

Degrees of Inequity:

***A Policy and Strategic Alternative Assessment to Identify a Twenty-First Century
Definition of Undue Hardship for Student Loan Debt in the United States***

Linden J. Houston

A dissertation submitted in partial fulfillment
of the requirements for the degree of
Doctor of Public Administration

School of Public Affairs

University of Baltimore
Baltimore, Maryland

December 2020

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Submitted to
College of Public Affairs
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by

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December 2020

DEDICATIONS

*I am a walking affirmation,
that imagination and focus and patience
gets you closer to your aspiration.*

Black Thought

*I also dedicate this work to everyone that's paid the toll on the road to my success and
to anyone that's ever punched a time card to put in the work of investing in me.*

Linden J. Houston

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ABSTRACT

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This study was undertaken to address issues resulting from the vagueness of imprecisely defined legislative language located in the Bankruptcy Reform Act of 1978 (Public Law 95-598) and subsequent policies, regulations, and laws such as the Bankruptcy Abuse Prevention and Consumer Protection Act (Public Law 109-8); which relate to the dischargeability of federally insured student loans.

Prior to Public Law 95-598, student loans could be discharged *with de minimis* limitations, but undertaking the same task afterward became harder due to a lack of clear Congressional guidance regarding the term “undue hardship” used in the law. As a result, bankruptcy courts created the *Brunner* test and the *Totality* test to determine discharge eligibility, and these tests serve as *de facto* national standards.

In the absence of a declarative ruling from the Supreme Court—or *preferably, legislative direction*—petitioners will continue to be subject to different circuit-based juridical standards to discharge student loans. A related focus of this study was to examine student loan affordability in respect to contemporary living conditions.

The major findings of the study acknowledge agencies and courts have administrative discretion, but the *Brunner* and *Totality* tests are vastly divergent, so similarly situated debtors in different jurisdictional venues will experience dissimilar outcomes under the same law. Secondly, what was an undue hardship in 1978 is vastly different than what constitutes an undue hardship today. Finally, the discharge standards are outdated and require a contextual revision to reflect contemporary life.

The major recommendations from the study include revamping the discharge tests, aligning loan interest rates with inflation, limiting collection fees, revising satisfactory academic progress requirements, ending wage garnishments without advance notification, reinstituting the statute of limitations, and clarifying/defining national undue hardship standards, with adjustments for regionally-based costs.

These recommendations acknowledge that the government has the right to ensure that its loans are collected, and the responsibility to not be so oppressive in its enforcement pursuits that educational discharge equities are elusive and promotes poverty by requiring petitioners to be impoverished in order to receive a discharge. Historically, the federal government’s policies on *promoting postsecondary education as an investment* is Janus-faced when juxtaposed with its policies on *repayment of that investment*. Implementing these recommendations will lead to the fresh start supported by Congress in the Bankruptcy Code, ending the system of two national student loan discharge standards with their dual degrees of inequity.

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List of Acronyms

Acronym	Definition
ADA	Americans with Disabilities Act of 1990
ATB	Ability to Benefit
AWI	Average Wage Index
BLM	Black Lives Matter/Black Lives Matter Movement
BLS	Bureau of Labor Statistics
CARES Act	Coronavirus Aid, Relief, and Economic Security Act
CAT	College Affordability and Transparency
CES	Consumer Expenditure Survey
CETA	Comprehensive Employment Training Act of 1973
CFR/C.F.R.	Code of Federal Regulations
CHIP	Children's Health Insurance Program
Commission	Commission on the Bankruptcy Laws of the United States
COVID-19	Coronavirus/Coronavirus Disease 2019
CPI	Consumer Price Index
DCIA	Debt Collection Improvement Act of 1996
DO	Doctor of Osteopathy
DOC	Department of Commerce
DOE	Department of Education
DOJ	Department of Justice
DPA	Doctor of Public Administration
EEOC	Equal Employment Opportunity Commission
FFEL	Federal Family Education Loan
FY	Federal Fiscal Year
GAO	General Accounting Office/General Accountability Office
GPA	Grade Point Average
GPO	Government Printing Office/Government Publishing Office
GPS	Global Positioning System
GS	General Schedule
HBCU	Historically Black Colleges and Universities
HEA	Higher Education Act of 1965
HHS	Department of Health and Human Services
HEOA	Higher Education Opportunity Act of 2008
HUD	Department of Housing and Urban Development
IRAC	Issue, Rule, Application of the Law, and Conclusion
IRB	Institutional Research Board
JD	Juris Doctor/Juris Doctorate
LL.B/LLB	Bachelor's degree in law (Latin: <i>Legum Baccalaureus</i>)
LL.M/LLM	Master's degree in law (Latin: <i>Legum Magister</i>)
MD	Doctor of Medicine/Medical Doctor (Latin: <i>Medicinae Doctor</i>)
MIT	Massachusetts Institute of Technology

MSW	Master's degree in Social Work
NDEA	National Defense Education Act
NEPA	National Environmental Policy Act
NGO	Non-Governmental Organization
NRA	National Recovery Administration
NSLDS	National Student Loan Data System
NYSHESC	New York State Higher Education Services Corporation
OCR	Office for Civil Rights
OMB	Office of Management and Budget
OPM	Office of Personnel Management
PACER	Public Access to Court Electronic Records
Ph.D.	Doctor of Philosophy (Latin: <i>Philosophiae Doctor/Doctor Philosophiae</i>)
PPACA	Patient Protection and Affordable Care Act
PPP	Paycheck Protection Program
PSLF	Public Service Loan Forgiveness
SAP	Satisfactory Academic Progress
SAT	Scholastic Assessment Test
SEC	U.S. Securities and Exchange Commission
SHSAT	Specialized High Schools Admissions Test
SSA	Social Security Administration
SWOT	Strengths, Weaknesses, Opportunities, Threats
TARP	Troubled Asset Relief Program
TEPSLF	Temporary Expanded Public Service Loan Forgiveness
TILA	Truth in Lending Act
Title IV	Title IV of the Higher Education Act of 1965
Title IX	Title IX of the Education Amendments of 1972
Title VI	Title VI of the Higher Education Act of 1965
UDC	University of the District of Columbia
UDCCC	University of the District of Columbia Community College
USC/U.S.C.	United States Code/U.S. Code
USM	University System of Maryland
VISTA	Volunteers in Service to America

Chapter 1: Introduction

Overview

The Higher Education Act of 1965 (HEA, [Public Law 89-329]) was enacted with the express purpose of “strengthen[ing] the educational institutions and resources of our colleges and universities and to provide financial assistance for students in postsecondary and higher education” (p. 1) for those individuals that would not be able to attend college without such assistance. As a result of the HEA, the federal government created several programs to implement the mission of making college affordable to all students. One of the programs created is the Federal Family Education Loan (FFEL) program, which ensured that students have the ability to borrow funds to pay for a postsecondary education. In the half century since the initiation of the FFEL in 1965 and continuing through its successor, the Direct Loan program (Public Law 111-152), the Student Loan program became the primary source of funding for postsecondary education in America.¹

Although Title IV of the HEA (Title IV) ensured that college costs are

¹ The FFEL program ended with the passage of Public Law 111-152, the Health Care and Education Reconciliation Act of 2010, which prevented any new FFEL loans from being originated after June 30, 2010, and concurrently designated the existing Direct Loan program to be the successor to the FFEL program. The primary difference between the two programs is as follows: The FFEL program loaned money to students but disbursed the money to *banks* for disbursement to colleges and universities. The Direct Loan program lends money directly to students (using U.S. Treasury funds as the source of income) and disburses the money *directly to colleges and universities*. It is noted the Stafford loan program is part of the FFEL program.

Although the funds are disbursed directly to colleges and universities, collegiate financial aid offices serve the role of information centers (providing information on the different ways to pay for college),

borrowable, it did not assure that those college loans would necessarily be *affordable*. The cost of borrowing funds to go to college through the student loan program has historically outpaced the cost of inflation since that the HEA was enacted, threatening the journey to Edutopia.^{2,3}

As tuition and other student costs have disproportionately risen in relation to inflation, students have been compelled to borrow larger amounts of money annually to cover the cost of tuition and expenses. When students are overwhelmed by the cumulative magnitude of these loans, the readily predictable response to borrowers that may fiscally be in over their heads is to advise the person to file the requisite papers to have the respective student loans discharged in a bankruptcy court. Although loans to and from *businesses* can readily be discharged in the bankruptcy process, student loans are one of the few debts that are practically non-dischargeable, per the U.S. Code (USC, U.S.C). Over the last half-century, the gap between college costs and non-repayable grants has exacerbated the long-term effects of increased

administrators (certifying eligibility for loans and disbursing funds) and monitors (of their students Satisfactory Academic Progress [SAP]).

SAP is a set of federal government standards that students must meet to maintain eligibility for financial aid. Undergraduates must maintain a cumulative 2.00 Grade Point Average (GPA), successfully pass between fifty percent and sixty-seven percent of the attempted credits (depending on the number of credits earned) and make enough progress toward their degree so that it is completed within one hundred fifty percent of the amount of the credits required for the degree. For example, if an undergraduate degree requires one hundred twenty credits, the student shall not take more than one hundred eighty credits to complete the degree. Graduate students must maintain a cumulative 3.00 GPA, successfully complete sixty-seven percent of the attempted credits, and similar to undergraduates, complete the degree within one hundred fifty percent of the credits required for the program.

² The FFEL program and Direct Loan program shall collectively be referred to in the aggregate as the more popular name *Student Loan Program*. The uncapitalized term *student loans* is meant generically.

³ Edutopia is a portmanteau of the words *Education* and *Utopia*.

borrowing (creating a new affordability crisis) which is a significant economic issue that will consequently affect not only students in debt, but the economic stability of the United States going forward.

The economic stability of the United States is also reflected in the current economic culture, as the tenure, type and nature of work in the United States has fundamentally changed since the enactment of the HEA and the Social Security Act of 1935 (Public Law 74-271). The economy of the United States in 2020 was so dismal that for the first time in history, Congress authorized the distribution of a six-hundred-dollar weekly payment, in addition to separate state unemployment benefits, to individuals eligible to receive unemployment insurance benefits as the country's economic response to the 2020 response to the worldwide medical pandemic (Adamczyk, 2020).^{4,5} These are some of the economy's recent changes in the last decade, in addition to fluctuations in the labor market, which have been exacerbated by the coronavirus disease. These changes have been due to the development and maturation of the gig economy.

What is the gig economy? Forbes.com notes "The gig economy is the rising

⁴ The number of weeks a person is eligible to receive unemployment insurance payments ranges by state. The states of Florida and North Carolina authorize twelve weeks of payments while Montana authorizes as many as forty-one weeks of unemployment benefit payments.

The North Carolina Department of Commerce, Division of Employment Security (n.d.) notes a minimum eligibility period of twelve weeks, as does the Florida Department of Economic Opportunity (2020). Montana authorizes twenty-eight weeks of unemployment benefits and Massachusetts authorizes as many as thirty weeks of benefits, which is based on meeting all qualification conditions. Otherwise, Massachusetts claimants will receive twenty-six weeks of benefits (Isaacs, 2019).

⁵ The pandemic referred to above is the COVID-19 disease caused by a new coronavirus called SARS-CoV-2 (World Health Organization, 2020). COVID-19 is commonly known as the coronavirus, or COVID. This paper will use the terms *COVID-19* and *the coronavirus* in referring to the disease and its effects.

labor market that hires temporary, contracted workers instead of traditional employees. Companies are outsourcing tasks to already-trained, non-benefited workers, and workers have a chance to work for multiple companies in temporary positions and quick gigs or to fulfill ongoing work” (Walker, 2019). This reliance of non-dedicated freelancers exemplifies the shift from the long-term stable industrial employment with benefits in place at the time of the Social Security Act of 1935 to account for the volatility and prevalence of short-term shift-based service jobs.⁶

When a student or cosigner takes out a loan, it is expected that the student will pay the loan back in full and it is implied that there won’t be any circumstances in life which will prevent the student from working to do so. However, the Social Security Administration (SSA [2015]) has indicated that a 20-year-old worker has a 3-in-10 chance of becoming disabled in their working lifetime. If this statistic is extrapolated to the universe of student loan debtors, there will be many individuals who will be unable to pay their loans in full. Further, an underlying and unstated construct of the federal student loan program assumes that the United States economic infrastructure will support increased salaries for college graduates, such that their net income will be high enough to pay back their student loans. However, future recessions, such as the Great Recession of 2007-2009 and the current COVID-19 recession of 2020 may disprove this supposition.

⁶ This can be seen in academia, where an article on the *Atlantic* magazine’s website titled *The Death of an Adjunct* noted that “nearly 80 percent of faculty members were tenured or in a tenure-track position in 1969. Now roughly three-quarters of faculty are nontenured. The jobs that are available—as an adjunct, or a visiting professor—rest on shaky foundations, as those who occupy them try to balance work and life, often without benefits” (Harris A., 2019).

Purpose of the Dissertation/Purpose and Focus of the Study

Therefore, the primary purpose of this study is to critically examine the Bankruptcy Reform Act of 1978 and its past and current impact on student loan affordability for college students. Section 523(a)(8) of the Bankruptcy Reform Act of 1978 is the principal statute that prevents students from discharging student loans in bankruptcy “unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution...”

A successful bankruptcy petition permits the debtor a release from the debt. After the debt is discharged, creditors can no longer pursue the debtor for the repayment, all legal action initiated by the creditor to secure payment must cease and the debtor has no further legal liability to pay any discharged debts.

There are three primary types of bankruptcy available to consumers, and each type is named based on its respective location in the U.S. Bankruptcy Code (11 U.S.C. 7, *et seq.*): Chapter 7, Chapter 11, and Chapter 13. In Chapter 7 bankruptcy proceedings, debtors surrender most of their assets to the court. Those assets are liquidated and the proceeds are sold to repay creditors.⁷ When a bankruptcy proceeding is filed under Chapter 11 of the Bankruptcy Code, “the debtor may seek

⁷ The debtor is allowed to retain *some* personal property after the discharge proceedings. The items that the debtor is allowed to retain are considered to be exemptions. Exemptions vary nationwide and are based on the state where the bankruptcy petition is filed.

an adjustment of debts, either by reducing the debt or by extending the time for repayment, or may seek a more comprehensive reorganization” (United States Courts, 2021). Chapter 13 bankruptcies permit individuals that regularly receive income with an opportunity to reorganize their debts through a repayment plan that lasts between three and five years.

The spectre of bankruptcy is often seen as a solution to address the immediate weight of a debt, but there are other options to address debts prior to filing bankruptcy, as laws that were passed after the Bankruptcy Reform Act of 1978 such as the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Public Law 109-8) were put in place to ensure that the filing of a bankruptcy petition is the clear option of last resort. Those other options for consideration include settling the debt, selling of assets, borrowing money from friends and family, working more and lowering expenses. Although these possibilities do exist, they may not always be viable alternatives to bankruptcy.

There are additional supplementary laws, rules and administrative regulations which were implemented after the HEA and the Bankruptcy Reform Act of 1978, such as HEA amendments and reauthorizations, like the Higher Education Opportunity Act of 2008 (HEOA, [Public Law 110-315]), the Public Health Service Act (Public Law 78-410), and Title 34 of the Code of Federal Regulations (CFR), all of which were affected by the implementation of the Bankruptcy Reform Act of 1978.⁸ These related inquiries are important and reviewed in this study due to their

⁸ Title 34 of the CFR is where most of the administrative regulations regarding postsecondary education are located.

apparent relevancy to the topic and to the research questions. The primary focus of this dissertation concentrated on examining what is an “undue hardship” as referenced in Section 523(a)(8) in the Bankruptcy Reform Act of 1978, creating a workable definition of the term and investigating the affordability of student loans in today’s fiscal climate.

Research Questions

The central research question for the dissertation is: Since Congress did not adequately define the term “undue hardship” in Section 523(a)(8) of the Bankruptcy Reform Act of 1978, what are the elements of undue hardship as practiced by the agencies responsible for implementing student loan related provisions of the Bankruptcy statute? *Further, how does the concept of student loan affordability comport with the Congressionally defined intent of giving debtors a fresh start if student loans pose an undue hardship?* Since the lack of inclusion of the term undue hardship in Section 523(a)(8) of the Bankruptcy Reform Act of 1978 was the main post-HEA encumbrance to the existing *Federal Register* regulations implementing discharges, then the focus of that inquiry served as the primary question from which all other subsequent research questions followed. Those clarifying derivative inquiries used to accentuate the central research question are as follows:

Since Congress did not provide explicit legislative guidance to implement student loan discharges in the Bankruptcy Reform Act of 1978, what are the juridical standards that are used to adjudicate student loan discharges, as determined by each of the federal circuit courts? Is there a difference between the philosophies used by the different circuits?

Further, are the juridical standards that are applicable to student loan discharges applied uniformly in the federal circuit court system (in respect to similarly situated cases in other circuits), as determined by the leading cases in each of the federal circuit courts?

If those standards in the circuit courts are different, then what, in the absence of Congressional legislation, would/should a repayment policy and undue hardship criteria look like based on contemporary societal conditions in respect to the student loan discharge provisions contained within the current version of the Bankruptcy Reform Act of 1978 and its successor legislation?

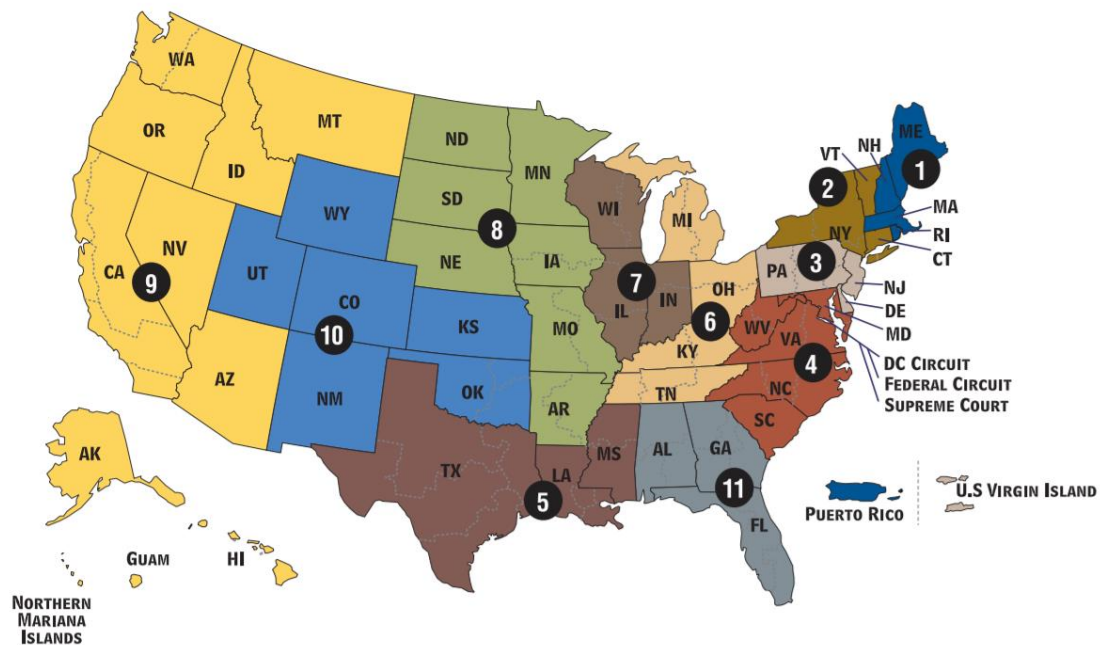
These working research questions served as a filtering and funneling function to determine which elements were applicable to geographically dispersed student debtors located nationwide. Further, the questions permitted the researcher to focus on the leading cases within the eleven numbered regionally based circuit courts. A map is included as Figure 1 which shows the geographical clustering of the regionally based circuit courts.

The legislative clarity on the implementation on Section 523(a)(8) of the Bankruptcy Reform Act of 1978 was opaque, so focusing on those elements that were approved for discharge in each of the eleven numbered circuit courts (as of December 31, 2018,) served as a metering function to focus the attention on the final remaining elements which were applicable to all student debtors nationwide. The legislative language as written implies a degree of administrative discretion to those that will implement the law's provisions. It is this discretion and the variances in implementation that were of interest in this study.

Why is the discharge of student loans a public policy issue to be examined? There are two bases for this matter as a public policy matter. The first element is human resource related—the *federal government, state government and local*

government need educated employees—and the second basis is commercial in nature and predicated upon sustaining structural stability as it relates to economic development for entrepreneurial endeavors.^{9,10}

Figure 1: Map of the Numbered Federal Circuit Courts



Source: Adapted from United States Courts., 2020

⁹ An underlying public policy nexus and purpose of examining the difference in judicial standards on a panoramic level is to—in the absence of national Congressional standards on the matter—examine whether student loan discharge seekers are being treated equally and equitably on a national scale, if a difference in standards exists.

¹⁰ Drilling down beyond a nationwide level and not just fixed on a governmental perspective, student loans facilitate a cycle of economic development, both public and privately entrepreneurial. When income is earned, that income is used for three purposes: Paying taxes, goods/services consumption and savings/investment. Additionally, education facilitates spillover in other areas, such as entrepreneurial endeavors. Generally, the more education a person has, the higher their income, as

The relationship between education and income is strong. Education is often referred to as an investment in human capital. People invest in human capital for similar reasons people invest in financial assets, including to make money. In general, those with more education earn higher incomes. The higher income that results from a college degree is sometimes referred to as the "college wage premium." Research shows that this premium has grown over time. In addition, in general, the more skills people have, the more employable they are. As a result, workers with more education have a lower average unemployment rate than those with less education. (Wolla & Sullivan, 2017)

On the first point, the Office of Management and Budget (OMB [2018, p. 65]) notes “the federal government is the single largest direct employer in the nation” and many of the existing (and future) positions will require a college education. The educational trendlines for federal employees illuminates this notion, as the number of federal employees that have a high school degree or less is declining, while the number of federal employees that have that a master’s degree is concomitantly increasing.¹¹

As a point of reference, the average grade on the General Schedule (GS) pay system scale is 10.38 nationally and a 12.53 for the Washington-Baltimore-Arlington, DC-MD-VA-WV-PA locality pay area (U.S. Office of Personnel Management, 2017).¹² The educational requirements for a GS-10 is a master’s degree or first professional degree (i.e., a JD [Juris Doctor] or a LL.B/LLB [Bachelor’s degree in law; Latin: *Legum Baccalaureus*]) and the educational requirements for a GS-11 position require a Ph.D. (Doctor of Philosophy (Latin: *Philosophiae Doctor/Doctor Philosophiae*) or a LL.M/LLM ([Master’s degree in law, Latin: *Legum Magister*) degree (U.S. Office of Personnel Management, 2020).¹³ The *OPM Group Coverage Qualification Standards* (2020) indicates the federal positions which require a higher education.

¹¹ OMB (2018) notes the number of federal employees with a high school degree or less is around twelve percent and the number with a master’s degree or higher is about twenty-nine percent.

¹² The Core Based Statistical Area is a metropolitan region defined by OMB that has an urban metropolitan city at the core of the center.

¹³ The *Juris Doctor* is the degree commonly earned by law school graduates. The LL.B. (Bachelor of Laws) is a degree that is less commonly given to law school graduates. This degree was conferred in the United States until the middle of the 20th century, when most law schools changed their degrees to the JD degree. Graduates of non-domestic law schools normally receive the LL.B. degree. The LL.M. degree (Master of Laws) degree is a graduate degree in law.

Another way of looking at the importance of education to the federal work force is to look at the number of employees that have the lowest general entry level degree. The Office of Personnel Management (OPM [2017]), the federal government's human resources agency, notes that 51.74% of federal non-postal employees have *at least* a bachelor's degree.¹⁴ The average age of a federal employee is 47.50 years with an average length of service of 13.51 years, so as employees attrition arrives, the human capital will need to be replenished with a similar educational set (U.S. Office of Personnel Management, 2017). As a result, future federal workers will likely be required to have a college degree. The same is expected to be true for state and local government employees.

When the number of contract employees working for federal, state and local governments is added to the government employees, the number of individuals likely needing a college degree will increase exponentially, as the quantity of non-federal government employees working as third-party contractors on behalf of the federal government outnumber federal employees (Hill, 2020). Thus, it is estimated that by 2020, sixty-five percent of all jobs will require a postsecondary education (Bergeron & Martin, 2015).

As to the point on economic development, the issue of student loans and student loan repayment directly impacts the American economy as well as the amount of discretionary income that each student debtor has available to spend. This issue has come to the fore due to the amount of student loans that are currently

¹⁴ For comparison, the Bureau of the Census (2019) estimates that the number of people with a bachelor's degree is 30.9 percent.

outstanding and the exponential growth rate of existing student loans. At the end of federal Fiscal Year (FY) 2009 (September 30, 2009), the Department of Education (DOE [2020]) noted the total amount owed in student loans was 657 billion dollars. In September 2012, the Associated Press (2013) noted that there were 956 billion dollars of outstanding student loans. As of March 31, 2020, the National Student Loan Data System (NSLDS) noted that there aggregately are 1.542 *trillion* dollars of student loans owed by 42.6 million student loanholders in the United States (U.S. Department of Education. Federal Student Aid, 2020). This is a ratio of approximately one in every eight Americans.¹⁵

Drilling down further into the subject to look at the scope of this topic, what percentage of the nearly twenty million students in the college population does this subject have the potential to affect? The answer, on the undergraduate level, is about fifty percent of all college students, as the DOE National Center for Education Statistics (2018) reports 46.2% of all associate degree holders and 66.7% of all bachelor degree holders have at one point in time borrowed federal loans to finance their education, averaging \$27,050. That number increases when viewed on the post-baccalaureate level, as 68.8% of law students; 60% of all master's degree candidates; 48.2% of research doctorate students and 81% of doctoral medicine students have student loans (U.S. Department of Education. National Center for Education Statistics, 2018). Respectively, the latter three groups average \$64,800; \$106,400 and \$241,600 in

¹⁵ This ratio is based on the July 1, 2019 population estimate of 328,239,523 (U.S. Department of Commerce. Bureau of the Census, 2019). The \$1.542 trillion dollars is enough to give approximately \$4,700 to each of the 328, 239, 523 individuals included in the July 1, 2019 population estimate.

outstanding student loans.¹⁶ For comparison, the Bureau of the Census (2019) notes that as of December 31, 2019, the nation's per capita income is \$32,621; the median household income is \$60,293 and the median value of owner-occupied units is \$204,900.

Another example of the high amount of student loan debt is the amount of law school debt in comparison to average salary. The U.S. Department of Education. National Center for Education Statistics (2018) notes law students are indebted at an average of \$148,800 and the U.S. Bureau of Labor Statistics (2019) notes lawyers have an average salary of \$145,300.^{17,18}

Zack Friedman (2019), a senior contributor for *Forbes* magazine, notes "as of 2019, more than forty-two million student loan borrowers have student loan debt of \$100,000 or less. More than 2.5 million student loan borrowers have student loan debt greater than \$100,000, with 610,000 of that total holding student loan debt greater than \$200,000. The largest concentration of student loan debt is \$10,000 - \$25,000, which accounts for 12.3 million student loan borrowers."

The Federal Reserve System, the central banking authority in the United States, commissioned an annual study titled, *Report on the Economic Well-Being of U.S.*

¹⁶ If viewed as a function of age, thirty-four percent of adults aged eighteen to twenty-nine have student loan debt (Cilluffo, 2019). That percentage decreases to twenty-two percent for adults aged thirty to forty-four; seven percent for adults aged forty-five to fifty-nine and one percent for those aged sixty and above (Cilluffo, 2019).

¹⁷ Salaries among lawyers vary greatly, and is skewed toward the wages paid in the private sector, as government lawyers earn less than the average. Lawyers working for local governments earn \$106,990 in salary; State government attorneys average \$94,050 and attorneys working in the executive branch of the federal government earn an average salary of \$139,720 (U.S. Bureau of Labor Statistics, 2019). A study by Law School Transparency pegs the 2018 average salary for lawyers at \$70,000 (Depersio, 2020).

¹⁸ Lawyers and doctors spend the most on student loans (Sgubin, 2017).

Households. The 2018 edition of the report noted about forty percent of Americans, if faced with an unexpected expense of four hundred dollars, would not be able to pay the amount in full by either cash, savings or a credit card (Board of Governors of the Federal Reserve System, 2019). Although the percentage of Americans with zero dollars in their savings account has decreased by seven percent in the prior year from thirty-nine percent to thirty-two percent, the number of Americans with less than one thousand dollars in their savings account has increased to fifty-eight percent (Huddleston, 2019).

At the end of the day, if Americans cannot afford to address an emergency expense of four hundred dollars within *one month* of incurring the expense, how are student loan debtors expected to address a debt with a repayment term of ten years that may be extended as far out as *thirty years*?

The United States is currently in a recession amidst the global health pandemic (Horsley, 2020). In the existing economic climate, the economy is facing a long climb to recovery. Scores of millions of Americans have filed for unemployment benefits at a record pace. “Before the pandemic, weekly applications typically numbered around 225,000. They spiked to nearly seven million last spring after nationwide shutdowns took effect. Applications declined over the summer but have been stuck above 700,000 since September” (Ocean City Register, 2021).

The economic situation is so dire that the federal government enacted the Paycheck Protection Program (PPP) as a part of the CARES Act (Coronavirus Aid, Relief, and Economic Security Act [Public Law 116-136]). The PPP provides loans to help businesses keep their workforce employed during the COVID-19 crisis. “PPP

Loans can be used to help fund *payroll costs, including benefits*, and may also be used to pay for mortgage interest, rent, utilities, *worker protection costs related to COVID-19*, uninsured property damage costs caused by looting or vandalism during 2020, and certain supplier costs and expenses for operations” (U.S. Small Business Administration, 2021). These loans are targeted toward small businesses of all types, inclusive of private, entrepreneurial endeavors.

Statement of the Problem and Opportunity

Defining Undue Hardship

The problem examined in respect to student loans emanated from the two-word phrase “undue hardship” as used in Section 523(a)(8) of the Bankruptcy Reform Act of 1978. Although the term undue hardship was used in the Bankruptcy Reform Act of 1978, the meaning of the expression was never clearly articulated in the legislation. Further, while the term undue hardship was *never* defined in the enabling legislation (as cited in *Jerry L. Roberson v. Illinois Student Assistance Corporation*, 999 F. 2d 1132 [1993]) and this oversight could have been rectified by defining the term via regulation in the intervening years. However, the phrase was not defined in the CFR, the *Federal Register* or in the rules and regulations for the federal agencies that would be chiefly responsible to uphold the statute, the Department of Health, Education and Welfare (HEW), or its successor, DOE. Although the judicial system allows for great deference to federal agencies to afford operational flexibility in interpreting terms, the phrase *undue hardship* is vague, and the lack of a precise legislative connotation may lead to the act of uneven administration in practice.

Although the federal courts and the CFR allow for deference to agency decision-making, the Fifth Amendment and Fourteenth Amendment of the Constitution require due process of law to be provided and the Fourteenth Amendment requires equal protection under the law. There is an artfully meticulous skill of fairly balancing equality, equity, and consistency in the exercise of applying flexibility, commonly known as administrative discretion. In theory, two similarly situated people that are subject to the same law should be treated comparably and consistently expect to receive similar results. However, in reality, courts in different federal circuits may use different standards to apply the same federal law.

There are several areas under the aegis of student loans causing undue hardship that were addressed within the confines of this exploratory work. There are three areas (of which an overview is provided here) and are explained in detail below. The first problem which was addressed is examining the standards used by the different federal circuit courts to determine undue hardship and whether a student loan warrants being discharged. A tangentially related matter that had been examined was to determine affordability as a function of undue hardship. The final topic was to determine, if there were different standards, whether these different standards treated similarly situated persons differently to potentially deny them equal protection under the law, per the Constitution.

The commonality of all three areas rests on a finding of undue hardship. Ultimately, the decision to discharge a student loan is based on a determination of undue hardship, and while the term has not been legislatively defined, there are some elements which are prevalent, such as long-term poverty, lower than average income,

a large number of dependents, and chronic medical conditions. Courts have been more forgiving toward individuals that have a combination of these circumstances, as they view these situations as generally being beyond the loan holder's control and more than "a mere inconvenience" as noted in *Jerry L. Roberson v. Illinois Student Assistance Corporation* (1993).

Topics to be Examined in the Study

As aforementioned, there were three main topics that were explored as a part of this dissertation: Undue Hardship, Affordability and Equal Protection. Each of these three items originated from an area of postsecondary education that has a direct legislative or policy connection to an aspect of public administration. A short explanation of each topic and its connection to public administration follows each section's entry.

Topic: Undue Hardship

The first problem which was studied in this dissertation related to the ability to legally eliminate educational debts owed to the federal government through the bankruptcy process. The undue hardship provision is a clause in the Bankruptcy Reform Act of 1978 that permits student loans to be discharged through an adversarial process in bankruptcy court. Further, the parameters employed by the courts which use this standard preclude many borrowers from accessing its relief. This area of analysis delved into the undue hardship threshold for a select group of no more than eleven cases that were adjudicated by the federal court system in

respect to—the *public administration association*—Congress’ legislative intent of the Bankruptcy Reform Act of 1978 to give debtors a fresh start while maintaining the integrity of the student loan program.

Topic: Affordability

The second subject which was reviewed in this research is student loan repayment affordability. This segment of the work focused on undue hardship as a financial function. Empirical data shows that the cost of college tuition has historically outpaced the cost of inflation and the cost has been shouldered more and more by the student by using student loans. Consequently, the concept of a current full-time student working part time to pay for their college education may be an idyllic relic of yesteryear.

A director at an Ivy League college noted the wages students earn is less than twenty percent of their total expenses, specifically stating “not many students can earn during term time more than board or its equivalent, or can count on netting toward their next year's expenses more than \$100 or \$200 during the summer vacation” (Barnard, 1932, p. 6). What makes this quote more damning toward proving the point is that it wasn’t stated recently. It was said on August 7, 1932—*over eighty-five years ago*—which is an indication that the disparity between the cost of college and the cost of affordability is both historical and longstanding.

Given the historical year after year increase of college tuition and expenses in respect to the Consumer Price Index (CPI), it is likely that this trend line will continue to curve upward. This line of inquiry examined student loan repayment terms, in

respect to expenditures as well as other federal and state obligations (such as taxes), and the federal government's expected family contributions to a college education.

The public policy tie-in here is that the federal government acknowledges that college is expensive, so it has made efforts to rein in college costs for families through awareness by publishing College Affordability and Transparency (CAT) lists. The CAT lists were created as the result of Section 132 of the HEOA. The intent of this piece of legislation was to identify the cost of college after financial aid and loans to give college students and parents a better idea of how much they will actually spend in loans in the course of the college student's career. The list, which stratifies the most expensive colleges and least expensive colleges by type of institution, provides information on affordability, so that students can make well-informed educational selections.

Topic: Equal Protection

At the time the promissory note for each student loan is executed, each student loan borrower agrees to be held to the same repayment standards. However, when applications for discharge are filed in bankruptcy court, different standards for evaluation are used depending on the circuit that has jurisdiction over the case. This common practice leads to venue shopping by petitioners as a strategy, that is, looking for a forum in the federal court system where the court's previous decisions indicate that it is (or will be) sympathetic to the desired end goal of discharge. The research for this segment primarily addressed the topics of disparate student loan discharge standards and applications of the Constitution's Equal Protection Clause. To this end,

the public administration link is in the equal protection aspect. The term equal protection “refers to the idea that a governmental body may not deny people equal protection of its governing laws. The governing body state must treat an individual in the same manner as others in similar conditions and circumstances” (Cornell University, n.d.). If individuals located in different states are treated differently, this *may* constitute a Constitutional violation.

Chapter Outline

Chapter Outline and Taxonomy

The dissertation is organized into five chapters. The first chapter addresses the background of the HEA and its related policies; the problem statement and study’s purpose; the significance of the study; the proposed research questions; the theoretical framework/ideology, and an overview of the methodology/research plan with the study’s limitations.

The second chapter provides the literature review supporting the study. The material in this section commences with an overview regarding the federal government’s involvement in postsecondary education. This topic is presented further in-depth beginning with the federal government’s historical indirect support of postsecondary education in the colonial era origins of the issue and is followed by transitioning through the federal government’s direct support of postsecondary education as the backing evolved into development of the nation’s collegiate infrastructure and educational accessibility. This area ends with the topics of bankruptcy and affordability as they relate to the enactment of the Bankruptcy

Reform Act of 1978. The texts in this section are organized into several overarching themes: The first theme is the federal government's historical role in post-secondary education. The main subjects in this area are the in-depth review of the development and experimentation of federal programs to increase access to college in the twentieth century.

The second theme is fiscal access to college through financial aid programs that were enacted by the HEA and the HEA's subsequent follow-on legislation. The penultimate area examines the development of the provisions and the underlying reasons that served as the drivers as to why student loans were excluded from being dischargeable debts within the Bankruptcy Reform Act of 1978. The final topic also examines the legislative stipulations which further minimized the circumstances upon which student loans could be discharged in the laws and regulations that have been enacted in the subsequent decades after the enactment of the Bankruptcy Reform Act of 1978.

These areas were selected for inclusion as a part of the working conceptual framework and upon further inspection, there are common theoretical and conceptual themes which aligned the topics both to each other and to the research questions listed above. The knowledge that was developed as the result of the literature review served to guide the parameters of the methodology.

Chapter three addresses the methodology that will be used to conduct the research questions. The details of the proposed methodology are discussed in the Methodology & Research Plan section of this document. The fourth chapter contains the analysis of, and findings from, the research questions. The final chapter provides

a summary and conclusion as well as offers recommendations and insights which were designed to address the challenges of student loan affordability.

Chapter 2: Literature Review

Overview

There are several themes identified in the prior chapter which were surveyed in conducting the foundational inquiry for this dissertation. During the process of undertaking the literature review, various books, articles and ephemera were examined in respect to the research topic, research problem and other related areas.

Although the federal government is currently involved in many aspects of collegiate education, this intervention was not always the case in the early part of the nation's history. For the first century of the country's existence, the federal government left the subject of postsecondary education as a topic for the states to address, as the *Unanimous Declaration of the Thirteen United States of America*, which framed and shaped the limits of government power in the United States, said nothing about the subject when it was executed on July 4, 1776.¹⁹

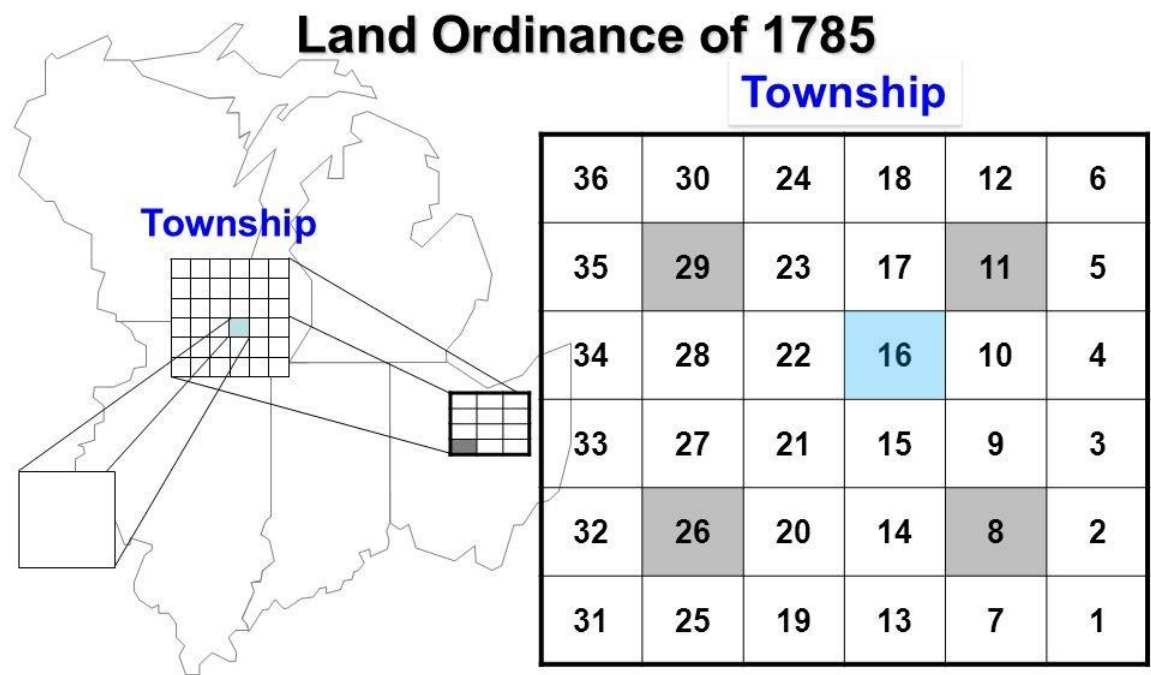
Indirect Federal Support of Postsecondary Education: Colonial Era Origins

The Land Ordinance of 1785 required division of federally owned segments of property into thirty-six equally sized six by six square subsections. The second page of the document noted that four of the thirty-six segments (squares eight, eleven, twenty-six, and twenty-nine) were reserved for future federal development and

¹⁹ The Unanimous Declaration of the Thirteen United States of America is the formal name of the Declaration of Independence.

section sixteen was explicitly reserved for educational purposes, as shown in Figure 2 (United States. Congress., 1785).

Figure 2: Division of Land, as Required by the Land Ordinance of 1785



Source: Adapted from an online presentation hosted at SlidePlayer.com

Two years later, the Northwest Ordinance of 1787 *indirectly* furthered postsecondary educational development in the United States. The third article of this document notes the-then public policy on education in the United States, in stating “religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” This directive remained the lay of the land for two decades until the federal government became involved by opening its first postsecondary institution,

the United States Military Academy at West Point.

There were few postsecondary educational institutions to attend in the United States prior to 1800 and many of the entities that existed were either founded by (or affiliated with) an organized religion, according to Donald George Tewksbury's book titled, *The Founding of American Colleges and Universities before the Civil War*.²⁰ Further, there were few colleges and universities chartered by Congress, and none of these institutions were federally owned or operated, so the federal perspective on education was clear. Harvard University (1636) and the College of William and Mary (1693) are two oldest non-federal colleges in the country that are still in existence.²¹

The number of federally sponsored and supported colleges did not change much during the next century, as there were only three such institutions in existence during the nineteenth century, and all of these federal colleges had a military foundation as their respective educational bases for existence. At that time, it was clear where the focus of education was in the country at the time.

²⁰ Tewksbury (1932) notes of the colleges in operation in 1800, about half had ties to religious sects or institutions. Harvard University (1636) and Dartmouth College (1769) were founded by Congregationalists in respect to their need for an educated ministry. The College of William and Mary (1693) and Columbia University (1754) were founded in part by the interests of the Anglican church. Yale University (1701) and Princeton University (1746) were founded by Presbyterian ministers. Brown University (1764) was founded by Baptists. Queen's College, (1766, currently Rutgers University), was founded by Dutch Reformers. Georgetown University (1789) was founded by Jesuits. St. John's College (1784) had Episcopalian, Jesuit and Presbyterian influences. The three public colleges, which are notable exceptions of the era, are the University of Georgia (1785); the University of North Carolina (1789) and the University of Vermont (1791).

²¹ The six Congressionally chartered institutions that are currently in existence are Georgetown University (1789); Columbian College in the District of Columbia (1821, currently the George Washington University); Gallaudet University (1864); Howard University (1867); and American University (1893) and the University of the District of Columbia through charters issued to its legacy institutions, most notably the Miner Normal School (1851).

Direct Federal Support of Postsecondary Education

The first federally supported educational institution was the United States Military Academy at West Point, in West Point, New York, which was founded on March 16, 1802 (Library of Congress, n.d.). The next federally supported institution was the United States Naval Academy in Annapolis, Maryland, which was established on October 10, 1845 (Library of Congress, n.d.). The last federal college established in the nineteenth century was the U.S. Coast Guard Academy, which was founded in 1876. (U.S. Coast Guard Academy, n.d.) The commonality of these postsecondary institutions is that they were all built to support the U.S. military.

Although education is commonly categorized as a local and state government issue, the federal government does have a vested interest in ensuring that the nation has educated people, even though it has not always been thorough in establishing postsecondary institutions of a non-military nature. This interest is not a new phenomenon, as the federal government has been involved in contributing to the educational well-being of its citizens from the outset. The earliest vestiges of the federal government contributing to education on the state and local level reach back to the first decade of the nation's existence.

The Morrill Acts: Expansion of America's Postsecondary Infrastructure

The federal government's legacy of directly supporting postsecondary education emanated from the Land-Grant College Act of 1862 (Public Law 37-108). The bill, colloquially called the Morrill Act, was named after its primary sponsor, Vermont Congressman Justin Smith Morrill.

The Morrill Act was the first of a series of federal laws that responded to the burgeoning postsecondary educational movement in the mid to late nineteenth century. The Morrill Act (formally, “An Act Donating Public Lands to the Several States and Territories which may provide Colleges for the Benefit of Agriculture and the Mechanic Arts”) was enacted on July 2, 1862, and explicitly provided assistance for higher education in the form of land. The federal land was sold to raise funds to establish endowments for postsecondary institutions, with each state recipient required to establish at least one institution “to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life” per Section 4 of the Morrill Act.²²

Several well-known collegiate institutions were founded because of this legislation, inclusive of Kansas State University; Michigan State University, Ohio State University; the University of California; the University of Maryland, Virginia Polytechnic Institute and State University and West Virginia University. Additionally, there were a few private universities that were designated as land grant institutions because of the Morrill Act. These colleges include the Ivy League institutions of Brown University and Cornell University as well as the private college, the

²² While the Agricultural College Act of 1890 (Public Law 51-841) is sometimes referred to as a Morrill Act, the term “Morrill Act” generally refers to the July 2, 1862 act.

Massachusetts Institute of Technology (MIT).²³

A second law, the Agricultural College Act of 1890, which is informally known as the second Morrill Act, was enacted on August 30, 1890. Chapter 841 (Page 418) of this piece of legislation subsequently amended the initial Morrill Act to provide increased funding for land grant colleges to provide “instruction in agriculture, the mechanic arts, the English language and the various branches of mathematical, physical, natural and economic science.” Although the law prohibited any funds to be distributed to any state with an existing land grant institution that discriminated against applicants based on race, it allowed separate institutions to be established based on racial identity of the students, as long as the federally provided funding was split evenly among each institution.²⁴ The primary legacy of this piece of legislation is the creation of nineteen of the nation’s Historically Black Colleges and Universities

²³ Brown University (then named College of Rhode Island) was designated as Rhode Island’s land grant institution at the time of the land grant status, however that designation was transferred to the Rhode Island College for the Agricultural and Mechanic Arts, the predecessor of the University of Rhode Island. Cornell is a private university; however, it has several components which are public entities and serve the functions of the Morrill Act. As to the final entry, MIT Section 4 of the Morrill Act simply required the Commonwealth of Massachusetts to establish

At least one college where the leading object shall be, without excluding other scientific and classical studies, and including military tactics, to teach such branches of learning as are related to agriculture and the mechanic arts, in such manner as the legislatures of the States may respectively prescribe, in order to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life.

In short, while the Morrill Act required each state to designate *an* educational institution, the Morrill Act never required the state designated college to be a *public* institution. Although MIT is not on the map of 1862 land grant institutions in Figure 3, the federal government still considers the institution to be a land grant college (Ramaswamy, 2016).

²⁴ The law was silent regarding states providing using their own funds for each institution, as well as states allowing discrimination based on a student’s gender.

(HBCU) that were founded as the result of the Agricultural College Act of 1890.²⁵ It is noted that there are some HBCUs precede the 1890 Morrill Act such as Lincoln University, Morgan State University, Howard University and Virginia State University. A map of the of the 1862 land grant colleges and a map of the 1890 land grant colleges are included as Figure 3 and Figure 4, respectively.

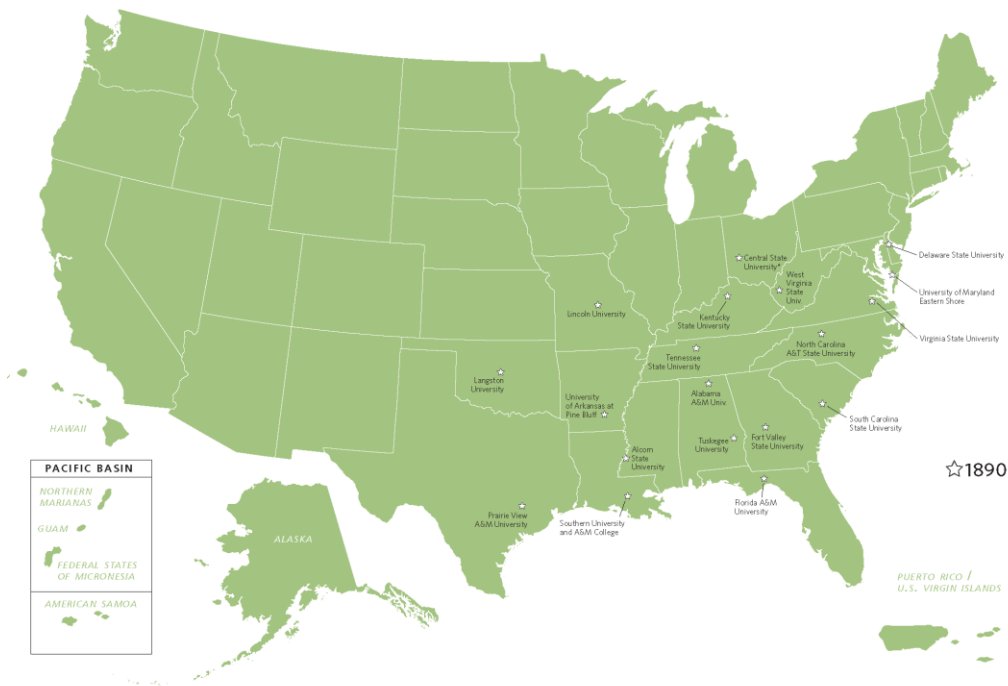
Figure 3: Map of 1862 Land Grant Colleges



Source: U.S. Department of Agriculture. National Institute of Food and Agriculture 1862

²⁵ A third group of twenty-nine postsecondary institutions that primarily serve Native Americans received land grant status. These tribal colleges and universities are collectively designated as the 1994 land grant universities.

Figure 4: Map of 1890 Land Grant Colleges



Source: U.S. Department of Agriculture. National Institute of Food and Agriculture 1890

The G.I. Bill: Expanding Access to America's Postsecondary Institutions

The next major piece of federal legislation that supported postsecondary education is the Servicemen's Readjustment Act of 1944 (Public Law 78-346), popularly known as the G.I. Bill. This piece of legislation, as described by the Veteran's Administration, provided "servicemen and women the opportunity of resuming their education or technical training after discharge, or of taking a refresher or retrainer course, not only without tuition charge up to five hundred dollars per school year, but with the right to receive a monthly living allowance while pursuing their studies" (U.S. Department of Veterans Affairs, 2013). The G.I. Bill made postsecondary education theoretically accessible to the masses, even if it wasn't practically or functionally

available.²⁶

The G.I. Bill was the turning point toward democratizing postsecondary education in America. Further, this newfound seminal moment of accession to academe was reflective of an ideological shift on educational accessibility. Peter F. Drucker, described as the father of modern management, when asked about the most transformational shift in American society stated

My own candidate would be the G.I. Bill of Rights, which gave every American soldier returning from World War II the money to attend a university, something that would have made absolutely no sense only 30 years earlier at the end of World War I. The G.I. Bill of Rights and the enthusiastic response to it on the part of America's veterans signaled the shift to a knowledge society. In this society, knowledge is the primary resource for individuals and for the economy overall. In this society, knowledge is *the* primary resource for individuals and for the economy overall. Land, labor, and capital—the economist's traditional factors of production—do not disappear, but they become secondary....If history is any guide, this transformation will not be completed until 2010 or 2020" (Drucker, *The New Society of Organizations*, 1992).

The long-term effect of the G.I. Bill is that it made a postsecondary education accessible to significant numbers of Americans who served in the military. Prior to the G.I. Bill, a college education was an object for the elitist, moneyed set. In 1940, 24.5 percent of Americans had a high school education and 4.6 percent of Americans

²⁶ Page 288 of the G.I. Bill extended educational benefits to veterans and "any such eligible person shall be entitled to education or training, or a refresher or retraining course, at an approved educational or training institution" but did not specifically ensure that the benefits would be accepted by educational institutions.

Theoretically, all veterans were entitled to equal post-service educational benefits, but the segregationist era principles of postsecondary institutions educationally discharged many minority veterans preventing them from using their G.I. Bill benefits. "In 1946, only one fifth of the 100,000 Blacks who had applied for educational benefits had been registered in college" (Herbold, 1994-1995).

had a college degree (Bauman & Graf, 2003). Drucker was pragmatically prophetic, and his timeline is fairly accurate, as the effect can be seen in a pre-G.I. Bill and a post-G.I. Bill educational comparison. By 2015—*the midpoint of his prediction*—those numbers rose respectively to eighty-eight percent and thirty-three percent (Ryan & Bauman, 2016).²⁷

After the G.I. Bill, there were several attempts to address postsecondary education; however, during this transition from educational sieve to sluice, a constant obstacle that was raised regarded the appropriateness of the federal government intervening in education. There were several interstitial efforts between the G.I. Bill and the next evolution of educational enlightenment to determine how the federal government should weigh in on the issue.²⁸

²⁷ The long-term effects of the G.I. Bill can be seen through the percentage of college age students and postsecondary expenditures.

Even making allowances for higher education's lean years of 1942-45, the nation's degree production during the 4 peak years of veteran enrollment under the G.I. Bill *was more than double that of the best 4 years of pre-World War II production*. Degree-credit enrollment percentage figures for age groups 18-21 and 18-24 reached 29.58 and 16.50 respectively in 1949-50 – almost double the prewar peaks of 15.59 and 9.08 in similar age groups in 1939-40 (Breedin, 1972, p. 2).

This pattern of increased postsecondary educational activity continued through the next generation, as shown by expenditures. Breedin notes that “in 1972-73, the Veterans Administration [spent] more money for education than at anytime since the conclusion of World War II - twice as much as the U.S. Office of Education [spent] on higher education in 1972-73” (Breedin, 1972, p. 4).

For the 2015-2016 academic year, about six percent of undergraduate students and seven percent of graduate students were veterans, on active duty, reservists, or members of the National Guard (Fain, 2020). While the number is less than the twelve percent of Americans that served during World War II (Eikenberry & Kennedy, 2013), this is also reflective of the *military downsizing* after World War I and World War II, but the ratio of 18- to 24-year-olds enrolled in college in 2016 *increased* to 41.2 percent (National Center for Education Statistics, 2019).

²⁸ It is acknowledged that there are other pieces of legislation that increased the number of college degrees in America, such as National Defense Student Loans, Perkins Loans, Pell Grants and SEOG grants in addition to state grants, private scholarships and private funds.

The President's Commission on Higher Education

The next landmark occurred on July 18, 1946, when President Harry S. Truman established the President's Commission on Higher Education, which was impaneled to examine the nation's system of higher education "in terms of its objectives, methods, and facilities; and in the light of the social role it has to play" (President's Commission on Higher Education, 1947, p. 1). The President's Commission on Higher Education (1947) released its report titled *Higher Education for American Democracy* on December 11, 1947, which made several recommendations on page sixty-seven. Some of the recommendations built upon the access to education concept which was prevalent in the outcomes of the G.I Bill and are still in force today. The major endorsement that is relevant to this work is the second recommendation, which notes

Following broadly the precedent set by the G.I. Bill, we recommend a Federal program of scholarships in the form of grants in-aid at the undergraduate level based primarily on individual need, available in all types of higher educational institutions. The individual student should have a free choice nationally among approved institutions. (President's Commission on Higher Education, 1947)

During the early 1950s, the federal government focused on defense and in this effort, education funding was channeled through the National Institutes of Health and the National Science Foundation to create fellowships and training grants.

Sputnik and the National Defense Education Act

The next federal educational milestone nominally occurred on September 2, 1958, but the concepts behind the effort began in earnest a year prior on October 4,

1957. While America demonstrated its technological superiority to the world after the Manhattan Project resulted in the development of the world's first atomic bomb in 1945, the country was caught off guard on Saturday, October 5, 1957, when the headline from the front page of the *New York Times* (Figure 5) broadcast the news of the day prior, reading "SOVIET FIRES SATELLITE INTO SPACE: IT IS CIRCLING THE GLOBE AT 18,000 M.P.H.; SPHERE TRACKED IN 4 CROSSINGS OVER U.S." (New York Times, 1957, p. 1).

The U.S. Department of State (n.d.) noted "few in the United States had anticipated it [the satellite launch], and even those who did were not aware of just how impressive it would be." In a National Security Council meeting five days later, on October 10, 1957, President Eisenhower stated "Sure, we underestimated the propaganda advantages they [the Soviet Union] would gain" from the satellite launch (Mieczkowski, 2013, p. 59).²⁹ The result, in the end, was that the Soviets beat the Americans into space.

²⁹ In retrospect, the Sputnik launch was not as secret as the government led the public to believe and the American delegation should have not been surprised. In the November 1958 edition of *Galaxy* magazine, Willy Ley provided seven publicly stated items in the two years prior to the Sputnik launch and before the announcement of America's Vanguard satellite program. The information was published in *Aviation Week*, the *New York Times* and Reuters Wire Service, and the publications provided details regarding the satellite's elements which would be proven correct, such as a twenty-four-inch satellite diameter (Actual diameter, 23.8 inches); A dawn launch time (6:29 a.m. Eastern Standard Time); the type of rocket that would be used (three stage); with a ninety-minute orbit time (Actual time: ninety-three minutes). Further, four months and two days prior to Sputnik's launch (June 2, 1957) the then President of the Soviet Academy of Sciences was quoted as saying "We have created the rockets and all equipment and instruments necessary to solve the problem of the artificial earth satellite" (Ley, 1958, p. 49). Ley continues, "I no doubt missed a few items, but this should have been enough information for anybody. If somebody tells me that he has the rockets to shoot which we knew from other sources, anyway and tells me what he will shoot, how he will shoot it, and in general says virtually everything except for the precise date well, what should I feel like if I'm surprised when the man shoots?" (Ley, 1958, p. 50)

Figure 5: Front Page of the October 5, 1957 Edition of the New York Times



Source: New York Times, 1957, p. 1

The 184-pound satellite was an unrefined conglomerate of wires, metal and gases emitting a radio signal, but the effect of the message being transmitted to the American public by the launch of the space borne aircraft was far greater and complex than the electromagnetic pulse signals emitted through the astronomically broadcasted radio waves. By December 1957, only four percent of Americans reported seeing a Sputnik, but the effect was vast, as a contemporary poll reported that the majority of Americans (Fifty-one percent) were surprised that the Russians were able to launch a satellite before the United States (Michael, 1960).³⁰ Moreover, the unstated and privately held sentiment in the intelligence community is that the

³⁰ The term *a Sputnik* was used because as of December 1, 1957, two Sputniks had been launched. The first was the radio satellite launched on October 4, 1957 and the second Sputnik, launched on November 3, 1957 was a satellite with a passenger, a dog named Laika.

rockets which launched the satellite into space were powerful enough to reach the United States. When Americans were surveyed as to why Russia placed a satellite into space before America, the top two responses were “The Russians worked harder and longer at it; concentrated on it” and “Russia has better scientists; got scientists from Germany after World War II” (Michael, 1960, p. 577). Sputnik served as proof of America’s technological disadvantage on a worldwide stage to an international audience. In response, the American people demanded that the country produce scientists and engineers to counter the perceived threat in short order.

Congress followed the current of the public mood, and less than a year later, enacted the National Defense Education Act (NDEA, [Public Law 85-864]), the purpose of which listed in Section 101 (page 1581) was to “correct as rapidly as possible the existing imbalances in our educational programs which have led to an insufficient proportion of our population educated in science, mathematics, and modern foreign languages and trained in technology.” President Eisenhower (1958) signed the bill on September 2, 1958, noting that the NDEA was a temporary “emergency undertaking to be terminated after four years.” Though the legislation was put forth as a *defense* act, the NDEA had the biggest impact on *civilian* students.

At the time, the NDEA was viewed as a *temporary* endeavor, but it started the groundswell of student loans emerging as a *permanent* policy matter because the federal government serves as the guarantor for those loans. The larger the loan, the more likely bankruptcy is an option. The NDEA program, albeit small and limited in scope, is the first example of student loans that could have potentially been discharged in bankruptcy. The legislative record is replete with examples where

Congress noted its concern regarding future student loan defaults. Consequently, the NDEA served as the ground where this topic began the embryonic stages of its development as a policy issue.

With the ushering of the NDEA, the federal government transformed the narrative and its role in postsecondary education, as Title II of NDEA authorized a minimum of \$295 million dollars for the Commissioner of Education to make low interest loans to students.³¹ With its \$295 million-dollar investment, the federal government had become a player in the educational loan game. This change to the postsecondary landscape to authorize loans for educational purposes caused a sea change in the scholastic universe, one from which the country would never look back, as the loans became a debt that would be subject to the potential of bankruptcy.

Bankruptcy Legislation

Every unsecured loan is an agreement between parties which specifies that a defined sum of money will be advanced from a lender to a borrower for an identified purpose without the surety of collateral. The loan is expected to be repaid according to the stipulations in the agreement, usually with a specified rate of interest, fixed payment dates and amounts. The more formal the loan, the more likely the terms and conditions of the agreement are to be rigidly structured.

Why would anyone want to get a loan? From the borrower's perspective, the

³¹ The appropriated amount was staggered as follows: FY 1959: \$47,500,000, FY 1960: \$75,000,000, FY 1961: \$82,500,000 for the fiscal year ending June 30, 1961, FY 1962 \$90,000,000 and funds for FY 1963 through FY 1966 as necessary.

loan provides the ability to secure goods or services that debtor doesn't have the upfront capital to procure at the present, while the lender can make money on the loan by charging interest. If there's a meeting of the minds, and terms of the loan are agreed to and followed, the end result is mutually beneficial for both parties.

With any loan, there exists the potential for one of the parties to not fully follow through on the agreement. In the event that this occurs, the compact may provide terms for rehabilitating the loan. If not, there will be a loss for one party. When the loans are smaller, the losses are smaller, but with larger loans, the losses are larger. As the amounts get larger, the more likely a party is to turn to bankruptcy.

In the country's first century of existence, the subject of bankruptcy is one that Congress rarely targeted, as it largely deferred to the states to address the matter.³² The lack of federal interest in the matter of bankruptcy is evidenced both by Congress' inaction on the issue and their dearth of longevity in its laws when it did act.³³ Although the topic was explicitly addressed by name when the Constitution was signed in 1787, Congress only passed three laws on the subject in the ensuing one hundred ten years.³⁴ This lack of activity can be interpreted as a clear lack of interest in the topic, especially when juxtaposed to the fact that the three bankruptcy laws enacted between 1800 and 1867 was a reactionary response to a then-existing event

³² The prevailing conventional wisdom of the era viewed the topic as a local matter, which was best addressed by the states.

³³ This view is consistent with intergovernmental relations of the era when the federal government deferred to states on many topics.

³⁴ These laws were the Bankruptcy Act of 1800 (2 Stat. 19), the Bankruptcy Act of 1841 (5 Stat. 440), the Bankruptcy Act of 1867 (14 Stat. 517), and the Bankruptcy Act of 1898 (Public Law 55-541).

and contemporarily viewed as a temporary measure.

The fourth version of federal insolvency legislation, the Bankruptcy Act of 1898, changed the fundamental nature of bankruptcy in the United States. The short-lived essence of the three prior bankruptcy acts raised the question to Congress as to whether a new insolvency relief bill should be transient or timeless in nature. The issue of permanence arose because each of the three laws, having been in force for approximately sixteen years total, was enacted within five years after a financial crisis. After the impending crisis of each era passed, each respective law was retired via a repeal. As a result, the consequences of enacting a law which would eventually be repealed seemed unappealing. Therefore, these conditions, in conjunction with a recession in 1893, laid the groundwork for a new bankruptcy law, as the impetus for this legislation was borne from the necessity to have a uniform nationwide system which was fair to both creditors and debtors. The Bankruptcy Act of 1898 remained the law of the land for seven decades, with one major update in 1938 (the Bankruptcy Act of 1938 (Public Law 75-696), then-known as the Chandler Act) until the enactment of the Bankruptcy Reform Act of 1978.

What Legislative Forces Sparked the Development of a Successor Bill?

In reflection, the Bankruptcy Act of 1898 was flawed but remained stable throughout its history; as the initially tendered law was amended eighty-six times through the summer of 1966, but it was never overhauled (Dray, 1967). The mere number of changes and the length of the underlying law in respect to the transitioning of the nation's economy from manufacturing to modernity and increasing reliance on

credit would require an investigation to determine whether the Bankruptcy Act of 1898 would require a regulatory realignment or a replete rewrite.

The successor bill to the Bankruptcy Act of 1898 was not a bill that was enacted in short order, nor was it ratified in response to an urgent prolonged economic crisis.³⁵ This law was developed over the course of a decade (1968-1977) during the end of the post-World War II economic expansion.

The initiating action began in 1968 at the inquest of a Senate subcommittee. This panel was charged with reviewing the existing bankruptcy laws and determining whether the existing structure should be amended or abandoned. As a result of those hearings, the Commission on the Bankruptcy Laws of the United States (Commission) was impaneled. On July 24, 1970, the enabling legislation that gave rise to the Commission was enacted.³⁶ The law (Public Law 91-354) was a joint resolution that in section b (Page 468), directed the Commission to undertake the following actions:

The Commission shall study, analyze, evaluate, and recommend changes to the Act entitled “An Act to establish a uniform system of bankruptcy throughout the United States” approved July 1, 1898 (30 Stat. 544), as amended (Title 11, United States Code), in order for such Act to reflect and adequately meet the demands of present technical, financial, and commercial activities. The Commission’s study, analysis, and evaluation shall include a consideration of the basic philosophy of bankruptcy, the causes of bankruptcy, the possible alternatives to the present system of bankruptcy administration, the applicability of advanced management techniques to achieve economies in the administration of the Act, and all other matters which the Commission shall deem relevant.

³⁵ Although the United States experienced a minor credit contraction (known as a credit crunch) in July-August 1966, the action was undertaken to mitigate inflation. In the end, the effect of the credit crunch was short lived, as the intended effect was achieved by early 1967.

³⁶ The legislation is Public Law 91-354, titled Joint Resolution to Create a Commission to Study the Bankruptcy Laws of the United States.

After the Commission's members were secured, the committee began its work on June 1, 1971, and completed its work in the summer of 1973. At the conclusion of the committee's work, the group delivered a report to Congress in July 1973 titled *Report of the Commission on the Bankruptcy Laws of the United States* (H.R. Doc. No. 93-137). The first part of the tripartite report contained the challenges that the existing bankruptcy system faced that required congressional attention, as well as potential solutions. This document also addressed the ideological constructs for, and causes of, bankruptcy in the United States. The second part included proposed text for a new Bankruptcy Code, in addition to recommending changes to the Judicial Code and the Internal Revenue Code. The final part contained the result of studies initiated by the Commission.

The Commission's report provided the impetus for advancing a new bankruptcy law. However, as the month of July 1973 drew to a close, the inertia for examining the report for the purposes of enacting a new law plateaued, as the House and Senate's attention to this matter was displaced by other pressing contemporary matters. On July 31, 1973, Representative Robert Drinian of Massachusetts introduced a resolution to impeach then-President Richard Nixon. The impeachment proceedings continued into 1974, as the House of Representatives voted 410 to 4 to grant the House's Judiciary Committee the power to investigate President Nixon on February 7, 1974.

The debate over a new bankruptcy bill continued for several years through the mid and late 1970s. During this period, the bill went through several iterations. At this point in time, student loans weren't excluded from bankruptcy proceedings and

could be discharged without limitation until October 12, 1976. On that date, the Education Amendments of 1976 (Public Law 94-482) came into force. Section 439A(a) of the law was the first prohibition enacted to discharge student loans which stated

A debt which is a loan insured or guaranteed under 20 USC 1087-3. 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 (exclusive of any applicable suspension of the repayment period) beginning on the date of commencement of the repayment period of such loan, except that prior to the expiration of that five-year period, such loan may be released only if the court in which the proceeding is pending determines that payment from future income or other wealth will impose an undue hardship on the debtor or his dependents.

President Ford (1976) reluctantly executed the bill, noting he did so “because of the positive elements it contains and because most of its worst elements are readily susceptible to corrective legislation in the next session of Congress...and I ask the support of those who participated in the development of S.2657 to assist in its improvement.” Ford’s optimism and faith in Congress to remedy the bill and craft a solution was short-lived, as he lost the presidential election to Jimmy Carter twenty-one days after signing the law.

On February 1, 1978, the House of Representatives resumed consideration of the new bankruptcy bill. One of the amendments to the bill (H.R. 8200) contained a clause to allow certain educational loans to be discharged in the bankruptcy code. However, that amendment was removed before the final bill was approved. H.R. 8200 (the Bankruptcy Reform Act of 1978) was passed by the House of Representatives and the Senate, then signed into law on November 6, 1978 and became effective for

cases filed on or after October 1, 1979. With this action, the Bankruptcy Act of 1898 established the United States Bankruptcy Code and the fundamental nature of student loan discharges in America changed forever, as Section 401 of the new legislation invalidated its predecessor with the following four words: “The Bankruptcy Act is repealed.”³⁷ Never again would student loans be dischargeable without limitation as the result of bankruptcy.

Why Focus on the Bankruptcy Reform Act of 1978?

The first question that a critic may hone in on is the age of the law to be studied and ask: *Why study a law that is over four decades old and further, why is that law relevant today?* It is acknowledged that the Bankruptcy Reform Act of 1978 is over 40 years old, but the law’s age does not belie its applicability and direct connection to today’s society, as it is noted that there are other educational and debt collection laws, which are older than the Bankruptcy Reform Act of 1978 that are still valid and enforced today.

Examples of such laws are the HEA; the Civil Rights Act of 1964 (Public Law 88-352); the Higher Education Amendments of 1968 (Public Law 90-575); the

³⁷ There is some historical conjecture as to whether the Bankruptcy Act of 1898 invalidated Section 439A of the Education Amendments of 1976. Section 439A allowed discharges, but not until five years had passed after the beginning of the repayment period, exclusive of any tolled time, unless “the court in which the proceeding is pending determines that payment from future income or other wealth will impose an undue hardship on the debtor or his dependents.” However, Section 317 of the Bankruptcy Reform Act of 1978 repealed the five-year provision commencing upon enactment (November 6, 1978), while Section 523(a)(8) waived the five-year period immediately if “excepting such debt from discharge...will impose an undue hardship on the debtor or the debtor’s dependents.” Consideration of future income was not a requirement in Section 523, but this provision did not take effect until October 1, 1979, so there was an eleven-month gap in coverage where the old law was repealed and the new law did not take effect. Judicial historians label the gap as a legislative oversight.

Education Amendments of 1972 (Public Law 92-318); the Family Educational Rights and Privacy Act of 1974 (Public Law 93-380); the Education Amendments of 1976 (Public Law 94-482); and the Fair Debt Collections Practices Act (Public Law 95-109). Legislative longevity does not equate to relevance, as all of these laws are older than the Bankruptcy Reform Act of 1978, but they are all still in effect. Secondly, the concept of repayment of collecting and discharging outstanding debts as older than the republic, going back to the Articles of Confederation.

There's been seven major legislative changes to the Bankruptcy Reform Act of 1978. Section 3 of Public Law 96-56 specifically disallowed student loans insured or funded by the government from being discharged.³⁸ At the time, there was a five-year waiting period before loans could be discharged, exclusive of any deferment of forbearance periods. Section 454 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Public Law 98-353) expanded the universe of non-dischargeable student loans to loans made by nonprofit institutions. Six years later, Section 3621(2)(A) of the Crime Control Act of 1990 (Public Law 101-647) extended the waiting period from five years to seven years. Section 3(a)(2) of the Higher Education Technical Amendments of 1991 (Public Law 102-26) removed the six-year statute of limitations for federal student loans. Section 971 of the Higher Education Amendments of 1998 (Public Law 105-244) ended the ability to discharge student loans in bankruptcy after seven years of repayment and Section 432 eliminated debt management options. The most recent of the major amendments is Section 220 of

³⁸ Public Law 96-56 is *res ipsa loquitur*, as its title is "A Bill to Amend the Bankruptcy Act to Provide for the Non-Dischargeability of Certain Student Loan Debts Guaranteed or Insured by the United States."

the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This amendment expanded the discharge restrictions to any “educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986.” This expansion includes federal and non-federally secured student loans.

In the instant case, although the Bankruptcy Reform Act of 1978 has been amended numerous times since its initial passage, and the edicts in relationship to student loan collections and student loan discharges generally made elimination of student loans harder, increased the repayment amount, prolonged the repayment terms, increased the cost of loan collection or made a discharge harder to secure, but the act as amended is currently good law and still stands as the law of the land.^{39,40,41}

Theoretical & Ideological Infrastructure

This work employs a theoretical lens to support, explain and clarify the problems within a cohesively comprehensive set of ideological constructs. “The selection of a theory should depend on its appropriateness, ease of application, and

³⁹ Several of these laws involve technical corrections, which address legal inaccuracies, typographical errors, change text without altering the structural framework of the underlying law or issue purposive clarifications of a law’s intent.

⁴⁰ As a point of reference, Section 427(c) of the HEA (Page 1240), titled “Eligibility of Student Borrowers and Terms of Student Loans notes “The total of the payments by a borrower during any year of any repayment period with respect to the aggregate amount of all loans to that borrower which are insured by the Commissioner [of HEW] under this part shall not be less than \$600 or the balance of all such loans (together with interest thereon), whichever amount is less.” The aggregate allowable amount of indebtedness at the time was \$7,500 for graduate and professional students (\$59,261 in 2018 dollars) and \$5,000 for all other students (\$39,507 in 2018 dollars).

⁴¹ Loans made pursuant to the NDEA allowed a minimum repayment amount of fifteen dollars per month (\$119.02 in 2018 dollars).

explanatory power” (University of Southern California, 2020). O.C. McSwite, *nom de plume* for Dr. Cynthia McSwain and Dr. Orion White, has developed a six-dimension theory competency model for public administration educated practitioners. This competency archetype is focused on graduate students studying public administration and is inherently applicable toward doctoral studies.⁴² Camilla Stivers (2001) notes that “McSwite's position is that theoretical competency does not consist of specific content, such as theories of the budgeting process; rather, it is a frame of mind that helps practitioners ‘know what kind of situation they are in.’”⁴³ Ultimately, the purpose is to “creat[e] a certain attitude or process of reflection that can be employed to inform practical action” (McSwite, 2001).

In the instant case, the McSwite framework was used for this study because it marries the utilitarian concept of making college accessible via affordability with a contrast of the practical application of socially accepted expenses in determining

⁴² The article is titled “Theory Competency for MPA-Educated Practitioners” (McSwite, 2001).

⁴³ There are six dimensions of McSwite’s paradigm. The first dimension is linkages. There are few actions/decisions which when executed do not influence a system as a whole. It’s a domino effect. The second dimension is structuralist awareness. A public administration practitioner must know (or be able to know where to locate) the codes, ordinances, rules, regulations and laws of the environment in which the administrator operates. The third dimension is awareness of the social field. The first two dimensions address formal hierarchies and the lines between operational parameters, whereas the third dimension addresses the anatomy of the informal non-governmental linkages that exist outside of the formally defined spheres. Dimension number four titled “It’s the system, stupid” addresses organizational improvement under the belief that the system in which the public administrator works is flawed and requires improvement, instead of improving the people. The next dimension is dialectics, which the *Stanford Encyclopedia of Philosophy*, notes is “a term used to describe a method of philosophical argument that involves some sort of contradictory process between opposing sides” (Maybee, 2016). It is the embodiment of Newtonian physics: For every action, there is an equal and opposite reaction. Each decision that is made has an outcome that has a detrimental effect to another party. The idea here is to consider all alternatives (and their resultant consequences) in the decision-making process. McSwite calls the final element the mysterian dimension. This component recognizes that there is always more at play than what is immediately present, causing a moment of pause to consider a reasonable range of alternatives before developing a tunnel vision and locking in a final decision.

collegiate affordability. In this case, the pendulum of power has genuine consequences: If college is financially inaccessible, then fewer students will attend and the nation will not have enough educationally qualified workers for the workforce. Moreover, if the road to college is accessible but oppressively expensive, that obstacle serves as a barrier deterrent to entry, which may adversely affect the economy by evaporating the disposable income that is available for spending. No matter the predicament, the competent, capable public administrator has to have a handle on the problem from the perspective of both the polity and the proletariat and to be able to explain the matter to each group from both perspectives. Mastery of the field during this study required a full literacy in successfully articulating, applying and employing all of the tools in the McSwite toolbox of theory competency from multiple angles.

Social Equity in the Era of Educational Enlightenment

In order to demonstrate a full proficiency in theory competency, it is necessary to not just examine the inputs that go into the toolbox, but also the application of the archetype. The talent to theorize means little if it's not placed in the proper perspective.

The purpose of the Student Loan Program was to equalize educational opportunities by assisting students overcome the financial obstacle of access to capital to overcome inequities that existed in access to education, but that step only addresses access due to a lack of capital and does not address access due to educational exclusion. Several public institutions, such as the College of William and

Mary and private institutions, such as Harvard, were built using slave labor, but the slaves and their descendants that built the organizations could not access the institution for generations as students.

In the case of William and Mary (2020) the college succinctly states “While William & Mary’s role in the nation’s founding has been widely studied, it has only been recently that scholars have begun asking questions of the university’s role in perpetuating slavery and racial discrimination.” Harvard’s legacy is no less sordid. “In the 18th century, the Royall House was home to the largest slaveholding family in Massachusetts. It was a bequest from Isaac Royall Jr. that funded the establishment of Harvard Law School in 1817” (Walsh, 2020). In tribute, the coat of arms from the Royall family was used as the seal for Harvard Law School. The variant of the seal with the Royall crest remained in use until 2016 (Coughlan, 2016).

Contemporary efforts in postsecondary education have focused in on the concept of social equity in terms of accessibility. The National Academy of Public Administration defines social equity as the “fair, just, and equitable management of all institutions serving the public directly or by contract and it is committed to promoting fairness, justice, and equity in the formation of public policy” (Maldonado, 2015). With the twenty-four-hour news cycle and the pervasiveness of social media, this idea of social equity as coined seems new because of its omnipresence, but it is not a recent effort.

The notion has existed in different names throughout history from antiquity to the modern era and in this time its function has been refined from conceptual chrysalis to applied concept. Aristotle (350 BCE) opined that “Injustice arises when

equals are treated unequally and also when unequals are treated equally” so as a result “inferiors revolt in order that they may be equal.” More modern applications of the theory have been in concert with the new public administration movement of the 1960s and 1970s wherein social activism was incorporated into the obligations of public administration to society using an equity lens to integrate equity in all policies (American Planning Association, n.d.).

In 1968, H. George Frederickson put together a theory of social equity as a foundational axis of public administration. Frederickson later described social equity as the third pillar of public administration, alongside economy and efficiency (Frederickson, 1990). Previously, public administration was focused on equality via uniformity, where everyone would be treated similarly, but Frederickson recognized that *equality* does not equal *equity*. Equality ensures that everyone receives sameness (Figure 6), but equity requires an affirmatively defined path to levelness. Figure 7 is a visual illustration of the difference between equality and equity.

There are several authors that were of particular interest in this literature review whose books aligned with the social equity concepts in this study, notably Susan Gooden, Richard Gregory Johnson III and Susan Mettler.

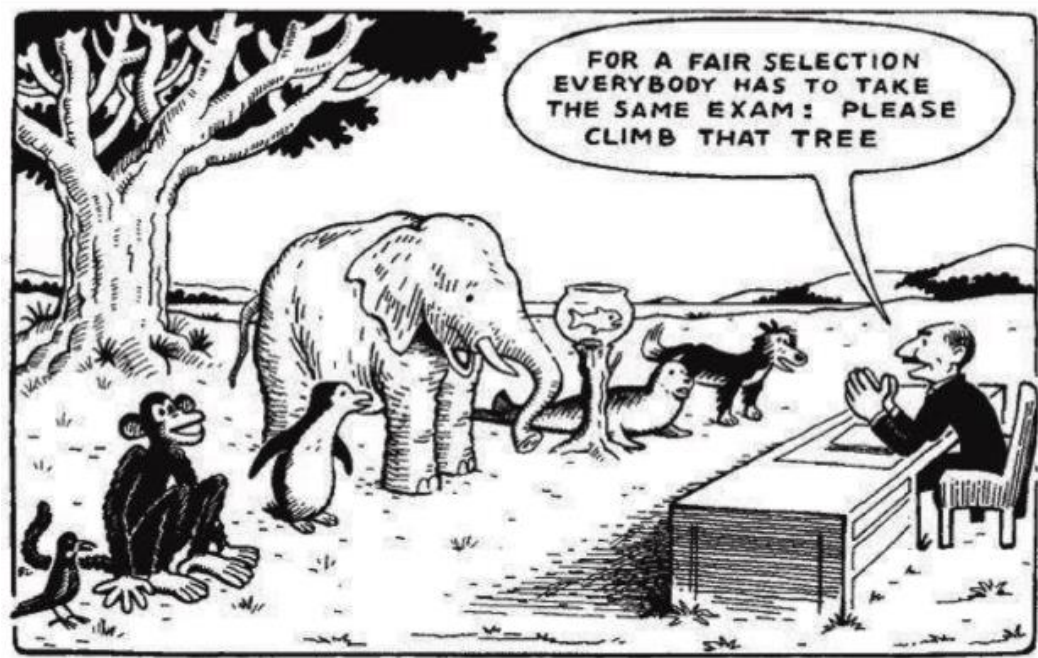
Gooden’s work, *Race and Social Equity: A Nervous Area of Government*, and Johnson’s book, *A Twenty-First Century Approach to Teaching Social Justice: Educating for Both Advocacy and Action*, provided insightful information about categories as race, colorism, gender, social class and disability are just a few of the elements that play a role in the social equity discussion. Mettler’s manuscript follows the work of this study on a parallel path, but from a different perspective.

Johnson focuses on social equity as a base to which justness is applied like a global cloak, covering all underneath the cowl with its protection from the elements. He examines the social structures as the supports of society, acknowledging that some of these establishments can be oppressive institutions, further examining how these roles are sometimes surreptitious and otherwise self-evident in their respective functions (Johnson III, 2008). He uses the role school principal role as the prototype.

School principals and teachers are the primary points of contact in a young person's life to which they are not related. In these roles, the educators serve as the first authorities with influence with which an adolescent interacts in an extended community outside of their home. Social scientists acknowledge that a child's personality has been sculpted by many hands by the time the youngster heads to elementary school (Jarrett, 2016). The University of California in Riverside confirms the same, remarking that "the traits that will define that individual throughout his or her life can be clearly identified when he or she is as little as seven years old...scientists show that, by the time they start going to school, children already exhibit the personality traits that will remain with them throughout their lives. (Vieru, 2010)

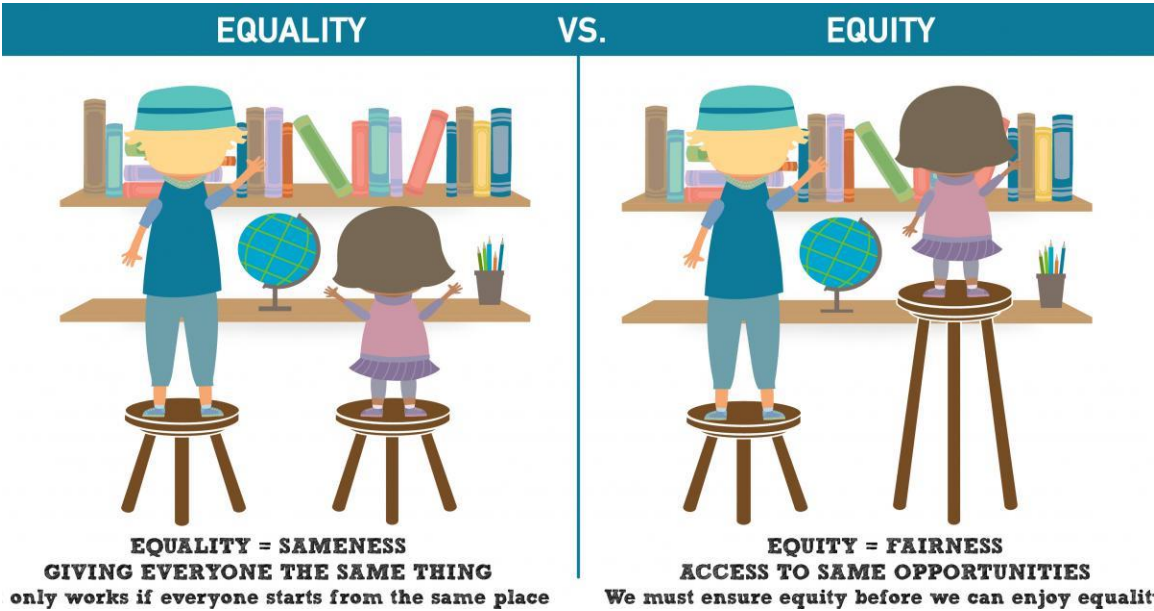
The intersection of youthful development of a nascent personality added to an explorative phase of life where confidences are developed within the context of a structured institution affects the youth's behavior, as principals and teachers impart values on the individual child, the child's community and those with which the child interacts (peers and parents). It is with these eyes that youngsters learn what actions are approved, permissible, tolerated, indifferent, ignored or outright unacceptable.

Figure 6: Visual Depiction of Equality



Source: Traxler, 1976

Figure 7: Equality vs. Equity



Source: SMARTReading.org, 2021

They also see the way that they are treated may or may not be the same, learning lessons on fairness.

This microcosm of society is a learning lab where children can escape as victors or victims with lifelong scars based on their treatment by these establishments, and this treatment is shaped by the values of the authority or of the student as a socialized insider or an outcast.

Gooden looks at social equity from a different trajectory. In one part of her book, she articulates the bridge between minority community members and non-minority public servants, which is reflective of the public servants and those people in which they serve, especially in the social services arena. She notes that as a whole, “there are wide racial and ethnic disparities in virtually every walk of life” (Gooden, 2014, p. x). Gooden notes that there are uncomfortable conversations that need to be had within public administration between practitioners and the public, as social equity.

One of the more commonly discussed subjects within the field of social equity relates to education. New York City has nine specialized public high schools and the only way to gain acceptance to eight of the nine schools is through a qualifying score on the Specialized High Schools Admissions Test (SHSAT) given to eighth and ninth grade students.⁴⁴

Gooden, quoting Lomawaima & McCarty, notes that there is an inherent

⁴⁴ The eight schools are as follows: Bronx High School of Science; Brooklyn Latin School; Brooklyn Technical High School; Queens High School for Sciences at York College; Staten Island Technical High School in New Dorp; Stuyvesant High School; the High School for American Studies at Lehman College; and the High School for Math, Science and Engineering at City College. The ninth high school, LaGuardia High School is a performing arts school and requires an audition for entry.

problem with using testing as a sole admission determinant. Specifically, she notes that while there are complexities in addressing educational injustice

a more basic injustice is a system that bestows educational resources on the privileged, rewards their cultural capital, then consecrates their ensuing advantages with standardized tests. There is nothing democratic about this process. It standardizes inequality and ensures that existing race-and class-based hierarchies are legitimized and reproduced (2002, p. 298).

New York City is known for its cultural diversity, but one of the criticisms of the SHSAT and the specialized schools is that the specialized schools are homogenous, and not reflective of the diverse student population, as reflected by Figure 8 and Figure 9. New York City's mayor, in conjunction with the New York City Council, has worked to address this matter by bringing proposals forth to align the population of the specialized high schools with the population of the schools as a whole. Their efforts have been met with fierce resistance, notably by the communities which fear the most to lose if the proposed changes are put in place.

Mettler's work most parallels the lines of inquiry that were followed in this work, albeit from a different perspective. Mettler posits that

over the past thirty years, however, our system of higher education has gone from facilitating upward mobility to exacerbating social inequality. College-going, once associated with opportunity, now engenders the creation of a something that increasingly resembles a caste system: it takes Americans who grew up in different social strata and it widens the divisions between them and makes them more rigid. (Mettler, 2014)

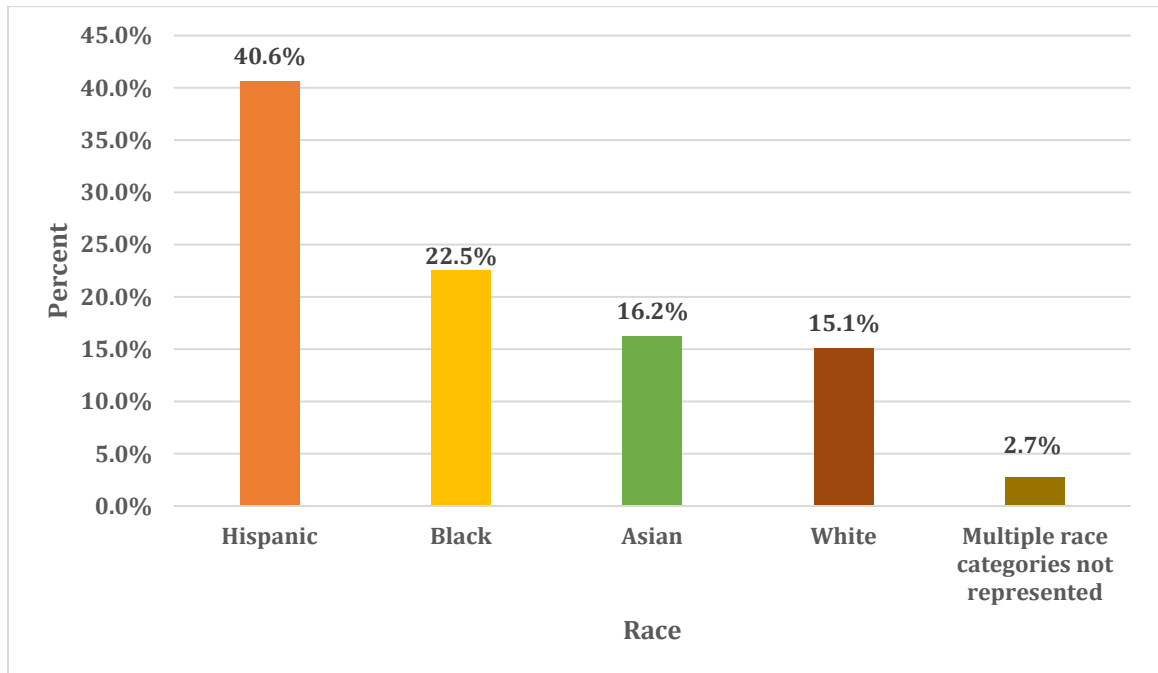
Mettler focuses in on college accessibility as a function of inequality. The quote above notes the creation of a class system based on the college attended and family

income. The higher the family income and higher the rank/tier of the college attended, the more likely it is that the student will graduate. The lower the family income the more likely it is that the student attended a lower the tier college, and it is less likely it is that a student will graduate. She notes that students with higher family incomes will have access to more resources to supplement their struggles, whereas students that attend higher tier colleges have more amenities, such mental health counselling, and experienced tutors in subject areas.

In this vein, lower tier students are more likely to focus in on survival than school status. For example, amenities at lower tier colleges are lacking as compared to their more well-suited counterparts and tutors at the lower ended colleges are more likely to be general educators than specialized subject matter specialists.

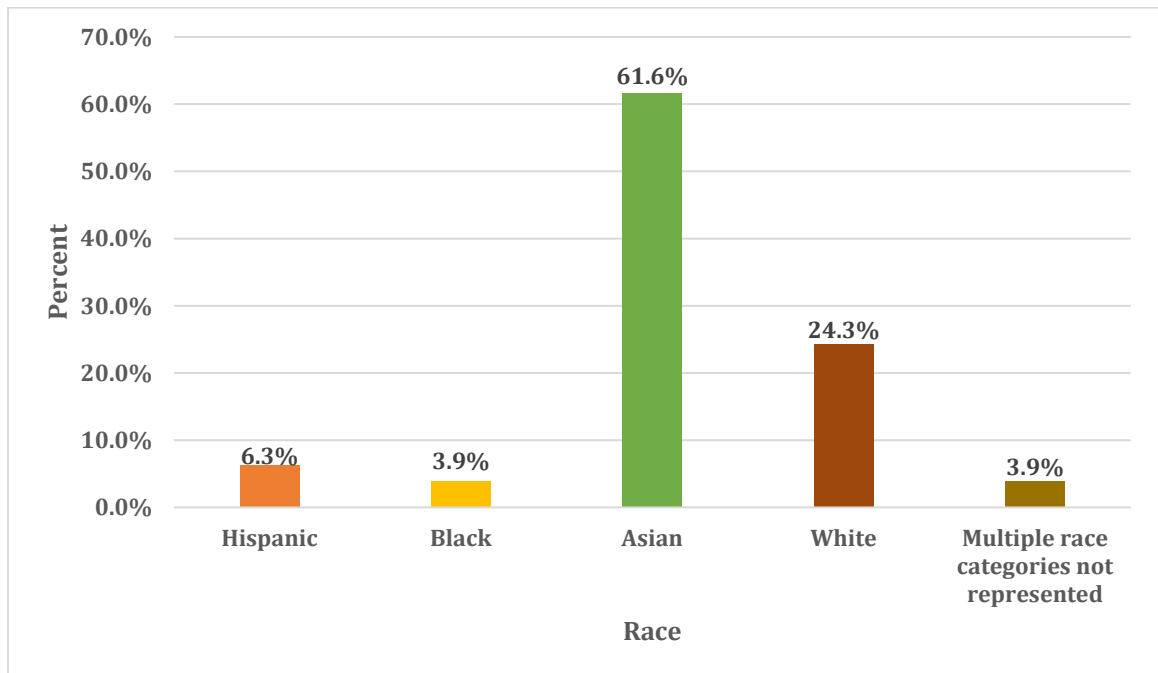
Mettler further noted that the inequality centers on different areas in this caste casting, inclusive of growth of for-profit schools. For profit colleges have dollars as the bottom line for their motivation and tend to focus on *recruitment* and *retention* rather than *education*. Mettler notes that ninety-four percent of students that earn a bachelor's degree at a for profit college borrow funds. That number is even higher for students enrolled in associate programs at for profit colleges at ninety-seven percent (Mettler, 2014). Thus, these organizations disproportionately depend on the federal government for their source of funds. These inequalities are a part of the things that lead to an educational caste system in America (Mettler, 2014).

Figure 8: Population of New York City Public Schools: 2018-2019



Source: New York City Council, 2020

Figure 9: Population of New York City Specialized High Schools: 2018-2019



Source: New York City Council, 2020

Researcher's Perspective & Approach

For this study, the researcher will take an ethically constructivist approach in addressing the research questions. The constructivist approach, also known as an interpretivist perspective, explains human experience by noting that reality is a social construct. Further, the constructivist archetype notes that the holistic whole of the system is more than its disparate parts and keeping that in mind, this outset allocates importance to information within a practical context.

Chapter 3: Methodology & Research Plan

Development of the Methodology and Research Plan

The purpose of the methodology is to formulate a research plan that is appropriately designed to answer the research questions. Dr. Deborah Gabriel (2018) notes “a good methodology is more a critical design attitude to be found always at work throughout a study, rather than confined within a brief chapter called ‘Methodology’” and the background readings that will be used to create the literature review establish an integral part of the methodology. In the instant case, the background readings, the subject to be studied and the literature review formed the methodology and research strategy that was employed to undertake this study and the peripheral limits of the research.

The design of the methodology and research plan was based on the underpinnings of the literature review, which employed a historical review. As such, the investigative inquiries were addressed by a mixed methods study entrenched in archival information that engaged extant information within the legal system, juridical system, nonprofit institutions and government agencies. The researcher, in accordance with the University System of Maryland’s (USM) *Policy on Human Subjects of Research* and the federal regulations set forth in 45 CFR 46, sought approval from the University of Baltimore’s Institutional Research Board (IRB) for authorization to conduct the study. A copy of the IRB approval letter has been included in Appendix A and a logic model is included as Appendix B.

Student loans are taken out by individual borrowers, yet they are owed to the federal government, which is a public organization that does not have the mandate of a private company to return the maximum financial value to the shareholders of the organization.

The methodology had three questions to be answered: First, *what counts for evidence or data...and why?* Secondly, *how will that data be collected?* Finally, *how will the collected data be analyzed to draw conclusions to address the research questions?*

What Counts for Data and Evidence?

In this case, the temporal frame boundaries of the study are between November 6, 1978 to December 31, 2018 and the primary sources of information consist of the U.S. Constitution, the enabling legislation, the Bankruptcy Reform Act of 1978 as enacted, as well as the CFR, the administrative supplement used to execute the day to day administration of the law.⁴⁵ These items, in addition to the aforementioned material, such as committee hearings and background information served as information to be reviewed for the purpose of providing a baseline starting point to understand the-then intent of the law. This review provided insight as to the existing public mood as well as the issues that were important to the lawmakers and regulatory agencies, and provided the expected deliverable outcomes of the initial

⁴⁵ As a reminder, November 6, 1978 is the date that the Bankruptcy Reform Act of 1978 was enacted.

legislation.⁴⁶ The objective at the end of the review was to understand the purpose of the law as initially enacted, its goals, the success benchmarks and what would have then been considered to be a successful outcome or outcomes.

Although the Bankruptcy Reform Act of 1978 as enacted was examined, the law (as amended) was also surveyed, inclusive of the major follow-on legislation that amended the initial law, such as the Bankruptcy Abuse Prevention Consumer Protection Act of 2005. The purpose of performing these analyses was to understand the legal environment at specific points from the enactment of the law to the end point of the study period—December 31, 2018—and to examine changes over time, to include explanations as to what has evolved over that time period and why. It was acknowledged during the review that sociopolitical shifts may impact the discrete subjects of how postsecondary education and student loans are perceived as the Student Loan Program has evolved.

The principal source of data was acquired from publicly sourced extant information, primarily from the legislative, executive, and judicial branches of government. The data that counted as essential evidence was the-then current leading case on student loan repayment in each of the circuit courts as of December 31, 2018. A leading case is the case that sets precedent for other cases to follow in the same circuit court.⁴⁷ The reason why the decisions of the circuit courts were being

⁴⁶ Affiliated information such as court decisions and statutes; the CFR; Congressional Reports; the *Federal Register*; government reports; government websites; public laws; and the U.S. Code were also reviewed.

⁴⁷ The lawsuits that challenge established legal boundaries and set jurisprudential precedent for related cases going forward are the leading cases and are alternatively referred to as landmark cases. The influence of the precedent depends on the level of the court where the decision is made and the

used as the barometer is that the circuit courts have jurisdiction over the subject matter and that they serve as the appellate venue to review the decisions that are within their respective provinces. Further, since the final published decision on the leading case serves as the authoritative word in that circuit, it provides the respective court's outlook on the matter by delivering the case's IRAC (Issue, Rule, Application of the Law, and Conclusion).⁴⁸ Moreover, comparing the IRAC and decisions in the circuit courts to each other and to the requirement of Article 1, Section 8, Clause 4 of the Constitution assisted to illuminate inequities in applying uniform bankruptcy laws nationwide. As such, the circuit court cases served as the unit of analysis and the most appropriate process to review the cases is to undertake a comparative case law review.

Secondary information that was used to assess contemporary undue hardship included extant economic data from the federal government (such as the Consumer Expenditure Survey (CES) from the Bureau of Labor Statistics (BLS), loan data from

location of the court in conjunction with that court's historical rulings and current prevailing judicial thought. If a ruling is delivered from the Supreme Court, the ruling is applicable to all subordinate federal courts. This concept is called *vertical stare decisis* and represents a juridical hierarchy. However, if a ruling comes from a circuit court, the ruling is only applicable to the subordinate courts in that same circuit, and not to the complementary circuit courts. This concept is called *horizontal stare decisis*. Additionally, where the decision is made also plays a part in seriously it is taken.

If a ruling is made in an area which is viewed as a leader in a given subject matter, the decision will carry more weight with other circuit courts, even though all circuit courts are coequals and are under no legal obligation to follow the decision. For example, if a decision regarding a banking case is made in the Second Circuit (which is located in New York City) the decision will be given great deference, due to New York City's importance in banking matters and its colocation with the center of the nation's banking world. Other courts will likely reference the Second Circuit's decision in rendering decisions in their respective circuit. In cases involving federal agencies, the circuit with the most gravitas is the Circuit Court for the District of Columbia, due to its jurisdiction over cases filed in the District of Columbia.

⁴⁸ A map of the circuit courts is included as Figure 1.

DOE, and housing data from the Department of Housing and Urban Development [HUD]). The purpose of the secondary data was to have validated, broad reaching information to determine what a nationwide repayment policy and undue hardship criteria would look at the time the Bankruptcy Reform Act of 1978 was enacted and at the end of the study time frame (December 31, 2018) based on then contemporary societal conditions, contexts and eligibility for federal social service programs.⁴⁹

Data Collection

The data for the legal cases that were collected from the circuit courts was secured by remote access to the cases through the electronic PACER (Public Access to Court Electronic Records) system as well as through the *National Reporter* casebook series.⁵⁰ The PACER Case Locator is a national index for U.S. district, bankruptcy, and appellate courts and the *National Reporter* is a series of hardcover books that have abstracted information on legal cases. The Supreme Court's cases are available through the *United States Reports* publication series.⁵¹ An alternative method used to

⁴⁹ It is acknowledged that the term *undue hardship* was not defined within the Bankruptcy Reform Act of 1978, however there are different contexts in which the term is defined within the time frame of the study. The three most well-known uses of the term are the National Basketball Association prior prohibition on entering the league's draft before four years after graduating from high school, as litigated in *Haywood v. National Basketball Association*, 401 U.S. 1204 (1971); military discharges, and providing accessibility accommodations per the Americans with Disability Act (Public Law 101-336).

⁵⁰ The information contained within a bankruptcy file is public information by statute, so confidentiality is not a concern in securing or divulging the data. Title 11, Section 107 of the United States Code notes that (a) "Except as provided in subsections (b) and (c) and subject to section 112, a paper filed in a case under this title and the dockets of a bankruptcy court are public records and open to examination by an entity at reasonable times without charge." The two noted exclusionary clauses in subsections (b) and (c) allow for trade secrets and commercially sensitive information, such as research and development material, to be excepted from disclosure.

⁵¹ If a case has reached the Supreme Court and been adjudicated, the juridical record—the *United States Reports*—contains the authoritative final legal position on the matter.

secure the information was to travel to district and circuit courthouses in the different circuits. The researcher travelled to the United States Bankruptcy Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit in New York City to retrieve information from the court on the leading case for most of the circuit courts.

There are three major authoritative legal databases and their citation systems which were used to secure legal information as a backup. Those databases and citation systems are Bloomberg's BCite; Westlaw's KeyCite and LexisNexis' Shepard's.

The non-legal information data was secured from existing reports, datasets and publicly accessible physical repositories, such as federal agencies and libraries as well as libraries located at local postsecondary institutions. Interviews were not essential to secure the information required for this study.

Data Analysis Procedures

Data Acquisition

The case law analysis started by reading each circuit court's outcome of its leading case and acquiring the background information, which necessitated identifying the parties, acquiring the procedural history and isolating the relevant facts and legal issue that gave rise to the instant case. This information is normally included in the case summarization but required outreach to acquire further details that are not in the case reporter.⁵²

⁵² This is because a case reporter is a summarization is a review of the issues that have taken place in a trial court. Although the decision of the appellate courts is binding, it is not a transcript of the trial.

Determine the Court's Perspective and Philosophy

The next step to determine the court's reasoning for its decision on the case was to understand why the court ruled the way that it did on the case. Kent McKeever (2019), the Director of Columbia University's Arthur Diamond Law Library notes that

In each published case, there is an opinion and possibly concurring or dissenting opinions. The written reasons for the court's action is the opinion, and it is that which has precedential value. Concurring opinions are written by judges who agree with the result of the decision but have different reasons for arriving at the result than those outlined in the majority opinion. Dissenting opinions are written by judges who voted against the majority opinion and who feel it is important to get their ideas on the record. Concurring and dissenting opinions can be persuasive when used by an attorney in conjunction with other precedent of similar logic.

It is important to not just note the majority opinion, but also the concurring opinion and the dissenting opinion and the vote, if given.

After identifying the legal rule to be applied to the case for each of the eleven cases and how the rule is applied to the facts of the case, the researcher highlighted the facts that the court found important and discerned if and how the rule would apply to different facts (i.e., the other cases).

Compare the Cases and the Philosophies to Determine Uniformity

The Constitution of the United States requires a uniform bankruptcy law and it is expected that the outcomes in the divergent circuit courts would have a similar outlook in applying this aspect of legislation.

court...which aren't normally published. It is noted that trial decisions aren't a part of comparative case law. Comparative case law consists of reviewing "the written opinions of *appellate* courts deciding a point of law" (McKeever, 2019).

In this case, the legal analysis began with a case brief by looking at the facts and the factors that are (and are not) used in each circuit. The points made in the leading case ruling for each circuit were noted as well, examining the parties, procedures and judicial pronouncements that played a role in the student loan discharge process. This was followed by reviewing the tangential issues that are in dispute and the issues or questions of law that are applicable in respect to the facts for each respective case. Next was a scrutinization of the court's holding, which is the application of the facts, decision or determination and finally, its rationale, the reason behind its decisions.

Although Congress included the above stated proviso in the Bankruptcy Reform Act of 1978, Congress failed to provide an operational definition for the term undue hardship. The phrase was extracted verbatim from the pre-legislative debate sessions and inserted into the law, so without hindsight's benefit of the then-current insight or foresight, there's little to perceive in determining what was considered *undue* or a *hardship*. The lack of legislative guidance left the federal court system to divine an operational meaning for the phrase. The intent was to examine the backstory of the term in a governmental and content-based context by performing a historiographical appraisal of the term undue hardship. This included different uses of the term "hardship" in effect at that time, such as for service-connected disabilities (as used by the Veterans Administration) and unemployability (for Social Security

⁵³ For example, Section 2044 of Public Law 101-647 uses the term. The section, titled *Payment of Fine with Bond Money*, notes "The court shall not release any money deposited for bond purposes after a plea or a verdict of the defendant's guilt has been entered and before sentencing except upon a showing that an assessment, fine, restitution or penalty cannot be imposed for the offense the defendant committed or that the defendant would suffer an undue hardship."

Disability Insurance/Supplemental Security Income recipients).

After gaining an understanding of the undefined expression, the second research question also required a review of a phrase whose meaning that was less clear at the time of the Bankruptcy Reform Act of 1978...the term *fresh start*. In the Bankruptcy Reform Act of 1978 and its subsequent revisions, Congress' intent is clear. A search was performed to note the use of the term in business and compare that usage to its employment in the education realm. After the contrast occurred, the goals of the Bankruptcy Reform Act of 1978 were paralleled to the goals of the student loan program to compare the terms "Undue Hardship" and "Fresh Start." This retrospective review was useful for the purposes of comparing if the law as intended did what Congress intended for it to do at the time of enactment.

Repayment Policy and Recommendations

In the event that there was a disparity between the philosophies of the circuit courts, the final question (regarding the creation of a repayment policy and undue hardship) and its affiliated recommendations were examined through the creation of a budget which was representative of expenses that are commonly incurred by a typical American family, or to be more precise, a family that was at or close to the statistical average or median. The reference family for this purpose consisted of a household with two parents and two children living in the same residence. The parents were in their late thirties to early forties and the children were pre-teen minors. None of the reference family members had any medical needs above and beyond traditional medical issues for their respective ages. The family lived a lifestyle without indulging in extravagance and was the most common representative in BLS

standard budgeting practices.

Historically, creating a standard budget is a value laden practice, which requires the imposition of tailor-based normative principles and it is acknowledged that the creation of a budget combines assessments and measures of economic well-being. In short, the creation of a budget for a family is a delicate dance of art and science. Several leading critiques of standard budgeting acknowledge that there isn't a prevailing theoretical model that allows for the creation of a universally accepted technique. As the result, there is no one superior approach to developing standard to address this question.

To approximate the current expenses, there are several works that were reviewed to assist in the creation of the approach. The most notable of the chronicled documents are aforementioned works by Gordon Fisher and Mollie Orshansky, two of the most noted researchers in their respective fields, as well as different publications by the BLS and the New American Family Budget Standards Report by the Expert Committee on Family Budget Revisions.

In discharge cases, judges formally take the position that movants are entitled to retain certain items as a part of their living expenses, such as a home, health insurance and food. The items that compose the budget for this question were put together based on objects that judges mentioned in their rulings, as well as items that executive agencies recommend for living. The rulings where these items were cited was considered conclusive proof of each item's legitimacy. The financial milestones that were used by the court are statistical measures for calculative tabulation, which

may not be reflective of market-based actual costs.⁵⁴ The major legal databases, such as Westlaw and Lexis-Nexis, were searched to find cases where lists of the items are publicly stated and the costs for these items was cross referenced by performing a market analysis with the details provided in the analysis section.

Statement of the Significance of the Study

This dissertation, which is “a systematic investigation of a socially significant research question that contributes to the literature and demonstrates the skill of doctoral students to conduct original research” by establishing its significance (Yin, 2009).

The significance of this study comes in two forms: Significance in the field (via its contribution in an underexamined area, providing knowledge for potential table setting of future policy) as well as significance to the population that it can affect. Student loan debt impacts 42.6 million citizens totaling 1.542 trillion dollars with an average student interest loan rate of 5.8 percent annually, which is roughly 90 billion dollars to financial institutions in interest (Helhoski, 2020). Additionally, this work is noteworthy to the discipline of public administration, serving as an applied holistic assessment of interrelated government policies for practitioners, while the latter serves as a coherent cognizant confirmation of life to the proletariat.

⁵⁴ The milestones are the poverty guidelines published annually by HHS, the poverty thresholds issued by SSA and the Internal Revenue Service’s *Collection Financial Standards*.

Chapter 4: Findings

Discussion & Analysis: The Students Affected by the HEA & the Markets

The Educational Proletariat

With the proletariat in mind, the HEA was enacted with the global goal of helping students to go to college, but who are the students that the HEA helped? What did that group look like then, and what does that group look like now?

At the time the HEA was enacted, the ethnographic distribution of the nation's college student population outside of the nation's HBCUs was not a diverse lot. Although President Lyndon B. Johnson spoke of providing opportunities to over a million students on November 8, 1965, the dollars went to the crowd that was in college at the time. The Department of Commerce (1969) and DOE (1993) note that in the fall of 1965, America's college campuses were overwhelmingly white (94.20%), male (61.73%), full time students (69.18%) enrolled in four-year (80.19%) public college (73.75%) undergraduate programs (89.49%) in the-then existing 2,230 post-secondary institutions nationwide.^{55,56}

There are several reasons for the homogeneity of the college student population, some of which are pragmatic and practical, such as campus class capacity constraints, while other reasons which are more overt and obtuse, such as state

⁵⁵ The racial distribution of college students at the time is as follows: "White" (94.2%); "Negro" (4.6%) and "Other non-white" (1.2%).

⁵⁶ Respectively, the data is from DOC (Table 185); DOC (Table 145); DOE (Table 24); DOE (Table 24); DOE (Table 24); DOC (Table 182); DOC (Table 140); and DOE (Table 26).

sanctioned segregation. Although Title IV of the Civil Rights Act of 1964 (Public Law 88-352) states that discrimination based on race, color, or national origin is patently illegal in programs that receive federal funds, DOE confirmed that after this law was passed, the nineteen states in Figure 10 operated racially exclusionary higher educational systems as late as the early 1970s. This is even after the DOE Office for Civil Rights (OCR) put forth efforts to desegregate colleges (U.S. Department of Education. Office for Civil Rights, 1991).^{57,58}

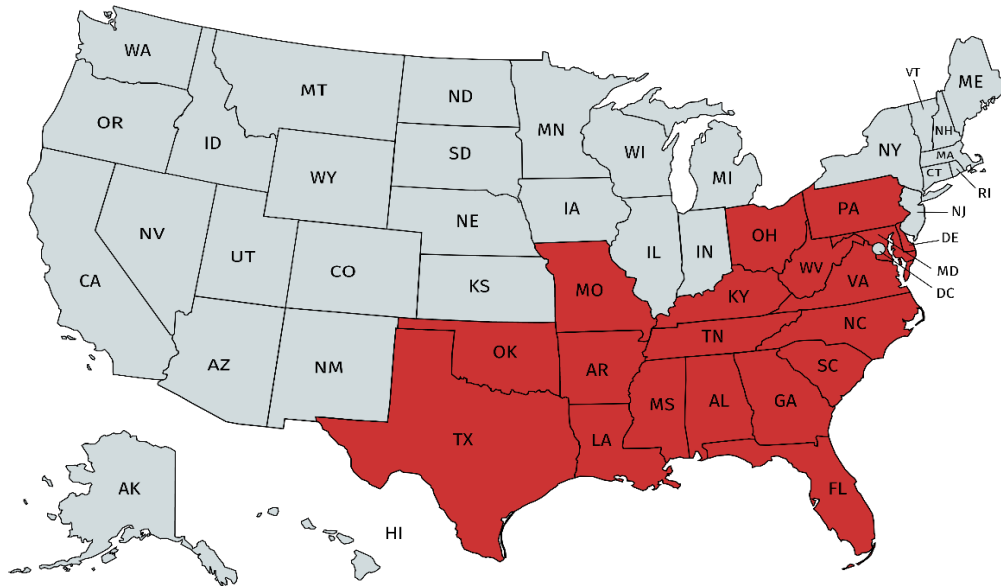
One decade after the HEA, the racial demographics did not change much. In the Fall of 1976, DOE (2018, 1993) noted the racial disparity remained intact with whites (82.62%) and males (52.77%) as the prevalent groups on campuses, while the number of postsecondary educational institutions increased to 3,046. After this point, the profile of America's college students began to change through the next four decades so that the college student population began to become a more reflective composite of America's demographic makeup.

⁵⁷ The nineteen states are Alabama, Arkansas, Delaware, Florida, Georgia, Kentucky, Louisiana, Maryland, Mississippi, Missouri, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, and West Virginia (Litloff, III, 2007).

⁵⁸ This is in part due to the incompleteness of the Supreme Court's ruling in *Brown v. Board of Education* (1954) where Chief Justice Earl Warren noted that "in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal."

The primary focus of the *Brown* case was to secure *access* to educational facilities; it wasn't until two decades later as the result of *Adams v. Richardson*, 356 F. Supp. 92 (D.D.C. 1973) where states were required to provide educational *equity*.

Figure 10: Segregated Postsecondary Educational Systems in the 1960s

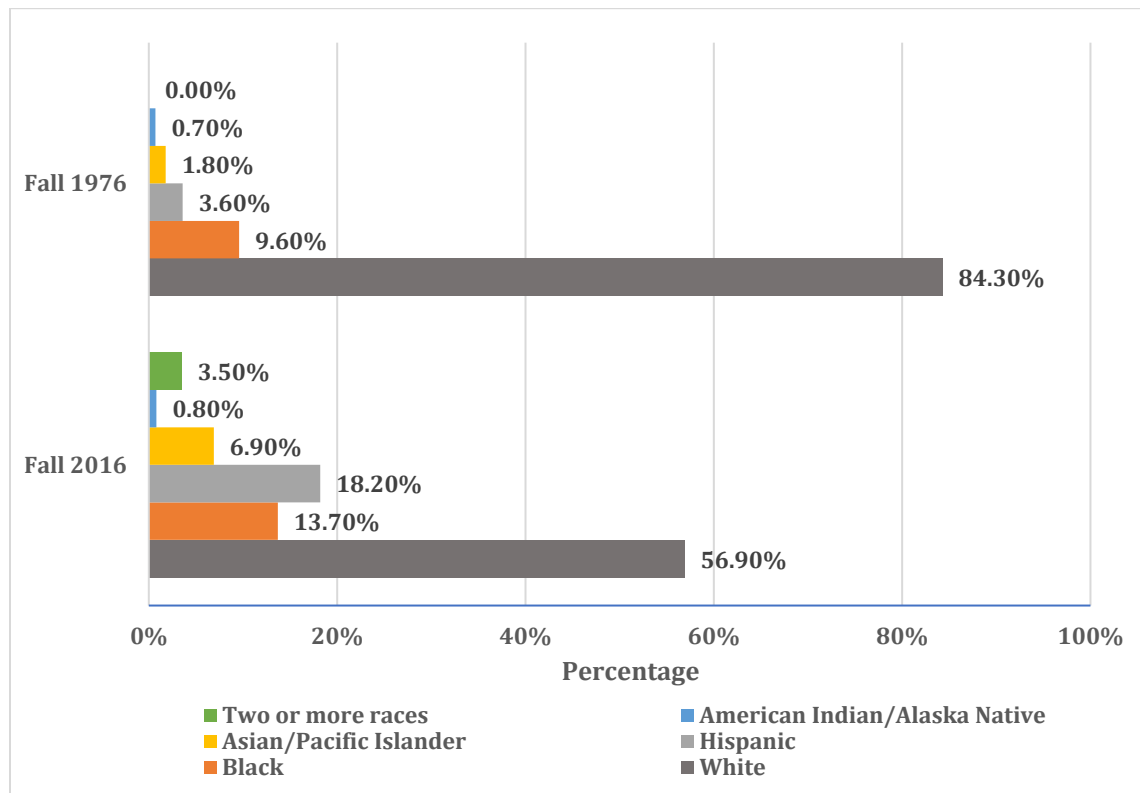


Source: Houston (2020), based upon data provided by the U.S. Department of Education. Office for Civil Rights. 1991

Demographic Changes After 1976

At the beginning of 1976, the percentage distribution for college students was skewed heavily in favor of white students to non-white students by a ratio of nearly seven to one (84.30% to 15.70%) as depicted in Figure 11. However, four decades later, the non-minority to minority proportion shrunk to almost a four to three ratio (56.90% to 43.10%). Not long thereafter, the gender balance in college shifted. The Fall of 1979 is when more females attended college than males for the first time (50.88%/49.12%) and females have remained the majority gender in college since then, matching their status as the preponderant sex in the United States (U.S. Department of Education. National Center for Education Statistics, 1993).

Figure 11: College Enrollment (by Race): Fall 1976 and Fall 2016



Source: U.S. Department of Education. National Center for Education Statistics 2017

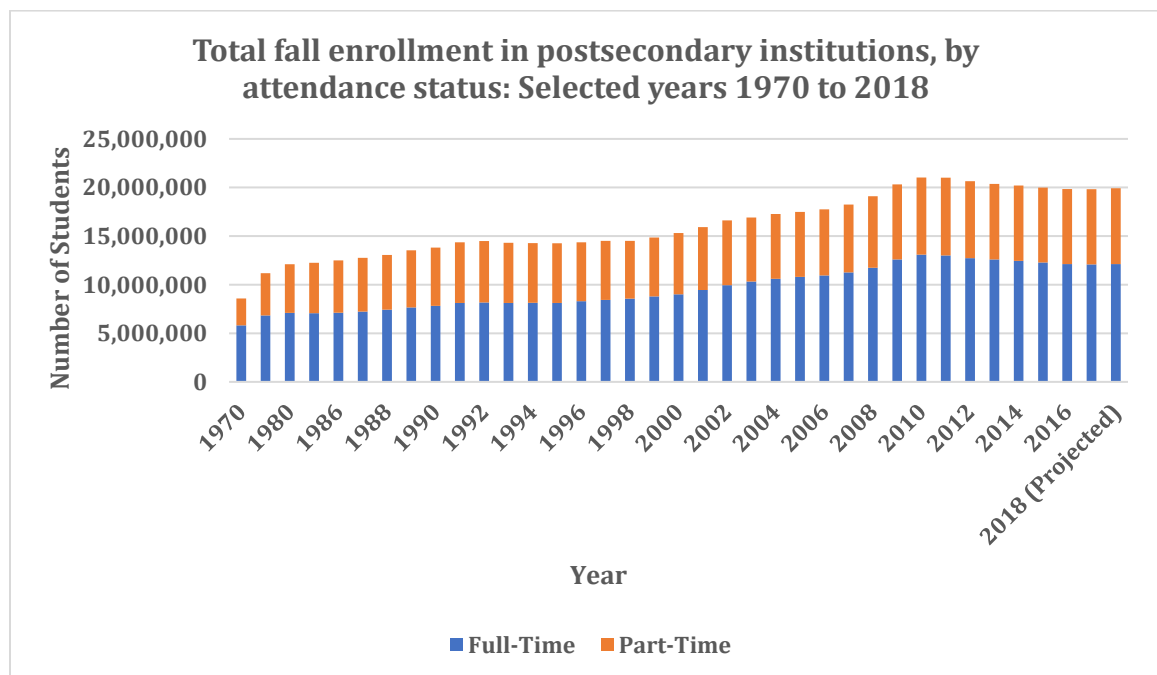
The National Center for Education Statistics (NCES [2017, 1993]), a division of DOE, notes that total enrollment at four-year colleges and universities nearly doubled from 1976 to 2016, from 7.13 million to 13.75 million, while enrollment at two-year colleges increased by more fifty percent during the same time span from 3.88 million to 6.09 million per Figure 12 and Figure 13. As of the Fall 2016 semester, NCES (2017, 1993) data shows that most students are enrolled in four-year colleges as opposed to two-year colleges by a ratio of 69.30% to 30.70% and at public colleges at a rate of 73.50% versus private colleges at a rate of 26.50%. NCES (2018, 1993) also notes that the number of colleges has grown accordingly with the number of college students from 3,046 in 1976 (1,455 public/1,591 private) to 4,360 (1,623

public/2,737 private) as of the Fall of 2016, with the growth for the period of 1969 to 2016 shown in Figure 14. The amount of debt for graduate students has risen by fifty percent for most graduate students, as shown by Figure 15.

Community College: An Alternative Solution

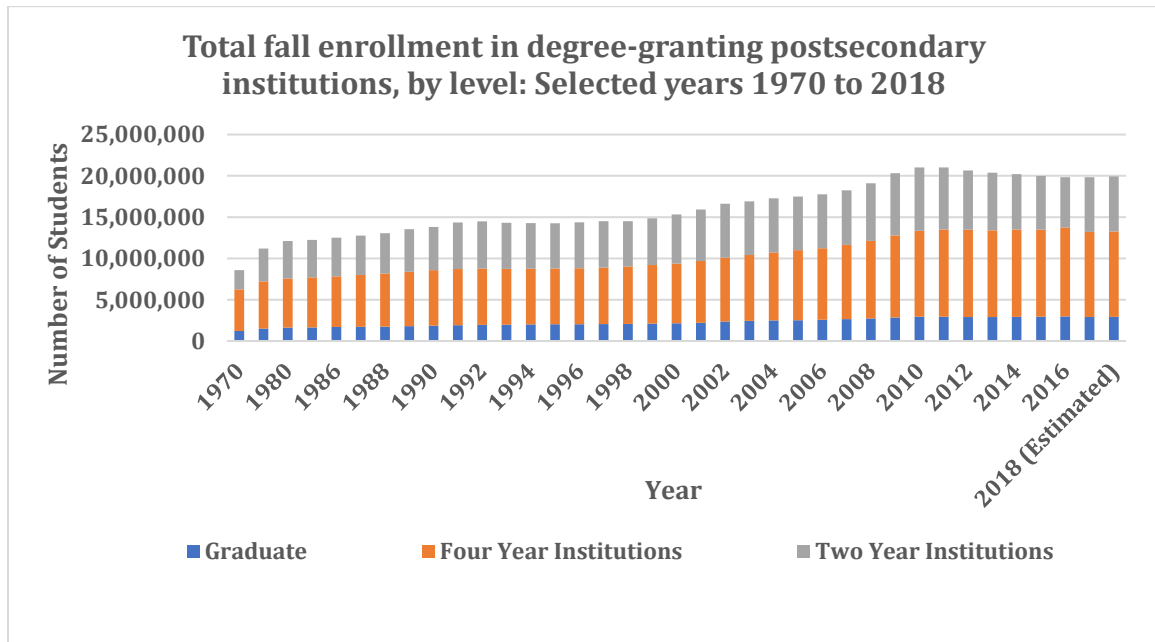
Part of the reason for the rise in the number of institutions is the growth of community colleges, less commonly known as junior colleges. Community colleges are two-year institutions that cater to individuals that have a high school diploma or equivalent. They generally serve as a pathway to continuing education at a traditional four-year institution or as a venue to develop technical skills and abilities in a trade for vocations that are not taught at four-year colleges and universities.

Figure 12: Post Higher Education Act College Attendance: Enrollment Status



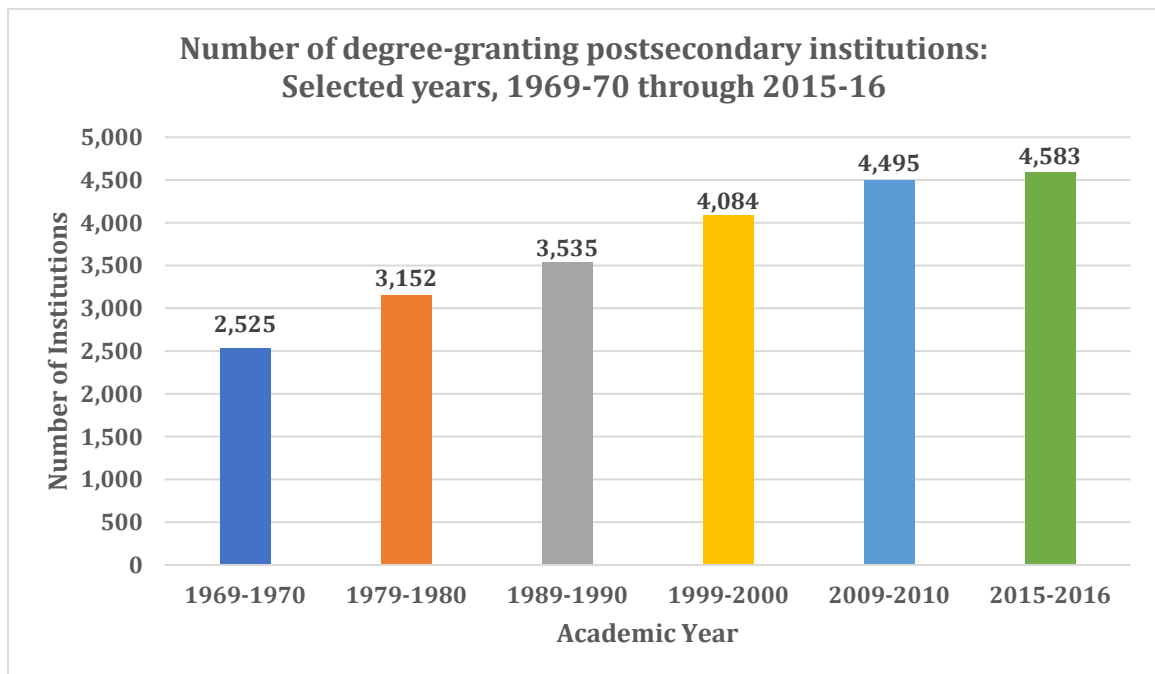
Source: U.S. Department of Education. National Center for Education Statistics 2018

Figure 13: Post Higher Education Act College Attendance: Academic Level



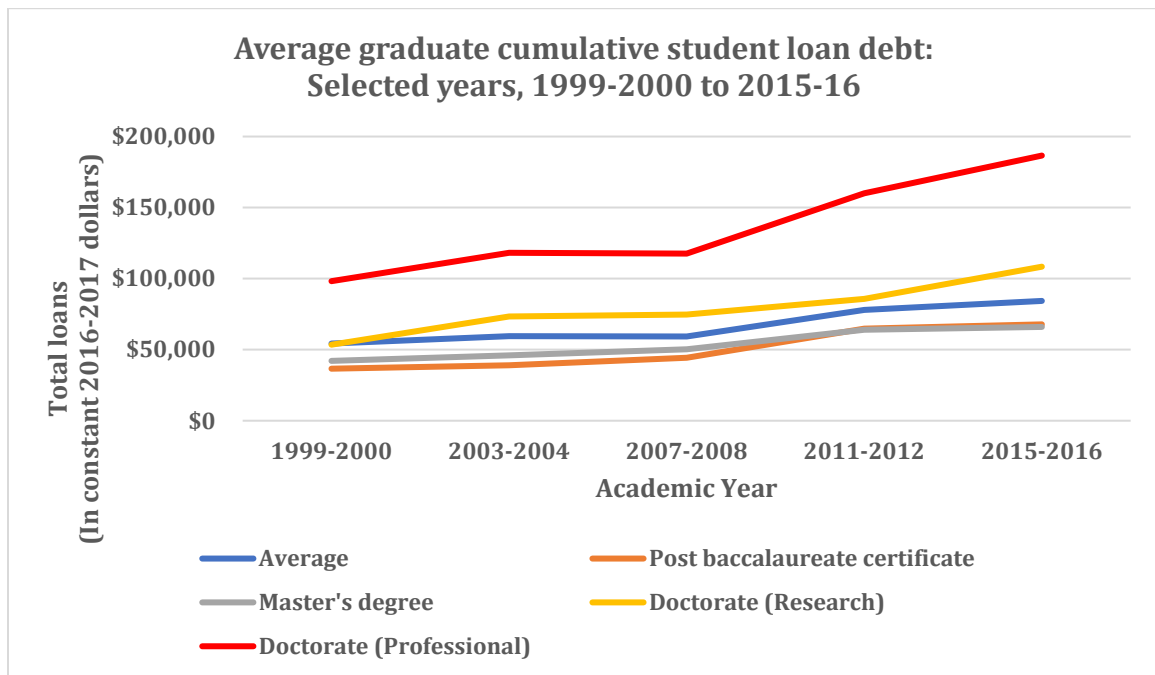
Source: U.S. Department of Education. National Center for Education Statistics, 2018

Figure 14: Post Higher Education Act Institutional Growth



Source: U.S. Department of Education. National Center for Education Statistics, 2018

Figure 15: Student Loan Debt for Graduate Students



Source (U.S. Department of Education. National Center for Education Statistics, 2018)

Joliet Junior College (2020) in Joliet, Illinois, founded in 1901, is widely known as America's first junior college. There were a few others in existence until the middle of the century, when an explosion of community colleges opened in the 1950s, 1960s and 1970s to accommodate the number of veterans coming home from the Korean Conflict/Vietnam War and expand access to the academic market to the public. This access to community college education follows the recommendations of the President's Commission on Higher Education report titled *Higher Education for American Democracy*.

The highlight of community colleges is that they serve as a lower cost open access postsecondary educational option since they are less expensive than their four-year counterparts. The American Association of Community Colleges (2020)

estimates the average annual cost of tuition and fees at a community college to be \$3,730. However, the nadir of community college and its relative inexpensiveness comes at the expense of graduation, as only thirteen percent of community college students graduate within two years; twenty-two percent within three years and twenty-eight percent of community college students graduate with an associate's degree in four years (Chen, 2020).

One example of a college recognizing the need to balance the tension between access to higher education and maintaining quality is the University of the District of Columbia (UDC), the capital city's public university.

UDC was founded in 1976 by the merger of three public institutions: Miner Teachers College, Federal City College and Washington Technical Institute. When UDC opened its doors, it had an open admissions policy, but being an open access institution hindered its mission to provide the best education, as ninety percent of incoming freshmen required remediation and the DOE Integrated Postsecondary Education Data System noted the college's undergraduate graduation rate hovered around ten percent for many years.

The institution recognized that what it was doing wasn't working, so it needed to readjust its focus to serve the public as a comprehensive university. In 2009, UDC ended its open access policy to the *university* and fully complete its mission by creating the University of the District of Columbia *Community* College (UDCCC). UDCCC continued UDC's mission of permitting those individuals that wanted a college education, but were not prepared to go to a four-year college with the opportunity to attend a postsecondary institution and have an avenue to seamlessly transition to a

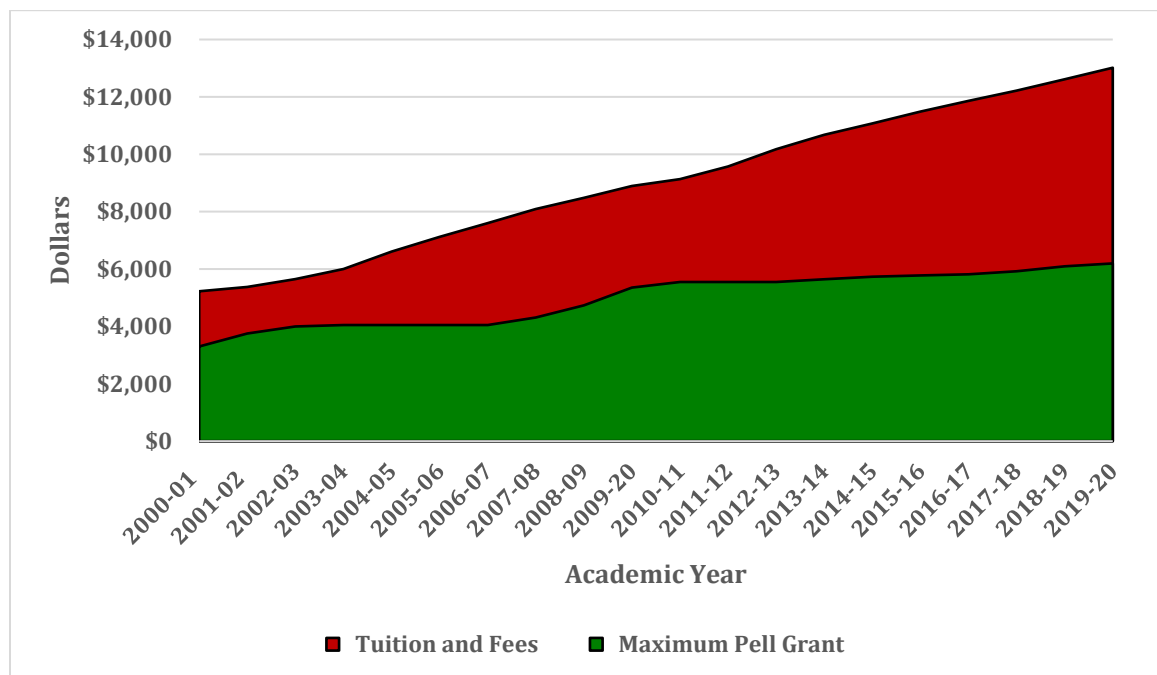
full four-year university (UDC) upon completion. The end result is that the university was able to raise its academic graduation rate for its bachelor's candidates while still being able to provide instruction to other students with an open admissions policy, but college aspirants still must pay the cost.⁵⁹

Pell Grants have been in existence since 1973 as the primary source of nonrepayable federal funding for postsecondary education. While the grants were generous in the early days of the program, covering most of the cost of education, adjustments have not kept pace with inflation, so that Pell Grants currently only cover fifty-nine percent of tuition and fees (Renter, 2020). "As recently as 2002, the most at-need students would nearly be able to cover their entire tuition and fees at these lower-cost institutions by qualifying for the maximum Pell Grant" (Renter, 2020).

The chart at Figure 16 shows the variance between the cost of education and the maximum amount of Pell Grants given to an individual annually for the last two decades. If an individual qualified for the maximum Pell Grant, there would be a funding gap. While state funding programs may have previously covered the difference, the funding streams for those programs have dried up. As a result, college students that need financial assistance the most will be required to take out student loans, perpetuating the cycle of educationally victimizing the individuals that are most in need of assistance and least equipped to take on the cost.

⁵⁹ The six-year graduation rate for bachelor's degree candidates improved from fifteen percent in 2008, the year prior to UDCCC to forty-five percent in 2012 (University of the District of Columbia, 2019).

Figure 16: Gap between Pell Grants and Tuition/Fees



Note: The red area in Figure 16 shows the difference between the maximum Pell Grant (the green area) and the cost of tuition and fees.

Source: Congressional Research Service, 2018; U.S. Department of Education. Federal Student Aid, 2019; U.S. Department of Education. National Center for Education Statistics, 2020

Administrative Laws and Regulations

There are two ways in which a student loan can be dismissed. The first is through a prebankruptcy forgiveness, cancellation or discharge program and the second is through the bankruptcy process. The following section explains the prebankruptcy process.

Prebankruptcy Loan Termination

There are several different types of prebankruptcy student loan terminations. The most prominent of the terminations are through the Public Service Loan Forgiveness (PSLF) program, the Teacher Loan Forgiveness program and the Perkins

Loan Forgiveness program. These three programs forgive the remainder of student loans based on the position that the debtor holds. For the PSLF, if the student works in the public sector for ten years and makes one hundred twenty qualifying timely payments, then the rest of the student loan is forgiven in full. The Teacher Loan Forgiveness program is not as generous. This program only forgives \$17,500 of student loan debt, but only if the student borrower is a full-time educator or other qualified staff member for five years. The Perkins program forgives one hundred percent of student loans for teachers, affiliated professions, public defenders, firefighters, and seventy percent for AmeriCorps VISTA (Volunteers in Service to America) or Peace Corps volunteers. Of the three, the PSLF program is the largest program.⁶⁰

The Government Accountability Office (GAO) released report GAO-18-547 on September 5, 2018 titled, *Education Needs to Provide Better Information for the Loan Servicer and Borrowers*. The report noted that out of 1,173,420 borrowers that filed applications to determine their eligibility for the PSLF program, 890,516 applicants were declared eligible, and of the 19,321 applications that were filed to request loan forgiveness from the PSLF program, only 55 qualified to have their loans forgiven, forming a disapproval rate of 99.72% (2018).

DOE acknowledged the shortcomings of the PSLF program and advised GAO that it would do better to streamline the process, making it easier for applicants to

⁶⁰ There are discharges for other causes, such as if the college or university closed before the program of study was completed, fraud, discharge due to the death of the borrower, or a discharge because of the total and permanent disability of the borrower. However, these types of discharges are rare.

apply and to educate the public and loan servicers about the program. Congress, in response to the report, directed DOE to do better in decreasing the disapproval rate by enacting Section 315 of Public Law 115-141, the Consolidated Appropriations Act, 2018. Thus, the Temporary Expanded Public Service Loan Forgiveness (TEPSLF) program was initiated.

One year later, GAO released report 19-595 on September 5, 2019, titled *Improving the Temporary Expanded Process Could Help Reduce Borrower Confusion* (2019). The results of the revised program noted that DOE improved on its prior showing...by nearly a full percent. Of the 53,523 applications for loan forgiveness that were filed for the TEPSLF program, only 661 were approved, for a disapproval rate of 98.76 percent, which is a *slight* improvement when compared to the 99.72 percent disapproval rate for the PSLF program.

GAO issued a third report on the matter on September 19, 2019, titled, *Opportunities for Education to Improve Both the Program and Its Temporary Expanded Process* (2019). This third report noted that none of the recommendations issued in the first two reports were fully implemented. The high disapproval rate, even for the redux, make it abundantly clear that the PSLF or the TEPSLF programs were—and still are—not a viable option to discharge student loans.

Why Are We Bankrupting Our Students?

One question that was asked during the dissertation proposal defense is: *Why are we bankrupting our students?* It is a question that merited further investigation to come up with a thorough response. In order to complete the context and frame of

the dynamic, the researcher examined the student loan regulations, the students that are subject to the regulation and the methods of funding a college education, keeping in mind that the purpose of the HEA was to enable students that could not afford to go to college the opportunity to go to college by using loans.⁶¹

A loan by nature is an investment in a person, object or concept, which has inherent risk of loss or non-recoupment of principal. In this case, making good on a loan requires the fulfillment of several assumptions by the student and the federal government. None of the federal government's assumptions are explicitly set out in a promissory note, but all are implied in the tenets of the Student Loan Program. The first assumption is that the economy of the United States will increasingly expand. The second assumption is that there will always be a place in the economy for the debtor to practice the profession studied by the student. The optimism expressed in the third assumption (the loan is an investment which is potentially subject to being a loss) is no longer a subject to the possibility of deficiency by the federal government guaranteeing that the loan will be repaid for any entity—*private or public*—that participates in the Student Loan Program.⁶²

⁶¹ There are five primary methods for funding a college education: Loans, grants, scholarships, in-kind payments, tuition benefits and paying out of pocket. The lion's share is funded by student loans and grants. Further, CNN notes that "most students borrowed from the federal government's low-interest student loan program" (Lobosco, 2017).

⁶² There is a captive audience here, as for some, loans were always going to be a part of the process. Sallie Mae reports that "nearly 6 in 10 families who borrowed (57%) say that borrowing was always part of how they planned to pay for college" (Sallie Mae and Ipsos, 2020).

Graduation Rate, Financial Aid and E-Books

Another part of determining why students are being bankrupted and who falls in the cracks is to determine the current student market that puts them in the position to be bankrupted. In short, the students that are in the worst possible position to fall through the cracks are the ones that don't have the degree but still have the loan. Reworded, *how many students graduate from college with federal assistance?*⁶³

The standard period to receive funding as an undergraduate is roughly six years, so the 2012 class is the most recent group from which numbers are available (U.S. Department of Education. Federal Student Aid, 2020). The six-year graduation rate for private four-year nonprofit colleges is 76.1 percent. The six-year graduation rate for public four-year colleges is 65.7 percent. The six-year graduation rate for private four-year for-profit colleges is 37.3 percent. The six-year graduation rate for public two-year colleges is 39.2 percent (Nandworny, 2019). Generally, half the students at public universities drop out and it is estimated that "forty percent of college freshmen never make it to commencement is higher education's dirty little secret, a dereliction of duty that has gotten too little public attention" (Strauss, 2019).

Further, about fifty percent of college students never make it to graduation. Black and Hispanic students graduate at the rate of roughly forty percent and the dropout rate is highest at community colleges, where nearly sixty percent do not graduate or transfer within six years (Strauss, 2019).

⁶³ Getting the graduation rate provides a good idea as to how many people don't graduate.

Financial aid is mostly funded by DOE and state funds based on achieving Satisfactory Academic Progress (SAP). SAP ensures that a student is making progress “toward successfully completing your degree or certificate in a time period that’s acceptable to your school” (U.S. Department of Education. Federal Student Aid, 2020).

Financial aid can be used to cover an assortment of non-tuition expenses, such as for books and computers. Several colleges and universities have taken note of the increased cost of textbooks and worked to assist in lowering costs, such as through electronic book (E-book) rentals as opposed to printing commercial books. The cost of E-books are less than traditional printed textbooks. The University of Baltimore is one of the universities that have moved toward the trend of using open source materials and electronic books to lower postsecondary costs.

Misreading of the Markets and Recoupment

It can be surmised that students are being bankrupted due to a misreading of the markets. Taking out a loan to attend college is an investment in oneself, but students may be fundamentally misreading the market as to where education and labor are headed, as they are clearly going in two divergent directions.

The recent moves by state legislatures to raise the minimum wage to fifteen dollars per hour put an unintended twist into the educational field. Fifteen dollars requires paying a high wage to a large population at the lower end of the payscale, especially in states such as California and New York, to combat poverty. The aphorism that a rising tide lifts all boats ultimately does more for those at the bottom,

so unskilled workers and their unions praised the move, even if it was to their own detriment.⁶⁴

Students and skilled workers may not have been so vociferously effusive in praising the action, as it diminished the value of working for years to secure a degree. For those that have degrees and are paying loans back, the action did little to differentiate them from the non-degreed, making the proposition of getting a degree not as beneficial as it would be otherwise.

Conclusion: The Students Affected by the HEA & the Markets

In the half century since the enactment of the HEA, America's non-HBCU college student population has included more women and minorities to become reflective of a composite of America.⁶⁵ While academe is becoming more diverse, education is becoming more expensive, labor is moving in the direction of credentials and experience, as opposed to focusing on degrees as the basis of hiring. Even the federal government is working toward minimizing the value of a college education, and educational institutions by emphasizing skills and skill sets over college degrees.

The federal action that may destabilize the educational market the most going forward is the recently the *Executive Order on Modernizing and Reforming the Assessment and Hiring of Federal Job Candidates*, known as Executive Order 13932.

⁶⁴ New York City raised its minimum wage for fast food restaurants to fifteen dollars per hour in 2018. Several McDonald's restaurants in New York City complied with the new law by laying off cashiers and installing digital ordering kiosks in exchange. The employees that remained employed prospered, while the rest were unemployed.

⁶⁵ HBCUs have traditionally comprised persons of color and women at higher percentages than their non-HBCU counterparts.

Executive Order 13932 (2020) was intended to “replace degree-based hiring with skills and competency-based hiring” by devaluing degrees in the federal hiring process, so getting a degree is not as respected as it was once was, and the value of a completed educational degree may never be as high as it is currently worth. Ultimately, the Chief Executive of the United States devalued postsecondary education and a half century of edicts from the federal government encouraging people to go to college nationwide with a mere stroke of a pen.⁶⁶

Discussion & Analysis: Evolution of Judicial Discharge Philosophies

The derivative inquiries which were used to explore the primary research questions were focused on the elements of undue hardship as espoused in judicial philosophies in respect to the outcome of a fresh start in the bankruptcy process. The Supreme Court in *Local Loan Co. v. Hunt*, 292 U.S. 234 (1934) notes that intent of the Bankruptcy Code is to give “the honest but unfortunate debtor...a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.”

Although student loans were dischargeable without restriction prior to October 12, 1976, when the Education Amendments of 1976 was enacted, the standard for discharging student loans was not fully operationally articulated until

⁶⁶ DOE expects to receive “85 cents on the dollar for every defaulted loan” (Huffington Post, 2012). This number is higher than the standard for a debt collector, which is four cents on the dollar, but the powers that the federal government wields go well beyond those of a standard debt collector (Fontinelle, 2020).

well after the Bankruptcy Reform Act of 1978 was in force.^{67,68}

After the Bankruptcy Reform Act of 1978 was functional and tested through the federal court system, two distinct juridical philosophies for the discharge of student loans developed in the enumerated circuit courts over the next three decades. A list of the eleven leading cases that was reviewed is included at Appendix C.⁶⁹

Those two philosophies, which were reduced to writing and implemented as prescriptive protocols are known as the *Brunner* test and the Totality of the Circumstances test.⁷⁰ The discussion of the two philosophies will begin by focusing on the first of the benchmark which is used in the nine of the eleven federal circuits, the *Brunner* standard.⁷¹

Brunner: Background & Development

The Brunner standard developed from the case captioned *Brunner v. New York*

⁶⁷ Section 439A(a) required a five-year waiting period and for the court of competent jurisdiction to “determine that payment from future income *or other wealth* (emphasis added) will impose an undue hardship on the debtor or his dependents.”

⁶⁸ The most notable changes to the Bankruptcy Code prior to the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 occurred in 1976, 1978, 1979, 1984, 1990, 1991, 1993, 1996, 1998 and 2001.

⁶⁹ Additionally, a list of cases referenced in this text is included as Appendix C and a list of laws referenced in this text is included as Appendix D.

⁷⁰ Hereinafter, these two standards shall be referred to as the *Brunner* standard (or *Brunner* test) and the *Totality* standard (or the *Totality* test).

⁷¹ Those nine circuits are the Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, Ninth Circuit, Tenth Circuit, and the Eleventh Circuit. The other two circuits, the First Circuit, and the Eighth Circuit, use the *Totality* standard.

State Higher Education Services Corporation, 831 F.2d 395 (1987).⁷² Marie Brunner, the plaintiff in the case, was born in 1946 and entered college as an undergraduate student in 1972. At 26 years of age, she was older than the traditional college freshman and took a little longer to graduate than the norm, leaving college as a graduate seven years later, receiving a bachelor's degree in liberal arts from Lehman College in May of 1979.⁷³ Brunner's undergraduate education focused concentrated on psychology and she noted in her bankruptcy petition to discharge her student loans that she did not take any business courses during her undergraduate training.

After graduation, she secured a psychology related position in February 1979, as the result of the Comprehensive Employment Training Act of 1973 (CETA) where her duties consisted of psychological and social counselling. After attending Lehman College, she subsequently took post-baccalaureate classes at Mercy College in Dobbs Ferry, NY and received an educational loan from the New York State Higher Education

⁷² The researcher travelled to the United States Bankruptcy Court for the Southern District of New York in New York City to examine the original *Brunner* case file to secure in-depth information beyond the data listed in the summarized Federal Court Reporters. Although the case file and its contents are publicly available for review upon request, the privacy of the medical information contained therein has elements of privacy as the result of practical obscurity, since "the records [are] stored in such an inaccessible fashion that only the determined and resourceful could obtain them" (Electronic Privacy Information Center, n.d.).

The publicly available dossier includes personal data which will not be repeated hereinafter, except to provide the background and breadth that is necessary to articulate the establishment and development of the *Brunner* standard. The types of medical creditors have been included are listed as the function of the creditor's profession, which is not *necessarily* indicative of the specific procedure that the professional performed. Further, the *medical diagnoses* contained in the *Brunner* file has been reduced in this document in non-specific terms. For example, a specific diagnosis of occipital neuralgia would be simplified to the generic, all-purpose term of a *headache*.

⁷³ Lehman College is a public senior college of the City University of New York located in the Bronx, NY.

Services Corporation (NYSHESC).⁷⁴

Brunner faced a number of medical challenges in the last year of the 1970s, as she reported that she was hospitalized in March of 1979, which coincided with her last semester of studies as an undergraduate. Of the thirteen creditors listed in her bankruptcy petition, the lion's share—*nine*—were attributable to the medical profession, with those bills totaling \$2,397. Four charges totaling \$588 were for the services of medical professionals, inclusive of an anesthesiologist, two doctors and a surgeon. Three charges totaling \$1,734 were attributable to hospitals and the final two entries (\$75) were attached to laboratory facilities. Seven of the nine medical charges were in collections status at the time the petition was filed. Later in the year, Brunner (1982, p. 10) received intense treatment, suffering from depression and what she called a nervous breakdown, followed by anxiety “and deep failure for not being self-sufficient.” Brunner acknowledged addressing the subjects with a therapist, but also conceded that she was in good health and capable of working.

The remaining four creditors in the bankruptcy petition were educational related entities, as the residual charges were for student loans. Specifically, eighty one percent of the total outstanding debt (\$10,548) listed in the petition was filed to address student loan debt. Brunner's petition to the court (1982, p. 1) notes “I began making weekly payments on my undergraduate loan of \$41.00 but had to stop when

⁷⁴ Brunner's post-baccalaureate classes did not entail enrollment in a graduate program, as Mercy College, which was founded in 1950, began its first graduate program in 1981 (Mercy College, n.d.).

my job was terminated in July 1980.”^{75,76}

Thereafter, she noted that this was the only time when she could afford to make payments on the loan before she subsequently went on to graduate school. Brunner’s bankruptcy petition does not indicate whether the CETA position was temporary or permanent. Additionally, her petition does not indicate that she was terminated for cause, released due to work related misconduct, or quit, as Brunner received unemployment insurance payments.⁷⁷ Brunner claims she “lived primarily on unemployment compensation from August 1980 through the summer of 1981” (Brunner, 1982). In September 1981, Brunner secured a one-year internship at what is now known as the Westchester Institute for Human Development of the Westchester Medical Center University Hospital in Valhalla, NY.⁷⁸ The fellowship paid Brunner a non-taxable amount of \$300 per month.

Three years later in 1982, she graduated with a master’s degree in Social Work (MSW) from Fordham University. Her social work coursework consisted of clinical training focused on social therapy training. Nine months after receiving her MSW,

⁷⁵ It is noted that there are variances between the information in the Federal Court Reporters and the documents in the official file on record with the court. Additionally, the documents in the court file provide different dates, amounts and other information for one particular item. The differences are footnoted as necessary to provide clarity.

⁷⁶ The job may not have ended in July 1980, but one month later in August 1980, which is the month and year provided by Brunner’s attorney (R. Mark Goodman) to the United States Bankruptcy Court for the Southern District of New York in her March 30, 1983 answers to the interrogatories.

⁷⁷ If Brunner was fired, voluntarily left her job (under certain conditions) refused employment, or was engaged in misconduct and/or criminal acts, she would not be eligible to receive unemployment compensation, per Article 18, Title 7, Section 593 of the New York State Labor Law.

⁷⁸ The Westchester Medical Center University Hospital was previously known as the Westchester County Medical Center.

Brunner had accumulated approximately nine thousand dollars in outstanding accumulated student loan debt (\$23,431 in 2018 dollars) and filed a motion to discharge the loans.

When Brunner filed her bankruptcy application with the court on December 20, 1982, she owned a vehicle, a 1973 Chevrolet Malibu with 115,000 miles on the odometer (Brunner, 1982).⁷⁹ She also had \$2,500 dollars in cash on hand as well as \$450 in deposits and \$100 in clothing and other apparel, as noted in the application. There were a few changes noted between Brunner's December 20, 1982 bankruptcy file and the responses provided to the interrogatory questions posed by NYSHESC, the guarantor of the loans, on March 30, 1983.

At the time of the updated responses, Brunner noted she was a 37-year-old childless divorcee. She replaced the Malibu with a 1979 Honda CVCC, of which Brunner paid approximately \$2,000 dollars of the-then manufacturer's suggested retail price of \$3,999.^{80,81} Her rent at the time was two hundred dollars per month, with her food costs being one hundred dollars per month and a clothing allotment of forty dollars per month. Miscellaneous costs, utilities and telephone cost eighty dollars; fourteen dollars and twelve dollars, respectively. Brunner maintained that it

⁷⁹ Brunner's bankruptcy petition noted that her automobile, a 1973 Chevy Malibu, was exempt from bankruptcy proceedings. In 1973, the Malibu was the mid-tier edition of the Chevrolet Chevelle but would later become its own model in the late 1970s.

⁸⁰ Page four of Brunner's bankruptcy response to interrogatories (1983) notes she owned a "1979 Honda CVCC" which is an early edition of the modern-day Honda Civic. The name of the model, CVCC, referenced the engine's technology, Compound Vortex Controlled Combustion. *Brunner* lists the vehicle as being used. Although Honda notes that the 1979 Civic is the first year of the car's second generation, the date on *Brunner's* bankruptcy petition indicates that the vehicle was approximately three years old at the time of acquisition (Honda Motor Company, n.d.).

⁸¹ Judge Haight's February 21, 1985 order listed the value of the car as \$2,400.

was hard to find employment despite her education. She filed over sixty resumes seeking work in the fields of social work, teaching, counselling, personnel and clerical tasks.

On April 12, 1983, a brief oral hearing was held in the court of Judge Howard J. Schwartzberg of the United States District Court for New York's Southern District, and at the end of the hearing, the judge ruled that Brunner qualified to have her student loans discharged. NYSHESC appealed to the Second District Court of Appeals, disputing the ruling by arguing that the information presented to Judge Schwartzberg was inadequate to support a finding of undue hardship and further, the loans were dismissed in error. The NYSHESC variance was centered on its disbelief regarding Brunner's efforts to secure employment concerning her "inability to find employment despite a ten-year educational program" (Brunner, Marie Brunner v. New York State Higher Education Services Corporation 1987, p. 3.).

On appeal, Judge Charles S. Haight, Jr. of the U.S. District Court for the Southern District of New York issued an edict on February 21, 1985, reversing Judge Schwartzberg's ruling and concurring with the NYSHESC assertion that the bankruptcy judge discharged the loans in error and that Brunner did not meet the undue hardship threshold. The court issued the following written ruling noting that Brunner did not meet the undue hardship threshold espoused in the Bankruptcy Reform Act of 1978:

In conclusion, obtaining a discharge of student loans in bankruptcy prior to five years after they first come due requires a three-part showing:

- 1) that the debtor cannot, based on current income and expenses, maintain a "minimal" standard of living for himself or herself and his or her dependents if forced to repay the loans,
- 2) that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan, and
- 3) that the debtor has made good faith efforts to repay the loans.

These three items were derived from the analysis used in *Pennsylvania Higher Education Assistance Agency v. Johnson*, 5 Bankr. Ct. Dec. 532 (1979).

In the absence of a legislative definition of the term undue hardship, this declarative denial was the first use of the tripartite test and established the mantra that became the canonical bedrock for other courts to follow going forward. However, the legal challenges in this case did not end here. Brunner, appearing *pro se*, appealed this decision to the United States Court of Appeals for the Second Circuit.⁸² The Court of Appeals, also based out of New York City, concurred with the reversal in its decision issued on October 14, 1987.

The *Brunner* standard, as initially proffered by the United States District Court for the Southern District of New York was intended to be a Bright Line rule. Bright Line rules have specific guidelines to dispel ambiguity and these standards come at the expense of individual justice for the benefit of societal simplicity, certitude and

⁸² Although the Court's entry notes "Appellee's counsel below has apparently deserted her, for no responsive brief was filed on her behalf" Brunner had counsel (R. Mark Goodman) during the aforementioned oral hearing. However, in her motion seeking an extension of time, she noted could not afford to retain her previous counsel.

clarity.⁸³ An inflexible dogma would require a myriad of laws which, if enacted, would limit operational functionality by minimizing the flexibility and discretion that constituent actors require to function effectively. However, the sheer infinite complexities of human existence within the context of the contemporary administrative state precludes such an axiom from being implemented as a pure binary function.

The *Brunner* case has served as the standard for determining whether student loans should be overturned for most of the country, and as of December 31, 2018, Westlaw notes that this case has been cited nearly 1,400 times since the decision was issued.^{84,85} Further, as of that date, the decision still stands as valid law which has not been rendered obsolete or overturned by another decision.⁸⁶

Brunner: Inability to Repay

The *Brunner* standard has three elements. As aforementioned, the debtor must have a current inability to pay the loan(s); a future inability to pay the loan(s),

⁸³ The standard emanates from the image of a clear bright line on the ground. The basic concept is that if a person crosses that line, the person has committed a violation. When a bright line rule is established, it does not matter whether a person was pushed, pulled, driven, dragged, carried or otherwise transported over the boundary without consent; the mere presence on the other side of the line is the only determining factor of violation or indication.

⁸⁴ As of December 31, 2018, LexisAdvance notes that the case was referenced 964 times in legal decisions, and 374 times in non-legal cases (193 times in court documents; 164 times in law reviews; 22 times in treatises; twice in statutes and once in a government review.)

⁸⁵ It is noted that other courts have used this case to impart other standards related to the initial case, such as determining what actions on the borrower's part constitutes good faith.

⁸⁶ The *Brunner* test is a mechanical test. It is the progeny of prior tests and attempts to be objective in its decision-making process.

and have made a good faith effort to repay the loans. In order for a plaintiff to prevail on a discharge action using the *Brunner* standard, the debtor must prove its case for each of the three prongs of the test. If the proffered evidence doesn't prevail for any one of the three parts, then the action as a whole shall fail.

The first prong, regarding maintaining a minimal standard of living if the borrower is compelled to repay the loans, is understandably engrained as a fundamental tenet toward the end of ensuring the stability of the student loan program. This item is also referred to as the mechanical test. However, the use of the term *minimal* in the *Brunner* test's standards is problematic, since the term is subjective and what is considered to be minimal is fluid in the eyes of the arbiter. Some judges view a minimal standard as a subsistence standard which is marginally enough to biologically sustain a person's life, whereas others define the term to mean life working at the minimum wage. Although these are two different standards with different technical meanings, the latter is the one that is often used to encompass the concept of the former. The minimum wage is generally the lowest legally allowable prescribed wage in a jurisdiction.⁸⁷ In Washington, DC, the nation's capital, the minimum wage was \$13.25 as of December 31, 2018, (City of Washington, DC, 2018).

The final representative of a minimum standard is a concept known as a living wage. A living wage is an income which is high enough to meet a certain standard of living or quality of life in a given area. In the United States, the living wage is often

⁸⁷ There are some exceptions to the minimum wage, such as the wage for tipped workers, which is normally about half of the minimum wage. Employers may pay tipped workers less than minimum wage. However, if the tips do not bring the worker's wage up to the minimum wage, then the employer must make up the difference to achieve the minimum wage.

higher than the minimum wage for a given area. Again, using Washington, DC as an example, the living wage rate for the nation's capital was \$14.50 per hour, as of December 31, 2018, (City of Washington, DC, 2018). Additionally, the standard of living has increased since the *Brunner* guidelines were issued, so the floor of the minimum threshold has been raised since that time.

Circuit courts use one of three valuations to make the determination on maintaining a minimal standard of living. The assessment used is either the poverty guidelines published annually by the Department of Health and Human Services (HHS), the poverty thresholds issued by SSA or the IRS *Collection Financial Standards*.⁸⁸ Using each as an assessment for this purpose entails its own weakness.

The poverty thresholds were developed in the early 1960s by Mollie Orshansky (1965), a SSA economist and published in a January 1965 article in the *Social Security Bulletin* (1965, p. 26) titled "Counting the Poor: Another Look at the Poverty Profile" to create "a profile of poverty based on a particular income standard that makes allowance for the different needs of families with varying numbers of adults and children to support." The SSA poverty thresholds, which are updated annually by the Census Bureau, simply provide a baseline for determining a *statistical rate of poverty in America*. A person whose pretax income is above the threshold has qualified to be in poverty. If the income is above the predetermined level, *even if by one dollar*, the person is deemed to not be in poverty.

⁸⁸ The poverty guidelines and the poverty thresholds are related but serve different purposes. The guidelines are administrative in nature and are generally used to determine eligibility for programs or assistance, whereas the thresholds are statistical in nature and are used to determine the number of people that are in poverty (Department of Health & Human Services 2017). Of the two, the former is less applicable for the purposes of determining the standard of living.

While the HHS poverty guidelines were described as “a crude and approximate measure” by Orshansky (1965, p. 1), they were generally considered accurate in 1965 during President Lyndon Johnson’s War on Poverty. A common contemporary criticism is that although the initial underlying numbers have been updated to address the cost of inflation, the inputs that are the basis for the calculation hasn’t been updated since the article was published over a half century ago.⁸⁹ Further criticisms note that the inputs for the calculation aren’t scientifically based, nor are the assumptions aligned in accordance with modern society and are woefully inadequate.⁹⁰

Orshansky, the inventor of the guidelines, admitted that the “standard itself is admittedly arbitrary” (1965, p. 26).⁹¹ Nevertheless, some judges have ruled if a person’s income exceeds the federal poverty rate, the person is not eligible for loan discharge.⁹²

⁸⁹ A more modest definition is evidenced in *Correll v. Union Nat’l Bank of Pittsburgh*, 105 B.R. 302 (Bankr. W.D. Pa. 1989). In this case, the court opined “[w]here a family earns a modest income and the family budget, which shows no unnecessary or frivolous expenditures, is still unbalanced, a hardship exists from which a debtor may be discharged of his student loan obligations.”

⁹⁰ In 2014, Congressman Tim Ryan attempted to live for one week at the minimum wage. He started off the week with seventy-seven dollars to cover food, entertainment, transportation and emergencies. The starting amount was determined by the challenge’s sponsor, which calculated the disposable income that workers in Ohio’s 13th district earning minimum wage have left weekly for food, gas, entertainment and emergencies after housing and bills are paid. Representative Ryan lasted *five days* and would have succumbed to the challenge sooner, had he not attended a friend’s picnic to eat one evening (Caldwell, 2014).

⁹¹ Orshansky’s (1965) reference family was derived from the arbitrary assumptions based on age and sex distributions in the 1960 Census. Additionally, Orshansky assumed that a married couple had a homemaker.

⁹² “We believe that use of the federal poverty guidelines to determine undue hardship is appropriate because it is an objective test. Furthermore, since these poverty guidelines are used as eligibility criterion for federal assistance programs, it appears obvious that such income levels are viewed as being bare subsistence levels which cause such persons to be deemed incapable of affording to pay for

The IRS disclaimer clearly notes that the “IRS Collection Financial Standards are intended for use in calculating repayment of delinquent taxes. These standards are effective on [DATE] for purposes of *federal tax administration only*” (U.S. Department of the Treasury. Internal Revenue Service, 2020). Despite this disclaimer for the limited use purpose of this assessment, the magistrates trained in Socratic thinking and logic occasionally use this document as the standard, and in the process liken student loans to taxes...however, the judicial arbiters overlook one small, but obvious, detail...student loans are not taxes!⁹³ The IRS further opines on its standard, acknowledging that “the necessary expense test is defined as expenses that are necessary to provide for a taxpayer's (and his or her family's) health and welfare and/or production of income” (U.S. Department of the Treasury. Internal Revenue Service, 2020). As of March 25, 2019, the *Collection Financial Standards* allows a monthly maximum of \$727 for one person for food, housekeeping supplies, apparel & services, personal care products & services and miscellaneous items (U.S. Department of the Treasury. Internal Revenue Service, 2020). This is roughly 70% of the monthly poverty guideline of \$1,040.⁹⁴

certain necessary services. Thus, we feel comfortable in concluding that such persons cannot afford to repay governmentally-guaranteed student loans” (Randy Lewis Bryant, Plaintiff, v. Pennsylvania Higher Education Assistance Agency, Defendant. In re Mary Gamble, Debtor. Mary Gamble, Plaintiff, v. Pennsylvania Higher Education Assistance Agency, Defendant. In re Paul Pine, Debtor. Paul Pine, Plaintiff, v. Pennsylvania Higher Education Assistance Agency, Defendant 1987).

⁹³ The IRS defines taxes as “Required payments of money to governments that are used to provide public goods and services for the benefit of the community as a whole” (U.S. Department of the Treasury. Internal Revenue Service).

⁹⁴ The amount of \$1,040.⁸³ was obtained by dividing the 2019 poverty guideline for one person of \$12,490 and dividing it by twelve (U.S. Department of Health and Human Services, 2016).

The weakness in using the *Collection Financial Standards* to address the first prong of the *Brunner* test is that while the test successfully answers the query of whether a person *can generate income*, it still yields to being inappropriate for *Brunner* purposes, as it fails in resolving the question of *how much income* the person can generate and ultimately resolving the inquiry of whether the person can avoid *undue hardship*. It is understood that the question to be answered is not the validity or efficacy of the practice of using the *Collection Financial Standards...the question here is its suitability*.

A corollary weakness is that on its face, the *Collection Financial Standards* neglects to consider the actual costs of living as well as the country's economic/employment landscape. Further, the *Brunner* standard implicitly dictates the internal edict of a petitioner by addressing their living standards without examining the external environment in which the individual exists.⁹⁵ In the end, it's easy to admonish and impart the exhortative message to get a job or make more money and yet another for the person to actually *do* it, especially with more than one in eight Americans living in poverty, nearly two-thirds (63.01%) making less than \$45,000 annually; 58% of Americans having less than \$1,000 in their savings accounts and with 44% noting that paying an unexpected \$400 expense would be challenging.⁹⁶

⁹⁵ The federal government does this for determining pay for its employees by the use of locality pay areas and locality pay program.

⁹⁶ The official poverty rate for 2018 is 11.8%, which represents 38.1 million people, per the Census Bureau (U.S. Department of Commerce. Bureau of the Census, 2017). The salary information is derived from Wage Statistics for 2018 from the SSA (n.d.); the emergency expense information is from the

Brunner: Likelihood to Persist

The second prong of the *Brunner* test requires a showing that the petitioner's state of affairs will persist for the duration of the student loan repayment period. The purpose of including this element in the judicial review (in contrast to the first component) is to show the extent of the person's economic standing. The first prong examines the borrower's statement at the time of the petition is filed (and is an instantaneous overview of the debtor's fiscal portfolio as a screenshot measure of standing), whereas the second prong provides wide-ranging latitude delivering breadth and depth to the story. The first two questions, when viewed in tandem, are intended to give a more complete representation of the requestor's fiscal picture.

The second prong is usually examined in two parts. The first part investigates temporalness in investigating whether the current state of affairs is situational or static and the next part addresses longevity in examining whether additional factors exist regarding the state of affairs which are expected to continue for a significant portion of the repayment period. The idea behind this prong is to ensure that the deficiency is not cyclical, seasonal, or short-term.

How do courts measure a current inability to repay the loans? The United States Bankruptcy Court for the Southern District of New York provided guidance in issuing a ruling that states "dischargeability of student loans should be based upon the certainty of hopelessness, not simply a present inability to fulfill financial obligations" (*Joan Briscoe, a/k/a Joan Bennett, a/k/a Joan Akers v. Bank of New York*

Board of Governors of the Federal Reserve (2019) and the savings account information is from Yahoo Finance (Huddleston, 2019).

and New York State Higher Education Services Corporation 1981). This distinction is logical, as the discharge of student loans as the result of the bankruptcy process is not intended to apply to a garden style generic inability to repay, a temporary condition, a sporadic situation or to a self-induced condition, but to a borrower that genuinely experiences adversity that is both perpetual and enduring.

Courts acknowledge and assess debtors' details in evaluating whether a situation is temporary or terminal. Some of the things that a circuit court evaluates during its review includes items that assist in determining the long-term outlook of the debtor, such as whether a person can earn more money, disability status, if a person is minimizing expenses, or is not maximizing their earning power through no fault of their own, and of course, whether the person has minor dependents or infirmed individuals that rely on the student loan signee for their livelihood. These factors, in conjunction with an inquiry as to the future for the debtor is what the deciding court uses to determine whether the requestor has met the second prong of the *Brunner* test.

One of the challenges in requiring a prospective perspective, as noted in *Strahm, v. Great Lakes Higher Education Corporation*, 327 B.R. 319 (Bankr. S.D. Ohio 2005) is that "consideration of the factor involving whether 'additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period' of the student loans always requires the court to consider a future time period where certainty is never available." Past information can be helpful to prognosticate forthcoming trends, but it is not a perfect predictor of future performance.

This counsel regarding monetary speculation is in line with U.S. Securities and Exchange Commission (SEC) Rule 156 regarding investments, wherein purveyors are prevented from advertising that past performance of a given commodity will be replicated in the future. Of note, SEC rule 156 specifically states it is illegal to advertise, as

Portrayals of past income, gain, or growth of assets convey an impression of the net investment results achieved by an actual or hypothetical investment which would not be justified under the circumstances, including portrayals that omit explanations, qualifications, limitations, or other statements necessary or appropriate to make the portrayals not misleading (U.S. Congress 1933).

In the instant case, the weakness of relying on a projected future earnings outlook as a factor in determining the debtor's projected pecuniary prowess is that it relies on knowing the unknowable and the omission of known information (in particular, that a presentation of a profile of the petitioner's potential as material, uncontroverted, unassailable fact) makes it unlikely that the any party can provide the certainty necessary to overcome the hurdle from the information being unknown unconfirmed speculation to confirmed impregnable fact.⁹⁷

Brunner: Good Faith

The final prong of the *Brunner* test is an inquest as to the petitioner's efforts to repay the loan. This is known as the good faith test. In this test, the court examines whether the debtor was negligent or irresponsible in maximizing resources or

⁹⁷ In theory, a person's prospects can always improve, but that overly optimistic outlook would invalidate the statute, rendering it functionally obsolete.

minimizing expenses. The primary question to be answered for this item is as follows: Is the borrower merely seeking to avoid the student loan due to its hardship, or is the person taking an affirmative action to evade the debt? Avoidance in this instance is allowable, whereas evasion is not.⁹⁸ The concept from this prong emanates from the idea that bankruptcies were being abused by loanholders that filed for bankruptcy in short order after finishing school.

This element combines the borrower's state of mind with factual evidence to make an affirmative finding as to whether the debtor's actions are made in good faith. In short, the inquiring court is looking for evidence to determine if the debtor has tried to repay the loan. There are five different types of repayment plans that are listed on the Department of Education's website, which are as follows:

Standard Plan:	This type of repayment plan features fixed repayment amounts of at least fifty dollars per month with a repayment period of ten years to thirty years, depending on the amount of outstanding loans.
Graduated Plan:	This plan requires fixed or graduated amounts for up to thirty years.
Extended Plan:	This plan features fixed payments which increase biennially for a maximum of ten years. The payments under this plan will never less than the amount of interest that accrues between your payments, nor will it be more than three times higher than the amount required by any other repayment plan.
Income-Driven Plans:	There are four different types of plans and the amount of repayment varies between ten percent and twenty percent of the debtor's discretionary income (depending on the plan chosen) for a period of twenty years or twenty-five years.

⁹⁸ This concept is similar to the IRS definition of the terms of avoidance and evasion.

Income-Sensitive Plans: Monthly loan payments in the income sensitive plan fluctuate based on your annual income for a maximum repayment period of ten years.

Creditors, as a standard practice, have advanced the argument that debtors are not acting in good faith if they have not engaged in either an income driven plan or an income sensitive plan as an alternative to non-payment. The monthly payment amount for these plans are dependent on the debtor's income and may result in a monthly payment of zero dollars. However, these plans (collectively known as Income Contingent Repayment Plans) normally require payment if the borrower's income exceeds the minimum dollar amounts set forth in the federal *poverty* guidelines.

If a debtor is unable to make loan payments, there are two options which can be of assistance and are known as deferments and forbearances. A deferment is a temporary postponement of loan payments. During this period, interest continues to accumulate on non-subsidized federal student loans and the interest is added to the principal outstanding balance. A forbearance allows loan payments to be temporarily suspended or lowered. Interest on these loans is also capitalized and added to the principal.

Critics of the Good Faith element note that it allows judges wide latitude in determining if a petitioner has met the requirements, which leads to the issue of there being a lack of consensus as to what should be considered in determining whether the borrower received a benefit of the loan and what the borrower's standard of living should be during the repayment period. Others believe that engaging in an ICRP should not be a factor in determining whether a person has complied with this

requirement. The threshold here is minimal and sometimes may not even need to be proven, as was the case in *Krieger v. Educational Credit Management Corporation*, 713 F.3d 882 (7th Cir. 2013). There are courts which believe that a borrower must engage in an ICRP in order to show good faith, however, in *Krieger*, Judge Frank H. Easterbrook noted that “to the extent that...debtors *always* must agree to a payment plan and forgo a discharge...that is a proposition of law--an incorrect proposition.”⁹⁹ The First Circuit is one of those critics, noting in *Bronsdon v. Educational Credit Management Corporation*, 435 B.R. 791 (Bankr. D. Mass. 2009) that “requiring the debtor to present additional evidence of ‘unique’ or ‘extraordinary’ circumstances amounting to a ‘certainty of hopelessness’ is not supported” by the text of the statute, nor is the good faith requirement.

Brunner: Conclusion

In conclusion, although Marie Brunner was within her legal rights to file for discharge, she presented a weak case to test the margins of the nascent principles and the limited information that was presented to the court may have made a contemplative court into a callous court. Brunner’s efforts to repay her loans or make other arrangements to address them after securing her master’s degree were nonexistent...at least in the court’s records that are held in the United States

⁹⁹ Judge Daniel A. Manion noted that *Krieger* was an “extreme exception and an outlier” (Susan M. Krieger v. Educational Credit Management Corporation 2013). Manion’s concern focused on potential borrowers using this information offering his take on the matter in opinion that “rather than challenging the non-dischargeability barrier in bankruptcy, those who have concluded that there is no way they can pay off the debt should be required to enroll in the William D. Ford Income-Based Repayment Plan.”

Bankruptcy Court for the Southern District of New York in New York City. The case file is bereft of any loan payments made on Brunner's behalf, nor does it contain requests for payment deferment. Additionally, she chose to deplete the lion's share of her life savings on a depreciable asset, a vehicle.

It is acknowledged that a vehicle could be used to assist in job search efforts by extending the area in which employment can be sought and secured, but the vehicle requires affiliated ongoing expenses, such as gasoline, insurance, maintenance, oil changes, registration, parking fees; fines as well as tolls. She indicated she spent her life savings on the vehicle that entails additional expenses, which would have to come from *somewhere*, but that somewhere wasn't indicated to the court. Further, the area where she lived at the time of filing—the New York City metropolitan area—had (and still has) a well-developed and extensive public transportation network, so incurring a charge for *personal* transportation may not have been well conceived in the process of ranking cash outlays in a bankruptcy case. In the end, the action to give precedence to purchasing a vehicle (in addition to not seeking a deferment) may have left an impression with the court that she was either disinterested or simply did not care to prioritize trying to repay the loan with the existing cash on hand.

Brunner volunteered with an industry association in order to learn of potential job leads, registered with the Westchester County Personnel Office as well as her alma maters and participated in civil service examinations in her attempts to secure employment. The case record notes that she sent out over sixty resumes, but she limited her searches to areas which complemented her educational background,

which included psychology, sociology and social work. Brunner did not fully engage firms for clerical or secretarial positions, as she felt that she was overqualified for those jobs and would not be selected by potential employers. Also, she didn't help her case by self-certifying that she was unqualified for employment outside of the fields of clinical social work or therapy, as "these were the only jobs for which I was qualified and considered for by virtue of my undergraduate and graduate education." Even going outside her area of educational expertise was a non-starter, as Brunner (1987) stated on the second page to her response to the interrogatories that "I was not qualified for any computer-based employment [sic] or business arena as that had not been any part of my educational background." In short, she limited the universe of potential employment opportunities to those prospects that were directly germane to her degrees.

It is acknowledged that the amount in Brunner's savings account would not have paid off all of her loans, but she had enough money on hand to address the smaller loans and her medical expenses. Brunner did not show responsibility with her other debts by paying off any of the medical expenses with the remainder of her life savings, nor did she even wait (in the absence of a solid foundational argument) for the then five-year cooling off period to pass before seeking discharge, as her loans were not yet due at the time she requested the court to discharge the loans. It can be argued that the court may have showed her leniency had she shown some measure of contrition in being judicious with her life's savings.

In short, Brunner put in little non-judicial effort to address the loans, and this lack of effort, in combination with her post-petition actions, are indicative that the

loans were an inconvenience to her as opposed to a genuine hardship and the court's tone in its written opinion is indicative of its displeasure.

While the case was remanded to the lower court for review and the loans were rendered non-dischargeable *without prejudice*, the case ended up being precedential, as NYSHESC persuaded the court to use the three-tiered analysis from *Johnson* as the standard assessment used in many other circuit courts. One of the biggest critiques of the *Brunner* test is that it requires petitioners to show that its tenets of good faith, future hopelessness and crippling economic hardship are linked, but not mutually exclusive, nor inextricably intertwined.

Totality of the Circumstances

Although most of the circuit courts use the *Brunner* test as their standard to determine whether a loan should be dismissed, a few courts use a different standard which is known as the *Totality* test. This assessment is used exclusively by the First Circuit and Eighth Circuit.¹⁰⁰ The *Totality* test is a combination of analyses, which aggregately serve as a holistic assessment and examination of the student borrower in an all-inclusive examination, similar to a SWOT (Strengths, Weaknesses, Opportunities, Threats) analysis.

The history behind the *Totality* standard has developed over a number of years and was informally put in place four years prior to the *Brunner* test on October

¹⁰⁰ The First Circuit has jurisdiction over cases originating in states of Maine; Massachusetts; New Hampshire and Rhode Island and the Eighth Circuit consists of the states of Arkansas; Iowa; Missouri; Minnesota; Nebraska; North Dakota and South Dakota.

14, 1981, as the end result of the case captioned *Andrews v. South Dakota Student Loan Assistance Corporation*, 661 F. 2nd 702 (8th Cir. 1981) in the United States Court of Appeals for the Eighth Circuit. The standard for the Eighth Circuit was accepted outright on March 11, 2003 with the Court of Appeals for the Eighth Circuit's ruling in *Long v. Educational Credit Management Corporation*, 322 F.3d 549 (8th Cir. 2003).

In this case, the circuit court opined that

We prefer a less restrictive approach to the "undue hardship" inquiry. (See *Andrews*, 661 F.2d at 704.) We are convinced that requiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in § 523(a)(8)(B).

Therefore, we continue-as we first did in *Andrews* — to embrace a totality-of-the-circumstances approach to the "undue hardship" inquiry. We believe that fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.

The Eighth Circuit made its position unequivocally clear in the following assessment noting "some bankruptcy courts in our circuit have not acknowledged and followed the controlling *Andrews* standard in an 'undue hardship' determination. We trust that this opinion will serve to clarify the applicable analysis in future cases" (*Nanci Anne Long v. Educational Credit Management Corporation* 2003). Further, the Eighth Circuit noted

In evaluating the totality-of-the-circumstances, our bankruptcy reviewing courts should consider: (1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable, necessary living expenses; and (3) any other relevant facts and circumstances surrounding each particular bankruptcy case. *Id.*; *Andresen*, 232 B.R. at 132. Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt-while still allowing for a minimal standard of living-then the debt should not be discharged. Certainly, this determination will require a special consideration of the

debtor's present employment and financial situation-including assets, expenses, and earnings-along with the prospect of future changes-positive or adverse-in the debtor's financial position.¹⁰¹

The First Circuit took a more circuitous route in getting to its discharge test selection. Although the Court noted its desire to include flexibility in the 1980s with the *Andrews* decision, it had not formally adopted a designated discharge test when it stated on April 26, 2006 that it had “no need...to pronounce [its] views of a preferred method of identifying a case of ‘undue hardship’” (Noreen E. Nash, v. Connecticut Student Loan Foundation, New Hampshire Higher Education Assistance Foundation and United States Department of Education 2006). Four years later, the First Circuit Court’s Appellate Panel took the Court’s views a step farther by making its perspective known in *Bronsdon*.

Having considered the various tests used to determine undue hardship, the plain text of § 523(a)(8), and further recognizing that the majority of courts in the First Circuit adopt the totality of the circumstances test, the Panel declines to adopt the Brunner test as requested by ECMC. The Panel is persuaded that the totality of the circumstances test best effectuates the determination of undue hardship while adhering to the plain text of § 523(a)(8).

The *Brunner* standard and the *Totality* standard require prognostication based on deterministic events, but the *Totality* standard acknowledges that there is no one solitary item that should govern the acceptability or rejection of a discharge claim. This is functionally antithetical to *Brunner*, which (as a policy based review) espouses a hard-core standard with three fixed, immutable tenets within a kaleidoscopically

¹⁰¹ The Eighth Circuit affirmed the use of the *Totality* test as established in *Andrews v. South Dakota Student Loan Assistance Corp.*, 661 F.2d 702 (8th Cir. 1981).

structured context, whereas the *Totality* standard (as a case-based assessment) is navigably floatable, unrestrained in its focus and direction when looking at student loan debt in respect to the entirety of the borrower's environment. This juxtaposition of contrastive views is in line with *Brunner's* standing as a Bright Line rule, as opposed to the *Totality* standard's individualistic contextual discretionary perspective.

Conclusion: Judicial Philosophies and Discharge Standards

The answer to the first three clarifying research questions is well-defined and clear. *What are the juridical standards that are used to adjudicate student loan discharges, as determined by each of the federal circuit courts?* The juridical standards that are used to adjudicate student loan discharges by the federal circuit courts are the *Brunner* standard and the *Totality* standard. *Is there a difference between the philosophies used by the different circuits?* Yes, there is a marked difference between the two standards. While the two standards are used to apply uniform bankruptcy law nationwide, the practical application of these standards creates a duopoly where the same de jure uniform law exists on its face, there in actually is a de facto segmentation of equity based on whether the borrower is subject to the jurisdiction of a *Brunner* court or a *Totality* court. In short, there are two standards to which can lead to venue shopping.

Finally, *are the juridical standards that are applicable to student loan discharges applied uniformly in the federal circuit court system (in respect to similarly situated cases in other circuits), as determined by the leading cases in each of the federal circuit courts?* No, those standards are not uniformly applied. *Brunner* espouses an

inflexible hard and fast approach to determining whether a loan should be discharged based on an intractable standard, while the other test recognizes the integrated nature of person, profession and purlieu to pursue a holistic approach, characterized by viewing the whole person and comprehending that the value of the individual parts of the debtor are “intimately interconnected and explicable only by reference to the whole” (Oxford University Press, 2019). This tension in the jurisprudence is similar to the difference between the practice of allopathy versus osteopathy.

Allopathic practitioners focus on finely acute *symptoms* that create a disorder, whereas osteopaths concentrate on comprehensive *situations* that contribute to the malady.¹⁰² Both practitioners are equally qualified, having received equivalent training, but the application (treatment) prescribed by each to alleviate the ailment is a by-product of the outlook acquired via training, wherein the *Brunner* courts (using exacting measures in order to pinpoint eligibility) are the allopaths and the *Totality* courts (which employ a global perspective) serve as the osteopaths.¹⁰³ In the end, each of the two courts sees things differently as the output of the decisions made. As a policy matter, this disparity in application runs counter to the concept behind the Ashbacker doctrine, which is applicable to Federal agency proceedings and derived from *Ashbacker Radio Corp. v. Federal Communications Commission*, 326 U.S. 327 (1945).

¹⁰² Traditional medical doctors (MDs) are allopaths and the DOs (Doctors of Osteopathy) are the osteopaths. Each must complete medical school, but their training is dissimilar. As a result, their outlook and how they go about solving problems is different.

¹⁰³ Abraham Maslow (1966) stated “If you only have a hammer, you tend to see every problem as a nail.” In this case, the training is the backdrop for the outlook for the practitioner’s perspective.

The *Ashbacker* doctrine is a concept in administrative law that requires all applications before a federal agency to be treated equally prior to rendering a decision, as opposed to granting one application, and then requiring all other applicants to compete against the approved application, as granting the license to one party would deprive all other parties of the opportunity to take ownership of the license. For this reason, secondary parties have a defined interest in each applicant's application and the respective review process for the application.¹⁰⁴

The purpose of allowing open access is to ensure that there is fair treatment to all parties and that "each applicant has an interest entitling it to a hearing and review by some method which effectively compares the applicants in light of applicable aspects of the public interest" as noted in *State Harness Horse Racing and Breeding Assoc., Inc. v. State Racing Commission*, 175 N.E. 2d 244 (Mass 1961).¹⁰⁵

In this case, all student loan discharge requests should be measured against either both standards or none, as the circuit court's decision to follow a given standard has the force of law, which ultimately deprives those student loanholders located in *Brunner* states or *Totality* states the benefit of having their case reviewed against the other standard.

¹⁰⁴ The alternative of granting a license and requiring the loser to show why the license should be revoked in the vein of self-interest, as opposed to granting non-applicant parties' intervenory status in the hearing process prior to licensure establishes a standard and puts the non-licensee at a competitive disadvantage.

¹⁰⁵ At the time the *Ashbacker* decision was rendered in 1945, the *Ashbacker* doctrine had limited application. However, since that time, the concept has been expanded in the field of administrative law.

Discussion & Analysis: Equal Protection in Education

In America, the concepts of freedom and equality are almost as old as the existence of the Union. Although the United States was founded on these principles, in practice, these concepts were not omnipresent in its constituent colonies, especially when in looking at the subject of education. For example, even though the Commonwealth of Massachusetts abolished slavery by 1783 by judicial decree, its denizens were societally differentiated by their government even after the pronouncement (Commonwealth of Massachusetts, 2018).

On October 17, 1787, forty-one days after the signing of the Constitution, a group of the commonwealth's freemen petitioned the Massachusetts General Assembly for access to Boston's schools, led by Prince Hall, an abolitionist in the Boston area. An excerpt of Hall's petition for equal education facilities reads:

The petition of a great number of blacks, freemen of this Commonwealth, humbly sheweth, that your petitioners are held in common with other freemen of this town and Commonwealth and have never been backward in paying our proportionate part of the burdens under which they have or may labor under; and as we are willing to pay our equal part of these burdens, we are of the humble opinion that we have the right to enjoy the privileges of free men. But that we do not will appear in many instances, and we beg leave to mention one out of many, and that is the education of our children which now receive no benefit from the free schools in the town of Boston, which we think is a great grievance, as by woful experience we no feel the want of a common education... (Aptheker, 1951).

Although Hall and his co-petitioners were acknowledged as brothers in arms during the Revolutionary War (and free men afterward) they were not considered to be co-equals afterward, as the petition would ultimately be denied. With this setting as a backdrop for the subject, the stage was set for educational inequality in America.

In the United States, the concept of equal protection under the Constitution has been traditionally viewed as an area in the subject of civil rights, and for more than one hundred fifty years, the United States has enacted civil rights legislation with the intent to provide protection to its citizens. The country's first civil rights act, the Civil Rights Act of 1866, was initially vetoed by President Andrew Johnson, but Congress voted to override the presidential veto, causing *An Act to Protect all Persons in the United States in their Civil Rights and Liberties, and Furnish the Means of their Vindication* to become law on April 9, 1866.¹⁰⁶ Since the inception of that initial Civil Rights Act, there have been seven additional Civil Rights Acts which have been made into law. These additional acts were enacted in 1871, 1875, 1957, 1960, 1964, 1968 and the most recent piece of legislation was enacted in 1991. The most often cited of these statutes is the Civil Rights Act of 1964.

Although there are many milestones, movements, and motivators that spurred change and were responsible for playing a part in ensuring that Americans have equal opportunity, there are five laws which heavily shaped educational equality in America. A brief background of the case that was responsible for initiating the disparity on the federal level as well as an overview of the following cases and laws that were responsible for remedying the residual repercussions of that case are listed below.

¹⁰⁶ An Act to Protect all Persons in the United States in their Civil Rights and Liberties, and Furnish the Means of their Vindication is the long name of the bill.

Plessy v. Ferguson

Federally, educational inequality started off not as a prohibition against any specific group that sought to secure an education, but as a generic across-the-board restriction against equity along racial lines. The legislative apartheid started from an event in Louisiana in the tail end of the nineteenth century. In 1890, Louisiana enacted the *Louisiana Separate Car Act/Withdraw Car Act* (1890), in which Section 1 of the act required railroads to provide

equal but separate accommodations for the white, and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations; provided that this section shall not be construed to apply to street railroads. No person or persons, shall be permitted to occupy seats in coaches, other than the ones assigned to them on account of the race they belong to.

On June 7, 1892, a multiracial man named Homer Plessy purchased a ticket to ride on the East Louisiana Railroad and was arrested for not sitting in the designated section. Plessy was one-eighth Black and thus required by Louisiana to sit in the section reserved for African-Americans. He was arrested for not doing so, subsequently challenging the legality of the arrest (and by extension its underlying doctrine) in Louisiana State Court, where Judge John H. Ferguson sided with the railroad company and upheld Plessy's apprehension.

Plessy, in response, sued in federal court, contending that the doctrine of equal but separate accommodations violated his rights under the Thirteenth and Fourteenth Amendments. The case, *Homer A. Plessy v. John H. Ferguson* 163 U.S. 537 (1896) worked its way to the Supreme Court, where the Court in a 7-1 decision, concurred with Ferguson. The equal but separate doctrine, commonly referred to as

separate but equal, became the lay of the land in the land of the free for the next six decades and the principle, now with the sanction of the Supreme Court, rapidly spread to other areas of public life, inclusive of education.

Brown v. Board of Education

The perspective that educational equality is a civil right in America stems from a case in the Supreme Court decided on May 17, 1954, titled *Brown et al. v. The Board of Education of Topeka, Kansas*, 346 U.S. 483 (1954).¹⁰⁷ This case was centered on the question of whether educational segregation based on racial identification, when either allowed or required by state law, is unequal and denies African-American children equal protection under the Constitution's Fourteenth Amendment, even if the physical plant of the educational campus and other affiliated facilities are equal.

The Chief Justice of the Supreme Court (Earl Warren) delivered the Court's opinion, writing "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms" (Supreme Court of the United States, 1954, p. 493). The Court's opinion overturned the equal but separate state sponsored racial segregation that was established in 1896 in *Plessy v. Ferguson*, 163 U.S. 537 (1896)

¹⁰⁷ Brown was a consolidation of five separate cases that the Supreme Court elected to hear as one case due to related subject matter. The underlying facts in each case was different, but all were united in that each addressed state sponsored educational segregation. The four other cases were: *Bolling v. Sharpe*, 347 US 497 (1954); *Briggs v. Elliott*, 342 U.S. 350 (1952); *Davis v. County School Board of Prince Edward County* 347 U.S. 483 (1952); *Gebhart v. Belton* 33 Del. Ch. 144 (1952).

rendering it null and void.¹⁰⁸ Although the opinion here was focused on elementary education, the ruling extended to postsecondary education and other aspects of citizen's interactions with government.

Brown I and Brown II

When *Brown* is traditionally mentioned, it refers to the aforementioned case, which is referred to as *Brown I*. This is the case where Chief Justice Earl Warren declared "in the field of public education, the doctrine of 'Separate but Equal' has no place" (Supreme Court of the United States, 1954, p. 495). Although this case declared educational segregation to be unconstitutional, the ruling had more moral than practical effect, as the Supreme Court neither provided guidance, nor direction as to how to provide relief, which is what led to the second case, known as *Brown II*.

Brown II (formally *Brown et al. v. The Board of Education of Topeka, Kansas*, 349 U.S. 294 [1955]) was argued one year after *Brown I*. *Brown I* answered the question as to whether segregation was acceptable in public schools. *Brown II* answered the question as to how to remedy the problem of segregation in public schools. Chief Justice Warren recognized that local school districts were better in tune with their constituencies and what works to desegregate schools in Philadelphia, PA. won't necessarily work in Philadelphia, MS, so the Supreme Court remanded the

¹⁰⁸ The Supreme Court in *Morgan v. Virginia*, 328 U.S. 373 (1946) ruled that segregation on public buses and interstate bus facilities were unconstitutional and illegal, but that ruling was declared *persona non grata* in southern states.

case to the local school districts for implementation.¹⁰⁹ The Supreme Court feared that requiring the immediate desegregation of schools would cause more harm to Black children both inside and outside of the classroom, so the decision to use the local courts was seen as a compromise.

The primary guidance that the Court gave the districts was to desegregate public schools “with all deliberate speed.” The post-verdict criticism for *Brown II* is that the Supreme Court’s was lenient, as the term “all deliberate speed” was undefined and in some cases, was used as the basis for *delaying* integration efforts. Federal judge Sterling Hutcheson had given Prince Edward County, home to one of the five consolidated cases heard as a part of *Brown I* and *Brown II* (*Davis v. County School Board of Prince Edward County* 347 U.S. 483 [1952]), an order to desegregate by 1965. In May of 1959, the Fourth Circuit Court of Appeals ordered Hutcheson to implement school desegregation in the county by the fall of 1959. The judge chose to retire rather than give the order (Bonastia, 2015).

Prince Edward County anticipated this as an outcome of the case and altered its budgeting process from an annual basis to a monthly basis. This was done to provide the county with the ability to defund education rather than to integrate their schools (Green, 2015). Further, Prince Edward County elected to shut down its public school system and pay for white students to attend out of county institutions. In short, the county would rather not have a public school than to integrate.

¹⁰⁹ Philadelphia’s schools were desegregated by law passed on June 8, 1881, (Laws of the General Assembly of the State of Pennsylvania Passed at the Session of 1881, 1881) but a 2019 study found some parts of Philadelphia are still segregated to this day (Gambardello, 2019).

This resistance caused the sitting Attorney General, Robert F. Kennedy, to specifically comment on the county's efforts to evade integration: "*We may observe with much sadness and irony that, outside of Africa, south of the Sahara, where education is still a difficult challenge, the only places on earth known not to provide free public education are Communist China, North Vietnam, Sarawak, Singapore, British Honduras—and Prince Edward County, Virginia*" (June-Friesen, 2013).

There are several milestone cases after 1954 that were instrumental toward developing and demonstrating how the Constitution's Equal Protection Clause was to be implemented educationally, but *Brown I* and *Brown II* served as the watershed case to break down the separate but equal paradigm in America. Although the foundation of *Brown I* and *Brown II* was deep-seated in the field of education, the resultant application of the Equal Protection Clause extended well beyond that singular case.

The Civil Rights Act of 1964

The Civil Rights Act of 1964 is the major federal piece of legislation that, in tandem with the *Brown* case, is responsible for ensuring that each American is afforded equal opportunity in education. Title IV, titled *Desegregation of Public Education*, addressed discrimination in public colleges, specifically in Section 407(a) *et seq.*, which authorized the Attorney General or Attorney General designate "to initiate and maintain appropriate legal proceedings for relief" as necessary for those persons that have been denied admission to college or to continue their education on the basis of race, color, religion or national origin. These four categories are known as protected classes.

Title VI of the law (Title VI) went further to underscore equality for the protected classes and protecting individuals from discrimination by ensuring that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹¹⁰ The DOE OCR is responsible for enforcing Title VI in coordination with the Department of Justice (DOJ).

Any program that receives federal funding or federal financial assistance, be it a grant, loan or any contract other than an insurance contract, is subject to (and covered by) Title IV and Title VI. The term *federal financial assistance* is inclusive of non-cash grants, such as public benefit conveyances, which are commonly transfers of federal real estate to non-federal entities to third parties for public purposes.

The DOE Educational Public Benefit Conveyance Program is such an example, wherein ownership of a surplus federal property is assigned to states, local governmental entities, and private non-profit organizations for educational purposes at no cost for thirty years. After the thirty-year sunset period, the property is owned by the transferee free clear of all restrictions. However, if the property is used on a discriminatory basis, the federal government has the authority to revert (repossess) the property and return it to federal ownership.

¹¹⁰ Upon reflection, it is noted that the exclusion of religion in this quotation is not an inadvertent oversight; it was intentionally omitted. Inclusion of the term would cause a conflict by potentially having the government enforce an antidiscrimination statute based on a specific religion which directly contravenes the First Amendment’s separation of church and state, and the prohibition (or the appearance) of creating a state sponsored religion, i.e. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...”

The Education Amendments of 1972

While the Civil Rights Act of 1964 protected individuals on the bases of race, color, religion and national origin, it did not extend these protections to individuals on the basis of sex. Title IX of the Education Amendments of 1972 (Title IX) remedied the textual omission in Section 901. Section 901 of Title IX is written similar to the antidiscrimination provision in Title VI: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” OCR is responsible for enforcing Title IX in conjunction with DOJ.

The Rehabilitation Act of 1973

Section 501 *et seq.* of the *Rehabilitation Act of 1973* (Section 504 [Public Law 93-112]) was intended to protect people with disabilities from discrimination in employment. However, Section 504 has been extended to education as an adjunct to discrimination in employment. Section 504 ensures that

[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

This text is similar to the language used in Title VI and Title IX and parallels the concept of inclusion.

The Americans with Disabilities Act of 1990

Section 504 cleared the way for the final one of the five primary antidiscrimination laws. The Americans with Disabilities Act of 1990 (ADA [Public Law 101-336]), similar to Section 504, primarily affects people with disabilities. The term disability as used in Section 3(2) of the ADA is expansive and is defined as “(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” Section 202 of the ADA is responsible for remedying allegations of unequal protection by preventing discrimination “on the basis of disability with regards to the full and equal enjoyment of the goods, services, facilities, or accommodations of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation.”

Conclusion: Equal Protection

The aforementioned laws and cases were instrumental in ensuring equality by legislatively addressing accessibility through prohibiting discrimination on the bases of race, color, religion, national origin, sex, physical disability or structural accessibility. They also ensured that access to educational opportunity should not be predicated or constrained by genetic code or zip code and reinforced the idea that if an object or program is paid for (or with) federal funds, it should be made available and accessible to all on an equal basis.¹¹¹

¹¹¹ The concept behind Title VI echoed the sole dissent in *Plessy*, which was filed by Justice John Marshall Harlan. Harlan noted

The use of two different standards to apply “uniform Laws on the subject of Bankruptcies throughout the United States” as called for by the Constitution, may be the cause for a denial of due process claim by creating two classes of student loan holders, a *Brunner* class and a *Totality* class. The creation and segregation of the two concomitant classes reinforces a post-*Plessy* separate but equal student discharge loan schema. If the rights of the *Brunner* class and the *Totality* class are equivalent, then one cannot be inferior to the other. Even, *arguendo*, if the current arrangement among the judicial circuit alignment were non-contested, an argument could be made that the disparate deprivation of the review of one test to a class (to the benefit of the other) is an ideology that was struck down by the Supreme Court in *Brown* for not providing equal protection under the law in defense of protecting civil rights.^{112 113}

Every president elected in the twenty-first century has stated that education is the “civil rights issue of our time.” President G.W. Bush (2002) made the statement

Our Constitution is color-blind and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved....

¹¹² This would be a case of geographic redlining.

¹¹³ *Brunner* judges and *Totality* judges note that having a disability or being a parent is a reason for discharging a student loan. However, discharging student loans on the basis of having a disability or being a parent may be discriminatory as well.

It is noted that judges will dismiss a case based on a disability, as that status can be viewed to impair future earnings. Additionally, being a parent is sometimes the basis for having a student loan discharge petition approved in bankruptcy court. It is noted that this creates a perverse incentive (and benefits those who are either disabled or parents) to the detriment of those that do not have children and are not disabled.

in a radio address on January 19, 2001 in Washington.¹¹⁴ President Obama (2011) delivered his remarks at the National Action Network's Keepers of the Dream Awards Gala in New York on April 6, 2011 and the most recent (2017) comment was made at a joint session of Congress in the nation's capital on February 28, 2017.^{115,116}

College Affordability—How Did We Get Here?

Although every President of the United States elected in the twenty-first century has described education as a socialized civil right, the cost to incur that right on the post-secondary level was, is, and will remain, a personal responsibility. In order to fully understand the integrated strands of the student loan system that are tightly weaved together in the fabric of modern society, it is critical to undertake a deep dive beyond the immediacy of the current situation to examine the precipitating factors for the purpose of making an accurate diagnosis to fully understand how America got here.

At first glance, the visible exostructure of the student loan system appears strong and intact. A superficial survey would have ended after the first set of clarifying questions, rendering the structure in good health—after all, more students

¹¹⁴ Bush's quote: "Americans can proudly say that we have overcome the institutionalized bigotry that Dr. King fought. Now our challenge is to make sure that every child has a fair chance to succeed in life. That is why education is the great civil rights issue of our time."

¹¹⁵ Obama's quote: "The best possible education is the single most important factor in determining whether they succeed. But it's also what will determine whether we succeed. It's the key to opportunity. It is the civil rights issue of our time."

¹¹⁶ That comment was "Education is the civil rights issue of our time."

are headed to, and graduating from, college than ever before—but a more parsed and pensive examination lasting longer than eighteen seconds should draw out more nuanced information in order to make a better diagnosis.¹¹⁷ The outside shell of the body is attractive and pleasing to the unaided eye, but an osteological examination of the system’s internal skeleton that carries the weight of the system shows that it has brittle bones and may well collapse under its own weight. Doing a review without an introspection is passable, but to render a diagnosis without a thorough examination is figuratively, and in some cases literally, criminal.¹¹⁸

The quick and dirty answer as to how the country arrived at this point may be described by some as simple and straightforward. However, for *this* purpose, it is not just enough to recognize that student loan discharge applications are judged differently in each jurisprudential arena, depending on the circuit where it is filed, but to know the engineering behind the enigma. In other words, pressing beyond the immediacy of what is proximately apparent. How did the seeds of suffering settle in, how were they fertilized to sprout, and why did the system of future sustenance grow asunder? It is the in-depth analysis to identify Student Zero and procure a differential diagnosis of the tension between what the Student Loan Program was intended to do at the time of enactment, what the system as implemented did, and what the system

¹¹⁷ Dr. Jerome Groopman, professor of medicine at Harvard Medical School, notes that eighteen seconds is the average amount of time that it takes from the time a patient begins to describe symptoms until the doctor makes a diagnosis (NPR.org, 2007).

¹¹⁸ The use of the word “criminal” as a double entendre is intentional, with one version of the expression being used as a metaphor for the words *unprincipled* or *unscrupulous*, and the other in the literal sense meaning forbidden by law, as in when doctors furnish prescriptions at will without ever examining their patients to determine their maladies.

should look like in the future that makes this insight more valuable to readers going forward.

Discussion & Analysis: The Evolution of Student Zero

Anecdotal Accounts of Arrears

What was the primary action that spearheaded changes to student loan discharges? As aforementioned, the undercurrent started with the formation of the Commission in 1971. After the Commission was disbanded, the driving force behind excluding student loans from discharge occurred as the result of anecdotal accounts of students discharging student loans after graduation and then entering the workforce with a tuition-free college education and degrees in hand.

One oft-repeated story is the categorical tale of a student who entered college using loans with no intention of paying back the advanced funds. Four years after the Commission started its work, this anecdotal account was ensconced in the memory of the public by Mr. Robert P. Zeigler, Executive Director of the Oklahoma State Regents for Higher Education, who recounted the legend of one psychology student that sought to avoid paying roughly \$4,100 dollars in loans in 1975.¹¹⁹

The girl (sic) graduated from a state university in March 1972 and she owed \$4,100 (principal) on four loans. She subsequently married, the son of a wealthy New York businessman and petitioned for bankruptcy on August 9, 1973 under her married name... She went to work and prior to her petition, had enough money in a second bank to pay off her student loans. She used the entire sum to make a down payment on a house in her husband's name, and then she blew the student loan debt

¹¹⁹ Zeigler later served as the President of the National Council of Higher Education Loan Programs, a nationwide network of guaranty agencies, lenders, loan servicers and collectors, as well as the Executive Director of the Ohio Student Loan Commission (Education Commission of the States 1977).

which constituted her only debt. In August 1973, she informed the original bank that she had no intention of repaying the loans... Then, she hit the second bank in July 1975 for a \$1,400 student loan for graduate study before we could close the circuit... She also received G.I. Benefits and can safely look out the window of her house and thumb her nose at the U.S. Congress and the taxpayers, as she reads the latest profound thoughts about psychology (Zeigler, 1975).

This story was scripted in a letter dated October 16, 1975 from Zeigler to Representative Edwin D. Eshleman, a member of the House Education and Labor Committee and the ranking minority member of the Postsecondary Education Subcommittee.

A second anecdotal story from the Student Loan Guarantee Foundation of Arkansas (1975) tells the tale of a lawyer employed by a legal aid organization who discharged eighteen thousand dollars in student loans after graduation and was later indicted for bankruptcy fraud. These stories of 1975 set the stage for later actions.¹²⁰

The General Accounting Office Study

One year later, there was a study conducted by the General Accounting Office (GAO) at the request of Representative Don Edwards (Chairman, House Committee on the Judiciary: Civil and Constitutional Rights Subcommittee) and Representative William D. Ford (Chairman, House Committee on Education and Labor:

¹²⁰ Although these two stories are oft repeated, neither ascribes a student's name to the story.

Postsecondary Education Subcommittee).^{121,122} On August 5, 1976, the Representatives requested that GAO examine bankruptcy discharges for student loans that were authorized per HEA, and by response letter dated December 23, 1976, GAO (1977, p. 1) noted it would "analyze a sample of guaranteed student loan borrowers who had petitioned for bankruptcy and to provide a profile of the borrowers."¹²³ GAO conducted the assessment in accordance with the Congressmen's request and completed the task, providing a response to the representatives on April 15, 1977.

As noted, the purpose of the survey was to use existing data from the Office of Education, as well as the agencies who guaranteed payment for student loans, and the bankruptcy courts to develop a *profile* of borrowers for transmission to the Representatives.¹²⁴ Only claims that were paid during the baseline period for the study during FY 1976 (July 1, 1975 to June 30, 1976) were eligible for inclusion in the study.¹²⁵ While the parameters for qualifying participants were clearly set forth and

¹²¹ On July 7, 2004, the General Accounting Office was renamed the Government Accountability Office as the result of Section 8 of Public Law 108-271. The acronym GAO, as used hereinafter, refers to the office in its former nomenclature or in its current designation.

¹²² Section 358A of the Improving America's Schools Act of 1994 (Public Law 103-382) renamed the Direct Loan Program the *William D. Ford* Federal Direct Loan Program after Representative William D. Ford.

¹²³ In short, GAO was asked to complete a survey.

¹²⁴ At the time, the Office of Education was a subcomponent of HEW. HEW was renamed the HHS on October 19-1979, per section 509 of Public Law 96-88 when the educational functions of HEW were transferred into the newly established Department of Education in the Department of Education Organization Act.

¹²⁵ At the time the study was undertaken, the federal government's fiscal year began on June 1 and ended on June 30 of the next year. However, the Fiscal Year Adjustment Act (Public Law 94-273, effective April 21, 1976) legislatively adjusted the fiscal year to begin on October 1 and end on September 30 of the next year. The interceding period was not included as a part of any fiscal year.

the source of the information was definitively known, the methodology used to develop the number of potential participants may have discredited the integrity of the information used to create the profile.

Although the study was finalized and signed by the Acting Comptroller General of the United States, the study was structurally flawed in its design and in its execution. The Acting Comptroller intimates that the sample is a representative reflection of the borrowers, but the data which follows the initial write-up shows that the group is a stratified random sample, which was not qualified to serve as a representative sample, due to sampling error, which will be explained below.

At the start of the investigation in September 1976, the Office of Education noted that there was a total of 3,350 bankruptcy claims paid during the study period. Two months after GAO began its work, the Office of Education supplemented its initial information to GAO with a more reliable number of 4,414 paid claims. However, although the higher number was more reliable, only 751 of the total number of claims were made eligible for inclusion for profile development. Further, only about twenty percent of the 751 claims (150) were selected for inclusion on the profile. (GAO excluded an additional thirteen claims from this number, as the Office of Education did not have records for the long dozen.) This left 137 out of a total out of 4,414 cases which were included in the profile from the Office of Education's files.

The second source of data—the guarantee agencies—reported that there were 2,574 claims, and similar to the claims from the Office of Education, only about twenty percent (511) were selected for inclusion into the pool that would create the borrower's profile. The guarantee agencies were decentralized and their files were

located nationwide. When the cases from the Office of Education and the guarantee agencies were summed, this amount totaled 648 cases (137 + 511) out of a total 6,988 (2,574 + 4,414) cases that were used to create the profile.

GAO requested information from Bankruptcy Courts on the 648 selected case filings and only received responses for 606 cases. Of the 606 cases, 27 were further excluded, since they were filed as business bankruptcy filings and not personal bankruptcy filings, leaving a final number of 579 cases for review. It is noted that the GAO report uses different numbers for each metric and the number used depends on whether or not the particular information which was necessary to complete the asked question was located in either the case file or in the bankruptcy file.

Delving into the General Accounting Office Study

GAO's justification for curtailing the number of claims to be included in the Office of Education's sample is availability, as only 751 claims were paid by the Office of Education's headquarters. Since the files for the remaining 3,663 claims were located in the Office of Education's ten regional offices, they were summarily excluded.¹²⁶ This decision means roughly 83% of the population (3,663/4,414) was eliminated from further consideration. As a result, without knowing anything further, this part of the profile is clearly over-reliant on the files that were protected and processed by the Washington, DC headquarters staff and the ten regional offices.

¹²⁶ In the beginning of FY 1976, the Office of Education's headquarters paid for bankruptcy claims, but that responsibility was devolved to the regional offices in the latter half of FY 1976. The HEW regional offices were located in Boston, MA; New York, NY; Philadelphia, PA; Chicago, IL; Atlanta, GA; Dallas, TX; Kansas City, MO; Denver, CO; Seattle, WA and San Francisco, CA.

Further, this biased tendency relies on a purposive sample and is unable to generate a truly representative sample.

Defining the relevant population is important, because there may be endemic differences between the members that are included in the group and the outsiders. In this case, the headquarters office serviced applications from five mid-Atlantic states (Delaware, Maryland, Pennsylvania, Virginia, and West Virginia) as well as the city of Washington, DC. In this case, the report notes the defined universe, the scope of the sample and dialogue as to why non-members were filtered from the group, but no discussion as to the potential consequences for that action. In this case, the overreliance on cases from this geographic area to impart those results to the entire nation is an effect that was not discussed in the GAO report, nor was it mentioned (even in passing) as a potential consequence in a detail as minute as a footnote.

Even assuming *arguendo* that the whole of the GAO (1992) universe consisted of just the 751 cases in the headquarters, the number of individuals surveyed (137) is well short of the number that would be required in order to conduct a representative survey with a ninety-five percent confidence level (which is the GAO standard) and a four percent margin of error (334). The number surveyed is less than half of the number of the respondents that is necessary to fit within those parameters and is more appropriate to a survey conducted with a ninety-five percent confidence level and 7.6% margin of error. It is noted that the number of respondents (511) for the number of participants in the guarantee agency universe (2,574) is appropriate to support a 95% confidence level and a four percent margin of error. In order to cull a profile that is accurately reflective of the group, a more rigorous vetting process

should have been undertaken and made to include more case files than just those that were located in the Office of Education's headquarters.

A non-cursory review of the underlying data that was used to compile this numerical profile is important because of the paucity of the underlying reasons for making changes to student loan laws that it warrants more than an analytical once-over without further introspection (United States. Congress. House, 1976).

The weaknesses of the study are clearly palpable and observable. The participants were randomly selected from a small pool in one segment of all eligible members. Therefore, the profile is not a representative sample of America's student loan holders. Secondly, the regional distribution shown in the study represented the court where the discharge paperwork is filed and is not representative of where the debt was incurred. This bias shows up in the regional distribution of the samples, which is heavily weighted toward the larger states, as nearly sixty percent of the sample represents one of the following seven states: California, Illinois, Ohio, New York, New Jersey, Pennsylvania, and Wisconsin.

Contemporary critics charged that the legislation was unnecessary and a solution in search of a problem. Congress enacted the legislation over allegedly high default rates. However, a default on a student loan does not mean that default cannot be cured, nor does it amount to a discharge of the debt. Assuming that there was a problem, the enacted legislation may not have mitigated the matter. In retrospect, the amount of loans that were discharged during the study period totaled approximately 12.8 million dollars (5.7 million dollars for the 4,414 claims and \$7.1

million dollars for the 2,574 claims.)¹²⁷ If the Office of Education had to pay the cost of discharging these loans from its budgetary allotment (the higher education fund allotted to the Office of Education), the effect would arguably be negligible, as the total amount that was discharged amounts to a little more than six-tenths of one percent (0.638%) of the agency's budget, per OMB (1975).¹²⁸ For comparison, the amount of loans to be discharged is approximately two percent of the operating costs for the federal motor vehicle fleet for fiscal year 1976.¹²⁹

Further, less than one-third of one percent of the student loans in existence at the time (0.3%) had been discharged. Harvard Law Review (2012, p. 607) notes that "...by 1977, under 0.3% of the value of all federally guaranteed student loans had been discharged in bankruptcy—a rate that was comparable to that for consumer loans."

Zeigler, in the capacity of Executive Director of the Ohio Student Loan Commission, noted the governing boundary for student loan defaults, specifically saying "We don't yell about our debt [default] rate because it's low, about 3.7 percent" (Bowling Green State University, 1979, p. 3). If a 3.7 percent default rate doesn't generate enough attention to warrant a response of yelling, then a rate which is

¹²⁷ Respectively, these numbers are approximately 58 million dollars; 25.83 million dollars; and 32.17 million dollars (in 2020 dollars).

¹²⁸ To put this in perspective, the higher education fund allotted to the Office of Education in 1976 was \$2,005,541,000. (Government of the United States 1976)

¹²⁹ The cost to operate the federal fleet for fiscal year 1976 was \$664,512,700, per *the Federal Motor Vehicle Fleet Report* (Government Fleet Staff, 1977).

roughly one tenth of that limit could easily be regarded with silence due to indifferent acquiescence.¹³⁰

Transitioning from Anecdotal Accounts to Administrative Action

Examining the timeline was important because the deliverable produced by GAO was the primary document used to support the Education Amendments of 1976, and on its face, it appears that the profile could have—at best—been constructed to provide a socially acceptable result to support the legislation—and at worst—engineered to keep the existing scheme intact, especially when the events are placed in chronological order in the following timeline of events:¹³¹

- October 16, 1975: Letters noting anecdotes of students attending college with the intent to intentionally evade paying their student loans are sent to members of college.
- August 5, 1976: Representatives Edwards and Ford requested GAO to undertake the profile.
- August 27, 1976: The Senate passed the Education Amendments of 1976.
- August 31, 1976: The House passed the Education Amendments of 1976.
- September 28, 1976: The Senate agreed to a conference report.
- September 29, 1976: The House of Representatives agreed to a conference report.
- October 12, 1976: The Education Amendments of 1976 was approved.

¹³⁰ The \$12,800,000 is a relative bargain when compared to the \$300 million in fraud that was spent on Medicare in the contemporary 1976 report titled *Fraud and Abuse Among Practitioners Participating in the Medicaid Program* (United States. Congress. Senate., 1976).

¹³¹ It is noted that while GAO acknowledged that the Office of Education didn't have all of the required records, GAO did not chide the agency for the lack of internal control for maintaining control of its records.

- April 15, 1977: The requested report is completed and transmitted to Congress. At this point in time, the report is in the public domain. The document is available for review, and can be used as background information for the purposes of legislative review.
- October 28, 1977: The House considered the Bankruptcy Reform Act of 1978.
- February 1, 1978: The House passed the Bankruptcy Reform Act of 1978.
- September 7, 1978: The Senate passed the Bankruptcy Reform Act of 1978.
- September 22, 1978: The passage was amended by the Senate.
- September 28, 1978: The House concurred with the Senate's amendment and added an amendment to the bill.
- October 5, 1978: The Senate concurred on the House's amendment with added an amendment to the bill.
- October 6, 1978: The House concurred on the Senate amendment.
- November 6, 1978: The Bankruptcy Reform Act of 1978 was signed by President Carter.

The Bankruptcy Reform Act of 1978 replaced the Bankruptcy Act of 1898 and in doing so, Congress accepted the draft legislation proposed by the Commission—verbatim—which made student loans included provisions that the Commission report's draft statute that made student loans absolvable if more than five years old and non-absolvable otherwise, unless repayment caused an undue hardship to the debtor and their dependents. Later revisions to the Bankruptcy Reform Act of 1978 lengthened the review period before eliminating it altogether, leaving the undue hardship clause as the only provision to discharge student loans.

The Cost of College After the Higher Education Act

The initial intent of the programs outlined in the NDEA and the HEA were to ensure that college is affordable by “giv[ing] assurance that no student of ability will be denied an opportunity for higher education because of financial need” (NDEA 1958, p. 1581) and to “mak[e] available the benefits of higher education to qualified high school graduates of exceptional financial need, who for lack of financial means of their own or of their families would be unable to obtain such benefits without such aid” per section 401 of the HEA (1965, p. 1232).

At the time of enactment, the primary focus of providing access to college was through postsecondary educational grants. However, in the half century since the enactment of the NDEA and HEA, the primary method of rendering postsecondary assistance to students shifted to providing loans. In many ways, the current federal educational assistance scheme does not look similar to the one that was envisioned by the drafters of the legislation.

The drafters of the NDEA conceptually concurred with the Truman Commission’s recommendation of endorsing a system of grants and full subsidization for a portion of college education costs. However, there was a bit of consternation in getting the law passed as the action was approved three times in the Senate (in 1955, 1956 and 1957) but died in the House of Representatives each time primarily due to conflict over the scholarship portion of the funding.¹³² One of the opponents to the NDEA was the United States Chamber of Commerce

¹³² McClure, Chief Clerk, was the originator of the idea to link education and defense together, as noted in a January 28, 1983 interview with Donald A. Ritchie, associate historian of the Senate Historical Office that the NDEA was drafted in Montgomery, Alabama (McClure 1983).

Stewart McClure, the Chief Clerk of the Senate Committee on Labor, Education, and Public Welfare from 1949 to 1973, noted that the Chamber of Commerce had a major objection to federal funds going to education, based on the belief that the NDEA, as a new federal program, would cause an increase in taxes, and trumpeted “Reds, race, and religion” as the reasons for its opposition, “march[ing] these issues forward at any time whenever whichever one seemed appropriate” (McClure, 1983). Senator Joseph Lister Hill charged his staff with finding a way to “steer between the Scylla of race and the Charybdis of religion” (Advisory Commission on Intergovernmental Relations, 1981).

After Sputnik launched, McClure came up with the idea to link education to defense and the unwillingness to disapprove the NDEA dissipated, knowing that Congress would not object to a bill combining education and defense. Senator Hill and Representative Carl Elliott (the NDEA’s co-authors) realized the politically expedient method to securing passage was to capitulate to adding a loan component, as educational grants were perceived as being socialist in nature...although even though in the end, the loans functionally became scholarships (United States Congress. Senate, n.d.).¹³³ Mary Allen Jolley, the Legislative Clerk assigned to the

¹³³ *Ibid.* The following segment is from the interview.

RITCHIE: The big bone of contention between the House and the Senate got down to whether or not to make it [the type of student aid] scholarships or loans. MCCLURE: Oh, that was another clever, clever ploy. That was done on the House side. They narrowed the issue. There were millions of dollars for all kinds of other things, but Carl Elliott and his guys narrowed the issue to whether we should have the federal government hand out scholarships or loans. And they took the defeat, of course. The House denounced scholarships, it was a waste of money and socialism and all of that. And the minute the damn scholarship issue was done for, dead, the bill swooped through. RITCHIE: The irony is that now so many of those loans haven't been paid back, so they really turned out to be scholarships after all. MCCLURE: De facto scholarships--which I think we all suspected they would be.

House of Representatives Subcommittee on Special Education, noted “the passage of the National Defense Education Act broke the dam of a hundred years of federal inaction in American education; its passage was an essential precursor to the landmark legislation of the 1960s and transformed the federal role in education in America” (Urban, 2010).¹³⁴ The tenets of the NDEA, described at the execution of the bill as a temporary measure, found a permanent constituency in the follow-on legislation, the HEA.

The foundation of the HEA was generous, offering students either \$800 or half of the amount of student financial aid (\$6,547 in 2020 dollars) with a kicker of \$200 (\$1,637 in 2020 dollars) if the student was in the upper half of the class for a maximum of four years (U.S. Congress 1965). Fast forwarding fifty years, most federal financial aid is conveyed through loans.

Federal Pell Grants, currently the largest source of federal grant aid, is the primary foundation of educational assistance. The maximum Federal Pell Grant for the 2020-2021 academic year to which every eligible is entitled is \$6,345 (\$775 in 1965 dollars). When the current amount of aid is compared on a year-to-year basis, the current grant amount is devalued, especially when factoring in the increased cost of college.

Nowhere better can the increased cost of college be seen than in the field of law. In 2011, Brian Tamanaha (2011), a professor at St. John’s University School of

¹³⁴ In the end, the NDEA was defunded, having been functionally replaced by the HEA.

Law quoted information from the Association of American Law Schools (AALS) in the late 1950s regarding the cost of attending law school:

Median annual tuition and fees at private law schools was \$475 (range \$50-\$1050); adjusted for inflation, that's \$3,419 in 2011 dollars. The median for public law schools was \$204 (range \$50 - \$692), or \$1,550 in 2011 dollars. [For comparison, in 2009 the private law school median was \$36,000; the public (resident) median was \$16,546].

Even after adjusting for inflation, the cost of going to law school has increased by roughly one thousand percent since the 1950's, well above the rate of wage increases of wages during the same period. With federal student grants stagnant and the cost of education increasing at an astronomical rate, students are turning to student loans as the primary method to finance their education.

One measure of the extent of reliance on student loans to finance education is to compare the amount of outstanding loans at the time of the HEA with the current amount of outstanding debt. The amount of outstanding student loans that have been made over the last five decades has been both explosive and exponential. During the 1965-66 academic year, the Office of Education notes that the total amount of outstanding student loans was \$72,000,000, which is \$589,250,286 in 2020 dollars (Congressional Quarterly, 1968). That number pales in comparison to the \$1,542,700,000,000 in outstanding student loans through the second quarter of FY 2020 (U.S. Department of Education. Federal Student Aid, 2020).¹³⁵ With the increased cost of a college education, and wages not keeping up with tuition and

¹³⁵ The amount of 1965-1966 student loans (\$72,000,000) is less than four billionths of one percent (0.0000466714%) of the outstanding 2020 loans and the 2020 equivalent (\$589,250,286) is equal to is less than three millionths of one percent (0.0003819604%) of the outstanding 2020 loans.

related costs, it is plausible as to why an increasing number of borrowers have sought to file for bankruptcy.

The Public Mood on Bailouts

The national mood on providing financial assistance to national banks and insurers changed from tepid to agnostic to bearish during 2008. In the third part of the year, the backlash from government intervention to save private industry and public fallout in subsequent years led to the formation of the Occupy Wall Street movement in the summer of 2011. During the 2011 movement, the press focused on the anger emanating from the crowd as a result of the government giving financial assistance to the corporations which were responsible for the crisis. Several polls noted the prevailing public mood that corporations should not receive a bailout because they, as the taxpayers that were funding the perk of corporate welfare through their tax revenue, were not receiving a personal bailout (CBS News 2009). President Barack Obama captured the sentiment during an October 6, 2011 press conference when he commented about the Occupy Wall Street movement by stating:

It expresses the frustrations that the American people feel that we had the biggest financial crisis since the Great Depression, huge collateral damage all throughout the country, all across Main Street...and yet you're still seeing some of the same folks who acted irresponsibly trying to fight efforts to crack down on abusive practices that got us into this problem in the first place (Bruce, 2011).

In short, the corporations that caused the country's crippling condition were given new life on their balance sheets and allowed to shed their debts at public expense, while the public was forced to muddle through its fiscal obligations. This, in

turn, led to questions as to the validity and necessity of the economic stimulus packages that were enacted in the Troubled Asset Relief Program, as allowed by the Emergency Economic Stabilization Act of 2008 (Public Law 110-343). This scrutinization included an examination of the government saving publicly traded companies from their self-induced afflictions by offering cash assistance as a salve, while tightening the requirements to discharge student loans in bankruptcy six years earlier. However, the tide may be changing.

The temporary student loan relief in Section 3513 of the CARES Act started to turn the tide as it ordered the “the Secretary (of Education) to suspend all payments for loans” through September 30, 2020. It assisted in the addressing the most oppressive part of the loans—interest—as the CARES Act dictated that “interest shall not accrue on a loan described under subsection(a) for which payment was suspended for the period of the suspension.”^{136,137}

Discussion & Analysis: Budgeting and Affordability

Overview

The next part of this dissertation focuses on student loan affordability based

¹³⁶ A list of selected student loan relief and debt collection laws enacted after the Bankruptcy Reform Act of 1978 is included as Appendix E.

¹³⁷ This relief was later extended until January 31, 2021. The history of the extension is as follows: On August 8, 2020, the Secretary of Education was directed to continue to suspend loan payments, stop collections, and waive interest on DOE held student loans until December 31, 2020. The order was extended until January 31, 2021 (U.S. Department of Education. Federal Student Aid, 2020).

On January 20, 2021, the White House noted “at the request of President Biden, the Acting Secretary of Education will extend the pause on federal student loan payments and collections and keep the interest rate at 0%” (The White House, 2021).

on affordability through the use of standard budgeting.¹³⁸ Standard budgeting is a concept used by economists, statisticians and governments to describe a hypothetical list of items, goods and services (as well as their estimated costs) that are consumed by economic units (which are commonly referred to as families) at varying levels to represent a designated standard of living and an estimated costs of living for the economic unit.^{139,140} Internationally, standard budgeting is a practice that has been around in its most embryonic form since 1672, and as a fully mature function, is linked to the related subjects of affordability, wages, income, market costs, poverty, and standards of living (Chapin, 1909).

Domestically, standard budgets have historically served similar functions. They've been used to support increasing employee salaries, measure annual costs of living, assess the living standards of groups, determine the adequacy of subsistence payments to families, as well as evaluate an individual's ability to pay for social services. Additionally, standard budgets have been used in the formulation of social

¹³⁸ Affordability is a measure, which is conterminously a concept that describes the capacity to purchase items; a construct that characterizes those capitalistic confines; and a condition which clarifies choices between competing commodities. It is acknowledged that the affordability can also be a function of a debtor's *ability* to pay, which is different from affordability as a function of the debtor's *willingness* to pay. While income is linked to affordability, one is not a substitute for the other.

¹³⁹ Generally, a budget –*as opposed to a standard budget*—is a plan that describes a goal (or a series of goals) that are used to estimate and define the expected results of future operations. This is an amalgam of the definitions used by Stickney, . (2010) “a financial plan a firm uses to estimate the results of future operations” and Aaron Wildavsky (1984) “a budget is a series of goals with price tags attached.”

¹⁴⁰ The use of the words family and families is a colloquialism. Although the members of the economic domestic unit *may* be linked by blood, commonality, or legality, but the members of the unit don't always have a common tie between the members, as the definition of economic unit and family is left to the discretion of the researcher based on the purpose of the research.

security programs, such as minimum wage laws (Douglas, 1919). Standard budgeting as used in the United States is neither new, niche nor novel, as the earliest factions of standard budgeting in America were published prior to the turn of the twentieth century.¹⁴¹ A list of standard budgeting studies that have been completed over one hundred years ago is attached in Appendix F.

Although the United States initial foray into standard budgets was over a century ago, the practice as a program fell out of favor in starting in the late sixties. The country's version of the practice, the BLS Family Budgets Program, was defunded by President Reagan in 1981 and was ultimately demolished by neglect as it has not been refunded since that time. Nevertheless, the principles behind the program are still in practice, as evidenced by legislation. Section 132 *et seq.* of Public Law 109-270 and Section 1002(2)(E)(i) *et seq.* of Public Law 110-140 require use of the data that was previously collected by the program (Fremstad, 2010).

The most widely accepted definition for the term was created by Gordon Fisher. The practice is alternatively called a family budget, a market budget or a basic needs budget, depending on the literature. Specifically, a standard budget is *"a list of goods and services that a family of a specified size and composition would need to live at a designated level of well-being, together with the estimated monthly or annual costs*

¹⁴¹ It is noted that the Commonwealth of Massachusetts used standard budgeting as early as 1875 (Stecker, 1921). The state of North Dakota followed suit thereafter by passing legislation stating "It shall be unlawful to employ women in any occupation for wages which are inadequate to supply the necessary cost of living and to maintain them in health; and it shall be unlawful to employ minors...for unreasonably low wages" (Gordon & Frankfurter, 1928).

of those goods and services. The actual expenditures of an existing family or a group of families do not constitute a family budget” (Fisher, 1992).¹⁴²

Phases of Standard Budgeting

There are several phases in the development of a standard budget, and these steps are like making a budgetary pie. The first step in creating the pie—*preparation*—is to choose the recipe and determine the components of the culinary collation.¹⁴³ The second step—*compilation*—is to determine the composite amount of materials to be included in the tart.¹⁴⁴ This phase is concerned with ascertaining the quantities of items required to obtain and sustain the level of life at the desired lifestyle. The question of whether a designated standard of living and its associated standard budget is adequate, subjective and largely contingent upon the target to which the standard is applied. The final step of the process—*allocation*—is to cut the quiche and determine the serving size for each portion of the finished product.^{145,146}

¹⁴² In this case the economic unit, referred to as the family, or Reference Family, is considered to be the base or standard family for the purposes of the Standard Budget. This family consists of two married adults and their two minor children. Specifically, it is a four-person family comprised of thirty-eight-year-old male that works full time; a domestic wife and an eight-year-old female child and her thirteen-year-old brother. This definition is derived from Mark K. Sherwood’s report titled *The Measure of Poverty* (Sherwood, 1977).

¹⁴³ In short: What ingredients should be selected to go into the pie?

¹⁴⁴ In short: How much of each ingredient should go into the pie, or alternatively, how big of a pie should be made?

¹⁴⁵ In short: Where is the second and subsequent cuts of the pie? The second cut of a circular pie (from center to radius) determines the percentage of the pie to be allocated. Every subsequent cut determines additional percentages. How much pie should be reserved for a given entity?

¹⁴⁶ The quality can be done as a weeding out function in the *preparation* phase (by the choice of ingredients selected or rejected), via *compilation* (by masking items [in using more or less of a given thing] to achieve a balance outright exclusion of the items), or it can be done as a function of *allocation*

Historically, the concept of affordability (as practiced by the United States executive agencies) is generally treated as *individual* slices of *separate* budgetary pies—as if they were disparate pieces independent of each other—as opposed to being viewed as *E Pluribus Unum* (many parts uniting into one), essentially as multiple slices of the *same* fiscal pie. In the end, no matter how the budget is engineered, the value of the study comes from having validated the constituent components of the budget.

The budget to be composed for modelling expenses was based on items that were deemed to be acceptable based on governmental recommendations, government programs, and the legal definitions for program qualifications. The justification for each inclusion is incorporated into each explanation.

Standard Budgeting: Preparation

The first step was to determine the which goods and services to be included in the market basket of goods. While some items to be included in a family budget may be contentious, there are others that are less debatable.

The initial plan was to create a prescriptive budget, but due to serendipitous fluidity, an opportunity presented itself, and this resetting created a pivot point, causing the research to take a different approach during the writing phase.¹⁴⁷ The change was kaleidoscopic in nature in that a shifting of the viewing slope caused a

(with the percentage of the pie that is reserved for a given actor, with proportionally sized slices being representational of values that are allotted to that given recipient).

¹⁴⁷ These changes are discussed in Challenges Encountered During the Research: Logistical Obstacles segment of this document.

change of the angle of incidence and of the angle of refraction. In the end, although the elements contained within the viewing tube did not change, the external alteration of luminescence cast a new perspective on the outlook. This moment of enlightenment reset the baseline for this part of the investigation and inadvertently changed a potential weakness into a source of strength.

In order for the components of the budget to be adequately addressed, its elements had to be defined and accepted. The experts in the field of poverty indexes, wages, and standards of living, such as Fisher, Nearing, Orshansky, and Sherwood, acknowledge that there is no one best way to assemble the items in a budget. This longstanding challenge is something that followed the practice in the United States from its overseas origins.

Before World War I, Scott Nearing (1913) noted “The measurement of the amount of food necessary to maintain a standard of living is by far the easiest part of the problem” and “the determination of the amounts of housing, clothing, fuel and light necessary to the maintenance of a standard, is a much more difficult problem than that involved in the discussion of food, because there is no way of stating what amount of these items is requisite for the running of the body on an efficiency basis.” Additionally, Orshansky (1977), the inventor of poverty standards in the United States, noted “there is no generally accepted standard of adequacy for essentials of living except food.”

This divergence of opinion in the field is an issue that was of concern articulated in the researcher’s personal notes. The initial goal was to create a prescriptive budget in a pyramid fashion, with the two points of the foundation at the

bottom, whittling away at objects until the smallest, most acceptable group of items was left at the top, knowing that the validation of these items would be the biggest obstacle to authenticity. The refocused baseline inverted the pyramid by turning it upside down on its head with its tip on the ground as the foundation.

The new starting point commenced with an operative question: *What do the arbiters of the term undue hardship believe should be included as a part of the research family's budget?* The baseline stemmed from the premise that if a judge, as the final frontline arbiter of the student loan discharge hearing process, found an object, item, or service to be suitable for preservation by ruling or by reference, then the article should be included in the budget. This is because these objects have been validated by the hardest, most unpredictable critics in the process—*the judiciary*—and should by acclimation be the most acceptable items for the student loan debtor to retain, and in tandem, be the least unacceptable things from which the debtor should depart.

Standard Budget: Initial list of items

The initial list of guidelines for items to be included in the budget was developed from the oft-cited case, *Ivory v. United States of America, United States Department of Education*, 269 B.R. 890, 899 (Bankr. N.D. Ala. 2001). The *Ivory* list, is as follows:

List of Ivory Items

1. People need shelter, shelter that must be furnished, maintained, kept clean, and free of pests. In most climates, it also must be heated and cooled.
2. People need basic utilities such as electricity, water, and natural gas. People need to operate electrical lights, to cook, and to refrigerate.

People need water for drinking, bathing, washing, cooking, and sewer. They need telephones to communicate.

3. People need food and personal hygiene products. They need decent clothing and footwear and the ability to clean those items when those items are dirty. They need the ability to replace them when they are worn.
4. People need vehicles to go to work, to go to stores, and to go to doctors. They must have insurance for and the ability to buy tags for those vehicles. They must pay for gasoline. They must have the ability to pay for routine maintenance such as oil changes and tire replacements and they must be able to pay for unexpected repairs.
5. People must have health insurance or have the ability to pay for medical and dental expenses when they arise. People must have at least small amounts of life insurance or other financial savings for burials and other final expenses.
6. People must have the ability to pay for some small diversion or source of recreation, even if it is just watching television or keeping a pet.

Ivory has been cited multiple times as the torchbearer as the list of essential items that a student loan debtor should preserve. The items that are included therein are in-line with objects that the United States either directly recommends, supports through legislation, regulation or tax policy. The breakdown and translation of these guidelines are as follows:

The first of the six *Ivory* parts acknowledges that a person needs the most basic tenet of physiological needs: Housing which is vermin free, structurally/environmentally safe and hygienically sound. The housing unit must be sufficiently adjustably moderated and ventilated so that the housing unit's ambient temperature is appropriate for the season and to the inhabitant's preference. Moreover, the housing unit's atmosphere should be tailored to its occupants, as the

edifice is more than a multisided box with walls. Furnishing the living chambers is what transforms a house into a home.¹⁴⁸

The second phrase continues with that line of thought, observing that a home is more than an edifice with walls. The items within the home need to be operationalized in order for the place to be fully functional. Adding the items that make the residence into a functioning environment, such as lights, gas, water, sewer, garbage removal, and clean running water, supplements the state of the home.

The third group of *Ivory* items attends to the health of the person, their general protection, presentation, maintenance of homeostasis as well as sanitization and sterilization.

A home is the paragon of stability and the next set of the *Ivory* conditions breaks from focusing from the person to tend to the interaction of the person with their environment. It recognizes that people are not self-isolated islands which do not interact with the world, even in a quarantined setting. Engagement with external entities is necessary to maintain the entity and their ecosystem, and the need to get to and from places is a vital part of that experience.

The cinque of the set addresses the long-term upkeep and preservation of the person through insurance. Insurance can be done in several different ways, most often by purchasing a policy from a company. Alternatively, the purpose and premise of self-insurance is to go about “accumulating a savings fund, and of protecting the

¹⁴⁸ The difference between a house and a home is that a house is the physical accumulation and configuration of outlaid concrete, wood and wires that compose the structure. It is generic, and nonspecific. The furnishings are what give a residence its character, provides ties of attachment and sense of belonging to its inhabitants, to make a house into a home.

family income" (Little & Cotton, 1920). The idea here is that the debtor should be able to retain sufficient resources to provide a cushion to maintain the lifestyle that they are accustomed to in case of calamity.

The last of the *Ivory* items acknowledges that the student debtor should have some respite from being a corporate sycophant (defined by Edward Lawrence Godkin as *Homo Economicus* [Economic man]) to being a live action person that is not always perfectly rational and solely focused on pecuniary proceedings in every action. Godkin (1891, pp. 491-492) notes

The "Economic Man" of Ricardo always buys in the cheapest markets, and always waits patiently until he can sell in the dearest, and he assumes that in so doing he renders the best service in his power to the community. His one desire is to make all the money he can by every means not illegal.

For his "Economic Man" is not a real man. This man does not represent the human race in general, or any particular part of it. He is a creature of the economist's imagination. The facts of human life have not entered into his composition.

The last of the *Ivory* items acknowledges that human life does not exist solely as a financial presence infallibly traversing from moneymaking objective point A to profitability center point B without interruption, diversion, a loss of momentum, or breakdown.

Although a person's home is their sanctuary, and their vocation is their means to sustain their existence, *Ivory* notes that recreational deviation is a temple for escape. The clearly defined boundary balancing work, home and non-professional pursuits is what keeps a person sane and engaged to reset, refresh, renew and reengage. When that barrier is breached, the ecological equilibrium is disrupted. In

the end, *Ivory* concedes that student loan debtors are not just unidimensional soulless pawns.

Although American society has changed since standard budgeting began in the nineteenth century, the basic list of items hasn't changed much since that time. Humans need to be housed, fed, clothed, children need to be cared for and people require transporting from place to place. The biggest difference between the items of then and now is in technology. The federal government now considers items such as cellular phone service and broadband internet access to be commonplace and even essential, so much so that it sponsors access to these objects through its Lifeline program and its Lifeline Broadband program.¹⁴⁹ This listing of goods and services concludes the first step of the budgetary pie.

Standard Budgeting: Compilation

This part of the task, determining the level of the livelihood, is uncomplicated and straightforward. After the ingredients are gathered, the next step is to determine the quantity of the items that will be placed in the pan to bake the budgetary pie.

Economist Amartya Sen (1988) addresses a longstanding enigma of quantitative living standards, noting that the best reflection of living standards is “*in*

¹⁴⁹ In 2013, JadaKiss, a musician from the group the Lox, stated “Pop depreciates the value of luxury” and that sentiment is apparent, especially in respect to the necessity of cell phones (Jacobs, Phillips, & Styles, 2013).

The Pew Research Center notes cell phones were perceived to be so exotic in 1996 that they were not included in the luxury or necessity survey undertaken by the Washington Post, however, the 2006 edition of the survey, undertaken by the Pew Research Center, notes that 49% of Americans consider a cell phone to be an essential item (Pew Research Center, 2006).

the living” and not solely in the collection of items.^{150,151} This outlook is in concert with Abraham Maslow’s Hierarchy of Needs ideology listed in his 1943 paper titled “A Theory of Human Motivation.” These assessments by Sen and Maslow reflect the duality in the subjective nature of composing a standard budget as well as the value of the items encompassed within that budget.

This tension in views was helpful for providing a balance between which level should be used for the evaluation. The investigation looked to the HEA as initially enacted as the inspiration for the level to be used, as the Bankruptcy Reform Act of 1978 was not in place at the time the HEA was signed. The enabling legislation was chosen to be the point of origination for this item, as any action subsequent to the underlying action is the legally progenous fruit of the poisoned tree.

A poverty-level measure was eliminated for consideration, as the word “poverty” is used only once in the HEA, and that use describes a problem to be solved. Therefore, using poverty (the issue to be solved) as the measure for solving poverty (the problem) by applying poverty creates a logical fallacy due to circular reasoning. The use of equating student loan repayment to a tax was not considered. Further, there was no basis for using taxes as a point of comparison, as the word “tax” does not appear in the initial version of the HEA.

¹⁵⁰ The only matter to be determined here is the level (i.e., if it has been decided that a new car is needed, the real question is what type of vehicle to purchase: Mazda, Mini, Mercedes, Maybach, or McLaren). In the end, the circumstances will dictate the type vehicle purchased.

¹⁵¹ Some critics contend that a having collection of items reflects a level of lifestyle comfortability, while others assert that an amalgamation of possessions is not reflective of the quality of a person’s life. There are four primary components that are used for measuring class distinctions: Assets, Consumption, Income and Value.

The measure that was used for this section of the paper was fifteen thousand dollars, as the number was quoted twice as a marker for adjusted family income in the HEA in different places for different purposes and those dual purposes parallel each other. Section 428 (a)(1) of the HEA notes that “each student who has received a loan for study at eligible institution...and whose adjusted family income is less than \$15,000 at the time of execution of the note or written agreement evidencing such loan, shall be entitled to have paid on his behalf and for his account to the holder of the loan, over the period of the loan.”¹⁵² The amount is used here as a point of separation at which relief from student loan interest begins.

The second use of the term occurs in Section 428 (b)(1)(H) of the HEA. This section of the law discusses insuring student loans, and fifteen thousand dollars is the legislatively specified point where the benefit of the student loan insurance program cannot be denied to a student because their adjusted family income falls below this point. The two uses of fifteen thousand dollars serve as the juncture at which Congress believed protection for those that fall into the class would be acceptable. The former use was employed to ensure relief from excessive overpayment through relief of interest and the deployment in the latter ensured that the loan is paid for in case the student cannot pay for the loan.

Fifteen thousand dollars at the time of HEA is equivalent to approximately one

¹⁵² At this point in time, the Bankruptcy Reform Act of 1978 was not yet in force and the ability to discharge the student loans was unfettered. This legislative reprieve of the interest is an early sign of relief of Congress’ intent and level to provide relief to student loan debtors.

hundred twenty thousand dollars in 2018 dollars and translates to being between the seventieth percentile (\$100,162) and eightieth percentile (\$130,000) in 2018 based on the U.S. Census Bureau's (2019) income dispersion measure.¹⁵³ Additionally, the amount of \$120,000 falls between 69.6 percent and 84.5 percent of households by total money income based on the Bureau of the Census 2018 (2019) listing of households. Further, the amount of \$120,000 is in the fourth of five quintiles, for which the income limits ranges between \$79,543 and \$130,000 (U.S. Department of Commerce. Bureau of the Census, 2019). This level of income is generally representative of the upper middle class.

Standard Budgeting: Assessing the Middle-Class

How did the researcher make the middle-class assessment? Defining the term middle class is difficult, as there are different ways to define the expression. The most common definitions focus on the lines of income, wealth, education and sociology. The three major government agencies that measure income (BLS, the Census Bureau and SSA) concur that there isn't a commonly accepted definition of the term. BLS does not define the term. The Bureau of the Census (2016) acknowledges that it "does not have an official definition of 'middle class'" and SSA (2017) confirms the same, noting that "there is no official government definition of the middle class."

With that as a backdrop, the researcher required an alternative setting to correlate to the nominated income level, as being middle class has many different meanings among non-governmental organizations (NGO) and within private

¹⁵³ Fifteen thousand dollars in 1965 is the equivalent of \$122,760 in 2020 dollars.

industry. The Brookings Institution (2018) completed a study titled *Defining the Middle Class: Cash, Credentials, or Culture?* which examined the primary elements of middle classification.

The same group of Brookings researchers completed a second study titled *A Dozen Ways to be Middle Class* (2018) which assembled the results of how twelve world-class experts and organizations defined the term on an income rooted basis. The results that there were a dozen different ways to define the phrase. The income limitations for these definitions ranged from thirteen thousand as the minimum to be considered middle class, to two hundred thirty thousand as the maximum. This group also collectively has a rate of ten percent of households to as many as seventy three percent of households being included within the middle class.

The need to simplify the definition in an expeditious manner prompted the use of the commonly used mathematical definitions as noted on CNNBusiness.com.

One of the narrowest definitions limits it to those who are literally in the middle fifth of the nation's income ladder (from \$50,001 to \$79,542).¹⁵⁴ A wider characterization includes everyone but the poorest 20% (\$25,600, maximum) and the wealthiest 20% (starting at a minimum of \$130,001). Displayed below is the Pew Research Center's definition, which is two-thirds (\$42,119) to two times the national median income (\$126,358, and \$63,179, respectively) for your household size (Luhby & Baker, n.d.).

¹⁵⁴. The amounts for the respective points are included in the quote. The Bureau of Census (2019) is the source of all the data within the offset quote.

The value of one hundred twenty thousand dollars, as described by either of the latter two definitions, clearly falls under the highest end of the definition of middle class by income.¹⁵⁵ Therefore, the standard of living befitting a moderately contented middle-class income will be used for the level of the livelihood.¹⁵⁶

Standard Budgeting: Allocation & Development of the Measure

The final phase was to determine what percentage should be allocated to each respective cost. This part is a mechanical exercise where the percentage allocated to each item was mated with actual market-based costs which were obtained for the items in the particular level of lifestyle selected during the first phase. The allocation percentage was derived from was obtained from the CES, which is a series of nationwide inquiries which ascertain how Americans spend their money. BLS notes that it is “the only federal government survey that provides information on the complete range of consumers’ expenditures” (U.S. Department of Commerce. Bureau of the Census, 2018). For this reason, the percentages acquired from BLS were used

¹⁵⁵ The SSA 2018 Average Wage Index (AWI) is a measure of wages that are subject to federal income taxes and deferred compensation. This inflation information is used to make annual adjustments to Social Security payments. “Such indexation ensures that a worker’s future benefits reflect the general rise in the standard of living that occurred during his or her working lifetime” (U.S. Social Security Administration, n.d.). AWI is reflective of *net compensation*, as opposed to just wages. An AWI of one hundred twenty thousand dollars represents a net compensation level that is higher than 92.93 percent of wage earners (U.S. Social Security Administration, 2018).

¹⁵⁶ It is recognized that “No method of determining the specific requirements for a healthy and decent standard of living is practicable, unless it gives due recognition to actual local conditions” (Stecker, 1921). The variance in dollar ranges in each of the offset quote’s three provisions permits a degree of tolerance to recognize and accommodate local conditions.

as the baseline for the composite, with adjustments made for the reasons explained in the following sections.

There are several items that the Reference Family, albeit hypothetical, will require in order to live in America. The six major expense categories in the CES are housing, food, transportation, healthcare, personal insurance/pensions, and entertainment. All of these objects are referenced in the *Ivory* list of items.¹⁵⁷

Collectively, the focus is on these items, as these categories comprise more than six out of seven dollars (roughly eighty-five percent) of expenses for all consumer units in the last three years in which BLS data is available. In 2016, these items totaled 86.36 percent. In 2017, these items encompassed 86.73 percent, and in 2018, their share increased to 87.00 percent, nearly seven out of eight dollars (U.S. Department of Labor. Bureau of Labor Statistics, 2019). The information provided by BLS served as a point of departure for this endeavor, as the percentage corresponds to the major expenses incurred by American families.

The percentage to be allocated to the six specific categories was determined by taking an average for each of the six categories for the years 2016 to 2018. The purpose of the multiyear averaging was to get a central value from the data set and to protect the integrity of the collective information against unusual spikes that may have happened for any given category for a given year. The three-year average for the categories is as follows in Table 1.

¹⁵⁷ The items are listed in the *Ivory* list as follows: Housing (Bullet number 1 and 2), food (Bullet number 3), transportation (Bullet number 4), healthcare (Bullet number 5), entertainment (Bullet number 6), personal insurance and pensions (Bullet number 5).

Table 1: Bureau of Labor Statistics Three Year Average

Category	2016	2017	2018	Total	Average/Percentage
Total Expenses	\$57,311	\$60,060	\$61,224	\$178,595	\$59,532/100.00%
Housing	\$18,886	\$19,884	\$20,091	\$58,861	\$19,620/32.96%
Transportation	\$9,049	\$9,576	\$9,761	\$28,386	\$9,462/15.89%
Food	\$7,203	\$7,729	\$7,923	\$22,855	\$7,618/12.80%
Healthcare	\$4,612	\$4,928	\$4,968	\$14,508	\$4,836/8.12%
Entertainment	\$2,913	\$3,203	\$3,226	\$9,342	\$3,114/5.23%
Personal Insurance/Pensions	\$6,831	\$6,771	\$7,296	\$20,898	\$6,966/11.70%
Total	\$49,494	\$52,091	\$53,265	\$154,850	---
Average Utilization	86.36%	86.73%	87.00%	86.70%	86.70%
Other Expenses	\$7,817	\$7,969	\$7,959	\$23,745	\$7,915/13.30%

Housing

The single largest expense for most American families is housing. The traditional threshold for this category has been thirty percent, based on the HUDs definition of affordable housing located at 24 CFR 92.252(a)(2), *et seq.*¹⁵⁸ Further, HUD considers any family that pays more than thirty percent of its income toward housing costs to be cost burdened (U.S. Department of Housing and Urban Development, 2020).

The thirty percent is a long-established baseline level which is linked to the National Housing Act of 1937. Since that time, the percentage varied as low as twenty percent in section 2 of the National Housing Act of 1937 and then was stabilized at twenty-five percent in Section 213(a) of the Housing and Urban Development Act of 1969 (Public Law 91-152) before being fixed at thirty percent in 1981 (U.S.

¹⁵⁸ The qualifications for participation in the HOME Investment Partnerships Program affordable housing program set forth in the regulation imposes a maximum rent that does not exceed thirty percent of a family's income.

Department of the Interior. United States Housing Authority, 1938).¹⁵⁹ Additionally, the regulatory definition of affordable housing listed at 12 CFR 1291.1 also uses the thirty percent as the benchmark (Government Publishing Office, 2019).¹⁶⁰ However, the threshold for this item has been set higher for this budget.

This justification for setting the threshold higher than the statutory benchmark information was confirmed by the CES, which notes that housing costs for the three-year period averages 32.96 percent.¹⁶¹ While some categories have percentages under the average (Married couples [30.2 percent] and married couples with children [31.3 percent]), several subcategories within the BLS have higher percentages (One parent, at least one child under 18 [35.8 percent], single persons and others [36.5 percent]) (U.S. Department of Labor. Bureau of Labor Statistics, 2019). Married couples generally have more disposable income due to shared expenses, however, the number for the budgetary pie will be rounded to 33 percent to be used for the allocation percentage.

¹⁵⁹ The twenty percent number mentioned in the National Housing Act of 1937 is an indirect reference. Section 2 of the law states that “rentals are available solely for families whose net income at the time of admission does not exceed five times the rental...except that in the case of families with three or more minor dependents, such ratio shall not exceed six to one.” The first reference created a twenty percent cap and the latter would create a limitation of sixteen and two thirds percent of income.

¹⁶⁰ Thirty percent is a statutory guideline, but the CES is a more suitable and practical limitation, given that it is based on how consumers actually spend their money.

¹⁶¹ While the primary purpose of the thirty percent threshold is to impose a legal ceiling for eligibility in the housing programs, the weight of the HUD guideline has practical implications which extend to other related areas, such as home ownership. The Federal National Mortgage Association (popularly known as Fannie Mae) and the Federal Home Loan Mortgage Corporation (commonly known as Freddie Mac), have home lending underwriting guidelines which require the monthly principal, interest, taxes, and insurance to be 28 percent or less.

Transportation

The next area of the family budget is transportation. In October of 2015, the Deputy Secretary of Transportation noted that transportation expenses traditionally form the second largest share of a family's budget (U.S. Department of Transportation. Bureau of Transportation Statistics, 2016). The Bureau of Transportation Statistics (2018) concurs with this assessment in its 2018 Transportation Economic Trends report.¹⁶² Further, this observation is consistent with the historic expenditures of the CES in the years used to compile the three-year average of 15.89 percent.

The elements that compose transportation costs vary among different families in different localities, so the threshold used is commensurate with the three-year average.¹⁶³

Healthcare

Most Americans receive their healthcare coverage through an employer-based plan (Sanger-Katz & Abelson, 2020). The Patient Protection and Affordable Care Act (PPACA [Public Law 111-148]) as enacted, limited the cost of those plans to 9.80 percent of the employee's income. PPACA statutorily limited coverage to just the

¹⁶² BTS calculates its numbers differently than BLS; however, the positioning is similar. BTS (2018) notes that "Households spend similar percentages on transportation across all income categories except for the bottom income quintile, or the bottom fifth of households by income."

¹⁶³ Costs can be variable, as some cities are predominantly reliant on public transportation, (i.e., New York City), and others are highly dependent on automobiles, (i.e., Atlanta).

employee, so the cost for a person with dependents is usually higher.^{164,165} The three-year BLS average for the healthcare costs (8.12 percent) is slightly below the PPACA rate, so the threshold for this item will be the 9.80 percent listed in the PPACA.

Other Expenses

The areas of food, entertainment and personal insurance/pensions have the most room for variance, based on personal tastes, sensitivities, necessities and proclivities, so the values for these items have been set at the three-year BLS average values of 12.80 percent, 5.23 percent and 11.70 percent respectively.

Final Allocation Percentages

The final post allocation values are as follows:

Table 2: Final Allocation Percentages

Category	BLS Average	Allocation Percentage
Housing	32.96%	33.00%
Transportation	15.89%	15.89%
Food	12.80%	12.80%
Healthcare	8.12%	9.80%
Entertainment	5.23%	5.23%
Personal Insurance/Pensions	11.70%	11.70%
Total	86.70%	87.53%

¹⁶⁴ This oversight is known as the *family glitch*.

¹⁶⁵ Children who are not ensured under a parent's plan may be able to obtain healthcare through the federal Children's Health Insurance Program (CHIP). CHIP is a program administered by HHS, which assists in providing health insurance for children whose families are ineligible for Medicaid, but do not make enough to secure private insurance.

It is noted that the totals for the primary six categories do not amount to one hundred percent.^{166,167} This amount of the BLS Budget (86.70 percent) nearly perfectly parallels the percentage amount of 1.5σ (standard deviation) for normal data distribution at 86.64 percent. This amount of variance is wide enough to capture a good crop of amount of data. Information that is within one standard deviation is considered to be within the average, so information that is encompassed within a higher standard deviation has a higher-level associated degree of confidence in the information. Therefore, this fluctuation is acceptable for this purpose, as the total of the expensed funds is solely intended to be representative for the average American family and not all exhaustive.

Allocation Reconciliation

The BLS top line categories were merged with the *Ivory* list and was supplemented by additions to operationalize the objects. The items were then mated with their respective average nationwide costs in the year closest to 2018 in which data was available and compiled into the list.¹⁶⁸

¹⁶⁶ The remainder of the allocation are for other miscellaneous items, exclusive of taxes, such as contributions to charity.

¹⁶⁷ The allocation values do not include taxes, as this budget and the BLS spending values focus on post-income taxed spending.

¹⁶⁸ The *Ivory* list noted that a person should have shelter. Lenders generally require borrowers to secure home insurance and more lessors are requiring lessees to acquire renter's insurance as a condition of renting a living space. These two items are not included as a part of the *Ivory* list but are required to secure shelter and are a non-enumerated real cost which must be taken into consideration.

Housing:

Shelter

The U.S. Census Bureau noted that the median amount of a mortgage for 2018 was \$1,566 (\$18,792 annually) and the median monthly amount of rent paid was \$1,058 (\$12,696 annually).¹⁶⁹

The Census Bureau reported that 40.6 percent of all renters dedicated more than thirty-five percent of their household income to rent. This finding has left the impression that the prior allocation of thirty-three percent may be unnaturally low, especially in high-cost metropolises such as New York City, Los Angeles and Chicago, where the renter ratio (64.6 percent, 60.1 percent 51.5 percent, respectively) was higher than the nationwide average of 36 percent (Governing.com, 2017). The variability of rents (and related information) is included for information purposes, but most Americans are homeowners, so the monthly mortgage amount is the measure that was used.

Homeowners Insurance

The Insurance Information Institute (2017) noted the average annual premium paid by homeowners is \$1,211 and the average annual premium paid by renters is \$180.

¹⁶⁹ It is noted that an individual working at the minimum wage cannot afford a two-bedroom apartment anywhere in the United States (Jan, 2018). Even in the state with the lowest housing costs, Arkansas, the minimum hourly wage is \$8.50, and a person would need to make \$13.84 per hour to afford a two-bedroom apartment. In San Francisco County, California where the housing is the most expensive, a person would have to make more than the median wages for software developers in Silicon Valley (\$60.92 per hour) to afford a two-bedroom apartment (National Low Income Housing Coalition, 2019).

Furnishings and Home Decor

On average, Americans spent \$518.43 on furniture annually (O'Connell, 2019).

Maintenance

There was no prescriptive standard to determine how much money should be set aside for maintenance costs. Therefore, an informal guide of thumb, known as the one percent rule was used for this item. The rule states that one percent to three percent of the home's value should be set aside annually for maintenance costs. The average sales price of the American home for 2018 was \$385,000, and the median sales price of homes in America was \$326,400, so this measure required an annual payment of \$3,850 or \$3,264 (U.S. Department of Commerce. Bureau of the Census; U.S. Department of Housing and Urban Development, 2020). Since this is a general application of a concept and not an absolute edict, the average of the two numbers was used for monthly costs of \$296.42 and an annual cost of \$3,557.04.

Cleanliness: Laundry and Cleaning Supplies

On average, Americans spend \$183.79 annually on cleaning supplies (Conway, 2020).

Utilities:

Electricity/Natural Gas

EnergyStar.gov, the United States government's collaborative effort between DOE and EPA to lead the nation's energy efficiency efforts, noted that "a typical

household in the U.S. spends more than \$2,000 a year on energy bills” (Bailey, 2016).
The actual number is \$2,060, which is what is used.

Water/Sewage

The United States Geological Survey (n.d.) notes that “estimates vary, but, on average, each person uses about 80-100 gallons of water per day.” The average monthly cost of water for a family of four using 100 gallons of water per day is \$70.39, or \$844.68 per year (Walton, 2016).

Trash

The National Solid Wastes Management Association (n.d.), estimates the national average cost for monthly waste collection to be around \$20, which totals \$240 per year.

Telephones

The Cellular Telecommunications Industry Association estimates that the typical American family spends a total of \$1,441 in cell phone service fees and taxes annually.

Internet

The average cost of internet is \$60 per month, per USAToday.com, for a total cost of \$720 (Blumenthal, 2018).

Transportation:

Vehicle Payments

The average American family owns two cars, per the Bureau of Transportation Statistics (U.S. Department of Transportation. Bureau of Transportation Statistics., 2017). The average new car payment for 2018 was \$523 per month; leases ran \$436 per month and payments for used car loans were \$372 monthly (Meier, 2018). The average of the three (\$443.66 monthly, \$5,323.92 annually) was used.

Public Transportation and Taxis

The nationwide average for public transportation was set at \$153 annually. The breakdown of that cost is as follows: Eighty-three dollars is the amount spent on taxis and seventy dollars is the amount spent on public transportation (Griswold & Kopf, 2019).

Car Insurance

The annual cost of car insurance in the United States averaged \$1,416 per car (Threewitt & Doell, 2020).

Driver's License

The cost of a driver's license varies from ten dollars in Missouri to approximately eighty dollars in Washington State and the length of the license varies from two years (Oklahoma, Vermont) to a minimum of twelve years (Arizona). The amount of twenty-five dollars was used as an approximation of the national average.

Vehicle Tags, Tax and Registration

The amount varies greatly nationwide, so the value of one hundred dollars per vehicle was used.

Gasoline

Drivers spent an average of \$1,560 dollars on gasoline (DiLallo, 2018).

Maintenance/Unexpected Repairs

AAA estimated the cost of maintenance at \$99 a month per vehicle (Reed & Arata, 2019). This amounts to \$1,188 annually.

Clothing and Footwear

American families spend an average of \$1,800 on clothing annually, with \$388 of the spending on shoes and the rest (\$1,412) on clothing (Bowling, 2019).

Food

The Official USDA Food Plans for December 2018 (2019) lists the cost of food for a family of four is \$1,061.40 per month for a moderate plan, while the liberal plan costs \$1,288.40 monthly. Expanding those costs to an annual basis amounts to \$12,736.80 and \$15,460.80. The former number was used.

Healthcare Premiums

The Kaiser Family Foundation's (2018) Employer Health Benefits Survey notes that the average monthly premiums for *employer-sponsored health insurance* individual coverage was \$1,186 and the cost for family coverage is \$5,547.

The monthly premium for individual coverage from the 2018 Open Enrollment Period averaged \$440 per month (\$5,280 annually) and monthly family plan premiums averaged \$1,168, or \$14,016 annually (eHealthInsurance, 2019). The average annual deductible for individual plans was \$4,578 and the average deductible for family plans was \$8,803.

Although more Americans receive their healthcare through an employer sponsored plan, there is a segment of the population that may not qualify for healthcare subsidies or does not receive their coverage through government exchanges. Therefore, the family plan premium amount of \$14,016 was used. This number does not take into other healthcare expenses. A conservative estimate of approximately 25 percent of the family deductible amount (\$2,200) was added for deductibles, copayments, prescriptions, and other medical related items, such as lab fees, eyeglasses and contact lenses.

Entertainment:

Television/Cable Television

The average monthly cable television bill is \$107, per Fortune magazine (Pressman, 2018). This is \$1,284 on an annualized basis.

Subscription Services

The average annual spending on subscription-based services (Netflix/Gym, etc.) was \$237.33 (Lin, 2020).

Pet Expenses

The American Society for the Prevention of Cruelty to Animals (2020) estimates the annual costs of a small dog are \$1,471 and the costs of a cat are \$1,174. The assumption is that there is one pet for the family, and the average of these two numbers (\$1,322.50) was used.

Personal Insurance/Pensions:

Drivers spent an average of \$1,560 dollars on gasoline (DiLallo, 2018).

Life Insurance

The cost for a \$500,000 life insurance policy for a forty-year-old, regardless of gender, is \$37.51 per month (\$450.12 annually) and rises to \$65.69 monthly (\$787.12 annually) for a one-million-dollar policy (Iervasi, 2020). The amount of \$1,237,24 (\$787.12 + \$450.12) has been used here.

Disability Insurance

Disability insurance is priced differently for men and women. Women tend to file more claims, so their cost for disability coverage is more expensive. The average annual cost for disability insurance for a forty-year-old male is \$1,539.44 and the

average annual cost for disability insurance for a forty-year-old female is \$2,467.92 for a policy that pays \$5,000 per month until the age of 65 years of age (Sigel, 2018).

Disability insurance, as a function of life insurance, was included but at a lower rate of 25 percent for each policy, resulting in a combined total of \$1,001.84.

Retirement: Pensions/401(k)/403(b)

Many financial advisors and financial news outlets, such as CNBC, Motley Fool, Fidelity, CNN, TIAA and Charles Schwab recommend putting away ten to fifteen percent of current income for retirement. This is not a one size fits all approach, but a common general rule intended to ensure that there is enough saved to live through retirement by building a nest egg to replace income from working. Yahoo Finance noted that Americans contribute an average of \$6,831 to their retirement accounts (Lin, 2020).

Childcare

This item was not included in the *Ivory* list, but a list of family expenses would not be replete if it did not include an accommodation for childcare. The cost of childcare is set at \$8,320 annually and was acquired from a national study completed by the Brookings Institution (Whitehurst, 2018).

Conclusion: Budgeting and Affordability

In conclusion, when all of the items on the permissible *Ivory* list are calculated, the total of these items are \$116,474.73, as shown in Table 3. This amount is nearly

twice the median household income for 2018 of \$61,937 (Guzman, 2019) and nearly fifty percent above the pre-tax income average of \$78,635 (U.S. Department of Labor. Bureau of Labor Statistics, 2019). If a family purchased the items on the *Ivory* list, it would not have the funds to repay student loans, no matter the amount outstanding. As a result, it is confirmed that if a family at the statistical mean—*representing the average American family*—that does not indulge in excess or extravagance fully followed the federal government’s laws, guidelines, and commonly provided guidance from nationally recognized subject matter experts, that family could not afford to pay their student loans at the national average for their respective levels, even with the accommodations provided therein.

Discussion & Analysis: Undue Hardship

Earlier in this paper, it was noted that the term undue hardship came from Section 523(a)(8) of the Bankruptcy Reform Act of 1978 and the phrase was extracted verbatim from the pre-legislative debate sessions. Although the term was used in the law and its legislative progeny, the phrase *undue hardship* was not legislatively defined.¹⁷⁰ In the four decades since the enactment of the law, Congress repeatedly

¹⁷⁰ Moreover, the term *dependent* has not been defined in this context. In context, Section 523(a)(8) of the Bankruptcy Reform Act of 1978 notes “A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt...

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for— (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual

passed on the opportunity to define the term when it fortified laws relating to the subject in the Crime Control Act of 1990, the Higher Education Technical Amendments of 1991; the Higher Education Amendments of 1998 or the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. This left a legislative void to be filled by the judiciary.

There are two ways to determine in a legislative context what constitutes an undue hardship: Either directly through a definition or implicitly by deriving a definition for consumption based on the use of the term in other settings. In the latter sense, the gist of the expression can be drawn from either by how the term is used or from what has explicitly been ruled out.¹⁷¹

Specifically, the term was examined in the contexts of legislative use and common parlance. As Congress used the term *in medias res*, it follows that the language may have had a contemporary context which didn't need a legal definition, as the phrase existed in the sense of a common definition which was well-known at the time.

Generally, what's commonly understood doesn't have to be explained, but there are few living that could describe the connotation of the investigatory term at the time that the Bankruptcy Reform Act of 1978 was created. The short list of primary sources that would have an unquestionably concrete authoritative idea of the term's intended meaning are the bill's sponsor and the bill's co-sponsors...and as

¹⁷¹ Kanye West famously said "Everything I'm not, makes me everything I am" (West, 2007). This divining serves as a process of distilling a definition for the term undue hardship via the simple process of elimination. Whatever is left after the sifting the valuable definitional wheat from the immaterial chaff gives a good idea as to what constitutes an undue hardship.

of this writing, every one of them are dead. Therefore, secondary sources were used to distill a proximate meaning of the term.

The objective in using government records primarily from the Government Printing Office (GPO) is that the agency serves as an impartial arbiter in finding previously cited federal government sources.¹⁷² The purpose of searching for the term undue hardship in legislative documents was not to complete a histogram that showed the frequency of the amount of times that the term was used in different publications, but to use that frequency to determine which entries contained the most explanative uses of that term prior to enactment of the Bankruptcy Reform Act of 1978 for the purpose of later developing a determining the elements and a definition of the term of undue hardship.

Searching for the term “undue hardship” in www.govinfo.gov for all responses prior to November 6, 1978—the date the Bankruptcy Reform Act of 1978 became law—returned 4,787 entries. When the search phrase was expanded by coupling qualifiers such as “definition of” undue hardship, “from” undue hardship, “like” undue hardship, “meaning of” undue hardship, “such as” undue hardship, “cause of” undue hardship, and “undue hardship caused” to the term caused the number to drop precipitously to a more manageable number. Many of these entries are actually identical reproductions of the same text in different locations. After the duplicates were consolidated, there were less than one hundred entries left for deliberation.

¹⁷² The Government Publishing Office was named the Government Printing Office prior to Section 1310 of the Consolidated and Further Continuing Appropriations Act, 2015 (Public Law 113-235) on December 13, 2014.

Table 3: Itemization of Ivory List Items

Item	Monthly Cost	Units	Annual Cost
Housing:			
Shelter: Mortgage (Monthly)	\$1,566.00	12	\$18,792.00
Homeowner's Insurance (Annual)	\$1,211.00	1	\$1,211.00
Furnishing and Home Décor (Monthly)	\$518.43	1	\$518.43
Maintenance (Monthly)	\$296.42	12	\$3,557.04
Cleanliness: Laundry and Cleaning Supplies (Annual)	\$183.79	1	\$183.79
Utilities:			
Electricity/Natural Gas (Annual)	\$2,060.00	1	\$2,060.00
Water/Sewage (Monthly)	\$70.39	12	\$844.68
Trash (Monthly)	\$20.00	12	\$240.00
Telephones: Cellular (Monthly)	\$1,441.00	1	\$1,441.00
Internet (Monthly)	\$60.00	12	\$720.00
Transportation:			
Vehicle Payments (Monthly [2 Cars @ \$443.66])	\$887.32	12	\$10,647.84
Public Transportation and Taxis (Annual, per person)	\$153.00	2	\$306.00
Car Insurance (Annual [2 Cars])	\$1,416.00	2	\$2,832.00
Driver's License (Annual [2 Cars])	\$25.00	2	\$50.00
Vehicle Tags, Tax & Registration (Annual, per person)	\$100.00	2	\$200.00
Gasoline (Annual [2 Cars])	\$1,560.00	2	\$3,120.00
Maintenance/Unexpected Repairs (Annual [2 Cars])	\$198.00	12	\$2,376.00
Clothing and Footwear:			
Clothing (Annual [per family])	\$1,412.00	1	\$1,412.00
Shoes (Annual [per family])	\$388.00	1	\$388.00
Food (Annual [per family])	\$1,061.40	12	\$12,736.80
Healthcare:			
Premiums (Annual [per family])	\$14,016.00	1	\$14,016.00
Deductibles/Other Expenses (Annual [per family])	\$2,200.00	1	\$2,200.00
Entertainment:			
Television/Cable Television (Monthly)	\$107.00	12	\$1,284.00
Subscription Services (Monthly)	\$237.33	1	\$237.33
Pet Expenses (Annually [per family])	\$1,322.50	1	\$1,322.50
Personal Insurance/Pensions:			
Life Insurance (Annually, per person)	\$1,237.24	2	\$2,474.48
Disability Insurance (Annually, for 2 people)	\$1,001.84	1	\$1,001.84
Retirement: Pensions (Annually, per person)	\$6,831.00	2	\$13,662.00
Childcare (Annual [2 Children])	\$8,320.00	2	\$16,640.00
TOTAL			\$116,474.73
Average Household Income			\$61,937.00

The use of the term of undue hardship in the United States prior to the Bankruptcy Reform Act of 1978 generally falls into the one of three categories: military obligations, financial responsibilities and employment accommodations.¹⁷³

Undue Hardship: Military Usage

The earliest uses of the term undue hardship emanated from the former Department of War, so the implications of the phrase may have had a military influence.¹⁷⁴ A search for the term found an early variation of the phrase existed in the March 1947 edition of *All Hands: The Bureau of Naval Personnel Information Bulletin* (United States. Department of the Navy, 1947).¹⁷⁵ Four years later, another close variation of the term appeared on page 2 of the *Leatherneck*, a publication of the United States Marine Corps.¹⁷⁶ In context, both variations of the term were used in response to servicemembers requests to leave the armed services prior to the expiration of their respective terms of service.¹⁷⁷

¹⁷³ The usage of the term in the latter evolved from Section 703 *et seq.* of the Civil Rights Act of 1964 into the definition used by the ADA and the Equal Employment Opportunity Commission (EEOC) (Equal Employment Opportunity Commission, 2019).

¹⁷⁴ The Department of War existed until 1947 and was renamed the Department of the Army by Section 205 of Public Law 80-253, the National Security Act of 1947.

¹⁷⁵ This version of the phrase read “undue *or genuine* hardship.”

¹⁷⁶ This version of the phrase noted “The Commandant of the Marine Corps will direct discharge when it is considered that an *undue and genuine hardship* exists” (Leatherneck Association, 1951).

¹⁷⁷ The Naval variation of the term required the servicemember to file an application to be released from the military and undergo an interview, after which, the sailor’s record and supplementary information would be reviewed in order to for the Navy to make a determination as to whether or not the release request would be granted.

Another one of the few times when the term undue hardship *sans modification* had been explicitly defined prior to the Bankruptcy Reform Act of 1978, was again in a military context and occurred during a March 7, 1952 hearing before the Subcommittee Number 4 of the House of Representatives Committee on the Judiciary (United States. Congress., 1952). The definition of the term took place during the following exchange between Representative Elijah Lewis “Tic” Forrester and Lieutenant Colonel Allen E. Poole of the Air Force regarding undue hardship:

Mr. Forrester: You use the language there “undue hardship.” Do you have a definition of what an “undue hardship” is?

Lieutenant Colonel Poole: It is hardship conditions under which an individual’s family—or hardship suffered by the individual family not normally being suffered by the military personnel in the service.

Mr. Forrester: Now I have heard something. Do you have that in the statute?

Lieutenant Colonel Poole: That is not in a statute.

Mr. Forrester: Is it in writing?

Lieutenant Colonel Poole: Undue hardship exists when the family of the airman concerned must endure hardship conditions beyond those normally incident to military service as a result of his military status. That is written right in here: Undue hardship does not necessarily exist solely because of altered present or expected income, or because the airman is separated from his family, or must suffer the inconveniences normally incident to military service (United States. Congress., 1952).¹⁷⁸

In the fuller exchange on the subject between Representative Forrester and Lieutenant Colonel Poole, it is noted that there is difference between hardship and

¹⁷⁸ This definition also appears in the Friday, December 5, 1952 edition of the *Federal Register* (17 FR 10981) listing the policy at 32 U.S.C. 882.16(b).

undue hardship. The term *hardship* is a standalone phrase, whereas adding *undue* serves as a modifier to the unconnected term. Hardship is “undue and unforeseeable” whereas releasing a member of the military from their commitment “will contribute materially to the care or support of his family and alleviate the hardship” (United States. Congress., 1952).

Mr. Forrester noted that “[t]he words ‘undue hardship’ without a definition would be one thing to me, another thing to Tom Jones and another to Bill Smith” and followed on Lieutenant Colonel Poole’s statement, remarking “You have a definition of undue hardship which I think is a reasonable definition” (United States. Congress., 1952).

Undue Hardship: Financial Usage

The most prevalent use of undue hardship in the financial sense relates to the payment of taxes. The most prominent citation of the term in this context is through its use in respect to the Internal Revenue Code. The use of the term at 26 CFR § 1.6161-1 *et seq.* and in the *Federal Register* on January 3, 1957 (22 FR 85) was used for this purpose (National Archives And Records Administration, 1957).

The reference notes that taxes must be paid in accordance with the prescribed schedule for payment or file for a tax extension. If the payment cannot be timely paid, a first extension of the time to pay shall last no longer than eighteen months. This initial extension is administratively fixed by regulation and may, upon taxpayer request, be approved by the IRS. A second extension, if granted by the IRS, is limited to an additional twelve months after the initial extension.

These extensions may be granted by a showing of undue hardship and similar to the military example above, there is a difference between a hardship and an *undue* hardship. In this case, the term “undue hardship” means more than an inconvenience for the taxpayer. The undue hardship reference that appears for these references specifically requires the taxpayer to incur substantial financial loss, such as selling property at a fire sale or a sacrifice price in order to pay taxes.¹⁷⁹ It is noted that the *Tax Recommendations of the President* contains the statement that “the definition of undue hardship as contained in the regulations seem[s] unduly restricted” (United States. Congress. House. Committee on Ways and Means, 1970).

Undue Hardship: Employment Accommodation

The third area of undue hardship relates to employment and employment accommodations. One of the earliest references to the term in this vein appeared in the 1934 *Labor Law Reporter*.¹⁸⁰ An accommodation would pose an undue hardship if it would cause more than de minimis cost on the operation of the employer's business” (United States. National Labor Relations Board, 1934). The use of this term

¹⁷⁹ The CFR explains further, noting that

An undue hardship is an extraordinary or unexpected event such as the destruction of records or place of business of the payor by fire or other casualty (or the place of business of the payor's agent who under a pre-existing written contract had agreed to fulfill the payor's due diligence obligations with respect to the account subject to the penalty and there was no means for the obligations to be performed by another agent or the payor). Undue hardship will also be found to exist if the payor could have met the due diligence requirements only by incurring an extraordinary cost.

¹⁸⁰ The reference is “When does an accommodation pose an “undue hardship?”

in this aspect led to the phrase being included in the ADA, which was referenced earlier in this document.

Conclusion: Elements of Undue Hardship

The exploration of these different definitions of undue hardship is the *raison d'être* as the hub of the central research question. Generally speaking, the documents have revealed that undue hardship is a gelatinously fluid octopial body from which several different tangentially related but noncoupled tentacles originate and extend from a unified common core. The conjoining center which forms the base of the body is hardship.

The reviewed documents recognize that *undue* hardship is a derivative of hardship, the two phrases are inextricably intertwined and unseverable, as a loanholder must first have a hardship before it can be determined whether the adversity can be termed undue hardship. The threshold for proving undue hardship ranges from being more than a mere “inconvenience to the estate” (for tax purposes 37 FR 28723) to “on request” (for military purposes). Undue hardship as used in the Bankruptcy Reform Act of 1978 may be contracted from the expression “undue or genuine hardship” as used by the military (1947), or the terms “undue personal hardship”/“undue economic hardship” as used by the IRS (1969). Consideration of undue personal hardship is one of the “prime essentials of a model municipal revenue stream” as described by Luther Gulick (1920), fondly remembered as the dean of public administration, in the *Bulletin of the National Tax Association*.

It is known that as an action, undue hardship is an extraordinary or unexpected event that causes suffering, as outlined in 26 CFR § 301.6724-1 at A-7. Further, as an action to which someone is subjected, undue hardship is something to be protected against as meeting the threshold for overcoming an undue hardship can only be done “by incurring an extraordinary cost.”

Conceptually, undue hardship is in one way or another a financial burden which is always affiliated with a funding disruption or deficiency. The various documents note that the source of the funding trouble should be examined to determine culpability but doing so is of secondary import to validating the paucity’s existence.

There are several types of actions that are specifically cited in statute or in regulation as undue hardships. A lack of funds due to a lapse of budgetary authority, or insufficiency due to withholding money allocated for use by a program are two specifically listed examples. The duration (or anticipated duration) of the deficiency is important as well, as a short-term insufficiency of funds has a different effect on a debt than a long-term fund divergence.

Aggravation or rupturing of an existing but otherwise fragilely stable condition creates a cause for undue hardship, as undue hardship is a function of dependency, maintenance and consistency.¹⁸¹ Consistency here does not require a

¹⁸¹ “Officers and enlisted men who are not eligible for release under the age or point system may be discharged if their families are so dependent on their earning ability or family leadership that undue hardships would result if they were retained in service” (U.S. War Department, 1945).

contract to be continued to completion, so an agreement may be severed to prevent the effect of undue hardship on a party.¹⁸²

Consistency (as a function of time) serves as an element of undue hardship, as either an action (via a failure to perform) or an inaction (by negligence to undertake an activity) is a cause to declare an undue hardship. If a condition caused undue hardship, the object need not exist indefinitely, but its duration must be consistently present, without being intermittently transient, and severing the item that causes undue hardship concomitantly alleviates the adversity.

Mechanically, undue hardship can exist due to a lack of work or because a person is overworked. Undue hardship can occur as the result of an intentional action or as the result of an accident, such as when an agency makes a mathematical error in computing benefits that would deprive a person of financial benefits.¹⁸³ Another noted characteristic of undue hardship is when workers must receive “payment of time and one-third for the overtime work” when the markets are not good (National Recovery Administration, 1935).¹⁸⁴

The payment of overtime is an example of an approved undue hardship because it places a party at a disadvantage, preventing adaptation to a “competitive

¹⁸² Referenced text: “The Administrator may consent to the termination of any contract with a producer in any case where the Administrator determines that continuation of such contract would work an undue hardship on the producer (6 CFR 485.511(b); 1961 edition).

¹⁸³ Referenced text: “He made a substantial mathematical error in computing the cost of the benefits which he would derive under that Act and that such misinformation or error has resulted in *undue hardship*” (United States. Congress. House. Committee on Armed Services. Subcommittee No. 2, 1954).

¹⁸⁴ Referenced text: The “NRA (National Recovery Administration) was informed that the general financial position of the markets are not good, and the payment of time and one-third for the overtime work permitted by the Code would cause an *undue hardship*.”

situation” from occurring.^{185,186} It is expected that “unemployment insurance, savings and other income [would keep] most of the new jobless from undue hardship”

Undue hardship is “proportional” and as a benchmark, is an adversity level which is above the norm. The norm (or deviations therefrom) can be proven by empirical evidence, first person evidence or through the use of or statistically-based evidence. Its tolerance level for acceptability wanes at unbearable or unsustainable to the point of unreasonability and the continued imposition of undue hardship on a person is unjust in nature.

Ameliorating undue hardship requires acting in good faith, but a good faith effort does not require an affirmative action to be undertaken by the debtor, as good faith efforts can be evinced by showings of ownership and accountability. This includes such actions as an acknowledgement of responsibility for the debt and making efforts toward settlement but does not require confessing judgment or extending repayment to show good faith on the part of the debtor.

The basis for undoing an undue hardship is entrenched in inequities which are rooted in injustice which warrants granting relief.¹⁸⁷ In reviewing requests for undue

¹⁸⁵ Referenced text: “The resources of government should be brought into play to assist the affected industries to improve productivity, move into new and more competitive lines, or otherwise adapt to the competitive situation without *undue hardship*” (United States. Congress. Senate. Committee on Commerce, 1961).

¹⁸⁶ Referenced text: “To pay full Code minimum wages while training new workers, the company contended, would place it at a disadvantage and work *undue hardship*” (National Recovery Administration, 1935).

¹⁸⁷ The quote in context is “An application shall be made by the Code Authority to the National Industrial Recovery Board for an extension of the time limit for the registration by any member of this industry, if it appears that the time limit as provided herein might cause injustice or *undue hardship* to a member of this industry (National Recovery Administration, 1934).”

hardship, it is important to keep in mind that the reviewer undertakes “realistic requirements of that position” and impracticable flights of fancy related to “undue hardship or of harsh interpretations have been in most cases met with measures of transitory relief.” Further, while the underlying obligation is borne by the debtholder, the undue hardship is not.

Finally, undue discharge standards are intended to be broad and the standards of hardship discharge have been made as liberal as possible. Adhering to a rigid bright line causes undue hardship, as the standard is digital and not analog and does not allow for fluctuations, divergences or non-conformities.

Who is More Likely to Experience Elements of Undue Hardship?

Although DOE provides information to the public on the amount of outstanding student loan debt, it does not regularly collect information about the race of its student loanholders (Pallardy, 2019). Neither the Free Application for Federal Student Aid document, which every student is required to complete to receive federal financial aid, nor the NSLDS database records the racial characteristics of borrowers. However, studies conducted by non-federal organizations, such as the American Council on Education, American Institute for Research, Brookings Institute, Dēmos, and Washington University in St. Louis, have noted that Black and Hispanic students have larger loan balances than their White and Asian counterparts. This is due to several reasons such as parental wealth/contributions, average median salary and higher borrowing percentages. Public groups have called on DOE to track the

disparities information through the NSDLS by adding racial information to the database (Douglas-Gabriel, 2016). Those calls have thus far gone unheeded.

The reason why public groups have requested DOE (2020) to track the information through the NSDLS is because “the NSLDS database provides a centralized, integrated view of federal student aid loans and grants that are tracked through their entire lifecycle from aid approval through disbursement and repayment (if applicable).”

There are different explanations why a student would choose a particular college (Academic program; campus; financial aid package; family legacy; location/proximity; name recognition; sports programs, etc.) and similarly, the reasons are myriad as to why a student would have student loans.^{188,189} A student may fail a class and have to pay to repeat the class. The college may be expensive, or the student’s grade point average may be below the threshold for scholarship consideration, or the student may not have applied for financial assistance. Therefore, this line of inquiry cannot be examined on a micro level, as there are too many variables to examine this query in depth on that level. Consequently, this subject was examined on a macro level to explore the imperceptible reasons for undue hardship and explain why students of color have higher amounts of student loans than the norm and thus are more likely to experience undue hardship.

¹⁸⁸ it is acknowledged that students have options as to which educational institutions to attend, choices that were not available a generation ago.

¹⁸⁹ Colleges in the Northeast, West Coast, in metropolitan cities, as well as flagship universities tend to be more expensive than those in the south, rural colleges or non-flagship schools.

Educational Exclusion

The first of the reasons why people of color have more student loans and undue hardships is due to educational exclusion. There are public educational institutions (such as the University of Virginia and the University of North Carolina at Chapel Hill) and private ones (such as Brown University, Emory University and Georgetown University) who used slave labor to build their campuses.

These and other institutions that were formed on the backs of slave labor prevented those slaves and their descendants from attending their respective institutions as students for many years. The irony of these activities is that the slaves were important factors which contributed to college construction (as they were deemed strong enough to build these institutions) and these establishments were financially dependent on these indentured servants, (as they have financially contributed to the institutions through their taxes) but architects of the academies were considered neither capable, nor intelligently suitable to matriculate as students.^{190,191}

There segregationist actions which were applied to preceding generations prevented the laborers from going to college, impairing their long-term lifetime earning potential and placing students of minority descent decades behind their counterparts. This impaired their opportunities to develop generational wealth for their children. These isolationist practices didn't end with the issuance of the

¹⁹⁰ The historical inequities that exist are some of the reason why HBCUs were formed. Even when HBCUs were formed, states such as Maryland decided to locate their HBCUs in the most remote non-minority populated places to intentionally make them inaccessible to their intended population.

¹⁹¹ These exclusionary practices were not limited solely to the named institutions.

Emancipation Proclamation, as these procedures existed a full century later, as shown previously in Figure 10. The Supreme Court issued a ruling to desegregate schools and colleges in 1954, yet several states still persisted in postsecondary education.

Over a decade after the Court's ruling, Governor Ross Barnett of Mississippi physically obstructed Mr. James Meredith, an African-American student from registering for classes at the University of Mississippi on September 20, 1962. Less than a year later on June 11, 1963, Governor George Wallace of Alabama also stood in the doorway to prevent Mr. James Hood and Ms. Vivian Malone from registering for classes at the University of Alabama. Both instances required the students to be accompanied by federal agents; Meredith, with U.S. Marshals, while Hood and Malone were escorted to campus by the Alabama National Guard.

On one hand, there's educational exclusion by taking the type of actions noted above. On another note, there's educational exclusion by *inaction*. The United States was formed on July 4, 1776, with its seat of government as the District of Columbia and Congress having exclusive jurisdiction over the nation's capital. Congress' inaction on addressing public postsecondary education in the District of Columbia for the first two centuries meant that a fully operational public comprehensive university was not established in the nation's capital until the nation's bicentennial in 1976.

These historically documented actions of educational exclusion contributed to the perception and the reality of being unwanted in the halls of higher education. Moreover, these obstructionist actions were the seeds which were sown, fertilized and from which roots were developed to form the foundation of educational exclusion.

Educational Envisage

Part of breaking down these walls of educational exclusion occurs by educational envisage. One of the ways that this has occurred is through media that portrays images of minorities succeeding in college, such as *A Different World* to counteract the historical imbalance and minorities that were invisible and impotent in collegiate histories of yesteryear.

The show, albeit fictional, created a legacy of minorities that attended college due to the positive characters, their growth and evolution as they developed and progressed through their collegiate years. The relatability of the story lines resonated with minority viewers and was well received, leading to an overall final rating no lower than fourth through its first four seasons and first or second with minority audiences (Hunt, 2006).

Essence magazine and the *New York Times* noted that the show still has an impact with minorities over thirty-five years after its initial broadcast in 1987 (Harris A., 2018; Littles, 2017). This is because the show instilled within Generation X, Generation Y and the ensuing legacies with the confidence that they could go to college, could achieve, and could excel when people that looked like them are depicted in a positive light in American television. In the end, *A Different World* positively affected their outlook and in turn, their belief in themselves and their ability to go to college and succeed in breaking through the barrier of educational exclusion.¹⁹²

¹⁹² The breakthrough of that barrier is evidenced by the attendance of African-Americans in graduate programs. Studies show that there are fewer African-Americans that attend college, but they attend graduate school in greater percentage than their counterparts. The American Council on Education's study titled *Race and Ethnicity in Higher Education: A Status Report*, 57.2% of black bachelor's degree

Educational Inequity

Another less focused on topic that is no less important to the subject of why undue hardship exists for minority students is the subject of educational inequities. Maryland's four HBCUs, Bowie State University, Coppin State University, Morgan State University, and the University of Maryland Eastern Shore filed a lawsuit in 2006 alleging that the State of Maryland practiced educational inequity in funding for the HBCUs in comparison to the state's non HBCU public colleges. The states of Alabama, Louisiana and Mississippi have had to address similar charges (Douglas-Gabriel & Wiggins, 2019).

The specific allegation for Maryland is that the state is "fostering segregation by allowing well-funded academic programs at traditionally white institutions to undermine similar ones at four historically black institutions" (Richman, 2019). Although twelve of the thirteen public colleges in Maryland are members of USM, they do not all receive comparable funding.¹⁹³ With less funding, the four HBCUs are not on a similar playing field and are in a vulnerable position. As a result, they are not able to offer similar programs, and cannot offer as many educational programs, library materials or experiences as the other institutions due to a lack of operating capital. Additionally, if colleges have varying funding levels, they have less to give to their students for scholarships. In turn, this affects the students, as the students at

graduates went on to pursue advanced degrees, while only 43.8% of white bachelor's degree holders did the same (Espinosa, Turk, Taylor, & Chessman., 2019). The need to go on to graduate school is to earn more money to pay back the acquired student loans.

¹⁹³ Morgan State University is the public college that is not a member of USM.

the four HBCUs must take out more loans than their counterparts at other institutions, and thus are more likely to experience undue hardship.

The outcome of the lawsuit found that “the state’s university system for years created an uneven playing field and encouraged segregation by allowing academic programs at traditionally white universities to undermine those at HBCUs, making it harder for the institutions to attract students and earn money” (Baltimore Sun Editorial Board, 2020).¹⁹⁴ This is nothing new, because “despite the landmark Supreme Court decision in *Brown*, most HBCUs remained segregated with poorer facilities and budgets compared with traditionally white institutions” (U.S. Department of Education. Office for Civil Rights, 1991).

Conclusion: Who is More Likely to Experience Elements of Undue Hardship?

The emergence and presence of the Black Lives Matter (BLM) movement has been a catalyst to hasten exploring systemic issues which may help to explain disparity in outstanding student loans along lines of racial identification. It would be disingenuous to ignore these factors in the calculus of educational affordability within the current cultural climate and the BLM movement materializing at the fore.

The issues of educational exclusion, educational envisage and educational inequities are now being addressed through different measures and venues, be it institutional oversight, through lawsuits or through social media. These historical

¹⁹⁴ The practice of awarding scholarships to students has always been a function of a college’s *ability* to exercise institutional discretion in distributing funds, but the distribution of funds is predicated on the *capability* to do so based on the outright *inability* to exercise this function due to the most basic premise...a lack of capital.

inequities are some of the reasons why minority students of color must take out more student loans and experience undue hardships at rates higher than average.

Research Limitations, Delimitations and Encountered Challenges

There are several challenges, limitations, and delimitations that were present during this study. These constraints served as demarcators which maximized limited resources by narrowing the efforts and applying boundaries to keep the research actions focused within a keenly defined theater of operation. The limitations of this study were externally imposed restrictions that were out of the researcher's sphere of control, whereas delimitations were consciously imposed boundaries to direct the research efforts. The challenges were the unexpected impediments that were encountered during the research, writing and revision of this work. The levied limitations, desired delimitations and encountered challenges are recognized as follows in the following two sections.

Research Limitations and Delimitations

It is acknowledged that the focus upon eleven cases in the federal court system did not include the federal courts with jurisdiction over the District of Columbia, nor any case decided after December 31, 2018.¹⁹⁵ Additionally, the single scope of this work concentrated on these leading cases with a focus on the tripartite functions of government. The executive and legislative levels of the federal government recently

¹⁹⁵ Those courts with jurisdiction over the District of Columbia are the United States Court of Appeals for the District of Columbia Circuit and the U.S. District Court for the District of Columbia.

received renewed calls from the public and legislators to review student loan discharge policies, practices and procedures concurrently with the conclusion of the study. Therefore, there may be more information and more current data than what has been reviewed here. Additionally, discharge reasons other than undue hardship do exist, such as for fraud, identity theft and school closure exist, but were not the emphasis of this paper and subsequently were not explored.

A secondary limitation was the availability of information. Although the information published in legal databases, Federal Reporters and other ephemera are presumed to be truthfully accurate reflections and summarization of the cases, but the case information presented in these dossiers is an abstracted précis of the case presented at trial.

Further, it was assumed that the information contained in the examined case files are valid and truthful, due to the requirement for the borrower to cooperate fully with the federal government during the duration of the discharge process. Therefore, the information is self-represented by the person seeking discharge and thus it is in their interest to provide as much information as possible to make the person eligible for discharge.

Finally, it is acknowledged that time (as a finite resource) is both a limitation and a delimitation, depending on the perspective in which it viewed. Time, which when viewed as the amount that will be devoted to this endeavor is a delimitation, and when viewed as a function of the period of a calendar that others have to assist in this endeavor, is a limitation.

Challenges Encountered During the Research: Logistical Obstacles

Brooklyn's native son, Hall of Fame boxer Mike Tyson once said, "Everyone's got a plan until they get punched in the face" (Tyson, n.d.). No matter how much pre-planning preparation occurs, there will be unexpected challenges that will drive a wedge between proposition and performance when the punches start to get thrown. The extent of the changes encountered, in combination with the timing of the deviations, required shift on the fly adaptability to keep the final product true to the approved proposal.

In between the time that proposal was approved by the doctoral committee and the Institutional Research Board, the plan to personally visit all circuit courts for more case file information and NGOs for data needed to be reworked. This reworking was a direct response to the most talked about item of the 2020 calendar year, COVID-19.

On March 19, 2020, the World Health Organization officially declared COVID-19 as a pandemic and each of the circuit courts enhanced their access protocols as a result (Ghebreyesus, 2020). These protocol enhancements served as barriers to access the law library and case files of each court due to the result of orders, notices and issued on the U.S. Courts website which expressly disallowed non-litigants access to the physical facilities.

Even if those repositories of information were open to the public, travel to these buildings would not have been easily accessed via commercial transportation, as the quickest way to access them—airports—were nearly halted.

American Airlines, the world's largest airline, reduced the number of combined daily flights servicing New York's John F. Kennedy International Airport and LaGuardia Airport as well as New Jersey's Newark Liberty International, from 271 in April 2019 to 13 flights in April 2020 (Arnold, 2020).^{196,197} Since COVID-19 rendered the air service in America's largest metropolis gaunt, the number of flights to smaller cities were comparatively skeletal and in other cases, outright nonexistent.

Transportation through America's rivers, rails and road routes was also severely curtailed as the result of state-imposed quarantine edicts and stay at home orders. Amtrak announced that its daily ridership was down 96 percent (Shepardson, 2020). Additionally, state troopers increased scrutiny on out of state drivers through border checks, especially with connections to certain states (Lazo & Shaver, 2020). As a result, the grand plan to visit all eleven circuit courts and subject related NGOs suffered from the punch of the coronavirus and subsequently required rejiggering.¹⁹⁸ The complications were overcome by reaching out to the courts, NGOs and other resources digitally, by phone, and through the use of postal mail.

¹⁹⁶ American is the largest carrier by seat capacity and the number of airplanes operated (Zhang, 2019).

¹⁹⁷ Although Atlanta's Hartsfield is the world's busiest airport by passenger traffic, the New York City metropolitan area has the most congested airspace in the United States (National Business Aviation Association, n.d.).

¹⁹⁸ The travel plan relied on all forms of transportation. The initial plan was to start off in San Francisco (Ninth Circuit) taking Amtrak's California Zephyr train to Chicago (Seventh Circuit) through Denver (Tenth Circuit). The second leg of the trip would have continued the train ride from Chicago to Cincinnati (Sixth Circuit), and then a drive to St. Louis (Eighth Circuit), followed by a flight or a train ride to New Orleans (Fifth Circuit). The third leg of the trip would have commenced via the Crescent train from New Orleans to Philadelphia (Third Circuit) via Atlanta (Eleventh Circuit), with a break and train change in New York (Second Circuit) for a ride on a Northeast Regional train to Boston (First Circuit), concluding with a flight home. The final trip to Richmond's Fourth Circuit was envisioned as a day trip due to its proximity to Baltimore.

Chapter 5: Summary, Conclusions and Recommendations

Review of the Research

The primary focus of this study was to examine what is an “undue hardship” (as referenced in the Bankruptcy Reform Act of 1978) and to examine the reasonability of student loans in a contemporary fiscal climate through the central research topics of undue hardship and affordability. This research was designed with the intent to focus on two areas through clarifying derivative research questions. Each line of inquiry targeted a specific emphasis: The applicability, parity and uniformity of discharge standards nationwide, as well as and affordability of student loan repayment in a post-Bankruptcy Reform Act of 1978 environment. The research findings for the first three clarifying queries note that the *Brunner* test and the *Totality* test are the juridical standards used to adjudicate student loan discharges, the two juridical standards are different from each other in form, features and function and they are not uniformly applied.

The first subject of discharge standards addressed discharging student loans as a function of a legal construct through three questions to examine the variance of the “uniform Laws on the subject of Bankruptcies” as ascribed in Article 1, Section 8 of the Constitution.¹⁹⁹

¹⁹⁹ To recap, the three clarifying questions are as follows:

The first finding on the first subject addressed the variance of student loan discharge standards. While there is one *de jure* law—the Bankruptcy Reform Act of 1978—there are two *de facto* laws due to the juridical application and implementation of the varying benchmarks, the *Brunner* test and the *Totality* test. The issue herein is that while the Fourteenth Amendment to the Constitution espouses the concept of equitable application of laws (by invoking the concept of equal justice under law) individuals subject to the jurisdiction of different circuit courts are treated differently due to the use of disparate standards. As a result, the research showed that similarly situated debtors in different jurisdictional venues places should anticipate experiencing divergent outcome decisions based on their locational input.

The second finding under the first subject continued to focus on its applicability of these standards, as it relates to the Fourteenth Amendment to the Constitution. The Fourteenth Amendment ensures that neither a state, nor the federal government “...shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws” (United States.

Since Congress did not provide explicit legislative guidance to implement student loan discharges in the Bankruptcy Reform Act of 1978, what are the juridical standards that are used to adjudicate student loan discharges, as determined by each of the federal circuit courts?

Is there a difference between the philosophies used by the different circuits?

Further, are the juridical standards that are applicable to student loan discharges applied uniformly in the federal circuit court system (in respect to similarly situated cases in other circuits), as determined by the leading cases in each of the federal circuit courts?

Congress., 1787). Thus, it is anticipated that the application of different student loan discharge standards, if brought to the Supreme Court, would likely be found unconstitutional.

The final finding for the first topic delves into the *Brunner* standard used by the *Brunner* courts. The prevailing standard for most federal courts is the *Brunner* test, which requires applicants to prove that “additional circumstances must exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period” (*Marie Brunner v. New York State Higher Education Services Corporation* 1987). The nine of the eleven circuit courts that use this standard require the borrower to define their state of affairs to a near scientific certainty, which is structurally similar to litigation to recover lost profits, where a plaintiff seeking to recover losses in court based on a casualty has to provide proof of profits to a near certainty in order to prevail. Additionally, several courts require the debtor to prove that there exists a “certainty of hopelessness” as noted in *Roberson*, the leading case in the Seventh Circuit.

This Certainty of Hopelessness standard is impossible to prove with a reasonable degree of assurance, as any assumptions that would be made would be specious at best, akin to Alabama’s and Georgia’s general rule on securing lost profits of a commercial venture. The adjoining states regard lost profits to generally be non-recoverable because they are speculative, remote and uncertain, as cited in *Atlanta Gas Company v. Newman*, 76 S.E.2d 536 (1953). If the standard of certainty is not good enough to be used as a basis for profit recovery because it is speculative, then certainty should not be the standard used to make predictions about *life*, where the

degree of sureness is less predictable than a crapshoot. It is expected that the same should hold true here for student loans, and that element should not require a person to state to a degree of inevitability—short of death—that a certainty of hopelessness will exist, as it is a near impossible standard to meet. As a result, the legal respite of student loan discharge relief as currently employed is like a desert oasis to a thirsty person—beautifully constructed, yet functionally inaccessible—making it operationally impracticable to be of serviceable use to the proletariat.

The second subject of student loan repayment affordability concentrated on the resultant effects of the Bankruptcy Reform Act of 1978 itself through creating a student loan repayment policy rooted in affordability as a practical matter within the context and cost of contemporary daily living social conditions.

The Philosopher Kings: Gatekeepers of Pandora's Box

The governmental reform movements of the late 1990s and early 2000s reacted in response to Americans view of wanting to government to operate more like business. However, private businesses exist for the sole purpose of making a profit and is a corporate exercise of “management directed by the profit motive” while “the objectives of public administration cannot be measured in money terms and cannot be checked by accountancy methods...In public administration, there is no connection between revenue and expenditure” (von Mises, 1944).

Businesses can declare bankruptcy in order to shed itself of toxic assets. Occasionally, the United States government assists business in this manner, as was done for the Troubled Asset Relief Program (TARP) during the Great Recession and

during the COVID-19 epidemic. However, student loan borrowers—the CEOs of themselves—don’t have a program to give them relief from troubled assets, as such, it is necessary to strike a balance so that borrowers experiencing undue hardship can obtain a fresh start as well. Adversarial discharges are the closest thing to such a TARP program.

The initial hypothesis to support the fourth derivative question is that the definition of the term “undue hardship” was left undefined by Congress, so it was left for the judges in the federal court system to create a definition that is representative of Congress’ intent while also providing borrowers with a fresh start. This decentralization of standards allowed judges to be sensitive to the cases before them, but their disproportionate focus on the undue hardship part of the law led to deprioritizing the overall intent of the Bankruptcy Reform Act of 1978, which is likely not what Congress intended at the time enactment.²⁰⁰

Brunner’s Flaw: Hardship Evolves as a Function of Contemporary Society

The first of two hypotheses for this question believe that if a person follows ordinances, guidelines, laws and requirements that are set forth by the federal government (such as taxes) their student loan payments should still be affordable within the context of traditional profile of American spending habits to prevent undue hardship. This is in context with the sentiment espoused by nearly every president after the HEA was enacted, from Lyndon B. Johnson to Barack Obama, that the federal

²⁰⁰ Keep in mind that student loan discharges are a subordinate part of the bankruptcy process and not an exclusion to the process.

government should invest in every student that wants to go to college by making funds available and that the student shouldn't go broke in the process of acquiescing to that ambition.

The next supposition addresses affordability and hardship as a function of contemporary culture. To wit, the circumstances that the government constituted to be a hardship at the time the Bankruptcy Reform Act of 1978 was reformed are vastly different than the circumstances that would constitute the same situation today.

A well-known example of a person that experienced hardship in the 1970s is the titular character in the 1974 movie *Claudine*. Although the movie is a work of fiction, critics praised the writing and acting for its authenticity in reflecting life at the time for the less fortunate.²⁰¹ At that time, a person that owned a car was functionally barred from receiving public assistance, as the vehicle was considered a luxury item and a resource to be sold to support the family.²⁰² However, times have changed since that age and ownership of an automobile is not considered to be an automatic disqualifier. In fact, the federal government now considers items such as cellular phone service and broadband internet access to be commonplace and even essential, as it sponsors access to these objects through its Lifeline program and its Low-Income Broadband Pilot Program.

²⁰¹ Diahann Carroll was nominated for Best Actress award at the thirty-second Golden Globe Awards and forty-seventh Academy Awards. James Earl Jones portrayed the male lead actor in the movie and was nominated for Best Actor at the thirty-second Golden Globe Awards. The movie's writers received nominations for the screenplay at the twenty-seventh Writers Guild of America Awards.

²⁰² The circumstances which befell Claudine weren't far off from reality, as the Food and Agriculture Act of 1977 (Public Law 95-113) required the fair market value of a vehicle to be counted as a resource for purposes for determining income eligibility for social service programs, such as Food Stamps.

An underlying and unstated construct of the federal student loan program is that it assumes that the United States economic infrastructure will support increased salaries for college graduates, such that their net income will be high enough to pay back their student loans.

The D.O.C., a venerable musical performer, ensconces this plight with a moderated, yet realistic tone in his sonnet titled *The D.O.C. and the Doctor* when he states, “I don’t understand the misconception, thinking if you make it, you go in one direction” (Curry & Young, 1989). Morbidity aside, the underlying tone in the tome sets a theme which peers the three recessions and depressions of the twenty-first century, acknowledging that economic insecurity with new paradigms, such as the gig economy, is the new normal.

This neoteric baseline of uncertainty will impair students from repaying their loans back or paying them back in accordance with the initially prescribed terms. When the instability of the economy is combined with exponential year over year tuition increases and affiliated interest, it is confirmed that it is increasingly impracticable for a family at or near the statistical mean or median of income and spending patterns to follow federal government laws, guidelines, and recommendations and concomitantly keep their student loan payments affordable.

Reflection on Brunner: A Deeper Dive

The *Brunner* case, as the torchbearer for determining whether a student loan bankruptcy petition for discharge, is often quoted for its principles in the eleven numbered circuit courts, but while the three points of the Brunner test are often cited,

the richness and fullness of the text is rarely quoted fully in context. It's here where the immediate function of sight and the long term of vision diverge and, in the end, both lose meaning, since Brunner is used as the principal discharge test for 93.43 percent of Americans, however the case text (other than the three tenets) has been disregarded and its supplemental verbiage is *non repetatur*.^{203,204,205}

Delving further into the *Brunner* case brings forth information which is necessary to securing a fuller understanding of the misuse of the case. Judge Charles S. Haight Jr., (quoting *New York State Higher Education Services Corporation v. Leonard Anthony Kohn*, 5 Bankr. Ct. Dec. 419 (S.D.N.Y. 1979), noted that the purpose of the *Brunner* test is to *avoid* “the ‘demeaning’ exercise of determining how a person should live his or her life, or how much effort should or can be made to repay the loan.” The reality is that the avoidance of deciding as to how someone should live their lives or imparting how much effort should be placed in repaying the loan is honored far more in the breach than in the observance.²⁰⁶ Ostensibly, the *Brunner* case resulted in being the key opening to opening a Pandora’s box of making a Sophie’s Choice that the

²⁰³ The sight is the immediate acuity of perceptibility; and vision is the iterative process of acquiring knowledge. Proper stereoscopic binocularity requires having both attributes simultaneously functioning in sync.

²⁰⁴ This percentage is based on the populations of the states that are not under the jurisdiction of the First Circuit and the Eighth Circuit. This data is calculated from the information in the Census Bureau’s 2018 National and State Population Estimates Table NST-EST2018-01: Table 1 (U.S. Department of Commerce. Bureau of the Census, 2018).

²⁰⁵ *Non repetatur* means “not repeated” in Latin.

²⁰⁶ Many of the published precedential student loan bankruptcy cases provide insight as to why the request was denied, and the memorandum opinion often provides commentary ranging from light extolling to heavy excoriation as to what changes the debtor should make in order to remediate the loan.

standard intended to avoid.²⁰⁷ Ultimately, the application of the two different discharge tests to apply the same law is a *prima facie* case of inequality.

The minimal standard of living concept used by many judges was derived from a specific quote in the *Report of the Commission on the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93rd Cong., 1st Sess., II, 140, 141 (Appendix 2) (1973), which reads

The total amount of income, its reliability, and the periodicity of its receipt should be adequate to maintain the debtor and his dependents at a minimal standard of living *within their management capacity, as well as to pay the educational debt.*

The words “as well as to” indicates that the educational debt, while imperative, is of secondary import, but not to the exclusion of the living thereto, nor is the standard a poverty level existence.

Ultimately, the laws that were made in 1978 when the nation was transitioning from a manufacturing economy to a service economy, have not changed over with the country’s progression. As a result, the regime that administers student loan discharges is a troglodyte twinned to an era which is no longer present. Therefore, the rules and structure for discharges which was built for an economy forty years ago, is not applicable to contemporary society.²⁰⁸ A retrospective

²⁰⁷ The full quote is as follows: “This test is useful as it provides a conceptual framework for analysis of the facts which avoids what former Bankruptcy Judge Roy Babbitt termed the ‘demeaning’ exercise of determining how a person should live his or her life, or how much effort should or can be made to repay the loan.

²⁰⁸ For perspective, at the time the Bankruptcy Reform Act of 1978 was enacted, a person had to physically travel to a bank to deposit a check and wait until the check cleared to have access to the funds. Now a check can be deposited by taking a picture of the check and money can be sent worldwide

exposition on modern culture succinctly polls the proletariat in positing, *“How can you expect something to grow and not change?”*²⁰⁹ (Budden, 2008).

The circumstances that the government constituted to be a hardship at the time the Bankruptcy Reform Act of 1978 was reformed are vastly different than the circumstances that would constitute the same situation today. However, times have changed since that age and ownership of an automobile is no longer considered to be an automatic disqualifier. Further, single individuals earning as much as \$97,600 and families earning \$139,400 in California’s Bay Area in FY 2020 are considered low income by HUD and qualify for housing assistance (Strassman, 2018). Therefore, this is why hardship is an evolutionary function of contemporary civilization.

Epilogue

The central research questions for this work required investigation to ascertain the points of symmetry between the arc of applying the goals of the Bankruptcy Reform Act of 1978 in tangency with the curve of affordability via determining how the elements of undue hardship should be applied upon student loan debtors.

On one hand, the federal government has the responsibility to ensure that its assets—the outstanding loans—are collected for the purpose of maintaining the

instantly via a cell phone., e.g. “Just sent a million dollars through a hands-free. That’s big money talk, can you answer me?” (Jay-Z & B-Money, 2006).

²⁰⁹ If America was stuck in that outmoded society, the federal government would still be using such outdated terms as Negroes and Orientals. It is noted that the offensive terms were removed and modernized as the result in Public Law 114-157.

program's solvency, but does not act so oppressively in its enforcement that it is elusive in ensuring educational discharge equities by being effusive in praising poverty. If this is the case, the outcomes of the overall content, design and outcome of the Student Loan Program will stray rudderlessly from the post-educational mission outlined by President Johnson in his speech at Southwest Texas State College in signing the Higher Education Act of 1965 into law.²¹⁰ Ultimately, the most important terminus of this tour is to disembark at the intersection of the happy medium and the happy median.²¹¹

There may not ever be a societally acceptable absolute answer for the latter two questions. However, in the absence of an applicable response, the researcher has developed suggested repayment guidelines and recommendations to improve the existing system. The guidelines and recommendations, which are attached and set forth at length in include a recommended definition for the term undue hardship in Appendix H and guidelines for a draft student loan repayment policy for consideration in Appendix I. The recommendations have been developed through the readings that were undertaken for this study and in consultation with the comments submitted by the public in response to the February 21, 2018 DOE *Federal Register* Notice (83 FR 7460-7462) published to request feedback on the appropriate

²¹⁰ The college went through several name changes after the date of the speech. In 1969, the school was named Southwest Texas State University. The 2003 iteration christened the college as Texas State University-San Marcos, and the 2013 most recent conversion titled the institution as Texas State University.

²¹¹ Here, the happy medium is the point of acceptability between two extremes. The median might not be the at the halfway point, as in the mathematical definition, so the median in this case is meant as the middle, as in the balancing point in a scale.

implementation of the undue hardship standard, which would not discourage potential filers from filing a discharge petition in a bankruptcy case. The recommendations are attached in no particular order.

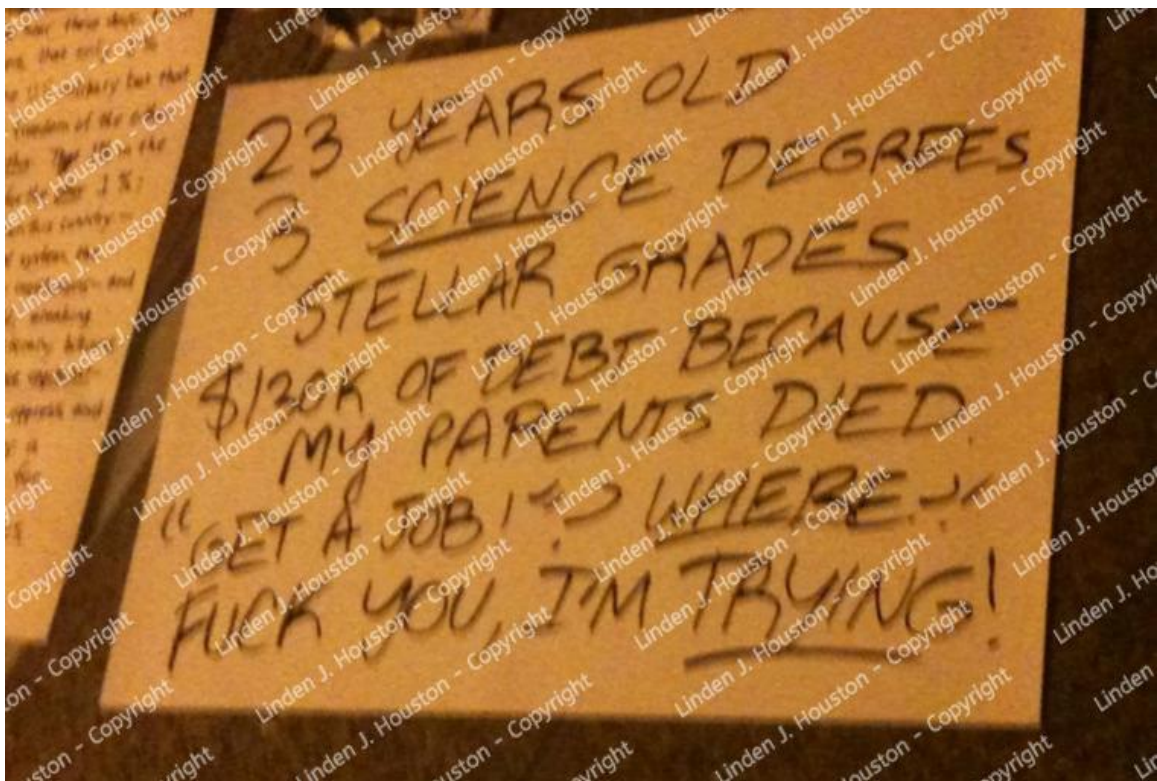
Some of these recommendations are intended to immediately address items that can be resolved quickly by executive order to employ short term relief, while others are envisioned to align with the regular regulatory rulemaking processes to impart long-term structural reprieves. The implications for this study spill over to other areas in which future research action and policy efforts can be directed, with the most prominent potential prospective avenue for future research is from a quantitative econometric perspective.

The goal of the journey *en route* to the end destination of Edutopia listed in the introductory overview is to find the balance between solvency and benevolence for the purpose of arriving at the common sweet spot of program sustainability. Peter Drucker's charge on communication advises that "[t]he most important thing in communication is to hear what isn't being said" and the distal perspective held by a viewpoint holder's adversary may not have historically been fully appreciated or exchanged with the opposing party (Drucker, Peter Drucker: Father of Modern Management, 1988).

For many years after the Bankruptcy Reform Act of 1978 was enacted, loan borrowers and loanholders have been on opposite sides of the ideological field in protecting their interests and have not fully engaged in dialogue through a non-adversarial forum. During the writing of this analysis, the tide on what isn't being said is being said publicly and the direction of the current public mood has started to

change from the vehement agitation a decade ago during the Occupy Wall Street movement. The image shown in Figure 17, taken on September 25, 2011 in New York City's Zuccotti Park during the Occupy Wall Street Movement expresses the frustration of the time.

Figure 17: *Picture Taken During the Occupy Wall Street Movement*



There are various follow-on pieces of legislation to the CARES Act, calling for cancellation of student loan payments. This is a rare watershed moment where the confluence of tributary politicians, proletariat, and the purse-strings coalesce in the public administration arena and converge for procuring a common policy solution.

This collaborative effort to bring together divergent actors to bring about change for a designated function or purpose is the end result of type of the linkages, structural and social awareness, structural improvement, dialectical tension, and dimensioning envisioned by McSwite.

There are two good starting points for the federal government, the nation's loan holder to hear the country's ire on the current status. The first is through the public's responses to the February 21, 2018 DOE *Federal Register* notice (83 FR 7460-7462) soliciting feedback on student loan repayment, titled *Request for Information on Evaluating Undue Hardship Claims in Adversary Actions Seeking Student Loan Discharge in Bankruptcy Proceedings*. Conversely, it is recommended that there be a communal venue for the government to educate the public and for the public to receive comments.

In that vein, it is specifically recommended that two blue ribbon panels be set up to investigate the topic of student loan reform: One joint independent non-partisan Congressional panel in addition to a second non-partisan Presidential panel. It is envisioned that the panels mirror the 1946 edition of the President's Commission on Higher Education Commission in style, structure, and substance and serve as a follow up to the changes to the postsecondary educational landscape in the decades since the conclusion of the initial Commission.

In conclusion, as the price of admission to the college marketplace becomes prohibitively inaccessible—both academically and economically—and when the time it takes for the fruits to bear a return on investment continues to include the process from preadmissions tutoring to the postgraduate marketplace for the newly degreed

candidate to secure a salary which is equal to or higher than their outstanding loans to pay their student loan off; where—in case a tragedy, malady or other disability should befall the debtor—the United States continues to contain a repayment policy where relief is inaccessible, its archetype is asymmetrically and inequitably applied, while the standards to access that relief are inarticulately opaque in its enumeration which is rooted in an obsolescently outmoded standard in tune with an extinct era, so the uncertainty regarding return of investment will make future generations of prospective collegiate students intensely evaluate and question whether the tenor, taste and turbidity of the academic juice is worth the rigor of the squeeze.

Appendix A: Institutional Research Board Approval (Institutional Research Board Approval Letter)



Office of
Sponsored
Research

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f: 410.837.5249
www.ubalt.edu

March 20, 2020

Linden Houston
University of Baltimore
1420 N. Charles Street
Baltimore, MD 21201

RE: **IRB Protocol #163- approved under Exempt review**

Dear Linden:

This letter serves as official confirmation of the Institutional Review Board's review of your protocol for a study entitled **Degrees of Inequity: A Policy and Strategic Alternative Assessment to Identify a Twenty-First Century Definition of Undue Hardship for Student Loan Debt in the United States.**

The Institutional Review Board considered your request and concluded that your protocol poses no more than minimal risk to participants. In addition, Secondary research for which consent is not required because the identifiable private information or identifiable biospecimens are publicly available is exempt from IRB full-committee review per 45 CFR 46.104(d) (4). As a result, the Institutional Review Board has designated your proposal as exempt.

Investigators are responsible for reporting in writing to the IRB any changes to the human subject research study, procedures, or personnel. This includes changes to the research design or procedures that could introduce new or increased risks to human subjects and thereby change the nature of the research. In addition, you must report any adverse events or unanticipated problems to the IRB for review. If you have any questions, please do not hesitate to contact me directly by phone or via email.

As authorized by Dr. Gabriela Wasileski
Chair, Institutional Review Board

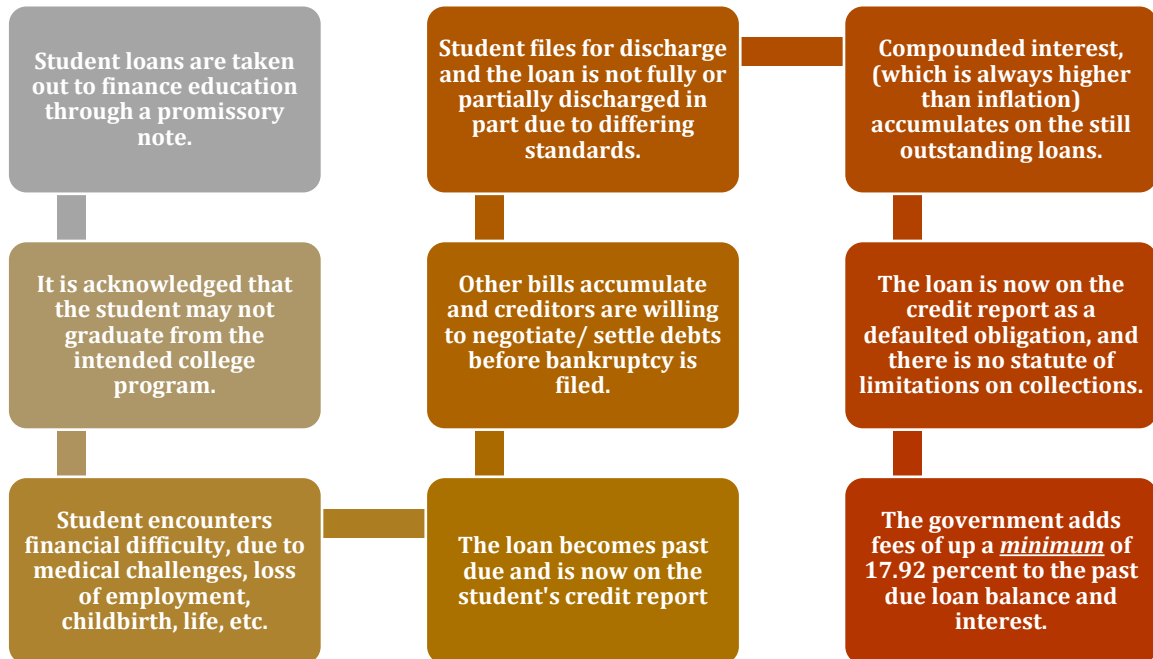
A handwritten signature in blue ink, appearing to read 'Stefanie Hamberger', written over a horizontal line.

Stefanie Hamberger
Coordinator, Institutional Review Board

University of Baltimore
1420 N. Charles St.
Baltimore, MD 21201-5779

Appendix B: Student Loan Logic Model

Figure 18: *Student Loan Repayment Lifecycle Logic Model*



What is a logic model? The Center for Community Health and Development at the University of Kansas (2010) notes

A logic model presents a picture of how your effort or initiative is supposed to work. It explains why your strategy is a good solution to the problem at hand. Effective logic models make an explicit, often visual, statement of the activities that will bring about change and the results you expect to see for the community and its people. A logic model keeps participants in the effort moving in the same direction by providing a common language and point of reference.

There are many different types of logic models and each is attuned to its respective use and purpose. The one used in this appendix is a simple breadcrumb trail/road map version of the logic model.

A road map logic model was selected because it provides the direction from the starting point to the desired end point, showing the major milestones along the way. It is akin to a visual GPS (Global Positioning System) showing the turns along the plotted path, within the superstructure of the student loan lifecycle with each successive detail building upon the prior position.

Walking through this nine-step process, the lifecycle begins at the start when the obligation for the loan is incurred by the signing of the promissory note. It is acknowledged that the student may not necessarily graduate from the college program for a number of reasons (incompatibility of the college, lack of support, pregnancy, homesickness, expulsion, family/dependent obligations. etc.).

Subsequently, the financial difficulty sets in for whatever reason and the first problem of the process begins, the loan is reported as being past due on the student's credit report. This affects the student by making the cost of capital more expensive to access. The more late payments that are reported, the lower the student's credit score, and the lower the credit score, the higher more that the student will pay for in interest when seeking credit. The lower the credit score, the more likely that other creditors see that there is a financial issue and will seek to recoup as much money as possible before bankruptcy is a real possibility. Bankruptcy is something that an unsecured creditor fears because non-securitized collectors have the lowest ranking on the repayment priority list.

If bankruptcy is filed, it is unlikely that a student loan will be discharged. Only one tenth of one percent even *attempt* to have their loans discharged. (Insler, 2020) for the 99.9 percent of student loans that are not discharged, interest compounds on the loan, which becomes exponential, if the capitalized amount from forbearances and deferments are taken into consideration. If the past due payment continues past two hundred seventy days, the loan is reported as a default to the credit bureaus, which has a dual effect. (U.S. Department of Education. Federal Student Aid, 2020). It makes the student ineligible for future student aid until the loan is rehabilitated. Further, it also makes the student ineligible to apply for federal jobs.

DOE (2020) notes the following consequences of defaulting on a student loan:

- The entire unpaid balance of your loan and any interest you owe becomes immediately due (this is called "acceleration").
- You can no longer receive deferment or forbearance, and you lose eligibility for other benefits, such as the ability to choose a repayment plan.
- You lose eligibility for additional federal student aid.
- The default is reported to credit bureaus, damaging your credit rating and affecting your ability to buy a car or house or to get a credit card.
- It may take years to reestablish a good credit record.
- You may not be able to purchase or sell assets such as real estate.
- Your tax refunds and federal benefit payments may be withheld and applied toward repayment of your defaulted loan (this is called "Treasury offset").
- Your wages may be garnished. This means your employer may be required to withhold a portion of your pay and send it to your loan holder to repay your defaulted loan.
- Your loan holder can take you to court.
- You may be charged court costs, collection fees, attorney's fees, and other costs associated with the collection process.
- Your school may withhold your academic transcript until your defaulted student loan is satisfied. The academic transcript is the property of the school, and it is the school's decision—not the U.S. Department of Education's or your loan holder's—whether to release the transcript to you.

Finally, the federal government will add collection fees of a minimum of 17.92 percent in addition to the past due balance. (U.S. Department of Education. Federal Student Aid, n.d.) There are loans which will impose higher collection fees. In the end, the student who made a student loan now has a multiple of problems other than just the loan itself. They've now got ruined credit for seven years in addition to a higher amount of money to repay, in addition to the underlying condition that caused the repayment.

This logic model rationally links activities to actions and explains how the problem developed and their expected outcomes. It also sets forth the reasons why the recommendations for changing the existing student loan system have been suggested in Appendix I.

Appendix C:
Leading Cases Reviewed in the Federal Circuit Courts
(as of December 31, 2018)

First Circuit:

United States Court of Appeals for the First Circuit – Non-Deferential as to *Brunner Denise Megan Bronsdon v. Educational Credit Management Corporation*, 435 B.R. 791 (1st Cir. BAP 2010).

Note: The court noted “we make no ruling as to which of the two tests is appropriate.”

Second Circuit:

United States District Court for the Southern District of New York – Precedential Case: *Brunner Marie Brunner v. New York State Higher Education Services Corporation*, 831 F.2d 395 (2nd Cir. 1987).

Third Circuit:

United States Court of Appeals for the Third Circuit – Concurs with *Brunner In Re Marjorie Jo Faish, Debtor. Pennsylvania Higher Education Assistance Agency v. Marjorie Jo Faish*, 72 F.3d 298 (3rd Cir. 1996).

Fourth Circuit:

United States Court of Appeals for the Fourth Circuit – Concurs with *Brunner In Re Sandra Jane Frushour, Debtor. Educational Credit Management Corporation v. Sandra Jane Frushour*, 433 F.3d 393 (4th Cir. 2005).

Fifth Circuit:

United States Court of Appeals for the Fifth Circuit – Concurs with *Brunner In the Matter of Jonathon R. Gerhardt, Debtor. United States Department of Education, Appellee, v. Jonathon R. Gerhardt, Appellant*, 348 F.3d 89 (5th Cir. 2003).

Sixth Circuit:

United States Court of Appeals for the Sixth Circuit – Concurs with *Brunner In Re: Michael J. Oyler, Debtor. Michael J. Oyler v. Educational Credit Management Corporation*, 397 F.3d 382 (6th Cir. 2005).

Seventh Circuit:

United States Court of Appeals for the Seventh Circuit – Concurs with *Brunner In the Matter of Jerry L. Roberson, Debtor. Appeal of Illinois Student Assistance Commission*, 999 F.2d 1132 (7th Cir. 1993).

Eighth Circuit:

United States Court of Appeals for the Eighth Circuit – Contravenes *Brunner*
In Re Gladys Marie Andrews, Debtor. Gladys Marie Andrews v. South Dakota
Student Loan Assistance Corporation, 661 F.2d 702 (8th Cir. 1981).

Ninth Circuit:

United States Court of Appeals for the Ninth Circuit – Concurs with *Brunner*
In Re Ernest J. Pena; Julie Pena, Debtors, United Student Aid Funds, Inc. v. Ernest
J. Pena Julie Pena, 155 F.3d 1108 (9th Cir. 1998).

Tenth Circuit:

United States Court of Appeals for the Tenth Circuit – Concurs with *Brunner*
Educational Credit Management Corporation v. Nancy Jane Polleys, 356 F.3d
1302 (10th Cir. 2004).

Eleventh Circuit:

United States Court of Appeals for the Eleventh Circuit – Concurs with *Brunner*
Hemar Insurance Corporation of America v. Ronald Jay Cox, 338 F.3d 1238
(11th Cir. 2003).

Appendix D:
List of Laws Referenced in the Text

Laws without Citations

Land Ordinance of 1785

Louisiana Separate Car Act/Withdraw Car Act, 1890 - Act 111

Northwest Ordinance of 1787

Laws with Citations

2. Stat. 19:

Bankruptcy Act of 1800

5 Stat. 440:

Bankruptcy Act of 1841

14 Stat. 517:

Bankruptcy Act of 1867

Public Law 37-108:

Land-Grant College Act of 1862

Public Law 51-841:

Agricultural College Act of 1890

Public Law 55-541:

Bankruptcy Act of 1898

Public Law 73-22:

Securities Act of 1933

Public Law 74-271:

Social Security Act of 1935

Public Law 75-696:

Bankruptcy Act of 1938

Public Law 78-346:

Servicemen's Readjustment Act of 1944

Public Law 78-410:

Public Health Service Act

Public Law 80-253:

National Security Act of 1947

Public Law 85-864:

National Defense Education Act

Public Law 88-352:

Civil Rights Act of 1964

Public Law 89-329:

Higher Education Act of 1965

Public Law 90-321:

Truth-In-Lending Act (Title I of the Consumer Credit Protection Act)

Public Law 90-575:

Higher Education Amendments of 1968

Public Law 91-152:

Housing and Urban Development Act of 1969

Public Law 91-190:

National Environmental Policy Act of 1969

Public Law 91-354:

Joint Resolution to Create a Commission to Study the Bankruptcy Laws of the United States

Public Law 92-318:

Education Amendments of 1972

Public Law 93-112:

Rehabilitation Act of 1973

Public Law 93-380:

Elementary and Secondary Education Amendments

Public Law 94-273:

Fiscal Year Adjustment Act

Public Law 94-482:

Education Amendments of 1976

Public Law 95-109:

Fair Debt Collections Practices Act

Public Law 95-113:

Food and Agriculture Act of 1977

Public Law 95-598:

Bankruptcy Reform Act of 1978

Public Law 96-56:

A bill to Amend the Bankruptcy Act to Provide for the Nondischargeability of Certain Student Loan Debts Guaranteed or Insured by the United States

Public Law 96-88:

Department of Education Organization Act

Public Law 98-353:

Bankruptcy Amendments and Federal Judgeship Act of 1983

Public Law 99-509:

The Omnibus Budget Reconciliation Act of 1986

Public Law 101-336:

Americans with Disabilities Act of 1990

Public Law 101-510:

National Defense Authorization Act for Fiscal Year 1991

Public Law 101-647:

Crime Control Act of 1990

Public Law 102-26:

Higher Education Technical Amendments of 1991

Public Law 103-382:

Improving America's Schools Act of 1994

Public Law 104-134:

Debt Collection Improvement Act of 1996

Public Law 105-244:

Higher Education Amendments of 1998

Public Law 108-271:

Higher Education Amendments of 1998

Public Law 109-8:

Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

Public Law 110-315:

The Higher Education Opportunity Act of 2008

Public Law 110-343:

Emergency Economic Stabilization Act of 2008

Public Law 111-24:

Credit Card Accountability Responsibility and Disclosure Act of 2009

Public Law 111-148:

Patient Protection and Affordable Care Act

Public Law 111-152:

The Health Care and Education Reconciliation Act of 2010

Public Law 113-235:

Consolidated and Further Continuing Appropriations Act, 2015

Public Law 114-157:

To amend the Department of Energy Organization Act and the Local Public Works Capital Development and Investment Act of 1976 to modernize terms relating to minorities

Public Law 115-141:

Consolidated Appropriations Act, 2018

Public Law 116-136:

Coronavirus Aid, Relief, and Economic Security Act

Other Laws Reviewed in the Preparation of this Dissertation

General Laws of Massachusetts, Chapter 163 (1838):

An Act for the Relief of Insolvent Debtors, and for The More Equal Distribution of Their Effects

Public Law 25-35:

An Act to Abolish Imprisonment for Debt in Certain Cases

Public Law 96-49:

Higher Education Technical Amendments of 1979

Public Law 97-365:

Debt Collection Act of 1982

Public Law 98-79:

Student Loan Consolidation and Technical Amendments Act of 1983

Public Law 98-369:

Deficit Reduction Act of 1984

Public Law 103-66:

The Omnibus Budget Reconciliation Act of 1993

Public Law 104-191:

Health Insurance Portability and Accountability Act of 1996

Public Law 107-122:

Higher Education Relief Opportunities for Students Act of 2001

Public Law 107-139:

Amendment to the Higher Education Act of 1965

Public Law 108-76:

Higher Education Relief Opportunities for Students Act of 2003

Public Law 108-409:

The Taxpayer-Teacher Protection Act of 2004

Public Law 109-67:

The Student Grant Hurricane and Disaster Relief Act

Public Law 109-76:

Amendment to Higher Education Relief Opportunities for Students Act of 2003

Public Law 109-78:

An Act to Extend the Waiver Authority of the Secretary of Education with Respect to Student Financial Assistance During a War or Other Military Operation or National Emergency.

Public Law 109-86:

The Natural Disaster Student Aid Fairness Act

Public Law 109-148:

The Higher Education Hurricane Relief Act of 2005

Public Law 109-171:

The Higher Education Reconciliation Act of 2005

Public Law 109-270:

Carl D. Perkins Career and Technical Education Improvement Act of 2006

Public Law 110-84:

The College Cost Reduction and Access Act of 2007

Public Law 110-93:

Amendment to the Higher Education Relief Opportunities for Students Act of 2003

Public Law 110-140:

Energy Independence and Security Act of 2007

Public Law 110-227:

The Ensuring Continued Access to Student Loans Act of 2008

Public Law 111-142:

Social Security Disability Applicants' Access to Professional Representation Act of 2010

Public Law 113-28:

The Bipartisan Student Loan Certainty Act of 2013

Public Law 113-235:

The Consolidated and Further Continuing Appropriations Act, 2015

Public Law 114-105:

The Federal Perkins Loan Program Extension Act of 2015

Appendix E:
List of Cases Referenced in the Text

Adams v. Richardson, 356 F. Supp. 92 (D.D.C. 1973)

Andrews v. South Dakota Student Loan Assistance Corp., 661 F.2d 702 (8th Cir. 1981)

Ashbacker Radio Corp. v. Federal Communications Commission, 326 U.S. 327 (1945)

Atlanta Gas Company v. Newman, 76 S.E.2d 536 (1953)

Bronsdon v. Educational Credit Management Corporation, 435 B.R. 791 (Bankr. D. Mass. 2009)

Brown et al. v. Board of Education of Topeka, Kansas, 346 U.S. 483 (1954)

Brunner v. New York State Higher Education Services Corporation, 831 F.2d 395 (1987)

Correll v. Union Nat'l Bank of Pittsburgh, 105 B.R. 302 (Bankr. W.D. Pa. 1989)

Ivory v. United States of America, United States Department of Education, 269 B.R. 890 (Bankr. N.D. Ala. 2001)

Haywood v. National Basketball Association, 401 U.S. 1204 (1971)

Joan Briscoe, a/k/a Joan Bennett, a/k/a Joan Akers v. Bank of New York and New York State Higher Education Services Corporation, 16 B.R. 128 (Bankr. S.D.N.Y. 1981)

Krieger v. Educational Credit Management Corporation, 713 F.3d 882 (7th Cir. 2013)

Local Loan Co. v. Hunt, 292 U.S. 234 (1934)

Long v. Educational Credit Management Corporation, 322 F.3d 549 (8th Cir. 2003).

Morgan v. Virginia, 328 U.S. 373 (1946)

New York State Higher Education Services Corporation v. Leonard Anthony Kohn, 5 Bankr. Ct. Dec. 419 (S.D.N.Y. 1979)

Pennsylvania Higher Education Assistance Agency v. Johnson, 5 Bankr. Ct. Dec. 532 (E.D. Pa. 1979).

Plessy v. Ferguson, 163 U.S. 537 (1896)

Randy Lewis Bryant, Plaintiff, v. Pennsylvania Higher Education Assistance Agency, Defendant. In re Mary Gamble, Debtor. Mary Gamble, Plaintiff, v. Pennsylvania Higher Education Assistance Agency, Defendant. In re Paul Pine, Debtor. Paul Pine, Plaintiff, v. Pennsylvania Higher Education Assistance Agency, Defendant, 72 B.R. 913 (1987)

Roberson v. Illinois Student Assistance Corporation, 999 F. 2d 1132 [1993])

State Harness Horse Racing and Breeding Assoc., Inc. v. State Racing Commission, 175 N.E. 2d 244 (Mass. 1961)

Strahm v. Great Lakes Higher Education Corporation, 327 B.R. 319 (Bankr. S.D. Ohio 2005)

Wilson v. City Bank, 84 U.S. (17 Wall.) 473 (1873)

Wolfe v. Department of Education, 501 B.R. 426 (2013)

Appendix F:

Selected Student Loan Relief and Debt Collection Laws

1979: Public Law 96-49

Section 467 of the *Higher Education Technical Amendments of 1979* authorized the-then Commissioner of Education to collect default loans and to be reimbursed for the cost of collecting those loans.²¹²

1982 Public Law 97-365

The *Debt Collection Act of 1982* set reduced to writing the procedures to recover debts owed to the federal government by federal employees.

1983 Public Law 98-79

Section 5 of the *Student Loan Consolidation and Technical Amendments Act of 1983* established an 8 percent interest rate for Student Loans.

1984 Public Law 98-369

Section 2653 of the *Deficit Reduction Act of 1984* outlined the procedures to recover debts owed to the federal government, which included seizure and offsets of tax refunds and other federal payments and extended this authority through January 1, 1988.

1990 Public Law 101-647

Section 3621 of the *Federal Debt Collection Procedures Act of 1990*, part of the *Crime Control Act of 1990* changed the non-dischargeability period for student loans from years to seven years and included loans provided by private providers.

1993 Public Law 103-66

Section 455 *et seq.* of the *Omnibus Budget Reconciliation Act of 1993* ushered in many fundamental tenets of student loans which are in place today, such as origination of the Direct Loan Program, consolidation of student loans and new repayment options, other than the standard ten-year repayment plan, such as an extended repayment plan, a graduated repayment plan and an income contingent repayment plan. The payment plans extend the payment period from ten years to twenty-five years. This law also capped student loan interest rates (for students) at 8.25 percent and for parent borrowers at 9 percent.

²¹² The Commissioner of Education was the lead official in charge of the former federal Office of Education, which was part of HEW.

1996 Public Law 104-134

The *Debt Collection Improvement Act of 1996* (Section 31001 of the Omnibus Consolidated Rescissions and Appropriations Act of 1996) allowed the federal government to offset any arrears due to the government by seizing of payments due to an individual, specifically Social Security payments.

2002 Public Law 107-122

Section 2 of the *Higher Education Relief Opportunities for Students Act of 2001* provided the Secretary of Education with the authority to waive and or modify any provision to assure that affected student loan borrowers that were serving in the armed forces, residing or employed in an area that is declared a federal disaster area, are not worse off financially due to their affected status as the result of the September 11, 2001, terrorist attacks.

2002 Public Law 107-139

Section 1 of this law amended Title IV of the *Higher Education Act of 1965* establish fixed interest rates for student and parent borrowers, with the interest rate for new Direct Loans being capped at 6.80 percent, parent loans limited to a top interest rate of 7.90 percent and consolidation loans being capped at 8.25 percent.

2003 Public Law 108-76

The *Higher Education Relief Opportunities for Students Act of 2003* expanded the *Higher Education Relief Opportunities for Students Act of 2001* by providing the Secretary of Education with permanent waiver authority to address student and family situations resulting from wars or national emergencies, with the waiver authority expiring on September 30, 2005.

2004 Public Law 108-409

The *Taxpayer-Teacher Protection Act of 2004* increased the amount of student loans that can be forgiven for certain borrowers who are highly qualified mathematics, science, and special education teachers who serve in high-poverty schools for five years.

2005 Public Law 109-67

The *Student Grant Hurricane and Disaster Relief Act* authorized the Secretary of Education to waive grant repayment requirements for students receiving campus-based federal grant assistance that are residing, employed or attending an institution of higher education located in a Presidentially declared disaster area.

2005 Public Law 109-78

This law (An act to extend the waiver authority of the Secretary of Education with respect to student financial assistance during a war or other military operation or national emergency) extended the Secretary of Education's waiver authority by changing the sunset date of the Secretary's waiver authority from September 30, 2005 to September 30, 2007.

2005 Public Law 109-86

The *Natural Disaster Student Aid Fairness Act* authorized the Secretary of Education during FY 2006 to reallocate campus-based student aid funds to institutions of higher learning in Gulf Coast States, as well as institutions that had accepted students displaced by Hurricane Katrina and Hurricane Rita.

2005 Public Law 109-148

The *Higher Education Hurricane Relief Act of 2005* authorized the Secretary of Education a one-year waiver of statutory and regulatory provisions with regard to student financial aid provisions, per the *Higher Education Act of 1965*.

2006 Public Law 109-171

The *Higher Education Reconciliation Act of 2005* made various amendments to programs of student financial assistance under Title IV of the *Higher Education Act of 1965*.

2007 Public Law 110-84

The *College Cost Reduction and Access Act of 2007* reduced interest rates on student loans and made other amendments to the *Higher Education Act of 1965* to make college more accessible and affordable.

2007 Public Law 110-93

This law gave the Secretary of Education the permanent authority to waive statutory and regulatory provisions that apply to student financial assistance programs, with respect to student financial assistance during a war, military operation or other national emergency.

2008 Public Law 110-227

The *Ensuring Continued Access to Student Loans Act of 2008* increased loan limits and provided various authorities to the Department of Education to help ensure that college students and their parents continue to have access to loans in the recessionary credit market.

2008 Public Law 110-315

The *Higher Education Opportunity Act* provided a comprehensive reauthorization of the *Higher Education Act of 1965*.

2010 Public Law 111-152

Title II of the *Health Care and Education Reconciliation Act of 2010* ended the federal government's role in subsidizing financial institutions that make student loans through the (FFEL Program under Part B of Title IV of the HEA, and correspondingly expanded the federal Direct Student Loan Program administered by the Department of Education under Part D of Title IV of the Higher Education Act of 1965.

2013 Public Law 113-28

The *Bipartisan Student Loan Certainty Act of 2013* amended the *Higher Education Act of 1965* to govern the interest rates on the various categories of student loans under Title IV of the HEA. The highest interest rate generally increased by one percent.

2015 Public Law 114-105

The *Federal Perkins Loan Program Extension Act of 2015* temporarily extended the federal Perkins Loan program, allowing continued disbursement of loans to current undergraduate borrowers through September 30, 2017.

Appendix G:

List of Prior Studies on Standard Budgeting

The use of standard budgeting as a discipline to investigate living conditions, as well as wages and approach is neither a new nor novel practice. The practice has been around for over a century in the United States. The following are examples of studies which use the approach that are more than one hundred years old.

1907

Wage-Earners' Budgets: A Study of Standards and Cost of Living in New York City

Author: Louise Bolard More (More, 1907)

Family Composition: There were two hundred members in the family and the average number of the families in the study was 5.6 members.

Type of Budget/Rationale: Wage-Earners Families – The budget is descriptive of those in the area and consist of “workingmen’s families of very moderate means” which “as a whole represent a fair average of industry, reliability and perseverance.”

Major Elements of the Budget: Food, Rent, Clothing, Lights and Fuel, Insurance (Industrial, Fractional, Savings), Benefit, Societies, and Sundries.

1909

The Standard of Living Among Workingmen's Families in New York City

Author: Dr. Robert Coit Chapin (Chapin, 1909)

Family Composition: Varied Accordingly reports from 391 families, each consisting of four, five or six persons. The standard number of people in the family was assumed to be five.

Type of Budget/Rationale: Workingmen’s Budget – The purpose was “to get a reliable representation of the standard of living”

Major Elements of the Budget: Housing. Car-fare, Fuel and Light, Food, Clothing, Health, Insurance, Sundry Minor Items

1914

Suggested Budget for a Textile Mill Worker's Family, Philadelphia

Authors: Esther Louise Little and William Joseph Henry Cotton (Little & Cotton, 1920)

Family Composition: Varied, base family of five

Type of Budget/Rationale: Fair Standard Budget – Based on prevailing customs and standards in the local area

Family Budgets in Chicago Stockyards District

Author: John C. Kennedy (Kennedy, 1914)

Family Composition: Varied

Type of Budget/Rationale: Family Budgets – Based on an investigation of actual standards of living

1917

Cost of Living of Unskilled Laborer's Family, New York City, 1917

Author: Bureau of Personal Service of the Board of Estimate and Apportionment, New York City (Bureau of Personal Service of the Board of Estimate and Apportionment, New York City, 1920)

Family Composition: man, wife, boy of thirteen years, a girl of ten years, and a boy of six years

1918

Budget Submitted to National War Labor Board, 1918

Author: William F. Ogburn (Ogburn, Budget Submitted to National War Labor Board, 1918, 1920)

Family Composition: Family of five: Two parents and three children

Type of Budget/Rationale: Minimum comfort budget – “The cost of maintaining a family”

1919

Budget for a Government Employee's Family in Washington, DC

Author: U.S. Bureau of Labor Statistics (U.S. Department of Labor. Bureau of Labor Statistics, 1920)

Family Composition: A family of five: Husband, wife and three children thirteen years of age and under

Type of Budget/Rationale: Quantity budget – The purpose here is to ascertain what it would cost to “[maintain]” the family of a Government employee in Washington at a level of health and decency.”

Budget for Bituminous Coal Mine Workers

Author: William F. Ogburn (Ogburn, Budget for Bituminous Coal Mine Workers, 1920, 1920)

Family Composition: A husband, wife, a boy of eleven, a girl of five, and a boy of two.

Type of Budget/Rationale: Quantity budget – “The main purpose borne in mind was this—to determine a standard of living in coal-mining communities necessary for health and decency, based on a determination of this standard by the Bureau of Labor Statistics for Washington, D.C.”

Workingmen’s Standard of Living in Philadelphia, 1919

Author: Philadelphia Bureau of Municipal Research (Philadelphia Bureau of Municipal Research, 1920)

Family Composition: Two parents, a thirteen-year-old boy, a ten-year-old girl, and a six-year-old boy.

Type of Budget/Rationale: Unspecified Standard – The “unspecified standard,” it should be explained, covers those classes of expenditure in the household budget that do not lend themselves readily to expression in terms of actual goods and services.”

Cost of Living Among Wage-Earners in Fall River, Massachusetts, October 1919

Author: National Industrial Conference Board (National Industrial Conference Board, 1920)

Family Composition: A man, his wife and three children under fourteen years of age.

Type of Budget/Rationale: Liberal Standard – “Items needed to meet the requirements of a decent standard of living was carefully estimated on the basis of several budget studies made by other authorities.”

Cost of Living Among Wage-Earners in Lawrence, Massachusetts, November 1919

Author: National Industrial Conference Board (National Industrial Conference Board, 1920)

Family Composition: A family of five

Type of Budget/Rationale: Minimum, but reasonable – This was “undertaken for the purpose of ascertaining the cost of maintaining a minimum but reasonable standard of living for a representative wage-earner's family, and the cost of maintaining a somewhat better standard, according to conditions actually existing in Lawrence.”

1920

Minimum Quantity Budget Necessary to Maintain a Family in Health and Decency

Author: U.S. Bureau of Labor Statistics (U.S. Department of Labor. Bureau of Labor Statistics, 1920)

Family Composition: Family of five: Husband, wife, and three children under the age of fifteen

Type of Budget/Rationale: Quantity budget – “Quantitative measurements furnish the only fixed standard applicable to all localities.”

Appendix H: Recommended Definition of Undue Hardship

What is an undue hardship? As noted throughout this paper, the phrase undue hardship is undefined in the legislative annals, and the term as stated was legally undefined in America going as least as far back to 1856.²¹³ In the absence of such a definition, the researcher determined that the best way to create a workable definition for the purposes of student loans was through the decisions made in the leading cases.²¹⁴

The first reading of the collective case notes made it known that undue hardship is a complex discontinuous polymorphic entity whose quality and state of existence occurs in different forms for different hosts. Secondly, in the cases that were examined, it is noted that undue hardship is not transient; it is permanent, or at a minimum can be long-term and persisting.

In researching the term and how the term was used in context domestically, it was discovered that the EEOC defined the term for ADA purposes, and that definition is as follows:

²¹³ The researcher checked the Revised Sixth Edition of *Bouvier's Law Dictionary* (1856) and the term undue hardship was not listed in that publication. Bouvier's glossary was the primary dictionary that separated American law from English law and is older than the most widely used law lexicon, *Black's Law Dictionary*.

²¹⁴ As background, the researcher kept in mind that the fundamental ideological construct in defining the purpose of an American bankruptcy law was espoused by Justice Samuel Freeman Miller (in *Wilson v. City Bank* [1873]), wherein he stated "The primary object of a bankruptcy law is to secure a just distribution of the bankrupt's property among his creditors; the secondary object is the release of the bankrupt from the obligation to pay his debts." This balance between property distribution, property retention and release of the obligation was cogitated while creating the definition in this chapter.

“Undue hardship” means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation. Undue hardship refers not only to financial difficulty, but to reasonable accommodations that are unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business. (U.S. Equal Employment Opportunity Commission, 2002)

Moreover, acquisition of undue hardship standing was intended to be different from being “readily achievable” as noted in *the Legislative History of Public Law 101-336, the Americans with Disabilities Act* (United States. Congress. House. Committee on Education and Labor., 1990).

In another use of the term, the *Proceedings of the Institute on Planning, Zoning, and Eminent Domain* notes that undue hardship “something less than a regulatory taking” (Institute on Planning, Zoning, and Eminent Domain, 2000).

Revisiting the leading cases, undue hardship must be prevalent and enduring, but prevalent and enduring does not translate into being malicious, invasive, nor indefinite. A localized cancer that is not stopped early before it burrows in and takes root need not be contagious to cause, create or leave a damaging effect in its host. The cancer’s mere presence may be enough to cause damage if the threat is inbound, documented, and virulent.

This outlook is consistent with the view of the Medical Society of the County of New York (1945), who quipped that “citizens are expected to undergo *some* hardship—the same as all of us. It is only when the *continued* suffering of a hardship

is too great a sacrifice to ask of a man.”²¹⁵ Gender notwithstanding, during the research process, it was clear that a viable *domestic* definition did not exist for the term, so the use of comparative public administration and historical research was employed in the international arena to assist in the creation of a working definition.

In looking to America’s northerly neighbor, the *Encyclopedia of Canadian Laws* (Norton, 2020) notes that the phrase undue hardship specifically refers to child support and a differential in incomes between the custodial parent and the non-custodial parent, but in general otherwise does not ascribe a definition to the term.²¹⁶ In Nunavut, the most northern of Canada’s provinces, undue hardship is statutorily defined to mean “excessive hardship as determined by evaluating the adverse consequences of a provision” (Queen's University, 2016). This context is in reference to ADA-type accommodations. Previously, the country’s International Labour Office (1947) found the similar term undue *personal* hardship to be “subject to various interpretations by local appeals panels and was intentionally chosen so as to provide an *equitable* remedy for such conditions as personal, health, family obligations, travelling time, distance, housing, etc.” The use of the word equitable notes elements of social equity espoused by Gooden, Johnson and Mettler.

Given that the United Kingdom has longstanding historical ties with the United States and a special relationship with America, as noted by Winston Churchill, it was

²¹⁵ From the readings, the researcher has concluded that undue hardship exists when the sacrifice is greater than the service.

²¹⁶ In this instance, the court noted that the payee of child support should not have a better living standard as a result of receiving child support than they would have otherwise if the payor had not paid child support.

the next logical choice for examination. Great Britain's House of Commons (1964) noted that "Undue hardship is hardship which is undeserved, due to causes which the individual could not foresee or prevent." This is similar in tone, type and structure to the leading cases examined for this dissertation.

In examining the law books of New Zealand, one of the democracies that is the furthest point away from the United States, the *New Zealand Law Reports* recounts (1965) the same quandary as the United States regarding applying a fixed definition to the term undue hardship, stating "While judges have refrained from attempting to define what undue hardship is, no doubt because there are infinite varieties of circumstances which might constitute undue hardship." New Zealand's Criminal Procedure Act 2011 uses the term in respect to regarding privacy related concerns to define undue hardship as "...hardship that is disproportionate to the purpose..." (Doogue, 2015).

The New Zealand Bar Association (2015) notes that undue hardship is a lower threshold to meet than extreme hardship, with extreme hardship being "something plainly out of the ordinary and must be significantly greater than undue hardship..."

In summary, these various international contexts, in conjunction with the current domestic descriptions, have given a good background to create an operational working definition of undue hardship. The recommended definition of undue hardship for the purpose of student loan discharges is as follows:

Recommended Definition of Undue Hardship:

Undue hardship is generally a state in which the student debtor has to forgo conventional necessities, traditional consumer goods or acquired essentials which is (or which are) required to maintain the student's current standard of living or to produce income in order to meet their student loan obligations. ^{217,218}

Undue hardship is concomitantly, concurrently or concordantly a condition which is rooted in unpredictability that is undeserved either due to causes which an individual could not reasonably foresee, or as the result of causes which an individual can reasonably foresee, but is unable to mitigate to the point where a continuing existence similar to the prevailing level of life and culture is maintained. The resultant effect of undue hardship causes an affirmative adverse diminishment in the existing standard of life as well as the quality of life of the student debtor.

Undue hardship is ambulatory and is relative to the person and the community in which the standard is applied.

Undue hardship is more than a mere inconvenience and is normally rooted in instability, accident, man-made disaster; natural disaster, physical disability, mental disability, funding disruption or deficiency, or a disparity between the annual interest rate of the student loan in respect to the student's income (such that it creates an inability for the student debtor to keep pace with the current cost of living), where either one or a combination of these actions are imposed on the student loan debtor and is normally not caused by the fault of the student debtor or as a result of the student debtor's actions.

An undue hardship as the result of fiscal basis may lead to insolvency, or may be based on an inability to keep pace with the cost of inflation but does not amount to, nor will it require a declaration of bankruptcy for all assets in order to be effective in respect to discharging the student loan.

²¹⁷ This is a modified version of the definition of hardship listed in Great Britain's House of Commons Parliament.

²¹⁸ A petitioner's marital status and parental status should be noted, but not be a *decisive* factor in deciding as to when an undue hardship exists.

The decision to become a parent or married is a personal choice and declaring an undue hardship on this basis rewards a petitioner for making a personal choice which has nothing to do with the outstanding student loan. An individual may be unable to be married, either via disqualification or inability, so it creates a disparate incentive and penalizes the single or childless for not making the same choices. It also creates a perverse incentive to have children.

Examples of undue hardship include

Incurring a substantial financial loss;

Incurring a substantial opportunity loss/opportunity cost;

Incurring an extraordinary cost which is disproportionate to the benefit received;

Compliance with a required action in order to ensure payment of the student loan would violate the United States Code or the Code of Federal Regulations, if the federal government were required to undertake the same action.

The party claiming undue hardship has an obligation to act in good faith by showing ownership and accountability of the debt, by taking action to mitigate losses, but is not required to engage in any repayment plan other than the standard repayment plan to show good faith. Student debtors that request deferments or forbearances are by definition deemed to be acting in good faith.

A person is eligible to declare undue hardship when it causes a diminishment in the existing quality or level of life lived by the student after the student graduates, or three years after the student ceases to be enrolled, still has eligibility to continue in the program, and has declared their intent to no longer pursue the degree but is not dismissed, retired, expelled from, or is otherwise ineligible to continue in the program.

The burden of proving that undue hardship has been met when, after three years after graduation, or three years after the student ceases to be a student at any degree bearing educational program, the student debtor's monthly repayment amount (at the standard ten-year payment plan) is either equal to or greater than:

Ten percent of the student's monthly average take home pay for any consecutive twelve month period (as defined by the student's paystubs), or²¹⁹

at any given time after the applicable aforementioned three-year waiting period, the total outstanding amount of loan debt is more

²¹⁹ Ten percent was chosen as the maximum payment because that is under the maximum that the federal government can garnish from a person's paycheck without securing a court order—fifteen percent—as set forth in the Debt Collection Improvement Act of 1996 (DCIA). Section 31001 of Public Law 104-134 is codified as 31 U.S.C. 3720D. The *Federal Register* (at 63 FR 25136) notes that “the DCIA authorizes Federal agencies administratively to garnish up to 15% of the disposable pay of a debtor to satisfy delinquent nontax debt owed to the United States. Prior to the enactment of the DCIA, agencies were required to obtain a court judgment before garnishing the wages of non-Federal employees.”

than two thirds of student's salary, as defined by the student's tax returns during the waiting period.

Any applied forbearances or deferments shall not count toward the three year post graduate waiting period or the three-year non-enrollment period.

This determination of undue hardship shall be applied no more than once for the lifetime of the student, unless waived by the Secretary of Education (or their designee); the Secretary of Labor (or their designee), or a court of competent jurisdiction.

The definition of undue hardship is only applicable to:

Those individuals who, in their tax filings for the last three consecutive calendar years do not fall within the highest rate schedules (tax brackets) for their taxable status as defined by the Internal Revenue Code (26 U.S.C et seq.), if there are five taxable rate schedules or less, or the top two schedules for the student debtor's taxable status if there are more than five taxable rate schedules, or

Those individuals whose salary, inclusive of locality pay, is at or below the highest rate of basic pay or salary listed on the General Schedule as set forth in 5 U.S.C. 5332(a) et seq. All other pay tables or special rate tables are excluded.

Appendix I: Suggested Repayment Policy and Recommendations

In the field of public administration, there are two documents that exemplify the priorities of a government. Those documents are a budget statement and tax policy. As aforementioned here in this paper, the budget is a plan that describes a goal (or a series of goals) that are used to estimate and define the expected results of future operations. Alternatively, Wildavsky (1984) notes that “a budget is a series of goals with price tags attached” while the tax policy represents those activities which the representative government finds permissible. The tax policy works hand in hand with the budget, as the tax policy serves as the method of raising revenue to afford the resources are allocated in the budget statement.²²⁰

If the goal is to make education affordable and if the government is trying to encourage its denizens to pursue higher education, if for no other purpose than to sustain itself, then its tax and repayment policies should be reflective of this goal. To that end, there are several leading indicators of affordability. Affordability at the time the HEA was enacted used to mean that a loan was paid off in ten years, and affordability is now order of magnitude.

Given the cost of housing and college, future students may have to choose between securing an education or being a homeowner, which would prevent the full realization of the American dream. It takes, on average, 18.5 years to pay off student

²²⁰ As aforementioned, a budget is a plan that describes a goal (or a series of goals) that are used to estimate and define the expected results of future operations, or a series of goals with price tags attached.

loans—from the prime earning years of age 26 to age 45—and the home loans generally are thirty years, which would span the same period of time (Friedman, 2019).

With this information as a backdrop, the following repayment policy outline and recommendations are presented for consideration. It is noted that the recommendations are presented in no particular order and judges should have some “degree of discretion to provide oil for the rule-based gears” (Greenhouse, 2005).²²¹

Suggested Repayment Policy: General Outline

When the HEA was enacted, the primary purpose of the law was to make college accessible by making it affordable. In the subsequent years, the focus on accessibility led to the detriment of affordability, which has become *persona non grata*. In the instant gratification society, the immediate success of the former has blurred the lines between the two overshadowing the long-term problems of the latter. The federal government’s sunny aplomb and rhetoric regarding postsecondary education as an investment is Janus-faced when juxtaposed with its tortious prosecutorial policies on repayment of that investment.

Overall, there are several parts to the suggested repayment policy. First, it is recommended that the repayment policy of the United States should be in tune with

²²¹ There are a lot of different elements that go into the jurisprudential process of decision making and although legal decisions are insular and isolated to the case that is before the respective court, these decisions are not made independently of their social, psychological, political medical, economic or historical frameworks.

the initial HEA as enacted, not as amended, and the recommendations that are presented hereafter are geared toward that purpose. Several of the recommended proposals are connected, as the existence of one directly necessitates others, as these items are physically and linearly interdependent, so there is a domino effect.²²² This is similar to a fabric, wherein each recommendation is a disparate strand that is not inextricably intertwined, but the power of the collective is weakened as each string is individually unraveled from the whole.

Second, the repayment policy should limit the repayment period to five to seven years. This is in line with the payment terms Congress considered during the HEA as enacted (five years), the period allowed between successive bankruptcy filings (four to eight years), and how long items can remain on a consumer credit report (seven years).²²³

Third, limit the repayment amount to seven- and one-half percent of *take-home pay*. This is a moderated amount between more in line with the average of five percent spent on education, as noted by BLS and less than the penalty amount of fifteen percent that can be garnished for non-tax debts.

Fourth, given that every dollar that is allocated to repay a student loan is removed from circulation, that dollar does not have a multiplier effect on the economy. As a result, it is expected that there will be an increased reliance on credit.

²²² It is similar to standing at the edge of the beach, where there, it is easy to differentiate between air, atmosphere and water; but, in practice, when looking off in the horizon, it is not as simple to determine clear boundaries of sea, sky and shore because at some point they all seem to come together.

²²³ Many of the noted policy proposals during the HEA contemplated a five-year repayment period (Eells & Hollis, 1960).

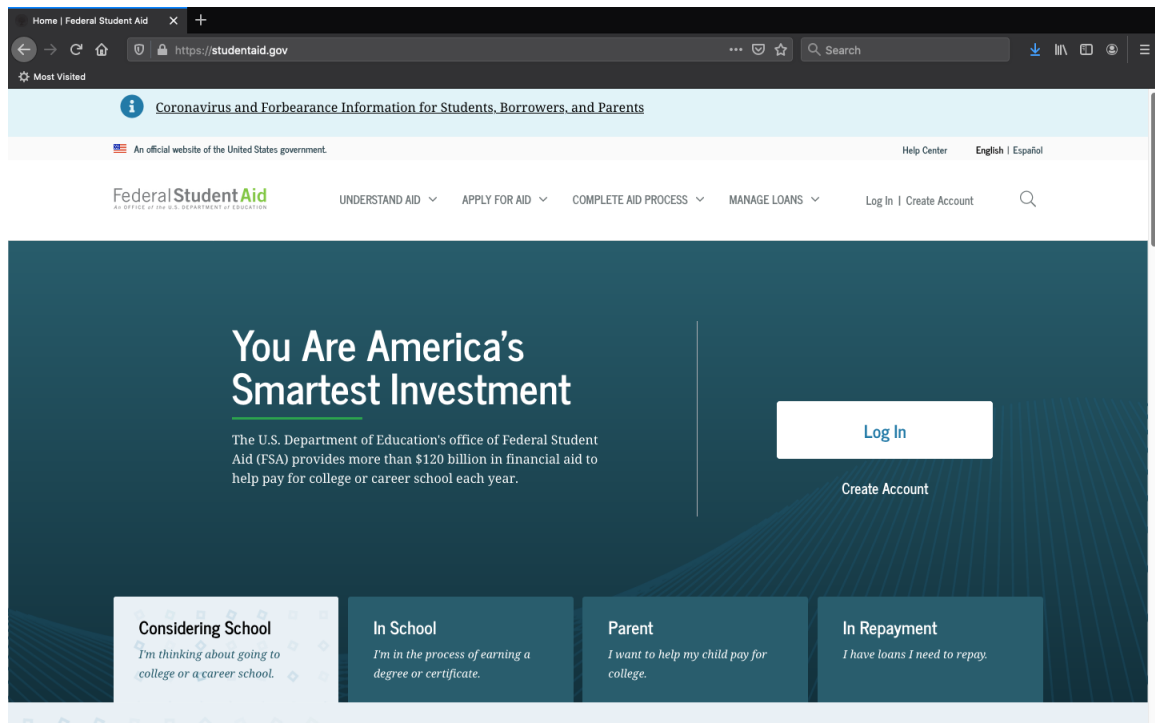
Student loans are regularly reported on the borrower's consumer credit report. While the reporting of the student loan can positively improve the borrower's credit score, the negative impact of a missed payment can affect the student's credit score for seven years. The negative impacts will result in a lowered credit score which will cost the student debtor more money in increased interest.

Even though the CARES Act administratively stopped all actions on all student loans by the federal government and the requirement to make payments on those student loans unless the borrower opted out, some borrowers have reported that their credit score has declined, even though no payments were due (Berman, 2020). Removing student loans as a part of scoring systems for consumer credit reports eliminates this problem. It is therefore recommended that the loans are reported to consumer credit reporting bureaus but missed payments should not be reported nor scored unless the student loan is in default.²²⁴

Fifth, the government should stop marketing the idea that *America* is increasing its *investment* in its students and spend more time promoting that the nation is *lending money* to its nascent scholars. Investments have risks; Student loans have no genuine inherent element of risk. The federal government advertises a college education as an investment, akin to Figure 19 from DOE which posits a postsecondary education as America's Smartest Investment.

²²⁴ This line of investigation focuses on strategies to reduce the number of accounts that are considered delinquent. In practice, the number of student loans that are delinquent have been greatly reduced by a process called re-aging. The re-aging process takes student loans that are delinquent and removing the delinquency status by taking the delinquent account and changing the due date to make it current, or applies a deferment, which is a relatively easy process. However, the weakness of re-aging is that, while it administratively removes the delinquency, it does nothing to affect the affordability of the student loan (Wei, 2008).

Figure 19: Department of Education - America's Smartest Investment



Source (U.S. Department of Education. Federal Student Aid, 2020)

Recommendation: Align Interest Rates with the Cost of Inflation

When the HEA was enacted, its function was to provide access to college for the non-moneyed set. However, as the number of colleges flourished and the cost of postsecondary education grew, the amount of student loans increased exponentially. Nowhere is this better seen than in the disparity between the interest rates charged on student loans in respect to the cost of inflation.

The annual interest rates for Direct Subsidized Loans and Subsidized Stafford Loans for undergraduate students and graduate students range between 2.70 percent and 5.30 percent (U.S. Department of Education. Federal Student Aid, 2020). The fixed annual interest rates for Direct PLUS Loan for parents and graduate students

range between 6.31 percent and 8.50 percent (U.S. Department of Education. Federal Student Aid, 2020).

The CPI is the most commonly cited measure of inflation in the United States, has only risen 1.8 percent annually over the last decade (U.S. Department of Labor. Bureau of Labor Statistics, 2020). As a result, the difference between two interest rates means that the amount of outstanding loan is going to grow at a rate greater than the CPI, the cost of living. This issue is exacerbated because it does not take into account that during deferments, unpaid interest is capitalized and added to the principal amount of the loan.

The inherent, yet unstated, assumption here is an employed student will receive an annual increase in their salary to keep pace with the cost of inflation. It is noted that the federal government does not ensure that it does the same for its workers, as it does not ensure that it compensates its workers at a rate comparable to catch up with the cost of living, as the basis for its pay raises are not directly tied to the rate of inflation. In fact, the federal government held pay rates flat for three straight years (FY 2011, FY 2012, FY 2013), so its workers could not hold court to make student loan payments with the gap in the two interest rates.

As a result, it is recommended that student loan interest rates be directly tied to the rate of inflation to minimize the amount that students have to repay and the practice of capitalizing interest be ended.

Recommendation: Use Simple Interest and End Interest Capitalization

The interest on student loans is often capitalized and added to principal. Additionally, the interest is compounded. This is a double whammy as the exponential cost of stacking cost on top of cost doesn't help affordability. Therefore, it is recommended that the interest calculation procedure that should be used be simple interest and the practice of capitalization should be ended.

Recommendation: Make Student Loans Subject to the Truth in Lending Act

The Student Loan Program as currently constituted, was borne from a need to ensure that a homegrown pipeline of scientists and engineers existed domestically by making college affordable. However, as the Student Loan Program developed, its tenets evolved to a point where its outputs no longer resemble the inputs of the originating program that bears its name. The original HEA had a standard repayment period of ten years (\$61,628 in 2020 dollars), with a maximum outstanding loan total of seven thousand five hundred dollars, minimum payment of three hundred sixty dollars annually (\$295 in 2020 dollars), and a maximum repayment period of fifteen years (U.S. Congress 1965). The only constant to the prototype is that the standard repayment period remains at ten years. At the time, student loans were considered an integrated part of the bankruptcy process and not a carved-out exception to it.

Using this ten-year timeframe as a baseline, a straight-line amortization of the current maximum permitted student loan of \$138,500 over the repayment decade amounts to \$1,154.17 per month for 120 months, *sans interest*. The seven percent rate interest allotted in the initial HEA would raise this monthly payment even higher.

For the 2.5 million borrowers with more than \$100,000 in student loans, the conflation of student loans and high interest rates make it harder to ever pay it off in their working lifetime, much less ever participate in the American dream of owning a home and having children.

One way to do this is through education and through applying existing laws to the process and providing greater education about the loans to loanholders. One of those existing laws that would help is the Truth in Lending Act (TILA) which is Title I of the Consumer Credit Protection Act (Public Law 90-321).

TILA is a law that was passed in 1968 and intended to “assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices” (U.S. Congress 1968). TILA provides a clear layout of financing costs and increases transparency to protect the borrower from predatory lending.²²⁵

While the goal of consumer protection is commendable, Congress wanted no part of that protection for college students, as it ensured that Student Loans were explicitly exempted from TILA via Regulation Z (codified as 12 CFR Part 1026 [titled Truth in Lending]). Making student loans subject to the laws that other credit purchases are subject to would provide the postsecondary institutions, as the

²²⁵ Colleges are required to perform entrance and exit interviews to advise the borrower of the rights and responsibilities of the loan, but there is no element of the interviews which would require the breadth and depth of TILA about the *cost* of the loan.

intermediaries, to provide the borrower with the educational knowledge of the effects of the loan.

Recommendation: Eliminate the Second Prong of the Brunner Test

The second prong of the *Brunner* test requires a showing that the petitioner's state of affairs will persist for the duration of the student loan repayment period, but

How does a debtor, for example, prove that financial circumstances will not improve in the future, a "future" which was five years long when the Brunner test was first adopted, but which may now be 25 years or longer? How do debtors prove that in the midst of a "certainty of hopelessness," they attempted to maximize their income?²²⁶

This is a central question for *Brunner* case. The student debtor is asked to prolong their repayment period to a term which is five times longer than set forth at the outset of the Student Loan Program and the student debtor petitioner is asked to look further into their crystal ball to predict the future for almost one out of three years of their expected lifetime.²²⁷

It is worth repeating that predicting a certainty of hopelessness is impossible to prove with a reasonable degree of assurance because it is speculative, so it should not be the standard used to make predictions about *life*, where the degree of sureness is less predictable than a crapshoot to require a person to state to a degree of inevitability—short of death—that a certainty of hopelessness will exist, since it is a

²²⁶ The quote is from *Wolfe v. Department of Education*, 501 B.R. 426 (2013).

²²⁷ The Centers for Disease Control and Prevention estimates that the average life expectancy in the United States is 78.6 years (Centers for Disease Control and Prevention. National Center for Health Statistics, 2017).

near impossible standard to meet. Therefore, the second prong should be eliminated, or at a minimum rolled back to no more than a five-year period.

Recommendation: Revamp the Brunner Good Faith Test

The good faith test was intended to ensure that students have made an attempt to repay their outstanding student loans. The concept behind the test is well placed, but its execution is fraught with problems. The yardstick is haphazardly applied, where some judges require debtors to enroll in loan deferments and loan forbearances and others do not.

In the appeal of *Brunner* (1987), the United States District Court for the Southern District of New York, noted that “...some courts, following the lead of *In re Johnson*, have required a showing of ‘good faith’ prior to discharge. There is no specific authority for this requirement [in the law], but the need for some showing of this type may be inferred from comments of the Commission report.”

There is little question as to whether or not a student *should make an earnest* attempt to repay a loan prior to seeking discharge, but disinterest in enrolling in either plan should not preclude a petitioner’s claim from moving forward, as it may not be necessary to file a deferment or forbearance application to prove a claimant’s underlying discharge assertion.²²⁸ Secondly, if enrollment is required as a perfunctory task for a claim to proceed, then why have the requirement if the

²²⁸ Example: The loss of all property, similar to what happened to many people as the result of Hurricanes Katrina, Rita, Harvey, Ike, Sandy, and Maria would obviate the need to file for a deferment or forbearance application.

standard requires the completion of a mere ministerial act? Also, even if the deferment/forbearance is approved, it will only prolong the inevitable.

The primary point of the test is to ensure that students cannot discharge their loans *shortly* after graduation, and Brunner is the exemplar as to why the concept was instituted. She filed her discharge application within *one month* of the first payment for being due and spent her life savings on a vehicle two months prior to filing the discharge application. In totality, these actions are inconsistent with showing an intention to pay the loan.

Judges routinely chastise petitioners that appear before them which have high student loan balances as a total ratio of indebtedness. The normal judicial response is to cast a negative implication on the student by insinuating that the student is looking to escape liability for the loans. In Brunner's appeal (1987), the brief for NYSHESC stated "This bankruptcy was filed with the dominant if not the sole purpose of escaping student loan debt. Such loans comprised five-sixths of her total indebtedness." While the idea is to prevent immediate postgraduate discharges is understandable, the negative aspersion from the bench is unwarranted, because this isn't just limited to student loans. In the end, *anyone* that's filed a bankruptcy discharge application *anywhere for any reason is looking to escape liability for debts*.

An alternative reason as to why the good faith test should be scrapped is because of the high proportion of student loan debt to other debt is not indicative of exhibiting responsibility. A person may have a low debt ratio of non-student loan debt to student loans because the debtor has successfully negotiated with debt buyers and debt collectors. These companies purchase outstanding debts for as little as two

cents on the dollar and their incentive is to maximize revenue. Therefore, these entities are more susceptible to discharging the debt at a lower, fire sale price, especially if it is known that the debtor is headed to bankruptcy court.

An unsecured debtor, such as a credit card company, is among the least likely to get paid and thus has incentive to recover as much as possible, writing the rest of the losses off in order to close the accounts and secure any quarterly or annual tax advantages affiliated with the losses. In short, if a person settles other outstanding debt, but has an outstanding student loan, the balance of debt negatively impacts their standing before the respective court simply for having a high student debt load, even when the person has been responsible in all other areas. In retrospect, this is a form of a universal default, which was generally but not fully outlawed by the Credit Card Accountability Responsibility and Disclosure Act of 2009, Public Law 111-24.

In summary, the good faith test should not be a prerequisite to granting a discharge petition, but if it is retained, borrowers should not be required to enroll in alternative repayment plans to be in order to show good faith. Additionally, the amount and type of debt should be inconsequential in determining whether the presenter has exhibited good faith, nor should debtors that are not in alternative based repayment programs be penalized.

Recommendation: Treat Payments to Student Loans as Nontaxable Income

The United States Code at 5 U.S.C. 5379(g) “authorizes [federal executive] agencies to establish a student loan repayment program for the purpose of recruiting

or retaining highly qualified personnel.”²²⁹ The enabling legislation permits the paying agency to pay a maximum of ten thousand dollars per calendar year, with a lifetime maximum of sixty thousand dollars.

The program is a great first step as an incentive to secure or retain employees. However, the flaws in the program (as currently constituted) are as follows: First, the IRS considers student loan payments from the federal government is considered to be taxable income, even though the debtor never takes possession of the money.²³⁰

Second, this transaction generally amounts to an intragovernmental transfer—a *routine action*—that comes with an unusually high cost. The result is that the student who is awarded the maximum payment does not receive the maximum benefit. If the full amount of the student loan repayment is awarded to a person in a calendar year, in the end, they will receive far less what was advertised.

During the research, the researcher encountered a case where a loan payment sent directly from one federal agency of \$10,000.00 to another federal agency cost \$4,111.51 to execute the action.²³¹ This resulted in an effective net payment to the loanholder’s capital of \$5,888.49. After looking at the key indicator inputs of this circumstance and statistical information from BLS, DOE and the Bureau of the Census,

²²⁹ The referenced code refers to Public Law 101-510, the National Defense Authorization Act for Fiscal Year 1991.

²³⁰ As stated earlier in this document, the definition of gross income taxes, from 26 U.S.C. 61(a), is “all income from whatever source derived.”

²³¹ The amount of \$5,888.49 in this case represented direct costs via income tax and does not represent indirect costs.

it is accurate to state that this index case is commonly emblematic of other cases. This is an item that can be easily remedied by a legislative technical edit.

As long as the advertised amount of student loan repayment does not match the amount deducted from capital, the Student Loan Repayment Program (and other similar programs) will continue to leave the impression that the high dollar level repayment number advertised for repayment is only meant to serve as the headline and not the bottom line.

Recommendation: Increase Federal Repayment Amounts to \$30,000 Annually

It is known that the federal government has more educated workers than the private sector. The Heritage Foundation (2019) notes that the federal government has 2.5 times as many workers with master's degrees or higher as the private sector, and only about one-third as many workers with less than a high school degree.²³² In order for these workers to secure their education, they have to secure their education, which ultimately costs money.

While the federal government has more educated workers, OMB (2018) notes that "federal employees with professional degrees are actually undercompensated relative to private sector peers, in CBO's analysis" and undercompensation is one of the primary reasons for attrition in the federal government.

The average age of a federal employee is 46 and given their education and experience, it is more likely that a federal employee is specialized in their field. This

²³² OMB (2018) places the number of workers with a master's degree or higher at a ratio of nearly three to one.

specialization and longevity increases the value of the human capital both to the federal government and to the federal workforce.

The cost to replace an employee and the value of the work they perform can easily run into tens of thousands of dollars. Boushey and Glynn (2012) estimate that the cost of employee turnover is roughly 21.4 percent of employee salary. A more recent study by Gallup (2019) estimates that the cost to replace an employee is one half to two times the employee's salary. The average salary for federal employees is \$94,463, according to data from the U.S. Bureau of Economic Analysis (2019), so the real cost for replacing an employee at the average salary would range from \$47,232 to \$188,926. The number is likely to be from the midrange to the higher end, as OMB (2018) concedes that "federal jobs can take more than a year to fill" even though the number of federal workers as compared to the private sector has decreased by about thirty percent since the 1970s.

One of the ways that the federal government recruits individuals to join the federal government or retain federal employees is to offer student loan repayment. However, the pool of funds is small, limited and not widely dispersed.²³³ For 2017, the executive branch of the federal government had 2,062,068 federal employees and 10,206 employees (0.49 percent) received student loan repayment benefits (U.S. Office of Personnel Management, 2019).^{234,235}

²³³ As aforementioned, the maximum student loan repayment payable per employee is ten thousand dollars per year.

²³⁴ The repayment benefits totaled approximately \$74.9 million dollars.

²³⁵ This number excludes employees from the U.S Postal Service (591,179) and the uniformed military (1,385,598), and the legislative branch, exclusive of the U.S. Senate (29,640) and the judicial branch

Even members of Congress are not immune to outstanding student loans. In the most recently filed financial disclosures, fifty-nine members of Congress reported owing student loans. The total amount of student debt for the 116th Congress totals 5.8 million dollars, or slightly less than ten percent of the amount allotted to the 10,206 federal employees that received student loan repayment payments for 2017 (Evers-Hillstrom, 2020). For this reason, it is recommended that greater efforts be undertaken to incentivize the federal work force by increasing the amount of student loan repayment that is available to thirty thousand dollars per year.^{236,237} This effort will help to sustain and retain the federal workforce.

Recommendation: Permit Students Researchers to Receive Deferments

Students that are enrolled in a postsecondary institution on at least a half-time basis are entitled to receive a deferment on their loans, per 34 CFR 682.210. There

(32,810). The total for all branches is 4,101,295, with 0.25 percent receiving a student loan repayment benefit.

²³⁶ For comparison, the cost to incarcerate a federal prisoner in America for FY 2018 was \$37,449.00 (U.S. Department of Justice. Bureau of Prisons, 2019). Ultimately, a student debtor could kill three people and be sentenced to less time in jail than the amount of years it would take to repay student loans under a graduated plan. The irony is that while in jail, the student debtor might even get a degree while in prison for free (Corbley, 2020). In the case of federal workers, there is a tangible benefit and in the case of federal prisoners, there is zero return on investment.

The U.S. Code (18 U.S.C. 1112[b]) notes that the term for involuntary manslaughter is no more than eight years, so three cases would amount to twenty-four years. Meanwhile, the full term for repayment of student loans under the extended repayment plan is *thirty* years. That's approximately sixty percent of a fifty-year working career (Belli, 2018). The moral compass that it would be better to kill three people than to be forgiven for student loans. In comparison, colonial servants typically worked a mere four to seven years (Public Broadcasting Service, 2014).

²³⁷ Tripling the current cost of 74.9 million dollars would cost 224.7 million dollars, which is less than the cost of one F-22 Raptor fighter plane (estimated at 250 million dollars), with 25.3 million dollars left to spare (Mizokami, 2017).

are two processes under which a student can be declared a half time student, as set forth at 34 CFR 668.2(b). and is defined as follows:

(1) Except as provided in paragraph (2) of this definition, an enrolled student who is carrying a half-time academic workload, as determined by the institution, that amounts to at least half of the workload of the applicable minimum requirement outlined in the definition of a full-time student.

(2) A student enrolled solely in a program of study by correspondence who is carrying a workload of at least 12 hours of work per week, or is earning at least six credit hours per semester, trimester, or quarter. However, regardless of the work, no student enrolled solely in correspondence study is considered more than a half-time student.

While most students fall into the in the former classification, there are some that fall into the latter category which requires a student to carry a workload of at least twelve hours per week. However, that twelve-hour weekly *workload* does not equate to twelve credit hour load. Generally, graduate students at the research stage must register in at least one continuing research credit every semester after completing all other requirements but the dissertation/thesis/final project/capstone class. That work may take place on a full-time basis while only being registered with their university for one credit.

The two main verification processes, the NSLDS and the Enrollment Clearinghouse are the most commonly used way to verify student status is employed by many colleges for enrollment verification as a quick and dirty method to provide responses based on the number of academic credits a student is registered for each semester, but it does not account for the students that fall into the situation described in the prior paragraph.

The unique nature of writing a dissertation or thesis is different than all other aspects of academia, as the work of the dissertation is student driven and research-focused outside of the traditional classroom lecture setting. For doctoral candidates, the post-classroom dissertation process is largely self-directed and analogous to study in absentia where the doctoral candidate writes, researches and perfects the dissertation off campus, with guidance from an on-campus advising professor and committee.

It is not inconceivable for a graduate student to avoid being physically present on campus after completing classwork, working full time in their locale, and having the research process as a second job. As such, a student performing field research can easily spend more than the twelve hours weekly set forth in 34 CFR 668.2(b) working on their dissertation/thesis/final project/capstone project. For this reason, graduate students in the research phase of their respective programs should be permitted to be a deferment, as the regulation as written has *no prohibition against self-certification of half-time status based on this definition, if registered for a research credit and the request is supported by their supervising advisor.*²³⁸

Moreover, there is no one that can better account for the hours worked on a dissertation/thesis/final project/capstone project than the researching student.

²³⁸ While there is no prohibition against self-certification, this set of events should be reduced to writing and it is recommended that the existing regulation should appended accordingly.

Recommendation: Give Debtors Credit for Settling Pre-Bankruptcy Debts

During student loan discharge hearings, judges typically orate to plaintiffs about the mores of responsibility, excoriating those petitioners before the bench about their life choices and how they should or should not live. This is the norm where student loans comprise the majority of the unsecured debt and it gives the impression to the presiding judge that the student debtor petitioner is irresponsible; however, the reasoning why the majority of debt is attributable to student loans may be very simple.

There are loans which are secured by collateral, such as a house or a car and there are unsecured loans, such as student loans. The majority of student loans are owned by the federal government, but there are some private loans that are issued. These private loans are protected by the same provisions as their public counterparts.

If a student loan case is filed in bankruptcy court, then it is probable that the petitioner's the situation had become dire long before reaching a bankruptcy judge.²³⁹ In this case, representatives for credit card companies and other private unsecured creditors generally reach out to their debtors in order to secure the most assets for their client in advance of assets being distributed before a bankruptcy hearing. As a result, the amount of unsecured debt that a bankruptcy judge would have for consideration would be minimized, leaving student loans as the primary outstanding debt by the time that a case would appear before a bankruptcy judge, so the perception that students are evading student loans may well be a misleading notion

²³⁹ It is acknowledged that *Brunner's* circumstances of filing bankruptcy shortly after graduation and spending money on a vehicle in light of pending bankruptcy are not the norm.

for this reason. This is also because unsecured creditors are looking for at the next quarter's profit and loss statement, so the incentive to quickly settle outstanding debts, and close the books is in their interest, even if they secure pennies on the dollar of the outstanding debt. For the student debtor, settling may be the most honorable and prudent course of action light of the existing circumstances and they shouldn't be chided by bankruptcy judges for their attempts to be responsible and self-distribute their assets to resolve their outstanding situation.

Recommendation: Limit Collection Agency Fees to Three Percent

When money is owed to the federal government, it can pursue the indebted for the outstanding amount. However, when it comes to student loans, the federal government has the ability to pursue collection with authority and power well beyond that allotted to any other unsecured creditor. This power does not just apply to collections of student loans guaranteed by the federal government, but also to private student loans.

The fees that the federal government charges when the loans are outsourced to a collection agency are high and virtually ensures that the student debtor will not be able to recover from the defaulted loan. DOE (2020) makes it known on its webpage in stating

If your loan is placed with a collection agency, you will be responsible for costs incurred by your loan holder to get payment. These costs amount to 17.92% of your loan amount if your loan is held by ED. Other loan holders may charge a different amount. You should check with them to find out what it is.

The 17.92% is payable in addition to your outstanding principal balance, interest, and fees. For example, if you owe ED \$10,000, you'll owe an additional \$1,792 in collection fees once your loan goes to a collection agency, for a total of \$11,792:

This is higher than the norm, as the industry standard for legal actions related to collections is ten percent (Tharnish, 2020). In order to pay off, whatever is owed, consumers have to have the funds to do so. The Association of Settlement Companies (2007), a debt industry group, notes “only consumers with considerable disposable income left over each month are able to get out of debt through a [Debt Management Plan].” Ultimately, “if consumers are not able to significantly lower the amount that they owe, they're more likely to fail in completing a three to five-year [Debt Management Plan]” (The Association of Settlement Companies, 2007). Compounding the issue is that some firms that are contracted to recover student loans on behalf of DOE earn commissions of thirty-one percent (Huffington Post, 2012).

Lowering the fees that are charged to defaulted loans from 17.92% to a *de minimis* number, such as three percent, is a simple way to getting the loans rehabilitated and repayments from debtors.

Recommendation: Revise the Ability to Benefit Requirement for Federal Aid

In order to receive federal student loans, the federal government requires students must have the ability to benefit (ATB) from a college education and achieve a passing score, per 34 CFR 668.141, *et seq.* There is no one designated test, but the ACT and the Scholastic Assessment Test (SAT) are two of the most commonly used tests and 34 CFR § 668.147 notes that the passing score is “one standard deviation

below the mean score of a sample of individuals who have taken the test within the three years before the test is submitted to the Secretary for approval.”

This number is low and by definition declares that few people would not benefit from a college education. Statistically, it would only exclude sixteen percent of the population, leaving the remaining eighty-four percent eligible.²⁴⁰ Although the answers to the ACT and SAT are randomized, and the test average changed as the result of each administration, if a test taker replied with one consistent letter response, (e.g. A, out of the choices of A,B, C and D), that test taker would stand a roughly twenty percent chance of being correct, which theoretically is above the sixteen percent threshold.

Those individuals that are the most affected by the ATB provision are the mentally challenged, who through dint of hard work may have studied and succeeded *just enough* to have achieved a passing score on a college aptitude examination test but will not truly benefit from the education. The other group is those that may score highly, but requires additional assessment above and beyond the areas tested by the ACT, SAT and other tests, such as spatial cognition for those students which are looking to become engineers, because an ability to perform arithmetic and algebra—which are tested on the—doesn’t translate to the ability to perform calculus, which is a building block of the field (Buckley, Seery, & Canty, 2019).

²⁴⁰ One standard deviation is roughly 68.27 percent, evenly divided on both sides of the mean at 34.135 percent. The number 15.87 percent was derived by taking 50 percent (one half of the lower end of the mean) and subtracting 34.135 percent to arrive at 15.865 percent, leaving 84.135 percent of all test takers have the ability to benefit from a college education. The 15.865 percent was rounded to 16 percent and the 84.135 percent was rounded to 84 percent.

Recommendation: Reinstitute the Statute of Limitations for Loan Collections

Linda Brice, a Los Angeles-area primary school teacher, borrowed three thousand one hundred dollars in student loans for her education. She consolidated her loans so that they would appear on one document as part of a unified financial statement and inadvertently forgot to include one loan in the consolidation and that loan went into default. As a result, DOE garnished twenty-five percent of her disposable income and seized \$2,496 from her bank account without notice.

The purpose of a statute of limitations is practical and intended to place a limit on the commencement of legal proceedings. It allows parties to move ahead with their lives, maintain productivity in the court system and compel parties to be responsible and proceed with a claim within a reasonable amount of time or otherwise discharge their demands. In the instant case, the issue here is the defaulted loan that Ms. Brice borrowed the money over thirty years ago in the 1970s (Hechinger, 2012).

While debt collectors are prohibited from pursuing outstanding debts after a defined period of time called the statute of limitations, there is no statute of limitations for student loan collections, so the federal government can seek reimbursement until the death of the student, and even after the student dies, as in the case of Freddy Reynoso. Freddy Reynoso was a college student that required loans to pursue his postsecondary education. His father Francisco, served as a cosigner on Freddy's student loans. Freddy died in a car accident in 2008 and even though an authenticated death certificate was issued, the companies that held

Freddy's student loans continued to pursue Mr. Reynoso—who made \$21,000—for the balance of the loans after his son's transition to the afterlife.

Previously the statute of limitations for student loans was six years, but that was eliminated with the passage of the Higher Education Technical Amendments of 1991. This equates the statute of limitations for a defaulted student loan with that of murder or manslaughter as “an indictment for any offense punishable by death may be found at any time without limitation” per 18 U.S.C. 3281. It is recommended that the statute of limitations be reinstated to six years to provide students with a sense of finality regarding their lives.

Recommendation: End Wage Garnishment Without Advance Notification

The reason for this recommendation is fairly obvious. Most of the other three debts which cannot be discharged that are named in Section 9103 of the Omnibus Budget Reconciliation Act of 1986 (Public Law 99-509 § 9103, commonly known as the Bradley Amendment), require notification prior to garnishment.²⁴¹ At a minimum, the other debts require due process prior to garnishment. The process of garnishing wages without notice does not provide due process to the parties of interest, and it is recommended that student loans not be treated differently from the other items.

²⁴¹ The primary other non-dischargeable debts, per 11 U.S.C. 523 *et seq.*, are child support arrears, malicious injuries, tax arrears, fraudulently obtained information, personal injury suits and judgments.

Recommendation: Require a NEPA Review Prior to Garnishing Wages

The National Environmental Policy Act of 1969 (NEPA, Public Law 91-190 [42 U.S.C. 4321 *et seq.*]) is an action-oriented policy that was signed into law on January 1, 1970 in the wake of an oil spill of over three million gallons on January 28, 1969. The accident was the largest offshore oil spill at the time and served as a focusing event that galvanized the attention of Congress and the public on the environment. The purpose of NEPA is to ensure that the federal government, in its planning and policies, proactively considers the impact of its actions *prior* to taking action.²⁴²

Specifically, NEPA notes that “...it is the continuing policy of the federal government...to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans” (42 U.S.C. 4331[a]).

In order to execute that policy, the federal government undertakes actions to accomplish that goal. Toward that end, when a federal agency through its own action, endeavors to undertake a major action that will significantly *affect the quality of the human environment* (emphasis added), the affected agency or agencies must assess a multitude of environmental impacts (adverse, assenting, alternative or unavoidable) as well as evaluate the effect of “any irreversible and irretrievable commitments of

²⁴² To be clear, NEPA isn’t just limited to proposals. NEPA also includes actions under analysis by a regulatory agency, proposals that are under consideration, and more to this point, actions that have involve federal funds. In the case of student loans, the funds are from the U.S. Treasury.

resources which would be involved in the proposed action should it be implemented” (42 U.S.C. 4332, *et seq.*). Further, NEPA requires “a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment...”

The primary segment of a NEPA review is a cumulative impacts analysis, per . Cumulative impacts are the consequence of individually discrete actions, that when aggregated and examined in the whole (with consideration given to previously related events and practicably viable future events) would affect a given resource, without regard to the initiator. These distinct actions may be individually insignificant; however, the tabulated outcome of these individual items will have a cumulative effect.²⁴³

Although NEPA is applicable to all federal agencies, DOE has never undertaken a NEPA review for student loans. Reverting to the case of Linda Brice, the contracted law firm for the Federal government of Goldsmith and Hull retrieved \$2,496 from Ms. Brice's bank account *after the judge in the matter ruled that Brice should pay twenty-five dollars per month* (Huffington Post, 2012).²⁴⁴

²⁴³ The metaphorical equivalent of a cumulative analysis is death by a thousand paper cuts. One paper cut may not be noticed at the time of the incision. Two or three cuts, when noticed, may be an annoyance. No one sanguinary action is lethal. However, the collective impact of these actions will be fatal.

²⁴⁴ If DOE had undertaken the NEPA analysis prior to acting, it would have realized that the cumulative effect of pursuing a thirty-year-old debt and the cost benefit analysis may have shown that the government spent more time in pursuing the debt and written it off instead of threatening Ms. Brice's living stability.

This recommendation is based on the fact that if DOE were compelled to undertake its obligation with NEPA to assess the impact on its targets prior to garnishing wages or initiating legal action in adversary hearings, it would have a better assessment of the actual bottom-line impact on the daily living environment of its student debtors.

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