NOTE

FORGIVE AND FORGET: BANKRUPTCY REFORM IN THE CONTEXT OF FOR-PROFIT COLLEGES

Rosalyn Harris was a single mother determined to make life better for herself and her son. Unemployed and without a college degree, Harris believed enrolling in the two-year criminal justice program at the for-profit Everest College was the right step toward the opportunities that higher education would provide.[1] Unfortunately for Harris, that was not the case. Despite Everest's claims of a 75% job-placement rate for students in the criminal justice program, she spent months unsuccessfully applying for jobs in her field after graduating with over $22,000 in student loan debt.[2] The only job she was able to secure was a minimum-wage position stocking shelves at Victoria's Secret.[3]

Harris's story, while concerning, is not unique. The growth of the for-profit-college sector has not met the promise of its potential. Rather than provide quality, affordable education to its students — many of whom belong to vulnerable populations — some for-profit institutions have created learning environments that impose significant costs without much benefit. The average tuition is more than four times higher than the average in-district tuition at a public two-year college and 67% higher than the average in-state tuition at a public four-year institution.[4] Yet the increased costs of attending for-profit institutions do not translate to a better employment outlook for their graduates. In fact, six years after initial enrollment, for-profit students tend to have higher unemployment rates and lower earnings than do their peers who attended public and nonprofit institutions.[5] Further, research has found that employers find graduates with for-profit degrees and online degrees the least desirable to hire.[6] As one education advocate recently noted, "[s]tudents go into the marketplace and they're told that no one is going to take their degree seriously[.] . . .

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1 Blake Ellis, *My College Degree Is Worthless*, CNN MONEY (Nov. 2, 2014, 5:42 PM), http://money.cnn.com/2014/11/02/pf/college/for-profit-college-degree [http://perma.cc/GLW7-BK5Y].

2 *Id.*

3 *Id.*

4 *Average Published Undergraduate Charges by Sector, 2014–15*, COLL. BD., http://trends.collegeboard.org/college-pricing/figures-tables/average-published-undergraduate-charges-sector-2014-15 (last visited Mar. 29, 2015) [http://perma.cc/X433-5GVC].

5 David J. Deming, Claudia Goldin & Lawrence F. Katz, *The For-Profit Postsecondary School Sector: Nimble Critters or Agile Predators?*, J. ECON. PERSP., Winter 2012, at 139, 159.

6 THE CHRONICLE OF HIGHER EDUC. & AM. PUB. MEDIA, THE ROLE OF HIGHER EDUCATION IN CAREER DEVELOPMENT: EMPLOYER PERCEPTIONS 58 (2012), https://chronicle.com/items/biz/pdf/Employers%20Survey.pdf [https://perma.cc/N8RS-P92F].

They're considered suckers."[7] Despite their good-faith work, many students find that a for-profit education isn't a reward; it's a racket.

These factors have combined to create a toxic financial situation for many students who are simply trying to attain an education as a means to access the middle class. Even though for-profit students are only 11% of the higher education population, they are 44% of all federal student loan defaults.[8] Perhaps more striking, about one in five for-profit students will default on their education loans within the first three years of entering repayment.[9] To address this issue, the Department of Education has promulgated rules that aim to ensure that for-profit programs are preparing students for gainful employment in recognized occupations.[10] Under the regulation, for-profit programs will only qualify as leading to gainful employment if the annual loan repayments for graduates of the programs do not exceed on average either 8% of their total earnings or 20% of their discretionary income.[11] For-profits that surpass these limits would be subject to the revocation of their eligibility to participate in federal student-aid programs.[12]

Although these regulations provide a meaningful step toward holding some of the worst-performing for-profit institutions accountable, they provide little solace to dropouts and graduates of underperforming institutions who struggle to repay their loans. Unfortunately, when it comes to debt incurred at underperforming for-profit institutions, the existing bankruptcy regime continues to deny retrospective relief to those who need it most. Yet a core principle of debt relief is the notion of a "fresh start."[13] As one bankruptcy court has put it, seeking relief for student loans incurred at an institution that failed to deliver adequate training and employable skills "is not the intentional abuse of bankruptcy laws for which denial of discharge was intended as a remedy."[14]

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[7] Nona Willis Aronowitz, *Campus Confusion: Corinthian Colleges Students Face Uncertain Future*, NBC NEWS (Aug. 15, 2014, 6:15 AM), http://www.nbcnews.com/news/education/campus-confusion-corinthian-colleges-students-face-uncertain-future-n178231 [https://perma.cc/ELV8-ZMAH] (quoting David Halperin) (internal quotation marks omitted).

[8] Press Release, U.S. Dep't of Educ., Obama Administration Announces Final Rules to Protect Students from Poor-Performing Career College Programs (Oct. 30, 2014), http://www.ed.gov/news/press-releases/obama-administration-announces-final-rules-protect-students-poor-performing-care [https://perma.cc/CHS7-A9EN].

[9] Libby Nelson, *The Obama Administration Wants to Close 1,400 Programs at For-Profit Colleges. Here's How.*, VOX (Oct. 30, 2014, 11:20 AM), http://www.vox.com/2014/10/30/7130151/gainful-employment-for-profit-colleges-obama-administration [http://perma.cc/U67M-NAEW].

[10] Press Release, U.S. Dep't of Educ., *supra* note 8.

[11] *Id.*

[12] *Id.*

[13] *See generally* Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393 (1985).

[14] Correll v. Union Nat'l Bank of Pittsburgh (*In re* Correll), 105 B.R. 302, 305 (Bankr. W.D. Pa. 1989).

This Note advocates for two different reforms to current bankruptcy law that can complement the ex ante regulations adopted in 2014 and that would more fully address the role of for-profit institutions in the student debt crisis.[15] Part I provides historical background on the federal loan program and the rise of for-profit colleges. Then the Note proceeds to briefly explain the purpose and substance of the Department of Education's gainful-employment regulations finalized in October 2014. The remainder of the Note focuses on two important legal and policy issues particular to debt in the for-profit education context. Part II evaluates the judicial standards governing the discharge of individual student loans under Chapter 7 of the Bankruptcy Code. Criticizing the existing doctrine as overly stringent and anachronistic, the Note seeks to provide alternatives that courts can embrace that better take into account the modern realities of for-profit colleges and the student debt crisis. Part III turns to the Department of Education's problematic policy on Title IV eligibility as it pertains to institutional bankruptcy filed by for-profit colleges themselves. By calling into question the Department's position, the Note hopes to reinvigorate the closed-school-discharge provisions of the Higher Education Act to provide an additional outlet for alleviating the loan burden of students who are victims of failing for-profit institutions.

I. BACKGROUND

A. The Higher Education Act, Its Amendments, and Title IV

In 1965, Congress enacted the Higher Education Act[16] (HEA) which established "a Federal program of student loan insurance for students who do not have reasonable access to a State or private nonprofit program."[17] While the HEA addresses various aspects of educational opportunities, Title IV is the most pertinent here. Under Title IV,[18] Congress created a program administered by the Department of Education to provide postsecondary students with financial aid via federal grants and federally backed loans. Initially, the loan program simply guaranteed student loans by private lenders, instead of issuing

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[15] *See, e.g.*, Andrew Martin & Andrew W. Lehren, *A Generation Hobbled by the Soaring Cost of College*, N.Y. TIMES (May 12, 2012), http://www.nytimes.com/2012/05/13/business/student-loans-weighing-down-a-generation-with-heavy-debt.html.

[16] Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended at 20 U.S.C. §§ 1001–1107 (2012), 42 U.S.C.A. §§ 2751–2756b (West 2012 & Supp. 2014)).

[17] *Id.* § 421(a)(2), 79 Stat. at 1236.

[18] *Id.* §§ 401–467, 79 Stat. 1219, 1232–54.

loans directly.[19] However, as of 2010, all federal student loans are issued directly by the government.[20] To be eligible for federal funding, every institution has to enter into a program participation agreement (PPA) with the Secretary of Education.[21] In its PPA, an institution is statutorily required to acknowledge that its eligibility for federal funding is conditional upon a host of factors including cohort default rate, publication of accurate employment and graduation statistics, and operation of a drug abuse prevention program.[22]

At the same time as it enacted the HEA, Congress also enacted the National Vocational Student Loan Insurance Act of 1965[23] (NVSLIA). While the HEA applied to nonprofit institutions, the NVSLIA extended the loan program to vocational and technical schools.[24] Although both statutes now operate under Title IV, Congress retained some of the distinctions between for-profit institutions and other institutions of higher education. As opposed to general public and private institutions, these profession-focused institutions are required to provide a "program of training to prepare students for gainful employment in a recognized occupation."[25] As this provision has formed the basis for the Department's expansive new regulations of for-profit colleges, its meaning has recently come under tremendous scrutiny without further guidance from legislative context.

B. The Rise of the For-Profit Education Sector

Over the last decade and a half, the growth of for-profit institutions has been extraordinary. Population growth and the changing labor market have fueled the rising demand for higher education.[26] Because

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[19] *See* Jonathan D. Glater, *The Other Big Test: Why Congress Should Allow College Students to Borrow More Through Federal Aid Programs*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 11, 37–38 (2011).

[20] *See id.* at 38; *see also* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 2201–2213, 124 Stat. 1029, 1074–81 (codified as amended in scattered sections of 20 U.S.C.).

[21] 20 U.S.C. § 1094(a).

[22] *Id.*

[23] Pub. L. No. 89-287, 78 Stat. 1037.

[24] *Id.* § 17(a). A few years later, in 1968, Congress combined the two loan programs into a single Title IV program. Higher Education Amendments of 1968, Pub. L. No. 90-575, § 116, 82 Stat. 1013–14. In 1992, the term "vocational school" was replaced by two different terms — "proprietary institution of higher education" and "postsecondary vocational institution." Ass'n of Private Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 140 (D.D.C. 2012) (citing Higher Education Amendments of 1992, Pub. L. No. 102-325, § 481, 106 Stat. 448, 609). For-profit institutions fall within the former. 20 U.S.C. § 1002(b)(1).

[25] 20 U.S.C. § 1002(b)(1)(A)(i).

[26] John Aubrey Douglass, *Money, Politics and the Rise of For-Profit Higher Education in the US: A Story of Supply, Demand and the Brazilian Effect*, CENTER FOR STUD. HIGHER EDUC. 3 (Feb. 2012), http://www.cshe.berkeley.edu/sites/default/files/shared/publications/docs/ROPS.JAD.ForProfitsUS.2.15.2012.pdf [http://perma.cc/LP8Q-4NER].

of their connection to the marketplace, for-profits are quick to open in order to train students for jobs in fast-growing areas.[27] Additionally, the Internet helped to support new models of educating that moved away from the traditional classroom setting and expanded the marketing potential of for-profit colleges.[28] The favorable regulatory environment of the first decade of the 2000s also supported the expansion of for-profit institutions by lowering the barrier to accessing federal funds.[29]

Between 2000 and 2012, enrollment in the for-profit education sector tripled.[30] For many members of historically disadvantaged groups, for-profit institutions serve as the primary vehicle for obtaining higher education and improving their economic condition.[31] Compared to community colleges, attendees of for-profit institutions are "disproportionately single parents, have much lower family incomes, and are almost twice as likely to have a General Equivalency Degree."[32] Not surprisingly given the socioeconomic demographics of individuals who seek to obtain a postsecondary education at a for-profit, students at such institutions have to borrow a greater proportion of their educational costs than their peers at public and private nonprofit colleges.[33] Four-year for-profit colleges enrolled more than 1.3 million students in the fall of 2014.[34] This growth in enrollment has also seen corresponding growth in federal loans that for-profits have received. From 2000 to 2011, federal Stafford loans more than doubled from $37 billion to $86 billion, which represents a significant percentage of for-profit revenue.[35] However, such rapid growth is associated with a decrease in program quality[36] and the prioritization of profits over students.[37]

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[27] David Deming, Claudia Goldin & Lawrence Katz, *For-Profit Colleges*, 23 FUTURE CHILD. 137, 139 (2013).

[28] Douglass, *supra* note 26, at 3.

[29] *Id.*

[30] Deming et al., *supra* note 5, at 140.

[31] *See* Constance Iloh & William G. Tierney, *A Comparison of For-Profit and Community Colleges' Admissions Practices*, C. & U., April 2013, at 2, 5. Black Americans account for 13% of all students in higher education but represent 22% of students in for-profit institutions. Deming et al., *supra* note 5, at 146. Latinos comprise 15% of students in for-profits even though they are only 11.5% of students in higher education. *Id.* Women are also disproportionately enrolled in for-profit colleges, as they comprise 65% of those attending such institutions. *Id.*

[32] Deming et al., *supra* note 5, at 146.

[33] *See* THE INST. FOR COLL. ACCESS & SUCCESS, QUICK FACTS ABOUT STUDENT DEBT (2014), http://www.ticas.org/files/pub/Debt_Facts_and_Sources.pdf [http://perma.cc/66PY-4NV5].

[34] NAT'L STUDENT CLEARINGHOUSE RESEARCH CTR., CURRENT TERM ENROLLMENT REPORT – FALL 2014, at tbl.1 (2014), http://nscresearchcenter.org/currenttermenrollment estimate-fall2014 [http://perma.cc/PF57-WQDE].

[35] Deming et al., *supra* note 27, at 138–39.

[36] *See id.*

[37] The combination of for-profit colleges' reliance on federal aid and increased compensation with higher enrollment incentivizes overly aggressive student recruitment. *Id.* at 149. The Gov-

C. The 2014 Gainful-Employment Regulations

Despite having the authority to promulgate regulations governing the administration of Title IV funding,[38] the Department of Education has historically chosen not to enact extensive regulations limiting access to these funds by underperforming institutions of higher learning. Until 2009, the Department primarily relied on two regulatory conditions as methods of attempting to ensure efficient use of Title IV resources — cohort default rates and the 90/10 rule. First, the cohort default rate conditions an institution's eligibility to receive certain Title IV funds on the percentage of students who have failed to make their loan payments in a given year.[39] An institution loses its eligibility to participate if either its cohort default rate is 25% or higher for three consecutive years or its rate exceeds 40% in any one year.[40] And second, under the 90/10 rule, a for-profit institution is required to receive more than 10% of its revenue from sources other than Title IV loan program funds.[41]

Recognizing the shortcomings of these two regulations,[42] the Department initiated a rulemaking to better protect the integrity of federal student loan programs and actually enforce the "gainful employment" requirement present in the federal statute. The first iteration of

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ernment Accountability Office has also found that for-profit colleges engage in aggressive recruiting tactics that often contain deceptive statements and practices. *See For-Profit Schools: The Student Recruitment Experience*: *Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 111th Cong. 10–38 (2010) [hereinafter *Hearing*] (statement of Gregory D. Kutz, Managing Director, Forensic Audits and Special Investigations, Government Accountability Office).

[38] *See* 20 U.S.C. § 1221e–3 (2012).

[39] Institutions that fail to meet the requirements of the cohort default rate regulations become ineligible to participate in the Federal Family Education Loan (FFEL), Direct Loan, and Federal Pell Grant programs. 34 C.F.R. § 668.187(a) (2014). A given year's cohort consists of all the students who entered repayment that fiscal year on loan-program funds that they received in order to attend that institution. *Id.* § 668.183(b).

[40] *Id.* § 668.187(a). To place these numbers in context, the national cohort default rate for fiscal year 2011 was 13.7% for all institutions receiving Title IV funding through loan programs and 19.1% for proprietary (for-profit) institutions. U.S. DEP'T OF EDUC., COMPARISON OF FY 2011 OFFICIAL NATIONAL COHORT DEFAULT RATES TO PRIOR TWO OFFICIAL COHORT DEFAULT RATES (2014), http://www2.ed.gov/offices/OSFAP/defaultmanagement/schooltyperates.pdf [http://perma.cc/WP5H-K9Z6].

[41] 34 C.F.R. § 668.28.

[42] For the cohort default rates, the narrow window in which defaults are considered has largely prevented this condition from imposing any form of meaningful limitation on access to Title IV funding. *See* Matthew A. McGuire, Note, *Subprime Education: For-Profit Colleges and the Problem with Title IV Federal Student Aid*, 62 DUKE L.J. 119, 146–47 (2012). For the 90/10 rule, permitting revenue from other non–Title IV programs such as veterans' benefits and Pentagon tuition assistance programs to fall outside the ninety-percent threshold undermines the purpose of requiring these institutions to prove independence. *See* Michael Stratford, *New Fodder for 90/10 Debate*, INSIDE HIGHER ED (Oct. 13, 2014), https://www.insidehighered.com/news/2014/10/13/more-profit-colleges-would-fail-9010-rule-if-veterans-benefits-are-included-analysis [https://perma.cc/YM3Z-AFUL].

this rulemaking ("the 2010 Regulation"[43]) was struck down by a federal court under the Administrative Procedure Act[44] as arbitrary and capricious.[45] However, the Department was not deterred,[46] and in October 2014, the Department released its final version of the "gainful employment" regulation ("the 2014 Regulation").[47]

Unlike the 2010 Regulation, the 2014 Regulation rests entirely on the debt-to-earnings rate — the ratio of the amount of student loan debt graduates from a for-profit program took on compared to their earnings.[48] Just as in the 2010 Regulation, the debt-to-earnings ratio will be calculated in two ways: (1) an annual measure that compares student loan debt to annual earnings and (2) a discretionary measure that compares debt to earnings after subtracting 150% of the federal poverty line for a single individual.[49] In order to calculate the annual loan repayments, the 2014 Regulation will use a three-year average of the Unsubsidized Stafford Loan rate for undergraduate certificates, associate degrees, graduate certificates, and master's degrees; and a six-year average for bachelor's degrees and doctoral programs.[50] Earnings will be measured either three and four or six and seven years after graduation, respectively.[51]

In another difference from the 2010 Regulation, a for-profit will pass the debt-to-earnings measure only if the rate is less than 8% on

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[43] Program Integrity Issues, 75 Fed. Reg. 66,832 (Oct. 29, 2010) (to be codified at 34 C.F.R. pts. 600, 602, 603, 668, 682, 685, 686, 690, 691).

[44] Pub L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[45] *See* Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 448 (D.C. Cir. 2012). For the most recent regulations, arbitrariness and capriciousness review is unlikely to be an issue given that the Department published multiple statistical regressions detailing the effects, or lack thereof, on low-income and minority students. *See* Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 65,039–57 (Oct. 31, 2014) (to be codified at 34 C.F.R. pts. 600, 668) (providing charts and data showing that the annual earnings rate bears no strong negative correlation with increased enrollment by minorities or Pell Grant recipients).

[46] Libby A. Nelson, *Trying Again on 'Gainful,'* INSIDE HIGHER ED (Apr. 16, 2013), https://www.insidehighered.com/news/2013/04/16/us-announces-rulemaking-gainful-employment-state-authorization-and-long-term-agenda [https://perma.cc/BL7Q-TFEM]. In the previous litigation, the U.S. District Court for the District of Columbia found that the Secretary did have the statutory authority under the HEA to promulgate regulations quantifying the term "gainful employment." *See* Ass'n of Private Colls. & Univs. v. Duncan, 870 F. Supp. 2d 133, 146–47 (D.D.C. 2012).

[47] Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890.

[48] *See* Ben Miller, *What's Different, What's New in Final Gainful Employment Rule*, NEW AM. EDCENTRAL (Oct. 30, 2014), http://www.edcentral.org/finalgainful [http://perma.cc/PZV9-GRJH]. The 2010 Regulation advocated for an additional test based on repayment rates that reached not only graduates but also included all students who had enrolled at a given institution. Program Integrity: Gainful Employment, 75 Fed. Reg. 43,616, 43,618 (July 26, 2010) (to be codified at 34 C.F.R. pt. 668).

[49] Miller, *supra* note 48.

[50] *Id.*

[51] *Id.*

the annual measure or 20% on the discretionary measure.[52] If the debt-to-earnings rate falls between 8% and 12% on the annual measure or between 20% and 30% on the discretionary measure, the institution is placed in a warning zone.[53] A program will fail the debt-to-earning measure if its annual measure exceeds 12% and its discretionary measure exceeds 30%.[54] The number of years that a for-profit spends in the warning zone or has failed the debt-to-earnings ratio determines its eligibility for Title IV funding. If a school spends four consecutive years in the warning zone or fails twice in a three-year period — a shorter timeframe than in the 2010 Regulation — then it will lose its eligibility.[55] The year before an institution is subject to the loss of Title IV eligibility, it must disclose its status to both enrolled and prospective students, and the school must receive some kind of acknowledgement from the recipients that they received the message.[56]

Recognizing the role that for-profit institutions look to play in providing quality career educations to the populations that need them the most, Secretary of Education Arne Duncan has noted: "[For-profit] colleges must be a stepping stone to the middle class. But too many hard-working students find themselves buried in debt with little to show for it."[57] In announcing the new rule, Secretary Duncan stated that the regulations are a "necessary step to ensure that colleges accepting federal funds protect students, cut costs and improve outcomes."[58] Supporting these goals, the 2014 Regulation will impact a significant number of for-profit college students; an estimated 840,000 students attend for-profits that would not pass under the new regulations.[59]

As with any regulation that could lead to school closures, one worry with placing restrictions on Title IV funding is that it would also limit student access to postsecondary educational opportunities and force historically underrepresented communities, in particular low-income and minority students, to forego college altogether.[60] While it

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[52] *Id.*

[53] U.S. DEP'T OF EDUC., FACT SHEET ON FINAL GAINFUL EMPLOYMENT REGULATIONS (2014), http://www2.ed.gov/policy/highered/reg/hearulemaking/2012/gainful-employment-fact-sheet-10302014.pdf [https://perma.cc/RHP5-EWWR].

[54] Miller, *supra* note 48.

[55] *Id.* Under the 2010 Regulation, a for-profit had to fail three times in a four-year period to lose eligibility and there was no warning zone concept. *Id.*

[56] *Id.*

[57] Press Release, U.S. Dep't of Educ., *supra* note 8.

[58] *Id.*

[59] James Marshall Crotty, *Obama Tightens Screws on For-Profit Colleges*, FORBES (Oct. 30, 2014, 7:17 AM), http://www.forbes.com/sites/jamesmarshallcrotty/2014/10/30/new-gainful-employment-rules-tighten-screws-on-for-profit-colleges [https://perma.cc/BH8B-FH2J?type=pdf].

[60] *See* Press Release, Ass'n of Private Sector Colls. & Univs., U.S. Department of Education Regulation Denies Access to Millions of New Traditional Students (Oct. 30, 2014), http://www

is certainly possible that the 2014 Regulation could have an adverse effect on the educational attainment of underprivileged communities, these concerns are often overstated and actually counterproductive to the interests of the students attending these institutions. First, there are a number of reasons to believe that the 2014 Regulation will result in a shift in enrollment to other for-profit colleges and community colleges[61] rather than a decrease in total enrollment. While access may be limited in the short term, some researchers anticipate positive long-term effects: students, they expect, will adapt and transfer to higher performing institutions rather than exit the postsecondary education market completely.[62] Additionally, the capacity of the for-profit sector is rapidly expanding and could accommodate displaced students.[63] And, second, even if the new regulations restrict access, it is far better for some students to forego postsecondary education opportunities than to attend one of these failing institutions that provide little to no benefit. Considering a staggering dropout rate[64] and minimal wage

.career.org/news-and-media/press-releases/us-department-of-education-regulation-denies-access-to -millions-of-new-traditional-students.cfm [http://perma.cc/D5NS-HNKQ]; *The Gainful Employment Regulation: Limiting Job Growth and Student Choice: Joint Hearing Before the Subcomm. on Regulatory Affairs, Stimulus Oversight & Gov't Spending of the H. Comm. on Oversight & Gov't Reform and the Subcomm. on Higher Educ. & Workforce Training of the H. Comm. on Educ. & the Workforce*, 112th Cong. 49–50 (2011) (statement of Harry C. Alford, President & CEO, National Black Chamber of Commerce).

61 *See* Stephanie Riegg Cellini, *For-Profit Higher Education: An Assessment of Cost and Benefits*, 65 NAT'L TAX J. 153, 157 (2012) (stating that for-profit colleges and community colleges compete for students); Anna S. Chung, *Choice of For-Profit College*, 31 ECON. EDUC. REV. 1084, 1089 (2012) (suggesting that the population of students at for-profit institutions is highly mobile across educational options). *But see* Joe Nocera, *Why We Need For-Profit Colleges*, N.Y. TIMES (Sept. 16, 2011), http://www.nytimes.com/2011/09/18/magazine/why-we-need-for-profit-colleges .html (contending that for-profit colleges and community colleges are not substitute goods and that for-profit colleges are better equipped to meet the needs of certain types of students).

62 *See* MAC TAYLOR, LEGISLATIVE ANALYST'S OFFICE, AN ANALYSIS OF NEW CAL GRANT ELIGIBILITY RULES 12 (2013), http://www.lao.ca.gov/reports/2013/edu/new-cal-grant /new-cal-grant-010713.pdf [http://perma.cc/H58H-GC2B] (expressing the belief that imposing a maximum cohort default rate of 15.5% will have little effect on access in the long term).

63 *See* Program Integrity: Gainful Employment, 79 Fed. Reg. 64,890, 65,083 tbl.3.8 (Oct. 31, 2014) (to be codified at 34 C.F.R. pts. 600, 668) (projecting the number of passing programs to nearly double by 2024 as the current expansion of the for-profit sector continues). These institutions have been particularly responsive to increased demands from the education market, utilizing innovative practices like distance learning to provide additional services to meet the increasing demand. *See* Cellini, *supra* note 61, at 156.

64 *See* MAMIE LYNCH ET AL., THE EDUC. TRUST, SUBPRIME OPPORTUNITY: THE UNFULFILLED PROMISE OF FOR-PROFIT COLLEGES AND UNIVERSITIES 2–3 (2010), http://files.eric.ed.gov/fulltext/ED513339.pdf [http://perma.cc/PC6R-7KWS] (noting that only 22% of students seeking bachelor's degrees at for-profit colleges complete their programs within six years compared to 55% at public colleges). Across the higher education spectrum, individuals who start but fail to complete a program appear to obtain virtually no benefits, and perhaps even suffer some harm in the form of stigmatization. *See* Melissa Korn, *A Bit of College Can Be Worse Than None at All*, WALL ST. J. (Oct. 13, 2014, 12:10 PM), http://www.wsj.com/articles/a-bit-of -college-can-be-worse-than-none-at-all-1413158511 [http://perma.cc/S52B-XN7H].

premium,[65] attendance at a for-profit institution that fails the debt-to-earnings ratio will likely fail to provide a student with sufficient return on her investment to overcome the opportunity cost and debt burden incurred in the process.[66] The view of education as a vehicle for social improvement not only requires access to educational opportunities but also mandates that those opportunities meaningfully develop the skills students need to succeed in society.[67] Along that dimension, any restrictions on access brought on by the 2014 Regulation would likely benefit low-income and minority students because the for-profit institutions that would be most harmful to their financial and employment interests would be forced to ensure that their students are prepared and able to find jobs that will allow them to service their loan debt.

II. REFORM OF INDIVIDUAL BANKRUPTCY DOCTRINE

While the ex ante regulations adopted by the Department work to protect students from matriculating at some failing for-profit institutions, they do not completely eliminate the need for more robust retrospective relief for debtors who find themselves at underperforming institutions that have retained Title IV eligibility.[68] This Part advocates for a loosening of the judicial standards governing dischargeability of debt in individual bankruptcy proceedings to complement the tightening of access to federal funding. The standard controlling discharge of student loans in bankruptcy court is nearly two decades old. With rising tuition costs and fiercer competition among graduates for employment, it is not difficult to imagine why this restrictive standard has

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[65] *See* Rajeev Darolia et al., *Do Employers Prefer Workers Who Attend For-Profit Colleges? Evidence from a Field Experiment* 19–20 (RAND Working Paper Series, Paper No. WR-1054, 2014), http://www.rand.org/content/dam/rand/pubs/working_papers/WR1000/WR1054/RAND_WR1054.pdf [http://perma.cc/WH8M-3A3U]; Kevin Lang & Russell Weinstein, *Evaluating Student Outcomes at For-Profit Colleges* 25 (Nat'l Bureau of Econ. Research, Working Paper No. 18201, 2012), http://www.nber.org/papers/w18201.pdf [http://perma.cc/FUS4-8H67].

[66] *See* Stephanie Riegg Cellini & Latika Chaudhary, *The Labor Market Returns to a For-Profit College Education*, 43 ECON. EDUC. REV. 125, 138 (2014) (noting that, while the optimistic calculations show that graduates of a two-year for-profit earn a 7% per-year return, this number falls short of the 8.5% per-year return needed to cover the full private costs of attendance).

[67] *See* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1501–03 (2007). *See generally* Amy L. Moore, *When Enough Isn't Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts*, 41 U. TOL. L. REV. 545, 560–75 (2010) (discussing the second wave of education litigation and its emphasis on adequacy rather than equity).

[68] Many commentators have criticized the final version of the regulations for being watered down and doubt its ability to truly filter out the worst for-profit colleges. *See, e.g.*, David Halperin, *New Gainful Employment Rule Is Weak, but Predatory For-Profit Colleges Remain on the Ropes*, HUFFINGTON POST (Dec. 29, 2014, 5:59 AM), http://www.huffingtonpost.com/davidhalperin/new-gainful-employment-ru_b_6072470.html [http://perma.cc/4Z5V-8U7M].

been referred to as "a relic of times long gone."[69] Here, this Note argues that more robust ex ante regulation of access to Title IV funds provides courts with leeway or justification to overturn precedent that makes it difficult for debtors to obtain meaningful relief.

A. Undue Hardship and the Current Approach to Discharge

Under the discharge provision of Chapter 7 of the Bankruptcy Code,[70] individuals are generally presumed to be able to discharge their debts in a bankruptcy proceeding.[71] This presumption, however, does not extend to debt from educational loans.[72] Under § 523(a)(8) of the Bankruptcy Code, student loans are presumed not to be dischargeable if "made, insured, or guaranteed by a governmental unit, or made under any program funded . . . by a governmental unit."[73] Currently, the Code only provides for an exception to this general presumption when not allowing discharge would "impose an undue hardship on the debtor and the debtor's dependents."[74] But Congress did not define "undue hardship" in any of the bankruptcy statutes.

Therefore, in the absence of clear congressional guidance, the burden has fallen on the courts to interpret the scope of this exception. The most popular interpretation of undue hardship was first articulated by the Second Circuit in *Brunner v. New York State Higher Education Services Corp.*[75] Following *Brunner*, a majority of courts apply a three-part test to determine undue hardship:

> (1) that the debtor cannot maintain . . . a 'minimal' standard of living . . . if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant por-

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[69] Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 920 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring).

[70] 11 U.S.C. § 727 (2012).

[71] *See* Robert B. Milligan, Comment, *Putting an End to Judicial Lawmaking: Abolishing the Undue Hardship Exception for Student Loans in Bankruptcy*, 34 U.C. DAVIS L. REV. 221, 227 (2000). There is, however, a limitation on this general presumption: Congress separately provided that, as a matter of policy, certain debts such as unpaid taxes and child support could not be discharged under Chapter 7. *See* 11 U.S.C. § 523; *see also* Milligan, *supra*, at 227.

[72] Originally, the presumption in favor of dischargeability extended to student loan debt just as it did for most other debt. *See* Kurt Wiese, Note, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of "Undue Hardship,"* 26 ARIZ. L. REV. 445, 446 (1984). However, with regard to student loan debt, the presumption flipped during the 1970s, partially in response to worries that student loan borrowers were abusing bankruptcy laws to discharge their debts. *See id.*

[73] 11 U.S.C. § 523(a)(8)(A)(i).

[74] *Id.* § 523(a)(8). This same undue hardship exception has also been extended by statute to Chapter 13 bankruptcy proceedings. *See* Student Loan Default Prevention Initiative Act of 1990, Pub. L. No. 101-508, § 3007(b), 104 Stat. 1388-25, 1388-28.

[75] 831 F.2d 395 (2d Cir. 1987) (per curiam); *see also* Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 373 (2013).

tion of the repayment period . . . ; and (3) that the debtor has made good faith efforts to repay the loans.[76]

The *Brunner* test has been adopted in all but four of the federal circuits.[77] Yet several commentators have criticized the application of the *Brunner* test as both overly harsh[78] and lacking uniformity.[79]

The former of these two characteristics is by design. The district court in *Brunner* deliberately articulated a standard that would prove difficult to overcome.[80] Many of the courts that have embraced *Brunner* have interpreted the test as requiring a "certainty of hopelessness" in a debtor's ability to repay the loan before finding undue hardship and allowing student loans to be discharged.[81] For many courts, the second prong of the *Brunner* test can only be satisfied by extreme circumstances like permanent illness or disability.[82] In effect, judicial interpretation of this provision of the Bankruptcy Code has produced an inflexible barrier to discharging student loan debt for many individuals who seek bankruptcy not as a means of duping the government but as a means of overcoming a legitimate inability to repay their debts.

In part, the stringent *Brunner* interpretation of the undue hardship exception has been guided by a belief that the judiciary needed to act as a tough obstacle in order to protect the federal loan program. The district court in *Brunner* understood this seemingly "draconian" barrier as "plainly serv[ing] the purposes of the guaranteed student loan program."[83] In explaining this view, the court portrayed the federal government as a vulnerable entity dispensing funds without consideration of the likelihood of repayment. Unlike private commercial lenders, the

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[76] *Brunner*, 831 F.2d at 396.

[77] *See* G. Michael Bedinger VI, Note, *Time for a Fresh Look at the "Undue Hardship" Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1830 (2014).

[78] *See, e.g.*, Robert F. Salvin, *Student Loans, Bankruptcy, and the Fresh Start Policy: Must Debtors Be Impoverished to Discharge Educational Loans?*, 71 TUL. L. REV. 139, 164 (1996).

[79] *See, e.g.*, Milligan, *supra* note 71, at 261–62; Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 412 (2005).

[80] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 46 B.R. 752, 756 (S.D.N.Y. 1985) ("The effect of these requirements is to make student loans a very difficult burden to shake without actually paying them off.").

[81] *See, e.g.*, Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005); *In re* Roberson, 999 F.2d 1132, 1136 (7th Cir. 1993); *see also* Richard Fossey, *"The Certainty of Hopelessness:" Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, J.L. & EDUC., July 1997, at 29, 36. However, some courts have moved away from the view that the *Brunner* test requires such hopelessness. *See, e.g.*, King v. Vt. Student Assistance Corp. (*In re* King), 368 B.R. 358, 368–69 (Bankr. D. Vt. 2007) (viewing adherence to the certainty of hopelessness standard as "misplaced," *id.* at 368); Salinas v. United Student Aid Funds, Inc. (*In re* Salinas), 240 B.R. 305, 313 n.15 (Bankr. W.D. Wis. 1999), *rev'd*, 262 B.R. 457 (W.D. Wis. 1999) (rejecting the need for a "draconian" standard as suggested in *Brunner*).

[82] *Oyler*, 397 F.3d at 386.

[83] *Brunner*, 46 B.R. at 756.

federal government does not tailor the terms of each loan to reflect the personalized risk of an individual seeking Title IV loans.[84] The virtual inability to discharge student loan debt was viewed as part of the bargain struck with a Congress that provided federal loans with limited government oversight and seemingly without regard to the risk of default.[85] This understanding of the federal loan program may have accurately reflected the regulatory regimes that existed at the time of *Brunner* and warranted the restrictive understanding of "undue hardship."

B. Against the Current "Undue Hardship" Approach

But since *Brunner* was decided in 1985, the regulatory landscape has changed considerably. It was not until 1990 in the Student Loan Default Prevention Initiative Act[86] (SLDPIA) that Congress amended the HEA to include the cohort default rate as a restriction on access to funding.[87] For the first time, the Department limited an institution's access to the federal loan program based in part on the number of its graduates successfully repaying their student loan debt.[88] Instead of conducting an individualized assessment of repayment risk for each loan applicant, the Department began to examine the aggregate repayment risk of institutions' loan portfolios. In this way, the government's behavior began to simulate that of commercial lenders to a degree.

Similarly, the 2014 Regulation moved the government a step closer toward commercial lending practices. First, the debt-to-earnings requirement in the October 2014 regulations considers exactly what the *Brunner* court assumed the government as a lender could not: likelihood of repayment. The new regulations provide a more sophisticated measure of risk assessment than previous regulations. Unlike the cohort default rates, which simply measured the number of students avoiding default, the gainful-employment requirement actually looks at the expected ability of a graduate to actively repay loan debt based

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[84] *See id.* ("When making such loans, the government (as guarantor) is unable to behave like ordinary commercial lenders . . . . It offers loans at a fixed rate of interest, and it does so almost without regard for creditworthiness."); Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 565–66 (2013).

[85] *See* DeRose v. EFG Techs. & Educ. Credit Mgmt. Corp. (*In re* DeRose), 316 B.R. 606, 609 (Bankr. W.D.N.Y. 2004) ("Congress purposefully granted a benefit to a student for which, in return, both the educational loan and bankruptcy statutes require the student debtor to bear the risks and burdens . . . .").

[86] Pub. L. No. 101-508, §§ 3001–3008, 104 Stat. 1388-25, 1388-25 to -29 (1990) (codified in scattered sections of 11 and 20 U.S.C.).

[87] *See* John H. Robinson & Mary Elizabeth Huber, *The Law of Higher Education and the Courts: 1993 in Review*, 21 J.C. & U.L. 157, 228–29 (1994).

[88] *See id.*; Simkovic, *supra* note 84, at 562–63.

on earnings and disposable income. This practice of using the ratio of income to debt burden is similar to the underwriting standards employed in mortgage lending decisions.[89] In that context, lenders make decisions about whether to underwrite a mortgage based in part on the percentage of monthly income consumed by debt payments.[90] Here, the Department of Education has likewise decided to limit the access of for-profit institutions to Title IV funding under a similar rationale. And the actual ratios and percentages of the debt-to-earnings requirement can function as a more objective filter than the first prong of the *Brunner* test. By looking at loan payments as a percentage of discretionary income and annual earnings, the Department has in part quantified the subjective "minimal standard of living" analysis in *Brunner*.[91] The shift toward greater regulation of the for-profit education sector shows that Title IV funding will not be distributed without consideration of the risk of default.

C. Alternatives to a Narrow Brunner *Interpretation*

In light of more robust ex ante regulation of access to Title IV funds, the various circuits that have embraced the *Brunner* test for undue hardship should adopt a less restrictive interpretation of § 523(a)(8) in the context of contemporary for-profit institutions. Courts could either apply the existing *Brunner* analysis but embrace a more lenient "undue hardship" test by adjusting its second prong or abandon *Brunner* entirely in favor of a totality-of-circumstances test.

If courts elect to work within the existing *Brunner* framework, they should consider the educational benefits actually obtained by a student in assessing whether an individual debtor's inability to meet his or her loan obligations is likely to persist for the foreseeable future. The primary source of *Brunner*'s inflexibility in many courts is the narrow construction of the "additional circumstances" requirement, which excludes consideration of educational benefit.[92] Allowing consideration of quality of education at a for-profit institution is not inherently incompatible with the second prong of the *Brunner* analysis. In fact, the Ninth Circuit, which continues to follow *Brunner* (although with res-

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[89] *See* SANDY BAUM & SAUL SCHWARTZ, COLL. BD., HOW MUCH DEBT IS TOO MUCH? DEFINING BENCHMARKS FOR MANAGEABLE STUDENT DEBT 2–3 (2006), http://research.collegeboard.org/sites/default/files/publications/2012/9/researchinreview-2006-12-benchmarks-manageable-student-debt.pdf [http://perma.cc/6475-K3TZ].

[90] *See id.*

[91] *See* Milligan, *supra* note 71, at 261–62 (describing the inquiry into an individual's minimal needs as giving "judges unbridled discretion to factor their personal values and sensitivities into these determinations," *id.* at 261).

[92] *See, e.g.*, *In re* Roberson, 999 F.2d 1132, 1137 (7th Cir. 1993); Mathews v. Higher Educ. Assistance Found. (*In re* Mathews), 166 B.R. 940, 943 n.3 (Bankr. D. Kan. 1994); Sands v. United Student Aid Funds, Inc. (*In re* Sands), 166 B.R. 299, 310 n.19 (Bankr. W.D. Mich. 1994).

ervations[93]), allows for consideration of "[p]oor quality of education" and "[l]ack of usable or marketable job skills" as objective factors influencing a court's evaluation of a debtor's ability to repay his or her loan in the future.[94] With this expanded notion of undue hardship, it is no surprise that the bankruptcy courts of the Ninth Circuit have been a friendlier forum for students seeking discharge of loan debts.[95] Furthermore, the notion that "additional circumstances" must be entirely beyond the control of the debtor[96] seems to be less compelling in an economic climate that coerces unskilled workers to pursue overpriced postsecondary education.[97] By including factors such as quality of education and type of degree program attended, the *Brunner* test would be more open to debtors suffering real hardship as a result of valueless degrees from for-profit institutions.

For courts willing to abandon *Brunner* completely,[98] an alternative approach could be a more widespread adoption of the "totality-of-circumstances" test embraced by the Eighth Circuit[99] and an assortment of district and bankruptcy courts.[100] Under that analysis, the bankruptcy court looks at "(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

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[93] *See* Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 922–23 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring).

[94] *See, e.g.*, Educ. Credit Mgmt. Corp. v. Nys (*In re* Nys), 446 F.3d 938, 947 (9th Cir. 2006) (quoting Nys v. Educ. Credit Mgmt. Corp. (*In re* Nys), 308 B.R. 436, 446–47 (B.A.P. 9th Cir. 2004)).

[95] *See, e.g.*, Batdorf v. Sallie Mae & Direct Loan SVC Sys. (*In re* Batdorf), No. 13–22960–C–7, 2014 WL 5100228, at *3–4 (Bankr. E.D. Cal. Sept. 30, 2014) (expressing that "[t]he court is sympathetic" to students and their plight, *id.* at *3); Cota v. U.S. Dep't of Educ. (*In re* Cota), 298 B.R. 408, 418–19 (Bankr. D. Ariz. 2003) (finding the second prong satisfied in part due to "the lack of any economic benefit," *id.* at 418, to the debtor in question).

[96] *See* Oyler v. Educ. Credit Mgmt. Corp. (*In re* Oyler), 397 F.3d 382, 386 (6th Cir. 2005) ("[M]ost importantly, [additional circumstances] must be beyond the debtor's control, not borne of free choice.").

[97] *Cf.* ELAINE L. CHAO ET AL., U.S. DEP'T OF LABOR, ADULT LEARNERS IN HIGHER EDUCATION 3 (2007), http://files.eric.ed.gov/fulltext/ED497801.pdf [http://perma.cc/R6FV-8877] (discussing a global economy that "demands higher levels of academic and technical knowledge, as well as other skills such as good communication and problem-solving abilities").

[98] Unlike when *Brunner* was decided, the presumption against discharge continues indefinitely as opposed to the five-year limitation under previous iterations of the statute. *See Batdorf*, 2014 WL 5100228, at *3 ("The question is what type of demonstration is required of 'undue hardship' when the only way out ever is undue hardship. It seems that the latter question is a far different question tha[n] what was before the courts in *Brunner* and that the perpetuation of the *Brunner* test is not appropriate or, at a minimum, needs to be re-calibrated.").

[99] *See* Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 705 (8th Cir. 1981).

[100] *See, e.g.*, Kopf v. U.S. Dep't of Educ. (*In re* Kopf), 245 B.R. 731, 739–41 (Bankr. D. Me. 2000).

bankruptcy case."[101] This case-by-case analysis permits a more open-ended inquiry into claims of undue hardship than the traditional *Brunner* test permits.[102] First, the "totality-of-circumstances" test could leave room for courts to distinguish loan debt at for-profit institutions from other educational loan debt. Taking into consideration the unique positions of graduates of ineffective vocational schools, some courts have already begun to call for a standard that accounts for the circumstances giving rise to these graduates' overwhelming loan burdens.[103] Second, this more flexible approach allows for a middle ground between the restrictive interpretations of "undue hardship" and a return to the presumption that student loans are dischargeable like any other debt. But a more flexible standard does not necessarily mean courts must, or will, begin to discharge student debt in a fashion hazardous to the federal loan program. Judicial discretion in bankruptcy is and should remain a fundamental aspect of discharging debt of all types.[104] In that light, rethinking the narrow *Brunner* analysis can be understood as freeing up discretion from dated doctrinal standards and allowing broader bankruptcy principles of fairness and equity to guide judicial decisionmaking.

III. Reform of Institutional Bankruptcy Statutes

In addition to utilizing bankruptcy doctrine to allow students to discharge their educational debt, the Department of Education should consider more readily allowing for-profit institutions to go bankrupt in order to mitigate students' loan burdens. This Part looks to institutional bankruptcy as a means of protecting the financial interests of enrollees at for-profits and questions the Department of Education's reluctance to support such bankruptcies. Given that failing the gainful-employment test would result in loss of Title IV eligibility — upon which many for-profits are heavily dependent — allowing the bankruptcy of a school that repeatedly graduated students who could not meet the debt-to-earnings ratio would seem to fall in line with the intent of the rule. Under current regulations, if a school closes, students with federal loans are eligible to have them discharged if they

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[101] Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2003).

[102] *See id.* (noting that the court "prefer[s] a less restrictive approach to the 'undue hardship' inquiry" that *Brunner* provides).

[103] *See* Roth v. Educ. Credit Mgmt. Corp. (*In re* Roth), 490 B.R. 908, 922–23 (B.A.P. 9th Cir. 2013) (Pappas, J., concurring) ("It would seem that in this new, different environment, in determining whether repayment of a student loan constitutes an undue hardship, a bankruptcy court should be afforded flexibility to consider all relevant facts about the debtor and the subject loans. But *Brunner* does not allow it.").

[104] *See* Durrani v. Educ. Credit Mgmt. Corp. (*In re* Durrani), 311 B.R. 496, 509 (Bankr. N.D. Ill. 2004); *see also* 11 U.S.C. § 523(a)(8) (2012).

meet certain criteria.[105] Students who have private loans may also be eligible to have them discharged if the private lender has a procedure for the discharge or if their state provides school-closure assistance.[106] As such, school closures can have a positive impact on the financial situation of students who have attended institutions that were closed due to losing eligibility for Title IV funding under the gainful-employment regulation.

A. The Effect of Bankruptcy on For-Profit Institutions

Under the 1992 amendments to the Higher Education Act, institutions of higher learning that file for bankruptcy are ineligible for Title IV funds.[107] This change was made to remedy the waste, fraud, and abuse that were found in the for-profit higher education sector in the period prior to the reauthorization of the Higher Education Act.[108] A congressional investigation found that for-profit institutions could utilize bankruptcy protection as a means to shield themselves from regulatory actions.[109] Following the amendment's passage, the Department of Education promulgated regulations to carry out the statute's provisions.[110] The rule not only encompasses the institutions of higher learning themselves but their management companies as well.[111]

For most postsecondary institutions, federal financial aid is a significant portion of their revenue. In fiscal year 2013, federal grants and loans received under Title IV accounted for an average of 71.5% of the revenues among Title IV–eligible for-profit institutions.[112] Given this reliance on federal financial aid, losing Title IV eligibility for three years would force many postsecondary programs to file for bankruptcy. Once the institution files for bankruptcy, the Office of Postsecond-

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[105] *See* 34 C.F.R. § 685.214 (2014).

[106] *See* Rohit Chopra, *What Happens to Your Student Loans If Your School Is Shut Down*, CONSUMER FIN. PROTECTION BUREAU (July 2, 2014), http://www.consumerfinance.gov/blog/what-happens-to-your-student-loans-if-your-school-is-shut-down [http://perma.cc/YDY6-A95D].

[107] *See* 20 U.S.C. § 1002(a)(4)(A) (2012).

[108] *See* S. REP. NO. 102-58, at 1–2 (1991).

[109] Specifically, the investigators heard testimony that revealed that for-profit institutions going through bankruptcy proceedings were still admitting students who were taking out federal loans to pay tuition. *Id.* at 19.

[110] *See* 34 C.F.R. § 600.7; *see also* Aaron Lacey, *Why Colleges in Bankruptcy Should Have Access to Federal Financial Aid*, THOMPSON COBURN, LLP (Oct. 7, 2014), http://www.thompsoncoburn.com/news-and-information/regucation/blog/14-10-07/why-colleges-in-bankruptcy-should-have-access-to-federal-financial-aid.aspx [http://perma.cc/TY3G-J899].

[111] 34 C.F.R. § 600.7(a)(2). The ineligibility for federal financial aid funds is effective as of the date of the bankruptcy, and once an institution loses its eligibility, the loss is permanent. 2 DEP'T OF EDUC., FEDERAL STUDENT AID HANDBOOK 2014–2015, at 11 (2014), http://ifap.ed.gov/fsahandbook/attachments/1415FSAHbkVol2Ch1.pdf [http://perma.cc/5GS9-DGMF].

[112] Calculations were made using data from the Department of Education. *See* U.S. DEP'T OF EDUC., 90/10 REPORT 2012–2013 (2014), https://studentaid.ed.gov/sites/default/files/fsawg/datacenter/library/9010Report20122013.xls [https://perma.cc/J2L6-Z5QK].

ary Education Identification (OPEID) number that signifies the organization's status as a Title IV–eligible institution becomes obsolete.[113] This number, which would be one of the closing institution's most valuable assets, becomes "essentially worthless" and makes finding a willing buyer extremely difficult and closure likely.[114]

Given for-profit institutions' heavy reliance on federal aid, the 2014 Regulation has the potential to cause bankruptcies at for-profits throughout the country since the rule will revoke Title IV eligibility for institutions that fail to meet the debt-to-earnings ratio.[115] As such, the 2014 Regulation could be the catalyst for institutional bankruptcies that could help the least financially capable students. The bankruptcy-related school closures and the subsequent access to closed-school discharges could help for-profit students handle debt incurred from educations that did not prepare them for gainful employment.

B. The Department of Education's Approach to Institutional Bankruptcy

Despite the benefits that students would receive if their for-profit college failed the debt-to-earnings ratio, the Department of Education is not likely to allow an institution to simply shut its doors without intervening in the process. Rather, the Department's policy is geared toward preventing for-profit institution bankruptcies since they lead to closures.[116]

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113 Andrew Scurria, *For-Profit Colleges Unlikely to See Ch. 11 Fix Soon*, LAW360 (Oct. 9, 2014, 8:10 PM), http://www.law360.com/articles/581446/for-profit-colleges-unlikely-to-see-ch-11-fix-soon [https://perma.cc/C4U4-EW6R].

114 *Id.*

115 Large for-profit institutions have been in danger of shutting down when the Department of Education has withheld federal funds. *See* Karen Weise, *The For-Profit College That's Too Big to Fail*, BLOOMBERG BUSINESSWEEK (Sept. 25, 2014), http://www.businessweek.com/articles/2014-09-25/corinthian-colleges-for-profit-and-too-big-to-fail [http://perma.cc/KD8E-7HPS] [hereinafter Weise, *Too Big to Fail*]. Even the threatened withholding of federal aid has placed for-profits in precarious financial positions. *See* John Lauerman & Janet Lorin, *ITT Educational Scrutiny Spreads to College's Lenders*, BLOOMBERG BUS. (Aug. 7, 2014, 6:26 PM), http://www.bloomberg.com/news/articles/2014-08-07/itt-educational-scrutiny-from-u-s-regulators-joined-by-lenders [http://perma.cc/TD72-J4EY]; *see also* Karen Weise, *S&P Says Weakened For-Profit Colleges Have a Grim Future*, BLOOMBERG BUS. (Aug. 27, 2014), http://www.bloomberg.com/bw/articles/2014-08-27/weak-student-outcomes-threaten-for-profit-schools-says-s-and-p [http://perma.cc/MTH8-ARLQ].

116 *See* Paul Fain, *Fallen Giant*, INSIDE HIGHER ED (June 26, 2014), https://www.insidehighered.com/news/2014/06/26/corinthians-failure-and-us-role-it-fuels-profit-critics [https://perma.cc/QSF5-2HLN] (noting that the Department of Education and officials from the for-profit institution Corinthian Colleges were in "[i]ntensive negotiations" to prevent the education company's schools from closing). Protecting for-profits from closure is actively pursued when the number of enrollees is high. *See* Karen Weise, *It's Hard to Shut Down a Poorly Performing For-Profit College*, BLOOMBERG BUS. (July 2, 2014), http://www.bloomberg.com/bw/articles/2014-07-02/why-the-government-is-struggling-to-shut-down-corinthian-colleges [http://perma.cc/4WH7-NRN7]. To do so, the Department may look to support for-profit education companies' attempts

This approach was most recently seen in the proposed sale of Corinthian Colleges, a postsecondary education company that operates for-profit institutions with nearly 72,000 students.[117] More than four years ago, the Government Accountability Office found Corinthian to be one of fifteen for-profit institutions that engaged in fraudulent practices in the enrollment and financial aid process.[118] In June 2014, the Department of Education subjected Corinthian to an increased level of financial oversight and withheld its access to $1.4 billion in federal student aid that Corinthian received annually from the Department — more than 80% of the for-profit institution's total annual revenue.[119] Corinthian announced that the twenty-one day withholding would lead to its dissolution and sought financial relief from the Department.[120] In response, the Department gave Corinthian $16 million in student aid so the company could keep its schools open until it could sell them or close them down after classes were completed.[121] In November 2014, the company agreed to sell fifty-six of its campuses to the ECMC Group.[122] This plan was part of Corinthian's effort to sell its eighty-five U.S. and ten Canadian campuses, while closing twelve others.[123]

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to sell their assets to other organizations, which would operate the acquisitions as new higher-education institutions or programs and accept the students and their credits. *See* Weise, *Too Big to Fail*, *supra* note 115.

[117] Weise, *Too Big to Fail*, *supra* note 115.

[118] Tamar Lewin, *Senator to Review Accreditation of For-Profit Colleges*, N.Y. TIMES, Aug. 4, 2010, http://www.nytimes.com/2010/08/05/education/05hearing.html; *see also Hearing*, *supra* note 37, at 10 (statement of Kutz). Many of the nation's largest for-profits engage in fraudulent behavior and misrepresentations in order to maximize their revenue flow. *See* SENATE HEALTH, EDUC., LABOR & PENSIONS COMM., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS, pt. II (2012), http://www.gpo.gov/fdsys/pkg/CPRT-112SPRT74931/pdf/CPRT-112SPRT74931.pdf [http://perma.cc/4DJW-4GDA]. Despite these findings, Corinthian continued to enroll thousands of students who took out thousands of dollars in loans to pay for their education. Danielle Douglas-Gabriel, *How Dozens of Failing For-Profit Schools Found an Unlikely Savior: A Debt Collector*, WASH. POST (Nov. 28, 2014), http://www.washingtonpost.com/business/economy/how-dozens-of-failing-for-profit-schools-found-an-unlikely-savior-a-debt-collector/2014/11/28/c3ea8218-7411-11e4-a589-1b102c2f81d0_story.html [http://perma.cc/L9Q5-SX9J].

[119] Douglas-Gabriel, *supra* note 118.

[120] *See* Weise, *supra* note 116.

[121] Douglas-Gabriel, *supra* note 118.

[122] Michael Stratford & Paul Fain, *Corinthian's Nonprofit Buyer*, INSIDE HIGHER ED (Nov. 21, 2014), https://www.insidehighered.com/news/2014/11/21/guaranty-agency-buys-most-crumbling-profit-corinthian-colleges-us [https://perma.cc/L4D7-PYT8]. ECMC is a nonprofit organization that runs one of the largest student loan debt collection practices in the country. *Id.* ECMC will create the Zenith Education Group, a nonprofit subsidiary, to run the campuses, which enroll more than 39,000 students. *Id.*

[123] *Id.*

Under the arrangement, federal student loans were not eligible for forgiveness,[124] which would have discharged at least $30 million in student loans at the campuses that ECMC plans to buy.[125] In a situation where Corinthian had found no buyer for its campuses and been forced to shut them down due to bankruptcy, students would have been eligible for the cancellation of the more than $1 billion in federal loans used to fund their educations.[126]

The Department's intervention did little to support the financial needs of Corinthian's students — a full thirty-five percent of whom are from households with incomes under $10,000.[127] If a student attends a school that is sold rather than closed, he or she is ineligible for a loan discharge even if the purchasing entity no longer offers the program of study he or she had been pursuing.[128] This result highlights the problem that such an arrangement poses: it does little more than reshuffle the deck chairs of the *Titanic*. Unless a school closes, many students are in the same negative financial position they were before the asset sale. Allowing institutions that do not prepare their students for gainful employment to go bankrupt and close would better help those students who attend for-profits that could not pass the 2014 Regulation than pursuing alternatives that prevent loan forgiveness. As one consumer protection advocate noted, "[i]f [Corinthian College's campuses] had closed as a result of bankruptcy, those students could have had their loans forgiven."[129]

The Department justifies its intervention as a means to avoid the "disruption and displacement"[130] of the vulnerable for-profit student population.[131] This justification presumes that it is better for the enrollees to continue to finance an education that may not lead to gainful

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[124] *See* Douglas-Gabriel, *supra* note 118. Students that Corinthian steered into taking high-interest private loans known as Genesis loans will have their debts forgiven, *see id.*, which would amount to approximately $4 million in forgiveness, *see* Stratford & Fain, *supra* note 122.

[125] Paul Fain, *Best of a Bad Situation?*, INSIDE HIGHER ED (Dec. 9, 2014), https://www.insidehighered.com/news/2014/12/09/feds-respond-criticism-bid-ecmc-buy-most-corinthian [https://perma.cc/Z52W-TLME]. Officials at the Treasury Department note that this figure is an estimate and that it is difficult to project the costs of loan discharges given the unpredictability regarding the number of students who would file for loan discharges. *Id.*

[126] *See* Paul Fain, *Controlled Crash?*, INSIDE HIGHER ED (June 30, 2014), https://www.insidehighered.com/news/2014/06/30/corinthians-failure-could-cost-federal-government-12-billion [https://perma.cc/FVL6-MYPJ].

[127] Fain, *supra* note 125.

[128] *See* Chopra, *supra* note 106.

[129] Douglas-Gabriel, *supra* note 118 (quoting Robyn Smith, a lawyer at the National Consumer Law Center) (internal quotation marks omitted).

[130] Ted Mitchell, *A Bold New Plan to Protect Students*, HOMEROOM (Dec. 5, 2014), http://www.ed.gov/blog/2014/12/a-bold-new-plan-to-protect-students [http://perma.cc/KZ63-MPQ8].

[131] Fain, *supra* note 125 ("'Pulling the rug out from under them under any circumstances would be problematic,' [Undersecretary of Education Ted] Mitchell said of the affected students. 'This is a very vulnerable population of learners.'").

employment than to receive loan forgiveness.[132] But this reasoning runs counter to the consequences of the enforcement of the 2014 Regulation. If 2014 Regulation–related bankruptcies were problematic, the Department would not have promulgated a rule that all but forces poorly performing schools to file for bankruptcy. As such, it seems that the regulation supports the shutting down of schools that cannot comply.

While the Department is concerned about students finishing their educations, it is also weary of paying for loan forgiveness.[133] Such an economic calculation has a harmful impact on the students who attended failing programs and will not allow them to claim restitution for the time spent pursuing a fruitless credential. Furthermore, it misdiagnoses the problem: it would be a waste of taxpayer dollars to continue to provide federal aid to institutions whose graduates have a likely chance of default. Indeed, by denying Title IV funds to for-profit institutions that declare bankruptcy due to failing the debt-to-earnings ratio test but then supporting those institutions' asset sales, the Department of Education permits taxpayer funds to continue to go to institutions that have failed their students, putting those students and others that may attend at risk of default.[134]

As such, the Department's current policy toward for-profits' bankruptcies is flawed. It values the wrong metrics in determining how to handle for-profits that are both harming their students and failing financially. Instead of prevention, the Department should support for-profit school closures that result from bankruptcy; especially if the bankruptcy is due to the 2014 Regulation's revocation of Title IV eligibility.[135]

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[132] This argument mirrors the concerns that have been expressed about the 2014 Regulation generally limiting access to education for vulnerable students. For discussion on the importance of access to quality education versus access to education, see *supra* pp. 2025–27.

[133] *See* Molly Hensley-Clancy, *Why the Government Supports Everest University's Controversial Sale*, BUZZFEED NEWS (Nov. 24, 2014, 8:00 PM), http://www.buzzfeed.com/mollyhensleyclancy/why-the-government-supports-everest-universitys-controversia [http://perma.cc/ZM3V-TZMD] ("The DOE is concerned about wanting to help students complete their educations, but they also have concerns about having to discharge a very large number of loans if the campus closes." (quoting Robyn Smith, a lawyer at the National Consumer Law Center) (internal quotation marks omitted)).

[134] Studies have found that federal student aid to for-profit students and loan defaults cost taxpayers about $4200 per student while community colleges cost taxpayers about $1500 per student in federal aid. *See* Cellini, *supra* note 61, at 168. Loan defaults account for 31% of federal spending on for-profits while they account for just 7% of federal spending on public two-year institutions. *Id.* at 169.

[135] While closure is preferred from a consumer protection standpoint, complicating the Department's resistance to school closures is its view that it is legally required to remove a bankrupt institution's Title IV eligibility. Scurria, *supra* note 113. Barring the Department's complete reinterpretation of its regulations, there are incremental legislative alternatives that could both protect some students and support the Department's bankruptcy-avoidance position under the gainful-

IV. Conclusion

This Note does not look to disparage all for-profits; many of these institutions provide a quality education and useful skills to their students. Rather, the Note suggests that high quality for-profit education that leads to employment for vulnerable student populations is more important than education qua education. Too many students have become trapped in financially untenable situations in the pursuit of an education that promised to open the doors of opportunity to the middle class. This Note has explored how to protect vulnerable students from an education without promise, and advocates that schools that have a track record of making the lives of their students more difficult be shuttered. For those students that in good faith trusted that their for-profit would help them find gainful employment, the government has a role to play in protecting them from substandard institutions.

employment-rule enforcement regime. The aim of any proposal would be to promote bankruptcy-related closures and the subsequent school-loan discharges without significantly jeopardizing a for-profit education company's chance of an orderly wind down. To do so, policymakers could make Title IV eligibility conditional rather than permanent in order for the offending school's OPEID number to retain some value in bankruptcy. First, an offending school's OPEID number can retain conditional eligibility if the acquiring institution agrees to shut down a majority of the campuses that failed the debt-to-earning rate test and to turn around the remaining campuses. If those campuses continue to fail the debt-to-earning rate measure, the acquiring institution must shut them down as well within a given time period or risk losing the acquired OPEID number's Title IV eligibility. Another solution for the OPEID number to again become a marker of federal student aid eligibility would require the acquiring institution to shut down all campuses that failed the debt-to-earning test. Finally, the Department of Education could be prohibited from pursuing school placements unless the schools where the Department is looking to place the students have not failed and are not in danger of failing the debt-to-earnings ratio test.