COMMENTS

STUDENT LOANS: PATH TO SUCCESS OR ROAD TO THE ABYSS?

AN ARGUMENT TO REFORM THE STUDENT LOAN DISCHARGE EXCEPTION*

I. INTRODUCTION

Meet Jane Doe. In 1989, nineteen-year-old Jane decided to invest in her future and go to college. Jane, a hardworking student, enrolled in a four-year university. She knew a college education would not be cheap and applied for student loans. Jane was easily approved for a federal student loan, and, after dotting the *i's* and crossing the *t's*, she received her loan money and began taking classes. To finance her freshman year, Jane received four student loans amounting to $13,250.

Unfortunately, life soon got in the way, and Jane had to leave school after only one year. With $13,250 in loans and no degree, Jane faced a tough road ahead. After withdrawing from school, Jane properly deferred her student loans to give herself time to find a job. Unfortunately, Jane's lack of a college degree, compounded with her crippling speech disability, made it nearly impossible for her to find, let alone keep, a job. Eventually, Jane ran out of money. Approximately ten years after embarking on her bright college future, she was struggling; Jane obtained Social Security disability benefits, food stamps, Medicaid, and Section 8 housing. Still, Jane tried to make the best of a bad situation and refused to shirk her financial obligations—with the little money she had, she made several modest payments on her student loan. Ultimately, she filed for bankruptcy twenty-two years after leaving school.

Even bankruptcy could not rid Jane of that pesky student loan debt.

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Despite being granted personal bankruptcy in 2013, Jane's student loan debt was not forgiven. To make matters worse, in the twenty-two years that Jane tried to find employment and avoid bankruptcy, interest had transformed her loan from $13,250 in 1989 to $37,431 in 2014.

Jane Doe is not a fictional character. Jane Doe is Monica Stitt, who currently bears the weight of almost $40,000 in student loan debt on her shoulders.[1] Ms. Stitt filed for bankruptcy in September 2012 and instituted a separate adversary proceeding in March 2013 to discharge her 1989 student loan debt.[2] The U.S. Bankruptcy Court for the District of Maryland denied Ms. Stitt's request for discharge.[3] The court did not dispute that Ms. Stitt lived below the poverty line and that her financial situation was likely to continue for the foreseeable future.[4] However, simply because Ms. Stitt had not consolidated her loans and entered into an income-based repayment plan, the court determined that she had failed to demonstrate a good faith effort to repay the loan and, thus, was not eligible for discharge.[5] The court made this conclusion despite the fact that Ms. Stitt's income was too low to make monthly loan payments under an income-based repayment plan.[6]

Monica Stitt's failed attempt to discharge her student loan debt is troubling, but more unsettling is the fact that so many individuals share her story, thanks to what is known as the "student loan discharge exception."[7] This Comment explores the history behind the student loan discharge exception and its ramifications for student loan debtors in bankruptcy. Section II provides a comprehensive overview of the student loan discharge exception and policy proposals in favor of its reform. Section III analyzes the current policy proposals and ultimately sets forth a four-part proposal for reform of the discharge exception. This Comment concludes in Section IV that the student loan discharge exception should be reformed according to the author's four-part proposal.

II. OVERVIEW

United States bankruptcy laws are conditioned on two fundamental principles—"a fresh start for the debtor"[8] and equal treatment for the creditor.[9]

1. *See In re* Stitt, No. 12-27357PM, 2014 WL 555220, at *1 (Bankr. D. Md. Feb. 12, 2014), *aff'd sub nom.* Stitt v. U.S. Dep't of Educ., 532 B.R. 638 (D. Md. June 9, 2015), *aff'd*, 621 F. App'x 262 (4th Cir. 2015) (per curiam).

2. *See Stitt*, 532 B.R. at 641.

3. *In re Stitt*, 2014 WL 555220, at *3.

4. *Id.* at *1–2.

5. *Id.* at *2.

6. *See* Pro Se Informal/Preliminary Brief at 20, Stitt v. U.S. Dep't of Educ., 621 F. App'x 262 (4th Cir. 2015) (No. 15-1781).

7. *See* Hon. C. Ray Mullins et al., Student Loan Discharge: Where Are We in 2015? 613 (2015) (unpublished manuscript) (on file with American Bankruptcy Institute).

8. Ryan Freeman, Comment, *Student-Loan Discharge—An Empirical Study of the Undue Hardship Provision of § 523(A)(8) Under Appellate Review*, 30 EMORY BANKR. DEV. J. 147, 152–53 (2013) (asserting that the fresh start principle aims to give the bankruptcy debtor a chance at a fresh

All bankruptcy laws, at least in theory, should serve these principles.[10] When Congress enacted the current Bankruptcy Code, it included a student loan discharge exception, providing that a student loan debtor cannot discharge his or her educational loans in bankruptcy.[11] In order to discharge student loans, the debtor must instigate a separate adversary proceeding to prove that retaining the loan after bankruptcy would impose "undue hardship."[12]

The student loan discharge exception stands in opposition to bankruptcy's fundamental principles—it inhibits debtors' ability to receive a fresh start, and it gives preferential treatment to student loan creditors.[13] Further, narrow judicial interpretations of "undue hardship" have made it nearly impossible for a student loan debtor to obtain relief.[14] In light of the expanding amount of debt students accumulate, the student loan discharge exception has become increasingly problematic.[15]

This Section first provides an overview of the development of student loan programs and the diversification among student borrowers. Second, it sets out the legislative history of the student loan discharge exception. Third, it discusses recent case law developments indicative of a changing attitude toward the undue hardship standard. Lastly, it sets forth the current, most popular policy proposals in favor of reforming the discharge exception.

A. The Changing Landscape of Loans, Borrowers, and Educational Institutions

1. The Development of Student Loan Programs

Student loans are practically a rite of passage for anyone seeking a higher education in today's society,[16] but student loan programs in the United States are a relatively recent development.[17] Following World War II, a greater number

start by allowing them to discharge their debts).

9. DAVID T. STANLEY & MARJORIE GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 9–10 (1971) (stating that the equality principle aims to treat creditors seeking satisfaction of their claims in bankruptcy fairly and equally within their class of claim).

10. *See* Freeman, *supra* note 8, at 152–53.

11. 11 U.S.C. § 523(a)(8) (2012).

12. Rafael I. Pardo, *The Undue Hardship Thicket: On Access to Justice, Procedural Noncompliance, and Pollutive Litigation in Bankruptcy*, 66 FLA. L. REV. 2101, 2104 (2014) (commenting that debtors who have already filed for bankruptcy have to "somehow find the resources to litigate a [second] full-blown lawsuit" to get relief from their student loans) (quoting Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 183 (2009))).

13. *Id.* at 2104–05.

14. *See* Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, N.Y. TIMES (July 17, 2015), http://www.nytimes.com/2015/07/18/your-money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html?_r=0 [https://perma.cc/8VM3-35LE].

15. *Id.*

16. *See* Matthew B. Fuller, *A History of Financial Aid to Students*, 44 J. STUDENT FIN. AID 42, 42 (2014).

17. *See* Connie Cass, *Student Loans 101: Why Uncle Sam is Your Banker*, HUFFINGTON POST (July 19, 2013, 9:46 AM), http://www.huffingtonpost.com/huff-wires/20130719/ap-us-student-loans-

of young adults sought higher education.[18] Colleges raised tuition prices to accommodate this growing student population and offered loans to needy students.[19] Over time, families became more comfortable with the idea of taking on debt for a college education.[20] Although colleges, and even some states, offered students financial assistance, such assistance could not keep pace with rising tuition prices and student demand.[21]

The Cold War and the 1957 launch of the Soviet satellite, Sputnik, prompted federal government involvement with student lending.[22] The United States, in an effort to remain competitive in the Cold War, sought to establish a growing population of scientists and engineers to rival Russian counterparts.[23] The National Defense of Education Act of 1958 (NDEA) created the first federal student loan program, which distributed loans to low-income undergraduate students and specifically focused on "expanding the labor pool of scientists and engineers while simultaneously increasing the quantity and quality of scientific research."[24] The federal government issued loans directly to borrowers and funding was predominately available to select institutions.[25] The NDEA increased the amount of money available to student borrowers.[26]

The Higher Education Act of 1965 (HEA),[27] signed into law by President Lyndon B. Johnson, significantly expanded federal student loan programs.[28] Instead of issuing loans directly to colleges (like under the NDEA), the HEA allowed the federal government to insure loans issued by private banks.[29] Both

banker-sam/ [https://perma.cc/42Z5-7GG3].

18. JOEL BEST & ERIC BEST, THE STUDENT LOAN MESS: HOW GOOD INTENTIONS CREATED A TRILLION-DOLLAR PROBLEM 21 (2014).

19. *Id.*

20. *See id.* at 21–22 (explaining that families were influenced by the media, which was touting higher education as a means to achieve greater levels of income).

21. *See id.* at 22–23.

22. Richard B. Keeton, *Guaranteed to Work or It's Free!: The Evolution of Student Loan Discharge in Bankruptcy and the Ninth Circuit's Ruling in* Hedlund v. Educational Resources Institute Inc., 89 AM. BANKR. L.J. 65, 69 (2015).

23. *Id.* at 69–70.

24. *Id.*; Patricia Somers & James M. Hollis, *Student Loan Discharge Through Bankruptcy*, 4 AM. BANKR. INST. L. REV. 457, 457 (1996) ("The first student loans were created by the National Defense Education Act of 1958 (the 'NDEA'), which provided fellowships for graduate study and long-term, low-interest loans to needy undergraduates." (footnote omitted)).

25. Keeton, *supra* note 22, at 69–70.

26. BEST & BEST, *supra* note 18, at 29 (stating that the "infusion of NDEA money" led to students borrowing four times the amount they had borrowed from individual college funds in 1957 (quoting CHRISTOPHER P. LOSS, BETWEEN CITIZENS AND THE STATE: THE POLITICS OF AMERICAN HIGHER EDUCATION IN THE 20TH CENTURY 159 (2012))).

27. Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended in scattered sections of 20 U.S.C. (2012)).

28. Somers & Hollis, *supra* note 24, at 458; *see also* Keeton, *supra* note 22, at 70–71 (stating that President Johnson's goal was to break the barriers to funding eligibility to ensure access to education for all students, not only students attending the most elite schools).

29. *See* Cass, *supra* note 17; *see also* Keeton, *supra* note 22, at 71 (explaining that lawmakers particularly liked this method of financing because direct loans had to be reflected on the

private lenders and the federal government initially found this arrangement attractive because private lenders had assurance that their loans would be repaid, and the federal government only had to cover the borrower's interest payments for the time the borrower was in school.[30] The HEA has been reauthorized several times since 1965, but it was the original Act that "permanently established a philosophy of higher education as an issue of national interest."[31]

The HEA significantly expanded federal student lending, but it was not without shortcomings. Every time interest rates rose, the federal government's financial obligations increased, requiring Congress to "quickly pass legislation authorizing higher payments."[32] Additionally, private lenders became frustrated since, in order to receive repayment on the principal amount of the loan, they had to wait for the borrower to finish school.[33] These issues led President Richard Nixon to create a secondary market for student loans—the Student Loan Marketing Association (Sallie Mae).[34]

2. A Profile of the Modern Student Borrower in Default

The number of student borrowers and the amount borrowed have drastically increased since the inception of student loan programs in the United States.[35] Consequently, the characteristics of a "typical" student borrower in default have changed.[36] Prior to 1965, "American colleges and universities were rarefied places populated mostly by white males from middle- or upper-income families."[37] The HEA and its subsequent reauthorizations opened the higher

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government's records, but indirect loans backed by the government only had to be recorded once the loan was in default).

30. BEST & BEST, *supra* note 18, at 32. Instead of using federal dollars to make student loan money available, the HEA allowed the federal government to establish "guaranteed student loans." *Id.* Under these guaranteed student loans, the federal government paid private lenders only the interest on the loan, as opposed to the entire principal amount borrowed. *Id.* at 32–33.

31. Fuller, *supra* note 16, at 53.

32. BEST & BEST, *supra* note 18, at 38.

33. *Id.*

34. *Id.* at 38–39 (stating that Sallie Mae functions as follows: (1) banks loan money to students, (2) banks sell the loans to Sallie Mae for cash, and (3) "Sallie Mae . . . issue[s] its own government-guaranteed debt in the capital markets, creating a secondary market where investors could purchase bundles of student loans as long term investments." (internal quotation marks omitted)).

35. *See* Mullins et al., *supra* note 7, at 589 ("According to a 2010 report, thirty-seven million Americans owe approximately one trillion dollars in student loans. The cost of a college education has risen by three times the cost of inflation since 1983." (footnote omitted)).

36. Adam Looney & Constantine Yannelis, A Crisis in Student Loans? How Changes in the Characteristics of Borrowers and in the Institutions They Attended Contributed to Rising Loan Defaults 17 (Sept. 10–11, 2015) (Brookings Institution Conference Draft), https://www.brookings.edu/wpcontent/uploads/2016/07/ConferenceDraft_LooneyYannelis_StudentLoanDefaults.pdf [https://perma.cc/R5R3-267W].

37. Thomas Brock, *Young Adults and Higher Education: Barriers and Breakthroughs to Success*, 20 FUTURE CHILD. 109, 110–11 (2010) (reporting that fall college enrollment in 1965 was just over 5.9 million compared to 17.5 million in fall 2005).

education door to students beyond affluent white males.[38] This influx led to more student loan borrowers and increases in the rate of student loan defaults.[39]

In 1999, the typical college student—a dependent teenager heading straight to a four-year public or private college after high school graduation—represented the largest group of student borrowers.[40] "Nontraditional" students—mainly older students attending for-profit or two-year institutions (primarily community colleges)—represented a comparatively small share of the total number of student loan borrowers.[41] In the 2000s, largely as a result of the economic recession, the number of nontraditional students taking out student loans increased.[42] Because community colleges struggled to satisfy the increased demand in the face of the economic downturn,[43] nontraditional students "took their Pell Grants and loans to for-profit colleges."[44] The number of nontraditional borrowers attending for-profit institutions "represented half of the increase in borrowers between 2003 and 2013."[45]

For-profit institutions, such as the University of Phoenix, are private companies that are funded by and distribute profits to investors.[46] These institutions became a particularly attractive option for low-income and older student borrowers in the mid-2000s, presumptively because they provided an alternative, accessible, and seemingly flexible way to access education.[47] In reality, for-profit institutions are characterized by poor employment outcomes, low degree completion rates, and extremely high tuition costs.[48] Despite the

38. *See* PATRICIA J. GUMPORT ET AL., NAT'L CTR. FOR POSTSECONDARY IMPROVEMENT, TRENDS IN UNITED STATES HIGHER EDUCATION FROM MASSIFICATION TO POST MASSIFICATION 4–5 (1997), http://web.stanford.edu/group/ncpi/documents/pdfs/1-04_massification.pdf [https://perma.cc/D52K-PNPU].

39. Looney & Yannelis, *supra* note 36, at 2 (finding that between 2000 and 2014, the student loan default rate reached its highest level in twenty years).

40. *Id.* at 12 (finding that these students represented "over 80 percent of aggregate student loans outstanding").

41. *Id.* at 13–14 (explaining that nontraditional borrowers tend to be "more likely to be independent for financial aid purposes and are both more likely to be without financial support from parents and also eligible to borrow more").

42. Susan Dynarski, *New Data Gives Clearer Picture of Student Debt*, N.Y. TIMES (Sept. 10, 2015), http://www.nytimes.com/2015/09/11/upshot/new-data-gives-clearer-picture-of-student-debt.html [https://perma.cc/JC74-P4EP] (commenting that during the recession, millions of students left the job market to go back to school to try to improve their skills).

43. *Community Colleges Struggle to Keep Up with Demands*, GOVERNING (Sept. 2010), http://www.governing.com/topics/education/community-colleges-struggle-keep-up-demands.html [https://perma.cc/BZA2-7AVX] (stating that community colleges had to turn away students due to a lack of resources, teachers, and space because enrollment skyrocketed at an unprecedented level from 2007–2009).

44. Dynarski, *supra* note 42.

45. *Id.*

46. U.S. DEP'T OF TREASURY & U.S. DEP'T OF EDUC., THE ECONOMICS OF HIGHER EDUCATION 7 (2012), https://www.treasury.gov/connect/blog/Documents/20121212_Economics %20of%20Higher%20Ed_vFINAL.pdf [https://perma.cc/G3HD-LZTE].

47. *See id.* at 7–9, 23–24.

48. *Id.* at 23–24 (stating that in 2009, tuition and fees at for-profit colleges were about $15,000

hope for a bright future, students who attend for-profit institutions typically incur significant debt, do not complete a degree, and end up unemployed or underemployed.[49] Take, for example, Shawn Brighenti, who pursued a degree through the University of Phoenix Online in order to better support his family.[50] After Shawn graduated, he claims potential employers told him that they did not consider the University of Phoenix an accredited school.[51] After four years of searching, Shawn remained jobless and drowning in student loan debt.[52]

Traditional student borrowers who attend four-year institutions carry greater student loan debt on average than nontraditional borrowers, yet they have lower rates of default and delinquency.[53] It is a mistake to believe that traditional student borrowers are responsible for spikes in the student loan default rate.[54] On the contrary, rising default rates are overwhelmingly caused by nontraditional students who attend either for-profit or two-year institutions.[55] In other words, the typical debtor turning to bankruptcy to discharge student loan debt is not the "recent graduate on the eve of a lucrative career looking to avoid the obligation to repay his or her student loans."[56]

B. The Evolution of Bankruptcy Laws in the United States

1. The Birth of Bankruptcy Law

The current Bankruptcy Code was enacted in 1978, but Congress had made

per year compared with about $6,000 per year for in-state students at four-year public colleges); *see also* Susannah Snider, *3 Must-Know Facts About For-Profit Colleges, Student Debt*, U.S. NEWS & WORLD REP. (Oct. 1, 2014, 9:00 AM), http://www.usnews.com/education/best-colleges/paying-for-college/articles/2014/10/01/3-facts-for-students-to-know-about-for-profit-colleges-and-student-debt [https://perma.cc/H2UJ-4GSE] (providing useful comparisons between for-profit institutions and four-year nonprofit colleges regarding tuition differences, average student loan debt, and graduation outcomes).

49. Dynarski, *supra* note 42; *College, Inc.*, PBS Frontline: Point Taken Blog, http://www.pbs.org/wgbh/point-taken/blog/frontline-college-inc/ (last visited Nov. 14, 2016) [https://perma.cc/33JR-RS5P] (commenting that for-profit institutions cater to "a vulnerable population of potential students, often working adults eager for a university degree to move up the career ladder").

50. Shawn Brighenti, *Real Life Student Debt Stories*, STUDENT DEBT CRISIS (Jan. 22, 2016), http://studentdebtcrisis.org/read-student-debt-stories/ [https://perma.cc/XW66-J36N].

51. *Id.*

52. *Id.*

53. Looney & Yannelis, *supra* note 36, at 3 (finding that twenty-one percent of nontraditional borrowers required to repay loans starting in 2011 defaulted within two years, compared with only eight percent of traditional undergraduate borrowers).

54. Dynarski, *supra* note 42.

55. *See* U.S. DEP'T OF TREASURY & U.S. DEP'T OF EDUC., *supra* note 46, at 24 ("For these students, low education quality and limited earning potential, combined with high student loan indebtedness, can translate into financial hardship in the years immediately following completion of a degree."); Looney & Yannelis, *supra* note 36, at 3–4; Dynarski, *supra* note 42.

56. 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, 432–33 (2005).

several prior attempts to create a uniform system.[57] The Bankruptcy Act of 1898[58] first defined "discharge" as "the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this Act."[59] The Act also contained a discharge exception.[60] Generally, only applicants that were convicted criminals or had acted with fraudulent intent in bankruptcy were excepted from discharge.[61]

The Chandler Act of 1938[62] was the most extensive of various amendments made to the Bankruptcy Act of 1898.[63] The Chandler Act listed certain debts that would not be released even when the debtor was granted a discharge.[64] Its list included taxes, fraudulently obtained liabilities, and liabilities created by embezzlement.[65] The Bankruptcy Act of 1898, in conjunction with the Chandler Act revisions, comprised the bankruptcy laws of the United States until Congress overhauled the entire system in the late 1970s.[66]

2. The 1973 Report to Congress by the Commission on Bankruptcy Laws and Subsequent 1976 Higher Education Amendments

The Commission on the Bankruptcy Laws of the United States was created on July 24, 1970.[67] A joint congressional resolution directed the Commission to evaluate ways of modifying current bankruptcy laws to address modern consumer and commercial behaviors.[68] Specifically, the Commission's purpose was to "'study, analyze, evaluate, and recommend changes [to] the Bankruptcy Act."[69] The Commission, in line with this mandate, assessed the increase in consumer bankruptcy petition filings.[70]

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57. *See* Bankruptcy Act of 1800, ch. 19, 2 Stat. 19 (repealed 1803); STANLEY & GIRTH, *supra* note 9, at 11 (commenting that, in addition to the Bankruptcy Act of 1800, the subsequent Acts of 1841 and 1867 were similar attempts to promote a uniform system of bankruptcy in the United States).

58. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *amended by* Chandler Act of 1938, ch. 575, 52 Stat. 840 (repealed 1978).

59. *Id.* § 1.

60. *Id.* at § 14(b)(1)–(2), 30 Stat at 550 (stating that debts were discharged "*unless* "[the debtor] has (1) committed an offense punishable by imprisonment as herein provided; or (2) with fraudulent intent to conceal his true financial condition and in contemplation of bankruptcy, destroyed, concealed, or failed to keep books of account or records from which his true condition might be ascertained" (emphasis added)).

61. *Id.*

62. ch. 575, 52 Stat. 840 (1938) (repealed 1978).

63. STANLEY & GIRTH, *supra* note 9, at 11.

64. § 17, 52 Stat. at 851.

65. *Id.* § 17(a)(1)–(4).

66. *See* Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 23–37 (1995).

67. Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468; *Report of the Commission on the Bankruptcy Laws of the United States*, 29 BUS. LAW. 75, 75 (1973) [hereinafter *Commission's Report*].

68. *Commission's Report*, *supra* note 67, at 85.

69. *Id.* (quoting Act of July 24, 1970 § 1(b)).

70. *Id.* at 92 (finding that, as a result of this increased availability of consumer credit, the increase in bankruptcy petitions was "a natural if not inevitable result").

The Commission put together its report in just over two years. On July 30, 1973, that report was filed with the President, the Chief Justice, and Congress.[71] It was separated into two components: (1) recommendations and findings, and (2) a proposed statute for a new bankruptcy law.[72] While the Commission concluded that the increase in consumer bankruptcy petitions was not concerning,[73] the report still recommended that the new bankruptcy code address the dischargeability of student loans.[74]

With respect to student loans, the Commission had a two-fold task that mirrored bankruptcy's fundamental principles of allowing debtors the chance to rehabilitate and ensuring the fair and equitable treatment of creditors.[75] The Commission set forth the following recommendation in Part I of the report: "[a]n educational loan [should] not be dischargeable in any bankruptcy case commenced within five years after the first installment [becomes] due, absent unusual circumstances."[76]

Part II of the report contained the following proposed statute:

> (a) Exceptions from Discharge. A discharge extinguishes all debts of an individual debtor, whether or not allowable, except the following: . . . (8) any educational debt if the first payment of any installment thereof was due on a date less than five years prior to the date of the petition *and if* its payment from future income or other wealth *will not impose* an undue hardship on the debtor and his dependents.[77]

The proposed statute offered a straightforward exception to discharge—educational loans were dischargeable provided they met two conditions:[78] the first loan payment was due no less than five years before the date of the bankruptcy petition, and the loan would not impose undue hardship on the petitioner.[79] Under this proposed statute, creditors had the burden of proving both conditions.[80]

The Commission's report laid the foundation for Congress's legislation on student loan dischargeability.[81] Congress's ultimate decision is codified in the

71. COLLIER ON BANKRUPTCY, app. pt. 4(c) (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2011), LexisNexis.

72. Kenneth N. Klee, *Legislative History of the New Bankruptcy Law*, 28 DEPAUL L. REV. 941, 943 (1979).

73. *Commission's Report*, *supra* note 67, at 92 (asserting that, despite the Commission's research into the matter, this increase in the number of filings was not cause for alarm considering the parallel increase in availability of consumer credit).

74. Pardo, *supra* note 12, at 2111 ("Unlike the structure of the Code's student-loan-dischargeability provision . . . the Commission's model provision consisted merely of an exception to discharge—specifically, an educational debt satisfying two requirements.").

75. COLLIER ON BANKRUPTCY, *supra* note 71, at 75–76.

76. *Commission's Report*, *supra* note 67, at 96.

77. *See* COLLIER ON BANKRUPTCY, *supra* note 71, at 136.

78. Pardo, *supra* note 12, at 2111.

79. *Id.*

80. *Id.*

81. *See* COLLIER ON BANKRUPTCY, *supra* note 71, at 140–42; Klee, *supra* note 71, at 943 ("After submission of the Commission's report, it became Congress' responsibility to continue the process of

Education Amendments of 1976, which amended the Higher Education Act of 1965 and set forth the student loan discharge exception, later codified in the Bankruptcy Reform Act of 1978.[82] The 1976 discharge exception provides:

> Sec. 439A (a) A debt which is a loan insured or guaranteed under the authority of this part may be released by a discharge in bankruptcy under the Bankruptcy Act only if such discharge is granted after the five-year period
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> . . . beginning on the date of commencement of the repayment period of such loan, except that prior to the expiration of that five-year period, such loan may be released *only if* the court in which the proceeding is pending determines that payment from future income or other wealth *will impose* an undue hardship on the debtor or his dependents.[83]

Congress's 1976 Amendment diverged significantly from the Commission's report.[84] Congress's student loan discharge exception created a complicated "exception within the exception."[85] Congress made student loans presumptively nondischargeable.[86] Congress divided "the burden of proof between the parties" by first requiring the creditor to prove "that the debt owed qualifie[d] as an educational debt excepted from discharge," then requiring the debtor to prove "that repayment of the debt would impose an undue hardship."[87]

Congress made the politically savvy choice to impose a more difficult discharge exception, in part, because of unfavorable public opinion of student loan debtors at that time.[88] In an effort to appease the public and remain in the political good graces of constituents and supporters, Congress rejected the Commission's somewhat more debtor-friendly proposal and opted for a

formulating a new bankruptcy law.").

82. *Compare* Education Amendments of 1976, Pub. L. No. 94-482, § 439A(a), 90 Stat. 2081, 2141 (stating that a student loan "may be released . . . only if" five years have passed or there is undue hardship), *with* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(8)(B), 92 Stat. 2549, 2591 (current version at 11 U.S.C. § 523 (2012)) (stating that a student loan "does not discharge . . . unless" five years have passed or there is undue hardship).

83. § 439A(a), 90 Stat. at 2141.

84. *Compare Commission's Report*, *supra* note 67, at 96 ("[T]he operation of the time bar should not be absolute but subject to being lifted if the debtor's inability to pay his debts is due to causes beyond his control and enforced payment would impose an undue hardship on the debtor."), *with* § 439A(a), 90 Stat. at 2141 ("A debt which is a loan insured or guaranteed under the authority of this part may be released by a discharge in bankruptcy under the Bankruptcy Act only if such discharge is granted after the five-year period . . . beginning on the date of commencement of the repayment period of such loan . . .").

85. Pardo, *supra* note 12, at 2111.

86. *See id.*

87. *Id.* at 2111, 2113.

88. *See* DEANNE LOONIN, NAT'L CONSUMER LAW CTR., NO WAY OUT: STUDENT LOANS, FINANCIAL DISTRESS, AND THE NEED FOR POLICY REFORM 28 (2006), http://www.studentloanborrowerassistance.org/wp-content/uploads/2013/05/nowayout.pdf [https://perma.cc/T6VU-YYV7] (remarking that the Department of Health, Education, and Welfare saw the dischargeability of student loans as a loophole in the system that needed to be closed and that student loan debtors were depicted in the press as "'deadbeat' student loan debtors").

complicated, burdensome, and creditor-friendly discharge exception.[89] The Education Amendments of 1976 ended student loan automatic dischargeability in bankruptcy and catalyzed the succeeding student loan discharge legislative debacle.[90]

3. 1976–1978: A Tumultuous Two Years for the Fight for Student Loan Discharge

In addition to reforming student loan dischargeability under the Education Amendments of 1976, Congress was concurrently undertaking a project to enact a new bankruptcy law that would address deficiencies in the Bankruptcy Act of 1898.[91] These reforms were codified in the Bankruptcy Reform Act of 1978, which "was the first comprehensive reform of the federal bankruptcy law in the forty years since the passage of the Chandler Act."[92] Although the Reform Act codified the 1976 version of the student loan discharge exception, its legislative history reveals heated debates in both the House and Senate.[93]

The House of Representatives, primarily relying on the Commission's 1973 report, introduced H.R. 8200 in 1977.[94] The House Committee on the Judiciary reported on H.R. 8200 on September 8, 1977.[95] Under § 523, "Exceptions to discharge," the student loan discharge exception was notably absent—the initial proposed bill would have repealed the discharge as it appeared under the Education Amendments of 1976.[96]

In short, it was no mistake to leave educational loans off the list of bankruptcy discharge exceptions. After passing the 1976 Amendments, Congress delayed the effectiveness date so that the Government Accountability Office (GAO) could conduct a study "to analyze a sample of guaranteed student loan borrowers who had petitioned for bankruptcy."[97] Congress was unsure, even

89. *See* Freeman, *supra* note 8, at 154 (finding that the student loan discharge exception was slanted against the debtor from the start because of Congress's fear that debtors were abusing the system).

90. *See* Brendan Baker, Comment, *Deeper Debt, Denial of Discharge: The Harsh Treatment of Student Loan Debt in Bankruptcy, Recent Developments, and Proposed Reforms*, 14 U. PA. J. BUS. L. 1213, 1217–18 (2012) (commenting that since the Education Amendments of 1976, Congress has only made it harder on student debtors by increasingly protecting creditors and by narrowing the circumstances in which students can obtain discharge).

91. *See History of the Federal Judiciary*, FED. JUDICIAL CTR., http://www.fjc.gov/history/home.nsf/page/landmark_20.html (last visited Nov. 14, 2015) [https://perma.cc/YD9A-Z8ZB] ("The inefficiencies of a system formulated in an age with relatively few bankruptcies and almost no consumer bankruptcies, coupled with a widely-perceived conflict between the referees' judicial and administrative responsibilities, contributed to calls for sweeping reform of the nation's bankruptcy law.").

92. Tabb, *supra* note 66, at 32.

93. *Id.* at 32–33.

94. *See* Klee, *supra* note 72, at 943–49 (discussing the various amendments and hearings that contributed to H.R. 8200).

95. H.R. REP. NO. 95-595, at 1 (1977) (Conf. Rep.).

96. *Id.* at 363–65.

97. ROBERT F. KELLER, ACTING CONTROLLER GEN. OF THE U.S., B-164031(1), GUARANTEED

after passing the Education Amendments of 1976, whether student loans ought to be included as a nondischargeable debt in the new Bankruptcy Reform Act of 1978.[98] The GAO study concluded that concerns about fraudulent student loan debtors were greatly overstated.[99] Specifically, the study concluded that only 8% of the sampled individuals recorded "educational loans" as the sole reason for their indebtedness, and "[o]ver 3% of those filing were still in school."[100] In accordance with the GAO findings that student loan debt was not a major policy concern, the House omitted educational loans from the discharge exceptions in its initial version of H.R. 8200.[101]

Despite the GAO study, in the report of the House Committee on the Judiciary to accompany H.R. 8200, Congressman Allen E. Ertel argued to reincorporate the educational loan exception.[102] He feared that without the exception, automatic dischargeability would promote fraud.[103] Ertel maintained that omitting the discharge exception seriously threatened the survival of student loan programs and that it was Congress's responsibility to ensure this did not happen.[104] Ertel's proposed amendment to include the 1976 student loan discharge exception was put to a vote, which came out in favor of the exception; it was subsequently added to H.R. 8200.[105]

Once H.R. 8200 passed in the House, the Senate considered its own Bill, S. 2266, which was essentially an "analogue of H.R. 8200."[106] The Senate Judiciary Committee and the Finance Committee reviewed S. 2266, which included

STUDENT LOAN PROGRAM BANKRUPTCIES (1977), http://archive.gao.gov/f1102a/101903.pdf [https://perma.cc/44A2-5XG2].

98. *See* Note, *Ending Student Loan Exceptionalism: The Case for Risk-Based Pricing and Dischargeability*, 126 HARV. L. REV. 587, 595 (2012) [hereinafter *Ending Student Loan Exceptionalism*].

99. *See* Joe Valenti & David A. Bergeron, *How Qualified Student Loans Could Protect Borrowers and Taxpayers*, CTR. FOR AM. PROGRESS (Aug. 20, 2013), https://www.americanprogress.org/issues/higher-education/report/2013/08/20/72508/how-qualified-student-loans-could-protect-borrowers-and-taxpayers/ [https://perma.cc/MK9G-9L9F] (stating that the GAO study "found that there were only a small number of delinquent borrowers obtaining discharges—typically low-income students who dropped out of poorly performing institutions and had few career options as a result").

100. KELLER, *supra* note 97.

101. Pardo & Lacey, *supra* note 56, at 420–21.

102. *Id.* at 423–24.

103. *See id.* at 536–37 ("At a time when political, business, and social morality are major issues, it is dangerous to enact a law that is almost specifically designed to encourage fraud. For example, as a student leaves college to find a job, that student would have [the] option[] [to] . . . discharge the debt in bankruptcy, having received the benefit of a free education." (quoting H.R. REP. NO. 95-595, at 536–38 (1977)).

104. H.R. REP. NO. 95-595, at 536–38; *see also* BEST & BEST, *supra* note 18, at 43 (describing the popular image of student loan "deadbeat" debtors promoted by the press at the time, such as the 1977 Newsweek article entitled "Study Now, Pay Never" and the U.S. News & World Report article entitled "Time of Reckoning for Student Deadbeats").

105. Klee, *supra* note 72, at 951.

106. *Id.* at 950.

educational loans among the list of debts excepted from discharge.[107] After much back and forth between the House and Senate, Congress sent a compromised version of the Bankruptcy Reform Act to the White House on October 25, 1978.[108] The Act codified the student loan discharge exception as follows:

> § 523. Exceptions to discharge (a) A discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual debtor from any debt
>
> . . . (8) to a governmental unit, or a nonprofit institution of higher education, for an educational loan, unless—(A) such loan first became due before five years before the date of the filing of the petition; or (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . . .[109]

The Bankruptcy Reform Act of 1978 officially passed and was signed into law by President Jimmy Carter on November 6, 1978.[110]

4. Incremental and Important Developments: 1978–2005

Following the passage of the Bankruptcy Reform Act of 1978, several subsequent acts slightly modified the student loan discharge exception. The first was the Bankruptcy Amendments and Federal Judgeship Act of 1984, enacted on July 10.[111] Sections 371 and 454, taken together, struck the words "or" and "of higher education" from the first paragraph of § 523(a)(8).[112] This modification made it so that any educational loan from the government or a nonprofit, regardless of whether that nonprofit was for higher education, was excepted from discharge.[113]

The Crime Control Act of 1990 provided the next important change to the discharge exception.[114] Section 3621 of the Act extended the discharge waiting period from five to seven years.[115] Then, eight years later, the Higher Education Amendments of 1998 completely abolished the waiting period.[116] This meant that student loan debtors were required to prove "undue hardship" to

107. *Id.* at 951–53 (citing S. 2266, 95th Cong., 2d Sess. (1977)).

108. *Id.* at 955–56.

109. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2590–91 (current version at 11 U.S.C. § 523(a)(8) (2012)).

110. Tabb, *supra* note 66, at 34.

111. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333.

112. *Id.* §§ 371, 454.

113. *Student Loan Bankruptcy Exception*, FINAID, http://www.finaid.org/questions/bankruptcy exception.phtml (last visited Nov. 14, 2016) [https://perma.cc/Q2DZ-W9BL].

114. Pub. L. No. 101-647, § 3621, 104 Stat. 4789 (current version at 11 U.S.C. § 523(a)(8) (2012)).

115. *See id.* (demonstrating that the Act did not alter the exception's undue hardship provision).

116. *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837 (amending § 523(a)(8) by "striking 'unless—'and all that follows through '(B) excepting such debt' and inserting 'unless excepting such debt'").

successfully obtain a discharge of their loan.[117]

5. The Unduly Hard "Undue Hardship" Standard

In order to fully understand the impact of the 1998 elimination of the waiting period, it is necessary to understand the burden on a debtor to prove that maintaining a student loan debt postbankruptcy would constitute undue hardship. The Bankruptcy Code does not define "undue hardship" within the context of the student loan discharge exception.[118] Therefore, tests for undue hardship have evolved entirely within the judiciary.[119] The *Brunner* test, set forth in *Brunner v. New York State Higher Education Services Corp.*,[120] is the most commonly used undue hardship test in student loan discharge cases.[121]

The *Brunner* test requires a plaintiff seeking a discharge of student loans in bankruptcy to prove undue hardship by satisfying the following three elements:

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans; and (3) that the debtor has made good faith efforts to repay the loans.[122]

Examining the debtor under each of these three prongs requires "a fact-intensive inquiry."[123] Under the first prong, the court examines the debtor's income and expenses.[124] The second prong requires a two-step analysis: "1) whether the debtor's financial difficulties are 'likely' to continue, and 2) that the duration of the debtor's financial hardship will be a significant portion of the repayment period."[125] Under the third prong, the court assesses whether the debtor has acted in good faith by attempting to repay the loan.[126]

The application of the *Brunner* test is plagued with judicial subjectivity.[127]

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117. *See* Alexander Yi, *Reforming the Student Debt Market: Income-Related Repayment Plans or Risk-Based Loans?*, 21 VA. J. SOC. POL'Y & L. 511, 544–45 (2014).

118. Freeman, *supra* note 8, at 150.

119. *Id.*

120. 831 F.2d 395 (2d Cir. 1987) (per curiam).

121. *See* Freeman, *supra* note 8, at 156, 161 ("Ultimately, in adopting the totality of the circumstances test, courts look at many of the same facts as those that apply the *Brunner* test to determine whether the debtor has proven undue hardship.").

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

123. Freeman, *supra* note 8, at 157.

124. *Id.* ("However, analyzing income and expenses to determine what constitutes a minimal standard of living and whether the debtor may fall beneath it is a fact-intensive inquiry that allows for considerable amounts of judicial subjectivity because of an ambiguous standard and differing interpretations of what constitutes 'minimal living.'").

125. Mullins et al., *supra* note 7, at 606 n.130.

126. Freeman, *supra* note 8, at 159 ("Basically, a court must determine whether a debtor has tried to find work, maximize income, and minimize expenses.").

127. *See, e.g.*, Freeman, *supra* note 8, at 156 ("The application of the undue hardship provision in bankruptcy courts has been plagued with inconsistency, which has primarily resulted from

Take, for example, an application of the third prong—a good faith effort to repay. In *In re Stitt*,[128] Judge Mannes concluded that Monica Stitt lacked the requisite showing of a good faith effort to repay because she had not entered into an income-based repayment plan.[129] The court drew this conclusion despite the fact that under such a plan, Ms. Stitt's monthly payment would have been zero dollars based on her income.[130] In contrast, Judge Kilburg in *In re Limkemann*[131] found that the debtor had acted in good faith and was entitled to a discharge of student loans despite never having entered into an income-based repayment plan.[132] Even though Mr. Limkemann was eligible for the plan, Judge Kilburg reasoned that eligibility was irrelevant because the debtor did not have the financial resources to satisfy a minimal monthly payment.[133] In both cases, the student loan debtors were eligible to enter income-based repayment plans despite insufficient income;[134] however, only Ms. Stitt was found to have acted in bad faith and denied a discharge.[135]

In addition to the judicial subjectivity that seeps into the application of the *Brunner* test, the second prong is problematic because it requires a judge to predict a debtor's future financial situation.[136] The speculation needed to make this determination creates a "certainty of hopelessness" for a debtor seeking discharge—it is nearly impossible to determine whether a debtor's financial situation will remain static for the foreseeable future.[137]

The *Brunner* test, besides its substantive shortfalls, is also criticized for its complicated procedural issues.[138] Debtors seeking to prove undue hardship must institute an entire second round of litigation after filing for bankruptcy.[139] Thus, even after their bankruptcy petition is granted, a judicially decreed *bankrupt* debtor must devote time and resources to carry on an entirely new case.[140] In sum, the Higher Education Amendments of 1998, by eliminating the seven-year

significant judicial subjectivity in undue hardship determinations." (footnote omitted)); Baker, *supra* note 90, at 1214 (Recent research indicates that the extent of relief "obtained by those few debtors is heavily contingent on extralegal factors": a debtor's inability to repay her loans was less of a factor affecting whether she obtained relief than her attorney's level of experience or the past tendencies of the bankruptcy judge presiding over her case.").

128. No. 12-27357PM, 2014 WL 555220 (Bankr. D. Md. Feb. 12, 2014).

129. *In re Stitt*, 2014 WL 555220, at *2.

130. *Id.*

131. 314 B.R. 190 (Bankr. N.D. Iowa 2004).

132. *In re Limkemann*, 314 B.R. at 197.

133. *Id.*

134. *See id.* at 193–94; *In re Stitt*, 2014 WL 555220, at *2.

135. *In re Stitt*, 2014 WL 555220, at *2.

136. Freeman, *supra* note 8, at 158–59.

137. *See* Bernard, *supra* note 14 ("'How do you prove things won't change for the better in the future?' said Daniel A. Austin, associate professor at Northeastern University School of Law."). This emphasizes the difficult burden on the student loan debtor under this second prong of the *Brunner* test. *Id.*

138. Freeman, *supra* note 8, at 162.

139. *Id.*

140. *Id.* at 163.

waiting period, created serious negative ramifications for debtors seeking student loan discharges, as evidenced by the substantive and procedural difficulties of the undue hardship standard.

6. Creditors Come Knocking: The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005

The Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA)[141] passed on April 14, 2005 and was enacted on April 20, 2005.[142] BAPCPA amended the scope of the student loan discharge exception to include private student loans, in addition to loans issued by the government and nonprofits.[143]

BAPCPA replaced § 523(a)(8) with the following language:

> (8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for . . . (B) *any other educational loan that is a qualified education loan*, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.[144]

This BAPCPA amendment implemented the catch-all provision that any "qualified education loan" presumptively falls within the discharge exception.[145] Looking to Section 221(d)(1) of the Internal Revenue Code, a "qualified education loan" is generally defined as "any indebtedness incurred by the taxpayer solely to pay qualified higher education expenses."[146] Therefore, BAPCPA's change to the statutory language incorporated all student loans—public and private—under the umbrella of the student loan discharge exception.[147] BAPCPA's incorporation of private student loans into the discharge exception created an arbitrary distinction between private student loan debt and other immediately dischargeable debts, such as mortgages and car loans.[148] Private student loans, along with other private loans, are subject to variable interest rates, prerequisite credit checks, and limited options for forbearance and repayment.[149]

141. Pub. L. No. 109-8, 119 Stat. 23.

142. Susan Jensen, *A Legislative History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 79 AM. BANKR. L.J. 485, 566–67 (2005).

143. Mike Papandrea, *Should We Really Discharge the Student Loan Debt Discharge Exception? Why Reversing the 2005 BAPCPA Amendment is Not Relief to the Debtor*, 12 RUTGERS J. L. & PUB. POL'Y 555, 557 (2015); *see also Federal Versus Private Loans*, OFFICE OF FEDERAL STUDENT AID, https://studentaid.ed.gov/sa/types/loans/federal-vs-private (last visited Nov. 14, 2016) [https://perma.cc/2DUD-V9ZJ] (comparing and contrasting private and federal student loans).

144. § 220, 119 Stat. at 59 (emphasis added).

145. *Id.*

146. I.R.C. § 221(d)(1) (2012).

147. Papandrea, *supra* note 143, at 556.

148. *See* Baker, *supra* note 90, at 1214, 1232 ("Thus, there is no fundamental difference between student loans and mortgages that would prevent an analogy between how they would respond to changes in bankruptcy law.").

149. *Federal Versus Private Loans*, *supra* note 143.

The legislative history of BAPCPA began eight years before its passage, with the Bankruptcy Review Commission report filed on October 20, 1997, detailing recommendations for reform of the Bankruptcy Code.[150] In what seemed like a case of déjà vu circa 1978, the Commission's report recommended the repeal of the student loan discharge exception.[151] The report recognized several flaws inherent in the discharge exception including the restrictive undue hardship standard[152] and inconsistency between the harsh treatment of student loans and the more lenient treatment of other debts, arguably less worthy.[153]

The report noted a primary flaw in the student loan discharge exception—it appeared to "penalize individuals who seek to educate and improve themselves while [the Bankruptcy Code] liberates other individuals from overwhelming debt incurred for other purposes or through different means."[154] The Commission acknowledged a benefit to insuring a return on student loan money, but argued that the government could protect the future of student loan programs using means outside the bankruptcy system.[155] The Commission concluded that a repeal of the discharge exception would be "consistent with federal policy to encourage educational endeavors," would address the difficult application of undue hardship litigation, and would provide a discharge to individuals who need it most.[156]

Despite the Commission's report, the credit industry exerted its power and influence and caused several lender-friendly bankruptcy reform bills to be introduced in the House and Senate.[157] President Clinton expressed disapproval of these bills and threatened a veto.[158] Ultimately, the Bankruptcy Reform Act

150. Jensen, *supra* note 142, at 487; *see also* Klee, *supra* note 71, at 943 n.15 (stating that the Bankruptcy Review Commission consisted of nine members appointed by the President, Congress, and Judiciary); Judith Benderson, *Introduction: A History of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 54 U.S. ATT'YS BULL. 1, 1 (2006), https://www.justice.gov/sites/default/files/usao/legacy/2006/09/07/usab5404.pdf [https://perma.cc/8RUC-8HGQ] (stating that although Congress was generally satisfied with the Code, it appointed the Bankruptcy Review Commission to "make recommendations for further improvements").

151. *See* NAT'L BANKR. REVIEW COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 207, 216 (1997).

152. *Id.* at 207 ("While the Code provides an exception to the rule of nondischargeability if a debtor can affirmatively prove that repayment of the loans would cause the debtor 'undue hardship,' this exception is narrowly construed such that the debtors most in need are least likely to be able to litigate the issue convincingly or at all.").

153. *Id.* ("The question is whether a debtor overloaded with consumer debts incurred to buy a car, a vacation, or a pizza can resort to bankruptcy but a debtor who borrows to pay for tuition and books cannot.").

154. *Id.* at 208–09.

155. *Id.* at 216 (stating that the government could protect itself by requiring a cosigner so both the debtor and the cosigner would need to be in financial trouble before instituting a bankruptcy proceeding).

156. *Id.*

157. *See* Jensen, *supra* note 142, at 493–97 (noting that the debates about bankruptcy reform coincided with "political turbulence in Washington, D.C." because news of President Clinton's affair had begun to leak and, as a result, "partisanship became more fractious").

158. *Id.* at 534.

of 2000, H.R. 2415, was sent to President Clinton, who pocket-vetoed the bill.[159]

Once George W. Bush took office in 2000, observers expected that bankruptcy reform would ultimately favor the powerful credit industry.[160] On February 1, 2005, BAPCPA was introduced.[161] President Bush signed the law without hesitation and gave the following statement: "The act of Congress I sign today will protect those who legitimately need help, stop those who try to commit fraud, and bring greater stability and fairness to our financial system."[162] Supporters touted BAPCPA as a response to an alleged increase in consumer bankruptcy petitions and systematic abuse of the bankruptcy system.[163] However, the bill did not protect those who legitimately needed help. Rather, it marked a major victory for the lending industry—giving it increased protection and recourse against debtors, particularly student loan debtors.[164]

159. *Id.* at 539 (citing Press Release, White House Office of the Press Sec'y, Memorandum of Disapproval by William J. Clinton, at 1 (Dec. 19, 2000), http://www.presidency.ucsb.edu/ws/?pid=1259 [https://perma.cc/8JWT-W22Z] (asserting that Clinton vetoed the Bill because it was "not balanced reform and it omit[ted] critical language to require accountability and responsibility from those who unlawfully bar access to legal health services"). Pocket veto is defined as "an indirect veto of a legislative bill by an executive through retention of the bill unsigned until after adjournment of the legislature." *Pocket Veto*, MERRIAM WEBSTER, http://www.merriam-webster.com/dictionary/pocket%20veto [https://perma.cc/8TA3-UUSZ].

160. *See* Jo Becker et al., *White House Philosophy Stoked Mortgage Bonfire*, N.Y. TIMES (Dec. 20, 2008), http://www.nytimes.com/2008/12/21/business/21admin.html [https://perma.cc/T8HM-PUWJ] (explaining that President George W. Bush focused many economic policies on goals that incidentally favored the lending industry—i.e. that every American be able to own their own home, which then induced lax lending practices in the mortgage industry); *see also Top Contributors, 2004 Cycle*, CTR. FOR RESPONSIVE POLITICS, https://www.opensecrets.org/pres04/contrib.php?cid=N00008072 (last visited Nov. 14, 2016) [https://perma.cc/4M9X-S4J6] (listing President Bush's top campaign contributors, which include credit companies and big banks).

161. Jensen, *supra* note 142, at 562.

162. *Id.* at 566–67 (quoting President George W. Bush, Remarks on Signing the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (Apr. 20, 2005), http://www.presidency.ucsb.edu/ws/?pid=63247 [https://perma.cc/PUR5-6X4Z].

163. MARK JICKLING & JARED CONRAD NAGEL, CONG. RESEARCH SERV., R41414, OBSERVATIONS ON THE IMPACT OF THE BANKRUPTCY ABUSE PREVENTION AND CONSUMER PROTECTION ACT OF 2005 (P.L. 109-8) 1 (2010).

164. Stephen Labaton, *House Passes Bankruptcy Bill: Overhaul Now Awaits President's Signature*, N.Y. TIMES (Apr. 15, 2005), http://www.nytimes.com/2005/04/15/business/house-passes-bankruptcy-bill-overhaul-now-awaits-presidents.html [https://perma.cc/X9CY-C2AH] (stating that congress passing BAPCPA is "the culmination of years of intensive lobbying by the nation's largest banks, credit card companies and retailers, who have complained about what they say is a rising tide of abusive bankruptcy filings"); *see also* Robert H. Scott, III, *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: How the Credit Card Industry's Perseverance Paid Off*, 41 J. ECON. ISSUES 943, 945 (2007) (commenting that between 1999 and 2005, credit card companies spent approximately twenty-five million dollars on political endeavors in an effort to reform consumer bankruptcy laws).

C. *Recent Case Law Developments—A Glimmer of Hope for the Bankrupt Student?*

Despite calls for reform and several proposed bills,[165] since 2005, no critical legislative changes have been made to the student loan discharge exception. Absent legislation, certain judges have taken it upon themselves to champion reform by adopting a more liberal approach to the *Brunner* test.[166] *Krieger v. Educational Credit Management Corp.*[167] and *In re Roth*[168] provide two examples of judicial attempts to reform the student loan discharge exception.[169]

1. *Krieger v. Educational Credit Management Corp.*

In *Krieger*, the Seventh Circuit reversed a district court ruling that denied Susan Krieger a discharge of her student loans.[170] Krieger was a stay-at-home mom for the greater part of her twenties and thirties.[171] After a failed marriage and with three children to care for, she obtained a paralegal certificate in 2000.[172] Krieger then looked for full-time employment but was unsuccessful.[173] It was at that time that Webster University, a nonprofit private institution, encouraged her to obtain a bachelor's degree so that she could be a competitive candidate for full-time paralegal positions.[174] Krieger took out student loans in order to finance this education.[175] In 2001, Krieger divorced from her second husband and obtained a modest settlement that she used to pay basic living expenses.[176]

165. *See, e.g.*, Private Student Loan Bankruptcy Fairness Act of 2015, H.R. 1674, 114th Cong. (2015) (limiting nondischargeability to government loans, thus making private student loans automatically dischargeable again); Fairness for Struggling Students Act of 2015, S. 729, 114th Cong. (2015) (limiting the discharge exception to federal loans, and excluding private loans from protection); Discharge Student Loans in Bankruptcy Act of 2015, H.R. 449, 114th Cong. (2015) (calling for a total elimination of § 523(a)(8) from the Bankruptcy Code).

166. *See* Mullins et al., *supra* note 7, at 615–19.

167. 713 F.3d 882 (7th Cir. 2013).

168. 490 B.R. 908 (B.A.P. 9th Cir. 2013).

169. *See* Michael J. Fletcher & J. Jackson Waste, *Student Loan Discharge Decisions Poke Holes in the* Brunner *Test*, AM. BANKR. INST. J. 1 (2014), http://www.bakermanock.com/sites/default/files/publications/ABI%20Journal%20Article.Student%20Loan%20Discharge%20Decisions%20Poke%20Holes%20in%20the%20Brunner%20Test..%20%20By%20J.%20Jackson%20Waste%20and%20Michael%20J.%20Fletcher.pdf [https://perma.cc/KTY7-FKVA] ("While Congress has been ineffectual, two recent bankruptcy cases indicate that the judiciary might, in incremental fashion, be reintroducing a debtor's ability to discharge student loans."); Mullins et al., *supra* note 7, at 615 (stating that *Krieger* and *Roth* demonstrate that the "hard-line approach to discharge may be coming to an end" (quoting Neil T. Phillips, Note, *How Poor is Poor Enough? Tracking the Evolution of Student Loan Dischargeability from Judge Haight to Judge Easterbrook*, 12 GEO J.L. & PUB. POL'Y 329, 341 (2014))).

170. *Krieger*, 713 F.3d at 885.

171. Brief of Appellant at 6, Krieger v. Educ. Credit Mgmt. Corp., 713 F.3d 882 (7th Cir. 2013) (No. 12-3592).

172. *Id.*

173. *Id.*

174. *Id.*

175. *See* Bernard, *supra* note 14.

176. *See* Brief for the Appellant, *supra* note 171, at 7–8.

When the Great Recession hit in 2008, Krieger's few financial assets were depleted, and she moved in with her elderly mother in rural Illinois.[177] She looked for work, including work outside of the legal field, but the rural location provided her with little to no employment opportunities.[178] Ultimately, she filed for bankruptcy in 2011.[179] At the time of the trial, her sole source of income was a few hundred dollars of government assistance each month.[180]

The bankruptcy court determined that Krieger was entitled to a discharge of her student loans because she satisfied all three elements of the *Brunner* test.[181] On appeal, the district court reversed and held that Krieger was not entitled to a discharge under the *Brunner* test.[182] Specifically, the court found that Krieger had not met the second prong, which requires the debtor to show that "additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the [loan] repayment period."[183] Likewise, the court held that Krieger failed to meet the third prong, requiring "that the debtor has made good faith efforts to repay the loans."[184]

The district court opined that Krieger failed to satisfy the second prong because she could have "searched harder for work."[185] Regarding the third element, the district court found that Krieger had not acted in good faith "because she had not enrolled in a program that would have offered her a 25-year payment schedule."[186] On appeal to the Seventh Circuit, Judge Easterbrook rejected the district court's analysis of the second element—holding that Krieger's situation was likely to persist because she was fifty-three years old, had not held a job since 1986 and, thus, did not have "the sort of background employers [were] looking for."[187] Judge Easterbrook further rejected the district court's conclusion regarding the third prong—holding that good faith was a question of law and the bankruptcy court's "[f]indings of facts must stand unless clearly erroneous."[188] Although Judge Easterbrook did not outright reject the student loan discharge exception, his opinion is "significant because it seems to reject an overly restrictive application of the *Brunner* Test."[189]

177. *See id.* at 9.

178. *Id.* at 9–10.

179. *See id.* at 10.

180. Krieger v. Educ. Credit Mgmt. Corp, 713 F.3d 882, 883 (7th Cir. 2013).

181. *See id.*

182. *Id.* at 883–84.

183. *Id.* at 883 (quoting *In re* Roberson, 999 F.2d 1132, 1135 (7th Cir.1993)).

184. *Id.* (quoting *In re* Roberson, 999 F.2d at 1135).

185. *See id.* at 883.

186. *Id.* at 883–84.

187. *Id.* at 884.

188. *Id.*

189. Mullins et al., *supra* note 7, at 617 (asserting that Judge Easterbrook's opinion vouches for a more liberal approach to the undue hardship standard, where he writes that "[i]t is important not to allow judicial glosses . . . to supersede the statute itself" (quoting *Krieger*, 713 F.3d at 884) (alteration and omission in original)).

2. *Roth v. Educational Credit Management Corp.*

Janet Rose Roth sought to discharge eighteen federal student loans in an undue hardship proceeding she instituted on April 27, 2010, sixteen months after filing for bankruptcy.[190] Roth began her foray into the student loan market when she took out approximately $33,000 from 1989–1995 to attend Mesa Community College and Arizona State University.[191] A "family issue" required Roth to leave school before completing any type of degree.[192] After leaving school, Roth endured grueling work schedules to try and make ends meet; however, her modest income prevented her from making voluntary payments on her federal loans.[193] Over the years, she developed severe medical conditions, including diabetes and macular degeneration, which caused her to stop working entirely in 2011 and to receive Social Security disability payments of $774 a month.[194] To make matters worse, by the time Roth sought to discharge her student loans, interest rates had turned her $33,000 loan into a $95,403.86 obligation.[195]

The bankruptcy court held that Roth had not satisfied the good faith prong of the *Brunner* test and was not entitled to a discharge.[196] The court followed Ninth Circuit precedent, which considers past efforts on the part of the debtor to reduce their student loan debt within the overall consideration of good faith.[197] Accordingly, the bankruptcy court felt forced to deny Roth relief because she had failed to make voluntary payments and "renegotiate, obtain a forbearance, or obtain a disability discharge" for her loans.[198] The Bankruptcy Appellate Panel for the Ninth Circuit reversed and held that Roth satisfied the *Brunner* test and was entitled to a discharge under § 523(a)(8) because a lack of voluntary payments was not dispositive of good faith.[199]

Judge Pappas wrote a concurring opinion in which he criticized the *Brunner* test and called for its revision.[200] Judge Pappas pointed out that circumstances have significantly changed since the restrictive *Brunner* test was set out in 1987 and, as such, "a bankruptcy court should be afforded flexibility to consider all relevant facts about the debtor and the subject loans."[201] Judge Pappas's

190. *See* Roth v. Educ. Credit Mgmt. Corp., 490 B.R. 908, 911–12 (9th Cir. 2013).

191. *Id.* at 911.

192. *Id.*

193. *See id.* at 912; Bernard, *supra* note 14 ("Janet Roth left home at 4 a.m. each day and drove 40 miles to a tax preparation office in Glendale, Ariz. When she finally got back home, she had less than an hour before starting her 6 p.m. shift decorating cakes at Walmart. She worked until midnight, giving her just a few hours to sleep before starting all over again.").

194. *Roth*, 490 B.R. at 912–13.

195. *See id.* at 911–12.

196. *Id.* at 913–14.

197. *Id.*

198. *Id.*

199. *Id.* at 918, 920.

200. *Id.* at 920 (Pappas, J., concurring) (stating that the *Brunner* test for undue hardship is "too narrow, no longer reflects reality, and should be revised by the Ninth Circuit").

201. *Id.* at 920–22 (commenting that today, student loan debtors no longer have the option of discharging loans after a waiting period; the cost of a modern education has made it so that students

criticism of the *Brunner* test is still the minority view, but the *Roth* and *Krieger* decisions granting student loan discharges at least "suggest that the stagnant reliance on Brunner is ebbing."[202]

D. *In Search of Solutions: Popular Policy Proposals to Reform the Discharge Exception*

The student loan discharge exception has long been criticized.[203] While some policy proposals have advocated for changes to the student loan discharge exception itself, other "commentators . . . [have] derided the undue hardship requirement."[204] These policy proposals can be grouped into two categories: (1) reforms that focus on the statutory language of the discharge exception; and (2) reforms that focus on the creditor, the borrower, and on the loan itself.

1. Reforms Focusing on Statutory Language: Repeal, Rewrite, and Define

A popular idea for reform of the discharge exception is to repeal it entirely, turning the clock back to pre-1976, when student loans were automatically dischargeable in bankruptcy.[205] This idea is supported by consumer bankruptcy advocacy organizations such as the National Consumer Law Center (NCLC) and the National Association of Consumer Bankruptcy Attorneys (NACBA).[206] Proponents of repeal argue that there is no justified rationale behind treating student loan debt differently from any other kind of dischargeable debt.[207]

Since a partisan Congress is unlikely to agree on repeal, another popular idea for reform is to exclude private student loans from the protection of the discharge exception—allowing them to be discharged and effectively returning to pre-BAPCPA days.[208] Senator Richard Durbin recently introduced a bill in the Senate—the Fairness for Struggling Students Act of 2015—supporting this

are borrowing more, and much of what is borrowed is being used by students pursuing training at for-profit institutions).

202. Fletcher & Waste, *supra* note 169, at 3.

203. Mullins et al., *supra* note 7, at 624.

204. *Id.*

205. *See id.* (stating that repealing § 523(a)(8) is a "fairly popular argument"); Baker, *supra* note 90, at 1232 (stating that there is "little justification for keeping the current system in place," and arguing for a "gradual repeal" of the law).

206. *See Private Student Loan Bankruptcy Fairness Act of 2010: Hearing on H.R. 5043 Before the Subcomm. on Commercial & Admin. Law, H. Comm. On the Judiciary,* 111th Cong. 16–18 (2010) [hereinafter *Loonin Prepared Statement*] (statement of Deanne Loonin, Counsel, National Consumer Law Center (NCLC) and Director of NCLC's Student Loan Borrower Assistance Project); NAT'L ASS'N OF CONSUMER BANKR. ATT'YS, THE STUDENT LOAN "DEBT BOMB": AMERICA'S NEXT MORTGAGE-STYLE ECONOMIC CRISIS? 5–6 (2012), http://www.nacba.org/wp-content/uploads/2015/06/020712-NACBA-student-loan-debt-report.pdf [https://perma.cc/8MJ4-PH6J] [hereinafter STUDENT LOAN DEBT BOMB].

207. Mullins et al., *supra* note 7, at 625–26 (discussing arguments in favor of making private student loans dischargeable).

208. *See* LOONIN, *supra* note 88, at 34 ("At a minimum, Congress should act immediately to eliminate the non-dischargeability provision for private student loans" (emphasis omitted)).

idea.[209] Durbin, along with supporters of this proposal, argue that privately issued student loans should be dischargeable in bankruptcy.[210]

With respect to the undue hardship standard, two proposals aim to make the test less burdensome for debtors and less rigid for judges: (1) reinstate a waiting period to give the debtor an alternative to undue hardship, and/or (2) adopt a national definition of undue hardship.[211] Regarding the waiting period, supporters "argue that a time-lapse balances the equitable interests of borrowers with the need to prevent potential abuse."[212] To the extent that debtors are opportunistic borrowers, a waiting period prevents them from being able to discharge student loan debt immediately upon completion of their education.[213] Even Sallie Mae announced in 2010 that it would support a proposal for a seven-year waiting period.[214]

Additionally, since the current undue hardship test gives way to judicial subjectivity and arbitrary results,[215] reformers argue that a national standard for undue hardship "would allow bankruptcy courts to take a more uniform approach in determining whether to discharge a debtor's student loan debt."[216] Proponents of a national standard contend that the test should focus on the

209. *See* Ashlee Kieler, *You Can't Discharge Your Student Loans in Bankruptcy Because of Panicked 1970s Legislation*, CONSUMERIST (Mar. 17, 2015), http://consumerist.com/2015/03/17/you-cant-discharge-your-student-loans-in-bankruptcy-because-of-panicked-1970s-legislation/ [https://perma.cc/N63K-D5CK] ("The most recent attempt occurred last week when a group of 12 senators introduced legislation that would amend the current bankruptcy code, allowing private student loans to be held in the same regard as other private unsecured debt."); *see also* Fairness for Struggling Students Act of 2015, S. 729, 114th Cong. (2015) (limiting the discharge exception to federal loans, and excluding private loans from protection).

210. Press Release, Sen. Richard Durbin, As Rising Student Loan Debt Nears $1.2 Trillion, Durbin Introduces Legislation to Address Crisis (Mar. 12, 2015), http://www.durbin.senate.gov/newsroom/press-releases/as-rising-student-loan-debt-nears-12-trillion-durbin-introduces-legislation-to-address-crisis- [https://perma.cc/6P7N-7RG2] (commenting that "[p]rivate loans involve only private profit and do not have the protections that government borrowers enjoy"); *see also* Adam Levitin, Commentary, *The Examiners: Discharge Private Student Loans, But Federal Loans Have A Safety Net*, WALL ST. J. (May 11, 2015), http://blogs.wsj.com/bankruptcy/2015/05/11/the-examiners-discharge-private-student-loans-but-federal-loans-have-safety-net/ [https://perma.cc/Q46P-RLQP] ("While there are good reasons for the current treatment of federal student loan debt, private student loans should be freely dischargeable, like most other unsecured debts.").

211. Mullins et al., *supra* note 7, at 626–28.

212. *Id.* at 626–27.

213. *Id.*

214. Baker, *supra* note 90, at 1222–23.

215. Freeman, *supra* note 8, at 150; *see also* Pardo, *supra* note 12, at 2104 ("[L]egally irrelevant factors unrelated to the merits of a debtor's claim for relief (e.g., the level of experience of the debtor's attorney and the identity of the judge assigned to the debtor's case) influence the extent to which a debtor obtains a discharge of her student loans.").

216. Mullins et al., *supra* note 7, at 627; *see also* Brief of Amici Curiae Nat'l Consumer Law Ctr. & Nat'l Ass'n of Consumer Bankr. Att'ys in Support of Appellant at 3, Murphy v. U.S. Dep't of Educ. Credit Mgmt. Corp., No. 14-1691 (1st Cir. July 29, 2015) [hereinafter *Amici Curiae Brief*] (urging the court "to provide a formulation of the undue hardship standard in simple terms, that restricts consideration of extraneous and inappropriate factors not consistent with the statutory language").

debtor's actual ability to "afford to pay the debt."[217] The NCLC and the NACBA argue that the undue hardship standard should be satisfied "if repayment of the student loan would prevent the debtor from satisfying ordinary and necessary living expenses so that a debtor could not effectively 'make ends meet.'"[218]

2. Reforms Focusing on the Creditor, the Borrower, and the Loan

Because the student loan industry and the notion of the traditional student loan borrower in default have significantly changed since the discharge exception was first enacted, certain policy proposals seek to target these changed conditions rather than the statute itself. One such proposal is to place front-end protections on student loans in order to save "potential borrowers from themselves."[219] The idea is to risk-rate federal student loans—adjusting the rate to mitigate risk for the lender—so that they are priced according to various criteria, such as the default rate for a specific degree at a particular type of institution.[220] The rationale is that risk-rating would "help students understand the links between educational choices . . . and employment opportunities" without hindering access to education.[221] For example, if the default rate is higher at a for-profit institution like the University of Phoenix, but lower at a two-year community college, the loan for the for-profit institution would cost a borrower slightly more.[222]

The proposal to risk-rate only affects federal student loans because risk-rating is already applied to private student loans.[223] However, the Center for American Progress (CAP) has come up with a policy proposal applicable to all student loans.[224] CAP proposes a new financial product called the "Qualified

217. Mullins et al., *supra* note 7, at 627; *see also* Symposium, *Undue Hardship: An Analysis of Student Loan Debt Discharge in Bankruptcy*, 31 EMORY BANKR. DEV. J. 215, 231 (2015) [hereinafter *Undue Hardship*] ("If there's not enough income, that's an undue hardship.").

218. *Amici Curiae Brief*, *supra* note 216, at 9 (quoting *In re* Skaggs, 196 B.R. 865, 868 (Bankr. W.D. Okla. 1996)).

219. *Ending Student Loan Exceptionalism*, *supra* note 98, at 598.

220. *See* Mullins et al., *supra* note 7, at 629.

221. *See id.*; *see also* Yi, *supra* note 117, at 536. ("Risk-based loans encourage parties to practice self-discipline, incentivize borrowers to enter careers that are in demand, and in some cases pressure schools to keep from inflating the costs of education.").

222. *See* ANDREW GILLEN, IN DEBT AND IN THE DARK: IT'S TIME FOR BETTER INFORMATION ON STUDENT LOAN DEFAULTS 1–2, 10 (2013), http://educationpolicy.air.org/sites/default/files/publications/Defaults_CYCT-F_JULY.pdf [https://perma.cc/B8RU-9K2B] (asserting that risk-rating must be done in conjunction with an effort to increase the transparency and accuracy of student loan default data, not just by comparing institutions, but by comparing different educational paths within each institution).

223. *Important Things to Know about Private Student Loans*, SALLIE MAE, https://www.salliemae.com/student-loans/information.aspx (last visited Nov. 14, 2016) [https://perma.cc/Z7GC-Z9B2].

224. Tyler Kingkade, *Bankruptcy Should Be an Option for Some Student Loans: Report*, THE HUFFINGTON POST (Aug. 20, 2013, 4:53 PM), http://www.huffingtonpost.com/2013/08/20/bankruptcy-student-loans_n_3782816.html [https://perma.cc/9QKS-9JBS]; *see also* Valenti &

Student Loan."[225] Loans fitting this definition would be safer financial products and, therefore, would be more difficult to discharge in bankruptcy.[226] Loans that fail to meet the Qualified Student Loan standards, which include several borrower-friendly terms, would be discharged in bankruptcy in much the same way as discharges of other credit card debt.[227]

While CAP's proposal focuses only on reforming the loan, the federal government has recently chosen to focus on both the loan and the borrower.[228] President Obama's proposal for the "Student Aid Bill of Rights" directs the Secretary of Education to "issue information highlighting factors the courts have used in their determination of undue hardship, to assist parties who must determine whether to contest an undue hardship discharge in bankruptcy of a Federal student loan."[229] While the Student Aid Bill of Rights does not directly impact the student loan discharge exception, it echoes calls for a national undue hardship standard. Both ideas—CAP's proposal and Obama's—seek increased clarity and consistency in undue hardship determinations to benefit student loan debtors.[230]

The policy proposals listed above represent the most popular and recent ideas to modify the student loan discharge exception. While they differ in many crucial respects, they share a common theme: the discharge exception, as it stands now, should change.

III. Discussion

A comprehensive reform of the student loan discharge exception requires more than adopting an existing policy proposal.[231] Two problems plague the

Bergeron, *supra* note 99 (stating that the "Qualified Student Loan standards" would include "[r]easonable interest rates and fees[,] . . . [d]eferment and forbearance provisions[,] . . . [a]ccess to income-based repayment" options, and would require that the borrower be enrolled in an institution that gives them a "[r]easonable likelihood of repayment").

225. Valenti & Bergeron, *supra* note 99.

226. *Id.*

227. *Id.*

228. *See* Kieler, *supra* note 209.

229. Press Release, White House Office of the Press Sec'y, Presidential Memorandum–Student Aid Bill of Rights (Mar. 10, 2015) [hereinafter *White House Press Release*], https://www.whitehouse.gov/the-press-office/2015/03/10/presidential-memorandum-student-aid-bill-rights [https://perma.cc/GB42-KNLA].

230. *See, e.g.*, Kim Clark, *6 Ways the New 'Student Aid Bill Of Rights' Will Help Borrowers*, TIME (Mar. 10, 2015), http://time.com/money/3739531/student-aid-bill-of-rights-student-loans/ [https://perma.cc/C3NT-CNFY] ("While congressional action would be needed to make significant changes in the student loan program, President Obama has ordered the Department of Education to take steps by 2016 to make things simpler and easier for student borrowers."); Felicity Nie, *Here's How Obama's New 'Student Aid Bill of Rights' Will Affect You*, READYFORZERO BLOG (May 15, 2015), http://blog.readyforzero.com/student-aid-bill-rights-you/#.VkP_SoT1LBI [https://perma.cc/R35Z-JG79] ("While the Student Aid Bill of Rights does not offer changes to current policy, it does promise to work with [the] Consumer Protection Financial Bureau to review options and recommendations for 'possible changes to the treatment of loans in bankruptcy proceedings.'").

231. See *supra* Part II.D for a discussion of current policy proposals to reform the discharge

current proposed reforms. Either they go too far and are politically unrealistic,[232] or they do not go far enough and only address a piece of the overall problem.[233] A comprehensive, effective, and realistic reform must take into account the legislative history of the discharge exception, the evolution of student loan programs, the student borrower population, types of academic institutions, and the political landscape. Evaluating existing proposals in light of these considerations should lead to a reform that (1) repeals the 2005 BAPCPA amendment, thereby making private student loans dischargeable,[234] (2) adopts an objective national standard for undue hardship,[235] (3) reincorporates a seven-year waiting period into the discharge exception,[236] and (4) modestly risk-rates federal student loans.[237]

A. *Step One: Repeal the 2005 BAPCPA Amendment*

1. Arguments to Repeal § 523(a)(8) Versus Arguments to Repeal BAPCPA

The proposal to repeal the discharge exception (§ 523(a)(8)) in its entirety is not only the most common call for reform, but also the most controversial.[238] The ever-powerful lending industry has significant influence and lobbying power over bankruptcy laws and, specifically, the student loan discharge exception.[239] Many politicians rely, at least to some extent, on the support of the lending industry and are unlikely to back a proposal to repeal the discharge exception knowing full well that it would damage relationships with some of their biggest campaign contributors.[240] Regardless of the fact that a complete repeal might be

exception.

232. See *supra* Part II.D for a discussion of the repeal of § 523(a)(8) and CAP's proposal to create a Qualified Student Loan.

233. See *supra* Part II.D for a discussion of current policy proposals to reform the discharge exception.

234. See *supra* Part II.B.6 for a discussion of the BAPCPA. See *supra* notes 205–07 and accompanying text for a discussion of the argument to repeal the BAPCPA.

235. See *supra* Part II.B.5 for a discussion of the undue hardship standard. See *supra* notes 208–10 and accompanying text for the argument to reform the undue hardship standard.

236. See *supra* notes 114–17 and accompanying text for a discussion of the establishment and eventual abolishment of the discharge waiting period. See *supra* notes 211–14 and accompanying text for a discussion of the argument to reinstate the waiting period.

237. See *supra* Part II.A for a discussion of the development of student loan programs and the changed conditions of student loan borrowers. See *supra* Part II.D.2 for a discussion of the proposal to risk-rate federal student loans.

238. *See* Baker, *supra* note 90, at 1232 (stating that a gradual repeal would be the most "politically palatable" because an all at once repeal would "encounter enormous opposition from lenders").

239. *See, e.g.*, Jensen, *supra* note 142, at 498–99 (discussing the various entities within the lending industry that influenced bankruptcy reform); Scott, *supra* note 164, at 943 ("Specifically, this paper isolates the credit card industry as the main driving force behind BAPCPA.").

240. *See* STUDENT LOAN DEBT BOMB, *supra* note 206, at 8 (asserting that, in 2005, creditors lobbied for discharge protection to advance their self-interests by ensuring a return on their student loans and, as such, would be unwilling to allow removal of this added protection).

the best and fairest reform, given the political reality, repeal is unlikely in the foreseeable future. In addition to the political barriers, opponents of full-blown repeal argue that it goes "too far."[241] Specifically, they argue that (1) the discharge exception is justified; (2) even if it were not justified, the undue hardship test provides discharge relief for those who need it most; and/or (3) a total repeal is too costly to lenders.[242]

Although complete repeal is fairly unrealistic, arguments in favor of it nonetheless provide an understanding of how the student loan discharge exception contradicts the fundamental principles of bankruptcy.[243] Proponents of repeal leverage the history of the student loan discharge exception and the original rationale underlying the decision to treat student loans differently from other debts in bankruptcy.[244] Congress's original rationale for the discharge exception was that it was necessary in order to prevent abuse by opportunistic student debtors and that it supported "the policy objective of protecting the financial integrity of that system."[245] Proponents of repeal point to the lack of evidence to support this original justification and conclude that it is an unsubstantiated overreaction.[246]

Even the largest consumer bankruptcy advocacy organizations concede that total repeal would be an uphill battle and assert that, as a second-best option for reform, BAPCPA should be repealed, and private student loans should once again be made automatically dischargeable.[247] Private student loans differ in several key ways from student loans secured by the federal government.[248] Federal student loans give borrowers benefits such as fixed interest rates, flexible repayment plan options, and a borrowing limit.[249] Since federal student loans have built-in protections, it is logical to make discharging them in bankruptcy

241. *Ending Student Loan Exceptionalism*, *supra* note 98, at 607.

242. *Id.* at 607–10.

243. See *supra* notes 9–15 and accompanying text for a discussion of how the student loan discharge exception stands in opposition to bankruptcy's fundamental principles.

244. *See, e.g.*, LOONIN, *supra* note 88, at 29 ("The impetus for this extraordinary treatment of student loans appears mainly to have come from panic over the high default rates in the student loan programs."); STUDENT LOAN DEBT BOMB, *supra* note 206, at 8 (stating that making bankruptcy discharge for student loans different from other debt was not based on concrete evidence of systemic abuse); *Ending Student Loan Exceptionalism*, *supra* note 98, at 607 ("[T]he absence of a strong justification for the provision might be the strongest argument for its repeal.").

245. Pardo & Lacey, *supra* note 56, at 429.

246. LOONIN, *supra* note 88, at 30; *see also* STUDENT LOAN DEBT BOMB, *supra* note 206, at 8 ("These statutory changes to the bankruptcy discharge for student loans were made despite the lack of any hard evidence that there were abuses of the system.").

247. *See, e.g.*, STUDENT LOAN DEBT BOMB, *supra* note 206, at 9 (calling on Congress to immediately eliminate private student loans from the discharge exception); LOONIN, *supra* note 88, at 34 ("At a minimum, Congress should act immediately to eliminate the non-dischargeability provision for private student loans." (emphasis omitted)).

248. *Federal Versus Private Loans*, *supra* note 143 (comparing and contrasting the key differences between federal and private student loans).

249. *Id.*

more difficult on the debtor.[250] There is no similar justification for private student loans because "[p]rivate borrowers do not have the protections that government borrowers enjoy."[251] Private student loans are subject to variable interest rates (some greater than eighteen percent), require credit checks, do not impose a limit on the amount borrowed, and are much more restrictive in terms of forbearance and repayment options.[252] Private student loans, by virtue of these key features, do not differ materially from other automatically dischargeable private loans—for example, mortgages or car loans.[253]

It is not surprising that BAPCPA gave lenders added protection and profits, given that it was passed in large part due to a push from the lending industry lobby.[254] However, bankruptcy amendments that give preference to profit-seeking creditors cut against a fundamental principle of bankruptcy law—that debtors in significant financial distress are entitled to a fresh start through forgiveness of their debts.[255] The BAPCPA amendment severely undercuts this principle by making it "more difficult for student loan borrowers to get a fresh start through bankruptcy."[256] Moreover, the BAPCPA amendment skews heavily toward protecting the interests of the lending industry.[257]

The counterargument to the repeal of BAPCPA is that it would disincentivize private lenders from loaning to students, thereby decreasing available student loan funding and restricting access to higher education.[258] This fear is overstated for two reasons. First, private student loans "constitute only a small percentage of total student-loan debt."[259] Second, the willingness of the private sector to issue student loans will always vary in accordance with the market and not the current status of bankruptcy laws.[260]

250. LOONIN, *supra* note 88, at 30.

251. *Id.*

252. *Federal Versus Private Loans*, *supra* note 143.

253. *See* Baker, *supra* note 90, at 1214, 1232 ("Thus, there is no fundamental difference between student loans and mortgages that would prevent an analogy between how they would respond to changes in bankruptcy law.").

254. *See* Scott, *supra* note 164, at 945 (discussing the credit card industry's influence on BAPCPA); *see also Loonin Prepared Statement*, *supra* note 206, at 12 ("Restricting the bankruptcy safety net helps give private lenders some additional peace of mind and potentially more profits.").

255. *See Loonin Prepared Statement*, *supra* note 206, at 7, 11.

256. *Id.* at 6.

257. *See* Scott, *supra* note 164, at 945–46.

258. John O'Connor, *Make Student Loan Debt Dischargeable in Bankruptcy . . . Again*, NAT'L BANKR. FORUM (Feb. 28, 2014), http://www.natlbankruptcy.com/make-student-loan-debt-dischargeable-in-bankruptcyagain/ [https://perma.cc/GQ25-N33U] ("The original motivation for reigning in dischargeability of student loan debt centered around preserving government loans, with proponents of reform painting bleak scenarios about federal educational aid drying up if the discharge status quo carried the day.").

259. Pardo, *supra* note 12, at 2174.

260. *Loonin Prepared Statement*, *supra* note 206, at 12 ("The business of private lending has expanded and contracted based on market opportunities, not based on bankruptcy policy.").

2. Why the BAPCPA Amendment Must Be Repealed

The two proposals discussed in Part III.A.1. to reform the student loan discharge exception statute seek to (1) repeal the exception in its entirety or (2) repeal the BAPCPA amendment and make private student loans automatically dischargeable again. While the complete repeal of the exception is the best option because it would treat all creditors equally in bankruptcy and would allow the debtor the chance to start fresh,[261] there is a lack of political muscle to carry it out.[262]

On the other hand, repeal of the BAPCPA amendment is necessary for effective reform of the discharge exception. The BAPCPA amendment, despite hollow claims to the contrary, was never passed for the benefit of the student loan debtor and marked a major victory for the lending industry.[263] The BAPCPA amendment has created a situation where a debtor can take out bank loans to buy a car and automatically discharge that loan in bankruptcy.[264] Yet, a debtor who takes out a loan from the same bank for higher education can only discharge that debt by meeting a stringent undue hardship standard in a subsequent adversary proceeding.[265]

This nonsensical distinction between private loans and private student loans in bankruptcy should not stand. Although repealing the BAPCPA amendment would be an uphill political battle against lending industry forces, it is a far less drastic and more realistic proposal than repealing the exception entirely.[266] The repeal of the 2005 BAPCPA amendment is step one towards a comprehensive reform of the student loan discharge exception.

B. Step Two: Define "Undue Hardship"

Repealing the BAPCPA amendment is a necessary first step towards effective reform of the student loan discharge exception. However, that alone is not enough because it does not address the ambiguous undue hardship standard that student loan debtors seeking discharge still must satisfy.[267] Accordingly, step two of a comprehensive reform of the student loan discharge exception would

261. *See* Mullins et al., *supra* note 7, at 624–25 ("By repealing the undue hardship exception, student loans would be treated like other unsecured debts and would be presumptively dischargeable.").

262. See *supra* notes 238–40 for a discussion of the political realities that obstruct this type of bankruptcy reform.

263. *See* Scott, *supra* note 164, at 945 ("Credit card companies gain from BAPCPA because it allows them more time to collect fees and interest rates from debtors.").

264. *See* NAT'L BANKR. REVIEW COMM'N, *supra* note 151, at 207.

265. *Id.* at 207–09.

266. *See* Baker, *supra* note 90, at 1232. *Realistic* does not mean that repeal would be easy. Repealing the BAPCPA amendment would still be a challenge, especially considering the power of the credit industry lobby. See *supra* Part II.B.6 for a discussion of the legislative history leading up to the passage of BAPCPA.

267. Pardo, *supra* note 12, at 2174–75 ("Even if Congress restored the pre-2005 automatically dischargeable status of private student loans . . . this would leave a huge swath of debtors litigating their undue hardship claims for relief under a vague and indeterminate standard.").

implement a national definition for undue hardship.

Because Congress did not define undue hardship when it created the student loan discharge exception,[268] the judicially crafted tests for undue hardship (the *Brunner* test and its variations) often result in judicial subjectivity and arbitrary, inconsistent decisions.[269] Imposing a national definition for undue hardship ensures that bankruptcy courts are able to decide dischargeability of student loans in a uniform manner.[270] While many reformers (including the NCLC and NACBA) support the idea of a national undue hardship standard, not many put forth ideas as to what this new standard should be.[271]

One idea for a national standard is to use the "means test" created by BAPCPA and currently used in the Bankruptcy Code to determine a debtor's eligibility for Chapter 7 or Chapter 13 bankruptcy.[272] The means test is undoubtedly better than the current undue hardship standard because it uses objective measures to evaluate a person's standard of living.[273] However, the means test is not the best option for a national undue hardship standard because of its shortfalls, including that it is complicated and difficult for consumers and professionals to understand.[274]

A second, and superior, proposal for a national definition is to apply the definition of undue hardship as it is used in § 524(m) of the Bankruptcy Code.[275] Section 524(m) states that a debtor, in the context of a reaffirmation agreement,[276] experiences undue hardship if, considering the debtor's income, expenses, and the amount of the payment, there is not enough income to make the payment.[277] This definition has several advantages: it is straightforward,

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268. *See* Freeman, *supra* note 8, at 150.

269. *See id.* (stating that tests for undue hardship rely on the "court's ability to predict the future" and therefore have created "an unsettling amount of judicial discretion and subjectivity").

270. *See* Mullins et al., *supra* note 7, at 627.

271. *See, e.g.*, *Amici Curiae Brief*, *supra* note 216, at 14 (arguing that the court should "describe the undue hardship standard in simple terms based on the statutory language . . . . [and] describe what the undue hardship standard is, and more importantly, what it is not (emphasis omitted)).

272. Mullins et al., *supra* note 7, at 627; *see also* Scott, *supra* note 164, at 944 (stating that Chapter 7 bankruptcy allows the debtor to "dissolve eligible debt obligations" whereas Chapter 13 bankruptcy "requires debtors to repay their debts over a three to five year period").

273. *See* Scott, *supra* note 164, at 947 (stating that the means test determines that a debtor is eligible for Chapter 7 bankruptcy if their "income is below the median income of a similarly sized family in the state where they live").

274. *Id.*

275. *See Undue Hardship*, *supra* note 217, at 231 ("[W]hen Congress wants to define [undue hardship], they can do it and it's right there parked next to [the student loan discharge exception].").

276. U.S. BANKR. COURT FOR D.C., DISCUSSION OF REAFFIRMATION AGREEMENTS 1, 4 (2016), http://www.dcb.uscourts.gov/sites/dcb/files/DISCUSSION_OF_REAFFIRMATION_AGREEMENTS.pdf [https://perma.cc/Z32N-TZJ3] (defining a reaffirmation agreement as "an agreement to reaffirm a debt and that . . . the debtor will be personally liable for the debt even though the debtor has received a discharge").

277. *Id.* at 4 (explaining that if there is a presumption of undue hardship as defined by § 524(m), then the agreement is ineffective until the creditor has successfully rebutted that presumption); *see also Undue Hardship*, *supra* note 217, at 231 (explaining that the undue hardship definition in § 524(m) "is simply in a reaffirmation").

objective, and, most importantly, removes the need for judges to speculate as to the debtor's future "certainty of hopelessness."[278] As opposed to crafting an undue hardship definition from scratch, it is efficient and logical to take the definition that Congress already thought prudent to use elsewhere (in fact, right next door) in the Bankruptcy Code.[279] Implementing this national definition for undue hardship would provide a relatively easy, yet incredibly necessary, step in the discharge reform process.

C. *Step Three: Reinstitute a Seven-Year Waiting Period*

In addition to adopting an objective and straightforward undue hardship test, reinstating a waiting period is a crucial part of effectively reforming the student loan discharge exception.[280] A waiting period provides student loan debtors with an alternative to undue hardship, yet still protects lenders from "abuses by opportunistic borrowers."[281] Congress initially included a five-year waiting period in the student loan discharge exception to combat the fear that newly graduated students would discharge their debts immediately before embarking on a profitable career.[282] This fear of abuse catalyzed the 1990 modification to and 1998 repeal of the waiting period.[283]

The waiting period was originally meant to counterbalance the debtor's interest in a fresh start, insulating the creditor from abuse of the bankruptcy system.[284] Though fears of opportunistic borrowers remain unproven, it is doubtful that this stereotype will soon disappear.[285] The stereotype has survived, without evidentiary support, since the 1960s, and it must be acknowledged, so as not to be perpetuated, in the reform process.[286]

A seven-year waiting period should be included in a reform of the student loan discharge exception. The waiting period provides student debtors with some degree of flexibility for discharge, yet appeases stereotype believers by ensuring that debtors cannot declare bankruptcy immediately after receiving a diploma.[287]

278. *See Undue Hardship*, *supra* note 217, at 231.

279. *Id.*

280. Mullins et al., *supra* note 7, at 626–27.

281. *See* Yi, *supra* note 117, at 536.

282. Kevin J. Smith, *Should the "Undue Hardship" Standard for Discharging Student or Educational Loans Be Expanded?*, 18 BARRY L. REV. 333, 337–38 (2013).

283. *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971, 112 Stat. 1581, 1837; Crime Control Act of 1990, Pub. L. No. 101-647, § 3621, 104 Stat. 4789, 4964–65.

284. *See* Baker, *supra* note 90, at 1218 (discussing the history behind the 1976 version of the discharge exception and, in particular, the utility of the time lapse).

285. *See* LOONIN, *supra* note 88, at 30 ("[T]he action taken in the 1970's was an overreaction based on fears that negative reports about defaulters might undermine the fledgling student loan programs . . . . Yet, the exception remains and was even expanded, inexplicably, to private student loans in 2005.").

286. *See* Freeman, *supra* note 8, at 154–55 ("Furthermore, [Pardo and Lacey's] study concluded that the landscape of student-loan debtors is not so inundated with abusers of the bankruptcy system . . . . However, since its inception, the Code's student-loan exception has progressively become more protective of student-loan lenders and harsher in its treatment of student-loan debtors.").

287. *See id.* at 154.

Further, a seven-year waiting period is preferable to the original five-year waiting period.[288] A five-year waiting period is too short in today's society because it may take longer for graduates to find gainful employment and start repaying their student loans due to the changes in higher education institutions, student loan borrowers, and the post-2008 economic climate.[289] The seven-year waiting period addresses these changed circumstances but still allows debtors to seek discharge in a reasonable time frame. Previously, for twenty-two years, Congress saw virtue in retaining a waiting period;[290] now, Sallie Mae (the largest student lender) continues to advocate for it.[291] The waiting period should never have been removed from the student loan discharge exception and must be reincorporated as step three of this four-part comprehensive reform.

D. *Step Four: Modestly Risk-Rate Federal Student Loans*

There is no denying that the statutory language of the student loan discharge exception has its shortcomings, but a comprehensive reform should go beyond the statute to target inherent problems with the student lending industry. These inherent problems include not only irresponsible lender behavior, but also unaccountable borrower behavior.[292] There are various proposals that address these issues, but the proposal that is most effective and realistic is to risk-rate federal student loans.[293] Federal student loans escape much of the discharge exception criticism because, unlike private loans, they provide borrowers with built-in protections.[294] However, it is important that a comprehensive reform of the student loan discharge exception address both private and federal student loans since federal loans still constitute the majority of outstanding student loan debt.[295]

1. The Argument for Risk-Rating Federal Student Loans

Ironically, the features of federal student loans that borrowers find attractive—for example, no prerequisite credit check—are the same features that

288. See *supra* Part II.B.4 for a discussion of the legislative changes to the waiting period.

289. *See* Baker, *supra* note 90, at 1233–24 ("If Kantrowitz's research into the availability of student loans is correct, and a return to the pre-2005 law did not affect the availability of student loans, there would be strong justifications for continuing to undo the bankruptcy code modifications: bringing back waiting periods (after which time loans would be dischargeable), limiting the loans that were protected from discharge, and relaxing the definition of undue hardship, so that debtors with true hardship have access to discharge and/or modification of their loans in bankruptcy."); Looney & Yannelis, *supra* note 36, at 17–20 ("The changes in who borrowed and where they borrowed have important implications for the composition and credit quality of the pool of borrowers, their educational outcomes, the amount of debt borrowers accrued, and their economic well-being after enrollment.").

290. See *supra* Part II.B.4 for a discussion of the legislative changes to the waiting period.

291. Baker, *supra* note 90, at 1222–23.

292. *See Ending Student Loan Exceptionalism*, *supra* note 98, at 598–603.

293. *See id.* at 598.

294. *See Federal Versus Private Loans*, *supra* note 143.

295. Pardo, *supra* note 12, at 2174–75.

have contributed to unmanageable debt, thanks to the increasing diversity among student borrowers and the popularity of for-profit institutions.[296] Modestly risk-rating federal student loans offers a solution to the competing considerations of ensuring access to higher education while encouraging student borrowers to carefully consider where to invest in their education.[297] Risk-rating is a direct way to alert students, particularly students attending two-year and for-profit institutions, to the relative security of their educational investment.[298]

Private student lenders risk-rate loans primarily according to a student's credit score,[299] but applying this same methodology to federal loans would unduly restrict a student's ability to borrow.[300] Instead, modestly risk-rating federal student loans according to the borrower's intended educational pursuit informs the student up front of potential red flags associated with that pursuit—that is, the school they choose might not lead to their envisioned salary or employment outcome.[301] This puts responsibility on the federal government to disclose more information to student borrowers and warn them about the relative risk of their education.[302] It also places personal responsibility on student borrowers for their student loan decisions.[303]

The following example demonstrates one possibility for implementing a modest risk-rating system for federal student loans. First, schools would be classified into four broad categories: four-year nonprofit public institutions, four-year nonprofit private institutions, community colleges, and for-profit institutions.[304] Next, the government—specifically, the Treasury Department—would look at each category to determine the respective default rates, average

296. *See* BEST & BEST, *supra* note 18, at 107–11 ("Taken together, these elements—higher-risk students who borrow larger sums but rarely finish their degrees—almost guarantee that loans to for-profit students will result in higher rates of default.").

297. Mullins et al., *supra* note 7, at 629 ("Risk-based pricing would help students understand the links between educational choices, such as picking a major, and employment opportunities.").

298. *See id.*

299. *See Ending Student Loan Exceptionalism*, *supra* note 98, at 594.

300. *See id.* at 598–99 ("Unlike the private methodology, however, the government risk-rating framework must balance the objective of capturing factors relevant to repayment ability with the federal student lending program's primary goal of promoting access to education among the needy.").

301. *See id.* at 599 (arguing that the government should examine the borrower's employment prospects post-graduation, focusing on "(i) the quality of the institution attended and (ii) the course of study pursued at that institution").

302. *See* Mullins et al., *supra* note 7, at 629–30; *Ending Student Loan Exceptionalism*, *supra* note 98, at 598 ("As paternalistic as this notion might seem, it is grounded in the market-based observation that by not providing a reliable signal of the riskiness of the debt that certain borrowers are assuming, the federal government is leading them to take on too much of it for too little educational value.").

303. *See* Yi, *supra* note 117, at 536–38 ("A framework that leads to an educated but bankrupt class of individuals seems like a worse alternative than one that produces a marginally less educated but financially solvent group of people.").

304. *See* U.S. DEP'T OF TREASURY & U.S. DEP'T OF EDUC., *supra* note 46, at 7 ("Today, colleges and universities can be divided into three broad categories: public, private non-profit, and private for-profit (or 'proprietary') schools. Public institutions, which range from two-year community colleges to large graduate research institutions, are non-profit institutions that typically receive a portion of their funding directly from state and local governments.").

amount of debt per student, percentage of students employed within a year of graduation, and students' average starting salary.[305] Analyzing these statistics, the government could risk-rate each category and price loans accordingly. The difference between the loans in terms of long-term costs to the borrower should be modest—that is, just enough to signal to the borrower that their slightly more expensive loan means the educational path they are about to embark on might not be as secure as an alternative educational choice. The hope is that risk-rating federal student loans would empower students, like Shawn Brighenti,[306] to make more informed decisions about their educational debt.[307]

2. Dispensing with Alternatives to Risk-Rating

In addition to risk-rating, other proposals address the student loan industry and the ever changing population of borrowers but fall short of providing a workable solution. CAP's proposal to create a new financial product called a Qualified Student Loan is one such example.[308] Qualified Student Loans would have to meet certain benchmarks—including low interest rates and repayment plan options—in order to qualify for discharge exception protection.[309] This idea of basing the applicability of the discharge exception on whether or not a loan is "qualified" incentivizes lenders to make their loans comply with the benchmarks and promotes better information for potential borrowers.[310] But this proposal, as unique and innovative as it may be, is inferior to risk-rating because it would essentially require an overhaul of all existing student loan programs.[311] In a perfect world, Qualified Student Loans might be a realistic and effective idea for reform, but in the polarized political world of 2016, it is simply wishful thinking.

The proposal to adopt a Student Aid Bill of Rights to clarify factors used to determine undue hardship in student loan discharge exception proceedings is not so much an alternative to risk-rating, but rather a supplement.[312] Any measure that seeks to increase disclosure requirements and transparency in the student loan process should be encouraged. However, this idea would not effectuate tangible solutions to the student loan discharge exception problem.[313] Thus,

305. *See id.* at 7–11 (reporting statistics that are relevant to the analysis for risk-rating, including enrollment trends, composition by institution type, and education rates by gender and age).

306. *See* Brighenti*, supra* note 50.

307. *See* Yi, *supra* note 117, at 536.

308. Valenti & Bergeron, *supra* note 99.

309. *Id.*

310. *Id.*

311. *See id.* ("Congress and regulators could establish parameters for a new financial product—what we call a Qualified Student Loan."); *see also* Kingkade, *supra* note 224 ("'Ultimately this is something where Congress will have to act,' said Bergeron . . . . [T]his reform is unlikely to be something the Obama administration could implement on its own.").

312. *See* Kieler, *supra* note 209.

313. Nie, *supra* note 230 ("While the Student Aid Bill of Rights does not offer changes to current policy, it does promise to work with Consumer Protection Financial Bureau to review options and recommendations for possible changes to the treatment of loans in bankruptcy proceedings." (internal quotation marks omitted)).

while a Student Aid Bill of Rights may be a good idea, it is not an effective discharge exception reform.

3. Risk-Rating Federal Student Loans Must Be Step Four of Reform

A comprehensive reform of the student loan discharge exception must attack the student loan debt problem from all sides; this includes addressing both the increasingly diverse student borrower population and the institutions they attend.[314] The rise of for-profit institutions has contributed to an increase in outstanding student loan debt and higher rates of default.[315] Despite this, the federal government has continued issuing student loans without warning for-profit borrowers that they are about to incur potentially risky debt.[316]

Federal loans should be modestly risk-rated by taking into account both the type of academic institution and the borrowers' prospective ability to repay their student loans.[317] This front-end protection will ensure that, before incurring even a penny of debt, student borrowers are given information on their financial outlook.[318] This is a more just system because the risk-rated loans would signal to a student borrower the financial risk associated with their chosen educational program. Students would be able to attend any academic institution they desire; however, the loan they take out may be subject to, for example, higher interest rates, if their academic institution is plagued by poor employment outcomes and graduation statistics. Modestly risk-rating federal student loans makes the federal government accountable for its lending behavior and, at the same time, imposes personal responsibility on the borrower. Risk-rating will also shed light on academic institutions that seek to dupe students into taking out loans for a career that might never be realized.[319] Risk-rating federal student loans recognizes that the world of higher education has changed significantly since 1958, when government-led student loan programs were first created.[320] As such, risk-rating is an integral step in the comprehensive reform of the student loan discharge exception.

314. *See* U.S. DEP'T OF TREASURY & U.S. DEP'T OF EDUC., *supra* note 46, at 18–24 ("[T]he many dimensions of college preparedness and educational quality are part of the larger conversation on educational attainment.").

315. *See id.* at 22–24.

316. *See id.* at 21–24.

317. *Ending Student Loan Exceptionalism*, *supra* note 98, at 598–99.

318. *See id.* ("A carefully designed risk-based pricing framework" can "mitigate each of the four problems of higher education economics—increasing tuitions, rising indebtedness, mounting defaults, and declining returns—largely by saving potential borrowers from themselves.").

319. Yi, *supra* note 117, at 515 (stating that as a result, "financing an education will no longer be the bait-and-switch that it is for many students today").

320. *See Ending Student Loan Exceptionalism, supra* note 98, at 587–88 ("The envisioned risk-rating framework calls for the federal government to price its student loans according to the institution a borrower attends and the course of study pursued at that institution."); Somers & Hollis, *supra* note 24, at 457 ("The first student loans were created by the National Defense Education Act of 1958 (the 'NDEA'), which provided fellowships for graduate study and long-term, low-interest loans to needy undergraduates." (footnote omitted)).

IV. CONCLUSION

The student loan discharge exception was first introduced in 1976 when the opportunity to obtain higher education was largely reserved for affluent young men. Now, individuals of all ages and socioeconomic standing can pursue various types of higher education in large part because of the accessibility of student loan funding. What started as essentially a student loan pilot program for targeted professions in 1958 has evolved into a massive public and private student lending market. It is safe to say that the student loan world Congress had in mind in 1976, when it adopted the student loan discharge exception, is not the student loan world we live in today.

Despite this stark contrast, in the last forty years, Congress has failed to adapt the student loan discharge exception to fit modern conditions. Legislative developments since 1976 have only expanded the scope of the discharge exception and made it more burdensome for student loan debtors. Reform is long overdue, and it needs to reflect the current state of student lending. Keeping in mind that politics and lending industry players will always play roles in the legislation of the student loan discharge exception, a comprehensive, effective, and realistic reform should (1) repeal the 2005 BAPCPA amendment, (2) define "undue hardship" using the objective test from § 524(m) of the Bankruptcy Code, (3) reinstate a seven-year waiting period, and (4) modestly risk-rate federal student loans.