SHOULD WE REALLY DISCHARGE THE STUDENT LOAN DEBT DISCHARGE EXCEPTION? WHY REVERSING THE 2005 BAPCPA AMENDMENT IS NOT RELIEF TO THE DEBTOR

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I. INTRODUCTION

"A special circle of bankruptcy hell reserved for dads who avoid child support and tax evaders"[1] — morbid as they may be, these words paint an accurate image of student loan debt and its respective bankruptcy laws in the United States today. Student loan debt shares a common evil with overdue taxes and child support obligations in that while most debts are treated relatively equally in bankruptcy, the laws governing these particular debts make them virtually impossible to discharge.[2]

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1 Tyler Kingkade, *Fairness for Struggling Students Act Would Reform Private Student Loan Bankruptcy Rules*, HUFFINGTON POST (Jan 24, 2013, 3:34 PM), http://www.huffingtonpost.com/2013/01/23/fairness-for-struggling-students-act_n_2538832.html (quoting Rich Williams, a former higher education advocate for U.S. Public Interest Research Group).

2 Press Release, Sen. Richard Durbin, As Student Loan Debt Surpasses $1 Trillion, Senators Introduce Legislation to Address Crisis (Jan. 23, 2013), *available at* http://www.durbin.senate.gov/public/index.cfm/pressreleases?ID=adad47a3-9b82-4c46-b971-57bb9dc11044; *see also* 11 U.S.C. § 523(a)(1) (2010) (declaring that a bankruptcy discharge generally will *not* discharge a debt "for a tax or customs duty"); 11 U.S.C. § 523(a)(5), (15) (generally excepting from discharge

With student loans constituting the largest form of consumer debt — clearing $1 trillion nationally — the inability to repay or discharge these loans creates an enormous burden for higher education graduates.[3]

The nondischargeability of student loans was the result of the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, in which Congress decided to render private student loan debt — along with the already nondischargeable federal student loan debt — nondischargeable out of fear that "debtors on the eve of lucrative careers would file bankruptcy to get out of their obligations."[4] Many college graduates are currently facing unmanageable debts, and the strict standards for discharging these debts is an albatross. Roughly 60% of American college students borrow annually to cover education costs, and there are approximately 39,500,000 student loan borrowers who currently have outstanding loan debts.[5] With $864 billion in federal loans and $150 billion in private loans, the national student loan debt exceeds the national credit card debt.[6]

This massive amount of debt causes great difficulty for student loan borrowers when it comes time to pay down these debts. Two out of five student loan borrowers become

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domestic support obligations and child support obligations incurred as a result of a divorce or separation decree).

[3] Tyler Kingkade, *Private Student Loan Bankruptcy Rule Traps Graduates With Debt Amid Calls for Reform*, HUFFINGTON POST (Apr. 17, 2013, 3:32 PM), http://www.huffingtonpost.com/2012/08/14/private-student-loans-bankruptcy-law_n_1753462.html.

[4] Katheryn E. Hancock, A Certainty of Hopelessness: Debt, Depression, and the Discharge of Student Loans Under the Bankruptcy Code, 33 L. & PSYCHOL. REV. 151, 165 (2009).

[5] Student Loan Debt Statistics, STATISTICS BRAIN RESEARCH INSTITUTE, http://www.statisticbrain.com/student-loan-debt-statistics/ (last visited May 25, 2015).

[6] Catherine Rampell, *Report Details Woes of Student Loan Debt*, N.Y. TIMES, http://www.nytimes.com/2012/07/20/business/government-report-details-student-loan-debt.html?_r=0 (July 20, 2012).; Kingkade, *supra* note 3.

delinquent within the first five years of entering repayment.[7] More than 20% of students attending for-profit colleges default on their student loans within three years of initiating their repayment period.[8] As of 2012, cumulative defaults on private student loans exceed $8 billion, representing over 850,000 distinct loans.[9] These overwhelming student loan debts not only affect the encumbered students personally, but also create a ripple effect throughout our economy. In 2011, for example, first-time home buyers — at a median age of *thirty-one* — fell to the smallest percentage of home purchasers since 2006.[10]

With the proposed Fairness for Struggling Students Act, Senator Dick Durbin (D-IL) aims to reverse the 2005 BAPCPA amendment to § 523(a)(8) — the Bankruptcy Code provision that dictates which debts are not dischargeable — by once again treating privately issued student loans the same as other forms of private debt.[11] Referring to the 2005 BAPCPA amendment's altering of private student loan treatment in bankruptcy, Senator Durbin believes his legislation will "right that wrong,"[12] explaining that "this harsh treatment of students in the bankruptcy system was built on the false premise that students

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[7] Kelly Field, *Study of Delinquent Borrowers Finds Many Student-Loan Recipients 'in the Middle'*, THE CHRONICLE OF HIGHER EDUCATION (Mar. 15, 2011), http://chronicle.com/article/Study-of-Delinquent-Borrowers/126744/.

[8] STAFF OF S. COMM. ON HEALTH, EDUC., LABOR AND PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 114 (Comm. Print 2012), *available at* http://www.help.senate.gov/imo/media/for_profit_report/PartI-PartIII-SelectedAppendixes.pdf.

[9] CONSUMER FIN. PROT. BUREAU & U.S. DEP'T OF EDUC., PRIVATE STUDENT LOANS 4 (2012), *available at* http://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf.

[10] Caroline Fairchild & Tome Keene, *Student Loan Debt Tied to U.S. Home Sales Lag, Soss Says,* BLOOMBERGBUSINESS (Jul. 24, 2012, 12:40 PM), http://www.bloomberg.com/news/articles/2012-07-24/student-loan-debt-tied-to-u-s-home-sales-lag-soss-says.

[11] Press Release, Sen. Richard Durbin, *supra* note 2.

[12] *Id.*

were more likely to 'abuse' the bankruptcy system."[13] Furthermore, President Obama's Health Care and Education Reconciliation Act provides another way out for student loan debtors, as it mandates that after twenty years of repayment at 10% of the graduate's income, the remaining balance of the debt will be cancelled.[14]

These legislative movements recreate the fear Congress had when it took action in 2005. If students are provided with these methods of having their loans discharged or forgiven, there is little incentive to make better decisions with respect to obtaining higher education funding. Furthermore, federal loans constitute 85% of the student loan market, and the Fairness for Struggling Students Act only amends the bankruptcy laws for private student loans, leaving federal loans to remain virtually nondischargeable.[15] The fact that federal loans are provided the option for Income-Based Repayment (IBR) only serves to further emphasize the real issue at hand. As of 2012, only 700,000 student borrowers were taking advantage of IBR, despite the Obama Administration's estimates that over 1.6 million student borrowers could have their monthly payments reduced by such plans.[16]

Prospective students must be educated with respect to obtaining education funding. A 2012 survey showed that approximately 65% of student loan borrowers "misunderstood or were surprised by" aspects of their student loans, with 20% of those students misunderstanding their repayment terms and 15% not fully grasping the loan interest rates.[17] Two-thirds of

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[13] Kingkade, *supra* note 3.

[14] AFFORDABLE CARE ACT 3, http://www.dpc.senate.gov/healthreformbill/healthbill61.pdf (last visited May 25, 2015).

[15] *Id.*

[16] Monica Mehta, *How to Start a Business With Student Loans and Not Go Broke,* Entrepreneur (Aug. 7, 2013), http://www.entrepreneur.com/article/227715.

[17] Healey C. Whitsett, *High Debt, Low Information: A Survey of Student Loan Borrowers*, NERA ECON. CONSULTING 2 (Mar. 21, 2012), http://www.nera.com/nera-files/PUB_Student_Loans_0312.pdf.

the students surveyed admit they did not fully understand the primary differences between the federal and private loans.[18] The Know Before You Owe Act of 2013, also proposed by Senator Durbin, is a giant step in the right direction. It proposes requirements that schools provide counseling to students before they take on private loans if they still have unutilized federal loan eligibility, and that schools confirm the students cost of attendance and estimated financial aid before a private loan is approved.[19]

This note will address in further depth the aforementioned subjects. First it will provide an overview of the state of student loan debt in bankruptcy prior to the controversial 2005 BAPCPA amendments and why the BAPCPA amendments were enacted in the first place. It will then discuss the undue hardship test in detail and illustrate its drastic effect on the dischargeability (or, more appropriately, lack of dischargeability) of student loan debts. From there, this note will analyze the increasing burden of student loan debt on our society. Not only will this note explain Senator Durbin's proposal, it will provide context and insight into the mindset of the senators backing the proposal. This note will then address both the effect of the Act on lenders and the Act's effect on the higher education and job markets. Finally, this note will promote alternative solutions that will better serve the goal of relieving students — and society generally — from the burdens of unmanageable student loan debt.

II. BEFORE THE 2005 BAPCPA

When bankruptcy laws were first established under the Bankruptcy Act of 1898, "government-backed" student loans had yet to exist — in turn, Congress did not consider the idea of restricting their dischargeability, and student loans were

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[18] *Id.*

[19] *As Student Loan Debt Surpasses $1 Trillion, Senators Introduce Legislation to Address Crisis,* DICK DURBIN, UNITED STATES SENATOR, ILLINOIS (Jan. 23, 2013), http://www.durbin.senate.gov/newsroom/press-releases/as-student-loan-debt-surpasses-1-trillion-senators-introduce-legislation-to-address-crisis.

generally considered dischargeable as a result.[20] Student loans were essentially placed in the same category as any other general unsecured debt.[21] Congress had yet to create any legislation that would distinguish student loans from other unsecured debts, and therefore student loan debts faced few roadblocks along the road to discharge.[22] This unrestricted free-for-all on discharging student loan debt lasted until the late 1970s.[23]

Prior to 1976, there had yet to be any nondischargeable distinction placed upon educational loans.[24] In the late '70s, however, Congress began to fear that higher education graduates were abusing the bankruptcy system as a means of discharging their student loans.[25] A prevailing view was that individuals should not be able to borrow to finance their efforts to obtain more lucrative careers, only to rescind on their obligations to pay if and when their plans did not pan out.[26]

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[20] Hancock, *supra* note 4, at 151.

[21] Terrence L. Michael & Janie M. Phelps, *"Judges?!—We Don't Need No Stinking Judges!!!": The Discharge of Student Loans in Bankruptcy Cases and the Income Contingent Repayment Plan*, 38 TEX. TECH L. REV. 73, 77 (2005).

[22] *Id.*

[23] All forms of student loan debt remained nondischargeable until Congress replaced the Bankruptcy Act of 1898 with the 1978 Bankruptcy Code. Hancock, *supra* note 4, at 151.

[24] Kayla Webley, *Why Can't You Discharge Student Loans in Bankruptcy?*, TIME (Feb. 9, 2012), http://business.time.com/2012/02/09/why-cant-you-discharge-student-loans-in-bankruptcy/.

[25] Michael & Phelps, *supra* note 21, at 77.

[26] As a report circulated in 1973 by the Commission on the Bankruptcy Law of the United States explained:

> [A] loan or credit extended to finance higher education that enables a person to earn substantially greater income over his working life should not as a matter of policy be dischargeable before he has demonstrated that for any reason he is unable to earn sufficient income to maintain himself and his dependents and to repay the educational debt.

Another widespread fear was that even those students whose plans *did* pan out would use bankruptcy as means of discharging their student loans right before starting their newly-obtained lucrative careers.[27] Not only did society (including Congress) view this as unethical, but many felt that this use of the bankruptcy system was a threat to the entire federal loan program.[28] In an effort to protect the "minds and skills of American youth," § 523(a)(8) was proposed in order to restrict the discharge of federal student loans.[29]

Initially, the bankruptcy code was only altered so that federal government-backed loans and loans from non-profit educational institutions were nondischargeable.[30] Such loans were deemed nondischargeable within the first five years of repayment.[31] Luckily for burdened students, this movement was not wholly restrictive because the nondischargeability stigma was removed after the initial five years of repayment.[32] The legislature graciously recognized that circumstances beyond an individual's control could make it impossible to repay student loan obligations while also maintaining a minimal quality of life.[33] The fate of the debtor was intended to depend upon a

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Id.

[27] See Hancock, *supra* note 4, at 165.

[28] From 1972 to 1976, delinquencies and defaults in federal student loan programs rose by three hundred percent. Robert C. Cloud, Ed.D., *When Does Repaying a Student Loan Become an Undue Hardship?,* 185 EDUC. L. REP. 783, 796 (2004).

[29] Representative Allen Ertel (D-Pa) proposed the amendment that later became the initial rendition of § 523(a)(8), and justified his proposal by explaining that "[D]estruction of student loan programs would represent a tremendous waste of one of this nation's greatest assets, the minds and skills of American youth." Id. 783-84.

[30] Webley, *supra* note 24, at 77.

[31] *Id.*

[32] *Id.*

[33] Michael & Phelps, *supra* note 21, at 77.

reasonable estimation of his future income and the consistency of his employment.[34] As a result, an exception to the exception to discharge was promulgated — the "undue hardship" test.

The need for student-borrowers to resort to the undue hardship test increased over the following years. In 1984, the legislature decided to include private student loan debts in the § 523 exception to discharge.[35] Then, in 2005, Congress further restricted the dischargeability of all student loan debts, dictating that no student loan debt can be discharged at any time unless the borrower could successfully meet his or her burden of establishing that an undue hardship would result and persist if the loans were not discharged.[36] It goes without saying that the significance of the undue hardship test grew exponentially.

III. WHAT IS THE "UNDUE HARDSHIP" TEST?

The 2005 Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) modified the relevant Bankruptcy Code provision, § 523(a)(8), which currently dictates that student loans cannot be discharged unless excepting them from discharge would impose an "undue hardship" on the debtor.[37] The Commission on Bankruptcy Laws of the United States intended the undue hardship test to involve a calculation that balanced whether, based on the amount and reliability of expected future income, an individual debtor could maintain a minimal standard of living for both himself or herself and his or her dependents while also repaying his or her student loan obligations.[38] Congress, however, did not define precisely what constitutes "an undue hardship."[39] This has left the courts with

[34] *Id.*

[35] Webley, *supra* note 24. The Bankruptcy Amendments and Federal Judgeship Act of 1984 rendered private student loan debts nondischargeable. *Id.*

[36] *Id.*

[37] 11 U.S.C. § 523(a)(8) (2010).

[38] Hancock, *supra* note 4, at 153.

[39] The undue hardship exception is:

the responsibility of creating a definition of "undue hardship,"[40] resulting in a split among the circuits as to the standard to which debtors should be held.[41]

The vast majority of circuits have adopted the Second Circuit's *Brunner* test.[42] Under the *Brunner* test, a student loan debtor must establish:

> [D]ifficult to apply because the drafters of the Bankruptcy Code did not define undue hardship. The drafters said that bankruptcy courts must decide undue hardship on a case-by-case basis, considering all of a debtor's circumstances. Looking for guidance in the undue hardship cases, the bankruptcy courts have shaped facts and circumstances tests of undue hardship by relying on the legislative history of section 523(a)(8).

Kurt Wiese, *Discharging Student Loans in Bankruptcy: The Bankruptcy Court Tests of 'Undue Hardship,'* 26 ARIZ. L. REV. 445, 447 (1984).

40 *Id.*; *see also* Hancock, *supra* note 4, at 153 ("Even taking into account the intentions of the Commission, it has been up to the courts to define undue hardship.").

41 Circuits are split regarding their interpretation of the term "undue hardship" due to the term's vagueness. Hancock, *supra* note 4, at 153.

42 The most-accepted test used for standardizing the undue hardship requirement has been dubbed the *Brunner* test, as it was originated in the Second Circuit's opinion in *Brunner v. New York State Higher Educ. Serv. Corp.*. 831 F.2d 395, 396 (2d Cir. 1987). Since the Second Circuit devised its interpretation of the undue hardship standard, virtually every circuit followed suit and adopted its test. The Third, Fourth, Seventh, and Ninth Circuits have formally adopted the test, while the Fifth, Sixth, Tenth, and Eleventh Circuits have at one point or another utilized the *Brunner* standards. Cloud, *supra* note 28, at 796; *see also, e.g.*, Brightful v. Pa. Higher Educ. Assistance Agency (*In re*

> (1) [T]hat [she] cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that [she] has made good faith[43] efforts to repay the loans.[44]

Other circuits utilize a "totality of the circumstances" approach, which is slightly less demanding on debtors because it does away with the good faith requirement.[45] This test was

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Brightful), 267 F.3d 324, 327 (3d Cir. 2001); Educ. Credit Mgmt. Corp. v. Frushour (*In re* Frushour), 433 F.3d 393, 400 (4th Cir. 2005); United States Dept. of Educ. v. Gerhardt (*In re* Gerhardt), 348 F.3d 89, 91-92 (5th Cir. 2003); *In re* Tirch, 409 F.3d 677, 680 (6th Cir. 2005); O'Hearn v. Educ. Credit. Mgmt. Corp. (*In re* O'Hearn), 339 F.3d 559, 564 (7th Cir. 2003); Rifino v. United States (*In re* Rifino), 245 F.3d 1083, 1087 (9th Cir. 2001); Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004); Hemar Ins. Corp. of Am. v. Cox (*In re* Cox), 338 F.3d 1238, 1241 (11th Cir. 2003).

43 Factors considered by the courts in establishing "good faith" include:

> (1) [W]hether the debtor has made any actual attempts at repayment; (2) the amount of time between when the loan first became payable and when the debtor sought to discharge the same; (3) the amount of the student loan debt in proportion to the entire amount of debt owed by the debtor; and (4) the debtor's efforts to maximize employment opportunities.

Michael & Phelps, *supra* note 21, at 87.

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

45 *See* Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 553-55 (8th Cir. 2003).

designed to consider the particular facts and circumstances surrounding each debtor and to render a conclusion accordingly.[46] Ultimately, a totality of the circumstances test focuses on an analysis of: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) [a] calculation of the debtor's and his dependents' reasonable necessary living expenses; and (3) any other relevant facts and circumstances surrounding that particular bankruptcy case."[47] The test merely focuses on the debtor's financial resources and his or her ability to pay down student loan debts while still maintaining a minimal standard of living for himself or herself and his or her dependents.[48] Without the good faith requirement, the totality of the circumstances test is less cumbersome for debtors than the *Brunner* test.[49] Moreover, while the totality of the circumstances test is merely a balancing of relevant factors, the *Brunner* test requires debtors to conclusively establish each of its three elements.[50]

Proponents of the totality of the circumstances approach feel that any effort to limit the undue hardship inquiry to a rigid set of elements naturally does away with the discretion Congress intended to provide courts under § 523(a)(8).[51] Not surprisingly, proponents of the *Brunner* test find a case-by-case approach to be too subjective, and consider an established set of elements to be necessary guidance for prospective debtors and creditors.[52]

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[46] Cloud, *supra* note 28, at 794 ("The test is tailored to the unique circumstances in each undue hardship claim, permitting careful analysis of each situation in light of the fresh start goal delineated in the Bankruptcy Code.").

[47] Andresen v. Nebraska Student Loan Program, Inc. (*In re* Andresen), 232 B.R. 127, 139 (B.A.P. 8th Cir. 1999) (citing Andrews v. S.D. Student Loan Assistance Corp. (*In re* Andrews), 661 F.2d 702, 704 (8th Cir. 1981)).

[48] Michael & Phelps, *supra* note 21, at 84.

[49] *In re* Andresen, 232 B.R. at 139.

[50] Michael & Phelps, *supra* note 21, at 86.

[51] *Id.* at 85, 91.

[52] *Id.* at 85.

Nonetheless, both tests tend to disable truly struggling debtors from discharging their loans, as each test is designed to establish that there is "certainty of hopelessness" with respect to the debtor's ability — or *inability* — to pay off the loans.[53] The two tests both tend to focus on similar factors surrounding the bankruptcy case, including: current income, the debt involved, living expenses, earning potential and employability, mental health and general personal health, critical illness, the ratio of education loan debt to total debt, the federal poverty line, exigent circumstances, and — despite the alleged distinction between the two tests — whether good faith efforts were made to repay the loan.[54] Not surprisingly, the two tests often lead to the same result — nondischargeability of student loans. From a practical standpoint, the notion that the totality of the circumstances approach is any less stringent upon debtors than the *Brunner* test is misplaced.[55]

Despite the reasoning each Circuit has utilized in deciding which test to use, the end result remains the same for debtors — discharging student loan debt is exceedingly difficult and nearly impossible.[56] That said, a discharge can still be achieved in certain limited situations.[57]

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[53] Hancock, *supra* note 4, at 153–54.

[54] Cloud, *supra* note 28, at 797.

[55] Educ. Credit Mgmt. Corp. v. Polleys, 356 F.3d 1302, 1309 (10th Cir. 2004). The Tenth Circuit noted that the only true discernable difference between the two tests was the totality of the circumstance approach's tendency to create "laundry lists" and that, ultimately, the two tests consider primarily the same facts and circumstances as a practical matter. *Id.* (quoting *In re* Pluckett, 82 F.3d 738, 741 (7th Cir. 1996)).

[56] *See In re* Brightful, 267 F.3d 324, 329-31 (3d Cir. 2001) (finding that a debtor could not discharge her student loans, despite having psychiatric issues, failing to obtain her college degree, and having a dependent, because she was physically healthy, currently employed as a secretary, and had no "extraordinary" expenses).

[57] *See* Green v. Sallie Mae Servicing Corp. (*In re* Green), 238 B.R. 727, 735-37 (Bankr. N.D. Ohio 1999) (finding that a debtor who was unable to maintain suitable employment due to bipolar disorder met her burden under the *Brunner* Test).

IV. A ROCK AND A HARD PLACE

"[Y]oung people are trapped between needing a college degree and burying themselves in debt to earn it."[58] Despite President Obama's recent declaration that a college degree is not necessarily a prerequisite to a great career,[59] the public's perception that a college education is the end-all-be-all of an academic career still persists.

A survey conducted in 2000 by Public Agenda revealed that 87% of the general public felt a college education was now as important as a high school diploma once was.[60] The same survey also indicated that 62% of parents believed it was "absolutely necessary" for their children to be college-educated, and that most people were convinced that the one thing that can help an individual succeed was a college education (as opposed to work ethic or an ability to get along with others).[61] Not only does this misconception still exist today, but it is a largely self-fulfilling misconception and therefore, ironically, probably not a misconception at all.[62]

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[58] This is a quote from Ethan Snack, a higher education associate for the U.S. Public Interest Research Group, which is an organization comprised of student members across seventy-five college campuses. Press Release, Sen. Richard Durbin, Durbin, Reed, Warren: Student Loan Debt is Hurting America's Middle Class (Dec. 19, 2013), *available at* http://www.durbin.senate.gov/newsroom/press-releases/durbin-reed-warren-student-loan-debt-is-hurting-americas-middle-class.

[59] *Obama: College Degree Not Needed for a Good Career*, YAHOO! NEWS (Jan. 30, 2014, 12:49 PM), http://news.yahoo.com/obama-college-degree-not-needed-good-career-174944330--finance.html.

[60] JOHN IMMERWAHR & TONY FOLENO, NAT'L CTR. FOR PUB. POLICY AND HIGHER EDUC., & PUB. AGENDA, GREAT EXPECTATIONS: HOW THE PUBLIC AND PARENTS—WHITE, AFRICAN AMERICAN AND HISPANIC—VIEW HIGHER EDUCATION 1-3 (May 2000), *available at* http://www.highereducation.org/reports/expectations/expectations.pdf.

[61] *Id.*

[62] One law firm's managing partner has insisted that "[c]ollege graduates are just more career-oriented" and that "[g]oing to college means they are making a real commitment to their futures." Catherine Rampell, *It Takes a B.A. to Find a Job as a File Clerk*, N.Y. TIMES, Feb. 19, 2013, http://www.nytimes.com/2013/02/20/business/college-degree-required-by-increasing-number-of-companies.html?_r=1. Logic along these lines leads to a

As the college degree — for whatever reason — is becoming more and more crucial for young job-seekers, the cost of obtaining such a degree is rising steadily. A report from 2010 showed that between the 2000–2001 academic year and the 2010–2011 academic year, tuition and fees at public four-year colleges and universities increased at an average annual rate of 5.6% *above* general inflation.[63] Between the 2009–2010 academic year and the 2010–2011 academic year, tuition and fees increased by 7.9% beyond inflation.[64] At private, nonprofit institutions this figure was 4.5%,[65] although taking inflation into account, net costs have actually declined at some institutions.[66] For the sake of taking the foregoing analysis full-circle, the median family income for individuals possessing at least a bachelor's degree was nearly $100,000 in 2009, while the same figure for individuals with only a high school diploma was less than half of that — $48,637.[67] The obvious predicament is impossible to ignore. Historically, to maximize one's own profitability, an individual likely needs to attend college; the cost of college, however, is consistently on the rise.

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concept known as "degree inflation" — that the college degree has displaced the high school diploma as the minimum requirement for even the lowest-level jobs. *Id.* This watering down of the college degree can also be tied to the struggling economy, as employers simply look to a college degree as a credential for weeding out some of the unreasonably high number of job applications they review. *Id.*

[63] *Average College Costs on the Rise*, EDUC. PORTAL, http://study.com/articles/Average_College_Costs_on_the_Rise.html (last visited May 25, 2015).

[64] *Id.*

[65] *Id.*

[66] Costs (including room and board) have increased by about $600 at public four-year colleges, those same costs have declined at private nonprofit colleges and public two-year colleges between the 2005–2006 academic year and the 2010–2011 academic year. *Id.* That said, a college education has still been largely unaffordable for a large number of American households due to a steep drop in the average family income for lower-income families. *Id.*

[67] *Average College Costs on the Rise, supra* note 63.

Not surprisingly, this impossible situation leads to excessive borrowing in order to fund an effort to increase earning potential, and student loan debt skyrockets as a result. A supporter of Senator Durbin's proposals, Senator Jack Reed (D-RI) points to the rising cost of higher education as the primary culprit for the ever-increasing student loan debt.[68] Senator Reed himself has attempted to thwart the unaffordability of higher education, as he recently introduced the Partnerships for Affordability and Student Success (PASS) Act, the ultimate goal of which is to push measurable goals for enrollment, affordability, and outcomes for students onto institutions.[69] Along with this push to directly make a college degree more affordable for prospective students, Senator Reed adamantly supports bankruptcy reform as a means of alleviating the burden on students.[70] The logic is that allowing students to discharge some of their student loan debts will cause a ripple effect that will ultimately boost our economy generally through consumer spending and consumer demand.[71]

V. THE MORTGAGE BEFORE THE MORTGAGE

"You could call it a bubble, but it's more like a ball and chain."[72] While in many ways the growing student loan debt is creating a crisis similar to the housing bubble of last decade, this

[68] *See* Press Release, Sen. Richard Durbin, *supra* note 58.

[69] *Id.*

[70] *Id.*

[71] *Id.* As Senator Reed argues, "ensuring hard working graduates can retire their student debt in a reasonable fashion will unlock a great deal of economic potential and consumer demand and that will have a positive ripple effect throughout our economy." *Id.*

[72] This is the opening line in an article where the author eventually makes comparisons between student loan debt and the housing bubble. *See* Sarah Jaffe, *Wall Street-Inflated Student Debt Bubble Hits $1 Trillion; Debtors Rally for Relief*, ALTERNET (Apr. 24, 2012), http://www.alternet.org/story/155133/wall_street-inflated_student_debt_bubble_hits_%241_trillion%3B_debtors_rally_for_relief/.

witty quote truly envelops the severity of the issue. The ever-increasing burden of student loan debt on our country's students is undeniable. There is currently more student debt than credit card debt.[73] The total amount of student loan debt in our country is approximately $1.2 trillion.[74] A recent surge in the accumulation of student loan debt in America is partially responsible for this large figure.[75] To put these statistics in perspective, student loan debt is rising at a pace that is twice as fast as the mortgage debt's pace at the height of the aforementioned infamous housing bubble.[76]

This rapid growth in student loan debt is, both ironically and unfortunately, tied to the fiscally unfavorable position prospective students find themselves in when they are seeking to head off to college, graduate school, and the like. Because prospective students typically have either a very limited credit history or no credit history whatsoever at the time they are applying for student loans, many of the private loans these students receive are set at exceptionally high interest rates.[77] Compounding this unfortunate situation is the fact that student loan borrowers are rarely able to refinance these rates.[78] Both the federal government and private lenders seem to profit immensely from this unique circumstance.[79] The federal

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[73] *Id.*

[74] Press Release, Sen. Richard Durbin, *supra* note 58.

[75] *Id.* ("From 2008 to 2012, debt at graduation increased at an average of 6% each year.").

[76] Jaffe, *supra* note 72.

[77] *FACT SHEET: The Fairness for Struggling Students Act*, NERDWALLET (Jan. 28, 2013), http://www.nerdwallet.com/blog/nerdscholar/ 2013/fairness_struggling_students_fact_sheet/ [hereinafter *FACT SHEET*].

[78] *Id.*

[79] Brian Smith, *Student Loan Interest Rates Can't Be Set to Avoid Profits for the US Government, GAO Report Says,* MLIVE (Feb. 3, 2014, 12:43 PM), http://www.mlive.com/education/index.ssf/2014/02/student_loan_interest_rates_ca.html. While the title of this source speaks for itself — "student loan interest rates can't be set to avoid profits for the US government" — the article specifies that in fiscal year 2013 alone the federal government was expected to

government, for example, has been said to turn a profit of as much as thirteen percent for every dollar lent to students.[80] The system feeds off the aforementioned anomaly that student loan borrowers feel absolutely compelled to purchase a product that they cannot afford.

It is not only the overall total amount of student loan debt that is an issue, but also the sheer number of individuals burdened with such debt.[81] For example, seven out of every ten members of the Class of 2012 were burdened with student loan debt at an average of nearly $30,000 per borrower.[82] At that time, over half of all college grads under age twenty-five were either underemployed or unemployed altogether.[83] Not to mention, the median wage for individuals holding a bachelor's degree is lower than it was over a decade ago.[84] Most grads are having a difficult time repaying these debts. The end result is that the current generation is faced with an unprecedented level of difficulty in earning a decent living.[85]

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earn approximately $66 *billion* from student loan repayment. *Id.*; *see also* Jaffe, *supra* note 72 (discussing how Wall Street traders treat student loans granted by private banks similarly to mortgage securities, repackaging them, selling them, and profiting off their trade).

[80] The federal government turns a profit of thirteen percent for every dollar lent because the loans are nondischargeable in bankruptcy and the government can utilize Social Security payments in order to provide the loans. *See* Jaffe, *supra* note 72.

[81] Press Release, Sen. Richard Durbin, *supra* note 55.

[82] *Id.*

[83] Jaffe, *supra* note 72.

[84] *Id.*

[85] Press Release, Sen. Richard Durbin, *supra* note 55. As Matthew Segal, the co-founder of OurTime.org, boldly asserts, "Millennials are the first generation in American history expected to be financially worse off than their parents, and much of this has to do with student loan debt." *Id.*

VI. THE PROPOSAL

Senator Durbin has been a leading reform activist, demanding the following call to action: "[t]oo many Americans are carrying around mortgage-sized student loan debt that forces them to put off major life decisions like buying a home or starting a family . . . . It's time for action. We can no longer sit by while this student debt bomb keeps ticking."[86]

On January 23, 2013, Senator Durbin proposed the Fairness For Struggling Students Act (the "Act").[87] Though not his first attempt to do so,[88] the 2013 Act seeks to amend the Bankruptcy Code such that the 2005 BAPCPA provision, 11 U.S.C. § 523(a)(8) will be returned to its pre-2005 existence — making private student loan debts dischargeable by ridding them of the undue hardship requirement.[89] It will not have the same effect, however, on government-provided loans — the treatment of those loans will remain basically unchanged under the Code.[90] That said, with respect to privately-issued student

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[86] *FACT SHEET*, *supra* note 77.

[87] Fairness for Struggling Students Act of 2013, S. 114, 113th Cong. (2013).

[88] Senator Durbin made a previous attempt to pass virtually the same reform in 2010. Fairness for Struggling Students Act of 2010, S. 3219, 111th Cong. (2010).

[89] *FACT SHEET*, *supra* note 77.

[90] As the Congressional Research Service — a nonpartisan division of the Library of Congress — summarizes, the Fairness for Struggling Students Act of 2013:

> [r]evises federal bankruptcy law with respect to the exemption from the exception to discharge in bankruptcy for certain educational loans if excepting such debt from discharge would impose an undue hardship on the debtor . . . . Repeals the current exemption for: (1) any loan made under any program funded in whole or in part by a governmental unit or nonprofit institution; and (2) any other qualified education loan incurred by an individual debtor on behalf of the taxpayer, the taxpayer's spouse, or any dependent, including indebtedness used to refinance a qualified education loan. (Thus makes both kinds of loans nondischargeable in bankruptcy).

loans, the Office of Senator Durbin has asserted that, in bankruptcy, such debt should not be held to a higher standard reserved only for the most serious of obligations such as child support obligations, tax debt, and criminal fines.[91]

The Act has garnered widespread support. Senators Al Franken (D-MN) and Tom Harkin (D-IA) also introduced the Act, and the Act was co-sponsored by Senators Sheldon Whitehouse (D-RI) and Jack Reed (D-IL).[92] The Director of Government Relations for the National Education Association has also given Senator Durbin her full support. She explained in a letter to the Senator that the Act will "restore fairness" to student lending by assisting defaulting borrowers and will "enable the bankruptcy system to work as a safety net so people can get the education they want with the assurance that they will be protected . . . ."[93] Even state legislatures have joined the cause. The California Senate and Assembly have formally requested that the President and Congress support Durbin's efforts, opining that the inability to easily discharge private student loan debt obscures the Bankruptcy Code's promise of a "fresh start" for debtors.[94] Even if the Act itself flounders, the hunt for student loan debt reform has clearly commenced.

Library of Congress Summary, GOVTRACK.US, https://www.govtrack.us/congress/bills/113/s114/summary (last visited May 25, 2015).

[91] Press Release, Sen. Richard Durbin, *supra* note 55; *see also* Durbin, *supra* note 2. Others have agreed with Senator Durbin by supporting the inverse of this standpoint; the argument being that student loan debt is quite similar to credit card debt in that they both have variable interest rates that are the highest for those individuals who, ironically, cannot afford the debt, and therefore student loan debt should be treated the same as credit card debt in bankruptcy. *See* Mary Ellen Flannery, *Fairness for Struggling Students Act Seeks Changes to Private Loan Bankruptcy Rules,* EDUC. VOTES (Jan. 28, 2013), http://educationvotes.nea.org/2013/01/28/fairness-for-struggling-students-act-seeks-changes-to-private-loan-bankruptcy-rules/.

[92] Flannery, *supra* note 91.

[93] Mary Kusler, *Letter to Senator Durbin in Support of his Fairness for Struggling Students Act*, NAT'L EDUC. ASS'N (Jan. 23, 2013), http://www.nea.org/home/54134.htm.

[94] 161 Cong. Rec. S1117 (2015).

A cursory glance at some statistics relating to private student loans makes it easy to see why advocates of the Act believe that it is the key to reversing some of the harm done to student borrowers and boosting the economy. Nearly one million private loans are in default, amounting to $8 billion.[95] Moreover, the private student loan industry nearly doubled to $23 billion between the enactment of the 2005 BAPCPA amendment and the year 2009.[96]

Senator Durbin presumably is concerned with private loans specifically because of the implications that come along with such loans. Private loans are considered to be much riskier for the individual borrower than federal loans due to their potential for variable rates (which can reach as high as thirteen percent), and their lack of deferment, IBR, and loan forgiveness options that would otherwise be available with federal student loans.[97] Despite unanimity among experts that borrowers should not turn to private loans until all government-funded options have been exhausted, fifty-two percent of private loan borrowers in 2007 and 2008 had not exhausted their available federal Stafford loans.[98] During that same time, a quarter of all private loan borrowers did not utilize any federal Stafford loans at all.[99]

Perhaps eliminating borrower accountability by providing for the dischargeability of private student loans is not the best route for alleviating this issue of underuse of safer federal loans. This holds especially true when considering that the majority of students are not exhausting their federal loan options before turning to these private loans. By rendering private student loan debts dischargeable, and ignoring borrowers' unawareness of the more favorable terms and perks of federally-provided loans, the government would be

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95 *FACT SHEET, supra* note 77.

96 *Id.*

97 *Private Loans: Facts and Trends,* inst. for c. access & success (June 2014), http://projectonstudentdebt.org/files/pub/private_loan_facts_trends.pdf.

98 *Id.*

99 *Id.*

incentivizing students to take on what it purports to be unfavorable loans.

If students are not utilizing the already-existing safer method, and are instead turning to riskier loans with potentially higher interest rates, then perhaps there is more of an issue of borrower knowledge and understanding than an issue of borrowing itself. Borrowers should be incentivized to make educated decisions towards obtaining these five-figure loans, and clearly the tools necessary for them to make such decisions are not as readily available as they should be.

VII. BUT WHAT ABOUT THE LOAN PROVIDERS?

Of course, those suggesting that we eliminate the private loan nondischargeability presumably have prospective students' best interests in mind. This suggestion, however, tends to ignore the unconsidered effect that allowing for discharges of private student loans could result in providers protecting themselves with even more unfavorable terms than those currently used.

The risk of default is one of the primary components lenders consider when determining the rate of interest to be charged on any loan.[100] As the Bankruptcy Code currently stands, private student loan lenders are afforded some protection from a borrower's default because those loans are extremely difficult to be disposed of through bankruptcy. At the very least, lenders can be assured that their respective borrowers' obligations will not be tossed aside. If Congress revoked this protection, then the risk of default would become a

[100] Matthew D. Diette, *How Do Lenders Set Interest Rates on Loans?*, FED. RESERVE BANK OF MINNEAPOLIS (Nov. 1, 2000), http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3030. This is a broadly accepted concept that emphasizes, "the higher the risk, the higher the interest rates." David Cohen, *U.S. Debt Downgrade = Higher Student Loan Interest Rates*, COLLEGEPLUS (Jan. 28, 2014), http://www.collegeplus.org/blog/u-s-debt-downgrade-higher-student-loan-interest-rates (explaining—in the context of foreign countries buying our country's debt — that there is a correlation between risk and interest rates); *see also* John Garger, *Factors Which Affect the Price of Bonds*, BRIGHT HUB (Jan. 17, 2011), http://www.brighthub.com/money/investing/articles/62092.aspx (describing how the credit-worthiness of a bond-issuer will affect the bond's interest rate).

more grave consideration for lenders, and it is safe to assume that loan terms would become even more unfavorable for borrowers and the interest rates lenders provide students would increase accordingly.

This is a very serious side effect to consider. Quite often, the highly favorable loans a student may or may not be eligible for from the federal government — such as Stafford loans[101] — do not cover the entire cost of higher education.[102] When this occurs, students are forced to turn to either other federal loans (i.e., Parent/Grad PLUS loans) or loans from private lenders.[103] Many students, therefore, need private loans to some extent; an increase in the interest rates of those loans would be unbearable for obvious reasons.

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101 Stafford loans carry much lower fixed interest rates — 3.86% — than other types of student loans. *Understand How Interest Is Calculated and What Fees Are Associated with Your Federal Student Loan*, FED. STUDENT AID: OFF. U.S. DEP'T OF EDUC., http://studentaid.ed.gov/types/loans/interest-rates#how-is-interest-calculated (last visited May 25, 2015) [hereinafter FED. STUDENT AID]. The highly-touted subsidized Stafford loan is based on financial need. *See Stafford Loan Frequently Asked Questions*, STAFFORDLOAN.COM, http://www.staffordloan.com/stafford-loan-info/faq/ (last visited May 25, 2015). The unsubsidized Stafford loan is not based on financial need, but does have maximum amounts that can be taken by borrowers. *Id.*

102 The Federal Stafford loan comes with limits — an undergraduate student can only borrow up to $31,000 total during the course of a 4-year education, and a graduate/professional student can only take up to $20,500 per annum. *Federal Student and Parent Loan Limits*, STAFFORDLOAN.COM, http://www.staffordloan.com/stafford-loan-info/stafford-loan-limits.php (last visited May 25, 2015). The cost of an undergraduate education averages more than $20,000 per year at public schools and about $40,000 per year at private schools. *A Breakdown of College Education Costs*, GUIDE TO ONLINE SCHOOLS, http://www.guidetoonlineschools.com/articles/financial-aid/college-education-costs (last visited May 25, 2015). As far as professional/graduate schools, the average cost of a year in law school can reach more than $35,000 for public schools and more than $40,000 at private schools. *Law School Cost*, COSTHELPER.COM, http://education.costhelper.com/law-school.html (last visited May 25, 2015).

103 Katy Hopkins, *Consider When to Use Private Student Loans*, U.S. NEWS & WORLD REP. (Oct. 1, 2012, 9:00 AM), http://www.usnews.com/education/best-colleges/paying-for-college/articles/2012/10/01/consider-when-to-use-private-student-loans (explaining the options for prospective students when Stafford loans do not cover the full cost of college).

Of course, the federal government is not concerned with the risk of default. Rather than determining an interest rate based on each individual borrower's credit rating (and therefore, riskiness) as a private lender would,[104] the federal government simply applies interest rates that are legislatively established by Congress.[105] This is broadcast as a positive aspect of federal loans because Congress is capable of legislating for fixed-rate loans, which are set at lower rates than those that can be established by private lenders.[106]

Indeed, when calculating the relevant interest rates, the government does consider the expected payments to the government, which envelops the probability of default and the recovery rate.[107] This might help explain why federal loans, despite being advertised as the safe route for obtaining higher-education funding, come with interest rates that can far exceed the current average mortgage rates.[108] However, this cannot be

[104] For example, the eligibility requirements to be considered for a Discover Student Loan "include but are not limited to an established and satisfactory credit history." *Frequently Asked Questions*, DISCOVER STUDENT LOANS, https://www.discover.com/student-loans/help/faq.html (last visited May 25, 2015).

[105] FED. STUDENT AID, *supra* note 101.

[106] Numerous sources imply, or explicitly note, that federally provided loans are safer because of the lower fixed rates that they provide. *See id.*; *see also Federal Student Loans vs. Private Loans: Which Loan Is Right for You?*, STUDENTFINANCEDOMAIN.COM, http://studentfinancedomain.com/student_loans/federal_vs_private_loans.aspx (last visited May 25, 2015) (considering a "pro" of federal student loans, as opposed to private student loans, to be that a federal loan "offers a low interest rate"); *Why Do Students Choose Costlier Private Loans? Report Outlines Their Reasons*, CHRONICLE HIGHER EDUC. (Aug. 21, 2007), http://chronicle.com/article/Why-Do-Students-Choose/39425.

[107] Equal Justice Works, *How the Government Calculates the Cost of Student Loans*, U.S. NEWS & WORLD REP. (June 19, 2014), http://www.usnews.com/education/blogs/student-loan-ranger/2013/06/19/how-the-government-calculates-the-cost-of-student-loans.

[108] As of May 2015, the average interest rate on a fifteen-year fixed mortgage was 3.17 percent. *See generally Mortgages*, BANKRATE, http://www.bankrate.com/mortgage.aspx (last visited May 25, 2015). Federal loans generally have a ten-year repayment plan, and can reach interest rates as

confused with the more case-specific method of applying interest rates that private lenders use in scrutinizing the applying borrower's individual credit history. As a *U.S. News & World Report* article acknowledged last year, the interest rates provided by the private sector reflect a much higher degree of risk.[109]

The concept that private lenders are better accounting — or at least more accurately accounting — for the risk of default in their interest rates is clearly reflected by the numbers. For the purpose of illustrating this point, let's assume a student has exhausted his or her eligible Stafford loans and is still looking to borrow to cover the remainder of his or her higher education costs. This allows for a more reasonable comparison considering both the majority of borrowers and funds lent by the government go to students who are not eligible for the aforementioned lower-rate loans.[110] Federal loan rates are static numbers across the board and, depending on which loan is utilized, can reach as high as 4.66% fixed for undergraduates and as high as 6.41% fixed for students of graduate and professional schools.[111] Private lenders' potential rates typically start at figures only slightly above these rates, but can increase significantly based on credit history. For example, Sallie Mae offers a private student loan for undergraduates with a fixed

high as 6.41% for graduate students and 4.66% for undergraduate students. FED. STUDENT AID, *supra* note 101; *see also Comparison of Federal and Private Student Loans*, DISCOVER STUDENT LOANS, https://www.discover.com/student-loans/compare-loans.html (last visited May 25, 2015) (stating a ten-year repayment plan for federal student loans is standard). It should be noted that at least one source does not blame the market for the discrepancy between federal loan rates and mortgage rates, but rather blames the simple fact that Congress sets the rate rather than the market. *See* Karen Weise, *Why Your Student Loan Interest Rate Is So High*, BLOOMBERG BUSINESSWEEK: MKTS. & FIN. (Apr. 4, 2013), http://www.businessweek.com/articles/2013-04-04/why-your-student-loan-interest-rate-is-so-high.

[109] Equal Justice Works, *supra* note 107.

[110] Shahien Nasiripour, *Student Loan Rates Boost Government Profit as Debt Damps Economy*, HUFF POST BUS. (Apr. 9, 2013, 7:36 P.M.), http://www.huffingtonpost.com/2013/04/09/student-loan-rates-debt-economy_n_3048216.html.

[111] FED. STUDENT AID, *supra* note 101.

interest rate that, depending on the borrower, ranges from 5.74% APR to 11.85% APR.[112] Discover Student Loans similarly offers fixed rate loans for law students ranging from 6.74% APR to 10.99% APR.[113] With both of these private lenders, a co-signer can be used to help the borrower qualify for the loan and to potentially receive a lower interest rate.[114] Federal Stafford student loans, on the other hand, do not come with a co-signer option.[115]

In other words, private lenders are determining applicable interest rates based on each individual borrower's likelihood of repayment, while the federal government is indiscriminately enticing students with lower rate loans; the term "lower" is relative here, because these loans still far exceed mortgage rates, for example. The federal loan is simply the lesser of two evils disguised as a bargain.

Moreover, the discrepancy between the public and private sector's accounting leads to amazingly different conclusions as to how the government, as a lender, is fairing with respect to providing student loans.[116] The Congressional Budget Office, in May 2013, showed a fiscal year 2013 profit of approximately $50.6 billion from student loans for the Department of Education.[117] This figure was based on the government subtracting the then-current discount rate — or, the cost the government takes on by borrowing funds from the Treasury.[118] However, some analysts believe that the Congressional Budget Office would be more accurately assessing its "profits" by

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[112] *Undergraduate Smart Option Student Loan*, SALLIEMAE, https://www.salliemae.com/student-loans/smart-option-student-loan/ (last visited May 25, 2015).

[113] *Comparison of Federal and Private Student Loans*, *supra* note 108.

[114] *Id.*; *see also Undergraduate Smart Option Student Loan*, *supra* note 112.

[115] *Comparison of Federal and Private Student Loans*, *supra* note 108.

[116] *See generally* Equal Justice Works, *supra* note 107.

[117] *Id.*

[118] *Id.*

applying a "fair-value" approach.[119] Under this approach, the calculation would be made using a market-based discount rate just as the private sector uses.[120] The result? Using the latter approach, the Congressional Budget Office predicts that between fiscal years 2013 and 2023, rather than earning $184 billion, the government would lose roughly $95 billion.[121]

So, despite the representation that the government can provide lower rate loans, the reality is that it can't.[122] Placing the government and private sector on the same plane, the government is actually costing itself money in order to compete with the private sector and artificially entice prospective students towards the federal loans.

While there is the argument that private lenders don't need the protection of § 523(a)(8) if they are already accounting for

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[119] *Id.*

[120] *Id.* Using a market-based discount rate is more appropriate than using a discount rate based on returns on Treasury bonds because Treasury bonds come with virtually no risk of default, while the default rate on student loans is approximately five percent. Dylan Matthews, *No, The Federal Government Does Not Profit Off Student Loans (In Some Years—See Update)*, WASH. POST (May 20, 2013), http://www.washingtonpost.com/blogs/wonkblog/wp/2013/05/20/no-the-federal-government-does-not-profit-off-student-loans/. Essentially, the method used by the CBO is comparing apples to oranges and is not a very accurate portrayal of the profitability of student loans. *Id.* ("Comparing [student loans] to Treasuries make them seem safe no matter what the risk."). *Id.*

[121] *See generally* Equal Justice Works, *supra* note 107.

[122] That is, unless the government takes from other coffers, of course. *See* Jaffe, *supra* note 72.

the risk of default by varying their interest rates, this argument may be missing the bigger picture. As previously noted, there is the possibility that these varying rates will only increase if the 2005 BAPCPA were reversed. Not to mention, if Congress were to allow for the discharge of private student loans in bankruptcy, this would have no effect on any potential co-signer's obligations to the lender.[123] The Act therefore, in addition to potentially raising private loans' interest rates, would create a disincentive for potential co-signers, as they would not want to be left with the entire burden of the student co-signer's obligation after a discharge occurs. This could deter such individuals from helping student borrowers obtain lower rates by co-signing.

Moreover, we generally want the degree of risk to be factored into these loans. The rates offered by the federal loans may be lower, but the government cannot necessarily afford them and neither can the students being offered them. There is a fiscal discrepancy between the money being handed out for education and the net value said education brings to borrowers — a discrepancy that, at the very least, the appropriately-based higher rates provided by the private sector would potentially be alleviating by deterring students from borrowing without discretion. If the private sector's interest rates seem alarmingly high, it is because *they should be high*. Many student borrowers are extremely risky borrowers, and interest rates are designed to reflect risk. If a prospective student is alarmed at a lender's interest rates, in reality that student should be alarmed by the risk they are taking on. The government's model is artificially creating an incentive to go to undergraduate, graduate, and professional schools — which may not necessarily be in the borrowing student's best interest.[124]

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[123] A bankruptcy discharge eliminates "the personal liability of the debtor with respect to any debt." 11 U.S.C. § 524(a)(1) (1992); *see also* Johnson v. Home State Bank, 501 U.S. 78, 83 (1991). For example, in the inverse scenario as the one mentioned above, the Third Circuit explained, "the debt of the student co-signer would remain outstanding notwithstanding the co-signer's discharge." *In re* Pelkowski, 990 F.2d 737, 744 (3d Cir. 1993).

[124] The concept that it is counter-productive and costly when the government attempts to artificially alter the market for student loans has been previously asserted. *See* Jay Bowen, *Student Loans: Another Federal Debacle*, FOUND. FOR ECON. EDUC. (Jan. 29, 2013), http://www.fee.org/the_freeman/detail/student-loans-another-federal-debacle.

VIII. DEGREE INFLATION & THE STUDENT LOAN BUBBLE

The federal government is currently encouraging students to "borrow with impunity," and, as one author summarizes the situation — "it bears an eerie resemblance to the obsession with homeownership that got us into our current straits."[125] For obvious reasons, this is a scary proposition. This effort by the federal government to open the floodgates into college by pushing the private loan sector out of the picture is creating a hopeless scenario where the public will ultimately have to bear the burden of the billions of dollars of loan debts that will not be repaid by the borrowers who were never going to be able to afford their loans.[126]

Not only will this "bubble" damage the economy in the long run, but it has already had drastic negative effects on the cost of higher education institutions.[127] The inflation-adjusted cost of a full-time undergraduate public university education has increased by 124% over the past thirty years.[128] Since 2000, that same number has increased by an inflation-adjusted seventy-two percent, and has increased at an annual rate of six percentage points more than the cost of living.[129] At the same time, the cost per student at these universities has remained stagnant.[130] One reason for this is that government funding has decreased over the years — at one time the government

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125 *Id.*

126 *Id.*

127 *Id.*

128 Elahe Izadi, *Focus on Student-Loan Interest Rates Ignores Larger Issue of Rising College Costs*, NAT'L J. (July 22, 2013), http://www.nationaljournal.com/daily/focus-on-student-loan-interest-rates-ignores-larger-issue-of-rising-college-costs-20130722.

129 Bowen, *supra* note 124.

130 Izadi, *supra* note 128.

contributed two dollars to public universities for every dollar the student provided.[131] That ratio has now been reversed.[132]

Another primary reason why college prices continue to rise is as simple as it is unsettling: there is no pressure for colleges to stop increasing their costs.[133] The loans being promised to students make college "affordable" regardless of price and income level.[134] The result is an artificially induced, infinite demand for college. In other words, the government's insistence on providing so-called affordable loans may actually be insuring that a college education never becomes affordable.

At the same time, colleges and professional schools are oversaturated. Nearly 320,000 waiters and waitresses held college degrees as of the end of 2010 — 8,000 of which held doctoral or professional degrees.[135] Seventeen million college-educated Americans are employed in positions that, according to the Bureau of Labor Statistics, require less than the skills obtained by a bachelor's degree.[136] This extreme degree of

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131 *Id.*

132 *Id.*

133 Jennifer Williamson, *Why Does College Tuition Only Go Up?*, DISTANCE EDUC. (Nov. 25, 2011), http://www.distance-education.org/Articles/Why-Does-College-Tuition-Only-Go-Up--452.html.

134 *Id.*

135 Richard Vedder, *Why Did 17 Million Students Go to College?,* CHRONICLE HIGHER EDUC. (Oct. 20, 2010), http://chronicle.com/blogs/innovations/why-did-17-million-students-go-to-college/27634.

136 *Id.* This number includes various jobs. The percentage of customer service representatives with at least a bachelor's degree is roughly twenty-two percent. *Id.* For secretaries, bartenders, telemarketers, mail carriers, and parking lot attendants, that figure is around fourteen to seventeen percent for each. *Id.* Twenty-five percent of amusement and recreation attendants fit this characteristic. *Id.*

inflation is indicative that our country is overvaluing and overinvesting in higher education.[137]

Meanwhile, our country is faced with a looming shortage of skilled-trade workers — welders, electricians, machinists, and the like — due to the age of said workers.[138] These jobs are in demand, and yet our country's youth is not gravitating toward these positions.[139] At a median wage of $20.25 per hour[140] (using a forty hour work week, this calculates to $42,000 annually), these jobs compare well with the jobs young students are currently being pushed toward — the average salary for college graduates is $46,000 per year.[141]

IX. THE ALTERNATIVE SOLUTION

Senator Durbin has not stopped with the Fairness for Struggling Students Act. In December of 2013, for example, he, along with Senator Reed and Senator Elizabeth Warren (D-MA), introduced the Student Loan Borrower Bill of Rights Act.[142] The purpose of the Student Loan Borrower Bill of Rights Act is simple—it aims to ensure that students are treated fairly and are

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[137] Cella R. Baker, *Degree Inflation: Tight Job Market Has Been Flooded by Too Many College Graduates,* DESERET NEWS (Feb. 22, 2013, 2:23 PM), http://www.deseretnews.com/article/865573888/Degree-inflation-Tight-job-market-has-been-flooded-by-too-many-college-graduates.html?pg=all.

[138] Joshua Wright, *America's Skilled Trades Dilemma: Shortages Loom as Most-In-Demand Group of Workers Ages*, FORBES (Mar. 7, 2013, 1:56 PM), http://www.forbes.com/sites/emsi/2013/03/07/americas-skilled-trades-dilemma-shortages-loom-as-most-in-demand-group-of-workers-ages/.

[139] *Id.*; *see also* Kent Darr, *In Demand: Skilled Trades*, BUS. RECORD (Mar. 24, 2013, 7:00 AM), http://www.businessrecord.com/Content/Real-Estate---Development/Real-Estate---Development/Article/In-Demand_-skilled-trades/173/835/58230.

[140] Wright, *supra* note 138.

[141] *Average College Graduate Salaries*, SIMPLYHIRED, http://www.simplyhired.com/salaries-k-college-graduate-jobs.html (last visited May 25, 2015).

[142] Student Loan Borrowers' Bill of Rights Act of 2013, H.R. 3892, 113th Cong. (2013); Press Release, Sen. Richard Durbin, *supra* note 55.

well informed when borrowing to fund their higher education.[143] The Student Loan Borrower Bill of Rights Act will accomplish this goal through six "rights" provided to borrowers of both federal and private student loans.[144] These rights are: (1) "the right to have options such as alternative payment plans to avoid default;" (2) "the right to be informed about key terms and conditions of the loan and any repayment options to ensure changing plans won't cost more;" (3) "the right to know your loan's servicer and who to reach out to when there is a problem;" (4) "the right to consistency when it comes to how monthly payments are applied" — which entails an obligation on lenders and servicers to honor their advertised loan offers; (5) "the right to fairness, like grace periods when loans are transferred or debt cancellation when the borrower dies or becomes disabled;" and (6) "the right to accountability, including timely resolution of errors and certification of private loans."[145]

Another Act proposed by Durbin, the Protect Student Borrowers Act of 2013, also aims to increase accountability at the institutional level for student debts.[146] It does this by allocating a portion of the risk of default to the higher education institution — a school could be fined anywhere from five to twenty percent of the amount defaulting students collectively owe, depending upon the proportion of students at the school that default.[147] The prevailing logic behind such a proposal is that students often are recklessly pushed through the front doors of colleges, and if being steered into college causes

[143] Press Release, Sen. Richard Durbin, *supra* note 55.

[144] *Id.*

[145] *Id.*

[146] Protect Student Borrowers Act of 2013, S. 1873, 113th Cong. (2013); Press Release, Sen. Richard Durbin, *supra* note 55.

[147] Karen Weise, *Putting Colleges on the Hook for Student Loans,* BLOOMBERG BUSINESSWEEK: POL. & POL'Y (Jan. 2, 2014), http://www.businessweek.com/articles/2014-01-02/a-bill-protect-student-borrowers-act-of-2013.

students to become crippled with debt, then those colleges should help bear the burden.[148]

These proposals are an excellent start. Allowing for the dischargeability of private student loans will not further this goal. In fact, it would do just the opposite. Not only would it implicitly incentivize irresponsible borrowing by students and isolate irresponsible lending by the government, but it could come with the aforementioned negative side effects on the private loan market while ignoring the glaring faults in the federal loan program.

Though the Act itself may not have a strong chance of making it past committee consideration,[149] the implications of the Act still deserve scrutiny considering this loan-forgiving line of logic is clearly sweeping the nation via other political devices, such as President Obama's Student Loan Forgiveness Program.[150] As a society we need to be more accountable for our decisions regarding higher education. Schools should be accountable for their ever-increasing costs and the unbearable burden it imposes on students. The government needs to remain accountable for arbitrarily providing loans to those who

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[148] Justin Gregoire, *Should Colleges Have to Repay Student Loans?*, HOMESCHOOL C. NAVIGATOR (Jan. 8, 2014), http://homeschoolcollegenavigator.com/should-colleges-have-to-repay-student-loans/.

[149] *See Library of Congress Summary*, *supra* note 90. Despite multiple attempts to pass the Fairness for Struggling Students Act, it has yet to pass muster. In fact, since this note was written, the Fairness for Struggling Students Act of 2013 died in Congress. *S. 114 (113th): Fairness for Struggling Students Act of 2013*, Govtrack.us, https://www.govtrack.us/congress/bills/113/s114 (last visited May 25, 2015). The possibility of the bill becoming law still remains, however, considering the bill was reintroduced on March 12, 2015, as the Fairness for Struggling Students Act of 2015. *S. 729 – Fairness for Struggling Students Act of 2015*, CONGRESS.GOV, https://www.congress.gov/bill/114th-congress/senate-bill/729/text (last visited May 25, 2015).

[150] Among other things, under President Obama's loan forgiveness program, "anyone who makes his monthly payments for twenty years after leaving college is eligible to have his/her remaining balance forgiven." *Understanding Obama Student Loan Forgiveness*, OBAMA STUDENT LOAN FORGIVENESS, http://www.obamastudentloanforgiveness.com/ (last visited May 25, 2015).

cannot and will not be able to afford them, and should focus on subsidizing school cost. Moreover, it is clear that the federal government's indiscriminate flat rates would not ensure financial feasibility for the borrower on their own. Borrowing students need to remain accountable so that they are incentivized to make reasonable decisions that benefit our economy. After all, the purpose of higher education is to "'[train] kids to come out and be productive members of the economy, and they're not doing that if they're graduating with a debt burden that doesn't allow them to do things like a normal consumer.'"[151] We cannot endorse indiscriminately borrowing for an education as though it is the end-all-be-all of our economy.

While there are certainly benefits to enabling prospective students to obtain higher education funding, forcing this to occur against the market is not the solution. Rather than create a scenario where the federal government "solves" our student loan problem by attempting to shove private lenders out of the market via legislation, we should focus on allowing the private sector to function as it will,[152] and educate students on the ramifications of taking on hefty student loan obligations to finance their education. Ultimately, the primary solution to the student loan debt issue is not to incentivize hasty decision-making, but rather to facilitate informed decisions regarding higher education enrollment and the use of student loans to finance our country's future.

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[151] Izadi, *supra* note 128. This is a quote from Tucker Warren, managing director of Hamilton Place Strategies. *Id.* As used above, "things" refers to the fact that student loan debt makes it difficult for debtors to make purchases such as buying a car or home. *Id.*

[152] At least one author has argued that the government should take a back seat to the private student loan lenders, taking the most extreme position that the government should vacate the student loan-lending field entirely. Bowen, *supra* note 124 ("The government must exit the lending arena and be replaced by an active and innovative private market with sensible underwriting standards.").