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A TIMELY PROPOSAL TO ELIMINATE THE STUDENT LOAN INTEREST DEDUCTION

Victoria J. Haneman*

INTRODUCTION

Deductions for interest paid on indebtedness have a long and venerable history in United States tax law. The interest deduction was included in both the Civil War Income Tax Act¹ and the 1894 Income Tax Act,² and was one of the original itemized deductions allowed in the 1913 Revenue Act.³ Sweeping changes were made to the tax code under President Ronald Reagan based, in part, upon the belief that the complex web of deductions, credits, and exclusions encouraged personal consumption over savings and investment.⁴ One such change under Section 511(b) of the Taxpayer Reform Act of 1986 (TRA 1986) was the elimination of the deduction for interest on personal indebtedness⁵—and because education is generally treated as a personal consumption expense,⁶ this disallowance encompassed interest paid on student loan debt.⁷

The demise of the interest deduction sparked a decade-long battle in Congress for its revival. Less than three months after the enactment of TRA 1986, Senator John Kerry objected to the denial of the tax deduction for interest on

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¹ Act of Mar. 3, 1865, ch. 78, 13 Stat. 469, 479.

² Act of Aug. 27, 1894, ch. 349, § 28, 28 Stat. 509, 553.

³ Act of Oct. 3, 1913, ch. 16, § 2(B), 38 Stat. 114, 167.

⁴ David E. Rosenbaum, *The Push and Pull Over Taxes*, N.Y. TIMES, Dec. 8, 1992, at D1, D15, available at <http://www.nytimes.com/1992/12/08/business/the-push-and-pull-over-taxes.html?pagewanted=all&src=pm>. Due to the extent of the changes, the Tax Code of 1954 was renamed the Internal Revenue Code of 1986. Kelly Phillips Erb, *Deduct This: The History of Student Loan Interest*, FORBES (June 13, 2011, 9:58 AM), <http://www.forbes.com/sites/kellyphillipserb/2011/06/13/deduct-this-the-history-of-the-student-loan-interest>.

⁵ See Tax Reform Act of 1986, Pub. L. No. 99-514, § 511(b), 100 Stat. 2085, 2246 (codified as amended in scattered sections of I.R.C.); see also Julee Brooke Little, Note, *Section 163: Interest Paid on Educational Indebtedness—Past, Present and Future*, 43 TAX LAW. 1007, 1007–08 (1990).

⁶ Most student loan interest cannot be qualified as a trade or business expense. See Loretta Collins Argrett, *Tax Treatment of Higher Education Expenditures: An Unfair Investment Disincentive*, 41 SYRACUSE L. REV. 621, 630–31 (1990); Hamish P.M. Hume, Note, *The Business of Learning: When and How the Cost of Education Should Be Recognized*, 81 VA. L. REV. 887, 890–91 (1995).

⁷ For tax purposes, educational expenses are viewed as “constitut[ing] an inseparable aggregate of personal and capital expenditures” 26 C.F.R. § 1.162-5(b) (2013).

student loans as “unfair and unwise”⁸ and stressed that it is “urgent that we immediately address this problem during 1987. . . .”⁹ A bill renewing some form of a deduction for student loan interest was introduced in every Congress thereafter, until Section 202¹⁰ of the Taxpayer Relief Act of 1997 (TRA 1997) added § 221 to the Internal Revenue Code, allowing the deduction of interest paid on qualified student loans.¹¹ Objective analysis suggests that § 221 is a paradigm of inefficiency that is unlikely to increase access to education or markedly assist with debt service after graduation, and therefore, the dedicated effort by Congress to revive the deduction offers a troubling illustration of the way in which public perception may adversely affect the tax legislative process.

Recent developments in higher education create a pressing need to move past the proffered justifications to examine the utility of § 221. Over the past three decades, “annual costs at four-year colleges have risen three times as fast as inflation”¹² Federal assistance to college and graduate students has largely shifted from grants to loans over the past two decades.¹³ American stu-

⁸ 133 CONG. REC. 331 (1987) (statement of Sen. John Kerry). An important objection to the repeal was that students had borrowed with the expectation of a deduction and loans already closed would not receive “grandfathered” treatment, but instead, were afforded only minimal transition relief providing for a deduction that gradually phased out between 1987 through 1990. J. Timothy Philipps & Timothy G. Hatfield, *Uncle Sam Gets the Goldmine—Students Get the Shaft: Federal Tax Treatment of Student Loan Indebtedness*, 15 SETON HALL LEGIS. J. 249, 287, 293–94 (1991).

⁹ When we consider the growing cost of housing, and of other expenses associated with getting started in life, it becomes very clear why some educators have asked what the long-term effect of student borrowing will be on career choices, and even more fundamental decisions about marriage, family size and so on.

133 CONG. REC. 331 (1987). Senator Kerry may have been correct in his concern that student loan debt would have serious impacts on decisions such as marriage. *See, e.g.*, Lynnette Khalfani-Cox, *Student Loan Horror Stories: What’s the Worst That Can Happen?*, DAILYFINANCE (Aug. 20, 2010, 11:00 AM), <http://www.dailyfinance.com/2010/08/20/student-loan-horror-stories-whats-the-worst-than-can-happen/>

One woman . . . says student loans have helped her achieve various academic and professional goals. Those same loans, however, helped ruin a cherished relationship, too.

The [thirty-three]-year-old woman last month endured a painful breakup with her boyfriend of seven years. “Much of it was to do [sic] to the fact that I have over \$150,000 in student loan debt and he did not want to be responsible, or help me, pay it back He wanted other things, such as a house and kids, and that is simply not an option for me as I have this mountain of debt to pay back.”

Id.

¹⁰ *See, e.g.*, H.R. 488, 101st Cong. (1989); H.R. 394, 102d Cong. (1991); H.R. 82, 103d Cong. (1993).

¹¹ *See* Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 202, 111 Stat. 788, 806 (codified as amended at I.R.C. § 221 (2012)). The Act was “a significant expansion in the use of tax policy to encourage enrollment and to help families and communities pay for schools.” BOB LYKE, CONG. RESEARCH SERV., TAX BENEFITS FOR EDUCATION IN THE TAXPAYER RELIEF ACT OF 1997: NEW LEGISLATIVE DEVELOPMENTS 1 (2000), available at <http://digital.library.unt.edu/ark:/67531/metacrs1245/>.

¹² James Surowiecki, *Debt by Degrees*, NEW YORKER (Nov. 21, 2011), http://www.newyorker.com/talk/financial/2011/11/21/111121ta_talk_surowiecki.

¹³ The Pell Grant program has never before covered such a small portion of college costs. In 1980, the maximum grant amount covered 77 percent of the cost of a four-year degree at a public university, as compared to 36 percent today. Tyler Kingkade, *Pell Grants Cover Smallest Portion of College Costs in History as GOP Calls for Cuts*, HUFFINGTON POST

dents increasingly use loans to pay for the cost of higher education, and student loan debt recently surpassed \$1 trillion while continuing to climb.¹⁴ This type of indebtedness is increasingly difficult to shoulder with present unemployment and underemployment rates, and the Federal Reserve Bank of New York recently revealed that “as many as 27 [percent] of all student loan borrowers are more than [thirty] days past due.”¹⁵ With the rising cost of education, the younger generation may be indiscriminately borrowing more money than their education will ultimately be worth.¹⁶ There is legitimate concern that the country will soon be facing some version of a student loan debt bubble, with potentially devastating consequences for a struggling economy that has recently weathered (in relatively short succession) rupture of the dot-com bubble and the mortgage debt bubble.¹⁷

Providing students with access to higher education has been a priority of the federal government for more than half a century.¹⁸ Access to higher education for all citizens is viewed as a pillar of our egalitarian society, and the

(Aug. 29, 2012, 3:08 PM), http://www.huffingtonpost.com/2012/08/27/pell-grants-college-costs_n_1835081.html; see also THE NAT'L CTR. FOR PUB. POLICY & HIGHER EDUC., LOSING GROUND: A NATIONAL STATUS REPORT ON THE AFFORDABILITY OF AMERICAN HIGHER EDUCATION 7 (2002), available at http://www.highereducation.org/reports/losing_ground/affordability_report_final_bw.pdf.

¹⁴ Tyler Durden, *The Next Shoe Drops: More Than 25% of Student Loans Are Already Delinquent*. . . , BUS. INSIDER (Mar. 25, 2012 3:47 PM), <http://www.businessinsider.com/the-next-shoe-drops-more-than-25-of-student-loans-are-already-delinquent-2012-3> (“[J]ust surpassed \$1 trillion, and is growing at \$40–50 billion each month.”); see also Surowiecki, *supra* note 12 (“Some of the boom in student debt can be chalked up to demographics: in the past decade, the number of college-age Americans rose by more than three million and the proportion of eighteen-to-twenty-four-year-olds enrolled in college went from [35] percent to [41] percent.”).

¹⁵ Durden, *supra* note 14 (suggesting that the delinquency rates are a symptom of underemployment and unemployment, with 46 percent of eighteen to twenty-four year olds in the United States unemployed, which rivals unemployment statistics for young adults in European countries in the midst of financial crisis, such as Greece at 46 percent and Spain at 51 percent); accord Rick Newman, *How Student Debt is Slowing the Recovery*, U.S. NEWS & WORLD REPORT (Apr. 9, 2012), <http://www.usnews.com/news/blogs/rick-newman/2012/04/09/how-student-debt-is-slowing-the-recovery> (“With a shortage of income to make loan payments, the default rate on federally guaranteed student loans has nearly doubled, from 4.6 percent for loans originated in 2005 to 8.8 percent for loans granted in 2009.”).

¹⁶ Surowiecki, *supra* note 12; see also Blake Ellis, *Average Student Loan Debt Nears \$27,000*, CNN MONEY (Oct. 18, 2012, 8:14 AM), <http://money.cnn.com/2012/10/18/pf/college/student-loan-debt/> (“Two-thirds of the class of 2011 held student loans . . . and the average borrower owed \$26,600, according to a report from the Institute for College Access & Success’ Project on Student Debt. That’s up 5 [percent] from 2010 and is the highest level of debt . . . the report has . . . published.”).

¹⁷ Surowiecki, *supra* note 12.

¹⁸ See Sima J. Gandhi, *Understanding Students from a Behavioral Economics Perspective: How Accelerating Student Loan Subsidies Generates More Bang for the Buck*, 17 KAN. J.L. & PUB. POL’Y 130, 130 (2008).

Federal funding for higher education has played a substantial role in providing students with access to higher education from the 1944 direct subsidies of the GI Bill, to the 1965 subsidized student loans of the Higher Education Act (HEA), to the more recent tax credits and deductions of the 2001 tax bill.

Id.

public widely supports federal assistance in this area.¹⁹ Although investment in education theoretically produces an income stream sufficient to cover the cost of the investment, the private market will generally not lend against these future earnings and educational expenses because they arise before the individual has earned the income necessary to pay for them.²⁰ As one means of providing students with access to higher education, the government has stepped forward to bridge a gap by facilitating loans to fund higher education.²¹

Another way in which the government attempts to assist with the cost of higher education is through a complex web of tax expenditures that includes § 221.²² Although § 221 is unlikely to increase access to education or markedly assist with debt service after graduation, the decade-long battle waged by Congress to revive the deduction highlights the fact that public perceptions of a tax provision have an unquantifiable but tacit impact.²³ The complexity of the tax code causes many taxpayers to rely upon sound bites provided by politicians with a motive to undersell or oversell the impact of tax legislation, and as a result, the voting public may not necessarily perceive a tax provision as ineffi-

¹⁹ This Article will not explore whether supply exceeds demand—and specifically, whether some students are more likely to succeed in a vocational program rather than a university degree program. *See, e.g.*, Mark Phillips, *Why We Need Vocational Education*, WASH. POST (June 5, 2012, 4:00 AM), http://www.washingtonpost.com/blogs/answer-sheet/post/why-we-need-vocational-education/2012/06/04/gJQA8jHbEV_blog.html.

[I]n Finland's highly successful educational system, 45 [percent] of the students choose a technical track, not an academic track, after completing their basic education.

. . . .

. . . Many of the skills most needed to compete in the global market of the 21st century are technical skills that fall into the technical/vocational area. The absence of excellence in many technical and vocational fields is also costing us economically as a nation.

Id. *See also* Kenneth Gray et al., *Is Vocational Education Still Necessary? Investigating the Educational Effectiveness of the College Prep Curriculum*, 32 J. INDUS. TCHR. EDUC. 6, 6–7 (1995), available at <http://scholar.lib.vt.edu/ejournals/JITE/v32n2/gray.html> (“Between 1982 and 1990, the percentage of all high school students who reported being on the college track increased from 10 [percent] to 64 [percent]. . . . Meanwhile, by 1990, less than 10 [percent] of all high school students identified themselves as being enrolled in vocational education.”).

²⁰ *See generally* Stephen P. Zeldes, *Consumption and Liquidity Constraints: An Empirical Investigation*, 97 J. POL. ECON. 305 (1989) (discussing the problems that arise from the inability to borrow against future income). Conversely, “the Chicago School’s economists put forth the Human Capital Hypothesis (HCH) . . . [positing] that the costs of higher education should not be subsidized because the high returns to education more than compensate for the initial costs.” Thus, all education subsidies “essentially pay a student to make [more] money.” Gandhi, *supra* note 18, at 135.

²¹ *See* Scott Cohn, *Lots of Money for Student Loans—But at What Cost?*, CNBC (Dec. 20, 2010, 11:21 AM), <http://www.cnbc.com/id/40681252> (“Beginning this year [2010], the government began lending directly to students, rather than subsidizing and guaranteeing loans from private lenders.”).

²² *See, e.g.*, I.R.C. § 25A (2012); I.R.C. § 221 (2012); I.R.C. § 222 (2012); I.R.C. § 529 (2012).

²³ Placebo effects in the law have been discussed by several other scholars. *See, e.g.*, Amitai Aviram, *The Placebo Effect of Law: Law’s Role in Manipulating Perceptions*, 75 GEO. WASH. L. REV. 54 (2006) [hereinafter Aviram, *Placebo Effect*]; Amitai Aviram, *In Defense of Imperfect Compliance Programs*, 32 FLA. ST. U. L. REV. 763 (2005).

cient.²⁴ It is concerning, however, if congressional attachment to a student loan interest deduction is fueled less by its objective result and more by the normative message communicated: that student loan debt, like home mortgage debt, is favored personal debt.

While § 221 is intended to provide relief with the burden of debt service on student loans, it also underscores cultural and national norms through implicit characterization of student loan debt as preferred. Every tax deduction that encourages a behavior or expenditure is an act of social engineering with hidden costs.²⁵ Against the backdrop of steeply rising education costs, increased student borrowing, and current unemployment and underemployment rates, it is time to address the inappropriate political gamesmanship of capitalizing a cultural expectation in a deduction that provides no meaningful assistance to student borrowers. The Article begins in Section I with a discussion of the student loan debt bubble, if it indeed exists, and the way in which it may be exacerbated when conspicuous consumption collides with rising unemployment. Section II provides a brief history and overview of the tax treatment of student loan interest in the United States. Section III examines the procedural use of a tax expenditure such as § 221 to provide incentives for higher education and assist student borrowers, and Section IV discusses the failure of the expenditure to accomplish its objective goals. In light of its objective failure, Section V cautions that the student loan interest deduction is nothing more than a hollow gesture and proposes a realistic approach to replace the deduction.

I. THINKING OUTSIDE OF THE BUBBLE: THE SLOWLY DEFLATING STUDENT LOAN DEBT TIRE²⁶

The United States Department of Education was established in 1867.²⁷ Although its initial focus was information gathering to help establish an effective

²⁴ [J]ust as currency traders cause exchange rates to converge by identifying divergences in rates and transacting in a manner that diminishes the exchange rate divergence and generates profits for the traders, politicians profit from identifying misperceived risks and transacting (enacting laws) in a way that causes perceived risks to converge with actual risks. Aviram, *Placebo Effect*, *supra* note 23, at 78.

²⁵ Neil H. Buchanan, *The Case Against Income Averaging*, 25 VA. TAX REV. 1151, 1162 (2006).

[I]t is *always* the case that changes in tax policy have the intended or unintended effect of changing society, that is, of being at least inadvertent acts of social engineering. Every definition of income, every exclusion, every attempt to simplify the tax system, involves choices as to what should be encouraged and what discouraged.

Id.

²⁶ Cf. *The Student Loan Debt Bubble (Think Virus-Spreading Monkey from the Movie Outbreak!)*, I'M DATING A ONE PERCENTER (May 7, 2012), <http://imdatingaonepercenter.wordpress.com/2012/05/07/the-student-loan-debt-bubble-think-virus-spreading-monkey-from-the-movie-outbreak/> (“[T]he student debt crisis needs to be treated like the virus-spreading monkey from *Outbreak*. It needs to be tracked down, quarantined, studied, and injected with every single freaking viable solution out there — and then apply the solution in a mass sweep.”).

²⁷ *History of Student Financial Aid*, FINAID, <http://www.finaid.org/educators/history.phtml> (last visited Nov. 25, 2013). Harvard University established the first loan program in the United States in 1840, which is more than a quarter of a century before the establishment of the Department of Education. *Id.*

school system, this changed when there was a shift in cultural norms in the 1950s.²⁸ A college education gradually became viewed as more of a necessity than a luxury. Consequently, the Department of Education now has the third largest discretionary budget of the Departments, behind the Department of Defense and the Department of Health and Human Services.²⁹

Established in 1958 through the National Defense Education Act, the Perkins Loan Program was the first federally funded loan program.³⁰ The Higher Education Act of 1965 replaced the Perkins Loan Program with the Guaranteed Student Loan Program (currently known as the Stafford Loan Program), which was originally designed to open the door of higher education to the lowest-income students.³¹ In 1978, Congress and the Carter Administration enacted the Middle-Income Student Assistance Act—making loans available to virtually every student.³² As the cost of a college education gradually increased, borrowing to pay tuition costs became routine.³³ Anticipating that the number of student loan defaults would increase, the Bankruptcy Code was amended in 1978 to limit the number of student loan discharges.³⁴

Not surprisingly, federal loan expenditures increased dramatically when loans were made broadly available.³⁵ And despite an ever-increasing amount of student loan debt, Congress passed legislation in 1992 making it even easier for students to borrow money.³⁶ Although initially designed to be a program of last resort to finance higher education,³⁷ the student loan program has gradually evolved into a program providing money to all students regardless of their financial need.³⁸ Taking this one step further, the Obama Administration hopes

²⁸ See PATRICIA J. GUMPORT ET AL., *THE UNITED STATES COUNTRY REPORT: TRENDS IN HIGHER EDUCATION FROM MASSIFICATION TO POST-MASSIFICATION 1* (1997), available at <http://www.citizing.org/data/projects/highered/Trends%20in%20HE%20from%20Mass%20to%20Post-Mass.pdf>.

²⁹ Erb, *supra* note 4.

³⁰ The National Defense Education Act of 1958 was legislation intended to “strengthen the national defense and to encourage and assist in the expansion and improvement of educational programs to meet critical national needs; and for other purposes.” National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (codified as amended at 20 U.S.C. §§ 401-602) (repealed 1962); see also *History of Student Financial Aid*, *supra* note 27; Robert C. Cloud, *Offsetting Social Security Benefits to Repay Student Loans: Pay Us Now or Pay Us Later*, 208 EDUC. L. REP. 11, 13 (2006).

³¹ See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219; Cloud, *supra* note 30, at 13.

³² See Middle Income Student Assistance Act, Pub. L. No. 95-566, 92 Stat. 2402 (1978); Cloud, *supra* note 30, at 14. The prior Higher Education Act requirement that only families with incomes less than \$15,000 were eligible was removed under the Middle Income Student Assistance Act, and student loan benefits were available regardless of household income. See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1242.

³³ Erb, *supra* note 4.

³⁴ See 11 U.S.C. § 523 (2012); Cloud, *supra* note 30, at 14.

³⁵ Cloud, *supra* note 30, at 14.

³⁶ *Id.*

³⁷ Richard Fossey, “*The Certainty of Hopelessness*”: *Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, 26 J.L. & EDUC. 29, 31 (1997).

³⁸ See Lawrence E. Gladieux, *Federal Student Aid Policy: A History and an Assessment*, ED.gov, <http://www2.ed.gov/offices/OPE/PPI/FinPostSecEd/gladieux.html> (last visited Nov. 25, 2013).

to provide further relief to students facing rising tuition costs by capping loan payments and forgiving balances after twenty years of payments.³⁹

For almost half a century, the federal student loan program has received bi-partisan support from Congress because of its political popularity with voters.⁴⁰ However, it is easy to lose sight of the fact that student loan defaults cost the Department of the Treasury billions of dollars annually. The default rates reached a high of 22.4 percent in 1990 and then steadily dropped to a low of 4.5 percent in 2003.⁴¹ There is cause for concern, however, about the fact that the default rates steadily trended upwards from 2005 to 2010.⁴² The November 2012 quarterly report released by the Federal Reserve Bank of New York reports that 11 percent of all student loan balances are ninety or more days delinquent.⁴³ This percentage is far more troubling if one happens to notice the footnote at the bottom of the November quarterly that clarifies the delinquency rate is “likely” understated and may be “roughly” twice as high.⁴⁴

This combination of rising student debt and staggering default rates has caused many to forecast that a bursting student loan debt bubble looms on the

³⁹ Danielle Kurtzleben, *President Lays Out New Student Loan Rules*, U.S. NEWS & WORLD REPORT (Oct. 26, 2011), <http://www.usnews.com/news/articles/2011/10/26/president-lays-out-new-student-loan-rules>.

Today, the president announced his ‘Pay As You Earn’ proposal, which would allow federal student loan borrowers to cap their loan payments at 10 percent of discretionary income as early as next year. The plan would also forgive debt balances after [twenty] years of payments. This is a substantial change from current law, under which the cap is 15 percent, and loan balances can be forgiven after [twenty-five] years. The administration estimates that this change would affect 1.6 million students.

Id. At this point, it is impossible to predict the consequences of this plan over the next ten or twenty years. One can only hope that it does not simply kick the ball further down the road another ten years, and have the same type of negative consequences that were seen from the repeal of the Glass-Steagall Act of 1933. See Cyrus Sanati, *10 Years Later, Looking at Repeal of Glass-Steagall*, N.Y. TIMES (Nov. 12, 2009, 3:49 PM), <http://dealbook.nytimes.com/2009/11/12/10-years-later-looking-at-repeal-of-glass-steagall/> (discussing how the repeal of depression-era banking laws influenced last fall’s financial crisis).

⁴⁰ Cloud, *supra* note 30, at 21.

⁴¹ *National Student Loan Two-year Default Rates*, ED.GOV, <http://www2.ed.gov/offices/OSFAP/defaultmanagement/defaultrates.html> (last visited Nov. 25, 2013).

⁴² *Id.* (2005, 4.6 percent; 2006, 5.2 percent; 2007, 6.7 percent; 2008, 7.0 percent; 2009, 8.8 percent); *First Official Three-Year Student Loan Default Rates Published*, ED.GOV (Sept. 28, 2012), <http://www.ed.gov/news/press-releases/first-official-three-year-student-loan-default-rates-published> (the two-year default rate rose to 9.1 percent for the 2010 cohort; using the new three-year rate, the Fiscal Year (“FY”) 2008 default rate was 13.8 percent and the FY 2009 rate was 13.4 percent).

⁴³ Kelly Evans, *Student-Loan Delinquencies Now Surpasses Credit Cards*, CNBC (Nov. 27, 2012, 3:29 PM), <http://www.cnbc.com/id/49983471> (stating a comparable rate of delinquency for credit cards of 10.5 percent, auto loans of 4.3 percent, and mortgages of 5.9 percent).

⁴⁴ *Decrease in Overall Debt Balance Continues Despite Rise in Non-Real Estate Debt*, FED. RES. BANK OF N.Y. (Nov. 27, 2012), <http://www.newyorkfed.org/newsevents/news/research/2012/an121127.html>.

[T]hese delinquency rates for student loans are likely to understate actual delinquency rates because almost half of these loans are currently in deferment, in grace periods or in forbearance and therefore temporarily not in the repayment cycle. This implies that among loans in the repayment cycle delinquency rates are roughly twice as high.

Id.

horizon.⁴⁵ Bubbles arise when prices for a particular item rise above the real value of the item—as is typically seen in a marketplace without price equilibrium, wherein pricing does not conform to supply and demand.⁴⁶ Injecting liquidity into such a marketplace has the potential to create a vicious inflationary cycle, thereby compounding the problem. Several troubling indicators bear credence to the belief that just such a circumstance is arising with student loan debt. First, demand for a college education has increased. College enrollment has surged one-third in the past decade and tuition has more than doubled during that time.⁴⁷ Second, the volume of student loans is rapidly increasing.⁴⁸ Student loans are available to almost any student without regard to ability to repay or creditworthiness. Third, the consumer is unsophisticated. Most students utilize student loans without contemplating the burden they will impose on post-graduation decisions and lifestyle. Fourth, the number of defaults on student loans is also rapidly increasing.⁴⁹ Also, the government plays a dominant role in the student loan debt market and accounts for almost 85 percent of student debt.⁵⁰

The idea of a student loan debt bubble is not without controversy, however, and opinions are divided. Some assert either that a student loan debt bubble does not exist, or, in the alternative, that the bursting of this bubble will not have the catastrophic effect upon the economy that was seen with housing debt.⁵¹ Although the rupture of a debt bubble can often be characterized by a liquidity crisis wherein borrowers can no longer obtain the money they need, the government's dominant position in the student loan market prevented a liquidity crisis in the midst of the 2008 financial crisis, when fewer private

⁴⁵ See, e.g., Durden, *supra* note 14.

⁴⁶ See MILTON FRIEDMAN, *PRICE THEORY* 17 (1976). As consumers purchase more, prices rise. As prices rise, consumers consume less. As consumers consume less or producers produce more, prices decrease. *Id.* at 13–14, 17.

⁴⁷ *Fast Facts: Enrollment*, NAT'L CENTER FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=98> (last visited Nov. 25, 2013) (“Between 2000 and 2010, enrollment increased 37 percent, from 15.3 million to 21.0 million. . . . Enrollment increases can be affected both by population growth and by rising rates of enrollment.”); *Fast Facts: Tuition Costs of Colleges and Universities*, NAT'L CENTER FOR EDUC. STAT., <http://nces.ed.gov/fastfacts/display.asp?id=76> (last visited Nov. 25, 2013).

⁴⁸ Caroline Ratcliffe & Signe-Mary McKernan, *Forever in Your Debt: Who Has Student Loan Debt, and Who's Worried?*, URBAN INST. (June 2013), <http://www.urban.org/UploadedPDF/412849-Forever-in-Your-Debt-Who-Has-Student-Loan-Debt-and-Whos-Worried.pdf>.

⁴⁹ See *National Student Loan Two-year Default Rates*, *supra* note 41.

⁵⁰ Chris Miles, *The Government Holds 85% of Outstanding Student Debt: This Could Be Another Meltdown in the Making*, POLICYMIC (Jan. 22, 2013), <http://www.policymic.com/articles/23868/the-government-holds-85-of-outstanding-student-debt-this-could-be-another-economic-meltdown-in-the-making>. At least one registered investment advisor is offering advice as to how the savvy investor can make a profit when the student loan debt bubble bursts. Nicholas Pardini, *Shorting Student Loans: The Next Major Credit Bubble*, SEEKING ALPHA (July 5, 2011, 9:46 AM), <http://seekingalpha.com/article/277941-shorting-student-loans-the-next-major-credit-bubble> (Sallie Mae (NYSE: SLM), is the leading student loan company and a government-sponsored enterprise and Pardini recommends shorting for-profit colleges, such as DeVry, Apollo Group, and ITT Educational Services, which he says, “have 90 [percent] of their revenues coming from federal student loan aid.”).

⁵¹ See Chadwick Matlin, *Student Loan Bubble Babble*, REUTERS (Mar. 7, 2013), <http://blogs.reuters.com/great-debate/2013/03/07/student-loan-bubble-babble/>.

student loans were available.⁵² Some assert that the use of the term “bubble” is a misnomer that calls to mind the recent mortgage bubble—ignoring the material differences between student loans and mortgages.⁵³ The residential housing market was worth more than \$22 trillion preceding the mortgage crisis, and total student loan debt amounts to less than 10 percent of all outstanding mortgages.⁵⁴ Wall Street is not heavily invested in bundled student loans as it was with mortgages, and banks are not exposed to an enormous volume of student loan-backed securities.⁵⁵ Moreover, the concept of a debt bubble generally involves debt used to finance an asset that substantially declines in value whereas an education does not decline in value. It is further argued that student loan debt may be distinguished from other types of personal borrowing in that it has traditionally been accepted that most students will not borrow more in loans than their education is worth over the course of a lifetime, and even if it is perceived that they have excessively borrowed, the students will be unable to walk away from the non-dischargeable loans.⁵⁶

However, this argument raises some questions about the true value of an education. The expense of education continues to skyrocket as the government substitutes one failed ideology (the American dream of homeownership) for a new ideology (every child deserves a college education).⁵⁷ Blame does not rest solely at the feet of the government, as student demand for education also continues. Higher education, especially top-tier higher education, has become a conspicuously-consumed good.⁵⁸ In some instances, academic pedigree has become a flawed metric by which merit is assessed.⁵⁹ Degrees from select institutions serve as a golden ticket to increased social, romantic, and career

⁵² *Private Student Loans*, FINAID, <http://www.finaid.org/loans/privatestudentloans.phtml> (last visited Nov. 25, 2013). William S. Howard argues that the excessive leverage in the student loan market by the federal government contributes greatly to the problem at hand. See William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. ECON. & POL'Y 485, 487 (2011) (“When confronted with the increasing cost of education, the policy response is to myopically create programs that pour more leverage into an already over-leveraged system. The result of these actions is no different from the housing bubble, and their consequences may be just as disastrous.”).

⁵³ Nora Colomer & Karen Sibayan, *Bifurcation in Student Lending Shows Lack of Bubble*, ASSET SECURITIZATION REP. (May 23, 2012), available at 2012 WLNR 10929555; see also Jonathan Glowacki & Leighton Hunley, *The Student Loan Debt Crisis in Perspective*, MILLIMAN (June 20, 2012), <http://insight.milliman.com/article.php?cntid=8104>.

⁵⁴ Colomer & Sibayan, *supra* note 53; Glowacki & Hunley, *supra* note 53.

⁵⁵ Colomer & Sibayan, *supra* note 53.

⁵⁶ Christopher Matthews, *Viewpoint: Stop Calling Student Loans a “Bubble!”*, TIME (Mar. 7, 2013), <http://business.time.com/2013/03/07/viewpoint-stop-calling-student-loans-a-bubble/>.

⁵⁷ See Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 504 (2000) (proposing that “[the government student loan] program has interfered with the educational marketplace by unnecessarily causing tuitions to increase.”).

⁵⁸ See, e.g., Daniel B. Smith, *The University Has No Clothes*, N.Y. MAG. (May 1, 2011), <http://nymag.com/news/features/college-education-2011-5/> (“Still another possibility is that the primary role of college today is to serve a “signaling” function—like an elegant business suit, an impressive B.A. advertises talent, pedigree, and ambition employers can use as a hiring shorthand.”).

⁵⁹ See Stacy Berg Dale & Alan B. Krueger, *Estimating the Payoff to Attending a More Selective College: An Application of Selection on Observables and Unobservables*, 117 Q.J.

opportunities. In turn, a student is more willing to pay absolutely anything for the prestigious degree that few others have. These students also have less incentive to change their behavior, and assess the real value of academic ranking as compared against tuition cost, when “everyone” is jumping on the bandwagon and paying for tuition through financial aid packages.⁶⁰ There is no need for a student to be a sophisticated consumer because loans are made readily available without regard to the student’s eventual ability to repay the loan based upon such factors as earning potential or area of study. Unfortunately, defaulting on a student loan has adverse effects extending beyond damaged credit; it may also limit opportunities in professions requiring licensure, such as the medical and legal professions.⁶¹

Perhaps it is most appropriate to refer to the problem as the “higher education debt tire”—because, unlike a bubble that abruptly bursts, we seem to be listening to the hiss of a slowly deflating tire. College graduates are presently facing \$1 trillion in bankruptcy-proof⁶² student debt and the highest unemployment rates recorded by the federal government.⁶³ Student loan debt continues

ECON. 1491, 1523 (2002), *available at* http://cdn.theatlantic.com/static/mt/assets/business/daledkrueger_More_Selective_College.pdf.

Students who attended more selective colleges do not earn more than other students who were accepted and rejected by comparable schools but attended less selective colleges. . . . These results are consistent with the conclusion of Hunt’s . . . seminal research: “The C student from Princeton earns more than the A student from Podunk not mainly because he has the prestige of a Princeton degree, but merely because he is abler. The golden touch is possessed not by the Ivy League College, but by its students.”

Id.

⁶⁰ See THE PROJECT ON STUDENT DEBT, *STUDENT DEBT AND THE CLASS OF 2010 I* (2011), *available at* <http://projectonstudentdebt.org/files/pub/classof2010.pdf> (explaining that two-thirds of 2010 college graduates have student loan debt, with an average of \$25,250 a student, up 5 percent from the previous year).

⁶¹ Khalfani-Cox, *supra* note 9.

In addition to seriously damaging your credit rating, student loan defaults also carry severe career consequences. Under the law, professionals with any kind of state license – doctors, lawyers, accountants and so on – can all have their professional licenses revoked if they default on federal student loans. Such defaults are particularly troublesome for health-care workers because borrowers in default also get excluded from the Medicare and Medicaid programs by the U.S. Department of Health and Human Services. For existing doctors and health-care providers, they’d be unable to accept Medicare payments, which is critical for hospitals, clinics, physicians and others. . . . [F]or medical professionals, a federal student loan default ‘effectively eliminates 98 [percent] of your employment opportunities. . . .

. . . .

. . . . [T]hose who default on federal student loans can have 15 [percent] of their Social Security retirement benefits garnished.

Id.

⁶² Unlike credit card debt or mortgage debt, student loans are rarely discharged in bankruptcy. See Christine Dugas, *Graduates Saddled with Debt, Student Loans Can’t Easily Turn to Bankruptcy*, USA TODAY (May 15, 2009, 1:33 PM), http://usatoday30.usatoday.com/money/perfi/2009-05-12-studentloans13_N.htm.

⁶³ As *Student Debt and Unemployment Hit Record Highs Young Adults Seek Smart Ways to Build Credit*, PRWEB (Apr. 3, 2012), <http://www.prweb.com/releases/2012/student-credit/prweb9358385.htm> (“Saddled with \$1 trillion in student loans and the highest unemployment rate since the government began keeping track in 1948, today’s college students may be the unluckiest since the 1930s . . .”). See also Alexandra Thomas, *Loans, Debt and Jobs: Millennials and the Market*, HLN (Mar. 13, 2012, 9:38 AM), <http://www.hlnv.com/article>

rising, and the ombudsman for the Consumer Finance Protection Bureau—a newly created federal agency—has stated that the student loan debt market is now “too big to fail.”⁶⁴ As the student loan system grows in size, it is myopic to believe that rising default rates on student loans will not have a negative ripple effect on other areas of the economy.⁶⁵

II. AN OVERVIEW OF THE TAX TREATMENT OF STUDENT LOAN INTEREST IN THE UNITED STATES

At the outset, all interest was deductible. The deductibility of personal and investment interest was provided for when the federal income tax system was enacted in 1913.⁶⁶ Student loan interest was deductible without limitation as an itemized (or “below-the-line”) deduction⁶⁷ until the Tax Reform Act of 1986 (TRA 1986) amended the Code to deny a deduction for interest on personal indebtedness, including student loan interest.⁶⁸ Although the statutory history is

/2012/03/09/millennials-lost-generation (“Only 54 percent of Americans ages [eighteen] to [twenty-four] are currently employed, according to the Labor Department. That’s the lowest that figure has ever been since the Department began tracking the data in 1948.”).

⁶⁴ Bonnie Kavoussi, *Student Loan Debt Hits \$1 Trillion, Deemed “Too Big To Fail” By One Federal Agency*, HUFFINGTON POST (Mar. 22, 2012, 2:26 PM), http://www.huffingtonpost.com/2012/03/22/student-loan-interest-rate_n_1372506.html. See also Tom Morganthau et al., *Those Scary College Costs*, NEWSWEEK, Apr. 29, 1996, at 52 (“Critics warn that debt load will rise even more in the next decade . . .”). In 2011 alone, one commentator noted that students borrowed \$117 billion in federal student loans. Rohit Chopra, *Too Big To Fail: Student Debt Hits a Trillion*, CONSUMER FIN. PROT. BUREAU (Mar. 21, 2012), <http://www.consumerfinance.gov/blog/too-big-to-fail-student-debt-hits-a-trillion/>. To put this figure in perspective, borrowing under the federal loan program was \$23.1 billion in 1994. Kelly J. Todd & Sharon A. DeVaney, *Financial Planning for Retirement by Parents of College Students*, 8 FIN. COUNSELING & PLAN. 25, 26 (1997).

⁶⁵ See Newman, *supra* note 15.

The student loan market is smaller than the subprime mortgage market that blew up in 2008, and student loans are far less complex. But rising defaults could still generate taxpayer losses and cause collateral damage elsewhere in the economy. “A wave of defaults could have a crippling effect on the ability of many households to access credit in the future,” writes economist Christian deRitis of Moody’s Analytics. Millions of Americans, ultimately, could begin their working lives with wrecked credit.

Id.

⁶⁶ Erb, *supra* note 4 (noting that a provision in the income tax imposed in the United States in 1894 also allowed for the deductibility of interest; however, this tax was struck down as unconstitutional).

⁶⁷ See Little, *supra* note 5, at 1007. An itemized deduction is a deduction taken in calculating taxable income. Some itemized deductions (referred to as “miscellaneous itemized deductions”) are deductible only to the extent that the aggregate amount exceeds 2 percent of the taxpayer’s adjusted gross income. I.R.C. § 67 (2012). For tax year 2013, the American Taxpayer Relief Act of 2012 reduces the total amount of a taxpayer’s allowable itemized deductions by 3 percent of the amount by which the taxpayer’s adjusted gross income exceeds a threshold amount of \$250,000 for single filers (or \$300,000 for married couples filing jointly). American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, §101(b)(1), 126 Stat. 2313, 2317 (2013).

⁶⁸ See Little, *supra* note 5, at 1007. As a result of TRA 1986, there were two possible outcomes for the treatment of student loan interest: it either qualified for the business expense deduction, or, far more likely, it was treated as personal and nondeductible. This article limits its discussion specifically to the tax treatment of higher education student loan

silent, the justification that has been attributed to Congress for eliminating this deduction is that it discouraged saving for future consumption.⁶⁹ It has been argued, however, that a policy that results in education being delayed while one saves the necessary money is not necessarily prudent or feasible.⁷⁰

Most student loan interest was treated as nondeductible personal interest until Section 202 of TRA 1997.⁷¹ Section 202 added § 221 to the Internal Revenue Code, allowing for the “above-the-line” deduction⁷² of interest paid on qualified student loans.⁷³ The maximum deduction allowed in 1998 was \$1,000; this amount increased to \$1,500 in 1999, \$2,000 in 2000, and \$2,500 for taxable years beginning in 2001.⁷⁴

Several limitations apply to § 221. This deduction is available to single taxpayers or married taxpayers filing jointly—but is unavailable to married taxpayers filing separate returns.⁷⁵ The deduction is also rendered unavailable if a student is claimed as a dependent by his or her parents.⁷⁶ The parent of a dependent student is only eligible to take the interest deduction if the parent is an obligor or co-obligor on the underlying student loan.⁷⁷ Further, as initially enacted, § 221(d) provided that a deduction was only available for the first five years in which interest payments were required on the loan.⁷⁸ This five-year limitation was temporarily lifted under the Economic Growth and Tax Relief

interest that is not deductible as a business expense deduction, which incidentally is the vast majority of all student loan interest. For a discussion of deductibility of educational expenses as a business expense, see Stuart Lazar, *Schooling Congress: The Current Landscape of the Tax Treatment of Higher Education Expenses and A Framework for Reform*, 2010 MICH. ST. L. REV. 1047, 1101–02 (2010).

⁶⁹ Little, *supra* note 5, at 1012 (suggesting that interest attributed to education indebtedness was not distinguished from the personal interest category “merely to simplify the administration of the tax laws.”).

⁷⁰ Little, *supra* note 5, at 1013, 1016 (“Recognizing higher education as a necessity for individuals and for the nation, proposals to restore the educational interest deduction by reclassifying it as ‘investment’, rather than personal interest, are in order.”).

⁷¹ LYKE, *supra* note 11, at 1 (stating that TRA 1997 was “a significant expansion in the use of tax policy to encourage enrollment and to help families and communities pay for schools.”).

⁷² An above-the-line deduction, governed by § 62 of the Internal Revenue Code, is deducted from a taxpayer’s gross income in calculating his “adjusted gross income.” Above-the-line deductions are generally more favorable for the taxpayer than below-the-line deductions because the former is not subject to income-based phase-outs and limitations, and is available whether or not the taxpayer itemizes her deductions. *The Difference Between Above-the-Line and Below-the-Line Deductions*, FISCAL TAX (Mar. 19, 2009), <http://www.fiscaltax.com/tax-blog/the-difference-between-abovetheline-and-belowtheline-deductions>. See also I.R.C. § 62 (2012).

⁷³ I.R.C. § 221(b)(1) (2012). A deduction for student loan interest is taken above-the-line—directly lowering the adjusted gross income of the taxpayer. I.R.C. § 62(a)(2)(E)(17) (2012).

⁷⁴ I.R.C. § 221(b)(1). Note that the dollar limitation is not indexed for inflation and is \$2,500 through December 31, 2012.

⁷⁵ 26 C.F.R. § 1.221-1(b)(3) (2013).

⁷⁶ 26 C.F.R. § 1.221-1(b)(2) (2013).

⁷⁷ IRS, TAX BENEFITS FOR EDUCATION 28 (2013), available at <http://www.irs.gov/pub/irs-pdf/p970.pdf>.

⁷⁸ Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 202(a), 111 Stat. 788, 806–07.

Reconciliation Act of 2001,⁷⁹ and then permanently eliminated under the American Taxpayer Relief Act of 2012.⁸⁰

This deduction is taken above-the-line—meaning that the deduction is available without regard to whether the taxpayer itemizes his deductions, or, alternatively, takes the standard deduction.⁸¹ The maximum annual deduction was initially phased out for a taxpayer with a modified adjusted gross income⁸² of \$55,000 (or \$75,000 for married taxpayers filing a joint return).⁸³ This income limitation was increased effective January 1, 2013, with the phase out applying to any taxpayer with modified gross income of \$60,000 or more (\$125,000 for joint returns), and a complete phase “out for taxpayers with modified gross income of \$75,000 or more ([or] \$155,000 . . . for joint returns).”⁸⁴

III. UTILIZING A TAX EXPENDITURE TO ASSIST STUDENT BORROWERS

When an economist looks at a tax preference—such as a deduction, credit, or exclusion—she sees an indirect form of government spending referred to as a “tax expenditure.”⁸⁵ The critique of tax expenditures is that many such outlays are more appropriately made through direct spending programs. Pondering the merits of any tax expenditure, and specifically the student loan interest deduction, one must first consider the justification offered for government intervention in the subject area and then justify the use of a deduction as the best procedural tack to facilitate the intervention.⁸⁶ Section III examines both of these issues.

Justifying government intervention in the area of student loans is not a difficult task. Higher education is considered both a public and a private good, with benefits flowing to both the individual and the community.⁸⁷ Cost has

⁷⁹ Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 412(a)(1), 115 Stat. 38, 63–64.

⁸⁰ American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, § 101(a)(1), 126 Stat. 2313, 2315 (2013).

⁸¹ I.R.C. § 222(a) (2012); I.R.C. § 62(a)(18) (2012).

⁸² “Modified adjusted gross income” is defined in I.R.C. § 221(b)(2)(C) (2012).

⁸³ I.R.C. § 221(b) (2012).

⁸⁴ Rev. Proc. 2013-15, 2013-5 I.R.B. 2.12, available at http://www.irs.gov/irb/2013-05_IRB/ar06.html.

⁸⁵ This idea was first popularized by Stanley Surrey, Assistant Secretary of the Treasury for Tax Policy (1961-1969). Surrey oversaw the calculation of the first tax expenditure budget for fiscal year 1968. Upon departing from the Treasury, he joined the faculty of Harvard Law School. See STANLEY S. SURREY, *PATHWAYS TO TAX REFORM* vii (1973); see also Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970); Stanley S. Surrey, *Reflections on the Tax Reform Act of 1976*, 25 CLEV. ST. L. REV. 303 (1976); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970).

⁸⁶ The government seeks to advance higher education through a series of tax incentives, and this article does not seek to determine if this is a legitimate federal policy.

⁸⁷ See 2 THOMAS JEFFERSON, *Report of the Revisors, June 18th*, in *THE WORKS OF THOMAS JEFFERSON* 414–15 (Paul Leicester Ford ed. 1904) (suggesting that an educated citizenry is one that is able to guard against degeneracy, resist tyranny, draft wise laws, and administer those laws honestly—thereby protecting the liberties and ensuring the happiness of the community).

always been a barrier to access for students from diverse socioeconomic backgrounds who wish to pursue an education. Although data supports the idea that education results in higher financial returns, educational expenses arise before the individual has earned the higher income necessary to pay for them, and the private market will generally not lend against future earnings.⁸⁸ Some form of federal assistance is necessary to fill the gap, and the public seems widely supportive of government intervention in this area.⁸⁹ To this end, providing students with access to higher education has been a priority of the federal government for more than half a century.⁹⁰

Accepting that government intervention is justified,⁹¹ the procedural objection follows that the instrumentality of the intervention should not be a tax expenditure.⁹² Tackling the procedural question of whether a deduction for student loan interest is the most effective way for the government to intervene is a herculean task. Until Section 511(b) of TRA 1986 repealed the deduction for personal interest, which is the way in which most student loan interest is categorized,⁹³ student loan interest was deductible without limitation.⁹⁴ This deduction did not fade quietly from memory after its repeal in TRA 1986. A bill renewing some form of deduction for student loan interest was introduced every Congress thereafter,⁹⁵ until a version of the student loan interest deduc-

⁸⁸ See Zeldes, *supra* note 20, at 310 (discussing the problems that arise from the inability to borrow against future income).

⁸⁹ This Article will not explore whether supply exceeds demand—and whether it would be better policy to funnel some students into vocational programs instead of universities.

⁹⁰ Gandhi, *supra* note 18, at 130.

Federal funding for higher education has played a substantial role in providing students with access to higher education from the 1944 direct subsidies of the GI Bill, to the 1965 subsidized student loans of the Higher Education Act (HEA), to the more recent tax credits and deductions of the 2001 tax bill.

Id.

⁹¹ Although government intervention is justified in this area, it may be time to examine whether the intervention to-date has been effective. See, e.g., Aisha Labi, *OECD Report Links Higher-Education Access with Student Support, Despite Tuition*, CHRONICLE OF HIGHER EDUC. (Sept. 11, 2012), <http://chronicle.com/article/OECD-Report-Links/134300/> (stating that the United States only ranks 14th in the world for overall higher-education attainment levels, and countries such as Finland, Israel, and Russia may soon surpass American attainment levels).

⁹² Although tax scholars frequently object that social policy objectives should be funded directly, some economists see tax policy as an effective method of addressing societal concerns. See, e.g., Maureen B. Cavanaugh, *On the Road to Incoherence: Congress, Economics and Taxes*, 49 UCLA L. REV. 685 (2002).

⁹³ Most student loan interest cannot be qualified as a trade or business expense. See Argrett, *supra* note 6, at 630–31, 658; Hume, *supra* note 6, at 891–93; Lazar, *supra* note 68, at 1101–02.

⁹⁴ See Tax Reform Act of 1986, Pub. L. No. 99-514, § 511(b), 100 Stat. 2085, 2246 (codified as amended at I.R.C. § 163(g) (1988)).

⁹⁵ See 143 CONG. REC. S8,415, S8,456 (daily ed. July 31, 1997) (statement of Sen. Grassley) (“For education, this tax-relief bill renews the deductibility of interest incurred on student loans. I have introduced that particular bill in every Congress since it was repealed in 1986.”). Immediately on the heels of the enactment of TRA 1986, on January 6, 1987, Senator Kerry objected to the retroactive elimination of the tax deduction for interest on student loans as “unfair and unwise” and stressed:

[I]t is urgent that we immediately address this problem during 1987

tion was reincarnated as an above-the-line deduction in Section 202 of TRA 1997.⁹⁶

The revival of the student loan interest deduction slightly more than a decade after its elimination is mildly confusing in light of the heroic and persistent efforts to eradicate the tax expenditures that riddle the Code. More puzzling, however, is that the procedural choice made was once again a deduction.⁹⁷ While tax expenditures come in the form of exemptions, credits, and deductions, the latter are particularly inequitable in their conferral of a higher subsidy or benefit upon the taxpayers in the highest tax brackets—referred to as the “upside-down effect” of deductions. In an attempt to mitigate this inequity in § 221, Congress reduced the tax incentive as income levels rise through the use of a phase out provision.

As a procedural matter, incorporating a phase-out provision into the student loan interest deduction illustrates an interesting foundational paradox: namely, while education is universally regarded as valuable, a tension exists in U.S. tax policy with regard to assisting students with educational expenses when those same students are more likely to one day be affluent members of society.

The design of the deduction and its phase-out provision offers some form of federal financial assistance to the middle-income taxpayers, who comprise a significant number of students in college but are nonetheless excluded from direct assistance programs that primarily target low-income taxpayers.⁹⁸ As a practical matter, however, the phase-out provision is far from an elegant solution and operates as nothing more than a crude sorting mechanism that limits the deduction based upon income rather than burden. The phase-out therefore excludes many graduate and professional school students, who carry heavier debt loads, from taking the deduction.⁹⁹ The interest cap and phase-out rules will also exclude those who accept the higher paying jobs they may have to accept simply to repay their student loans and survive.

It is plausible that a deduction for student loan interest is embraced as a procedural counterbalance to other perceived inequities in the tax code. For

....

... When we consider the growing cost of housing, and of other expenses associated with getting started in life, it becomes very clear why some educators have asked what the long-term effect of student borrowing will be on career choices, and even more fundamental decisions about marriage, family size and so on.

133 CONG. REC. 331 (1987) (statement of Sen. John Kerry).

⁹⁶ Taxpayer Relief Act of 1997, Pub. L. No. 105-34, § 202(a), 111 Stat. 788, 806.

⁹⁷ Although Professor Surrey’s agenda with regard to tax expenditures has largely been embraced, an irony inheres in the fact that Congress utilizes tax expenditures. “[T]ax preferences receive bipartisan support—a ‘peculiar alliance’ resulting from conservatives’ attraction to allegedly reducing the role of government and from liberals’ anxiety to solve social and economic problems by whatever means.” Cavanaugh, *supra* note 92, at 714–15.

⁹⁸ Deborah H. Schenk & Andrew L. Grossman, *The Failure of Tax Incentives for Education*, 61 TAX L. REV. 295, 327–28 (2008) (“One possible justification for the structure of the tuition deduction and credits is that some forms of federal financial aid for education (Pell grants) do not target middle- and upper-income taxpayers, although these students make up a significant percentage of those attending college.”).

⁹⁹ See STAFF OF J. COMM. ON TAXATION, 105TH CONG., ANALYSIS OF PROPOSED TAX AND SAVINGS INCENTIVES FOR HIGHER EDUCATION 42 (J. Comm. Print 1997).

example, the use of a deduction for student loan interest may provide symmetry for the borrower and the scholarship student—that is, scholarship students receive favorable tax treatment under current laws, while borrowing students must repay student loans with after-tax dollars. Recent media attention focusing on the desperation of graduate institutions to climb the hierarchy of US News & World Report rankings calls into question whether graduate scholarships are allocated in a way that recognizes economic inequality, or whether universities are simply “buying” students who will bolster rankings.¹⁰⁰ In a system where the borrowing student must repay his loans with after-tax dollars, while the scholarship student receives a tax-free education, a student loan interest deduction mitigates the carrying costs of debt for the borrowing student.

Alternatively, the use of a deduction may be appropriate to resolve inequity created by TRA 1986 in denying deductibility for personal interest (including student loan interest) while permitting the deduction of interest accruing on home equity loans.¹⁰¹ After TRA 1986 and until TRA 1997, financing educational expenses through a home equity loan gave rise to deductible interest under Section 163(h)(2) while direct student borrowing did not.¹⁰² TRA 1997 lessened but did not eliminate the disparity in treatment in that borrowers who are disqualified from taking a deduction under § 221 may nonetheless be eligible to deduct interest attributable to their education expenses if they, or their parents, are homeowners.¹⁰³ However, the use of the student loan interest deduction to correct inequities arising from § 163(h)(2) may demonstrate the vicious cycle that results when one issue of national importance is accorded favorable tax treatment and is later used to justify extending favorable tax treatment to other areas of national importance.¹⁰⁴

Simpler explanations for the procedural use of a tax deduction may be more plausible: hesitancy to embrace innovative but untried solutions absent a crisis;¹⁰⁵ fondness for the low-cost, expansive reach provided by the tax

¹⁰⁰ See Charlotte Crane, *Scholarships and the Federal Income Tax Base*, 28 HARV. J. ON LEGIS. 63, 87 (1991).

¹⁰¹ One supporter of the student loan interest deduction asserted that “if we can allow the deductibility on a second home at the beach, at a minimum we can allow for that investment in a . . . [student’s] education.” 143 CONG. REC. H2,060, H2,062 (daily ed. Apr. 30, 1997) (statement of Rep. Etheridge).

¹⁰² Little, *supra* note 5, at 1010–11.

¹⁰³ There are many restrictions that limit deductibility under § 221, such as a phase-out and cap on the overall deduction, that do not similarly apply to § 163(h)(2). See Lazar, *supra* note 68, at 1102–03.

¹⁰⁴ See, e.g., Gregg D. Polsky, *Controlling Executive Compensation Through the Tax Code*, 64 WASH. & LEE L. REV. 877, 925 (2007) (suggesting that the enactment of § 162(m) may have had positive symbolic impact); Note, *Legal Analysis and Population Control: The Problem of Coercion*, 84 HARV. L. REV. 1856, 1874 n.82 (1971) (referencing tax exemptions proposed to favor small families, as a symbolic commitment by Congress to population stability); C. Garrison Lepow, *The Flimflam Father: Deconstructing Parent-Child Stereotypes in Federal Tax Subsidies*, 5 N.Y.U. J. LEGIS. & PUB. POL’Y 129, 156 (2001) (stating that a view of § 152 as merely a tax deduction “misses its symbolic character.”).

¹⁰⁵ In October 2011, President Obama implemented an income-based repayment plan by executive order. His plan is detailed further in this article. See *infra* Part V. See also *Education Department Launches ‘Pay as You Earn’ Student Loan Repayment Plan*, ED.GOV (Dec. 21, 2012), <http://www.ed.gov/news/press-releases/education-department-launches-pay-you-earn-student-loan-repayment-plan>.

code;¹⁰⁶ or a motive driven solely by political influences, such as the perception of the voting public. Navigating public opinion is no easy task, and the procedural advantage of a tax deduction is its lack of transparency. Section 221, for example, appears to provide meaningful assistance to student loan borrowers. In terms of dollars deducted for 2009, the benefit of the deduction seems to be more or less equally spread across three groups: taxpayers earning \$0 up to \$40,000 deducted \$3,017,476,000 (36.18 percent); taxpayers earning \$40,000 up to \$75,000 deducted \$2,820,386,000 (33.18 percent); and taxpayers earning \$75,000 up to \$200,000 deducted \$2,501,955,000 (30 percent).¹⁰⁷

Understanding the upside-down effect of deductions, however, provides a very different perspective on these numbers.¹⁰⁸ To illustrate, the following assumptions have been made: a student borrows \$22,000 to attend a four-year institution;¹⁰⁹ the amount borrowed consists only of Stafford subsidized loans;¹¹⁰ because the loan balance is subsidized, no interest accrues until the student begins repayment;¹¹¹ interest will accrue at the current interest rate of

¹⁰⁶ See Edward A. Zelinsky, *Efficiency and Income Taxes: The Rehabilitation of Tax Incentives*, 64 TEX. L. REV. 973, 977 (1986). In a recent Newsweek test of 1,000 U.S. citizens, 73 percent did not know why the U.S. fought the Cold War, 63 percent did not know the number of Supreme Court justices, 43 percent did not know that the first ten amendments to the Constitution are the Bill of Rights, 29 percent could not name the Vice President of the United States, and 23 percent did not know that Martin Luther King fought for civil rights. Corky Siemaszko, *Nation of Know-Nothings: 1,000 U.S. Citizens Take the Citizenship Test and 38% Fail*, N.Y. DAILY NEWS (Mar. 21, 2011, 1:53 PM), <http://www.nydailynews.com/news/national/nation-know-nothings-1-000-u-s-citizens-citizenship-test-38-fail-article-1.122353>. Disseminating basic information to the average American household may be far more herculean of a task than many realize; thus, on issues of national importance, the tax code allows for dissemination of federal policy at a lower transaction cost than communicating directly with individual households.

¹⁰⁷ *SOI Tax Stats – Individual Statistical Tables by Size of Adjusted Gross Income*, I.R.S., <http://www.irs.gov/uac/SOI-Tax-Stats—Individual-Statistical-Tables-by-Size-of-Adjusted-Gross-Income> (last visited Nov. 25, 2013) (click on “2009” hyperlink for the report published as “Individual Complete Report (Publication 1304), Table 1.4,” located under heading “Individual Income Tax Returns Filed and Sources of Income” and subheading “All Returns: Sources of Income, Adjustments, and Tax Items”). Data regarding the filing status of the taxpayers taking the § 221 deduction in 2009 is not available. However, it is fair to assume that a substantial number of taxpayers in the adjusted gross income category of \$75,000 to \$200,000 are filing joint returns, as the deduction was completely phased out in 2009 for any taxpayer earning more than \$75,000 (or \$150,000 for joint returns).

¹⁰⁸ For a more detailed analysis of the objective effects of the § 221 deduction, see Schenk & Grossman, *supra* note 98, at 337–38; see also Lazar, *supra* note 68, at 1048.

¹⁰⁹ A student loan balance of \$23,000 is less than the average. Two-thirds of the 2011 graduating class borrowed student loans—and the average loan balance at time of graduation was \$26,600. MATTHEW REED & DEBBIE COCHRANE, INST. FOR COLL. ACCESS & SUCCESS, STUDENT DEBT AND THE CLASS OF 2011, at 2 (2012), available at <http://projectonstudentdebt.org/files/pub/classof2011.pdf>.

¹¹⁰ Presently, the maximum amount that an independent student may borrow in Stafford subsidized loans is \$23,000 over four years (and effective July 1, 2012, graduate students no longer qualify for Stafford subsidized loans). The government pays interest accruing on subsidized loans (3.86 percent in 2013–14) while the student is enrolled in school. Alex Bright-year, *Subsidized Stafford Loan*, STAFFORDLOAN.COM, <http://www.staffordloan.com/stafford-loan-info/subsidized-student-loan.php> (last visited Nov. 25, 2013).

¹¹¹ Payment is deferred until six months after the student graduates. U.S. DEP’T OF EDUC., FEDERAL STUDENT AID HANDBOOK 2002–2003: CH. 3 - GRACE PERIODS, DEFERMENT, &

3.4 percent;¹¹² and the loan term is ten years. The cumulative loan payment is \$25,982.38, which includes principal of \$22,000 and interest of \$3,982.38. For the 10 percent taxpayer, the value of the deduction over the ten-year repayment term is \$398.24. The value of the deduction for the 15 percent and 25 percent taxpayers is \$597.36 and \$995.60, respectively. The 28 percent, 33 percent, 35 percent, and 39.6 percent taxpayers have too high of an adjusted gross income to take the deduction. Although each taxpayer has the same loan balance, term, and interest rate, each with a monthly payment of \$216.52, the prorated benefit conferred by the deduction per loan payment is \$3.32 for the 10 percent taxpayer, \$4.98 for the 15 percent taxpayer, and \$8.30 for the 25 percent taxpayer. While it is technically correct, therefore, that § 221 provides some level of assistance to borrowers, it is a gross overstatement to describe that assistance as meaningful. The inequity of the procedural use of a deduction also becomes clear: the least benefit is conferred to those taxpayers with the greatest need.

IV. THE FAILURE OF THE STUDENT LOAN INTEREST DEDUCTION TO INCREASE ACCESS TO HIGHER EDUCATION

Tax expenditures may be used as an incentive designed to change taxpayer behavior or hardship relief intended to help reduce the impact of a taxpayer's misfortune.¹¹³ The Senate Finance Committee Report accompanying Section 202 of TRA 1997 states that the student loan interest deduction in § 221 is intended to serve both as an incentive provision to encourage and support advanced education and also a hardship provision to assist with the burden of debt after graduation.¹¹⁴ The estimated tax expenditure attributable to § 221 was \$400 million in both 2012 and 2013.¹¹⁵ These numbers do not compare in size to some of the largest tax expenditures, including \$131.7 billion on employer-provided health insurance and \$69.7 billion on the mortgage interest deduction.¹¹⁶ Nevertheless, an expenditure of more than \$300 million per year is problematic if it does not accomplish intended goals. This Section considers

FORBEARANCE IN DETAIL (2002), available at <http://www.ifap.ed.gov/sfahandbooks/attachments/0203SLGCh3Forbear.pdf>.

¹¹² The interest rate for Stafford subsidized loans in 2013–14 is 3.86 percent. *Stafford Loan Interest Rates*, STAFFORDLOAN.COM, <http://www.staffordloan.com/stafford-loan-info/interest-rates.php> (last visited Nov. 25, 2013).

¹¹³ Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20 B.C. L. REV. 225, 228 (1979).

¹¹⁴ S. REP. NO. 105-33, at 20 (1997) (“[M]any students incur considerable debt in the course of obtaining undergraduate and graduate education. The Committee believes that permitting a deduction for interest on certain student loans will help to ease the financial burden that such obligations represent.”).

¹¹⁵ STAFF OF J. COMM. ON TAXATION, 110TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2007–2011, at 20 (J. Comm. Print 2007) (“A tax expenditure is measured by the difference between tax liability under present law and the tax liability that would result from a recomputation of tax without benefit of the tax expenditure provision.”). See also STAFF OF J. COMM. ON TAXATION, 111TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2009–2013, at 38 (J. Comm. Print 2010).

¹¹⁶ Both numbers are for 2013. *Joint Committee on Taxation Releases Latest Estimates of Tax Expenditures*, COMM. FOR A RESPONSIBLE FED. BUDGET (Feb. 1, 2013), <http://crfb.org/blogs/joint-committee-taxation-releases-latest-estimates-tax-expenditures>.

the myriad of ways in which the student loan interest deduction fails to achieve its underlying objectives.

Facilitating access to higher education is embraced as sound national policy, and tax expenditures are frequently used with the goal of making education more affordable and therefore accessible.¹¹⁷ However, § 221 fails to encourage investment into education primarily because of simple timing considerations. An interest deduction does not directly influence higher education enrollment unless the student determines (prior to enrollment) that he is unable to afford loan payments in the absence of the deduction, and, conversely, that he is able to afford the loan payments with the deduction. Prior to enrolling in college, a student cannot possibly know what his salary will be after graduation and he is therefore unable to calculate the savings that the deduction will provide¹¹⁸—although, to some degree, the optimism of youth and the phenomenon of social mobility both play an unquantifiable (though perhaps not insignificant and likely detrimental as concerns student borrowing) role in a student's estimation of future income.¹¹⁹

The provision also fails *ex concessis* to incentivize the many graduate and professional students who pursue advanced study specifically to earn an income greater than \$60,000 per year, which is the point at which they start to be phased out of the deduction.¹²⁰ Eligibility for the § 221 deduction is presently tied to modified adjusted gross income, and many students are unable to claim the deduction due to the relatively low phase-out levels.¹²¹ As a result of these

¹¹⁷ Sean M. Stegmaier, *Tax Incentives for Higher Education in the Internal Revenue Code: Education Tax Expenditure Reform and the Inclusion of Refundable Tax Credits*, 37 Sw. U. L. REV. 135, 137–38 (2008).

¹¹⁸ See Schenk & Grossman, *supra* note 98, at 354 (discussing the difficulty for students of predicting the ultimate relative value of lost present wages when compared to possible increased future wages after obtaining a college education).

¹¹⁹ See, e.g., Lee Anne Fennell, *Death, Taxes, and Cognition*, 81 N.C. L. REV. 567, 590–91 (2003).

It is also possible that risk aversion about financial matters increases with age. Richard Posner has suggested that this might occur because as one ages, more of one's wealth is held in financial rather than human capital; older people often do not have the ability to earn wages to cover any losses they encounter. Hence while people are naturally optimistic, they may become less optimistic with age and experience.

Id.

One explanation frequently offered for the widespread opposition to the estate tax is that people are unduly optimistic. Although few people are objectively justified in expecting to be subject to the tax, the argument runs, many unrealistically hope to become wealthy enough to be subject to it. As noted above, optimism is an important and enduring feature of human psychology.

Id. at 603.

¹²⁰ For 2013, the deduction phases out when modified adjusted gross income is between \$60,000 to \$75,000 for single and head-of-household filers. See Rev. Proc. 2011-12, 2011-2 I.R.B. 2.08, available at http://www.irs.gov/irb/2011-02_IRB/ar16.html.

¹²¹ The concept of a phase-out is not defined in the Internal Revenue Code, but, in this instance, requires that the deduction available under § 221 be reduced based upon the size of the taxpayer's modified adjusted gross income. As modified adjusted gross income increases, the amount of the deduction correspondingly diminishes and is eventually eliminated altogether. See Jacqueline T. Albus, Comment, *The Deduction for Interest on Student Loans: Relief is on the Way*, 42 ST. LOUIS U. L.J. 591, 613 (1998).

While restoring the deduction was definitely a step in the right direction, the new provision does not advance the intent of those who have been advocating the deduction for the past ten years in

phase-outs, students with similar loan balances are treated dissimilarly if one happens to accept a higher paying job. Further, the income phase-out level is not increased for those students with higher loan balances—meaning there is no correlation between the phase out and the burden that the loan payment (and accompanying interest) have upon the taxpayer.

Legislation introduced by Congressman Charles Rangel in 2012 proposed the elimination of the phase-out in § 221 as a way of making education more affordable.¹²² Perhaps bipartisan supporters of this proposal have simply resigned themselves to the fact that assistance with higher education is inherently regressive in that the education itself will increase a taxpayer's lifetime income.¹²³ Indeed, a heavy debt burden inherently forces one to earn a higher wage.¹²⁴ However, eliminating the phase-out limitations in § 221 paradoxically increases the assistance provided through the provision, while also ignoring the upside-down effect that the phase-out was incorporated to mitigate against. Elimination of the phase-out disproportionately distributes the benefit of the tax deduction to those with the highest incomes, without regard to whether or not they carry the greatest student loan debt burdens. For those higher income earn-

one important respect: the lowered income level phase-out will exclude most graduate students and those receiving high paying jobs upon graduation from qualifying for the deduction.

Id.

¹²² Press Release, Representative Charles Rangel, Rangel Introduces Student Loan Interest Deduction (SLID) Act, (May 11, 2012), *available at* <http://rangel.house.gov/press-release/rangel-introduces-student-loan-interest-deduction-slid-act#.Ugw66.WYbck.email>. Proposals continue to move the existing interest deduction closer to where it was prior to repeal in 1986. For example, Congressman Charles Rangel introduced the Student Loan Interest Deduction (SLID) Act of 2012 to increase the tax deduction for student loan interest to \$5,000 (or \$10,000 for married taxpayers), also removing the income limitation on taking the deduction and lifting the five-year limitation. *Id.* (“Already, the rising costs of tuition and high unemployment rates for recent graduates have created a student loan debt crisis. Forcing them to pay high taxes on an already overwhelming amount of debt makes education less affordable than it should be.”).

¹²³ The eight original (bipartisan) co-sponsors of the legislation are listed on the website of Congressman Charles Rangel: Reps. Jim McDermott (D-WA), Bill Pascrell, Jr. (D-NJ), Shelley Berkley (D-NV), Richard E. Neal (D-MA), John B. Larson (D-CT), Earl Blumenauer (D-OR), John Lewis (D-GA), and Jim Gerlach (R-PA). *Id.*

¹²⁴ Some commenters note the inherent unfairness of the redistributive financial burdens imposed on college graduates who finish degrees and earn large sums of money:

Fairness, in the sense of a just result, is not an easy concept to define. The problem of reaching an agreed upon meaning for the term is that people simply cannot agree on its meaning. . . .

. . . .

. . . . Is it fair for a group of persons who have less to take from others who have more? . . . [S]uppose an individual works her way up from poverty and, after attending medical school and completing various fellowships, enters practice at age [thirty-three]. She saves a lot of lives, works long and irregular hours, but also earns a great deal. Society values her contribution immensely, but the elected government chastises her for not paying her fair share. No such canard is laid at the feet of her old buddies from the neighborhood. While our doctor was studying and suffering considerable self-denial, they were out partying. The result of their lack of willpower and determination is that they barely get by now. There is unfairness, not fairness, in a system that requires our doctor to compensate for her former friends' shortsightedness.

Jeffrey A. Schoenblum, *Tax Fairness or Unfairness? A Consideration of the Philosophical Bases for Unequal Taxation of Individuals*, 12 AM. J. TAX POL'Y 221, 258–62 (1995).

ers who could easily pay for higher education without borrowing, the absence of a phase-out also creates an incentive to borrow.

Finally, while interest deductions by their inherent nature are designed to reduce the cost of borrowing by reducing the cost of debt service, § 221 does little to provide hardship relief with the annual debt service of the loans.¹²⁵ As a general rule, student borrowers do not see much of a financial benefit from the deductibility of their student loan interest. For those students who receive the benefit of the deduction, only \$2,500 of the interest paid is deductible each year. As illustrated in Section IV, whether or not a student will receive a benefit under § 221 depends on the student's adjusted gross income after graduation. A taxpayer subject to the 0 percent, 10 percent and 15 percent brackets receives little benefit (a maximum possible benefit of \$0, \$250, and \$375, respectively), the 25 percent taxpayer receives a greater benefit (a maximum possible benefit of \$625), and the taxpayers in the 28 percent, 33 percent, and 35 percent brackets have too high of an adjusted gross income to take the deduction at all.¹²⁶

V. TOWARDS SOLUTIONS

The use of a deduction to assist student borrowers is procedurally unsound, and the § 221 deduction fails to accomplish articulated goals, as explored in Sections III and IV of this article, respectively. The obvious inefficiencies attendant with the deduction of student loan interest raise a genuine question as to why Congress immediately fought to revive the deduction after its 1986 repeal. Objective benefits alone certainly do not warrant or explain the political battle. It is possible that Congress embraced this deduction because, if not in actual effect, it at least symbolically promotes higher education, and, if so, the way in which important national policies are embedded into the tax code bears consideration. Section V considers the problematic ways in which the student loan interest deduction hollowly capitalizes on a cultural expectation. Indeed, higher education policy has reached an inflection point when meaningful action is essential, and implementing meaningful policy changes necessitates a process of streamlining rather than simply layering new law upon old.

Since every deduction in the Code is, to some extent, an act of social engineering, it is useful to understand the impact of tax expenditures on cultural expectations and identity.¹²⁷ The deduction of student loan interest in § 221

¹²⁵ See DJM, *IBR: the Trench*, INSIDE THE L. SCH. SCAM (Oct. 8, 2012, 8:10 PM), <http://insidethelawchoolscam.blogspot.com/2012/10/ibr-trench.html> (“[A] . . . cut to middle-class [student borrower] discretionary spending has serious economic impact . . . Almost everyone agrees that [this decrease will] . . . cause significant economic damage.”).

¹²⁶ See Schenk & Grossman, *supra* note 98, at 330–36. In Part I of the Appendix of the aforementioned article, Schenk and Grossman provide a detailed breakdown of the tax benefit provided by the student loan interest deduction. *Id.* app. at 366–81. Although the 25 percent taxpayer should reap the greatest tax benefit from this deduction, this taxpayer repays \$34,372.70 of principal and interest borrowed to attend a four-year public college (assuming a 6.8 percent interest rate), and receives a tax benefit of only \$2,370.58. *Id.* app. at 369.

¹²⁷ Michael S. Kirsch, *Alternative Sanctions and the Federal Tax Law: Symbols, Shaming, and Social Norm Management as a Substitute for Effective Tax Policy*, 89 IOWA L. REV. 863, 913 (2004).

conveys an implicit favoritism of one type of indebtedness over another—specifically, removing student loan indebtedness from the category of consumer credit and recasting it, along with qualified residence indebtedness, as a type of debt upon which favored treatment should be bestowed.¹²⁸ The only other instance in which a taxpayer can deduct personal debt interest is the home mortgage interest deduction, and several eerie parallels between these two deductions should not be ignored.

Both provisions survived elimination in TRA 1986, despite the fact that neither can be justified on purely economic grounds.¹²⁹ Politicians have oversold the impact of the home mortgage interest deduction, which in turn receives staggering public support despite the fact that it does not achieve its articulated goals.¹³⁰ In much the same way, the complexities of the myriad of educational incentives in the Code obfuscate the actual benefits conferred through the provisions. The politically popular message underlying both deductions is that the expenditures are not purely ones of personal consumption, but an investment that benefits all of society.¹³¹ And while § 221 aggressively caps the amount of the student loan interest deduction in a way that distinguishes it from the home mortgage interest deduction, interestingly, there has been at least some movement to eliminate this cap and broaden the deduction available for student loan interest.¹³²

On the heels of the recent economic crisis, however, many are realizing that the home interest mortgage deduction should no longer be treated as sacrosanct.¹³³ The deduction is indefensible from a distributional perspective, as only those taxpayers with enough income to itemize their deductions receive any benefit.¹³⁴ Ironically, these same taxpayers are likely to buy a home without the assistance of a deduction, and thus the deduction merely rationalizes

¹²⁸ Pamela Stewart, Letter to the Editor, *Discouraging Students*, N.Y. TIMES, Feb. 10, 1991, at A16, available at www.nytimes.com/1991/02/10/opinion/l-discouraging-students-081091.html (“To lump education-loan interest in with assorted consumer credit sends the wrong message about the value of higher learning. If President Bush and Congress care about the lack of American-born Ph.D. candidates and the competitiveness of our work force, they should change this aspect of the tax code.”).

¹²⁹ See William T. Mathias, *Curtailing the Economic Distortions of the Mortgage Interest Deduction*, 30 U. MICH. J.L. REFORM 43, 43 (1996).

¹³⁰ Doyle McManus, *Tax Reform that Hits Home*, L.A. TIMES, Feb. 6, 2013, at A13, available at <http://articles.latimes.com/2013/feb/06/opinion/la-oe-mcmanus-mortgage-deduction-20130206>; Gregory Korte, *Only 26% Claim Mortgage Deduction: But Those Who Do Say It's Vital and They Depend On It*, USA TODAY, Dec. 5, 2012, at A5, available at <http://www.usatoday.com/story/news/politics/2012/12/04/fiscal-cliff-mortgage-deduction/1737611/>.

¹³¹ “Students need to know the Federal Government and the Nation value their contributions of the mind.” 143 CONG. REC. S3,299 (daily ed. Apr. 16, 1997) (statement of Rep. Grassley).

¹³² As discussed in Part IV, Congressman Charles Rangel introduced the Student Loan Interest Deduction (SLID) Act of 2012 to increase the tax deduction for student loan interest to \$5,000 (or \$10,000 for married taxpayers), also removing the income limitation on taking the deduction. *Rangel Introduces Student Loan Interest Deduction (SLID) Act*, *supra* note 122.

¹³³ See, e.g., Schoenblum, *supra* note 124, at 221.

¹³⁴ McManus, *supra* note 130; Korte, *supra* note 130; Francine J. Lipman et al., *More Alternatives in the Complex World of the Alternative Minimum Tax: The Election to Itemize Deductions*, 18 PRAC. TAX LAW. 7, 8 (2004); Gerald Prante, *Most Americans Don't Itemize*

carrying more debt to buy larger homes.¹³⁵ Promoting a policy of homeownership through the use of a mortgage interest deduction played more than an incidental role in overleveraging.¹³⁶

If the home mortgage interest deduction is being questioned in the aftermath of the mortgage bubble, so too should the student loan interest deduction be examined on the eve of a possible student loan debt bubble. Students who take out student loans are in effect mortgaging their future prospects for current receipt of education.¹³⁷ Moody's Analytics has warned that "[u]nless students limit their debt burdens, choose fields of study that are in demand, and successfully complete their degrees on time, they will find themselves in worse financial positions and unable to earn the projected income that justified taking out their loans in the first place."¹³⁸ The potential impact of student borrowers on national economic growth should not be minimized, because discretionary income dedicated to repayment of substantial student loan balances means dollars not spent or invested in a way that creates new jobs and powers the economy.¹³⁹ Further, with more than a trillion dollars in higher education

on Their Tax Returns, TAX FOUND. (July 23, 2007), <http://taxfoundation.org/article/most-americans-dont-itemize-their-tax-returns>.

¹³⁵ McManus, *supra* note 130; Korte, *supra* note 130; Teresa Dondlinger Trissell, *Turning the Tide on the Mortgage Interest Deduction*, 59 FED. LAW. 16, 17 (2012); Roberta F. Mann, *The (Not So) Little House on the Prairie: the Hidden Costs of the Home Mortgage Interest Deduction*, 32 ARIZ. ST. L.J. 1347, 1359–60 (2000).

¹³⁶ Gene Steuerle, *An Overleveraged Economy: Tax, Not Just Bank, Reform*, TAX POL'Y CENTER (Jan. 20, 2010, 9:22 PM), <http://taxvox.taxpolicycenter.org/2010/01/20/an-overleveraged-economy-tax-not-just-bank-reform/>.

¹³⁷ See Joey LeMay, *Ph.D. Masters Degree Holders Turn to Food Stamps at Record Numbers*, MINT PRESS NEWS (May 11, 2012, 5:00 AM), <http://www.mintpressnews.com/phd-masters-degree-holders-turn-to-food-stamps-at-record-numbers/25946/>.

A 2011 look at college majors with the highest unemployment rate shows some correlation of popular degrees and the chances of finding a full-time job. Some of the most common advanced degrees obtained for both men and women include law, clinical psychology, education, business administration and management and engineering. However, some of the highest unemployment rates for degree holders include areas in psychology, legal studies and management.

Also ubiquitous on the list of major [sic] with the highest unemployment are degrees in fine arts, liberal arts, graphic design and humanities. The Chronicle of Higher Education profiled [fifty-one]-year-old Elliot Stegall, who followed his passion by continuing graduate work in film studies, now finds that he is only able to get scarce work as a part-time adjunct professor at small colleges. With the low wages unable to comfortably pay bills, Stegall and his wife, who have two kids, receive food stamps, WIC support and Medicaid.

Id.

¹³⁸ Equal Justice Works, *College Tuition Growth Rate Is Biggest Bubble of Them All*, U.S. NEWS & WORLD REP. (Sept. 28, 2011), <http://www.usnews.com/education/blogs/student-loan-ranger/2011/09/28/college-tuition-growth-rate-is-biggest-bubble-of-them-all> ("And, if the rewards of a higher education continue to fall and required educational debt burdens continue to rise, Moody's foresees a future in which fewer people may invest in a college education. In the long term, a less educated and therefore less productive workforce would put the United States at a competitive disadvantage.").

¹³⁹ See DJM, *supra* note 125 (commenting on the effect that Obama's Income Based Repayment Plan will have on reducing the discretionary income of student loan borrowers, thereby impacting the overall economy).

indebtedness and troubling default rates, any program that encourages enrollment at the expense of responsible borrowing is not sustainable.¹⁴⁰

Favoring student loan debt through a student loan deduction, in combination with unqualified access to borrowed funds, is nothing more than the congressional recycling of policies applied in the context of home mortgage borrowing. Unlike mortgage debt however, all student loan debt (including debt borrowed from private, for-profit lenders)¹⁴¹ falls within a very narrow category of debt that is nondischargeable in bankruptcy—including tax debts, child support obligations, and also debts obtained by fraud, willful and malicious injury to another, and criminal restitution.¹⁴² The nondischargeability of student loan debt is a departure from bankruptcy dogma that society benefits as a whole by providing a “fresh start” from inexorable insolvency.¹⁴³ As a matter of national policy, an interesting tension between tax and bankruptcy statutes arises from inconsistent cues: borrowing to fund your education is worthwhile to you and society at large, but, should you struggle under the weight of the debt burden, you will be a slave to your debt in perpetuity.

Recognizing that measures such as § 221 were simply not enough when faced with escalating education costs, a commensurate increase in student borrowing, and borrowers struggling under the weight of nondischargeable debt, the government responded with an income-based repayment plan enacted as part of the College Cost Reduction and Access Act of 2007.¹⁴⁴ Under this

¹⁴⁰ Herein lies the foundational flaw in a program of loan forgiveness that focuses upon excusing—not repaying—some portion of higher education indebtedness: an effective student loan program should not be structured so as to encourage borrowing without regard to whether or not the underlying education is likely to produce a return that will enable the borrower to repay the debt. *The Kojo Nnamdi Show: Looming Loans & Scary Stats: A Student Loan Debt “Bubble”?* (WAMU 88.5 FM American University radio broadcast Apr. 2, 2012, 1:11 PM), transcript available at <http://thekojonnamdishow.org/shows/2012-04-02/looming-loans-scary-stats-student-loan-debt-bubble/transcript>.

Perhaps about 10, 12 percent will struggle to repay their loans, either because they majored in a field of study that doesn’t pay very well or they graduated with too much debt for that particular income level. A good rule of thumb is to not graduate — that your total debt at graduation should be less than you’re expected annual starting salary. If your debt is less than your income, you’ll be able to pay off that debt in [ten] years.

Id.

¹⁴¹ See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (codified as amended at 11 § U.S.C. § 523). Although nondischargeability initially applied to only government insured and guaranteed loans, the Bankruptcy Code was amended in 2005 to extend this protection to private, for-profit lenders. Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 181 (2009) (“In the words of New York State Attorney General Cuomo, these loans are the ‘Wild West of the student loan industry.’ Thus, with the 2005 overhaul of the Bankruptcy Code, Congress stripped away the social safety net available to the borrowers of such loans.”).

¹⁴² Student loans are nondischargeable absent a showing of undue hardship, which is a standard that is seldom met. Fossey, *supra* note 37, at 29; Brendan Baker, Comment, *Deeper Debt, Denial of Discharge: the Harsh Treatment of Student Loan Debt in Bankruptcy, Recent Developments, and Proposed Reforms*, 14 U. PA. J. BUS. L. 1213, 1214 (2012).

¹⁴³ See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1426 (1985).

¹⁴⁴ College Cost Reduction and Access Act, Pub. L. No. 110-84, § 493C, 121 Stat. 784, 792 (2007). More than 13 percent of the country presently has two or more outstanding loans.

income-based repayment plan (“Original IBR”), monthly payments are limited to the lesser of the following: the borrower’s monthly payment under a standard ten-year repayment plan; or alternatively, 15 percent of the borrower’s discretionary income. Discretionary income is the difference between the borrower’s adjusted gross income and 150 percent of the U.S. Department of Health and Human Services Poverty Guideline (based upon family size).¹⁴⁵ After twenty-five years, the government forgives any outstanding balance.¹⁴⁶

In 2010, President Obama urged Congress to enact a proposal that would cap a borrower’s payments at 10 percent of his discretionary income and forgive any loan balance remaining after twenty years.¹⁴⁷ This modified income-based repayment plan was enacted as part of the Health Care and Education Reconciliation Act of 2010, which applied to new borrowers on or after July 1, 2014. President Obama implemented the plan (“New IBR”) by executive order in 2011 so that it instead applies to borrowers who first borrowed in 2008 or later and took out at least one federal loan on or after October 1, 2012.¹⁴⁸ Original IBR remains intact for those borrowers who do not qualify for New IBR.

The problematic interplay between § 221 and both income-based repayment plans is that the departure point for calculation of the monthly payment cap is not salary or total income—but, instead, adjusted gross income. This is a number that can be easily manipulated and meaningfully reduced by those taxpayers who contribute to pre-tax benefits and take above-the-line deductions. In turn, the monthly payment cap is lowered under Original and New IBR and the outstanding balance forgiven by the federal government in twenty or twenty-

Paul O’Donnell, *Student Debt Climbs as Credit Risk Gets Steeper*, CNBC (Jan. 30, 2013, 4:39 PM), http://www.cnbc.com/id/100420887/Student_Debt_Climbs_as_Credit_Risk_Gets_Steepier.

¹⁴⁵ *Income-Based Repayment*, FINAID, <http://www.finaid.org/loans/ibr.phtml> (last visited Nov. 25, 2013). In 2013, the Poverty Guideline is set at \$11,490 for a single person in the forty-eight contiguous states and Washington D.C. . *2013 Poverty Guidelines*, U.S. DEP’T OF HEALTH AND HUM. SERVICES, <http://aspe.hhs.gov/poverty/13poverty.cfm> (last visited Nov. 25, 2013). Therefore, for a single borrower residing in Illinois with an adjusted gross income of \$40,000, \$17,235 will be excluded from income for the purposes of calculating discretionary income. Under Original IBR, payments will be capped at 15 percent of his discretionary income of \$22,765.

¹⁴⁶ 34 C.F.R. § 685.221(f) (2013).

¹⁴⁷ *Pay as You Earn Repayment Plan for the Direct Loan Program*, STUDENTAID.GOV (Nov. 2012), <http://studentaid.ed.gov/sites/default/files/pay-as-you-earn.pdf>.

¹⁴⁸ The Health Care and Education Reconciliation Act of 2010 was signed into law on March 30, 2010. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2213, 124 Stat. 1029, 1081. In October 2011, the Obama Administration announced that the plan was being implemented sooner by executive action, which is referred to by the administration as “Pay As You Earn.” Under this new income-based repayment plan, borrowers taking their first loans in 2008 or later and at least one loan in 2012 or later are eligible. Press Release, The White House, *We Can’t Wait: Obama Administration to Lower Student Loan Payments for Millions of Borrowers* (Oct. 25, 2011), *available at* <http://www.whitehouse.gov/the-press-office/2011/10/25/we-cant-wait-obama-administration-lower-student-loan-payments-millions-b>; Equal Justice Works, *Learn What Obama’s Loan Plan Means to You*, U.S. NEWS & WORLD REPORT (Nov. 9, 2011), <http://www.usnews.com/education/blogs/student-loan-ranger/2011/11/09/learn-what-obamas-student-loan-plan-means-for-you>.

five years increases. Therefore, for those taxpayers who are repaying student loan debt under either income-based repayment plan, the student loan interest deduction is a boon. In addition to the tax savings afforded by the deduction itself, this taxpayer also stands to benefit from lower monthly payments and increased loan forgiveness.

Although it is unavoidable that social and cultural expectations are going to be capitalized through the tax code, the use of a tax expenditure is wholly inappropriate when the *only* thing accomplished is the capitalization of an expectation.¹⁴⁹ Given the potential for another debt bubble, policy that generally encourages higher education must be thoughtfully refined and narrowed¹⁵⁰ to encourage responsible borrowing for higher education and repayment of any underlying indebtedness.¹⁵¹ Furthermore, a commitment to income-based repayment requires that the duplication of benefits generated by the tax code be corrected—because in a system with limited resources, it is inefficient for a benefit to be duplicated through both direct spending (i.e. the IBR program) and indirect spending (i.e. the tax code).¹⁵²

The repeal of § 221 would address a multitude of issues explored in this Article, but is not in and of itself a practical solution. Eliminating the inefficient tax expenditures that clutter the Code is a politically unpopular task. A better solution is to therefore address the problem at its analytical source: namely, Congress has battled to revive this deduction more for what it represents than for what it accomplishes. It is politically popular for Congress to utilize tax expenditures as a way of underscoring its commitment to and support of higher education, and consequently, a more realistic solution pairs the repeal of § 221

¹⁴⁹ With more than \$12.7 trillion added to the U.S. national debt over the last decade, there is no time like the present to focus on efficiency. *U.S. National Debt: \$12.7 Trillion Added to the Debt Over the Last Decade*, WHITE HOUSE, http://www.whitehouse.gov/infographics/us-national-debt?utm_source=wh.gov&utm_medium=shorturl&utm_campaign=shorturl (last visited Nov.25, 2013).

¹⁵⁰ See, e.g., President William Clinton, State of the Union Address (Feb. 4, 1997), available at <http://clinton2.nara.gov/WH/SOU97/> (“We must make the [thirteenth] and [fourteenth] years of education—at least two years of college—just as universal in America by the [Twenty-first] century as a high school education is today, and we must open the doors of college to Americans.”).

¹⁵¹ The obvious criticism of subsidizing education in a way that encourages enrollment in socially desirable areas of study is that such an approach is a crude strategy if the goal is to stimulate the production of outputs. In other words, paying for a college student to earn a degree in art as a way of subsidizing the arts may be less efficient than directly subsidizing the outputs—and purchasing works of art. This topic, however, will be explored in greater depth in a future article.

¹⁵² The public is entitled to a reasonable estimate of the amount spent by the government on its higher education programs. A true measure of aggregate costs when direct spending programs overlap with indirect spending through tax expenditures requires a change to the federal budget rules. It is presently inefficient for benefits to be duplicated through direct and indirect spending programs because, until there is greater transparency and accounting accuracy, it is difficult for Congress and the Treasury Department to understand exactly how much is being spent on efforts related to higher education. U.S. GOV'T ACCOUNTABILITY OFFICE, GOVERNMENT PERFORMANCE AND ACCOUNTABILITY: TAX EXPENDITURES REPRESENT A SUBSTANTIAL FEDERAL COMMITMENT AND NEED TO BE REEXAMINED (2005), available at <http://gao.gov/assets/250/247901.pdf>.

with an alternative provision that works more cohesively with the income-based repayment plans recently adopted.

The New and Original IBR plans provide for lump sum forgiveness of any outstanding loan balance after twenty or twenty-five years, respectively.¹⁵³ This outstanding balance will be included in the taxable income of the borrower in the year that it is forgiven.¹⁵⁴ With the relatively recent implementation of income-based repayment, many borrowers are unaware of the lump sum (tax) debt for which they will abruptly be responsible several years in the future. This will inevitably change, however, as tales of hardship surface.¹⁵⁵ The repeal of § 221 paired with a tax expenditure that excludes cancellation of indebtedness for those taxpayers below a designated income phase-out is a feasible solution that advances several goals: the taxpayer will be freed from a large tax bill after satisfying his debt, thereby alleviating a prospective problem, and the policy embedded in this tax expenditure supports higher education while also creating an incentive for timely repayment.¹⁵⁶

VI. CONCLUSION

If it is true that the collapse of the housing market was largely due to bad regulation driven by a cocktail of liberal ideology that every American deserves to own a house and conservative policies asserting that that free markets are self-regulating, it is important to apply some level of inspection and consider whether the same brew is again being served in the context of the student loan debt market.¹⁵⁷ Facilitating higher education through the use of an interest deduction is a recycling of the same ineffective policy that was applied by the government with home mortgages. After having weathered the rupture of the dot-com bubble and the mortgage debt bubble, the possibility of a student loan debt bubble requires meaningful action from Congress. As presently codified in § 221, the student loan interest deduction neither encourages students to enroll

¹⁵³ Kurtzleben, *supra* note 39.

¹⁵⁴ Section 61(a)(12) of the Internal Revenue Code includes into gross income any discharge of indebtedness. I.R.C. § 61(a)(12) (2012). Lenders must report cancelled debts of \$600 or more to the IRS on a 1099-C form. *Form 1099-C, Cancellation of Debt*, IRS (Dec. 4, 2012), <http://www.irs.gov/uac/Form-1099-C,-Cancellation-of-Debt>. An exclusion is set forth in § 108(f)(1) for qualifying public service employees who have worked “for a certain period of time in certain professions for any of a broad class of employers.” I.R.C. § 108(f)(1) (2012).

¹⁵⁵ Ron Lieber, *For Student Borrowers, Relief Now May Mean a Big Tax Bill Later*, N.Y. TIMES Dec. 15, 2012, at B1, available at http://www.nytimes.com/2012/12/15/your-money/for-student-borrowers-a-tax-time-bomb.html?pagewanted=all&_r=1&.

¹⁵⁶ The focus of this Article is the way in which § 221 embodies national norms. The proposed solution, pairing repeal of § 221 with an alternative tax expenditure, will be further detailed in a future article.

¹⁵⁷ Cohn, *supra* note 21.

[Secretary of Education Arne] Duncan rejects the notion that the administration is pushing student borrowing in a way that previous administrations pushed home ownership—with disastrous results. . . .

. . . .

. . . . [D]espite one of the worst job markets on record for college graduates, Duncan does not believe students should postpone college, or not go to college at all.

Id.

in school nor offers substantial assistance for those who have incurred debt to finance their education. The proposed solution—pairing the repeal of § 221 with the enactment of a tax expenditure that creates an incentive for timely repayment of student loan debt—continues to favor student loan debt, but does so in a way that also complements the recently implemented income-based repayment plans and underscores the importance of timely loan repayment.