HIGHER EDUCATION FINANCING: HOW THE CURRENT STUDENT LOAN PROGRAM IS A SELF-INFLICTING WOUND TO OUR NATIONAL ECONOMY

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"A college education is a path to a life of success," a phrase echoed from generation to generation. Yes, attaining a degree leads to more employment opportunities and higher lifetime earnings, but these benefits are slowly fading. The cost of a college education has doubled in the past two decades and continues to rise.† Couple this with a 10% decrease in the amount of high-quality jobs, and we have millions of Americans struggling to repay student loan debt.‡ For these struggling debtors, there is no end in sight as bankruptcy laws make relief near impossible.

People argue this to be a personal problem for the borrower, but the reality is that student loan debt has a detrimental effect on the national economy. The coronavirus pandemic has only magnified this problem as recent graduates are entering the worst job market since the Great Recession. It is in times like these where we must prioritize finding solutions to get more money into the stream of commerce, like helping those graduates drowning in student loans.

This Article will examine higher education financing from its inception to where it is today, the growing trends which are slowly making the benefit of a college education not worth its costs, the current bankruptcy laws which offer little relief for these struggling debtors, its effect on the economy, and the possible remedies to fix this flawed system.

In the end, without legislative change, we will be misleading the millions of Americans that continue to rely on student loans to fund their college education, only to fall at their own peril.

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† *See* Melanie Hanson, *Average Cost of College & Tuition*, EDUC. DATA INITIATIVE, https://educationdata.org/average-cost-of-college (Sep. 6, 2023).

‡ *See U.S. Private Sector Job Quality Index*, U. BUFF. SCH. OF MGMT. 1, 6 chart 3 (Nov. 2021).

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INTRODUCTION

Student loan debt, a debt so unique and burdensome that some experts characterize it as a "super debt."[1] Today, one-eighth of Americans (43.6 million) owe a combined $1.7 trillion in federal student loan debt,[2] making it the second largest consumer debt behind mortgages and accounting for ten% of the nation's total debt.[3]

The reason why experts refer to it as super debt is because, unlike most consumer debts, it is near impossible to discharge student loan debt in bankruptcy. Just how impossible? In 2020, a quarter of a million student loan debtors filed bankruptcy.[4] Of those, only 300, or 0.1%, were able to discharge their student loans.[5] Rather than getting a fresh start in life "unhampered by the pressure and discouragement of preexisting debt"[6] typically provided in bankruptcy, these borrowers are forced to push back major life milestones such as buying a house, buying a car, or even starting a family.[7]

Although there are other options for relief that can lower a borrower's monthly payment or pause repayment for a period of time, such options only increase a borrower's burden as interest will likely accrue on the loan's principle. Without proper relief, today's graduates can be referred to as the "indentured generation" because many of them will hold this burden for most of their lives, working tirelessly to relieve it.[8] For this indentured generation, their participation in the credit economy will be limited and our economy will hurt because of it.[9]

Although the government had good intentions in allowing access to all for higher education, the plan implemented has been a self-inflicting wound to the economy. If we do not allow for adequate relief in bankruptcy for those struggling, and do not go head-on in curbing the sharp rise in tuition cost by adding more regulations, our economy will come to a standstill and halt years of innovation for years to come.

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[1] *See* Chelsea Lombardo, *'Super debt': Expert explains why student loans are particularly brutal*, YAHOO!: YAHOO!MONEY (Dec. 19, 2019), https://www.yahoo.com/now/student-debt-mortgage-debt-190200740.html (statement of Michael Calhoun) ("Student loan debt is super debt . . . .").

[2] *See* Melanie Hanson, *Student Loan Debt Statistics*, EDUC. DATA INITIATIVE, https://educationdata.org/student-loan-debt-statistics (Aug. 20, 2023).

[3] *See* Melanie Hanson, *Student Loans Debt vs Other Debts*, EDUC. DATA INITIATIVE, https://educationdata.org/student-loan-debt-vs-other-debts (Aug. 9, 2023).

[4] *See* Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 498 (2020).

[5] *See id.*

[6] Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934).

[7] *See* Tom Anderson, *Debt-Locked: Student Loans Force Millennials to Delay Life Milestones*, NBC NEWS (Aug. 5, 2015, 2:14 PM), https://www.nbcnews.com/better/money/debt-locked-student-loans-force-millennials-delay-life-milestones-n404636.

[8] *See* Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 330 (2013).

[9] *See id.* at 331 (indicating that the lack of student loan debt relief under the Bankruptcy Code limits participation in the credit economy).

In order to find solutions that would help the economy, we must understand the plan implemented by the federal government and analyze the trends that are making recent college graduates suffer more than previous ones.

This Article proceeds as follows: The Analogy puts forth a comparison that illustrates what student loan debt does to the economy; Part I of this Article will discuss the history of student loans and the federal government's intentions in creating a federal student loan program; Part II will discuss the two trends of skyrocketing tuition, and the fragile job market which are allowing the cost of college to soon overtake its benefit; Part III discusses what these trends will ultimately lead to, which is an increase in defaults and the options borrowers have to prevent default, the "undue hardship" requirement in the Bankruptcy Code which makes student loan debt generally nondischargeable, and the effect this has on the economy; Part IV puts forth possible remedies for this flawed system which include ways to curb the rise in tuition cost by adding more government regulations and amending the Bankruptcy Code to allow discharge for those struggling debtors.

THE ANALOGY

Many experts like to draw comparisons to the housing bubble to show that there is a student loan bubble. However, there is a key difference between student loan debt and mortgage debt that deems this belief invalid. Unlike the housing market, where there is collateral in the houses, there is no tangible collateral in student loans as the collateral is future earnings.[10] Therefore, student loans are missing the mechanism of a rapid unwinding of debt which allows the "popping" of the bubble.[11] In housing, this can be seen after mass defaults where creditors would foreclose on these properties and suffer an immediate massive loss.[12] These immediate massive losses cannot occur with student loan debt because as long as there are future earnings, there are no rapid losses.[13] Rather, there are slow, prolonged losses that can last years.

To visualize this gradual slow drag on the economy, picture student loan debt as an anchor weighing down a boat that represents the U.S. economy.[14] This anchor was created by the good intentions of the federal government to allow access to higher education for everyone, but the plan implemented has had many flaws that are negatively impacting the economy. When this anchor sets, the economy will be at a standstill as there will be many struggling debtors who cannot participate in the economy.

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[10] *See* Robert Farrington, *Why the Student Loan Bubble Won't Burst*, FORBES (Dec. 12, 2018, 7:48 AM), https://www.forbes.com/sites/robertfarrington/2018/12/12/student-loan-bubble-wont-burst/?sh=197cc45b6768.

[11] *See id.*

[12] *See id.*

[13] *Cf. id.* (explaining that while bankruptcy for student loan debt is possible, it is extremely rare).

[14] *See id.*

I. CREATING THE ANCHOR: THE INCEPTION OF STUDENT LOANS

Before introducing the federal government's involvement in higher education, it is good to note that the right to an education is not guaranteed in the Constitution, rather, it is a "fundamental interest."[15] Under the Tenth Amendment, education has long been regarded as an "unenumerated power reserved to the states."[16] However, federal statutes, such as the Higher Education Act,[17] fill the gaps left in the Constitution by giving rights not guaranteed in it.[18] These statutes can be "elevated to 'super' statutes as society comes to expect and rely on the rights provided in them."[19]

A. 1940's: Servicemen Readjustment Act of 1944

On June 22, 1944, President Franklin D. Roosevelt signed into law the Servicemen's Readjustment Act of 1944, better known as the G.I. Bill.[20] The goal of the act was to ease the transition into civilian life for servicemen and women returning home post-World War II.[21] Rather than simply providing a pension to veterans, Congress wanted to invest in their futures by giving them the option to attend college.[22] There was no loan provision in the G.I. Bill; instead, it provided direct grants for these returning servicemembers to cover tuition cost.[23] The G.I. Bill allowed two million veterans to resume their studies or even opened the door for them to do so.[24] This led to a 78% climb in college enrollment over the course of ten years, most enrollees being men.[25] Colleges grew tremendously as higher education was

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[15] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16, 29 (1972) (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)); *see also* Serrano v. Priest, 487 P.2d 1241, 1249 (Cal. 1971) (noting the court has never interpreted the Constitution to require equal school spending).

[16] FEDERAL EDUCATION POLICY AND THE STATES, 1945-2009: A BRIEF SYNOPSIS 5, (New York State Education Department Jan. 2006, *revised* Nov. 2009).

[17] Higher Education Act, 20 U.S.C. §§ 1-1099d (2018) (citing the Higher Education Act generally).

[18] Twinette L. Johnson, *Going Back to the Drawing Board: Re-Entrenching the Higher Education Act to Restore its Historical Policy of Access,* 45 U. TOL. L. REV. 545, 546–47 (2014).

[19] *Id.*

[20] *Servicemen's Readjustment Act*, OHIO HISTORY CONNECTION, https://ohiohistorycentral.org/w/Servicemen%27s_Readjustment_Act (last visited Dec. 9, 2021).

[21] *See* ANGELICA CERVANTES, MARLENA CREUSERE, ROBIN MCMILLION, CARLA MCQUEEN, MATT SHORT, MATT STEINER & JEFF WEBSTER, OPENING THE DOORS TO HIGHER EDUCATION: PERSPECTIVES ON THE HIGHER EDUCATION ACT 40 YEARS LATER, 1, 9 (Texas Guaranteed Research and Analytical Services 2005).

[22] *See* Gregory L. Schneider, *The G.I. Bill*, BILL OF RIGHTS INSTITUTE, https://billofrightsinstitute.org/essays/the-gi-bill (last visited Dec. 9, 2021).

[23] *See* Servicemen's Readjustment Act of 1944 (G.I. Bill), Pub. L. No. 78-346, 58 Stat. 400 (codified at 38 U.S.C. § 3222 (1946)).

[24] *See* CERVANTES ET AL., *supra* note 21 at 9.

[25] *See id.* at 10.

seen as a ticket to middle-class income and status.[26] This was just the beginning of federal educational financing.[27]

B. 1950's: National Defense Education Act of 1958

In 1957, thirteen years after the G.I. Bill was signed, the Soviet Union successfully launched Sputnik into space.[28] Suddenly the United States feared that they were falling behind technologically and defensively to the Soviet Union.[29] Due to this fear, President Dwight D. Eisenhower called on the government to provide funds to "promote education in the math, science, and foreign language fields"—competencies he believed would help America win the Cold War.[30] In response, congress enacted the National Defense Education Act of 1958 (NDEA).[31] Unlike the G.I. Bill, which only impacted veterans, now everyone could attain funding to pursue higher education.[32]

The NDEA also introduced the first substantial federal student loan program called the National Defense Student Loan (NDSL) Program.[33] Rather than being a direct loan to consumers, the NDSL Program made loans directly to higher education institutions, which in turn loaned the money to students.[34] The federal money was separated by state and then by institution, with no institution receiving more than $250,000 every fiscal year.[35]

The NDEA resulted in 3.6 million students enrolling in higher education.[36] However, there were still financial barriers that many Americans faced. The maximum loan amount was $1,000 per student ($9,000 today), but the average loan was between $400 to $500 per student.[37] This still was not enough to cover the full cost of college as the average tuition was $1,286.[38]

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26 *See* Schneider, *supra* note 22.
27 *See* CERVANTES ET AL., *supra* note 21 at 10.
28 *See Sputnik Spurs Passage of the National Defense Education Act*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Sputnik_Spurs_Passage_of_National_Defense_Education_Act.htm (last visited Dec. 9, 2021) [hereinafter *Sputnik*].
29 *See* CERVANTES ET AL., *supra* note 21 at 11.
30 *Id.*
31 *See id.*
32 *See* National Defense Education Act of 1958, Pub. L.No. 92-318 § 137, 86 Stat. 235 (codified at 20 U.S.C. § 401 (1958)).
33 *See id.* § 421.
34 *See id.*
35 *See id*. §§ 422(b), 423(b).
36 *See Sputnik*, *supra* note 28.
37 *See* John R. Brooks & Adam J. Levitin, *Redesigning Education Finance: How Student Loans Outgrew the "Debt" Paradigm*, 109 GEO. L. J. 5, 21 (2020)
38 *See id*.

In addition, many students were ineligible because they had a high-income family, low grades, or studies outside of mathematics, science and foreign language fields.[39]

C. 1960's: The Higher Education Act of 1965

The 1960's were a time of social development in America. Although neither the G.I. Bill nor the NEDA were discriminatory, there was still institutionalized racism at many universities, specifically in the south.[40] African Americans were refused an opportunity to attend many institutions, and even if they did enroll, they were not prepared because their elementary and post-secondary schools lacked proper resources.[41] All of this was true despite the 1954 Supreme Court decision in the landmark *Brown v. Board of Education*.[42]

To address these discrepancies, under the Johnson administration, the government enacted the Higher Education Act ("HEA") of 1965.[43] The original concern in pushing for higher education was national security, but the HEA was justified in focusing on domestic issues, social welfare, and economic concerns.[44] The HEA—coupled with the passage of the Civil Rights Act of 1964, which barred segregation in federally funded programs—had eliminated race as a reason to oppose federal aid for education.[45]

In its first year, the HEA made $700 million in financing available, contrast that to the $17.5 million available under the NDEA.[46] These funds were only available to families earning less than $15,000, which later caused frustration for those middle-income families.[47]

There are eight sections of the HEA, each aimed to drive economic prosperity by increasing educational funding. To note a few provisions, Title I of the HEA issued grants to states for the purpose of strengthening "community service programs of colleges and universities."[48] These are programs that the government believed could solve problems such as poverty, housing, transportation, and youth opportunities.[49] Further, Title III of the HEA aimed at "developing institutions," mainly ones that served a high concentration of minorities.[50] To develop these institutions, Title III

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[39] *See* SUZANNE METTLER, DEGREES OF INEQUALITY: HOW THE POLITICS OF HIGHER EDUCATION SABOTAGED THE AMERICAN DREAM 61 (2014).
[40] *See* CERVANTES ET AL., *supra* note 21 at 10.
[41] *See id.*
[42] *See id.* at 13 (citation omitted).
[43] *See id.* at 13, 15, 17.
[44] *See id.* at 17.
[45] *See id.* at 18.
[46] *See* 20 U.S.C. § 1074(a).
[47] *See* H.R. REP. NO. 95-951, at 11 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 5314–15, 5324.
[48] CERVANTES ET AL., *supra* note 21 at 19.
[49] *See id.*
[50] *See id.* at 20.

created an exchange program between growing institutions and already established ones to promote learning amongst educators.[51] Under Title VII, the government provided funding for the construction of educational facilities because of the high baby boomer enrollment growth.[52] These are just a few of the many monumental changes the HEA was contrived of.

A particular section of the HEA, Title IV, is regarded as the most important and controversial section of the Act.[53] Title IV authorized federal aid directly to students for higher education.[54] What differentiated the HEA from the NDEA is that the NDEA targeted students that had an interest in mathematics, science, and foreign language.[55] The NDEA also did not entirely cover college expenses and thus discouraged low-income families from pursuing higher education to avoid the risk of debt.[56] However, President Johnson wanted to encourage all citizens to attend college no matter their interest or grades.[57] In passing the HEA, Johnson stated: "The important role of the federal government . . . is somehow to do something for the people who are down and out, and that's where its major energy in education ought to go."[58] Title IV mirrored this belief in that it created the Guaranteed Student Loan program ("GSL").[59]

The GSL was a public-private partnership with the federal government, subsidizing capital from banks to provide loans to low and middle-income students.[60] Essentially, under the GSL, the government was guaranteeing student loans provided by banks or private lenders, and only bore the risk in cases where the loans were left unpaid.[61] The government favored this as there would be no upfront budget cost because their payment for defaults and interest would not occur until later years.[62] This method "raised concerns among economists, who worried that the government was making financial commitments without accounting for the ultimate costs."[63] These concerns were later addressed in the Federal Credit Reform Act of 1990, passed under George H.W. Bush.[64] In this act, all government loan programs would

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[51] *See id.*
[52] *See id.* at 21.
[53] *See id.* at 20.
[54] *See id.*
[55] *See id.*
[56] *See id.* at 22.
[57] *See id.* at 17 ("Johnson hoped the HEA would help every willing individual receive a postsecondary education that would lead to a higher income for them and their children.").
[58] *See id.* at 22.
[59] *See id.* at 24.
[60] *See Growth of Federal Student Loans*, LUMINA FOUNDATION, https://www.luminafoundation.org/history-of-federal-student-aid/chapter-one/ (last visited Dec. 3, 2021).
[61] *Student Loan History*, NEW AM.: EDUC. POL'Y, https://www.newamerica.org/education-policy/topics/higher-education-funding-and-financial-aid/federal-student-aid/federal-student-loans/federal-student-loan-history/ (last visited Dec. 3, 2021).
[62] *See id.*
[63] *Id.*
[64] *See id.*

have to account for their full long-term expenses, income, and would have an estimated "subsidy cost."[65]

In all, the Higher Education Act of 1965 is deemed one of the most important pieces of legislation in our nation's history.[66] In its first five years, college enrollment almost doubled to eight million,[67] many of the enrollees being people who would've been unable to afford college without it. As discussed further, there have been several alterations made to the HEA, but its original goals remained intact and are the cornerstone of higher education today.

D. 1970–2000: Reauthorizations of the HEA and Additional Legislation

The Higher Education Act was reauthorized seven times in the oncoming decades.[68] These reauthorizations further entrenched the expectation that citizens should be able to attend college to support their families.[69]

Prior to his resignation for his involvement in the Watergate Scandal, President Richard Nixon was eager to further expand the federal role in education.[70] In 1972, the HEA was reauthorized.[71] This reauthorization created the Student Loan Marketing Association (Sallie Mae), a government sponsored enterprise that guaranteed student loans and provided liquidity for them.[72] Sallie Mae purchased student loans with the sale of bonds, which were backed by the full faith and credit of the United States.[73]

However, in 1996, Sallie Mae was no longer a federal entity and was granted permission to privatize.[74] It did so to lift constraints in order to become more competitive in a changing economy and student loan market.[75]

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[65] *See id.*

[66] *See* CERVANTES ET AL., *supra* note 21 at 17.

[67] *See College enrollment in the United States from 1965 to 2019 and projection up to 2029 for public and private colleges (in millions)*, STATISTA (Dec. 30, 2022), https://www.statista.com/statistics/183995/us-college-enrollment-and-projections-in-public-and-private-institutions/.

[68] *See* CERVANTES, *supra* note 21 at 31.

[69] *See* Lyndon B. Johnson, *Remarks at Southwest Texas State College Upon Signing the Higher Education Act of 1965*, (Nov. 8, 1965) (https://www.presidency.ucsb.edu/documents/remarks-southwest-texas-state-college-upon-signing-the-higher-education-act-1965).

[70] *See* Camilla E. Watson, *Federal Financing of Higher Education at a Crossroads: The Evolution of the Student Loan Debt Crisis and the Reauthorization of the Higher Education Act of 1965*, 2019 MICH. ST. L. REV. 883, 889 (2019).

[71] *See id.*

[72] *See* Education Amendments of 1972, Pub. L. No. 92-318, sec. 133(a), § 439, 86 Stat. 235, 265 (adding a new section to the HEA).

[73] *See id.* at 266.

[74] *See* Student Loan Marketing Association Reorganization Act of 1996, Pub. L. No. 104-208, Tit. VI, sec. 439, § 440, 110 Stat. 3009, 3009-275 (codified as amended at 20 U.S.C. § 1087-3).

[75] *See* MICHAEL J. LEA, PRIVATIZING A GOVERNMENT SPONSORED ENTERPRISE: LESSONS FROM THE SALLIE MAE EXPERIENCE 2–5 (Networks Fin. Inst. 2006).

The 1972 reauthorization also created new funding programs, including the addition of Pell Grants.[76] Pell Grants are usually only awarded to undergraduate students who display an exceptional financial need and, unlike a loan, typically do not need to be repaid.[77]

Although we will later go in depth in explaining the predatory practices at proprietary schools, this problem was already surfacing in 1974.[78] In response to this concern, Gerald Ford, who served the remainder of Nixon's second term, expanded the G.I. Bill to prohibit funding to any institution that "utilize[d] advertising, sales, or enrollment practices of any type which are erroneous, deceptive or misleading either by actual statement, omission, or intimation."[79] This extension also required these schools to provide a "fair and equitable refund" to students who dropped out.[80]

In 1976, there was a third reauthorization which focused on benefiting middle class families who believed the federal government had been neglecting them.[81] In response, the federal government increased the GSL income threshold from $15,000 to $25,000.[82] This income threshold would soon be exacerbated after the passage of the Middle-Income Student Assistance Act of 1978, which made all borrowers eligible regardless of income.[83]

The third reauthorization would also set the stage for why experts refer to student loan debt as a "super debt." This is because it included provisions that assessed the effect of student loan debt in bankruptcy.[84] At the time, the government guaranteed 100% of the loans and worried that students would simply file bankruptcy after graduation to avoid repayment.[85] Therefore, the provision made borrowers not eligible to discharge their student loans until after five years of repayment and the proving of "undue hardship."[86] Subsequent amendments raised the repayment term to seven years before discharge, and in 1998, Congress struck the provision entirely,

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[76] *See* Education Amendments of 1972, Pub. L. No. 92-318, secs. 131, 401, 411, 413(a)–(d), § 401, 86 Stat. 235, 247–55.

[77] *See* U.S. Dep't of Educ., *Federal Pell Grants are usually awarded only to undergraduate students*, FED. STUDENT AID, https://studentaid.gov/understand-aid/types/grants/pell (last visited Dec. 3, 2021).

[78] *See generally* Vietnam Era Veterans' Readjustment Assistance Act of 1974, Pub L. No. 93-508, 88 Stat. 1578 (1974) (describing assistance available to Vietnam veterans).

[79] *Id.* § 212, 88 Stat. at 1586 (amending 38 U.S.C. section 1796).

[80] *See* David Whitman, *Vietnam Vets and a New Student Loan Program Bring New College Scams*, THE CENTURY FOUND. (Feb. 13, 2017) (citing Guaranteed Loan Program, 40 Fed. Reg. 7586, 7588 (Feb. 20, 1975)).

[81] *See* Lawrence E. Gladieux, *Federal Student Aid Policy: A History and an Assessment*, FIN. POSTSECONDARY EDUC.; THE FED. ROLE, 45, 48 (1995), https://files.eric.ed.gov/fulltext/ED400775.pdf.

[82] *See* H.R. REP. NO. 94-1701, at 187 (1976), *reprinted in* 1976 U.S.C.C.A.N. 4877, 4888 (adjusting the income threshold for the benefit of the middle class).

[83] *See* Middle Income Student Assistance Act of 1978, Pub. L. No. 95-566, sec. 5(b)(1)(A), § 428(a)(2), 92 Stat. 2402–2403 (removing Higher Education Act section 428(a)(2)(A)–(B)).

[84] *See* Watson, *supra* note 70 at 904.

[85] *See* Education Amendments Act of 1976, Pub. L. No. 94-482, § 127, 90 Stat. 2141 (amending section 424 of the Higher Education Act of 1965).

[86] *See id.*

essentially making education loans non-dischargeable.[87] We analyze Bankruptcy Code section 523(a)(8) and what exactly the "undue hardship" requirement is later in this Article.[88]

In 1980, the HEA was again reauthorized.[89] This legislation created the Parent Loan for Undergraduate Student ("PLUS") program where parents can now take out student loans for their child.[90] PLUS loans are a major building block to where we are today, and in 1992, George H. W. Bush removed the borrowing cap on PLUS loans.[91] Prior to this, parents could only borrow up to $4,000, but now they can take out the full cost of tuition including room, books, and board for their child.[92] As a result, student loan volume spiked 50% within the next two years.[93]

Later, in 2005, PLUS loans were expanded to now benefit graduate students.[94] Grad PLUS loans now allowed the parents of graduate students to take out the full cost of attendance for graduate school.[95]

Prior to Reagan's presidency from 1981–1989, the additional amendments to the HEA had bipartisan support, but the House began to divide on education funding.[96] President Reagan's focus was to reduce federal spending to reduce taxes and attack inflation.[97] He accomplished this by cutting one billion dollars in funding to the Department of Education, a federal department he famously called "President Carter's new bureaucratic boondoggle."[98] As a result of these budget cuts, college tuition and fees increased approximately 82%.[99]

In 1990, the student loan default rate was at an all-time high of 41%.[100] At the same time there was widespread media coverage of massive school fraud and

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[87] *See* Higher Education Amendments Act of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (expanding the previous amendment to further avoid student bankruptcy filings).

[88] *See* 11 U.S.C. § 523(a)(8) (2018).

[89] *See generally* Education Amendments Act of 1980, Pub. L. No. 96-374, 94 Stat. 1367 (reauthorizing the HEA).

[90] *See id.* sec. 419, § 428B(a), 94 Stat. 1367, 1424– 25.

[91] *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, sec. 422, § 428H(c), 106 Stat. 448, 535.

[92] *See id.*

[93] *See* Jacqueline E. King, *Federal Student Loan Debt: 1993 to 2004*, AM. COUNCIL ON EDUC. ISSUE BRIEF, 1 (June 2005).

[94] *See* Higher Education Reconciliation Act of 2005, Pub. L. No. 109-171, sec. 8005(c), § 425(a)(1)(A), 120 Stat. 4, 158–59 (enacted as part of the Deficit Reduction Act of 2005).

[95] *See id.*

[96] *See* Watson, *supra* note 70 at 909–10.

[97] *See* Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, § 101, 95 Stat. 172, 176 (delineating that section 101 of the Economic Recovery Act of 1981 relates to adjustments in tax tables so that inflation will not result in tax increases).

[98] Neal McCluskey, *Cutting Federal Aid for K-12 Education,* DOWNSIZING THE FED. GOV'T (Apr. 21, 2016).

[99] *See* Snyder, T.D., de Brey, C., and Dillow, S.A., DIGEST OF EDUCATION STATISTICS 2017, NAT'L CTR. ON EDUC. STATS. tbl.302.10 (53d ed. 2019).

[100] *See* David Whitman, *When President George H. W. Bush "Cracked Down" on Abuses at For-Profit Colleges*, THE CENTURY FOUND. (Mar. 9, 2017).

abuse.[101] To address this, newly-elected President George H. W. Bush passed the Omnibus Budget Reconciliation Act of 1990.[102] The act made schools ineligible for federal funding if they had a cohort default rate equal of greater than 35%.[103] This threshold was lowered to 30% thereafter.[104]

Again, the HEA was reauthorized in 1992 and 1998.[105] These reauthorizations fluctuated interest rates of particular loans and provided loan forgiveness for those who taught at primary or secondary schools.[106]

Another Act passed in the 1993 was the Student Loan Reform Act.[107] The main goal of the Act was to expand the Direct Loan program and move away from the federally guaranteed Federal Family Education Loans ("FFEL") from private lenders.[108] These direct loans were made directly by the federal government and recorded on its balance sheet.[109] Studies showed that the previous FFEL loans favored the private lenders at the students' expense, whereas these Direct Loans were cheaper for students and taxpayers and reduced interest rates.[110] The Student Loan Reform Act also created Income Driven Repayment ("IDR") Plans, plans that allowed borrowers to repay loans at a rate based on their income rather than the fixed rate.[111]

E. 2000–2020

The 2000s brought about several crises, including 9/11 and the Great Recession, which led to a fluctuating interest for investing in higher education.

The Great Recession in particular pushed for the government to end privatization of student loans.[112] In 2006, direct loans issued directly from the government were only a small portion of federally backed loans and the FFEL loans from private lender were widely used.[113] However, the Great Recession left private lenders unable to cover their student loan obligations.[114] Since private FFEL loans were federally

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[101] *See id.*

[102] *See* Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388.

[103] *See id.* 104 Stat. 1388 § 3004.

[104] *See id.*

[105] *See* Watson, *supra* note 70 at 919.

[106] *See id.* at 920.

[107] *See id.* at 917.

[108] *See id.*

[109] *See* Student Loan Reform Act of 1993, Pub. L. No. 103-66, sec. 4021, § 452, 107 Stat. 312, 341 (enacted as part of the Omnibus Budget Reconciliation Act of 1993) (authorizing the Direct Student Loan Program).

[110] *See* Deborah Lucas & Damien Moore, *Guaranteed Versus Direct Lending: The Case of Student Loans*, *in* NAT'L BUREAU OF ECON. RES. 169 (Feb. 2010).

[111] *See* Student Loan Reform Act of 1993, sec. 4021, § 455 (d)(1)(D), (e).

[112] *See* Lucas & Moore, *supra* note 110 at 196.

[113] *See Feds Take Over Student Loan Program from Banks*, SFGATE (Mar. 30, 2010). Specificaly, they represented about 20% of federally guaranteed loans. *Id.*

[114] *See* Jason D. Delisle, *Private In Name Only: Lessons From The Defunct Guaranteed Student Loan Program*, AM. ENTER. INST. 1, 9 (2017).

backed, this was to the government's detriment and led to the Department of Education buying back outstanding FFEL debt held on private lenders' balance sheets.[115]

Private loans were not only expensive, but they were a source of corruption. A 2007 investigation discovered that private lenders engaged in deceptive practices such as selling student loans to third parties without the borrower's knowledge.[116] This practice left the benefits promised by the original lender void.[117]

Based on these findings, in 2009 President Obama eliminated the FFEL program altogether and provided that 100% of student loans would be from the Direct Loan Program.[118] The Obama administration predicted that eliminating the "middleman" would save $68 billion over the next eleven years.[119] Today, around 8% of student loans continue to come from private lenders.[120]

The Great Recession not only reduced privatization, but also decreased state funding to institutions. Between 2008 to 2018, forty-one states spent an average of 13% less per student.[121] Universities now needed to rely on tuition to pay faculty, facility upgrades, and other miscellaneous costs.[122] This resulted in a 37% increase in tuition since 2008 and led to a total outstanding student loan debt exceeding one trillion dollars in 2012.[123] Since the recession, student loan debt has more than doubled from $600 billion in 2008 to $1.7 trillion in 2021.[124]

F. The Coronavirus Pandemic

Today's college graduates are entering the worst job market since the Great Recession with close to twice the amount of student debt as graduates did then.[125]

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[115] *See* Ensuring Continued Access to Student Loans Act of 2008, Pub. L. No. 110-227, sec.7, § 459A, 122 Stat. 740, 746–47.

[116] *See* Amanda Ernst, *Sallie Mae Settles Student Loan Kickback Charges*, LAW360 (Apr. 11, 2007), https://www.law360.com/articles/22415/sallie-mae-settles-student-loan-kickback-charges.

[117] *See id.*

[118] *See generally* Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, § 2201, 124 Stat. 1029, 1074.

[119] *See* Peter Baker & David M. Herszenhorn, *Obama Signs Overhaul of Student Loan Program*, N.Y. TIMES (Mar. 30, 2010), www.nytimes.com/2010/03/31/us/politics/31obama.html?mcubz=1.

[120] *See* Melanie Hanson, *Student Loan Default Rate*, EDUC. DATA INITIATIVE, (Aug. 27, 2023), https://educationdata.org/student-loan-default-rate.

[121] *See, e.g.*, Michael Mitchell, Michael Leachman, & Matt Saenz, *State Higher Education Funding Cuts Have Pushed Costs to Students, Worsened Inequality*, CTR. ON BUDGET & POL'Y PRIORITIES (Oct. 24, 2019), https://www.cbpp.org/research/state-budget-and-tax/state-higher-education-funding-cuts-have-pushed-costs-to-students.

[122] *See id.*

[123] *See id.*

[124] *See 10 Key Facts About Student Debt in the United States*, PETER G. PETERSON FOUND. (May 5, 2021), https://www.pgpf.org/blog/2021/05/10-key-facts-about-student-debt-in-the-united-states#:~:text=The%20amount%20of%20student%20debt,in%202008%20(%24600%20billion).

[125] *See* Melanie Hanson, *Average Student Loan Debt by Year*, EDUC. DATA INITIATIVE (Oct. 25, 2023), https://educationdata.org/average-student-loan-debt-by-year.

The coronavirus pandemic caused the highest recorded unemployment rate since the Great Depression at 14.8% and halted all benefits college graduates sought by attaining a degree.[126]

In an effort to curb the expected rise in massive default, President Trump signed into law The Coronavirus, Aid, Relief and Economic Security (CARES) Act on March 27, 2021.[127] Among other things, the CARES Act froze student loan payments for six months interest free and later extended the freeze till January 2021.[128] Later, President Joe Biden made the final extension to September 1, 2023.[129]

In previous recessions, college enrollment has tended to bolster in the years following as students seek more skills that will qualify them for higher paying jobs.[130] However, we are seeing the opposite trend since the pandemic has started.[131] Since 2020, there has been a 3.5% decline (603,000 student) in undergraduate enrollment.[132] Experts attribute this decline to two factors.[133] The first being that virtual instruction makes learning less engaging, especially for those low-income families who may not have internet access.[134] The second factor being the health and economic downturn the pandemic has caused.[135] With this decline projected to continue, the face of higher education may look very different in the coming decade.[136]

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[126] *See Unemployment Rates During the Covid-19 Pandemic*, CONG. RSCH. SERV. 1, 2 (Aug. 20, 2021).

[127] *See How did provisions of the 2020 Coronavirus Aid, Relief, and Economic Security Act (CARES) Act related to student loan debt . . .*, BUREAU OF ECON. ANALYSIS, https://www.bea.gov/help/faq/1407 (last visited Nov. 7, 2023).

[128] *See* Elissa Nadworny, *Education Department Extends Student Loan Payment Freeze Through January*, NPR (Dec. 4, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/12/04/943293547/education-dept-extends-student-loan-payment-freeze-through-january.

[129] *See* Peter Buntler & Dan Avery, *Interest on Student Loans is Restarting: Here's What Borrowers Need to Know*, CNET (Sept. 1, 2023, 3:00 AM), https://www.cnet.com/personal-finance/loans/student-loan-payments-start-again-soon-how-to-prepare/.

[130] *See* Elissa Nadworny, *College enrollment plummeted during the pandemic. This fall, it's even worse*, NPR (Oct. 6, 2021, 5:07 AM), https://www.npr.org/2021/10/26/1048955023/college-enrollment-down-pandemic-economy.

[131] *See id.*

[132] *See Spring 2021 College Enrollment Decline 603,000 to 16.9 Million Students*, NAT'L STUDENT CLEARINGHOUSE (Jun. 10, 2020), https://www.studentclearinghouse.org/blog/spring-2021-college-enrollment-declines-603000-to-16-9-million-students/.

[133] *See* Dalia Faheid, *Fewer Students in Class of 2020 Went Straight to College*, EDUCATIONWEEK (Apr. 6, 2021), https://www.edweek.org/teaching-learning/fewer-students-in-class-of-2020-went-straight-to-college/2021/04.

[134] *See id.*

[135] *See id.*

[136] *See id.*

G. Present Day

In August 2022, President Joe Biden announced his student loan forgiveness program would be cancelling up to $20,000.00 in debt per borrower.[137] This plan directly linked to the coronavirus pandemic, as President Biden believes this will provide more breathing room for America's working families who continue to recover.[138] In particular, the Biden administration justified debt forgiveness under the HEROES Act, which grants the federal government authority to "waive or modify" student financial assistance program in response to national emergencies.[139]

The plan indicates that a borrower may have $10,000 forgiven if their loan is held by the Department of Education and the borrower makes less than $125,000 individually or $250,000 for a family.[140] If a borrower received Pell grants, which are offered to those with the most significant financial need, they may have $20,000 forgiven.[141] A study from the Wharton School of Business projects that this plan will cost taxpayers an estimated 300 million dollars.[142]

With projections being such, this plan has been met with pushback. Specifically, six states, including Arkansas, Iowa, Kansas, Missouri, Nebraska and South Carolina, sued the Biden administration to the policy arguing that the White House overstepped its authority with the debt forgiveness plan.[143] In *Biden v. Nebraska*, the Supreme Court agreed with the states and struck down President Biden's loan forgiveness plan.[144] The Court's reasoning fell on the interpretation of the word "modify" in the HEROES Act.[145] In this, the Supreme Court found that the Biden administration can make "modest adjustment and additions to existing provisions, not transform

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[137] *See FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, WHITE HOUSE (Aug 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/.

[138] *See id.*

[139] *See* Alison Durkee, *Biden's Student Loan Forgiveness Gets Greenlight As Judge Rules Against GOP Challenge*, FORBES (Oct. 21, 2022, 10:02 AM), https://www.forbes.com/sites/alisondurkee/2022/10/20/bidens-student-loan-forgiveness-gets-greenlight-as-judge-rules-against-gop-challenge/?sh=53f81b6695bd.

[140] *See* Cole Claybourn, *Biden's Student Loan Forgiveness Plan: Your Questions Answered*, U.S. NEWS & WORLD REPORT (Jun. 30, 2023), https://www.usnews.com/news/business/articles/2022-10-18/everything-to-know-to-apply-for-student-loan-forgiveness.

[141] *See id.*

[142] *See* Junlei Chen, *Forgiving Student Loans: Budgetary Costs and Distributional Impact*, PENN WHARTON BUDGET MODEL, 1 (Aug. 23, 2022), https://budgetmodel.wharton.upenn.edu/issues/2022/8/23/forgiving-student-loans.

[143] *See* Durkee, *supra* note 139.

[144] 143 S. Ct. 2355, 2375 (2023).

[145] *See id.* at 2358 (explaining the text "modify" in the HEROES Act does not authorize the Biden administration's loan forgiveness program).

them."[146] Further, the Court stated, "the 'modifications' challenged here create a novel and fundamentally different loan forgiveness program."[147]

The opinion in *Biden v. Nebraska* comes just three months prior to the September 1, 2023 removal of the pause on student loan payments.[148] Come September 1, 2023, it will be the first time in three and a half years since repayment was mandatory. Undoubtedly, many borrowers will struggle, and in turn our economy will have less money entering the stream of commerce.

This Article will continue by analyzing how student loans affect the national economy and how important it is that the government reform the existing program in place.

II. Descent of the Anchor: Expectation vs. the Growing Reality

When taking out student loans, it is not uncommon for borrowers to compartmentalize the fact that they will eventually have to be repaid.[149] After all, this debt was incurred with the expectation that it would be proportionate to their career earnings and that there would be adequate employment opportunities.[150] However, these expectations have become increasingly false.

The reality is that since 2000, tuition cost has grown at a rate that outpaces inflation by 111%.[151] Yet, there has been a 10% decrease in the amount of "high quality" jobs since 1990.[152] The combination of these findings force thousands of borrowers working to pay off creditors at the expense of their personal health and life enjoyment. Ultimately, if these trends continue, the anchor will set on the economy, as there will be a rise in defaults amongst borrowers. Without adequate relief for these borrowers, interest will cause loans to skyrocket in value, leaving less money flowing in the economy.

To come up with solutions, we must understand what is causing these two trends of rising tuition and fewer jobs. By doing this, we can also understand that it is little fault of the borrower that they are in these predicaments, rather it was partially the government's doing.

A. The Sharp Rise in Tuition

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[146] *Id.*
[147] *Id.*
[148] *COVID-19 student loan forbearance (pause)*, USA GOV, https://www.usa.gov/covid-student-loan-help# (last updated Oct. 24, 2023).
[149] *See* Austin, *supra* note 8 at 346.
[150] *See id.*
[151] *See* Melanie Hanson, *Average Cost of College & Tuition*, EDUC. DATA INITIATIVE, https://educationdata.org/average-cost-of-college (Sep. 6, 2023).
[152] *See U.S. Private Sector Job Quality Index*, U. BUFF. SCH. OF MGMT. 1, 6 chart 3 (Nov. 2021).

Since 1978, tuition and fees have risen twelve times over the consumer price index.[153] This means the cost of higher education has risen faster than families can pay and wages can cover.[154] Federal funding has no choice but to keep up with this trend and as of 2023, federal student loan debt is at $1.645 trillion, compared to $260 billion in 2001.[155] The reasons for this increase are widely argued, some even blaming the federal financial aid program for it, but generally the rise was caused by inadequate government regulations, a decrease in state funding, and an increase in cost these universities have to bear.

1. Federal aid enables greed

One hypothesis as to why tuition has increased is known as the Bennett Hypothesis.[156] Articulated by William Bennett, Ronald Reagan's Education Secretary, the hypothesis asserts that because there is such a wide availability of education credit, colleges know that tuition will be covered no matter its cost, thus increasing them.[157] In fact, economists at George Washington University found that proprietary schools that receive federal aid set their tuition roughly 75% higher than those unsupported by the government.[158]

Given this hypothesis, the plan to combat this rise of tuition is to cut funding.[159] However, there is a risk that this would disadvantage low-income families. Another solution is to limit eligibility to those truly low-income students.[160] This is just another inadequate solution in that it would contradict the purpose of the Middle-Income Student Assistance Act of 1978 by neglecting the middle class.[161]

The reason I state this argument is because many people believe this to be true despite contradictory findings. This theory will be debunked further in the coming paragraphs, and we will see logical reasons as to why this increase has truly occurred.

2. Inadequate government regulations

Even seventy years later, the federal government is still trying to figure out the proper formula for its student loan program. In doing so, they have made honest mistakes that have contributed to the increase in tuition cost. One such mistake is the

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153 Helen Li, *The Rising Cost of Higher Education: A Supply & Demand Analysis*, NYU STERN SCH. OF BUS. (May 2013), https://www.stern.nyu.edu/sites/default/files/assets/documents/con_042986.pdf.

154 *See id.*

155 *See* Hanson, *supra* note 2..

156 *See* Austin, *supra* note 8 at 345.

157 *See* Paul Kix, *Does Financial Aid Make College More Expensive*, BOSTON GLOBE, (Mar. 25, 2012), https://www.bostonglobe.com/ideas/2012/03/24/does-financial-aid-make-college-more-expensive/gNl6prWo5TcY514mpIpPXL/story.html.

158 *See id.*

159 *See id.*

160 *See id.*

161 *See* Middle Income Student Assistance Act, Pub. L. No. 95-566, 92 Stat. 2402 (1978).

addition of the 90/10 rule.[162] In 1992, Congress implemented the 85/15 rule (changed in 1998 to 90/10) to combat waste, fraud, and abuse at for-profit schools.[163] Under 90/10, federal funds can make up to 90% of a proprietary school's revenue, while the other 10% must come from private parties or state or local governments.[164] It was implemented to validate quality of education in that if an institution is providing such education, "someone other than the federal government should be willing to pay."[165]

Despite these good intentions, proprietary schools found ways to manipulate this rule at the students expense.[166] Instead of seeking non-federal funding to account for the 10%, some proprietary schools decided to raise tuition above the maximum amount students could receive in federal funding at the time.[167] This forced students to take out "gap loans," these are loans from other sources such as the school or private lenders to fill the gap between the cost of tuition and what their loan covered.[168] These gap loans would then account for the 10% and allow these schools to remain open.[169]

3. Decrease in state funding

Studies have concluded that as state funding has decreased, tuition has increased.[170] Post the 2008 recession, with less money available, states focused on mandatory spending programs such as Medicaid, rather than higher education.[171] The result: historic lows in education funding forcing institutions to rely on tuition to continue operations.[172] Whereas per student funding was just over $10,000 in 2001, the recession reduced this total to $6,500 per student.[173] However, 2020 marked an eight year rise in state funding which brought the average funding per student to $8,636.[174]

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162 *See* Higher Education Opportunity Act, Pub. L. No. 493, 122 Stat. 3078, 3308–3318 (2008).

163 *See* Vivien Lee & Adam Looney, *Understanding the 90/10 Rule: How reliant are public, private and for-profit institutions on federal aid?*, THE BROOKINGS INST. 1, 1 (2019), https://www.brookings.edu/wp-content/uploads/2019/01/ES_20190116_Looney-90-10.pdf.

164 *See id.* at 3.

165 *Id.*

166 *See* Billy L. Clark, *Opinion: Profits grew while students were hurt by a law intended to protect them*, THE HECHINGER REP. (May 4, 2021), https://hechingerreport.org/opinion-profits-grew-while-students-were-hurt-by-a-law-intended-to-protect-them/.

167 *See id.*

168 *See id.*

169 *See id.*

170 *See* Mike Mitchell, *Cuts to Higher Education Lead to Increases in Tuition*, WASH. STATE BUDGET & POL'Y CTR.: SCHMUDGET BLOG (Jun. 6, 2012), https://budgetandpolicy.org/schmudget/cuts-to-higher-education-lead-to-increases-in-tuition/.

171 *See* Sonya Krakoff, *Why Is College Tuition Rising So Fast*, CHAMPLAIGN COLL. ONLINE: BLOG AND NEWS, https://online.champlain.edu/blog/why-is-college-tuition-rising (last visited Dec. 9, 2021).

172 *See id.*

173 *See 2020 State Higher Education Finance Report,* STATE HIGHER EDUC. EXEC. OFFICERS ASSOC., 26 fig.2.1 (2020), https://shef.sheeo.org/wp content/uploads/2021/05/SHEEO_SHEF_FY20_Report.pdf

174 *See id.*

To better understand the dramatic decrease, we will compare state funding to federal funding. Historically, states provide far greater higher education funding than the federal government.[175] In 1990, state funding per student was almost 140% more than that of the federal government.[176] However, in 2017, this gap narrowed to only 14% above federal levels.[177] The total amount subsidized to four-year colleges in 2017 was $87.1 billion by the state government and $74.8 billion by the federal government.[178] Student loans are not included in these statistics, these statistics measure the government's subsidies directly to schools for costs such as construction, research, and salaries.[179]

These government subsidies only account for a fraction of the total expenditures universities have and thus, this decrease plays a major factor in why tuition has increased so significantly.

4. Increase in cost at universities

Another reason for an increase in tuition is that the cost has increased for colleges. These costs are directly linked to an increase in demand for higher education since the Great Recession.[180] Much of the expenses not-for-profit and public universities incur are to remain competitive against others, while increasing the quality of education. These expenses include high salaries for professors to match alternative employment, purchasing the latest technology to increase quality of education, and construction to accommodate more students.[181] The effect of these cost drivers can be seen when analyzing the profit margins at public universities. Profit margin is defined as the percentage of revenue that a company retains as income after subtracting its expenses.[182] In 2010, public universities had an average profit margin of 16%.[183] Today, their average profit margins are 4.%, a substantial ten-year difference.[184] Cost at private for-profit colleges has also risen. The difference is that they invest much less in education as seen by their 33% investment of revenues on marketing and advertising, compared to just 17% on instruction.[185]

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[175] *See* Phillip Oliff, *Two Decades of Changing in Federal and State Higher Education Funding*, PEW CHARITABLE TRUSTS (Oct. 15, 2019), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2019/10/two-decades-of-change-in-federal-and-state-higher-education-funding.

[176] *See id.*

[177] *See id.*

[178] *See id.*

[179] *See id.*

[180] *See* Li, *supra* note 153.

[181] *See* Daniela Kraiem, *The Cost of Opportunity: Student Debt and Social Mobility*, 48 SUFFOLK U. L. REV. 689, 695 (2015).

[182] *See American Public Education Profit Margin 2007-2021*, MACROTRENDS, https://www.macrotrends.net/stocks/charts/APEI/american-public-education/profit-margins (last visited Dec. 3, 2021).

[183] *See id.*

[184] *See id.*

[185] *See* Michael Stratford, *Senate Report Paints a Damning Portrait of For-Profit Higher Education*, CHRON. OF HIGHER EDUC. (July 30, 2012), https://chronicle.com/article/A-Damning-Portrait-of/133253/.

In economics, when cost increases, the price also increases, and universities are no exception to this. In fiscal year 2018–2019, four-year public college expenses were $401 billion, $219 billion at private nonprofit institutions, and $12 billion at private for-profit institutions, totaling $632 billion in expenses.[186] Note this outlier in expenses at for-profit school is due to there being a small percentage of them.[187] Now compare the $632 billion in expenses to the $161.9 billion in government subsidies being distributed in 2017. Although comparing to a year before, the increase in government funding by year remained at about 2%.[188] Therefore, this depicts colleges' reliance on high tuition to help cover the remaining 75% of expenses.

B. Decrease in Good Paying Jobs

Tuition rising is a problem of its own, but it is a manageable one if there are jobs that afford a borrower the ability to pay their debt. The reality however is that high quality jobs are slowly disappearing due to an increased supply of graduates and an increase in low paying jobs. In particular, it is more common than ever to have a four-year degree, which causes increased competition and underemployment for many graduates.[189]

Since 1995, there has been a 10% decrease in "high-quality" jobs in the U.S. private sector.[190] Translated, this means that there are currently eighty-two high quality jobs to every 100 low quality jobs.[191] "High-quality" jobs refer to those of which provide income necessary to maintain a necessary standard of living, save for retirement, and allow for other life essentials.[192] In this same time span, the number of college graduates with a four-year degree has doubled.[193] Today, 39% of adults over eighteen have a bachelor's degree or higher.[194]

These trends are leaving many recent grads unemployed or underemployed. This is true even in times of record low unemployment. Typically, the unemployment rate for recent graduates is a full percentage point below overall unemployment, but a study done in 2018 showed that graduate unemployment was at 3.7%, whereas total unemployment was 3.8%—the smallest difference since this data collection began in

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[186] *See* NCES, REPORT ON THE CONDITION OF EDUCATION 2021 28 (2021), https://nces.ed.gov/pubs2021/2021144.pdf.

[187] *See* Josh Moody, *A Guide to the Changing Number of U.S. Universities*, U.S. NEWS (Apr. 27, 2021), https://www.usnews.com/education/best-colleges/articles/how-many-universities-are-in-the-us-and-why-that-number-is-changing.

[188] *See supra* note 181 and accompanying text.

[189] *See* Reid Wilson, *Census: More Americans have college degrees than ever before*, THE HILL (Apr. 3, 2017), https://thehill.com/homenews/state-watch/326995-census-more-americans-have-college-degrees-than-ever-before.

[190] *See U.S. Private Sector Job Quality Index*, U. BUFF. SCH. OF MGMT. 1, 6 chart 3 (Nov. 2021).

[191] *See id.* at 3, 6.

[192] *See id.* at 3.

[193] *See* Melanie Hanson. *College Graduation Statistics*, EDUC. DATA INITIATIVE (Aug. 9, 2021), https://educationdata.org/number-of-college-graduates.

[194] *See id.*

1990.[195] Even when compared to the recent graduate unemployment rate in 2006, 2018 still ranks lower.[196]

As of September 2023, the unemployment rate for recent graduates is 4.4%.[197]

Not only higher unemployment, but these graduates are making less money than they were in 2000 (after adjusting for inflation), and there is a bigger gap in earnings inequality.[198] This means that the bottom quarter of recent graduates make less in 2018 than in the past.[199] All of this despite there being a fifty-year record low unemployment in 2019, which shows that a vast majority of these jobs created are low paying jobs.[200] In fact, 40% of recent graduates and 33% of all college graduates are underemployed, working jobs that don't even require a college degree.[201]

To put it in perspective, the Federal Reserve found that millennials controlled just 4.6% of U.S. wealth in 2020.[202] In 1989, when baby boomers were the same age, they controlled 21% of the nation's wealth, a five-fold difference.[203] Therefore, because of the amount of low paying jobs, millennials today are worse off than their parents and grandparents were despite being better educated.[204]

Given these two trends of soaring tuition cost and less high-quality jobs, it is easy to see why students today are struggling more than ever before to repay student loan debt. Because of this struggle, borrowers tend to miss payments which can result in default. This next section will analyze how many borrowers are projected to default in the incoming years, the lifetime of consequences from default, and why bankruptcy leaves these defaulters stuck in their suffering.

III. Setting of the Anchor: Rise in Defaults and No Adequate Relief

With soaring tuition cost and no good jobs to help pay them off, it is inevitable that there will be an increase in defaults. The penalties that come with default will cause a once $50,000 loan to turn into over $100,000. In this case, many debtors will look to bankruptcy to get these loans discharged, but it is unlikely for most of them to get relief. This combination of massive defaults and lack of adequate relief to escape its consequences will result in the setting of the figurative anchor on our

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195 *See* Jed Kolko, *What the Job Market Looks Like for Today's College Graduates*, HARVARD BUS. REV. (May 9, 2019), https://hbr.org/2019/05/what-the-job-market-looks-like-for-todays-college-graduates.

196 *See id.*

197 *See* Federal Reserve Bank of New York, *The Labor Market for Recent College Graduates*, FED. RSRV. (Nov. 8, 2023), https://www.newyorkfed.org/research/college-labor-market#--:explore:unemployment

198 *See* Kolko, *supra* note 195.

199 *See id.*

200 *See id.*

201 *See* Federal Reserve Bank of New York, *supra* note 197.

202 *See* Board of Governors of the Federal Reserve System, *Distribution of Household Wealth in the U.S. since 1989*, DISTRIB. FIN. ACCOUNTS (2021), https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/#quarter:119;series:Net%20worth;demographic:generation;population:all;units:levels.

203 *See id.*

204 *See* Alicia Adamczyk, *Millennials own less than 5% of all U.S. wealth*, CNBC (Oct. 9, 2020), https://www.cnbc.com/2020/10/09/millennials-own-less-than-5percent-of-all-us-wealth.html.

economy. These debtors will be forced to suffer this burden for a majority of their lives, leaving them unable to participate in the economy.

A. Default

Borrowers enter default when they go more than 270 days without making a payment.[205] Prior to day 270, the loans are called delinquent.[206] Currently, 15% of student loans are in default at any given time and student loan default affects nine million borrowers.[207] Although first year defaults have been steadily on the decline, currently at 11%, the default rate rises as graduates get further out of college.[208]

A study conducted on those that graduated in 2002 found that about twenty-eight to 29% of them defaulted after twelve years.[209] The study further concluded that there was a 41% higher default rate in year twenty than year twelve.[210] Therefore, 38% of those who graduated in 2002 would have defaulted by 2023.[211] These jumps mirror another study done on the 1994 graduating class.[212]

These estimates however will be lower than what the default rate over time will be for today's graduates. This is because as student debt has increased, it is taking longer for debtors to pay off their debts. In 2020, borrowers fifty and older owed 22% of the total amount of debt, whereas those over fifty years old only owed 4% of the total debt in 2004.[213] Being how it is taking debtors longer to pay, there is a greater odd today's debtors partake in deferment, forbearance, or switch repayment plans (as talked about below) resulting in interest accruing. In fact, the average thirty-year-old's student debt is 287% greater than the value of their original loan.[214]

With tuition increasing and less jobs, it is logical to find that the amount of defaults will only increase as time goes on. With the unemployment rate being at 5.4% due to the pandemic, many individuals will unfortunately be unable to keep up with student loan repayment when the freeze ends on January 31, 2022.

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[205] *See What Happens if I Default on a Federal Student Loan?*, CONSUMER FIN. PROT. BUREAU (June 23, 2021), https://www.consumerfinance.gov/ask-cfpb/what-happens-if-i-default-on-a-federal-student-loan-en-663/.

[206] *See* U.S. Dep't of Educ., *Student Loan Delinquency and Default*, FEDERAL STUDENT AID, https://studentaid.gov/manage-loans/default (last visited Dec. 9, 2021).

[207] *See* Hanson, *supra* note 120.

[208] *See id.*

[209] *See* Judith Scott-Clayton, *The Looming Student Loan Default Crisis is Worse Than We Thought*, BROOKINGS (Jan. 11, 2018) https://www.brookings.edu/research/the-looming-student-loan-default-crisis-is-worse-than-we-thought/.

[210] *See id.*

[211] *See id.*

[212] *See id.*

[213] *See* John Waggoner, *Student Loan Debt is an Unheralded Burden for Older Borrowers*, AARP (Nov. 22, 2022), https://www.aarp.org/money/credit-loans-debt/info-2021/student-debt-crisis-for-older-americans.html.

[214] *See* Melanie Hanson, *Student Loan Debt by Age*, EDUC. DATA INITIATIVE (Aug. 3, 2023), https://educationdata.org/student-loan-debt-by-age.

1. Severe consequences of default

The consequences of defaulting on student loan debt are much harsher than defaulting on other types of consumer debt. For most other consumer debts, if the borrower defaults, the creditor will seize collateral of the debtor and sell it at a foreclosure sale.[215] In most cases, this will relieve the debtor of their debt, but if there is a deficiency, the creditor can pursue other non-exempt assets of the debtor.[216] Student loan debt is different because it is an unsecured debt with no collateral for the debtor to pursue.[217] Therefore, the government engages in "administrative offset" of past due student loan debt by withholding future federal benefits and tax refunds.[218] These practices are unavoidable by the borrower and unlike any other loan; there is no statute of limitations.[219]

Further, under certain state laws, a default on student loans can mean frozen college credential (transcripts)[220] or even suspension of professional licenses;[221] a counterintuitive practice which makes the reason for attaining the degree worthless.

Another negative aspect of default is the effect on one's credit score.[222] Immediately after default, the defaulters credit score plummets, making it harder to obtain a mortgage, car loan, and credit cards.[223] When such loans are obtained, they come with higher interest rates, only further hurting the financial scenario of these debtors.

In the end, while all of these penalties are occurring, the original loan balance would have surely inflated as there would be accrued interest, court costs, and other expenses which are added to the outstanding loan balance.[224]

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[215] *See* Austin, *supra* note 8, at 578.

[216] *See id.*

[217] *See id.* at 578–79 (explaining that student loans are usually reported by debtors as Schedule F nonpriority unsecured debts).

[218] *See* 34 C.F.R. §§ 30.20–30.31, 682.410(b)(5)(iii) (2020).

[219] *See* Higher Education Technical Amendments Act of 1991, Public Law 102-26, 105 Stat. 123 (codified at 20 U.S.C. § 1091a(a) (2008)).

[220] *See* Kasey Klepfer, Chris Fernandez, Clara Fletcher, & Jeff Webster, *Informed Or Overwhelmed?: A Legislative History Of Student Loan Counseling With A Literature Review On The Efficacy Of Loan Counseling*, TG Rsch. and Analytical Servs. (Feb. 2015), https://files.eric.ed.gov/fulltext/ED579985.pdf.

[221] *See* John R. Brooks & Adam J. Levitin, *Redesigning Education Finance: How Student Loans Outgrew the "Debt" Paradigm*, 109 GEO. L. J. 5, 9 (2020)

[222] *See* Kelly Field, *Government Vastly Undercounts Defaults*, THE CHRONICLE OF HIGHER EDUC. (July 11, 2010), http://chronicle.com/article/Many-More-Students-Are/66223 ("The share of borrowers who default on their student loans is bigger than the federal government's short-term data suggest, with thousands more facing damaged credit histories and millions more tax dollars being lost in the long run.").

[223] *See id.*

[224] *See* Alisa F. Cunningham & Gregory S. Kienzl, *Delinquency: The Untold Story of Student Loan Borrowing* '(2011), http://www.ihep.org/Publications/publications-detail.cfm?id=142..

B. Current Relief for Borrowers

There are several options that federal student loan borrowers have for temporary relief from their student loan debt. One is to switch from a fixed payment plan to an Income Driven Repayment ("IDR") plan which lowers your monthly payment amount. Another option is to put the loans in forbearance or deferment which pauses the payment of loan. Note, you are only eligible for the above options if your loans are not currently in default.[225] Although these options seem helpful, they come with the risk of interest accrual and capitalization which can make an otherwise $50,000 loan into a $100,000 loan.

These debtors can also file for bankruptcy in hopes to get the loans discharged, but as we will see, the chances of that happening are miniscule. Without adequate relief, we will see these 38% of defaulters struggle for the remainder of their lives to pay off this debt, leaving the economy at a standstill.

1. Income Driven Repayment (IDR) Plans

Again, we see the unusualness of student loan debt in that no other consumer debt has the option to partake in an IDR plan.[226] There are four types of income driven repayment plans (ICR, IBR, PAYE, REPAYE), all of which alter your monthly payments from a fixed amount, to an amount proportionate to one's discretionary income.[227] Discretionary income is the income remaining after deducting taxes and expenditures on necessary items (shelter, food, water etc.).[228] The exact percent of one's discretionary income that one will have to pay monthly varies based on the plan, but typically floats around ten to twenty percent.[229] These plans require repayment for up to twenty-five years and thereafter the balance can be forgiven.[230] The right to forgiveness for unpaid balances on the loan are contractual and based on objective factors such as income and length of repayment.[231] Although IDR plans relieve a borrower's burden in times of financial distress, IDR plans will increase your length of repayment and cause your original loan to inflate in amount.[232]

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[225] *See* Brooks & Levitin, *supra* note 221, at 36.

[226] *See* Jason D. Delisle and Preston Cooper, *Fixing Income-Driven Repayment for Federal Student Loans*, AM. ENT. INST. 1, 1 (2021).

[227] *See* Cong. Budg. Off. 55968., *Income-Driven Repayment Plans for Student Loans: Budgetary Costs and Policy Options,* CONG. BUDG. OFF. 55968. (2020).

[228] *See* Jennifer Wadia, *Discretionary Income - What it is and how to calculate it,* STUDENT DEBT RELIEF (May 28, 2019), https://www.studentdebtrelief.us/student-loans/discretionary-income/.

[229] *See id.*

[230] *See* ALEXANDRA HEGJI, ELAYNE J. HEISLER & DAVID P. SMOLE, FEDERAL STUDENT LOAN FORGIVENESS AND LOAN REPAYMENT PROGRAMS 28 (Cong. Rsch. Serv. 2018).

[231] *See* Brooks & Levitin, *supra* note 221 at 37.

[232] *See* Anna Helhoski, *Income-Driven Repayment: Is It Right for You?*, NERDWALLET (Jul. 19, 2021), https://www.nerdwallet.com/article/loans/student-loans/income-driven-repayment-right.

2. Forbearance and deferment

Unlike IDR plans, where a debtor continues their monthly payments, forbearance and deferment postpone repayment.[233] Despite the similarity in that both deferment and forbearance pause repayment, there are notable differences. As for the length in postponement, deferment can pause repayment for three years or longer, whereas forbearance lasts no more than 12 months.[234] For interest accrual, deferment interest does not accrue on select loans, but in forbearance, interest always accrues.[235]

To exemplify what interest accrual can do to one's student loans, here are the facts of a family practitioner in Ohio.[236] After deferments, missed payments with late fees, and compound interest, a loan of $250,000 ballooned to $550,000.[237] Although it appears excessive, there are many cases that share similar facts and outcomes. A more typical situation is that of a student who borrowed $79,000 to study interior design.[238] After graduation she could not find a job and obtained several forbearances.[239] After twenty-five years of paying of the loan, she will have paid $211,000 and cannot start a business, own a house, or have children because of it.[240]

3. No safe harbor in bankruptcy

It is unfortunate to think that bankruptcy is a perceived safe haven for student loan debtors, but for those whose loans climb to the hundreds of thousands of dollars or even those struggling with a much smaller loan, it is. Unfortunately, however, there is a harsh reality that invalidates these perceptions and a significant majority of borrowers are stuck paying these loans even after filing bankruptcy.

The purpose of consumer bankruptcy is to allow for the honest but unfortunate debtor to receive a fresh start and not be burdened for life with the financial consequences of misfortune or bad choices.[241] Most consumer bankruptcy cases allow debtors to receive this fresh start in life by discharging their debts, but to discharge student loans, debtors need to prove a finding of "undue hardship," a feat near impossible to accomplish.

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[233] *See* Ryan Lane and Anna Helhoski, *Student Loan Deferment vs. Forbearance: Which Payment Pause is Better*, NERDWALLET (Jul. 19, 2021), https://www.nerdwallet.com/article/loans/student-loans/student-loan-deferment-forbearance.

[234] *See id.*

[235] *See id.*

[236] *See* Austin, *supra* note 8, at 351.

[237] *See* Mary Pilon, *The $550,000 Student-Loan Burden*, WALL ST. J., (Feb. 13, 2010), http://online.wsj.com/article/SB10001424052748703389004575033063806327030.html#printMode.

[238] *See* Sue Shellenbarger, *To Pay Off Loans, Grads Put Off Marriage, Children*, WALL ST. J. (Apr. 17, 2012), http://online.wsj.com/article/SB10001424052702304818404577350030559887086.html.

[239] *See id.*

[240] *See id.*

[241] *See Grogan v. Garner*, 498 U.S. 279, 287 (1991).

C. Brief History: The Effect of Student Loans in Bankruptcy

Prior to 1976, there was no limitation on when student loan debts could be discharged and were treated how typical consumer debts were in bankruptcy. However, in 1976, some members of Congress worried that recent graduates would abuse the bankruptcy system by filing a chapter 7 bankruptcy proceeding shortly after graduation and get their loans discharged without any repayment.[242] Although a reasonable concern, there was little evidence at the time to suggest that this worry was a significant problem.[243] Despite these findings, Congress believed that such abuses would discredit higher education and disrespect the law. [244] Thus in 1976, Congress enacted a law requiring proof of "undue hardship" for the first five years of loan repayment to discharge educational loans.[245] After this five-year period, a student loan was freely dischargeable like most other unsecured debts.[246]

The idea of proving undue hardship was born in the 1973 *Report of the Commission on the Bankruptcy Laws of the United States,* which proposed restricting student loan dischargeability.[247] The report asserted that "a loan . . . 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."[248] This idea of maintaining a minimal standard of living is a key factor courts use in assessing "undue hardship" today.

In 1978, Congress had to decide whether this five-year undue hardship rule should be a part of the Bankruptcy Reform Act of 1978 (the "Bankruptcy Code").[249] At these proceedings, congressmen put forth serious worries about a possible rise in student loan borrower abuse.[250] Evidence was brought that student newspapers carried advertisements which said: "Don't be a sucker and repay your debt. Here is a number to call, and we will tell you how you can get out of it legally."[251] Despite these assertions, studies consistently showed that there was no extraordinary increase in student loan bankruptcies.[252] Bankruptcy filings rose all over the country, but the increase in student loan bankruptcies was relatively stable compared to overall

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[242] *See* Education Amendments of 1976, Pub. L. 94-482, § 439A, 90 Stat. 2081 (1977); *see also* 122 CONG. REC. 20, 25392 (1976) (statement of Rep. James O'Hara).
[243] *See id.*
[244] *See* Bruce Grohsgal, *The Long Strange Trip to a Certainty of Hopelessness: The Legislative and Political History of the Nondischarge of Student Loans in Bankruptcy*, 95 AM. BANKR. L.J. 443, 459–60 (2021) (explaining how the use of bankruptcy to discharge student loans is an abuse of the system that should be eradicated).
[245] *See id.* at 446.
[246] *See id.*
[247] *See* H.R. DOC. NO. 93-137, pt. 2, at 140 (1973).
[248] *Id.*
[249] Pub. L. No. 95-598, 92 Stat. 2549 (1978).
[250] *See* 124 CONG. REC. 1794 (1978).
[251] *Id.*
[252] *See id.*

bankruptcies.[253] In fact, studies showed that bankruptcy resulted in a 5% loss to the Department of Education, whereas 92% of losses were from defaults.[254] Therefore, a bankruptcy provision would not address the actual problem of defaults.[255] Again, despite this data, Congress implemented the finding of undue hardship in section 523(a)(8) of the Bankruptcy Code.[256]

The finding of undue hardship was extended from five to seven years in the Crime Control Act of 1990.[257] The change came with little discussion among Congress.[258] This seven-year requirement was then raised to a borrower's lifetime in the Higher Education Amendments of 1998.[259] This lifetime bar was aimed "to ensure the budget neutrality" of the 160+ sections of the Higher Education Amendments of 1998.[260] At the time, Congress debated as to how the federal government should distribute funds to programs including Medicare, social welfare, defense, transportation, and other federally funded programs.[261] Therefore, in an effort to balance the federal government's budget and reduce losses, they implemented this lifetime bar.[262]

D. The Undue Hardship Standard

The undefined term of undue hardship is found under section 523(a)(8) of the Bankruptcy Code. At present, section 523(a)(8) states:

> (a) A discharge under . . . this title does not discharge an individual debtor from any debt—. . .
>
> (8) unless excepting such debt from discharge under this paragraph would impose an <u>undue hardship</u> on the debtor and the debtor's dependents, for—
>
> (A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit . . . or . . .
>
> (B) any other educational loan that is a qualified education loan . . . .[263]

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[253] *See id.*
[254] *See id.* at 1792.
[255] *See id.* at 1792–93.
[256] *See id.* at 1798.
[257] *See* Crime Control Act of 1990, Pub. L. 101-647, § 3621, 104 Stat. 4789, 4964–65.
[258] *See* Grohsgal , *supra* note 244, at 472.
[259] *See id.* at 473.
[260] H.R. REP. NO. 105-750, at 408 (1998) (Conf. Rep.).
[261] *See* Richard W. Stevenson, *After '97 Deal, New Showdown Over the Budget*, N.Y. TIMES (July 21, 1998) https://www.nytimes.com/1998/07/21/us/after-97-deal-new-showdown-over-the-budget.html.
[262] *See* Grohsgal, *supra* note 244, at 487–93.
[263] 11 U.S.C. § 523(a)(8) (2018) (emphasis added).

Congress left the interpretation of what is required for a debtor to satisfy a finding of undue hardship to the courts.[264] In doing so, courts have developed two tests for determining what constitutes "undue hardship": the *Brunner* test and the "totality of the circumstances" test.[265] Each of these tests are nearly insurmountable for a debtor to satisfy. As mentioned, it is such an unscalable standard that out of a quarter million debtors who filed bankruptcy in 2020, only 300 were able to discharge their student loan debt.[266]

E. The Brunner *Test*

Today most courts follow the *Brunner* test.[267] This test was enunciated by the Second Circuit in the 1987 case of *Brunner v. New York State Higher Eduation. Services Corporporation*.[268] The Brunner test is made up of three elements, all of which must be found: (1) the debtor has a present inability to maintain a minimum standard of living for herself and her dependents while also repaying the loan; (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) the debtor has made a good faith effort to repay the loan.[269] In the making of this test, the Second Circuit understood that in enacting the undue hardship requirement of section 523(a)(8), Congress intended to make discharge of student debt more difficult than that of other nonexcepted debt.[270] We will now further analyze each element.

a. The first element

The first element of the *Brunner* test requires that a debtor cannot maintain a "minimal standard of living" if forced to repay the loan.[271] The Bankruptcy Code does not form a definition for what a minimal standard of living is, but an often-cited opinion, *In re Ivory*,[272] lists several factors. These factors include: (1) shelter (including heating and cooling); (2) basic utilities such as electricity, water, natural gas, and telephones; (3) food and personal hygiene products; (4) vehicles, along with insurance, gas, licenses, and maintenance; (5) health insurance or money to pay for healthcare; and (6) some amount of entertainment or diversion, even if only a

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[264] *See* Grohsgal, *supra* note 244, at 446.

[265] *See id.* at 451.

[266] *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 498 (2012).

[267] *See* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395, 396 (2d Cir. 1987); *see also* Grohsgal, *supra* note 244, at 452 ("Including the Second Circuit, nine circuits apply the *Brunner* test – the Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh.").

[268] *See In re* Brunner, 831 F.2d at 396.

[269] *See id.*

[270] *See id.*

[271] *See id.*

[272] *See In re* Ivory, 269 B.R. 890, 909 (Bankr. N.D. Ala. 2001).

television or a pet.[273] This is not a definitive list, as what a minimal standard of living is can change over time.[274]

In finding whether the debtor truly lives below a minimal standard, courts consider whether the debtor has maximized their income (looking for a job, managing expenses), whether this was a self-imposed hardship due to unnecessary expenses, and any luxury spending.[275] Luxury or unreasonable spending may show that the debtor is able to maintain a minimal standard of living even with loan payment.[276] With these factors, the court in *In re Rosenberg* denied discharge under this element for his unnecessary move from suburban New Jersey to New York City, which raised rent.[277]

In all, this first element does not mean that a debtor live in poverty, but "it does mean that the debtor is expected to do some financial belt tightening and forgo amenities to which he may be accustomed."[278]

b. The second element

To meet the second element, the debtor must present evidence which shows that their current circumstances will likely persist for a significant portion of the repayment period.[279] In essence, the debtor must demonstrate "a certainty of hopelessness."[280] This element has been described as the heart of the *Brunner* test and is difficult to prove.[281] Often, satisfaction of this element requires that the current predicament of the debtor is "beyond the debtor's control, not borne of free choice."[282] Therefore, a debtor's decision to become poor or to remain poor while better earning options are available indicate that the debtor's circumstances are a result of his own decisions.[283] To illustrate this, in *In re Gipson*, an adjunct professor could not satisfy this element because she refused to take permanent work at other schools when she deemed them too far from her home.[284] Despite her decision revolving around the fact that the increase in income would offset due to extra transportation cost, the court found that she chose to forego the potential for more income and could not satisfy this second element.[285]

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[273] *See id.* at 899.
[274] *See In re* Miller, 409 B.R. 299, 312 n.26 (Bankr. E.D. Pa. 2009).
[275] *See In re* Nixon, 453 B.R. 311, 327–29 (Bankr. S.D. Ohio 2011).
[276] *See In re* Mandala, 310 B.R. 213, 221–22 (Bankr. D. Kan. 2004)
[277] *See In re* Rosenberg, 610 B.R. 454, 459 (Bankr. S.D.N.Y. 2020), *rev'd in part, aff'd in part sub nom.*, Rosenberg v. Educ. Credit Mgmt., No. 20-CV-00688 (PMH), 2021 WL 4461341 (S.D.N.Y. Sept. 29, 2021).
[278] *See In re* Campton, 405 B.R. 887, 891 (Bankr. N.D. Ohio 2009).
[279] *See* Barrett v. Educ. Credit Mgmt. Corp. (*In re* Barrett), 487 F.3d 353, 359–60 (6th Cir. 2007).
[280] Oyler v. Educ. Credit Mgmt. Corp, 397 F.3d 382, 386 (6th Cir. 2005).
[281] *See In re* Matthews-Hamad, 377 B.R. 415, 422–23 (Bankr. M.D. Fla. 2007).
[282] *In re* Barrett, 487 F.3d at 359.
[283] *See* Austin, *supra* note 8 at 376.
[284] *See In re* Gipson, No. 11-11550-PM, 2012 WL 2249619 at *1, *3–4 (Bankr. D. Md. June 15, 2012).
[285] *See id.* at *6.

Another case which shows how harsh this element can be is *Ward v. United States* (*In re Ward*).[286] In this case, the debtors, a married couple with two children, had a monthly deficit and could not maintain a minimal standard of living, thus satisfying the first element of the *Brunner* test.[287] However, the court denied discharge because of the family's decision "to have children and start a family."[288] Being how this decision was within the couple's control, it disallows a finding of the second element.[289]

Another key factor in the finding of this element is that the debtor's condition must foreseeably persist.[290] A case where there was denial based on this factor is *Thomas v. Department of Education* (*In re Thomas*).[291] In *Thomas*, a sixty-two-year-old debtor[292] suffered from incurable diabetic neuropathy, which made it impossible to stand for extended periods.[293] Her income consisted of $194 in food stamps, her expenses were $640,[294] her car was repossessed, she faced eviction, and she had not been able to find a job that did not require standing.[295]

Although sympathetic towards the debtor, the Fifth Circuit found that she was unable to show that she is completely incapable of employment now or in the future, and therefore her situation is not likely to persist.[296] The judge further explained that in fifteen years on the bench, he had not discharged a single student loan case.[297]

A last case worth mentioning that shows this factor is *Brunner*.[298] In this case, namesake of the test, Marie Brunner, was surviving on a monthly income of $258 in public assistance and $49 in food stamps.[299] After graduating from a master's program, Marie Brunner was unemployed, despite sending out over a hundred resumes.[300] She owed $9,000 in debt, and, before pursuing higher education, she never earned more than $9,000 in a year.[301] Given these facts, the court held that she "at most proved that she . . . was at the time of the hearing . . . unable both to meet her minimal expenses and pay off her loans."[302] She failed to satisfy the additional

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286 No. 02-34594-H4-7, slip op. (Bankr. S.D. Tex. May 25, 2004).
287 *See id.* at 6.
288 *Id.* at 6–7.
289 *See id.*
290 *See* Austin, *supra* note 8, at 375 ("[T]he debtor must present additional circumstances to show the debtor's state of affairs is likely to persist for a significant portion of the repayment period.").
291 *See In re* Thomas, 581 B.R. 481 (Bankr. N.D. Tex. 2017), *aff'd*, 931 F.3d 449 (5th Cir. 2019).
292 *See id.* at 483.
293 *See id.*
294 *See id.* at 484.
295 *See id.*
296 *See id.* at 485.
297 *See id.* at 482.
298 Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re* Brunner), 831 F.2d 395 (2d Cir. 1987).
299 *See id.* at 395.
300 *See id.*
301 *See id.*
302 *Id.* at 396.

circumstances element because she had the skills capable for employment and had no dependents.[303]

c. The third element

The third element of the *Brunner* test is whether the debtor has made a good faith effort to repay the loan.[304] It does not amount to bad faith to miss a payment, rather, courts measure a debtor's good faith by his "efforts to obtain employment, maximize income, and minimize expenses."[305] With this, the court in *In re Mosley* found the third element to be satisfied when a debtor attempted unsuccessfully to find work while living with his mother and at the same time suffering from a debilitating medical condition.[306]

However, a case that shows bad faith is *Brunner*, where the court found that she failed to satisfy this element because she made no effort to repay and filed for discharge within a month of the date the first payment came due.[307]

Given these elements and the harsh outcomes in these particular cases, it is rare for a court to abandon established precedent. Debtors like the ones in the recently decided case, *In re Tingling*, argue that "the *Brunner* test has, over time, become too high a burden for debtors to satisfy."[308] In this particular case and most others, the court is in decisive disagreement with the argument.[309] They further reiterate the view that "[s]tudent loans are presumptively nondischargeable in bankruptcy."[310]

F. The Totality of the Circumstances Test

Findings show that a minority of courts use the totality of the circumstances test to define undue hardship.[311] In fact, out of the 86% of courts that use either test, only 16% of them use this totality of the circumstances test.[312] Courts opposed to its use refer to it as a weaker standard,[313] but generally the tests are very similar.

In the totality of the circumstances test, courts consider: "(1) the debtor's past, present, and reasonably reliable future financial resources; (2) a calculation of the debtor's and her dependent's reasonable necessary living expenses; and (3) any other

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303 *See id.*
304 *See id.* at 395.
305 Educ. Credit Mgmt. Corp. v. Mosley (*In re* Mosley), 494 F.3d 1320, 1327 (11th Cir. 2007).
306 *See id.*
307 *See In re* Brunner, 831 B.R. at 397.
308 Tingling v. Educ. Credit Mgmt. Corp. (*In re* Tingling), 990 F.3d 304, 308 (2d Cir. 2021).
309 *See id.* at 308.
310 *Id.*
311 *See* Grohsgal, *supra* note 244, at 453.
312 *See* Rafael I. Pardo & Michelle R. Lacey, *Undue Hardship in the Bankruptcy Courts: An Empirical Assessment of the Discharge of Educational Debt*, 74 U. CIN. L. REV. 405, 487 n.343 (2005).
313 *See, e.g.*, Thomas v. Dep't of Educ. (*In re* Thomas), 931 F.3d 449, 454–55 (5th Cir. 2019) (calling the totality of the circumstances test a "weaker standard").

relevant facts and circumstances surrounding each particular bankruptcy case."[314] "Simply put, if the debtor's reasonable future financial resources will sufficiently cover payment of the student loan debt[—]while still allowing for a minimal standard of living[—]then the debt should not be discharged."[315]

In its reasoning as to why it prefers the totality of the circumstances test over *Brunner*, the Eight Circuit court states:

> We are convinced that requiring our bankruptcy courts to adhere to the strict parameters of a particular test would diminish the inherent discretion contained in §523(a)(8) . . . We believe that fairness and equity require each undue hardship case to be examined on the unique facts and circumstances that surround the particular bankruptcy.[316]

In the case in which this opinion was asserted, the debtor was a college graduate with $35,322.81 in student loans.[317] After ten years of payment, an illness resulted in her defaulting on the loan which made it grow to $61,000.[318] Further, the debtor earns minimum wage, lives with her parents, and has additional non-dischargeable loans of $15,000.[319]

The court granted her a discharge of the student loans because if not, she would be placed on a repayment plan that would impose a "sentence of [twenty-five] years in payments on an obligation that she could never realistically expect to retire or reduce."[320] The court also accounted for her serious illness which would prevent her from earning enough money to "dig herself out of these . . . loans."[321]

Although a more forgiving test, a high majority of courts continue to use the *Brunner* test as they believe it carries out the purpose Congress set in enacting the undue hardship requirement.[322]

G. What This All Means for the U.S. Economy

As we see, the combination of skyrocketing tuition cost, decrease in good paying jobs, and lack of adequate relief for those suffering, has left many college graduates unable to participate in the economy and postpone life goals. A study done found that "56 percent of people aged 18 to 29 have put off major life events like getting married,

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314 Long v. Educ. Credit Mgmt. Corp. (*In re* Long), 322 F.3d 549, 554 (8th Cir. 2002).
315 *See id.* at 554–55.
316 *See id.* at 554.
317 *See id.* at 552.
318 *See id.*
319 *See id.* at 551–52.
320 *See id.* at 552.
321 *See id.*
322 *See* Tingling v. Educ. Credit Mgmt. Corp. (*In re* Tingling), 900 F.3d 304, 309 (2d Cir. 2021).

purchasing a car or home, or saving for retirement."[323] 45% of people over thirty also conclude that "educational loans hampered their financial life."[324] Would-be entrepreneurs are 11% less likely to start a business if they have more than $30 thousand in debt, 36% less likely to buy a home, and 18% of student loan holders find it difficult to buy daily necessities because of their loans.[325] As for investing, less Americans today own stock than they did in the early 2000s.[326] In particular, 46% of millennials say they do not invest because they don't have money.[327]

For the economy to flourish, we need widespread investment, and these statistics show how detrimental student loans are to a borrower's financial health. If these trends persist, these numbers will only increase, and without this investment, there will be continuous slow economic and job growth.

The most common measurement economists use to determine a nation's economic health is its gross domestic product ("GDP").[328] "GDP measures the monetary value of final goods and services . . . produced in a country in a given period of time . . . ."[329] When GDP grows, workers and businesses are better off than when it does not.[330] GDP equals consumption plus government spending plus investment plus net exports (GDP = C+G+I+NX).[331] In particular, consumer spending (consumption) accounts for more than two-thirds of the U.S. GDP[332] which was $21.38 trillion in 2022.[333]

Student loans affect consumption both directly and indirectly.[334] Directly, these borrowers have increased debt and therefore spend less.[335] This decrease in consumption is estimated to shave 0.05% off of the U.S. GDP at any given year.[336]

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[323] Tom Anderson, *Debt-Locked: Student Loans Force Millennials to Delay Life Milestones*, NBC NEWS (Aug. 5, 2015), https://www.nbcnews.com/better/money/debt-locked-student-loans-force-millennials-delay-life-milestones-n404636.

[324] *Id.*

[325] Melanie Hanson, *Economic Effects of Student Loan Debt*, EDUC. DATA INITIATIVE (Sep. 20, 2023), https://educationdata.org/student-loan-debt-economic-impact.

[326] *See* Jeffrey M. Jones, *What Percentage of Americans Own Stock*, GALLUP (Aug. 13, 2021), https://news.gallup.com/poll/266807/percentage-americans-owns-stock.aspx.

[327] Jill Cornfield*, Millennials slow to start investing in stock market*, BANKRATE (Jul. 6, 2016), https://www.bankrate.com/investing/millennials-slow-to-start-investing-in-stock-market-bankrate-survey-finds/.

[328] *See* Tim Callen, *Gross Domestic Product: An Economy's All*, INT'L MONETARY FUND: FIN. & DEV., Nov. 2017, at 14, https://www.imf.org/external/pubs/ft/fandd/basics/gdp.htm.

[329] *Id.*

[330] *See id.*

[331] Jason Fernando, *Gross Domestic Product (GDP): Formula and How to Use It*, INVESTOPEDIA (Sept. 26, 2023), https://www.investopedia.com/terms/g/gdp.asp.

[332] *See id.*

[333] The World Bank, *GDP (current US$) - United States (2022)*, https://data.worldbank.org/indicator/NY.GDP.MKTP.CD?locations=US (last visited Jan. 19, 2021).

[334] *See* Laura Feiveson, Alvaro Mezza, & Kamila Sommer, *Student Loan Debt and Aggregate Consumption Growth*, FED. RSRV. (Mar. 1, 2018), https://www.federalreserve.gov/econres/notes/feds-notes/student-loan-debt-and-aggregate-consumption-growth-20180221.html.

[335] *See id.*

[336] *See id.*

Indirectly, these loans carry the risk of delinquency or default, thus losing the ability to acquire future loans and access to credit cards.[337] Although these affect GDP by a small percentage, the high levels of student loan debt will continue to increase a borrower's debt-income ratio and gradually increase its effect on GDP.[338]

1. The domino effect in lack of consumption

A large area of concern for economists is the potential for a lack of homeownership. This concern is only exacerbated when 36% of people are less likely to purchase a home if they have student loan debt.[339] Although homeownership itself does not boost consumption if a household simply converts from renters to homeowners,[340] homeownership still produces several economic advantages, advantages which we will address briefly.

One advantage is that a flourishing housing market increases consumer confidence.[341] Consumer confidence in the economy is key, as it increases a consumer's willingness to spend money and use credit cards.[342] Next, a home purchase accelerates the economy as it leads to additional purchases such as furniture, home goods, and equipment.[343] Another reason is that homeowners create jobs in construction and remodeling.[344] The Bureau of Labor Statistics estimates that there are 7.4 million jobs in this sector, many of which are high paying.[345] As one could then conclude, without confidence in the housing sector, there is less spending, which in turn can lead to layoffs and cause a recession.

IV. Lifting the Anchor: Solutions

Although the funding in higher education has been around for close to seventy years, government officials and experts are still yet to find the right formula. The solutions this Article poses are not drastic changes, but practical ones meant to help student loan borrowers and in turn, the economy. These solutions have been drawn on by many, but there has yet to be legislative action leading to the continued demise for these borrowers.

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[337] *See id.*
[338] *See id.*
[339] *See* Hanson, *supra* note 325.
[340] *See* Feiveson et al., *supra* note 334.
[341] *See* Doug Sandler*, Housing is an Important Key to Economic Growth… Fortunately it is Getting Back on Track*, ETF Trends (Mar. 10, 2021), https://www.etftrends.com/etf-strategist-channel/housing-is-an-important-key-to-economic-growth-fortunately-it-is-getting-back-on-track/.
[342] *See id.*
[343] *See id.*
[344] *See id.*
[345] *See id.*

The first solution we will put forth, is to amend the section 523(a)(8) of the Bankruptcy Code.[346] By removing the lifetime undue hardship requirement, allowing partial discharge, and clearly defining the term "undue hardship," we can provide relief to those who are struggling. In turn, this fresh start for the debtor will allow them to partake in the economy and better our nation.

The second solution is to add more regulations to better determine what schools receive government subsidies. To compete in today's job market, we need students to receive an optimal education that sets them up for success. If a school is not providing a good quality of education, they will lose funds, resulting in more subsidies being available for those schools who are providing a quality education. This will result in lower tuition cost at these schools as they will be less reliant on tuition to cover their expenses.

A. Amend the Bankruptcy Code

The Great Recession and coronavirus pandemic led to a free-falling economy, making it tough for graduates to find jobs and repay debt. The purpose of bankruptcy law is to allow such debtors "a new opportunity in life . . . unhampered by the pressure and discouragement of pre-existing debt,"[347] but this opportunity is not sufficiently afforded to those with student loan debt. In fact, the lifetime undue hardship rule does the opposite of providing a new opportunity for these debtors and rather creates more obstacles for these debtors to regain economic stability in this fragile market. It is imperative to fix this imbalance, allowing these debtors to return to normal economic life, and amending the Bankruptcy Code is the solution. By removing the lifetime undue hardship requirement, clearly defining "undue hardship," and allowing for partial discharge, consumers can once again put their income into the stream of commerce.

1. Remove the lifetime undue hardship requirement

In the Code's amendment, Congress should rid the lifetime undue hardship requirement in its entirety and reinstate the seven-year undue hardship rule for chapters 7 and 13 filings. A recent commission on bankruptcy reform has urged for such changes, finding that the lifetime undue hardship rule depresses the U.S. economy.[348] As is, debtors currently have to go through the demoralizing task of proving that they are at a "certainty of hopelessness" that their suffering will surely

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[346] *See generally* 11 U.S.C. § 523(a)(8) (2018).
[347] Local Loan Co. v. Hunt, 292 U.S. 234, 243 (1934).
[348] *See* AMERICAN BANKRUPTCY INSTITUTE, FINAL REPORT OF THE ABI COMMISSION ON CONSUMER BANKRUPTCY, 1–3 (2019), https://consumercommission.abi.org/commission-report.

persist for the foreseeable future.[349] If not, they will then most certainly suffer for the foreseeable future. By restoring the finding of undue hardship to seven years, this will reduce the incremental change in possible abuse as opposed to no time frame. Common sense makes this true as a debtor is less likely to surrender their assets after seven years of working to acquire possession, wealth, and financial security than they would shortly after graduation.[350] This change will also ensure that those debtors who are truly suffering get the fresh start they need to become a contributing member in the economy. The lifetime burden just leads to more defaults, less money flowing in the stream of commerce and hopelessness for the borrowers.

2. Clearly define "undue hardship"

As is, section 523(a)(8) leaves judges speculating what "undue hardship" requires, causing courts to use different tests and inconsistent applications of these tests. Without defined standards, borrowers file for bankruptcy with their fingers crossed with no accurate prediction of what the outcome will be. With defined standards, borrowers can determine whether such proceedings are worth the time, money, and effort, thus preventing wasteful filings.[351] Greater clarity will save money for borrowers, cost for the government and in turn taxpayers. The legal principle of stare decisis will also be protected by allowing for more uniformed treatment amongst filers.

In the making of a clear standard, Congress should incorporate the factors of the totality of the circumstances test which understands that every case is unique. In particular, the third factor of allowing courts to consider "any other relevant facts and circumstances surrounding each particular bankruptcy case,"[352] allows for this case-by-case determination. This promotes judges to consider factors such as: (1) total present and future incapacity to pay debts for reasons not within the control of the debtor; (2) whether the debtor has made a good faith effort to negotiate a deferment or forbearance of payment; (3) whether the hardship will be long-term; (4) whether the debtor has made payments on the student loan; (5) whether there is permanent or long-term disability of the debtor; (6) the ability of the debtor to obtain gainful employment in the area of the study; (7) whether the debtor has made a good faith effort to maximize income and minimize expenses; (8) whether the dominant purpose of the bankruptcy petition was to discharge the student loan; (9) the ratio of student loan debt to total indebtedness;[353] and (10) illness.

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[349] *See In re* Briscoe, 16 B.R. 128, 131 (Bankr. S.D.N.Y. 1981) (concluding that the dischargeability of student loans should be based on the certainty of hopelessness, not just a present inability to fulfill the financial commitment).

[350] *See* Grohsgal, *supra* note 244, at 494.

[351] Matthew Bruckner, Brook Gotberg, Dalié Jiménez & Chrystin Ondersma, *A No-Contest Discharge For Uncollectible Student Loans*, 91 U. OF COLO. L. REV. 183, 190 (2020).

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

[353] *See In re* Fern, 563 B.R. 1, 4 (B.A.P. 8th Cir. 2017).

Further, in incorporating the factors of the totality of the circumstance's standard, debtors no longer need to perform the demoralizing and demeaning task of presenting evidence that the debtor has lost all hope for the future.[354] Judges would also no longer need to speculate if the debtor's conditions will certainty persist for the debtor's future.[355]

3. Allow for partial discharge

Although some courts allow partial discharge of educational debt using the *Brunner* test or totality of the circumstances test, this practice is silent under the Code. Despite being silent in section 523(a)(8), there are other provisions in the Bankruptcy Code that allow adjustment in the quantity of debt. For example, section 506(a)(1) allows for modification of a secured debt into secured or unsecured debt to the amount of the creditors interest.[356] Other provisions allow debtors to avoid judgment liens against the debtor's property "to the extent that such lien impairs an exemption to which the debtor would have been entitled."[357] These provisions conclude that such language of partial discharge or modification can be found in the Code, just not for educational debt.

Despite the absence of express language, courts have allowed partial discharge pursuant to section 105 which provides "the court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[358] The Sixth Circuit has granted partial discharge by coupling section 105(a) and the *Brunner* test.[359] In *In re Nixon*, the court held that to receive discharge, the debtor must satisfy each prong of the *Brunner* test with respect to the portion of debt to be discharged.[360]

Using this combination, a court discharged all but $8,045.02 of a borrower's loan.[361] In its decision, the court found that the debtor's financial problem was caused by her cancer and that "it is highly likely that [her] financial predicament will persist for many years, and possibly the rest of her life."[362]

Another case in which the debtor was granted partial discharge is *In re Hinkle*.[363] In that case, the court agreed that it had no authority to grant partial discharge, but

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354 *See* Ron Lieber, *Degrees of Debt: Last Plea on School Loans: Proving a Hopeless Future*, N.Y. TIMES (Aug. 31, 2012), http://www.nytimes.com/2012/09/01/business/shedding-student- loans-in-bankruptcy-is-an-uphill-battle.html.

355 *See id.*

356 *See* 11 U.S.C. § 506(a)(1) (2018).

357 *See id.* § 522(f)(1)(A).

358 *See id.* § 105(a).

359 *See In re* Nixon, 453 B.R. 311, 336 (Bankr. S.D. Ohio 2011).

360 *See id.*

361 *See In re* Jorgensen, No. 10-03328, 2012 WL 171599, at *7 (Bankr. D. Haw. Jan. 20, 2012), *aff'd*, 479 B.R. 79 (B.A.P. 9th Cir. 2012).

362 *See id.* at *5.

363 *See In re* Hinkle, 200 B.R. 690, 694 (Bankr. W.D. Wash. 1996).

where the debtor had multiple debts, the court can discharge some of the debts based on the *Brunner* elements.[364] Thus, a debtor who had six student loans was granted a discharge of three of them, totaling $18,143.00.[365]

In conclusion, allowing partial discharge will at least increase the chances that the federal government's debt will be repaid in part. The language of such provision can be as follows: "Upon a finding of undue hardship, as much of the loan may be discharged to relieve the debtor and the debtor's dependents form the undue hardship." By relieving the debtor in part, this will allow more money to flow through the stream of commerce while reflecting Congress's intent in making educational debt not easily dischargeable.

4. Arguments against such amendments

Despite the substantial burden on these debtors and its negative effects on the economy, there are still many proponents to the current section 523(a)(8) provision. Below are some arguments that proponents may make.

a. Budget

One such proponent to the current standard is Professor Jason Iuliano, who argues that it would be "unwise to eliminate a provision that saves billions of dollars" by sorting those who cannot repay their loans from those who can.[366] This assumption undermines the fact that in all types of lending, there always entails some losses from defaults and bankruptcies.[367] There also has been no finding of extraordinary losses in the federal student loan program even before the lifetime undue hardship rule in 1998.[368] In fact, in the years prior to the 1998 lifetime undue hardship rule, the government averaged only 1.3% in yearly losses on the program.[369] In 1998, the program suffered a 1.7% loss.[370] In comparison, the actual loss rate in 1998 was 7.08% on the taxpayer-funded U.S. Small Business Administration loan program.[371] Even with the statistical findings, we need to consider the amount of money that would be freed up by allowing discharge. This is money that would enter the stream of commerce and lower the need for government spending to assist the economy.

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[364] *See id.* at 693.

[365] *See id.* at 694.

[366] *See* Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 505 (2012).

[367] *See* Grohsgal, *supra* note 244, at 494.

[368] *See id.*

[369] *See* U.S. DEP'T OF EDUC., OFF. OF POSTSECONDARY EDUC. POLICY, PLAN., & INNOVATION, FEDERAL STUDENT LOAN PROGRAMS DATA BOOK, FISCAL YEARS 1997–2000 8 tbl. A (2002), https://www2.ed.gov/finaid/prof/resources/data/fslpdata97-01/loandatabook.pdf.

[370] *See id.*

[371] U.S. SMALL BUS. ADMIN., FY 1998 SBA LOAN LOSS REPORT 9 (2012), https://www.sba.gov/sites/sbagov/files/2018-06/sba_fy1998lossreport.pdf.

b. Manipulation of the system

Another argument against lowering the threshold of finding undue hardship is that debtors may manipulate and worsen their situation to get loans discharged. While it is possible for this to happen, it would be highly unlikely that rational people, who sought higher education to better their chances to attain success, would do such a thing. Further, if discharge is prohibited during the first seven years after graduation, it is unlikely that even unreasonable individuals would find it ideal to live an unfavorable lifestyle for seven years. Also, to protect from such manipulation, all bankruptcy cases are overseen by a court whose job is to prevent abuse of the process.[372] In instances where fraud is found, the debtor is denied discharge.[373]

c. Congress intended for the courts to interpret "undue hardship"

As it currently stands, a particular case can be deemed nondischargeable in the Sixth Circuit under its *Brunner* application, yet found to be discharged in the Eighth Circuit's application of the yotality of the circumstances test. This is neither a fair, nor efficient, judicial system. There are ninety-four bankruptcy courts and approximately 350 bankruptcy judges in the United States.[374] One judge's decision in one bankruptcy case is nothing other than the law of that case; it is not governing precedent for any other judge or case.[375] Even with these two tests, judges interpret what satisfies the tests differently. Although the Supreme Court could grant certiorari of a case based on the circuit split of these tests and provide a more informed standard, they show no propensity to do so.[376] With that, there is no logical reason as to why these discrepancies should persist in today's judicial system.

d. Can reduce the availability of educational credit

As mentioned, many Congressmen were concerned that there may not be available funds for future borrowers if discharge is lenient.[377] This argument was debunked after studies found that the real concern was defaults, which accounted for eighteen times more of the government's yearly losses on the federal loan system than bankruptcy did.[378] Further, we have supplied statistics which show that there is

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[372] *See generally* 11 U.S.C. §§ 523(a), 727(a), 1328(e) (2018).

[373] *See id.*

[374] ADMINISTRATIVE OFFICE OF THE U.S. COURTS, COURT ROLE AND STRUCTURE, https://www.uscourts.gov/about-federal-courts/court-role-and-structure.

[375] *See, e.g.*, Paul Steven Singerman & Paul A. Avron, *Of Precedents and Bankruptcy Court Independence*, AM. BANKR. INST. J., 1, 57 (2003).

[376] *See* Grohsgal, *supra* note 244, at 498.

[377] *See, e.g.*, 124 CONG. REC. 1792 (1978) (statement of Rep. Allen Ertel).

[378] *See id.*

no indication of widespread abuse from student loan borrowers in the bankruptcy system. Rather than try to save future credit in the student loan program by forcing those suffering to continue to suffer, we should focus on lowering the costs of tuition to save future funds. If we do not decrease tuition, there will be a continuous decline in the number of students attending college because of its high cost. In this situation, there will be a need for less funding so either way future credit is not the issue at hand.

B. Strengthen Regulations of College Education

Aside from bankruptcy, another solution to this problem is to increase regulations in an effort to lower tuition costs. Every year the federal government and state governments provide billions of dollars in subsidies to higher education institutions, but much of those subsidies are poorly targeted.[379] Regulations attached to such aid tend to target bad schools that leave its graduates in a worse situation than before enrolling. However, these regulations suffer from serious flaws which allow bad colleges to continue its operations and receive subsidies.

An adequate system for regulating higher education is not a lax one where schools can find loopholes and sail right by, it is one that takes education seriously and strictly enforces that schools do to. This section will mirror this belief by providing several factors that should be implem ented in the government's determination of what schools can receive funding. By strengthening regulations, there will be less subsidies going to bad schools, thus allowing more of these funds to go to good schools which can decrease tuition cost.

1. Current and previous regulation

Current government regulations of colleges include examining a universities cohort default rate, 90/10 Rule, and Gainful Employment Rule. These regulations are aimed at cutting funding to bad schools who supply a poor quality of education, leaving the degrees worthless after graduation.[380] An example of this is Corinthian College who was found guilty of providing deceptive marketing tactics that misled students in enrolling based on false promises.[381] As a result, Corinthian College closed.[382] In these cases where a school is found guilty of fraud, graduates who

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[379] *See* Susan Dynarski & Judith Scott-Clayton, *Financial Aid Policy: Lessons from Research, in* 23 THE FUTURE OF CHILDREN 67, 68 (2013), https://files.eric.ed.gov/fulltext/EJ1015227.pdf.

[380] *See Why Students Need a Strong Gainful Employment Rule*, THE INSTITUTE FOR COLLEGE ACCESS & SUCCESS (Feb. 3, 2021).

[381] *See* Danielle Douglas-Gabriel, *Feds Found Widespread Fraud at Corinthian Colleges. Why Are Students Still Paying the Price?*, WASH. POST (Sept. 29, 2016), https://www.washingtonpost.com/news/grade-point/wp/2016/09/29/feds-found-widespread-fraud-at-corinthian-colleges-why-are-students-still-paying-the-price.

[382] *See id.*

borrowed federal funds receive automatic relief from indebtedness under the "borrower defense" theory, resulting in further losses in the federal student loan program.[383]

Although a great policy in adding regulations that would cut funding to these schools, the ones implemented suffer inefficiencies and loopholes that bad universities take advantage of. This Article has already drawn on some inefficiencies and loopholes in the 90/10 rule, but will also explain inefficiencies in the cohort default rate regulation and Gainful Employment Rule below.

a. Cohort default rate

The national cohort default rate measures the percentage of borrowers who have defaulted within three years after graduation.[384] This measurement is important because under Title IV of the HEA, colleges can lose access to federal student loans if their cohort default rate is 30% or higher for three consecutive years.[385] They can also lose eligibility if the rate is 40% in a single year.[386] However, less than 1% of schools are sanctioned each year under this metric.[387]

Experts argue that the CDR does not accurately depict the number of borrowers in default.[388] One reason is that the CDR does not include those on an income driven repayment plan who pay close to $0 because of such a low income.[389] The CDR also does not account for this in forbearance or deferment.[390] Schools use this to their advantage by encouraging former students to enter forbearance or deferment, so their default rate is lower.[391]

b. Gainful employment rule

Issued in 2014, the Gainful Employment Rule was designed to ensure that career-education programs leave their graduates with debts that are affordable relative to their annual incomes.[392] Under the Gainful Employment Rule, any program where graduates' debts exceeded both 8% of their total income and 20% of discretionary,

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383 *See U.S. Department of Education Announces Final Regulations to Protect Students and Taxpayers from Predatory Institutions*, U.S. DEP'T OF EDUC. (Oct. 28, 2016), https://content.govdelivery.com/accounts/USED/bulletins/16e7d89.
384 *See* Michael Itskowitz, *Why the Cohort Default rate is Insufficient*, THIRD WAY (Nov. 7, 2017), https://www.thirdway.org/report/why-the-cohort-default-rate-is-insufficient#:~:text=It%20is%20calculated%20by%20taking,the%20total%20number%20of%20student.
385 *See* Higher Education Opportunity Act of 2008, Pub. L. No. 110-315, § 436.
386 *See id.*
387 *See id.*
388 *See* Itskowitz, *supra* note 384.
389 *See id.*
390 *See id.*
391 *See id.*
392 *See* Douglas-Gabriel, *supra* note 381, at 1.

were required to improve or lose access to federal financial aid.[393] In response, schools began to eliminate programs, cut tuition, and increase scholarships to meet this requirement.[394] According to a study, 65% of for-profit programs failing the Gainful Employment Rule in 2017 were no longer enrolling students as of August 2018.[395]

However, this rule still had inefficiencies as it was too narrow to truly determine a school's relative position to others. This is because the rule only considered those who graduated.[396] Therefore, a school could have a high dropout rate, all those dropouts' default on their loans, and the school could still pass the test.[397]

The rule also isn't totally precise because there is a wide array of reasons why ones' income is low other than the quality of school.[398] Experts have pointed out that even established law schools can potentially fail under this rules assessment.[399]

Although the rule did have some positive impact despite its inefficiencies, the rule was repealed in 2019 under the Trump administration.[400]

2. A formula that covers it all

Given these inefficiencies, it is easy to see how schools can avoid penalties from the Department of Education. This is not to say these rules should be repealed, but this is to say we need more tests in addition to those already implemented to make them more accurate. With more tests or a more complex one, a bad program will not be able to argue that basing its failure on one metric is unfair.[401] Although this Article does not put forth a definitive test, it will enumerate factors that should be considered when analyzing whether a school should receive funding and why.

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393 *What To Know About the Gainful Employment Rule*, INST. FOR COLL. ACCESS & SUCCESS (Jan 9, 2017), https://ticas.org/wp-content/uploads/2021/02/Why-Students-Need-a-Strong-Gainful-Employment-Rule.pdf.

394 *See* Douglas-Gabriel, *supra* note 381, at 3.

395 Detailed comments on the gainful employment notice of proposed rulemaking, INST. FOR COLL. ACCESS & SUCCESS, 6–8 (September 13, 2018); Comments of Clare McCann, Deputy Director for Federal Policy, Higher Education Initiative, New America in response to Gainful Employment notice of proposed rulemaking.

396 Jack Millman, *Paying For Failure: Subsidizing Schools, Not Education*, 10 DREXEL L. REV. 307, 367 (2018).

397 *See id.*

398 S*ee, e.g.*, Matthew Denhart, *Federal Overreach into American Higher Education*, HERITAGE FOUND. (Nov. 4, 2010), http://www.heritage.org/education/report/federal-overreach-american-higher-education; Judith S. Eaton, *Why Higher Education is in Need of Regulatory Relief*, THE HILL (June 2, 2017), http://thehill.com/blogs/pundits-blog/education/336094-why-higher-education-is-in-need-of-regulatory-relief.

399 *See* Paul Caron, *New 'Gainful Employment' Rule Spells Trouble for For-Profit Law Schools (And Would For 50 Non-Profit Law Schools)*, TAXPROF BLOG (June 30, 2015), http://taxprof.typepad.com/taxprof_blog/2015/06/new-gainful-employment-rule-spells-trouble-for-for-profit-law-schools-and-would-for-50-non-profit-la.html.

400 *See* Douglas-Gabriel, *supra* note 384.

401 *See* Millman, *supra* note 396.

a. Reinvestment of revenue

Reports have found that when schools devote too many resources to advertising and other expenditures that don't support educational success, they have subpar academic quality and fail to provide proper accreditation.[402] This problem commonly occurs at for-profit universities. In fact, findings show that the ratio of instructional spending to tuition revenue is 0.26 at for-profit schools, whereas nonprofit and public schools have a ratio of 0.79.[403] Another study mirrored these findings after finding that for-profit colleges spent 23% of their revenue on marketing and advertising, compared to just 17% on instruction.[404] Therefore, rather than focusing on attaining high quality teachers or providing other academic success resources, they use money on noneducational activities.

This poor education is why for-profit graduates account for 30% of the defaults despite enrolling only 8% of all college students.[405] Further, the average enrollment period at for-profit schools is 5.8 years, compared to just 4.8 at nonprofit schools.[406]

Therefore, by analyzing how revenues are reinvested, we can be assured that these colleges are maximizing the possibility in providing a high-quality education to their students.

b. Drop out rate

Today, an average of 40% of undergraduate students drop out of college.[407] These students then have financial obligations of debt, without the income boost that comes along with a college degree. Because of this, students who dropped out are four times as likely to default on their student loans than their counterparts who did graduate.[408] Not only the risk of default, but they face higher unemployment than those who do

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[402] *See* STAFF OF S. COMM. ON HEALTH, EDUC., LABOR & PENSIONS, 112TH CONG., FOR PROFIT HIGHER EDUCATION: THE FAILURE TO SAFEGUARD THE FEDERAL INVESTMENT AND ENSURE STUDENT SUCCESS 7–8 (Comm. Print 2012).

[403]*See Non-Profit vs. For-Profit Colleges: What You Need to Know*, FRANKLIN UNIVERSITY: BACK TO COLLEGE BLOG, https://www.franklin.edu/blog/non-profit-vs-for-profit-colleges-what-you-need-to-know (last visited Dec. 8, 2021) [*hereinafter Non-Profit vs. For-Profit Colleges*].

[404] *See* Michael Stratford, *Senate Report Paints a Damning Portrait of For-Profit Higher Education*, CHRON. OF HIGHER EDUC. (July 30, 2012), https://chronicle.com/article/A-Damning-Portrait-of/133253/.

[405]*See TICAS Analysis of Official Three-Year Cohort Default Rates*, THE INSTITUTE FOR COLLEGE ACCESS AND SUCCESS (September 30, 2020), https://ticas.org/accountability/cohort-default-rates/ticas-analysis-of-official-three-year-cohort-default-rates-fy17/.

[406] *See Non-Profit vs. For-Profit Colleges*, *supra* note 403.

[407] *See* Sandra Craft, *College Dropout Rates*, THINK IMPACT (2021), https://www.thinkimpact.com/college-dropout-rates/.

[408] *What Percent of Student Loan Borrowers Never Graduate*, ONE CLASS: ONECLASS BLOG (Sept. 22, 2020),

have a degree.[409] Given these disadvantages, it is estimates that the cost of dropping out measured by lost earnings is $3.8 billion in a single year.[410]

Again, this is not only a personal problem for the borrowers, but an economic problem. It is estimated that states spend $1.3 billion per year on students who dropout; the Federal Government spends an additional $300 million.[411] It is likely that these government funds are never repaid as findings indicate that after twelve years, those who never graduate have 84% of their loan balance left.[412] Compare this to 58% of their loan balance left for those who did graduate.[413]

The sad reality is that we are capable of deterring some of these students from dropping out as 28% drop out because of academic underachievement.[414] This shows why considering the ways college reinvest their money will ensure that students are getting everything they need to achieve academic success.

c. Schools' four-year graduation rate

For some individuals, the reason why student loans add up is because of their inability to earn a four-year degree in 4 years. In fact, 41% of bachelor's degree earners graduate within four years.[415] As for many of the individuals in the remaining 59%, they must take out more loans. According to a study done from the University of Texas at Austin, students who graduate within four years spend 40% less than those who graduate in six years. [416]

There are many factors that can lead to a student needing more than four years to graduate such as work, switching majors or transferring but quality of education is also a factor. In fact, those who attend for-profit universities—which generally spend less on education than public or nonprofit universities—take longer to graduate.[417] We can also see how high-quality education leads to on time graduation in that six high ranking schools had an average graduation rate of 97% in four years.[418]

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[409] *See* Wesley Whistle, *Ripple Effect: The Cost of the College Dropout Rate*, THIRD WAY (Jan. 28, 2019), https://www.thirdway.org/report/ripple-effect-the-cost-of-the-college-dropout-rate.

[410] *See* Craft, *supra* note 407.

[411] Mark Schneider, *Finishing the First Lap: The Cost of First-Year Student Attrition in America's Four-Year Colleges and Universities*, AMERICAN INSTITUTES FOR RESEARCH 4 (Oct. 2010).

[412] Melissa Ezarik, New analysis: Student loan borrowers with no degree, UNIVERSITY BUSINESS (Nov. 12, 2020), https://universitybusiness.com/new-analysis-student-loan-borrowers-with-no-degree/.

[413] *See id.*

[414] *See Why your students drop out- and how you can stop them*, STUCOMM BLOG (Oct. 8,2020), https://stucomm.com/blog/why-your-students-drop-out-and-how-you-can-stop-them/.

[415] *See* Melanie Hanson, *College Graduation Statistics*, EDUC. DATA INITIATIVE (Sept. 25, 2023), https://educationdata.org/number-of-college-graduates. This data is consistent with the August 9, 2021, update of this article. *See* Hanson, *supra* note 193.

[416] *See* Nika Anschuetz, *Breaking the 4-year myth: Why students are taking longer to graduate*, USA TODAY (Dec. 16, 2015).

[417] *See Non-Profit vs. For-Profit Colleges*, *supra* note 403.

[418] *See* Abigail Johnson Hess, *Graduating in 4 years or less helps keep college costs down—but just 41% of students do*, CNBC (June 20, 2019), https://www.cnbc.com/2019/06/19/just-41percent-of-college-students-graduate-in-four-years.html.

In order to find an estimate of how much this costs the Federal Government per year, we will take the national first year enrollment for 2020 of 1.9 million students[419] and multiply by 0.59 to get the amount of student who will not graduate in four years, 1.1 million students. We will then multiply this by the average cost of tuition which is $35,720[420] and get that the government spends an extra forty billion per year in funding to these students. This is of course if all of those students are using federal funds to pay for college.

3. Argument against strengthened regulations

Many scholars have pushed back on the idea of increasing regulations, arguing that it would only "deprive hundreds of thousands of students of access to higher education."[421] This argument is based on the fact that for-profit schools provide cheaper education and training to low-income students who would otherwise be unable to attain any kind of post-secondary schooling.[422] Although a viable worry, it basically states that we may as well keep bad schools because of its affordability despite it leaving graduates worse off after college than before. In fact, 96% of these students who attended a fraudulent college say their lives are worse now than before they went to school.[423] It also is worth noting that there have been 97,506 complaints filed to the Department of Education about for-profit schools committing fraud.[424] These complaints further show the need in adding regulations to prevent instances of thousands of graduates being deceived by universities like Corinthian Colleges, Inc..

With 2020 bringing a 13% rise in for-profit school enrollment, [425] we need to assure that these students are receiving high quality education that will better their futures. More regulations would assure this to be true and would save money for the government and taxpayers.

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[419] *TED: The Economics Daily*, *62.7 percent of 2020 high school graduates enrolled in college, down from 66.2 percent in 2019*, U.S. BUREAU OF LABOR STATISTICS (Apr. 30, 2021), https://www.bls.gov/opub/ted/2021/62-7-percent-of-2020-high-school-graduates-enrolled-in-college-down-from-66-2-percent-in-2019.htm.

[420] *See* Melanie Hanson, *Average Cost of College & Tuition,* EDUC. DATA INITIATIVE (updated Sept. 6, 2023), https://educationdata.org/average-cost-of-college.

[421] Allie Bidwell, *Gainful Employment Survives For-Profit Challenge*, U.S. NEWS (June 24, 2015), http://www.usnews.com/news/articles/2015/06/24/federal-court-sides-with-education-department-on-gainful-employment-rule.

[422] *See* Carrie Sheffield, *In Defense of For-Profit Colleges*, FORBES (May 29, 2015), http://www.forbes.com/sites/carriesheffield/2015/05/29/in-defense-of-for-profit-colleges/#560ef5736741.

[423] *See 96% of Students Defrauded by For-Profit Colleges Report Their Lives Are Worse Now than Before They Went to School*, HARVARD LAW SCHOOL: CLINIC STORIES (Aug. 6, 2020), https://clinics.law.harvard.edu/blog/2019/08/96-of-students-defrauded-by-for-profit-colleges-report-their-lives-are-worse-now-than-before-they-went-to-school/.

[424] *See* Yan Cao & Tariq Habash, *College Complaints Unmasked,* THE CENTURY FOUNDATION, (Nov. 8, 2017), https://tcf.org/content/report/college-complaints-unmasked/.

[425] *See* Stephanie Riegg Cellini*, The alarming rise in for-profit college enrollment*, BROOKINGS (Nov. 2, 2020), https://www.brookings.edu/blog/brown-center-chalkboard/2020/11/02/the-alarming-rise-in-for-profit-college-enrollment/.

Conclusion

The current higher education program is a dysfunctional one causing distress for many. It is a problem with solutions that are recognized and there is no reason for the dysfunction to continue. After the coronavirus pandemic, we must act quick to allow recovery for the millions of Americans struggling financially, and fixing this system is a start for many. The solutions put forth in this article will add money into the stream of commerce and get the economy moving in the right direction.

By amending section 523(a)(8) of the Bankruptcy Code, we will allow honest student loan debtors a second chance in life, a chance that would benefit both them and our economy. Although the concern was that debtors would manipulate the system, this concern is curbed by the seven-year period of no discharge after graduation. Studies also concluded that this worry was not backed by statistical findings and the actual losses incurred were from defaults.

The other solution of increasing regulations would further assure that government subsidies are going to the right schools which could lower total tuition cost. Aside from tuition costs, these regulations would assure that graduates are set up for success after graduation which would lower the chances of default.

Both of these solutions would adequately solve the problems our higher education program currently possesses. Not only would they allow more money into the stream of commerce, but they undo the governments' inadequacies that left borrowers suffering in situations that were no fault of their own. I urge today's legislatures to not only analyze this article, but the countless other ones which pose other solutions to this well recognized problem.