *supra* note 35.

41. *Id.* Senator Tom Harkin (D-Iowa) called the default rate for for-profit institutions "troubling." *Id.* He further stated that this data "raises serious questions about the quality and value of the education students receive from these schools." *Id.*

42. *See* Andrew Martin, *Debt Collectors Cashing In on Student Loans*, N.Y. TIMES (Sept. 8, 2012), <http://www.nytimes.com/2012/09/09/business/once-a-student-now-dogged-by-collection->



companies more than \$1.4 billion to collect on defaulted federal student loans.<sup>43</sup> Because most borrowers would benefit from being placed on the IBR, should the federal government put something in place that would direct or even assist borrowers with being placed on IBR plans? This would lead to a possible savings of \$1.4 billion dollars.<sup>44</sup>

All of the federal government's collection efforts lead to a negative impact for the borrower's credit.<sup>45</sup> With the amount of federal student loan debt that exists on people's credit reports,<sup>46</sup> at what point does this debt begin to drag the economy down because people are unable to purchase homes, automobiles, and other items? Many have argued that this process has already begun.<sup>47</sup> It is interesting to note that during the age of the bank and automotive "bail-out" a few years ago, relieving federal student loan debt was not mentioned.<sup>48</sup> Since then, there has been some discussion of a bailout of the federal student loan problem;<sup>49</sup> however, nothing has been formalized by the federal government.<sup>50</sup> Imagine how much money would have been generated for the American economy or how the mortgage crisis may have been lessened if the bailout included federal student loans. However, this will never be discussed until for-profit schools are made exempt from any bailout process.

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agencies.html?pagewanted=1&pagewanted=all&\_r=0.

43. *Id.*

44. *See id.*

45. For a detailed explanation on how student loans appear on credit reports see Mark Cappel, *Learn How Long Student Loans Appear on Credit Reports*, BILLS.COM (Nov. 20, 2007), <http://www.bills.com/student-loans-on-credit-report/>.

46. *See id.*

47. *See, e.g.*, Alex Gomory, *Student Loan Debt Prevents Obtaining Home Loans* (Feb. 20, 2012, 9:59 AM), <http://loans.org/student/news/debt-prevent-obtaining-home-91969>; Bob Willis, *Student Loans Near \$1 Trillion Hurt Young U.S. Buyers: Mortgages*, BLOOMBERGBUSINESS (Feb. 16, 2012, 12:00 AM ), <http://www.bloomberg.com/news/articles/2012-02-16/student-loans-approaching-1-trillion-hurting-first-time-buyers-mortgages>.

48. *See Evans, supra* note 19 (discussing the possibility of the need for a bailout for federal student loans).

49. *See, e.g.*, *Calls for Wiping Out Student Loan Debt Leave Americans Split on New 'Bailout'*, FOX NEWS (Oct. 18, 2011), <http://www.foxnews.com/politics/2011/10/18/moveon-pushes-petition-calling-for-wiping-out-all-student-loan-debt/> (referring to a petition that has over 600,000 signatures to bailout federal student loan borrowers).

50. *See id.*

Nonetheless, that period has passed and all that is left is an unbelievable amount of federal student loan debt and no foreseeable way of getting it paid off. In addition, bankruptcy courts continue to use the harsh *Brunner* test in determining the dischargeability of student loans even with repayment plans like the IBR showing that *Brunner* is an antiquated test.<sup>51</sup> The U.S. went through a mortgage crisis and did nothing to address the looming student loan crisis. This Article argues that the student loan issue will be the next financial crisis in America. The U.S. needs to address student debt and the continuing cause of that debt. Additionally, the issues that surround for-profit schools must be resolved before the student loan crisis can be resolved.

Part I of this Article discusses the historical development of student loan repayment plans, focusing on the IBR and its features, and reviews proposals by the Gates Foundation and Obama Administration that impact IBR plans and for-profit education. Part II explores recent scrutiny and controversy surrounding for-profit colleges and their conversion to non-profits in disguise. Part III explains the history of opposition against for-profit schools. Part IV analyzes the *Brunner* test under the Bankruptcy Code and argues that the test is now obsolete due to the increase in student loan debt and the emergence of repayment plans like the IBR. Finally, Part V addresses the future of student loan dischargeability in bankruptcy. Specifically, the Article proposes solutions to the student debt crisis in the midst of the public's hesitance to endorse the discharge of student debt from for-profit schools.

#### I. REPAYMENT PLANS

Some good news from the federal student loan market: the total new federal loan volume will decrease slightly from 2014, “mostly because of a decline in demand as people find work and pass up school.”<sup>52</sup> However, the existing borrowing base will continue to

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51. See discussion *infra* Parts IV.A, V.B.

52. John Sandman, *2015 Student Loan Outlook: Regulators May Regulate, But the Lenders Will Still*

borrow more and more.<sup>53</sup> In addition, private student loan volume will grow, partially based upon the high costs of for-profit education.<sup>54</sup> Nevertheless, the amount of federal student loan debt is only increasing.<sup>55</sup> The question is what can be done?

#### A. *The Income-Based Repayment Plans*

The latest and most effective repayment plan is the Income-Based Repayment Plan or IBR.<sup>56</sup> Congress enacted the IBR as a part of the 2007 College Cost Reduction and Access Act (CCRA).<sup>57</sup> The CCRA aided borrowers experiencing partial financial difficulties while trying to repay their federal student loans.<sup>58</sup> It became available to student loan borrowers on July 1, 2009. This was convenient timing given the real estate and mortgage markets at the time.<sup>59</sup> The years 2007 and 2008 were dark years for the American economy due to the housing collapse.<sup>60</sup> Americans needed alternatives to repaying their federal student loans more than ever. Although the Government enacted the CCRA before the mortgage collapse, or as the collapse was beginning, it benefited Americans struggling to pay their debts during the mortgage collapse.<sup>61</sup>

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*Lend*, MAINSTREET (Jan. 29, 2015, 09:00 AM), <http://www.mainstreet.com/article/2015-student-loan-outlook-regulators-may-regulate-but-the-lenders-will-still-lend>.

53. *Id.*

54. *Id.*

55. See Horowitz, *supra* note 22.

56. See Megan Slack, *How President Obama Is Helping Lower Monthly Student Loan Payments*, WHITEHOUSE.GOV (Oct. 26, 2011, 11:11 AM), <http://www.whitehouse.gov/blog/2011/10/26/how-president-obama-helping-lower-monthly-student-loan-payments>.

57. 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 Session (2007), <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR02669:@@C@@@L&summ2=m&> (last visited Mar. 10, 2016).

58. *See id.*

59. Michael Kondracki, *The State of the Commercial Real Estate Mortgage Market: 2009–2010 Will be a Difficult Year*, NEW ENGLAND REAL ESTATE J., Apr. 14, 2009, <http://nyrej.com/31376>.

60. *Nearly 150 Mortgage Operations Collapse in 2007*, MORTGAGE DAILY, <http://www.mortgagedaily.com/PressRelease012208.asp> (last visited Mar. 10, 2016).

61. *College Cost Reduction & Access Act: Public Service Loan Forgiveness*, CAMPUS COMPACT, <http://compact.org/initiatives/policy-and-advocacy/college-cost-reduction-access-act-public-service-loan-forgiveness/> (last visited Mar. 10, 2016).

The IBR is an alternative to existing repayment plans such as the Income Contingent Repayment Plan (ICR).<sup>62</sup> The ICR was the federal government's first attempt to assist student loan debtors/borrowers with their repayments.<sup>63</sup> The ICR, along with other alternative repayment plans, is not going away; thus, the IBR is another repayment plan enacted to assist borrowers with federal student loan repayment plan options.<sup>64</sup> The IBR, however, specifically aids borrowers that pursue lower paying careers or choose public service jobs and have accumulated a large amount of student loan debt.<sup>65</sup> Nevertheless, any borrower can apply for any of these repayment options, and in many cases, these options can benefit any borrower.<sup>66</sup>

The IBR is a repayment plan that places a cap, or limit, on your monthly federal student loan payments based upon your discretionary income the previous tax year.<sup>67</sup> This is similar to the ICR, but each plan has a different cap and different definition of what discretionary income means.<sup>68</sup> When Congress enacted the IBR, the cap for the payment was 15% of the student loan borrower's discretionary income.<sup>69</sup> Discretionary income is defined by the IBR as "the difference between [the borrower's] adjusted gross income (AGI) and 150% of the federal poverty line that corresponds to [the borrower's] family size and . . . state . . . ."<sup>70</sup>

When this Act originally passed in 2007, it assisted student loan borrowers that had a partial financial hardship.<sup>71</sup> This type of

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62. *Income-Based Repayment*, FINAID, <http://www.finaid.org/loans/ibr.phtml> (last visited Mar. 10, 2016).

63. See 139 CONG. REC. S5585 (daily ed. May 6, 1993) (statement of Sen. Kennedy) (arguing for the passage of the repayment plan that income contingency would make it possible for borrowers "to pursue careers and to take lower paying jobs they prefer, including careers in public service and community service"). He further stated that not everyone needs or wants to be a lawyer or investment banker. *Id.*

64. See FINAID, *supra* note 62.

65. *Id.*

66. See *id.*

67. Slack, *supra* note 56.

68. FINAID, *supra* note 62.

69. *Id.*

70. *Id.*; see also The Federal Poverty Guidelines, 78 Fed. Reg. 16, 5182-83 (Jan. 24, 2013) (containing all fifty states' and the District of Columbia's poverty levels).

71. 20 U.S.C. § 1098e(a)(3) (2012).

borrower is defined as a high-debt but low-income borrower.<sup>72</sup> If borrowers qualify as having a partial financial hardship, then they are entitled to a payment reduction.<sup>73</sup> Even if the borrower is in default with their student loans, they can still qualify for this repayment plan.<sup>74</sup> The IBR plan was the “brainchild” of Senator Edward Kennedy.<sup>75</sup>

The IBR’s payment reduction amounts to 15% or 10%<sup>76</sup> of the borrower’s adjusted gross income exceeding the 150% of the federal poverty line, depending on which form of the IBR the borrower chooses.<sup>77</sup> The number arrived at can be adjusted according to the borrower’s family size and state.<sup>78</sup> The federal poverty line is an officially defined number based upon information derived from the United States Census Bureau.<sup>79</sup> This number is revised annually and is used as the criteria for many federal programs beyond the IBR.<sup>80</sup> If the borrower is married and files taxes separately from a spouse, the payment is calculated based solely upon the borrower’s federal student loan debt and adjusted gross income.<sup>81</sup> In summary, if the borrower qualifies, the borrower then is obligated to pay only fifteen percent of the borrower’s adjusted gross income less 150% of the borrower’s family poverty level.<sup>82</sup> The result for the borrower is a

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72. *Educational Loan Notes*, MICH. GUAR. AGENCY, July 2009, [http://www.michigan.gov/documents/mistudentaid/ELNJuly09\\_286394\\_7.pdf](http://www.michigan.gov/documents/mistudentaid/ELNJuly09_286394_7.pdf).

73. 20 U.S.C. § 1098e(b)(1) (2012).

74. *See* 34 C.F.R. §§ 685.220(b)(2) & (h)(2) (2013) (referring to the ICR); 34 C.F.R. § 682.215 (2013) (referring to the IBR).

75. 20 U.S.C. § 1098e (2012); Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27, 35 (2007). The formula to calculate the IBR payment is also located at 34 C.F.R. § 682.215(b)(1) (2013).

76. *See* 20 U.S.C. § 1098e(e)(1) (2012) (stating “[w]ith respect to any loan made to a new borrower on or after July 1, 2014,” the payment cap will be lowered from 15 percent to 10 percent).

77. 20 U.S.C. § 1098e(a)(3)(B) (2012).

78. *See* FINAID, *supra* note 62.

79. 42 U.S.C. § 9902(2) (2012).

80. *Id.*; *see also* *Poverty Thresholds*, U.S. CENSUS BUREAU, <http://www.census.gov/hhes/www/poverty/data/threshld/index.html> (last visited Mar. 10, 2016) (showing the poverty rates over the last few decades).

81. 20 U.S.C. § 1098e(d) (2012).

82. *See* *Educational Loan Notes*, *supra* note 72.

lower payment than can be achieved through other repayment plans.<sup>83</sup>

The payment, once configured, is based upon a yearly number and then divided by twelve.<sup>84</sup> Under the IBR, the borrower's payment could change each year because the payment is based upon the previous year's taxes.<sup>85</sup> This type of payment calculation may not be accurate. Thus, if a borrower suffers a reduction of income in the current year, they can submit forms with the federal government to have their payment reduced.<sup>86</sup> However, since this is a partial financial hardship payment plan, the payment may not actually cover what a normal payment would—principal and interest.<sup>87</sup> Under the IBR, if the borrower qualifies for a reduced payment, the amount paid first goes towards the interest on the loan.<sup>88</sup> Second, it goes towards any fees that may be owed and then, finally, towards the actual principal of the loan.<sup>89</sup>

The IBR treats subsidized and unsubsidized loans differently as well.<sup>90</sup> If the borrower has subsidized loans and qualifies for the IBR plan, the IBR essentially treats the student loans as if they are deferred.<sup>91</sup> For three years after being placed on the IBR, the federal government will pay the interest that is due on the loans.<sup>92</sup> This is the same structure as if the borrower has his student loan in deferment.<sup>93</sup> However, if the student loans are unsubsidized, then the unpaid interest that is accrued is capitalized and becomes part of the

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83. *See, e.g.*, In re *Ristow*, No. ADV. 10-01141-EWH, 2012 WL 1001594, at \*3 (B.A.P. 9th Cir. Mar. 26, 2012) (stating the debtor's payment under the ICR was \$479.97 and under the IBR it was \$268.91).

84. 20 U.S.C. § 1098e(b)(1) (2012).

85. FINAID, *supra* note 62.

86. *Id.*

87. *See* 20 U.S.C. § 1098e(b)(2) (2012).

88. *Id.*

89. *Id.*

90. 20 U.S.C. § 1098e(b)(3) (2012).

91. 20 U.S.C. § 1098e(b)(3)(A) (2012).

92. *Id.*

93. *See id.*

principal.<sup>94</sup> Lastly, any principal not paid in the IBR payment is also deferred.<sup>95</sup>

If the borrower stays within the IBR structure for twenty or twenty-five years,<sup>96</sup> he or she is eligible for student loan forgiveness, meaning her student loans are cancelled.<sup>97</sup> The cancelled amount is taxable though, which could be crippling to any borrower.<sup>98</sup> Because this law is relatively new, no borrower has reached this twenty or twenty-five year period.<sup>99</sup> Therefore, Congress and future presidents have plenty of time to adjust this result. The IBR and ICR repayments represent the current Congress and President of the United States deferring the issue of actually solving the federal student loan problem to a later congress and presidential administration.

Nevertheless, the tax consequences have influenced bankruptcy courts' determinations of what constitutes a borrower's good faith effort to repay federal student loans. In response to a debtor's argument for discharge because any forgiveness of the remaining student loan in twenty-five years under the ICR would be a taxable event with a high tax liability, a district court in *Education Credit Management Corporation v. Stanley (In re Stanley)*<sup>100</sup> found that "[f]orecasting such a tax liability under whatever tax laws will be in effect in [twenty-five] years would be sheer speculation. Forecasting the effect any such liability would have on [the borrower's] actual standard of living at that time would be even more speculative."<sup>101</sup>

94. 20 U.S.C. § 1098e(b)(3)(B)(ii) (2012).

95. 20 U.S.C. § 1098e(b)(4) (2012).

96. See 20 U.S.C. § 1098e(e)(2) (2012) (lowering the original twenty-five years to twenty years for all new borrowers after 2014).

97. 20 U.S.C. § 1098e(b)(7) (2012).

98. See Schrag, *supra* note 75, at 55–56 (describing the taxability of the forgiveness because it is not dependent on any work by the borrower for any “particular class of employers”). But see Gregory Crespi, *Will the Income-Based Repayment Program Enable Law Schools to Continue to provide “Harvard-Style” Legal Education?*, 67 S.M.U. L. REV. 51, 82 (2014) (stating borrowers under the Public Service Loan Forgiveness Program will not be subject to the taxable income provision).

99. See FINAID, *supra* note 62.

100. *Educ. Credit Mgmt. Corp. v. Stanley (In re Stanley)*, 300 B.R. 813, 818–19 n.8 (N.D. Fla. 2003).

101. See *id.* (referring to the potential tax liability of the ICRP); see also *Gibson v. ECMC (In re Gibson)*, 428 B.R. 385, 392 (2010) (citing 26 U.S.C. § 108(a)(1)(B) stating that tax laws may change before the twenty-five years pass and currently the Internal Revenue Code may already provide an exclusion of this type of income).

Not considering the tax as a possible liability, this calculated plan's result essentially just allows for most borrowers under the IBR to pay less than 10% of their gross income to their student loan debt.<sup>102</sup> Most types of federal student loans are also eligible for the plan's adjusted payment structure.<sup>103</sup> As previously stated, the purpose of the IBR plan is to lower the monthly payments for student loan borrowers that have high loan debt amounts and only modest to low incomes.<sup>104</sup> If the monthly payment amount is lower under the IBR than the borrower's monthly eligible loan payments under a ten-year standard repayment plan, then the borrower is eligible to repay her loans under IBR.<sup>105</sup> In fact, there is no minimum payment required with the IBR plan.<sup>106</sup> A borrower's payment could actually be zero each month and that would count as an actual payment made that month.<sup>107</sup> In theory, a borrower could go the entire repayment plan period without paying anything. This aspect of the IBR could make the question of including federal student loans in bankruptcy moot. This is because the IBR plan allows the borrower to make the modified payments for the twenty-five year period and the remaining balance to be "forgiven"—essentially like a bankruptcy discharge.<sup>108</sup> The size of the remaining balance does not matter.<sup>109</sup> However, the disadvantage is that the forgiven amount is taxable under current law.<sup>110</sup>

This tax consequence could pose a serious consequence for borrowers that have large amounts forgiven.<sup>111</sup> This aspect of the

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102. See generally *In re Stanley*, 300 B.R. at 818–19 n.8.

103. Slack, *supra* note 56 (stating loans in default and Parent PLUS Loans are not eligible for the IBR plan); *Federal Student Aid*, DEP'T OF EDUC., <http://studentaid.ed.gov/repay-loans/understand/plans/income-based> (stating that private education loans are not eligible either). However, see FINAID, *supra* note 62, which states that Parent PLUS Loans can be included if the borrower has consolidation them into a consolidation loan in the Direct Loan program. Other conditions apply. See *id.*

104. Slack, *supra* note 56.

105. *Id.*

106. FINAID, *supra* note 62.

107. See, e.g., *Krieger v. Educ. Credit Mgmt. Corp.*, 713 F.3d 882, 886 (7th Cir. 2013); *Stevenson v. Educ. Credit Mgmt. Corp. (In re Stevenson)*, 463 B.R. 586, 592 (Bankr. D. Mass. 2011); *Marshall v. Student Loan Corp. (In re Marshall)*, 430 B.R. 809, 814 (Bankr. S.D. Ohio 2010).

108. *In re Stevenson*, 463 B.R. at 592.

109. *Id.*

110. FINAID, *supra* note 62.

111. See *id.*



IBR needs to be abolished. This change would make the IBR a pseudo-Bankruptcy Code for federal student loans. Because there is still about twenty years before the first person reaches the situation of having their federal student loan balances forgiven,<sup>112</sup> this law could, should, and most likely will be changed before that event happens.

Nonetheless, the IBR plan treats borrowers as if they are on a deferment plan if their income is at or near the 150% federal poverty line for the first three years they are on the plan.<sup>113</sup> This aspect of the IBR allows borrowers to switch to another repayment plan within the first three years without suffering any penalties.

The borrower's monthly payments depend upon various factors, so it is best to use the IBR calculator in determining the payment size.<sup>114</sup> Because the Federal Government changes the national poverty rate each year, the borrower must be aware of the current calculation.<sup>115</sup> Essentially, the borrower's payment has the propensity to change each tax year based upon his or her income in comparison to the federal poverty level. This means a borrower may see an ever-increasing payment amount as her income increases from one year to the next.

Another factor considered by potential participants of this plan is whether their IBR payment covers the interest portion of their federal student loans. If it does not, the government will pay the interest on the subsidized loans for up to three years.<sup>116</sup> This is similar to what other existing payment plans provide.<sup>117</sup> As a result, any interest not paid by minimum monthly payments will not be capitalized even if the interest accrues during the IBR payment period.<sup>118</sup> However, because most borrowers choosing to use the IBR payment method will not be paying all of the monthly interest, the amount of interest a

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112. *See id.*

113. 20 U.S.C. § 1098e(b)(3)(A) (2012).

114. *See* FINAID, *supra* note 62 (containing the calculator and the reference table).

115. *See* *Income-Based Repayment*, AFFILIATED COMPUT. SERVS., <https://www.acs-education.com/CS/Jsp/loanoptions/ibr.jsp> (listing the federal poverty level for 2013) (last visited Mar. 10, 2016).

116. FINAID, *supra* note 62.

117. *See generally* *Federal Student Aid*, *supra* note 103.

118. *See* FINAID, *supra* note 62.

borrower will pay over time may be higher than what it would be if the borrower were to pay the interest off every month.<sup>119</sup> Thus, unless the current law is changed as a result of the negative amortization possibility of the IBR, a borrower's potential tax liability may be substantially higher than the original amount borrowed.

In 2010, with the passage of the Health Care and Education Reconciliation Act,<sup>120</sup> monthly payments under the IBR were reduced to 10% of discretionary income instead of 15%.<sup>121</sup> This effectively reduced borrowers' monthly payments by one-third from the already reduced amount.<sup>122</sup> Additionally, this Act reduced the number of years a borrower is required to pay into the plan to only twenty years.<sup>123</sup> However, these changes only apply to new borrowers and not to borrowers that currently have federal student loan debts.<sup>124</sup> President Obama signed an executive order making this plan effective for new loans established after July 1, 2012.<sup>125</sup> Nevertheless, borrowers that obtained their federal student loans before 2012 can use the plan discussed above if they consolidate their student loans after July 1, 2012.<sup>126</sup>

The high balances of federal student loans continue to define the lives of many borrowers today.<sup>127</sup> For example, millennials (the generation born from the early 1980s to early 2000s) with student loans are driving a shift from home ownership to Generation Rent.<sup>128</sup> Millennials have been starting families and buying homes later than their predecessor generations.<sup>129</sup> The National Association of

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119. *Federal Student Aid*, *supra* note 103.

120. Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

121. FINAID, *supra* note 62.

122. *Id.*

123. *Id.*

124. *See id.* (stating the effective date is for borrowers that took out new loans after July 1, 2014).

125. Reyna Gobel, *Will Obama's Executive Order on Student Loans Help You?*, MINTLIFE (Oct. 27, 2011), <http://www.mint.com/blog/credit/will-obamas-executive-order-on-student-loans-help-you-102011/>.

126. *Id.*

127. *See, e.g.*, Josh Boak, *Millennials Buying Homes Later in Life*, USA TODAY (July 19, 2014, 5:03 PM), <http://www.usatoday.com/story/money/personalfinance/2014/07/19/millennials-buying-homes-later-in-life/12839353/> (referring to census data).

128. *Id.*

129. *Id.*

Realtors notes that nearly half of Americans said student loan debt is a huge obstacle to buying a home.<sup>130</sup> First-time home buyers are an important, if not essential, part of the American economy.<sup>131</sup> If they cannot purchase a starter home, then they are less likely to pay for appliances or renovations to property they do not own.<sup>132</sup> According to recent studies, this generation is waiting longer to buy their first homes and this trend is likely to continue.<sup>133</sup> If homebuilders are not building for Millennials, then products are not moving as quickly out of Lowe's, Home Depot, or similar places as they might otherwise.<sup>134</sup> Something must be done to change how student loans are handled.

### B. *The Gates Foundation*<sup>135</sup>

Every indication is that there will be increased attention on the IBR over the coming years. This attention may focus on additions to the plan, including automatic payroll deductions of federal student loan payments.<sup>136</sup> The Bill and Melinda Gates Foundation is pushing student loan borrowers to enroll in an IBR plan as soon as they leave school and get a job.<sup>137</sup> The spirit of the Gates Foundation's proposal

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130. See Les Christie, *Is Student Loan Debt Hurting the Housing Recovery?*, CNN MONEY (Sept. 25, 2014, 1:38 PM), [http://money.cnn.com/2014/09/24/real\\_estate/student-loan-debt-home-buying/index.html](http://money.cnn.com/2014/09/24/real_estate/student-loan-debt-home-buying/index.html) (referring to a housing market survey of 2,000 Americans).

131. See Diana Hill, *Is Home Ownership Still the American Dream?*, ONLINE TRAINING ACADEMY (Oct. 22, 2013), <http://lessons.tradingacademy.com/article/is-homeownership-still-the-american-dream/> (discussing the economic impact of homeownership and first-time buyers).

132. See Bill Conerly, *Should You Buy A House Or Rent? The Economics of Home Ownership*, FORBES (Nov. 11, 2013, 2:54 PM), <http://www.forbes.com/sites/billconerly/2013/11/11/should-you-buy-a-house-or-rent-the-economics-of-homeownership/> (discussing the responsibilities and rights of home renters and homeowners).

133. See Christie, *supra* note 130.

134. See Mike Duff, *Home Depot Gains by Turning Recession into Opportunity*, CBS NEWS (Aug. 24, 2010, 2:31 PM), <http://www.cbsnews.com/news/home-depot-gains-by-turning-recession-into-opportunity/> (discussing downturn in new homebuilding because of recession).

135. BILL & MELINDA GATES FOUND., <http://www.gatesfoundation.org> (last visited Mar. 10, 2016).

136. See Chris Morran, *New Bill Would Take Income-Based Student Loan Payments Straight From Your Paycheck*, CONSUMERIST (Dec. 4, 2012), <http://consumerist.com/2012/12/04/new-bill-would-take-income-based-student-loan-payments-straight-from-your-paycheck/> (discussing proposed law allowing "automatic payroll deductions tied to the borrower's income").

137. *How We Work Grant: New America Foundation*, BILL & MELINDA GATES FOUND. (Aug. 2014), <http://www.gatesfoundation.org/How-We-Work/Quick-Links/Grants-Database/Grants/2014/08/OPP1116365>. In August 2014, the Gates Foundation provided a \$235K Grant to the New America Foundation to work with policymakers in determining how to implement an automatic IBR system to assist the student loan repayment process. *Id.*

is to make student loan repayment mandatory on the borrower by collecting student loan payments through the federal payroll withholding system.<sup>138</sup> This sounds like a unique and intriguing approach to federal student loan issues. However, this unique approach raises many questions. The first question is whether the borrower will be forced to choose a particular IBR plan, or whether the borrower may choose the plan the borrower wants.<sup>139</sup> Because there are currently multiple payment plan options, enforcement remains problematic.<sup>140</sup> The second question is how would the federal government enforce this approach.<sup>141</sup> The Gates Foundation has provided money to look into this issue.<sup>142</sup>

The third question is whether, in instances where some form of IBR is required, privacy issues will prevent employers from collecting student loan debts and discussing payment options, information about employees that employers would not have had access to before.<sup>143</sup> Lastly, would businesses incur additional costs to be involved in the student loan debt collection process?<sup>144</sup> If so, would the government reimburse the businesses for those costs?<sup>145</sup>

The Gates Foundation is trying to answer some of these questions with the use of their grants. The principal focus of the Gates Foundation research grants is to eliminate the need for debt collection on student loans, provided the borrower stays employed, thus eliminating most student loan defaults.<sup>146</sup> The difficulty of making the necessary contingency plans for those borrowers not able to find

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138. *See id.*

139. *See Federal Student Aid: Repayment Plans*, DEP'T OF EDUC., <https://studentaid.ed.gov/sa/repay-loans/understand/plans> (last visited Mar. 10, 2016).

140. *How We Work Grant: Center for Community Change*, BILL & MELINDA GATES FOUND. (June 2013), <http://www.gatesfoundation.org/How-We-Work/Quick-Links/Grants-Database/Grants/2013/06/OPP1091149>. In June, 2013, the Gates Foundation provided a grant to the Center for Community Change to research and analyze the various forms of the IBR and look into potential reforms. *Id.*

141. *See* Lauren Smith, *Petri Preparing Plan to Overhaul Federal Student Loan System*, ROLL CALL (Oct. 3, 2012, 1:00 AM), [http://www.rollcall.com/news/petri\\_preparing\\_plan\\_to\\_overhaul\\_federal\\_student\\_loan\\_system-218986-1.html](http://www.rollcall.com/news/petri_preparing_plan_to_overhaul_federal_student_loan_system-218986-1.html).

142. *How We Work Grant: Center for Community Change*, *supra* note 140.

143. *See* Sandman, *supra* note 52.

144. *See* Ed Lieber, *Don't Get Stuck With Your Employee's Student Loan Debt*, SMALL BUS. TRENDS (May 26, 2015), <http://smallbiztrends.com/2015/05/dont-get-stuck-employees-student-loan-debt.html>.

145. *See id.*

146. *See* Sandman, *supra* note 52.

employment, those who lose their jobs, or those who find only temporary work, could derail this aggressive plan. However, this approach could be better for student loan borrowers who want to repay their student loans but have trouble accomplishing that while maintaining a normal lifestyle.<sup>147</sup>

### C. Free Community College Tuition

President Obama's ambitious plan to make community colleges free to most students who maintain a 2.5 grade point average (GPA)<sup>148</sup> will be well-received by many Americans. With taxpayers already paying most of the tuition for community colleges,<sup>149</sup> most Americans would probably accept this proposal. Nevertheless, free college tuition does not sit well with many other Americans.<sup>150</sup> One consideration is that only about a third of community college students currently enrolled on at least a half-time basis maintain a 2.5 or higher GPA on a 4.0 scale, based on data from the 2011–2012 National Postsecondary Student Aid Survey.<sup>151</sup> It is arguable that the prospect of a tuition-free option would motivate many more students to achieve that goal.

The impact on for-profit schools will be catastrophic if the President's plan is adopted. Because most students would be drawn to the possibility of a free Associate's Degree, who would want to pay \$50,000–\$75,000 to get the same degree from a for-profit

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147. *See id.*

148. *See* Michael Gonchar, *Should a College Education be Free?*, N.Y. TIMES (Jan. 23, 2015, 5:00 AM), [http://learning.blogs.nytimes.com/2015/01/23/should-a-college-education-be-free/comment-page-3/?\\_r=0](http://learning.blogs.nytimes.com/2015/01/23/should-a-college-education-be-free/comment-page-3/?_r=0) (stating also that if all the states participate in the program, it could cover up to nine million students, saving an average of \$3,800 a year per student).

149. *See* MARK SCHNEIDER & LU (MICHELLE) YIN, AMERICAN INSTS. FOR RESEARCH, THE HIDDEN COSTS OF COMMUNITY COLLEGES 6 (Oct. 2011) (referring to the costs to taxpayers when a student drops out of the community college).

150. *See, e.g.*, Jim Namiotka, *College for Free? America Can Afford it: Opinion*, NJ.COM (Aug. 18, 2013, 7:00 AM), [http://blog.nj.com/njv\\_editorial\\_page/2013/08/college\\_for\\_free\\_america\\_can\\_a.html](http://blog.nj.com/njv_editorial_page/2013/08/college_for_free_america_can_a.html) (stating the biggest impediment is that higher education is big business); Jordan Weismann, *How Washington Could Make College Tuition Free (Without Spending a Penny More on Education)*, THE ATLANTIC (Mar. 8, 2013), <http://www.theatlantic.com/business/archive/2013/03/how-washington-could-make-college-tuition-free-without-spending-a-penny-more-on-education/273801/> (stating the a free education would cause a flood of students and that could possibly harm poorer students).

151. *See* Sandman, *supra* note 52.

school? This plan means the death of for-profit schools and all of the controversy surrounding them. Moreover, it would eliminate a large part of future federal student loan debt. This plan could be the change in the system many have been looking for in this country, but it depends on current politics.

## II. PRO-PROFIT AND THE LAWSUIT TSUNAMI

As mentioned above, for-profit schools and their non-profit twins are under more legal and legislative scrutiny than ever, and it appears well-deserved. For example, the Senate's HELP Committee in 2012 examined thirty for-profit schools and found that fifty-four percent of students who started at these colleges in 2008–2009 left without a degree by 2010.<sup>152</sup> Regulators and student loan advocates will likely continue to put pressure on for-profit colleges too. For-profit colleges are already contracting and many advocates hope this trend continues.<sup>153</sup>

### A. *Corinthian Colleges*

Advocates against for-profit institutions viewed the Department of Education's (DOE) crackdown on Corinthian Colleges, Inc. for student loan fraud as a victory.<sup>154</sup> Corinthian was forced to sell half of its college campuses, and it looked as if the schools would be closed forever.<sup>155</sup> However, some viewed it as a defeat because the sale was made possible by a bailout from the DOE.<sup>156</sup> The end buyer

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152. See U.S. SENATE HEALTH, EDUC., LABOR & PENSION COMM., FOR PROFIT HIGHER EDUC.: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT & ENSURE STUDENT SUCCESS 73 (2012), [http://www.help.senate.gov/imo/media/for\\_profit\\_report/PartI-PartIII-SelectedAppendixes.pdf](http://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf).

153. See, e.g., Libby Nelson, *One of the Worst For-Profit College Chains is About to go out of Business*, VOX (June 24, 2014, 5:30 PM), <http://www.vox.com/2014/6/24/5835884/one-of-the-worst-for-profit-college-chains-is-about-to-go-out-of>; Alan Pyke, *Federal Crackdown on For-Profit Colleges Claims Its First Victory*, THINKPROGRESS (June 23, 2014, 4:22 PM), <http://thinkprogress.org/education/2014/06/23/3452144/corinthian-colleges-everest-for-profit-college/>.

154. See Nelson, *supra* note 153 (“Headquartered in California, Corinthian operates more than 100 for-profit colleges under three brands: Heald College, Everest (which includes Everest College, Everest University and Everest Institutes), and WyoTech.”); Pyke, *supra* note 153.

155. See Nelson, *supra* note 153; Pyke, *supra* note 153.

156. See Press Release, U.S. Dep’t of Educ., U.S. Department of Education Accepts Operating Plan from Corinthian Colleges Inc. (July 3, 2014), <http://www.ed.gov/news/press-releases/us-department->

of the schools was none other than the Education Management Credit Corp (EMCC), a notorious student loan debt collector.<sup>157</sup> Because EMCC is a non-profit organization, no one was surprised by EMCC's plans to turn the fifty-six Corinthian college campuses it bought into non-profit schools through its newly created Zenith Education Group.<sup>158</sup>

The transition from for-profit to non-profit is essentially a disguise for for-profit schools.<sup>159</sup> The transition of Corinthian's fifty-six college campuses to EMCC campuses could redefine the for-profit industry. If the company can reinvent Corinthian as a non-profit, other for-profit colleges may follow this lead. However, this is not a new event.<sup>160</sup> Transitioning for-profit colleges to non-profit status might be the new trend in trying to save an industry with a horrible reputation.<sup>161</sup> Aside from Corinthian/EMCC, other schools that have transitioned include Keiser University, Stevens-Henager College, and Remington College.<sup>162</sup> Perhaps Grand Canyon University soon will.<sup>163</sup> If the transitions were successful for these schools, one would assume that many other for-profits would follow to see if this trend equals new profits.

Recently, "the public has come to recognize that many for-profit colleges have been ripping off taxpayers and ruining students' lives . . . ."<sup>164</sup> Now, this is not true for all students who attended these

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education-accepts-operating-plan-corinthian-colleges-inc (stating that the Department of Education and Corinthian will work together to establish a reserve fund of 30 million dollars to pay for refunds).

157. Danielle Douglas-Gabriel, *How Dozens of for-Profit Schools Found an Unlikely Savior: a Debt Collector*, WASH. POST (Nov. 28, 2014), [http://www.washingtonpost.com/business/economy/how-dozens-of-failing-for-profit-schools-found-an-unlikely-savior-a-debt-collector/2014/11/28/c3ea8218-7411-11e4-a589-1b102c2f81d0\\_story.html](http://www.washingtonpost.com/business/economy/how-dozens-of-failing-for-profit-schools-found-an-unlikely-savior-a-debt-collector/2014/11/28/c3ea8218-7411-11e4-a589-1b102c2f81d0_story.html).

158. Chelsey Dulaney & Alan Zibel, *Corinthian Colleges to Sell Campuses to Zenith Education*, WALL ST. (Nov. 20, 2014, 2:38 PM), <http://www.wsj.com/articles/corinthian-colleges-to-sell-campuses-to-zenith-education-1416496244>.

159. See, e.g., Patricia Cohen, *Some Owners of Private Colleges Turn a Tidy Profit by Going Nonprofit*, N.Y. TIMES (Mar. 2, 2015), [http://www.nytimes.com/2015/03/03/business/some-private-colleges-turn-a-tidy-profit-by-going-nonprofit.html?\\_r=0](http://www.nytimes.com/2015/03/03/business/some-private-colleges-turn-a-tidy-profit-by-going-nonprofit.html?_r=0); David Halperin, *If a For-Profit College Becomes a Non-Profit, Is That Good? Not Necessarily*, HUFFINGTON POST (Feb. 11, 2013, 9:48 AM), [http://www.huffingtonpost.com/davidhalperin/if-a-for-profit-college-b\\_b\\_2661788.html](http://www.huffingtonpost.com/davidhalperin/if-a-for-profit-college-b_b_2661788.html).

160. See Halperin, *supra* note 159.

161. See *id.*

162. See *id.*

163. Cohen, *supra* note 159.

164. See Halperin, *supra* note 159.

schools, yet, in some cases, these success stories have been exploited for more gain.<sup>165</sup> The vast majority of students who choose to attend these schools are buried in debt and worse off for their experiences, and the public is starting to realize what is happening.<sup>166</sup>

Because of this realization, enrollments have finally begun to decline steadily and the once-mighty industry has gone into a financial crisis.<sup>167</sup> Consequently, a number of these for-profit schools, “such as American Career Institute and ATI [Career Training Centers,] have abruptly shut down many or all of their campuses.”<sup>168</sup> Even the largest schools in the for-profit industry, including the University of Phoenix, Career Education Corporation, Education Management Corporation (EDMC), and Kaplan, have been forced to downsize as their revenues have “sharply plummeted.”<sup>169</sup> This does not even include Corinthian College, which, as previously mentioned, was shut down by the DOE for loan fraud.<sup>170</sup>

### B. *The Non-Profit Disguise and the Motivation*

To save themselves, “a small but increasing number of [for-profit] schools are pursuing a new survival strategy: transforming their for-profit institutions into more traditional non-profit [private] schools,”

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165. See, e.g., Yahoo! Search Results, YAHOO!, <http://video.search.yahoo.com> (search “For profit students in commercials” to find various commercials of for-profit schools using past students).

166. See Chris Kirkham, *For-Profit Colleges that Bury Students in Debt Face Second Obama Crackdown*, HUFFINGTON POST (Mar. 13, 2014, 11:06 PM), [http://www.huffingtonpost.com/2014/03/13/for-profit-colleges-obama\\_n\\_4961163.html](http://www.huffingtonpost.com/2014/03/13/for-profit-colleges-obama_n_4961163.html) (stating that 13% of students attend for-profit schools, but account for 50% of the student loan defaults); Yasmeen Qureshi, Sarah Gross & Lisa Desai, *Screw U: How For-Profit Colleges Rip You Off*, MOTHER JONES (Jan. 13, 2014, 6:00 AM), <http://www.motherjones.com/politics/2014/01/for-profit-college-student-debt> (discussing the money the schools’ CEOs make); Jane Bennett Clark, *The Real Deal on For-Profit Colleges*, KIPLINGER (May 2011), <http://www.kiplinger.com/article/college/T012-C000-S002-the-real-deal-on-for-profit-colleges.html> (discussing that even with their reputation, students are still attracted to them).

167. See, e.g., *For-Profit Colleges Still Seeing Declines in Enrollment*, NBC NEWS (July 25, 2012), [http://usnews.nbcnews.com/\\_news/2012/07/25/12949437-for-profit-colleges-still-seeing-declines-in-enrollment?lite](http://usnews.nbcnews.com/_news/2012/07/25/12949437-for-profit-colleges-still-seeing-declines-in-enrollment?lite); Rachel Wiseman, *Enrollments Plunge at Many For-Profit Colleges*, CHRON. HIGHER EDUC. (Aug. 16, 2011), <http://chronicle.com/article/Enrollments-Plunge-at-Many/128711/>.

168. Halperin, *supra* note 159.

169. *Id.*

170. See *supra* notes 154–58 and accompanying text.



or at least to appear that way.<sup>171</sup> At a recent “annual convention[] held in Las Vegas, the industry’s trade association, the [Association of Private Sector Colleges and Universities (APSCU)], offered a presentation [conducted] by lawyers about just how to make such a conversion, as well as the pros and cons of doing so.”<sup>172</sup> However, “there are potential dangers to the public when one of today’s for-profit schools becomes a non-profit.”<sup>173</sup> There are benefits associated with changing to a non-profit institution:

It is easy to see why some for-profit college owners now might want to take their institutions non-profit[:] to escape the bad reputation of their sector; to become eligible for private, tax-deductible donations and more state grants; to enjoy tax-free status; and, perhaps above all, to avoid strengthened federal and state regulations aimed at preventing for-profit college abuses.<sup>174</sup>

### 1. *Gainful Employment*

Obtaining non-profit status would also allow for-profit schools to avoid the Obama administration’s “gainful employment” rule.<sup>175</sup> One recent federal regulation aimed towards for-profits is the gainful employment requirement.<sup>176</sup> This regulation aims to prevent for-profit schools from charging tuition rates above their students’ ability to repay their student loans because their debt is higher than the wages commensurate with their career training.<sup>177</sup> Proponents of this plan anticipate that most for-profit school programs would be forced

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171. Halperin, *supra* note 159.

172. *Id.*; Neil Lefkowitz & Douglas M. Mancino, *Alternatives to For-Profit Status for Participating in Title IV Programs*, APSCU (June 21, 2012), [http://www.republicreport.org/wp-content/uploads/2013/02/APSCUConventionSession\\_AlternativestoForProfitStatus.pdf](http://www.republicreport.org/wp-content/uploads/2013/02/APSCUConventionSession_AlternativestoForProfitStatus.pdf).

173. Halperin, *supra* note 159.

174. *Id.*

175. Press Release, U.S. Dept. of Educ., Obama Administration Announces Final Rules to Protect Students from Poor-Performing Career College Programs (Oct. 30, 2014), <http://www.ed.gov/news/press-releases/obama-administration-announces-final-rules-protect-students-poor-performing-care>.

176. *Id.*

177. *Id.*

to shut down under this regulation, to restructure their tuition, or to change their for-profit status.<sup>178</sup>

For-profits attempted to block this regulation by filing a lawsuit in February 2015.<sup>179</sup> The APSCU, on behalf of the for-profit schools, filed a motion for summary judgment in the case regarding the gainful employment legislation.<sup>180</sup> The APSCU argued that the gainful employment rule “would penalize for-profit and trade school programs for consistently leaving students with overwhelming [student loan] debt[s]” and the inability to repay their student federal loans.<sup>181</sup> The rule requires these institutions to show potential students what previous students have earned upon graduation and the amount of debt they are going to accumulate.<sup>182</sup>

“In the [DOE’s] initial evaluation of compliance with the gainful employment rule, two out of eight Stevens-Henager programs, one out of two programs at another affiliated school, California College San Diego, and all four CollegeAmerica programs failed all three prongs of the federal test.”<sup>183</sup> Overall, the DOE estimated that over 1,400 programs would not pass the gainful employment criteria.<sup>184</sup> Since the gainful employment rule survived APSCU’s motion for summary judgment, many for-profit schools will likely face closures.<sup>185</sup> Thus, the reason to change their status from for-profit to non-profit becomes obvious.

The “biggest potential downside” to for-profit schools for changing, at least from the perspective of their owners, is that under their present status as for-profit they have been making incredible amounts of money.<sup>186</sup> With the Gainful Employment Rule now in

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178. *Id.*

179. *See, e.g.*, Press Release, Ass’n of Private Sector Colls. & Univs., APSCU Files Motion for Summary Judgment in Gainful Employment Regulation Litigation, APSCU (Feb. 6, 2015), <http://www.apscu.org/news-and-media/press-releases/apscu-files-motion-summary-judgment-gainful-employment-litigation.cfm>.

180. *Id.*

181. *See* Halperin, *supra* note 159.

182. Press Release, *supra* note 175.

183. *See* Halperin, *supra* note 159.

184. Press Release, *supra* note 175.

185. APSCU v. Duncan, 110 F. Supp. 3d 176, 181 (D.D.C. 2015). The court refuted every argument that the APSCU offered and even referred to some arguments as “absurd.” *Id.* at 195.

186. Halperin, *supra* note 159.

effect, this decision may not be as hard. The money they are making comes from the federal government; for-profit schools are almost entirely dependent on government cash in the form of federal student loan funding.<sup>187</sup> Up to “\$33 billion a year in federal [student loan] funding [feeds] this industry, with many for-profit schools getting [as much as] 85-90% of their revenue[s] from taxpayers.”<sup>188</sup> Owners and other top executives of for-profit schools have been taking home millions of taxpayer-generated dollars every year.<sup>189</sup>

For example, Jonathan Grayer, former CEO of Kaplan University, received \$76 million when he resigned in 2008, and Todd Nelson of EDMC increased his compensation from less than \$2 million in 2009 to \$13 million in 2011, even as EDMC’s value was falling.<sup>190</sup> “University of Phoenix founder John Sperling, who is [also the] chairman of the board of the . . . Apollo Group, received . . . compensation of \$8.6 million in 2009.”<sup>191</sup> “Apollo Group president[,] Joseph D’Amico, [received] compensation of \$5.1 million.”<sup>192</sup> Other executives at Apollo Group earned between \$1.6 and \$2.3 million.<sup>193</sup> The highest-paid president of a public university in the same year was the President of the Ohio State University, who earned \$1.3 million in total compensation.<sup>194</sup> With the Gainful Employment rule, it will be interesting to watch these figures and see if they fall and by how much.

There are many examples from other schools too, but note, for-profit compensation coincides with lawsuits filed against for-profit schools for gainful employment because the cost of their programs exceed the potential income for their students.<sup>195</sup> Thus, these owners

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. Emily Hanford, *The Case Against For-Profit Colleges and Universities*, AM. PUB. MEDIA, <http://americanradioworks.publicradio.org/features/tomorrows-college/phoenix/case-against-for-profit-schools.html> (last visited Mar. 10, 2016).

192. *Id.*

193. *Id.*

194. *Id.*

195. *See, e.g.*, Kimberly Hefling, *For-Profit Programs Face ‘Gainful Employment’ Rule*, DENV. POST (Oct. 30, 2014, 2:28 AM), [http://www.denverpost.com/breakingnews/ci\\_26828332/profit-colleges-face-gainful-employment-rule](http://www.denverpost.com/breakingnews/ci_26828332/profit-colleges-face-gainful-employment-rule) (discussing gainful employment and the effects of that rule).

are walking away with millions while many of their students will never be able to make enough money to repay the students loans they received to get these expensive degrees.<sup>196</sup> This does not sound right at any level of thinking and is a reason behind the Gainful Employment Rule.

What taxpayers should be concerned about is the prospect of some for-profit colleges, whose owners have gotten rich by offering low-quality degree programs with sky-high prices, becoming tax-exempt non-profit charities that are supposed to be serving the public interest and avoiding the Gainful Employment Rule.<sup>197</sup> The concern is that some of these schools may use their newly transformed non-profit status to disguise themselves in an attempt to continue selling their programs to vulnerable students, which primarily include veterans, single mothers, immigrants, and low-income people.<sup>198</sup>

## 2. *Stevens-Henager College*

A school that has recently changed operations is Stevens-Henager College and its group of schools, headquartered in Utah.<sup>199</sup> The school has about 10,000 students both online and on campuses spread throughout Utah and Idaho and, as of 2013, offers Associate, Bachelor, and Master degrees in business, health care, nursing, information technology, graphic arts, and more.<sup>200</sup> The school stated the switch to non-profit status “was made to allow the college to obtain private donations and . . . ’to meet the long-term vision of its single shareholder, Carl Barney, who purchased Stevens-Henager” in 1998.<sup>201</sup>

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196. See, e.g., Peter S. Goodman, *In Hard Times, Lured Into Trade School and Debt*, N.Y. TIMES (Mar. 13, 2010), <http://www.nytimes.com/2010/03/14/business/14schools.html>.

197. Halperin, *supra* note 159.

198. *Id.*

199. See STEVENS-HENAGER COLLEGE, <http://www.stevenshenager.edu> (last visited Mar. 10, 2016).

200. See Halperin, *supra* note 159; *Stevens-Henager College Programs*, STEVENS-HENAGER COLL., <http://www.stevenshenager.edu/programs>, (last visited Mar. 10, 2016).

201. Halperin, *supra* note 159; *Stevens-Henager College Becomes A Nonprofit*, CAREER COLL. CENT. (Jan. 21, 2013), <http://careercollegecentral.com/news/stevens-henager-college-becomes-nonprofit>.

“What kind of school has Stevens-Henager been” in the past?<sup>202</sup> Well, for example, “one of its employees wrote a letter to authorities”<sup>203</sup> that alleged and initiated a lawsuit<sup>204</sup> alleging “a lack of standards and integrity in the school’s recruiting” of students and in the faculty they employed.<sup>205</sup> The letter stated, “admission representatives are required to enroll anyone and everyone” and paid bonuses for their enrollees.<sup>206</sup> The school also allegedly “falsified student attendance records and grades” to show compliance with their accreditation.<sup>207</sup> Lastly, the school allegedly employed faculty that were not qualified for their positions.<sup>208</sup>

Another example was the school’s director saying, “[g]et 40 people and I don’t care what you say or do to get them.”<sup>209</sup> The admissions representatives were directed to enroll anyone and everyone regardless of their ability to attend school.<sup>210</sup> “Numerous [former] students have reported that [Stevens-Henager] only cares about making money, not about helping students.”<sup>211</sup>

“Stevens-Henager and its affiliated colleges have established records of leaving their students deep in debt” and unable to repay their student loans.<sup>212</sup> For example, the federal government compiled

202. See Halperin, *supra* note 159.

203. *Id.*

204. See United States *ex rel.* Brooks v. Stevens-Henager Coll., Inc., No. 1:13-CV-00009, 2014 WL 3101817, at \*1 (D. Idaho May 8, 2014); see also David Halperin, *Colorado Sues CollegeAmerica for Systematic Deception*, HUFFINGTON POST (Feb. 17, 2015), [http://www.huffingtonpost.com/david-halperin/colorado-sues-collegeamerica-for-systematic-deception\\_b\\_6702612.html](http://www.huffingtonpost.com/david-halperin/colorado-sues-collegeamerica-for-systematic-deception_b_6702612.html) (noting that the Justice Department charged Stevens-Henager schools with paying “their recruiters bonuses, commissions, and other forms of incentive compensation in violation of the federal ban on such compensation” as well as “employ[ing] faculty members who lacked the minimum qualifications required by the school’s accrediting agency, and that [Stevens-Henager] officials falsified student attendance records and grades”).

205. David Halperin, *Breaking: Justice Dept. Sues For-Profit Stevens-Henager College*, HUFFINGTON POST (June 9, 2014), [http://www.huffingtonpost.com/davidhalperin/breaking-justice-dept-sue\\_b\\_5120249.html](http://www.huffingtonpost.com/davidhalperin/breaking-justice-dept-sue_b_5120249.html).

206. *Id.*

207. *Id.*

208. *Id.*

209. See Halperin, *supra* note 159.

210. *Id.*

211. *Id.*; see also *Stevens Henegar College Ogden*, STUDENTREVIEWS.COM, [http://www.studentsreview.com/UT/SHC\\_comments.html?page=1&type=&d\\_school=Stevens%20Henger%20College%20Ogden](http://www.studentsreview.com/UT/SHC_comments.html?page=1&type=&d_school=Stevens%20Henger%20College%20Ogden) (last visited Mar. 10, 2016).

212. See Halperin, *supra* note 159.

the following records. In 2010, 29.5% and in 2011, 26.3% of the students from the Flagstaff, Arizona, campus of CollegeAmerica defaulted on their student loans within three years.<sup>213</sup> The default rate was 34.8% in 2010 and 25.4% in 2011 at the CollegeAmerica campus in Denver.<sup>214</sup> At the Stevens-Henager campus in West Haven, Utah, it was 33.6% in 2010 and 27.1% in 2011.<sup>215</sup> For comparison, the default rate at the University of Utah was 3.9% for both 2010 and 2011,<sup>216</sup> and the University of Arizona was 6.8% in 2010 and 7.0% in 2011.<sup>217</sup> These defaults are partially due to the high costs of attendance and the low pay for the graduates that can find jobs.<sup>218</sup> Stevens-Henager's own webpage does not display a cost of attendance.<sup>219</sup> There was no information about costs and to get that information, a prospective student must call and speak to an admissions representative.<sup>220</sup> This is actually a common practice for some for-profit websites.<sup>221</sup>

In 2011, Carl Barney, the owner of Stevens-Henager, argued that the for-profit industry was attacked through “‘ugly slander and denunciations by Senator Tom Harkin (D-IA) and promoted by some in the media,’ because of the greed of Wall Street short-sellers who bet against the industry (a familiar claim by for-profit college executives); and because the sector is ‘enormously successful’ and thus a threat to other colleges.”<sup>222</sup> I do not think the University of

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213. *Cohort Default Rates: CollegeAmerica-Flagstaff*, AM. COLL. REVIEW, <http://www.americancollegereview.com/getdetails.php?unitid=103945#fedloans> (last visited Mar. 10, 2016).

214. *School Default Rates*, FED. STUDENT AID, [https://www.nslds.ed.gov/nslds/nslds\\_SA/defaultmanagement/cohortdetail\\_3yr.cfm?sno=64&ope\\_id=025943](https://www.nslds.ed.gov/nslds/nslds_SA/defaultmanagement/cohortdetail_3yr.cfm?sno=64&ope_id=025943) (last visited Mar. 10, 2016).

215. *School Default Rates*, FED. STUDENT AID, [https://www.nslds.ed.gov/nslds/nslds\\_SA/defaultmanagement/cohortdetail\\_3yr.cfm?sno=2&ope\\_id=003674](https://www.nslds.ed.gov/nslds/nslds_SA/defaultmanagement/cohortdetail_3yr.cfm?sno=2&ope_id=003674) (last visited Mar. 10, 2016).

216. *School Default Rates*, FED. STUDENT AID, [https://www.nslds.ed.gov/nslds/nslds\\_SA/defaultmanagement/cohortdetail\\_3yr.cfm?sno=0&ope\\_id=003675](https://www.nslds.ed.gov/nslds/nslds_SA/defaultmanagement/cohortdetail_3yr.cfm?sno=0&ope_id=003675) (last visited Mar. 10, 2016).

217. *School Default Rates*, FED. STUDENT AID, [https://www.nslds.ed.gov/nslds/nslds\\_SA/defaultmanagement/cohortdetail\\_3yr.cfm?sno=4&ope\\_id=001083](https://www.nslds.ed.gov/nslds/nslds_SA/defaultmanagement/cohortdetail_3yr.cfm?sno=4&ope_id=001083) (last visited Mar. 10, 2016).

218. See Qureshi, *supra* note 166.

219. See STEVENS-HENAGER COLLEGE: TUITION FINANCIAL AID, <http://www.stevenshenager.edu/tuition-financial-aid> (last visited Mar. 17, 2016).

220. *Id.*

221. See, e.g., UNIVERSITY OF PHOENIX: TUITION AND FEES, [http://www.phoenix.edu/tuition\\_and\\_financial\\_options/tuition\\_and\\_fees.html](http://www.phoenix.edu/tuition_and_financial_options/tuition_and_fees.html) (last visited Mar. 10, 2016).

222. See Halperin, *supra* note 205.

Utah or Boise State University are worried about for-profit schools threatening their existence. Rather, it is taxpayers that are concerned that they are going to have to bailout the for-profit students' federal student loan debt.<sup>223</sup>

Another reason Carl Barney gives for attacks of for-profit schools is more philosophic in reasoning:

[T]he most powerful reason. It underlies and 'justifies' much of the disgraceful, unethical, and criminal activities of our adversaries: the Marxist view of profit . . . . There are many in Washington and in government colleges and universities who are convinced that profit is evil; and, therefore, what we do is evil . . . . Their view regarding profit as evil is their justification for vilifying us and for trying to damage us.<sup>224</sup>

Notably, the owner of Stevens-Henager is on the Advisory Board for the Clemson Institute for the Study of Capitalism and the board of the Ayn Rand Institute.<sup>225</sup> How does the conversion of Stevens-Henager into a non-profit meet the owner's long-term vision for the school, given his strong defense of the profit motive within education?

### 3. *Other Schools and the 90/10 Rule*

Stevens-Henager is not the only for-profit school to attempt this conversion.<sup>226</sup> Other for-profit schools, including Keiser University<sup>227</sup> and Remington College,<sup>228</sup> have raised concerns about

223. See Halperin, *supra* note 159.

224. Halperin, *supra* note 205 (quoting Carl Barney).

225. Press Release, CollegeAmerica, Carl Barney Appointed to Clemson Institute Advisory Board (Sept. 6, 2012) (on file with author).

226. See Goldie Blumenstyk, *Another College Takes the Path From For-Profit to Nonprofit*, THE CHRON. HIGHER EDUC. (Jan. 20, 2011), <http://chronicle.com/article/Another-College-Takes-the-Path/126007/>; Kelly Field, *Keiser U. Goes Nonprofit*, THE CHRON. HIGHER EDUC., Jan. 13, 2011, <http://chronicle.com/article/Keiser-U-Goes-Nonprofit/125947/>.

227. See Field, *supra* note 226 (stating the school was sold to Everglades College Inc., a nonprofit entity that operates Everglades University).

228. See Blumenstyk, *supra* note 226 ("Remington has sold itself to a nonprofit entity called

the reality of the change in structure.<sup>229</sup> The issues include (1) the structure of the transaction, (2) the salaries of the new non-profit school's leadership, and (3) disclosure to the public of relevant facts.<sup>230</sup> The fact that Keiser University apparently remains a member of the for-profit college trade association, APSCU, even though it became a non-profit in 2011 is an example of this third issue.<sup>231</sup>

At the APSCU convention in 2012, the presentation made it clear there are regulatory advantages of a for-profit, like Keiser, Remington, and Stevens-Henager, selling itself to a non-profit like the Center for Excellence in Higher Education and becoming non-profit.<sup>232</sup> A primary inspiration behind this move is to avoid certain federal regulations.<sup>233</sup> For example, after one year a non-profit school is no longer subject to the federal government's 90/10 rule, which requires for-profit schools to obtain at least 10% of their revenues from funds outside of the DOE's financial aid.<sup>234</sup>

Many for-profit schools hover over 85%, which is dangerously close to the federal government's 90/10 rule.<sup>235</sup> Congress is now considering protecting students at for-profit schools even more by making this rule tougher.<sup>236</sup> If Congress proceeds with this regulation, it would increase the challenge posed to for-profit schools

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Remington College Inc.”).

229. *Id.*; Field, *supra* note 226.

230. See Nat'l Conference of State Legislatures, *For Profit Colleges and Universities*, NAT'L CONFERENCE OF STATE LEGISLATURES (July 3, 2013), <http://www.ncsl.org/research/education/for-profit-colleges-and-universities.aspx>.

231. *APSCU Member School Listing*, APSCU, <http://www.career.org/membership/apscu-member-companies/educational-members/> (last visited Mar. 10, 2016).

232. See Halperin, *supra* note 159.

233. *Id.*

234. See Blumenstyk, *supra* note 226 (stating that the “U.S. Department of Education has advised Remington that it may require the college to continue to adhere to the 90-10 rule for a few years as a condition of the conversion”). The owner of Remington stated, “[t]hey do that just to make sure you're not using it as a 90-10 dodge.” *Id.*

235. Kelly Field, *Senators Mull Changes in 90/10 Rule to Rein In For-Profits*, THE CHRON. HIGHER EDUC. (March 2, 2011), <http://chronicle.com/article/Senators-Mull-Changes-to-90-10/126564/>.

236. *Durbin, Harkin: Congress Must Remove Loophole That Encourages For-Profit Colleges To Target Veterans*, DICK DURBIN UNITED STATES SENATOR ILLINOIS (Jan. 23, 2012), <http://www.durbin.senate.gov/newsroom/press-releases/durbin-harkin-congress-must-remove-loophole-that-encourages-for-profit-colleges-to-target-veterans>.



in complying with the rule for schools that are heavily dependent on federal money.<sup>237</sup>

The concern is that 96% of the students who go to for-profit schools borrow money to attend.<sup>238</sup> By comparison, only 13% of students who attend community colleges borrow money.<sup>239</sup> At four-year public schools, the number is 48%, and lastly, 57% at four-year private non-profit colleges borrow money to attend.<sup>240</sup>

There are several reasons for this disparity of borrowing. First, “[t]uition is typically higher at for-profits than at public schools.”<sup>241</sup> This is due, in part, because state taxpayers are paying some of the bill, which lowers the tuition price.<sup>242</sup> “Private non[-]profit colleges often reduce the sticker price for students through scholarships and other kinds of institutional aid.”<sup>243</sup> This is partially due to alumni contributions, which for-profit institutions cannot raise.<sup>244</sup> Second, students who attend for-profit schools typically have lower incomes than students at other kinds of colleges.<sup>245</sup> Given these two reasons, for-profit student must borrow money to attend.<sup>246</sup> This raises an ethical point: for-profit schools keep the poor, poor.

Another ethical point is for-profit schools’ focus on the military. Under current regulation, the Post 9/11 GI Bill is included as part of the 10% federal funding under the 90/10 rule.<sup>247</sup> This does not make sense because the GI Bill is also federal funding, but this loophole has allowed for-profit schools to use military students as a way to help them stay within the 90/10 rules.<sup>248</sup> If the proposed change to the 90/10 rule is made, then many for-profit schools will be in violation of the rule without even having to change the ratio.<sup>249</sup>

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237. *See id.*

238. Hanford, *supra* note 191.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. Hanford, *supra* note 191.

245. *Id.*

246. *See id.*

247. *90/10 Rule*, FINAID, <http://www.finaid.org/loans/90-10-rule.phtml> (last visited Mar. 10, 2016).

248. *See Durbin*, *supra* note 236.

249. *See 90/10 Rule*, *supra* note 247.

Nonetheless, the proposed change would shift the 90/10 ratio to an 85/15 ratio.<sup>250</sup>

The HELP committee, led by Senator Harkin, concluded that Keiser University's concern about its compliance with the 90/10 rule "likely played a role in Keiser's conversion to non-profit status."<sup>251</sup> Another reason for Keiser's concern was the expiration of the Ensuring Continued Access to Student Loans Act (ECASLA), which allowed the school and other for-profit schools an exclusion of some federal aid into the 90/10 ratio.<sup>252</sup> In addition, the conversion would allow non-profit schools more access to grants.<sup>253</sup>

### III. THE HISTORY OF OPPOSITION

Senator Tom Harkin (D-Iowa) is the most prominent opponent of for-profit schools.<sup>254</sup> The Senator believed that the University of Phoenix, the largest for-profit school, erred when it became a publically traded company in 1994.<sup>255</sup> This move created a profit driven atmosphere pressured by Wall Street.<sup>256</sup>

Strayer University, one of the oldest for-profit schools, was founded in 1892 as a business school.<sup>257</sup> A century later, in 1996, it established Strayer Education, Inc. and went public to raise capital for expansion.<sup>258</sup> Both Strayer and Phoenix were among many for-profit schools making the Wall Street leap in the 1990s.<sup>259</sup>

The Wall Street leap allowed these schools to grow at an incredible rate.<sup>260</sup> Strayer went from about 10,000 students to over

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250. *Id.* The rule used to be 85/15 and it was changed to 90/10 in 1998. *Id.*

251. HELP Committee Report, *The Keiser School, Inc.*, HELP COMMITTEE, at 572, [http://www.help.senate.gov/imo/media/for\\_profit\\_report/PartII/Keiser.pdf](http://www.help.senate.gov/imo/media/for_profit_report/PartII/Keiser.pdf) (last visited Mar. 11, 2016).

252. *Id.*

253. *Id.*

254. *See* Hanford, *supra* note 191.

255. *See id.*

256. *See id.*

257. *Strayer Education: History*, STRAYER EDUCATION, INC., <http://www.strayereducation.com/history.cfm> (last visited Mar. 11, 2016).

258. *Id.*

259. Hanford, *supra* note 191.

260. *Id.*

60,000 in 2010.<sup>261</sup> Phoenix grew from 10,000 students to over 100,000 the first five years it went public, then to an astonishing 470,000 students at its peak.<sup>262</sup> By 2010, 10% of all students were attending for-profit schools.<sup>263</sup> The move to Wall Street made the industry a lot of money in the short term.<sup>264</sup>

Another source of opposition has focused on the recruiting practices of publicly-traded, for-profit schools.<sup>265</sup> As far back as 1992, in response to evidence that representatives at some for-profit colleges were being paid based on how many students they enrolled, Congress passed a series of laws that prohibited incentive-based compensation at for-profit schools.<sup>266</sup> In the early 2000s, in response to lobbying efforts by the growing for-profit college industry, the Bush Administration added a series of exceptions to the laws, allowing some forms of incentive-based pay.<sup>267</sup>

Even with those exceptions, former employees at the University of Phoenix filed a whistleblower lawsuit in 2003 alleging that Apollo, the parent company of the University of Phoenix, violated those laws.<sup>268</sup> Apollo paid the federal government \$78.5 million to settle the lawsuit in 2009 without admitting wrongdoing in the case.<sup>269</sup> The Obama Administration eliminated certain “safe harbors” that legalized some forms of incentive compensation.<sup>270</sup> Students

261. *Id.*

262. *Id.*

263. *Id.*

264. *See id.*

265. Hanford, *supra* note 191.

266. Higher Education Amendments of 1992, Pub. L. No. 102-325, §§ 487(a), 490(a)(3)(B), 106 Stat. 448, 625 (codified at 20 U.S.C. § 1094(a)(20)); *see also* Kelly Field, *Government Scrutinizes Incentive Payments for College Recruiters*, CHRON. HIGHER EDUC. (Aug. 1, 2010), <http://chronicle.com/article/Government-Scrutinizes/123728/> (stating Congress passed the incentive ban in 1992 as part of a broader effort to prevent for-profit schools abusing the federal student aid system). *But see* 34 C.F.R. § 668.14(b)(22)(ii)(A) (2015) (containing current ban).

267. 34 C.F.R. § 668.14(b)(22)(ii) (2009); *see also* Diane Bartz, *Analysis: For-Profit Schools Attack Reform Rule by Lobbying*, REUTERS (Jan. 12, 2011, 8:57 PM), <http://uk.reuters.com/article/2011/01/12/us-congress-forprofit-idUKTRE70B6T020110112> (containing further analysis into the safe harbors).

268. Protect Consumer Justice, *University of Phoenix Settles with Whistle Blowers and Feds*, PROTECT CONSUMER JUSTICE (Dec. 14, 2009), <http://www.protectconsumerjustice.org/university-of-phoenix-settles-with-whistle-blowers-and-feds.html> (stating also that the whistleblower received \$19 million and the DOE received \$48.5 million).

269. *Id.*

270. 34 C.F.R. § 668.14(b)(22)(ii)(B) (2015).

attending these schools, incurring student loan debt, and being unable to repay their debt has again raised the question of how, as a society, to deal with massive student loan debts.

#### IV. THE FEDERAL STUDENT LOAN DEBT AND THE BANKRUPTCY COURT'S STANDARD TO DISCHARGE THEM

Bankruptcy courts are filled with borrowers attempting to discharge their student loans under Chapter 7 or Chapter 13 of the Bankruptcy Code from the issues caused by the for-profit college industry.<sup>271</sup> Most jurisdictions use the *Brunner* test<sup>272</sup> to determine whether a borrower can discharge student loans in bankruptcy.<sup>273</sup> The Bankruptcy Code states that unless a borrower can show undue hardship, student loans cannot be discharged in a bankruptcy proceeding.<sup>274</sup> Thus, the presumption is that student loans are not dischargeable in any bankruptcy proceeding.<sup>275</sup> However, because the Bankruptcy Code is silent on the definition of undue hardship, bankruptcy courts have had to define undue hardship on their own.<sup>276</sup>

As previously mentioned, the *Brunner* test is the most common standard employed by courts,<sup>277</sup> and courts have interpreted it so restrictively that most borrowers believe their federal student loans are never dischargeable in bankruptcy.<sup>278</sup> However, even with this strict standard, some borrowers have had their student loans discharged in bankruptcy proceedings.<sup>279</sup> The issues arising from the

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271. See, e.g., *In re Oyler*, 397 F.3d 382, 385 (6th Cir. 2005) (stating the Sixth Circuit adopts the *Brunner* test but as a hybrid); *In re Gerhardt*, 348 F.3d 89, 91–92 (5th Cir. 2003); *In re Cox*, 338 F.1238, 1240 (11th Cir. 2003); *In re Ekenasi*, 325 F.3d 541, 546 (4th Cir. 2003); *In re Goulet*, 284 F.3d 773, 777 (7th Cir. 2002); *In re Brightful*, 267 F.3d 324, 327 (3d Cir. 2001); *In re Rhodes*, 464 B.R. 918, 923 (W.D. Wash. 2012) (stating the Ninth Circuit has adopted the *Brunner* test).

272. *Brunner v. New York State Higher Educ. Servs. Corp.* (*In Re Brunner*), 831 F.2d 395 (2d Cir. 1987).

273. See, e.g., cases discussed *supra* note 271.

274. 11 U.S.C. § 523(a)(8) (2012).

275. See *In re Kidd*, 472 B.R. 857, 861 (Bankr. N.D. Ga. 2012) (citing 11 U.S.C. § 523(a)(8)).

276. *In re Wolph*, 479 B.R. 725, 729 (Bankr. N.D. Ohio 2012).

277. See, e.g., cases discussed *supra* note 271.

278. Betsy Mayotte, *Debunking the Student Loan Bankruptcy Myth*, U.S. NEWS (Aug. 13, 2014, 10:00 AM), <http://www.usnews.com/education/blogs/student-loan-ranger/2014/08/13/debunking-the-student-loan-bankruptcy-myth>.

279. *Id.*

amount of federal student loan debt are not going to be resolved under the current bankruptcy system regardless of how courts interpret the Bankruptcy Code.<sup>280</sup> The reason student loan debt cannot be resolved by the current bankruptcy system is the growing amount of federal student loan debt and the number of borrowers who are in default.<sup>281</sup> With the increase in student loan debt and the emergence of repayment plans such as the IBR, the *Brunner* test is now obsolete.<sup>282</sup>

#### A. *History of the Bankruptcy Code and Treatment of Student Loans*

The beginning of the United States' Bankruptcy Code is a story of reactionary politics.<sup>283</sup> Congress passed the first permanent Bankruptcy Code in 1898<sup>284</sup> due to the financial panic of 1893.<sup>285</sup> The 1898 Code was not the country's first Bankruptcy Code; there had been previous bankruptcy laws passed, but never a permanent bankruptcy law.<sup>286</sup> Before the passage of the 1898 Code, Congress had passed three different Bankruptcy Codes: one in 1800<sup>287</sup> in reaction to the depression of 1793,<sup>288</sup> another in 1841<sup>289</sup> in reaction to the financial panic of 1837,<sup>290</sup> and lastly, one in 1867<sup>291</sup> in reaction to the financial panic of 1857.<sup>292</sup> These Bankruptcy Codes were very short because after the Codes corrected the economic situation,

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280. See Danielle Kurtzleben, *5 Shocking Facts About Student Loan Debt*, U.S. NEWS (Mar. 12, 2006, 12:26 PM), <http://www.usnews.com/news/articles/2012/03/06/5-shocking-facts-about-student-loan-debt>.

281. See *id.*

282. Steve Rhode, *Brunner Test Needs to Die Say These Heroes in Student Loan Bankruptcy Discharge*, GETOUTOFDEBT.ORG (Aug. 7, 2015), <https://getoutofdebt.org/92785/brunner-test-needs-to-die-say-these-heroes-in-student-loan-bankruptcy-discharge>.

283. David A. Skeel, Jr., *The Genius of the 1898 Bankruptcy Act*, 15 BANKR. DEV. J. 321, 323 (1999).

284. Bankruptcy Act of 1898, ch. 541, § 14b, 30 Stat. 550 (repealed in 1978). The 1898 Act referred to bankruptcy judges as "referees". See H.R. REP. NO. 95-595, at 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 5969.

285. Skeel, *supra* note 283, at 323.

286. See Act of Apr. 4, 1800, ch. 19, 2 Stat. 19, *repealed by* Act of Dec. 19, 1803, ch. 6, 2 Stat. 248.

287. *Id.*

288. Skeel, *supra* note 283, at 323.

289. Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614.

290. Skeel, *supra* note 283, at 323.

291. Act of Mar. 2, 1867, ch. 176, 14 Stat. 517, *repealed by* Act of June 7, 1878, ch. 160, 20 Stat. 99.

292. Skeel, *supra* note 283, at 323.

Congress repealed them.<sup>293</sup> However, since the passage of the Bankruptcy Code in 1898, the United States has retained the concept of bankruptcy and borrowers' ability to obtain a fresh start.<sup>294</sup> This history of the various Codes also shows the ability of the Bankruptcy Code to improve the American economy.<sup>295</sup>

The 1898 Bankruptcy Code treated federal student loans like any other unsecured debt.<sup>296</sup> It was not until 1978, with the incorporation of the "modern" Bankruptcy Code, that the Code separated federal student loans from other unsecured debt in their treatment under the Code.<sup>297</sup> Federal student loans, which were not created until the 1950s,<sup>298</sup> obviously could not have been addressed until the 1978 Bankruptcy Code was enacted and modernized the bankruptcy system.<sup>299</sup> Beginning with the Education Amendments of 1976,<sup>300</sup> Congress made it more difficult to discharge federal student loans because of perceived abuses in the bankruptcy system by student loan

293. *Id.*

294. See Paulette J. Delk, *Lien Avoidance Under Section 522(F) of the Bankruptcy Code: The Winding Road to the Supreme Court*, 26 WAKE FOREST L. REV. 879, 879–81 (1991) (discussing the "fresh start" policy of bankruptcy).

295. Skeel, *supra* note 283, at 323.

296. See Craig Peyton Gaumer, *Chaos in the Courts*, AM. BANKR. INST. J., May 23, 2004, at 8.

297. See 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, 99–100 (2002). After the 1898 Act, Congress attempted to update the 1898 Act, by passing several amendments from the 1930s through the 1970s. See Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 30–31 (1995). These Amendments did not make any sweeping changes; they typically applied to specific issues only. *Id.*

298. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958). At the heart of NDEA was the National Defense Student Loan (NDSL) program, which for the first time offered federally provided student loans to Americans seeking postsecondary education. *Id.* Congress revamped the NDSL and renamed the program the "Perkins Loan Program" after Rep. Carl Perkins of Kentucky. See Higher Education Amendments of 1986, Pub. L. No. 99-498, 100 Stat. 1268 (1986).

299. Darrell Dunham & Ronald A. Buch, *Educational Debts Under the Bankruptcy Code*, 22 MEMPHIS ST. U. L. REV. 679, 680 (1992).

300. Education Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2141 (repealed 1978) (codified at 20 U.S.C. § 1087-3 (1976)). The provision reads in pertinent part:

Five-year nondischargeability of certain loan debts . . . . A debt which is a loan insured or guaranteed under the authority of this part may be released by a discharge in bankruptcy under the Bankruptcy Act only if such discharge is granted after the five-year period . . . beginning on the date of commencement of the repayment period of such loan, except that prior to the expiration of the five year-period, such loan may be released only . . . [if it] will impose an undue hardship on the debtor or his dependents.

*Id.* Congress repealed 20 U.S.C. § 1087-3 when it passed the Bankruptcy Reform Act of 1978. *Id.*

borrowers.<sup>301</sup> This perception grew as federal student loan spending increased dramatically in the 1970s, and many began to see the borrower's ability to discharge the federal student loans as a possible abuse that could be taken advantage of by student borrowers.<sup>302</sup>

Because of these concerns, Congress established a Commission on the Bankruptcy Laws of the United States in 1970.<sup>303</sup> Three years later, the Commission issued a report<sup>304</sup> that suggested bankruptcy reform and drafted a bill.<sup>305</sup> The report was separated into two parts.<sup>306</sup> Part one contained the findings and recommendations of the Commission.<sup>307</sup> Part two consisted of the proposed changes to the Bankruptcy Code.<sup>308</sup> This extensive study of the United States' economy and bankruptcy's role in the economy resulted in the Bankruptcy Reform Act of 1978, which was signed by President Carter on November 6, 1978, and took effect on October 1, 1979.<sup>309</sup>

The few stories of recent college graduates who obtained discharges of their federal student loans, without even attempting repayment, served as the catalyst for the changes that Congress and the Commission proposed and enacted.<sup>310</sup> Publicized stories of doctors and lawyers who abused the federal student loan discharge provision added to Congressional concerns that borrowers were

301. H.R. REP. NO. 94-1232, at 13 (1976).

302. See, e.g., Peter B. Barlow, *Nondischargeability of Educational Debts Under Section 523(A)(8) of the Bankruptcy Code; Equitable Treatment of Cosigners and Guarantors?*, 11 BANKR. DEV. J. 481, 483 (1995).

303. S.J. RES. 88, 91st Cong., Pub. L. No. 91-354, 84 Stat. 468 (1970); S. REP. NO. 95-989, at 1 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787. The Commission became operational in June 1971. *Id.*

304. H.R. DOC. NO. 93-137 (1973).

305. H.R. 10792, 93rd Cong. (1973); S. 2565, 93rd Cong. (1973). Many of the recommendations of the Commission stemmed from recommendations made by the Brookings Institute's study that concluded in 1971. DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* 143 (2001).

306. S. REP. NO. 95-989, at 1.

307. *Id.*

308. *Id.* at 2.

309. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (effective Oct. 1, 1979) (codified as amended at 11 U.S.C. §§ *et seq.* (2000)). For a general discussion of the legislative history of the Bankruptcy Reform Act of 1978, see H.R. REP. NO. 595, 95th Cong. (1977), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 5963, 5963-65. For a complete history of the Act including the documents, see *generally* BANKRUPTCY REFORM ACT OF 1978: A LEGISLATIVE HISTORY (Alan N. Resnick & Eugene M. Wypyski eds., 1979).

310. H.R. DOC. NO. 93-137, pt. 1, at 176 (1973).

intentionally exploiting the federal student loan program to get a free education.<sup>311</sup> However, during this time, Congress disregarded empirical evidence from a General Accounting Office study that found that less than one percent of all federally insured and guaranteed student loans were discharged in bankruptcy. Simply put, the discharge of federal student loans in bankruptcy proceeding was too minor to threaten the economic viability of the student-loan program.<sup>312</sup> However, since that time, more borrowers are taking more money each year.<sup>313</sup> Thus, Congress wanted to make sure that borrowers would not abuse the system.<sup>314</sup> Some members of Congress even worried that if federal student loans continued to be treated like other unsecured debts during bankruptcy, it could threaten the existence of the entire federal student loan program.<sup>315</sup>

In 1976, because of the growing reliance on federal student loans and Congressional concerns, Congress included Section 523(a)(8)(A) in the Bankruptcy Code.<sup>316</sup> Section 523(a)(8)(A) required the borrowers to show undue hardship before they could be discharged.<sup>317</sup> Furthermore, it prohibited the discharge of federal student loans under Chapter 7 petitions unless the student loans became due at least five years before the filing of the petition, unless the borrower could prove undue hardship.<sup>318</sup> These provisions were

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311. See Robert F. Salvin, *Student Loans, Bankruptcy and the Fresh Start Policy: Must Doctors be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 145 (1996).

312. Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. LJ. 179, 181 (2009).

313. Emily Driscoll, *The Student Loan Debt Crisis: Welcome to the \$1 Trillion Club*, FOX BUSINESS (Jan. 2, 2013), <http://www.foxbusiness.com/personal-finance/2013/01/02/student-loan-debt-crisis-welcome-to-1-trillion-club/> (discussing the rate that borrowers are increasingly borrowing student loans).

314. H.R. DOC. NO. 93-137, pt. 1, at 176.

315. See, e.g., H.R. DOC. NO. 93-137, pt. 1, at 141 (warning that the federal student loan program's integrity was at stake); 124 CONG. REC. H1791 (daily ed. Feb. 1, 1978) (statement of Rep. Ertel): see also *In re Lohman*, 79 B.R. 576, 580 (Bankr. D. Vt. 1987) (stating that prior to 1976, courts presumed federal student loan discharge).

316. Education Amendments of 1976, Pub. L. No. 94-482, § 127(a), 90 Stat. 2081, 2141 (codified as amended in scattered section of 20 U.S.C.) (repealed in 1978).

317. *Id.*

318. See H.R. DOC. NO. 93-137, pt. 1, at 174, pt. 2, at 136 (containing the Commission's proposal for borrowers to wait five years into repayment before being able to file for bankruptcy on their student loans).



included in the modern Bankruptcy Code enacted in 1978.<sup>319</sup> Twelve years later, in 1990, Congress updated the Bankruptcy Code again to lengthen the five-year waiting period to seven years unless, as before, the borrower could prove undue hardship.<sup>320</sup> In addition, this same time requirement and undue hardship standard was expanded to include Chapter 13 petitions.<sup>321</sup>

Even with these significant changes, Congress was convinced that abusive filings were still occurring and that they would only get worse.<sup>322</sup> Thus, the Bankruptcy Code was again amended in 1998.<sup>323</sup> The 1998 amendment removed the time component altogether and left only the undue hardship provision as the sole means of discharging federal student loans.<sup>324</sup> The last significant change to the Bankruptcy Code occurred in 2005.<sup>325</sup> Congress, under pressure from special interest groups, changed the definition of student loans covered under § 523(a)(8) to include private loans, thus making any student loan, federal or not, essentially non-dischargeable in bankruptcy.<sup>326</sup> To have federal student loans discharged in a bankruptcy proceeding the borrower must show “undue hardship.”<sup>327</sup> Courts interpret undue hardship as a very high standard to meet.<sup>328</sup> The Bankruptcy Code still does not define undue hardship, and the courts have developed a variety of unpredictable tests for the undue hardship standard to determine whether a borrower qualifies for discharge.<sup>329</sup> The most common test is discussed below.<sup>330</sup>

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319. Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2591 (1978) (codified as amended at 11 U.S.C. § 523(a)(8) (2000)).

320. Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789.

321. *Id.*; see also Carolyn J. Wilson, *Administrative Law and Procedure—Student Loan Discharges Under Chapter 13 Bankruptcy and Ripeness for Adjudication—Educational Credit Management Corporation v. Coleman (In re Coleman)*, 15 SUFFOLK J. TRIAL & APP. ADVOC. 165, 168–70 (2010) (discussing the difficulty courts had in applying the *Brunner* test that was originally used for Chapter 7 petitions being used for Chapter 13 petitions now).

322. See Salvin *supra* note 311, at 180.

323. Higher Education Amendments of 1998, Pub. L. No. 105-244, 112 Stat. 1832.

324. *Id.*

325. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23.

326. *Id.*

327. 11 U.S.C. § 523(a)(8) (2012).

328. See *infra* Part V.B.

329. See Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An*

### B. *The Brunner Test*<sup>331</sup>

The *Brunner* test is a three-prong test requiring borrowers to show that there is practically no way they could ever repay their federal student loans in order to have them discharged.<sup>332</sup> Borrowers must pass, or prove, all three prongs of the *Brunner* test to have their student loans discharged.<sup>333</sup> If a borrower fails to prove undue hardship on any prong, then the inquiry stops.<sup>334</sup> The borrower must prove each prong of the *Brunner* test by a preponderance of the evidence.<sup>335</sup> However, because this is a judicial rule, courts interpret the rule differently to determine the existence of undue hardship.<sup>336</sup> Nonetheless, most bankruptcy courts have chosen to interpret the *Brunner* test quite narrowly.<sup>337</sup> The following sections describe how courts have interpreted undue hardship.<sup>338</sup>

#### 1. *The First Prong*

The first prong of the *Brunner* test states that borrowers must show that if they were to pay their federal student loans, they would not be able to maintain a minimal standard of living.<sup>339</sup> “[T]his prong of

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*Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 486–91 (2005) (discussing the various tests courts have used).

330. See *infra*, Part V.B.

331. *Brunner v. New York State Higher Educ. Servs. Corp.* (*In Re Brunner*), 831 F.2d 395 (2d Cir. 1987).

332. See Dunham & Buch, *supra* note 299, at 702 n.127 (stating that regardless of which undue hardship test is used, most courts find that borrower has not established undue hardship, and these courts list *Brunner* as support).

333. See, e.g., *In re Frushour*, 433 F.3d 393, 400 (4th Cir. 2005); *In re O’Neal*, 390 B.R. 821, 824 (Bankr. D.S.C. 2008).

334. *In re Kidd*, 472 B.R. 857, 862 (Bankr. N.D. Ga. 2012).

335. See, e.g., *In re Lilly*, No. 09-02666-LT7, 2013 WL 489019, at \*2 (Bankr. S.D. Cal. Jan. 31, 2013); *In re Malone*, 469 B.R. 768, 773 (Bankr. N.D. Ohio 2012).

336. See, e.g., Terrence L. Michael & Janie M. Phelps, “Judges?!—We Don’t Need No Stinking Judges!!!”: *The Discharge of Student Loans in Bankruptcy Cases and The Income Contingent Repayment Plan*, 38 TEX. TECH L. REV. 73, 91 (2005).

337. See *In re Mosley*, 330 B.R. 832, 841 (Bankr. N.D. Ga. 2005) (stating that “the *Brunner* test is often strictly interpreted” resulting in denial of discharge for borrowers who are truly deserving and thus not complying with fresh start policy and goal of the Bankruptcy Code); *In re Speer*, 272 B.R. 186, 193 (Bankr. W.D. Tex. 2001) (describing *Brunner* test as making “it as tough as humanly possible to discharge a student loan”).

338. See *infra* Part IV.B. sec. 1–3.

339. *Brunner v. New York State Higher Educ. Servs. Corp.* (*In Re Brunner*), 831 F.2d 395, 396 (2d

*Brunner* contemplates an evaluation of the *present* impact” that the repayment of the federal student loan “has upon the standard of living of the [borrower] and the [borrower’s] dependents,” while considering the borrower’s “*current* income and expenses.”<sup>340</sup> In the 2012 case *Braun v. Sallie Mae (In re Braun)*, the Department of Education (DOE) argued that the borrower could maintain a minimal standard of living because the borrower was eligible for alternative repayment plans and under either plan the required payment would be zero.<sup>341</sup> This argument is becoming more common with the addition of the various repayment plans available to borrowers.<sup>342</sup>

While the effect may be the same, an alternative repayment plan’s payment, if zero, does not compare with a deferment or forbearance of the borrower’s federal student loans, where the loans are not in repayment status and no monthly payment of any amount is even calculated. With most repayment plans, the actual amount owed by the borrower increases over the time they are making their payments.<sup>343</sup> Thus, if the DOE’s argument becomes precedent, no borrowers would ever qualify for a discharge of their federal student loans. If that were the intention of Congress in 2005, they would have removed the undue hardship provision entirely from the Bankruptcy Code.<sup>344</sup> Congress did not remove it, so the DOE’s argument must fail. As a result, federal student loans are considered as a part of the borrower’s entire debt in consideration of their bankruptcy petition.

Therefore, borrowers are back to the *Brunner* test’s original inquiry. If borrowers can show that they cannot maintain the minimal standard of living, then they have shown that an undue hardship may

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Cir. 1987).

340. *In re Greene*, 484 B.R. 98, 115 (Bankr. E.D. Va. 2012).

341. *In re Braun*, No. 1:10-BK-1169-GM, 2012 WL 5199163, at \*6–8. (Bankr. E.D. Va. Oct. 19, 2012).

342. *See, e.g., In re Grove*, 323 B.R. 216, 229 (Bankr. N.D. Ohio 2005); *In re Durrani*, 311 B.R. 496, 507 (Bankr. N.D. Ill. 2004).

343. *See* Philip G. Schrag, *Federal Student Loan Repayment Assistance for Public Interest Lawyers and Other Employees of Governments and Nonprofit Organizations*, 36 HOFSTRA L. REV. 27, 36–38 (2007) (discussing the impact of alternative repayment plans).

344. *See* Kyle L. Grant, Note, *Student Loans in Bankruptcy and the “Undue Hardship” Exception: Who Should Foot The Bill?*, 2011 BYU L. REV. 819, 829 (2011) (stating that not only did Congress not remove the undue hardship clause but expanded it).

exist.<sup>345</sup> With the inception of the IBR and similar repayment plans, does this prong of the *Brunner* test become obsolete? Does that mean if a borrower can qualify for a zero-dollar-a-month repayment plan, the first prong of the *Brunner* test automatically becomes a question of the borrower's general state and not just her federal student loans? If the borrower is able to file for bankruptcy protection, and he qualifies for zero monthly payments on his federal student loans, then one should logically assume the first prong of the *Brunner* test is satisfied and thus obsolete. The IBR is taking us in this direction.<sup>346</sup>

However, this is only the first prong of the *Brunner* test. Even if the borrower passes the first prong of the *Brunner* test, they still must pass the other two prongs.<sup>347</sup> The first prong has been very difficult to satisfy, but with the passage of the IBR, courts need to change their stance on this prong significantly in light of the IBR's impact on federal student loan repayments.

*Healey v. Mass. Higher Educ. (In re Healey)* is one example demonstrating the need for the IBR and its effect on the first prong of the *Brunner* test.<sup>348</sup> In *In re Healey*, the borrower was denied undue hardship based upon the first prong of the *Brunner* test because, although she could not maintain the minimal standard of living, she did not demonstrate that she was "making a strenuous effort to maximize her personal income within the practical limitations of her vocational profile."<sup>349</sup> The Eastern District of Michigan also stated the lower bankruptcy court erred by not requiring the borrower to quit her job as a school teacher and find a higher paying job like the one she had before.<sup>350</sup> In fact, the court even stated she really did not

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345. *Brunner v. New York State Higher Educ. Servs. Corp. (In Re Brunner)*, 831 F.2d 395, 396 (2d Cir. 1987).

346. See Brief of for Nat'l Consumer Law Ctr. & Nat'l Ass'n of Consumer Bankr. Attorneys as Amici Curiae Supporting Appellants at 8–23, *In re Murphy*, No. 14-1691 (1st Cir. July 29, 2015), <https://www.nclc.org/images/pdf/bankruptcy/brief-murphy-1st-cir-amicus.pdf>.

347. See, e.g., *In re Roberson*, 999 F.2d 1132, 1135 (7th Cir. 1993); *In re Lehman*, 226 B.R. 805, 808 (Bankr. D. Vt. 1998); Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue hardship?*, 185 ED. L. REP. 783, 795 (2004).

348. *In re Healey*, 161 B.R. 389, 395 (E.D. Mich. 1993).

349. *Id.* at 394 (citing *North Dakota State Board of Higher Educ. v. French*, 62 B.R. 235, 241 (Bankr. D. Minn. 1986)).

350. *Id.*

work a forty-hour per week job because she had paid holidays.<sup>351</sup> This is one example of how absurd a court can be in determining the “minimal standard of living” prong of the *Brunner* test. Now that the IBR payment structures state the borrower may be able to have a payment of zero, is it time to declare the first prong of the *Brunner* test obsolete?

## 2. *The Second Prong*

The ways in which courts have determined cases under the second prong of the *Brunner* test are equally shocking.<sup>352</sup> This prong of the *Brunner* test is forward-looking.<sup>353</sup> Therefore, courts must look into the borrower’s future, which is the significant portion of the loan repayment period, to see if the borrower will be able to repay his federal student loans.<sup>354</sup> The second prong of the *Brunner* test “is intended to effect the ‘clear congressional intent exhibited in [11 U.S.C. § 523(a)(8)] to make the discharge of [federal] student loans more difficult than that of other nonexcepted debt.’”<sup>355</sup> Because of this intent, the borrower must “demonstrate insurmountable barriers” to her ability to pay their federal student loans in the future.<sup>356</sup>

One example of how the bankruptcy courts are forward-looking is the case *Standfuss v. United States Department of Education (In re Standfuss)*.<sup>357</sup> In *In re Standfuss*, the court determined that it was unlikely that the borrowers’ income would increase substantially over the repayment period of their federal student loans.<sup>358</sup> However, there was evidence and testimony to support the court’s finding that the

351. *Id.* at 394 n.7.

352. *See, e.g., In re Davis*, 373 B.R. 241, 250 (W.D.N.Y. 2007) (providing a list of possible reasons that would allow the borrower to satisfy the second prong of the *Brunner* test); *In re Nys*, 308 B.R. 436, 446–47 (B.A.P. 9th Cir. 2004) (providing a more detailed list including cases that were determined using the *Brunner* test).

353. *See, e.g., In re Greene* 484 B.R. 98, 115 (Bankr. E.D. Va. 2012) (stating the ICP should be considered in this forward-looking prong); *In re Mayer*, 198 B.R. 116, 127 (Bankr. E.D. Pa. 1996) (stating the court must look more than five years into the future).

354. *In re Rifino*, 245 F.3d 1083, 1088 (9th Cir. 2001). This prong implies a “certainty of hopelessness” on the debtor’s part. *In re Wallace*, 443 B.R. 781, 789 (Bankr. S.D. Ohio 2010).

355. *In re Rifino*, 245 F.3d at 1088–89 (quoting *In re Pena*, 155 F.3d 1108, 1111 (9th Cir. 1998)).

356. *In re Nys*, 308 B.R. at 444.

357. *In re Standfuss*, 245 B.R. 356 (Bankr. E.D. Mo. 2000).

358. *Id.* at 361.

borrowers' expenses would decrease in the future.<sup>359</sup> The decrease was caused by the fact that two of the borrower's dependents would reach the age of majority within five years of the hearing.<sup>360</sup> Thus, being forward-looking, the bankruptcy court found no undue hardship because the repayment period for the student loan was twenty-five years, the borrower's IBR plan was flexible, and the borrower's expenses would reduce in the next five years netting a positive effect on the borrowers' ability to repay their student loans.<sup>361</sup> The court did not consider possible increases in expenses or new expenses that could arise in the future.<sup>362</sup>

What that particular court, and others, seem to overlook is the possibility of borrowers incurring new expenses.<sup>363</sup> It is easy for a court to conclude that a child is reaching the age of majority, but it is much more difficult to accept the reality that possible events could happen that would cause the borrower to take care of that child as an adult. The nature of this approach by the courts shows that the second prong of the *Brunner* test needs to be changed. How can anyone expect to predict events twenty to twenty-five years into the future? Furthermore, if courts are expected to predict events, should they just predict events that possibly improve the borrower's position or should courts also take into account what possible events could occur that could worsen the borrower's position? The only consideration should be whether current conditions prohibit borrowers from repaying their federal student loans.<sup>364</sup>

In addition, because courts take into account future predictions to determine possible discharge, how do courts take into account the

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359. *Id.*

360. *Id.*

361. *Id.*

362. *See id.*

363. *See, e.g., In re Douglas*, 366 B.R. 241, 255–56 (Bankr. M.D. Ga. 2007) (discussing in detail how courts interpret the second prong of the *Brunner* test and never mentions any additional expenses occurring in the future for the borrower). There are hundreds of cases that are similar to *Douglas*, but none address a borrower's additional expenses in the future.

364. *See, e.g., Abbye Atkinson, Race, Education Loans & Bankruptcy*, 16 MICH. J. RACE & L. 1, 23 (2010); Salvin, *supra* note 311, at 196; *see also* Seth J. Gerson, *Separate Classification of Student Loans in Chapter 13*, 73 WASH. U.L.Q. 269, 290–91 (1995) (arguing for federal student loans to be included in Chapter 13 payment structure like other unsecured debts).

IBR and other repayment plans into their predictions of the future? The fact that the required payments on the borrower's federal student loans may change under any alternative repayment plan are certain in the future, and thus should be logically evaluated in the forward-looking second prong of the *Brunner* test.<sup>365</sup> For example, one district court remanded a case back to the bankruptcy court to determine the impact that the ICR would have on the borrower's ability to pay her student loans in the future.<sup>366</sup> Any court's evaluation should include an equal assessment of the borrower's future ability to repay his federal student loans. In any case, with the IBR, the second prong of the *Brunner* test essentially becomes obsolete. However, there is still one last prong for the borrower to satisfy.<sup>367</sup>

### 3. *The Third Prong*

The third prong of the *Brunner* test is the "good faith" requirement.<sup>368</sup> A significant portion of the good faith requirement is for the borrower to show the borrower has made some effort in repaying federal student loans and to what extent the borrower has made efforts to repay.<sup>369</sup> Under this prong courts look to see if borrowers have tried alternative repayment plans before asking for their federal student loans to be discharged in bankruptcy.<sup>370</sup> A borrower's failure to use either the IRC or IBR plans is not a "per se" showing of lack of good faith, but is probative of the borrower's intent to repay her student loans.<sup>371</sup> In *Pennsylvania Higher*

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365. *In re Greene*, 484 B.R. 98, 115 (Bankr. E.D. Va. 2012).

366. *In re Wallace*, 259 B.R. 170, 182 (C.D. Cal. 2000).

367. *See infra* Part IV.B. sec. 3.

368. *Brunner v. New York State Higher Educ. Servs. Corp. (In Re Brunner)*, 831 F.2d 395, 396 (2d Cir. 1987).

369. *See, e.g., In re Roberts*, 442 B.R. 116, 120 (Bankr. N.D. Ohio 2010) (citing *In re Cekic-Torres*, 431 B.R. 785, 794 (Bankr. N.D. Ohio 2010)); *In re Gibson*, 428 B.R. 385, 391 (Bankr. W.D. Mich. 2010) (stating the court was "particularly moved by the fact she has not made any payments" on her student loans).

370. *See, e.g., In re Tirsch*, 409 F.3d 677, 682 (6th Cir. 2005); *In re Greene*, 484 B.R. at 113 (stating that a borrower participating in the ICR plan is "relevant to much of the analysis conducted by a bankruptcy court to determine if undue hardship exists").

371. *In re Tirsch*, 409 F.3d at 682; *In re Branch*, No.09-31844-sgj-7, 2010 WL 817395, at \*2 (Bankr. N.D. Tex. Mar. 9, 2010) (stating the borrower's "failure to apply for an income-based repayment plan . . . evidences a lack of good faith in repaying his student loan").

*Education Assistance Agency v. Birrane (In re Birrane)*,<sup>372</sup> the court found no good faith on the borrower's part when he failed to pursue an alternative payment plan once it became available.<sup>373</sup> Moreover, in *Educational Credit Management Corp. v. Mason (In re Mason)*,<sup>374</sup> the court stated the borrower failed to show good faith in repaying his student loans because he did not pursue an alternative repayment plan with "diligence."<sup>375</sup> Thus, courts will look at the borrower's efforts to use an alternative repayment plan and look at the borrower with disfavor if one is not used.<sup>376</sup>

Over the years, new repayment plans have become available for borrowers to lower their student loan payments.<sup>377</sup> Most courts, as referenced above, have denied the discharge of student loans if the borrower had not tried to use one of these repayment plan options before petitioning the court.<sup>378</sup>

In *Barrett v. Education Credit Management Corporation (In re Barrett)*, however, the court explained that a borrower's failure to participate in an alternative repayment plan—the IBR was not in existence then—is not a per se indication of lack of good faith.<sup>379</sup> If Congress intended to require borrowers' participation in an alternative repayment plan it could have done so when the Bankruptcy Code was changed in 2005.<sup>380</sup> The court further explained that enrollment in an alternative repayment plan has potential negative consequences for the borrower.<sup>381</sup> First, the court acknowledged that the borrower will have the student loans for

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372. *In re Birrane*, 287 B.R. 490 (B.A.P. 9th Cir. 2002).

373. *Id.* at 500.

374. *In re Mason*, 464 F.3d 878 (9th Cir. 2006).

375. *Id.* at 885.

376. *See id.*

377. *See supra* Part I.

378. *See In re Birrane*, 287 B.R. at 500; *In re Mason*, 464 F.3d at 885. *But see In re Thomsen*, 234 B.R. 506, 514 (Bankr. D. Mont. 1999) (granting the discharge of the borrower's student loans even with a zero payment under a ICR payment plan because the borrowers "would simply exchange one huge nondischargeable debt for educational loans for another in the form of nondischargeable income taxes").

379. *In Re Barrett*, 487 F.3d 353, 364 (6th Cir. 2007).

380. *Id.*; *see also* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, 119 Stat. 23 (codified as amendments to 11 U.S.C. § 101 *et. seq.* (2012)).

381. *In Re Barrett*, 487 F.3d at 364.



twenty-five years.<sup>382</sup> Because the IRC plan passed in 1994,<sup>383</sup> no borrower had reached that twenty-five year plateau by 2005.<sup>384</sup> The first borrowers will reach the twenty-five year plateau in 2019.<sup>385</sup> Nonetheless, at the end of the twenty-five years—or twenty years with the ICR or IBR plan—if the borrower has been unable to repay all the student loans, then the remaining student loan debt is cancelled and treated as taxable income.<sup>386</sup> Again, no borrower has reached the twenty-five year mark.<sup>387</sup> Therefore, what Congress and the President will do as that date approaches is yet to be determined.<sup>388</sup> After finding that the borrower had established a present and future inability to pay his federal student loan debt, the court concluded that the borrower's decision not to enroll in the ICR plan was not a per se indication of bad faith due, in part, to the possibly significant tax consequences.<sup>389</sup>

The court's approach makes sense under the good faith requirement of the *Brunner* test. If a borrower has not attempted to lower her payments before petitioning the court, judges could interpret that as not using every effort to try to repay her student loans.<sup>390</sup> Furthermore, it does not help the borrower's position if, under one of these repayment plans, the payments are zero.<sup>391</sup> Courts must also consider the future tax consequences. As a result, under the *Brunner* test, courts have allowed the discharge of student loans where a borrower's monthly payments were zero.<sup>392</sup> Again, the IBR has changed things.

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382. *Id.*

383. 20 U.S.C. § 1087e(b)(9)(A) (2012).

384. *See id.*

385. *See id.*

386. *In re Barrett*, 487 F.3d at 364.

387. *See supra* notes 383–85 and accompanying text.

388. *See* Betsy Mayotte, *4 Must-Know Facts About Obama's New Student Loan Plan*, US NEWS (June 11, 2014, 10:00 AM), <http://www.usnews.com/education/blogs/student-loan-ranger/2014/06/11/4-must-know-facts-about-obamas-new-student-loan-plan>.

389. *In re Barrett*, 487 F.3d at 364–65.

390. *In re Mason*, 464 F.3d 878, 885 (9th Cir. 2006); *In re Birrane*, 287 B.R. 490, 500 (B.A.P. 9th Cir. 2002).

391. *See, e.g., In re Krieger*, No. 11-80144, 2012 WL 1155687, at \*19 (Bankr. C.D. Ill. Apr. 5, 2012).

392. *See, e.g., In re Rutherford*, 317 B.R. 865, 881 (Bankr. N.D. Ala. 2004) (using the future tax consequences of a possible zero monthly payment to show undue hardship).

## V. THE FUTURE OF FEDERAL STUDENT LOANS IN BANKRUPTCY

Bankruptcy courts are going to have to address three questions.<sup>393</sup> First, whether zero dollar monthly payments under the IBR repayment plan are evidence that a borrower cannot maintain a minimum standard of living, as required by the *Brunner* test.<sup>394</sup> If the inability to maintain a minimum standard of living is likely to persist, does this allow the discharge of federal student loans?<sup>395</sup> Moreover, does the fact that borrowers are attempting to repay their student loans, even though their payments are zero dollars each month, constitute a good faith effort to repay their loans and make the *Brunner* test obsolete?<sup>396</sup> Second, with the amount of a borrower's federal student loans increasing under these repayment plans, does this not reduce a borrower's ability to pay his loans in the future?<sup>397</sup> Third, with the IBR in effect, is this the first step in allowing discharge of federal student loans in bankruptcy?<sup>398</sup>

A. *IBR and the Three Prongs of the Brunner Test*

With the incorporation of the IBR, does that eliminate the question of undue hardship if the borrower can obtain a zero dollar monthly payment? Courts have struggled with this question since the beginning of the IBR and the other repayment plans.<sup>399</sup> The

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393. *Brunner v. New York State Higher Educ. Servs. Corp. (In Re Brunner)*, 831 F.2d 395, 396 (2d Cir. 1987); Craig Andresen, *Student Loans: Two Appeals Court Cases Question the Brunner Test*, BANKR. L. NETWORK (May 11, 2013), <http://www.bankruptcylawnetwork.com/student-loans-two-appeals-court-cases-question-the-brunner-test/>.

394. *Brunner*, 831 F.2d at 396.

395. *Id.*

396. *Id.*; *In re Krieger*, 2012 WL 1155687 at \*19.

397. *See Brunner*, 831 F.2d at 396.

398. *See* Joshua Cohen, *What Happens to Your Student Loans When you File Bankruptcy*, STUDENT LOAN LAW. (May 6, 2014), <http://thestudentloanlawyer.com/703/what-happens-to-your-student-loans-when-you-file-bankruptcy/>.

399. *See generally* Lelia B. Helms & James D. Jorgensen, *Recent Developments In Postsecondary Education Law: 2009*, 260 ED. L. REP. 493, 500–01 (2010); Jonathan M. Layman, Note, *Forgiven But Not Forgotten: Taxation Of Forgiven Student Loans Under The Income-Based-Repayment Plan*, 39 CAP. U.L. REV. 131, 153–54 (2011); Robert B. Milligan, Comment, *Putting An End To Judicial Lawmaking: Abolishing The Undue Hardship Exception For Student Loans In Bankruptcy*, 34 U.C. DAVIS L. REV. 221, 260 (2000).

Bankruptcy Code still contains the undue hardship provision,<sup>400</sup> but is that going to be interpreted the same in regards to the *Brunner* test and the IBR? Logically, one could ascertain that if the borrower's payment is zero then she could maintain a minimal standard of living under the first prong of the *Brunner* test. Does the *Brunner* test fail, however, in this instance because no borrower would ever qualify for undue hardship? If Congress wanted to eliminate the undue hardship provision, it could have in 2005 with the last major changes to the Bankruptcy Code.<sup>401</sup> Thus, this prong of the *Brunner* test is obsolete with the passage of the IBR.

The second prong of the *Brunner* test is forward looking.<sup>402</sup> Under the IBR, if the amount owed increases every year—and borrowers face tax consequences for any amount forgiven—does that present a case that their situation could be worse? If this is a common result, then the second prong of the *Brunner* test is obsolete as applied to federal student loans.<sup>403</sup>

Lastly, the third prong of the *Brunner* test is obsolete. Because the IBR allows for monthly payments of zero for an indefinite term, the good faith effort requirement is instantly satisfied.<sup>404</sup>

### B. Out-of-Control Federal Student Loan Debt

For now, the IBR co-exists with the undue hardship provision of the Bankruptcy Code.<sup>405</sup> Furthermore, the concept of treating federal student loans differently than other types of unsecured debt still exists.<sup>406</sup> This is temporary, however, because eventually borrowers will not be able to repay their loans.<sup>407</sup> When this occurs, the United

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400. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59; 20 U.S.C. § 1087e(d)(1)(E).

401. Bankruptcy Abuse Prevention and Consumer Protection Act § 220.

402. *Brunner v. New York State Higher Educ. Servs. Corp. (In Re Brunner)*, 831 F.2d 395, 396 (2d Cir. 1987).

403. *See id.*

404. Layman, *supra* note 399, at 137, 153.

405. Cohen, *supra* note 398.

406. Adam Levitin, *The Examiners: Discharge Private Student Loans, But Federal Loans Have Safety Net*, WALL ST. J. (May 11, 2015, 12:04 PM), <http://blogs.wsj.com/bankruptcy/2015/05/11/the-examiners-discharge-private-student-loans-but-federal-loans-have-safety-net/>.

407. *See* Kelly Field, *Government Vastly Undercounts Defaults*, THE CHRON. HIGHER EDUC. (July 11,

States is going to have to decide how to use federal student loans in the future. If federal student loans are to be included in bankruptcy like any other unsecured debt, then the federal government will need to restructure the entire federal student loan program including how much to provide to the student borrowers.<sup>408</sup>

The federal student loan debt problem is not unlike other financial issues in the American economy. The recent mortgage crisis signaled that some issues need special attention from the federal government.<sup>409</sup> The federal student loan dilemma will need the special attention because of the federal government's rules on the discharge of those loans.<sup>410</sup> Some economists suggest that the existing student loan debt has hindered recovery from the mortgage crisis.<sup>411</sup>

Student loan debt has a large impact on a borrower's credit report.<sup>412</sup> The amount of a borrower's debt can affect her ability to qualify for other loans.<sup>413</sup> Furthermore, the federal student loan debt can also influence interest rates for these other loans.<sup>414</sup> Thus, existing student loan debt is influencing the ability for the American economy to recover and will be the catalyst for a future economic crisis.<sup>415</sup>

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2010), <http://chronicle.com/article/Many-More-Students-Are/66223/> (discussing the actual default rate being reported is much higher due to the reporting methods of colleges); *see also supra* Part I.A (discussing the student loan debt).

408. Shahien Nasiripour, *Obama to Announce Student Loan Reforms as Education Department Stalls*, HUFFINGTON POST (Mar. 10, 2015, 8:59 AM), [http://www.huffingtonpost.com/2015/03/10/obama-student-loans-rights\\_n\\_6835922.html](http://www.huffingtonpost.com/2015/03/10/obama-student-loans-rights_n_6835922.html).

409. *See* Kimberly Amadeo, *Could the Mortgage Crisis and Bank Bailout Have Been Prevented?*, ABOUT.COM (Mar. 13, 2015), [http://useconomy.about.com/od/criticalissues/a/prevent\\_crisis.htm](http://useconomy.about.com/od/criticalissues/a/prevent_crisis.htm) (discussing what the government could have done to prevent the collapse); Polyana da Costa & Crissinda Ponder, *Financial Crisis Timeline: Collapse and Bailout*, BANKRATE.COM, <http://www.bankrate.com/finance/federal-reserve/financial-crisis-timeline.aspx> (last visited Mar. 11, 2016) (providing the bailout timeline); Ryan Guina, *The 2008–2009 Financial Crisis—Causes and Effects*, CASHMONEYLIFE, <http://cashmoneylife.com/economic-financial-crisis-2008-causes/> (last updated Dec. 29, 2011) (discussing the causes of the mortgage collapse).

410. 11 U.S.C. § 523(a)(8) (2012).

411. Robert Dietz, *The Connection Between Student Loans and Housing*, NAT'L ASS'N HOME BUILDERS (June 21, 2012), <http://eyeonhousing.wordpress.com/2012/06/21/student-loans-and-housing/>.

412. *See* Cappel, *supra* note 45.

413. *See* Dietz, *supra* note 411.

414. *See Credit Scores*, FINAID, <http://www.finaid.org/loans/creditscores.phtml> (last visited Mar. 11, 2016) (discussing the impact various items have on the borrower's credit score).

415. *See, e.g., Could \$1T Student Loan Debt Derail U.S. Recovery?*, CBS THIS MORNING (Apr. 4,

### C. *Bankruptcy Discharge in the Future?*

By developing different student loan repayment plans, the federal government is acknowledging there is a severe problem that exists in the American economy with the federal student loan debt that currently rests on a large segment of the American population's shoulders. Rather than addressing it directly, the government has delayed the issue for a future administration and Congress to address by passing various alternative repayment plans. At what point will the government and the American public say that there is a need for more changes to the Bankruptcy Code to address the issue of student loan discharge? More importantly, when will Congress create an alternative repayment plan that will accomplish a pseudo-bankruptcy by allowing borrowers that cannot repay their student loans a method of living? This Article argues that the IBR is the foundation of such a method.

The IBR provides that if your income is under a certain amount for twenty years and you are not able to repay the entirety of your student loans, the federal government will forgive the remainder of your federal student loan debt.<sup>416</sup> This is a middle-of-the-road solution to the federal student loan issue. The IBR does not grant an easy exit to borrowers that cannot repay their students loans, but does allow a method to get out from under the debt if necessary.

Under this repayment plan, it is much easier to obtain a payment of 'zero' than the previous repayment plans offered by the federal government.<sup>417</sup> Even if a borrower must pay a little over zero, a substantial percentage of their federal student loans will be forgiven at the end of the twenty years, and that does not include the interest that would be forgiven.<sup>418</sup> The first borrower achieving that twenty-year period of repayments is still over fifteen years away, but the trend of the government repayment plans is to allow for a smaller

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2012, 10:01 AM), [http://www.cbsnews.com/8301-505268\\_162-57409131/could-\\$1t-student-loan-debt-derail-u.s-recovery/](http://www.cbsnews.com/8301-505268_162-57409131/could-$1t-student-loan-debt-derail-u.s-recovery/) (discussing the future impact of the federal student loan debt on the economic recovery and possible future economy).

416. See FINAID, *supra* note 62.

417. See *id.* (comparing repayment plans and showing how each plan calculates its payments).

418. See *id.*

payment and a quicker forgiveness period.<sup>419</sup> Nonetheless, if a borrower has a minimal payment under the IBR, that would allow the borrower to possibly spend more money on other goods and help the economy.

The main hurdle is the tax consequence after the twenty-year period is complete. This could effectively make the situation for the borrower even worse at the end of the twenty-year period. If the remaining amount is forgiven at the end of the twenty years, then society can say no one received a free education. Borrowers have been forced to try to repay loans for twenty years, and then the loans will be forgiven, and the Bankruptcy Code will have been left unchanged. However, the concern over a “free” education remains in the public’s minds.<sup>420</sup>

This government approach, particularly the IBR plan, is moving the federal student loan program closer to a pseudo-bankruptcy program. Another serious hindrance to the IBR becoming a full-blown pseudo-bankruptcy provision is the emergence of for-profit colleges. A large segment of the population views for-profit schools as non-reputable businesses.<sup>421</sup>

It is one approach to allow bankruptcy discharge of federal student loans for public and private colleges, but another approach entirely to allow the discharge of student loans for a for-profit college where someone is making a profit off of the forgiveness of federal student loans. This is a distinction in the public attitudes concerning for-profit colleges and public/private institutions.<sup>422</sup> Nevertheless, very expensive private colleges and universities exist, but the fact they are

419. *Id.*

420. See, e.g., Matthew Yglesias, *Three Problems with Making College Free*, SLATE (Nov. 20, 2013, 3:12 PM), [http://www.slate.com/blogs/moneybox/2013/11/20/college\\_shouldn\\_t\\_be\\_free\\_three\\_big\\_problems\\_with\\_free\\_college.html](http://www.slate.com/blogs/moneybox/2013/11/20/college_shouldn_t_be_free_three_big_problems_with_free_college.html).

421. See, e.g., Amanda Alix, *For-Profit Colleges: Architects of Dreams or Fraudulent Diploma Mills?*, THE MOTLEY FOOL (Dec. 1, 2013), <http://www.fool.com/investing/general/2013/12/01/for-profit-colleges-architects-of-dreams-or-fraudu.aspx>; Tamar Lewin, *Senate Committee Report on For-Profit Colleges Condemns Costs and Practices*, N.Y. TIMES (July 29, 2012), <http://www.nytimes.com/2012/07/30/education/harkin-report-condemns-for-profit-colleges.html>.

422. See, e.g., Karoun Demirjian, *Attorneys General Target For-Profit Colleges Looking to Make a Buck—Especially off Veterans*, LAS VEGAS SUN (June 5, 2012, 2:00 AM), <http://www.lasvegassun.com/news/2012/jun/05/attorneys-general-target-profit-colleges-looking-/#axzz2TwnAjWF9>.

non-profit raises less concerns from the public than a for-profit college does.<sup>423</sup>

There have been many reports and publications about unethical behaviors by for-profit institutions.<sup>424</sup> The history of the Bankruptcy Code, its treatment of federal student loans, and the rise of for-profit schools are connected.<sup>425</sup> As the number of for-profit schools increases and the amount of student loan debt increases, those students who attend those for-profit institutions are also increasing; as a result, the difficulty of discharging student loans has also increased.<sup>426</sup> The origins of making federal student loans more difficult to discharge in bankruptcy coincided with reports of for-profit schools telling students not to worry about repaying their federal student loans because they could discharge them in bankruptcy.<sup>427</sup>

Borrowers should never be singled-out based upon where they decided to go to college. For-profit institutions serve their purpose for students that may not be successful in a public school setting and cannot afford a private school setting. For-profit schools are a choice for those students that are in the middle. However, because of the public's perception, right or wrong, that perception may affect any changes to the Bankruptcy Code or repayment plans that could benefit borrowers from these for-profit institutions. Because the federal government has not distinguished funding for students who attend public, private, or for-profit schools,<sup>428</sup> it should not single-out any borrower based upon where they attend school and the public should not either.

423. See discussion *supra* Part II.

424. See Demirjian, *supra* note 422.

425. See James Colman & Richard Vedder, *For-Profit Education in the United States: A Primer*, CTR. COLL. AFFORDABILITY & PRODUCTIVITY (May 2008), [http://www.centerforcollegeaffordability.org/uploads/For-Profit\\_corr\\_2.pdf](http://www.centerforcollegeaffordability.org/uploads/For-Profit_corr_2.pdf) (discussing the history of for-profit institutions in America).

426. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23 (containing the BAPCPA provisions).

427. See, e.g., Nick Pinto, *National American University Gets Rich from Federal Loans*, CITY PAGES (Nov. 17 2010), <http://www.citypages.com/2010-11-17/news/national-american-university-gets-rich-from-federal-loans/full/> (containing a story of a school telling students that they do not have to worry about repaying their student loans because “no one will come after you if you don't pay”).

428. See FINAID, *supra* note 62.

Nonetheless, perception that students will abuse the federal student loan system led to the near prohibition of student loan discharge in bankruptcy.<sup>429</sup> This needs to be changed, but this Article does not suggest an open door policy to the discharge of federal student loans. However, there will be an inevitable push towards easing the discharge rule or an alternative repayment plan such as the IBR, which is going to “pave the way” for the reality of a pseudo-bankruptcy provision.

Another step that is necessary to satisfy the public’s concerns over forgiving student loans is to separate private student loans from federally supported, or originated, loans that the borrowers have accumulated.<sup>430</sup> This would at least take borrowers back to pre-2005 bankruptcy changes.<sup>431</sup> The IBR treats all federal student loans from every college, public, private or for-profit, the same in its current structure.<sup>432</sup> If the evolution of the IBR will separate the treatment of federal student loans from private loans, then the public would be more receptive in permitting the discharge of federal student loans.

Finally, the IBR has started the reality of student loan bankruptcy and the inclusion of federal student loans under the bankruptcy code, or at least a pseudo-bankruptcy concept to forgive federal student loans. The IBR has made the *Brunner* test obsolete in bankruptcy proceedings because of the zero-a-month payment option, and it has opened the real possibility of borrowers not repaying any of their federal student loans after forgiveness.<sup>433</sup> As the federal student loan debt amount increases and the effect on the economy increases, Congress and the President will have no choice but to maintain the trend<sup>434</sup> of easing the burden of student loan repayment. The final obstacle remaining is limiting loans to attend for-profit schools.

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429. *Id.*

430. See generally Amanda Harmon Cooley, *The Need for Legal Reform of the For-Profit Educational Industry*, 79 TENN. L. REV. 515 (2012).

431. See Jean Braucher, *Mortgaging Human Capital: Federally Funded Subprime Higher Education*, 69 WASH. & LEE L. REV. 439, 455–56 (2012) (discussing how for-profit institutions use Title IV and in-house private loans).

432. See FINAID, *supra* note 62.

433. See Rhode, *supra* note 282.

434. See FINAID, *supra* note 62.



## CONCLUSION

To solve national student loan debt in this country, for-profit schools and their role in education must be addressed first. It is not an accident that spiraling federal student loan debt has occurred simultaneously with the growth of for-profit colleges. The movement in this country should be to forgive federal students loans given to students that have attended these institutions. However, in light of what happened at Corinthian Colleges, it further complicates things. Just forgiving federal student loans is not the proper course of action, especially loans obtained at for-profit schools, but rather including these loans once again in the bankruptcy process.

Then only borrowers who truly cannot repay their loans would have them forgiven in the bankruptcy process. This would provide a more 'fair' result that voters would be content with as a result. However, as mentioned, this approach is hindered by the public attitude towards for-profit institutions is warranted.

The concern about for-profit schools and student loans, even with the Corinthian College fiasco, could be alleviated with the progress of the IBR plans. In effect, if a student from one of these colleges cannot get employment, their payments under the most progressive IBR should be zero. Who could not afford that? The argument should never be "I can't get a job so forgive my student loans." Borrowers should use the IBR plan and be accountable, even if the payment is zero. This protects the taxpayers and protects the students that truly cannot repay their student loans. Thus, schools and the DOE should provide better education about the IBR. The public would be less disturbed by the news about for-profit schools if they were hearing that the students from Corinthian were not asking for loan forgiveness but placement on IBR plans until they can obtain employment.

The IBR can assist with the past issues of for-profit education but this nation needs to be progressive in the future. Thus, the government needs to restrict for-profit institutions' abilities to use the federal loan system in order to reduce the amount of new debt. This

includes the 85/15 rule for example. Then allow all students to include their federal student loans in the bankruptcy process, but only if the IBR cannot provide them a way to be accountable for their loans and still maintain a minimum lifestyle. This may be an expensive route to take, but the student loan debt is out of control. What else can be done?

