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## The Policy of Federal Student Loans: Looking Backward and Looking Forward

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## The Policy of Federal Student Loans: Looking Backward and Looking Forward

Aaron Mohr<sup>1</sup>

Federal student loans are a critical linchpin of American higher education.<sup>2</sup> Federal student loans progressed from rare and means-tested<sup>3</sup> to prevalent and universally available.<sup>4</sup> Loan volume and amounts continue to rise in tandem with rising national higher education costs.<sup>5</sup> Student debt is now the second largest source of household debt behind only home mortgages.<sup>6</sup>

In the past fifty years, income for college graduates rose about 50%,<sup>7</sup> while average student loan debt rose one hundred 83% in just a twenty-three-year period ending in 2012.<sup>8</sup> In other words, student debt rose three times as much as income and in half the time. The

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1. Washington University School of Law, graduating May, 2017.

2. Roots, *infra* note 5, at 504 (noting student loans “brought on a deluge of federal intrusion into student financing of higher learning”).

3. *Id.* at 504–05. *See also* Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended in scattered sections of 20 U.S.C.).

4. Roots, *infra* note 5, at 505–06. *See also* Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992) (codified as amended in scattered sections of 20 U.S.C.).

5. Palma Joy Strand, *Education-As-Inheritance Crowds Out Education-As-Opportunity*, 59 ST. LOUIS U. L.J. 283, 295 (2015). Tuition rose an average of 4.5% above inflation at public higher education institutions during a ten-year period from 1998 to 2009. *Id.* In absolute costs, average tuition rose over two hundred 34% from 1980 to 1995. Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 507 (2000).

6. Donghoon Lee, *Household Debt and Credit: Student Debt*, FED. RES. BANK N.Y., at 5–7 (Feb. 28, 2013), <http://www.newyorkfed.org/newsevents/mediaadvisory/2013/Lee022813.pdf>.

7. Strand, *supra* note 5, at 283. This number is inflation-adjusted, real value change, calculated using the federal Bureau of Labor Statistics’ CPI Inflation Calculator. *CPI Inflation Calculator*, BUREAU LAB. STAT., <http://data.bls.gov/cgi-bin/cpicalc.pl> (last visited Jan. 20, 2015).

8. Average student loans in 1989 were \$8,700. Strand, *supra* note 5, at 295. In 2012, college graduates with loans averaged a \$29,400 balance. Robert C. Cloud & Richard Fossey, *Facing the Student-Debt Crisis: Restoring the Integrity of the Federal Student Loan Program*, 40 J.C. & U. LAW 467, 468 (2014). Adjusted for inflation, the 2012 value of 1989 loans is \$16,108. *CPI Inflation Calculator*, *supra* note 7.

expansion of federal student loans through congressional action<sup>9</sup> coincided with a tightening of the requirements for student loan discharge in bankruptcy: from no additional requirements,<sup>10</sup> to the much maligned “undue hardship” standard,<sup>11</sup> to removing time limitations of collections,<sup>12</sup> and finally to allowing federal benefit garnishment to repay student loans.<sup>13</sup> The lack of a congressional definition of undue hardship also led to a profusion of judge-made law, with a consensus definition still out of reach today.<sup>14</sup>

Rising student loans are a national concern because, as stated above, education costs—the impetus for student loans—greatly outpace the growth in real wages. Taken to their logical extreme, rising federal student loan balances will reach a point when the economic benefit will outweigh the cost. While college graduates average over \$1 million more earnings throughout their careers than high school graduates,<sup>15</sup> potential loan balances of \$100,000 or more may be enough to deter large swaths of students from pursuing higher education, even though they are leaving future earnings on the table.<sup>16</sup> If federal student loans lead to an inability or unwillingness to

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9. See Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965).

10. See Nancy H. Kratzke, *The Disparate Treatment of Student and Family Farmer Debtors: Suggestions for Reform of Bankruptcy Policy*, N. ILL. U. L. REV. 25, 27 (1995).

11. 11 U.S.C. § 523 (a)(8) (LEXIS through Pub. L. No. 114-327).

12. See Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (1998).

13. See Debt Collection Improvement Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified at 31 U.S.C. § 3716(c)(3)(A)(i) (2012)).

14. Cloud & Fossey, *supra* note 8, at 475–76. See also Robert C. Cloud, *When Does Repaying a Student Loan Become an Undue Hardship?*, 185 EDUC. L. REP. 783, 784–85 (2004).

15. Jennifer C. Day & Eric C. Newburger, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings*, U.S. CENSUS BUREAU, at 3–4 (2002), <http://www.census.gov/prod/2002pubs/p23-210.pdf>.

16. The wealth gap between high school and college graduate accumulates most during peak earning years: during the late-career stage. *Id.* at 4 (disparate earning trajectories, i.e., salary divergence over time, accounts for some of the lifetime earning disparity). Entry-level wage differences are less pronounced across education levels. Heidi Shierholz et al., *The Class of 2014: The Weak Economy Is Idling Too Many Young Graduates*, ECON. POL’Y INST., at 18 (2014), <http://www.epi.org/files/2014/Classof2014FINAL.pdf> (citing data that new high school graduates from age seventeen to twenty made around \$20,400, while college graduates from age twenty-one to twenty-four made approximately \$35,300, in 2014).

pursue degrees, America fails in its core democratic value of equal opportunity education—the very impetus for expanding loans.<sup>17</sup>

Solving the issue of rising student loan balances first requires an examination of possible causes. Some scholars suggest that the very existence of loan programs leads to increasing demand and ultimately continued expansion of the loans available to be borrowed.<sup>18</sup> Since federal student loans fund higher education, and higher education costs have increased dramatically,<sup>19</sup> many posit increasing tuition is driving loan increases.<sup>20</sup> Finally, other academics suggest that the great difficulty in discharging loans in bankruptcy prevents hopelessly uncollectible debts from being purged from the program, in turn raising the national aggregate loan balance higher.<sup>21</sup>

The proposal suggested in this Note attempts to hone in on the root cause of loan increases: higher education costs. Loans do not exist without a reason to borrow. While restructuring loans and loosening bankruptcy standards may alter loan balances, they are more akin to treating symptoms than treating the underlying disease. Federal student loans exist to pay tuition and other expenses, so it follows a permanent solution must address, on some level, the costs for which we borrow. This Note proposes setting maximum loan amounts to the seventy-fifth percentile of college costs in the U.S. This formula would not permit annual allowable growth, though it would adjust with inflation. Exceptions could be made for schools that prove exceptional value.

Part I of this Note outlines the history of federal student loan programs, the development of bankruptcy law to complement loan programs, and the emerging student loan crisis. Part II analyzes the most pertinent factors influencing loans and existing proposals to

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17. H.R. Rep. 102-447, at 7 (1992). *Id.* (discussing the national goal of equal education).

18. *See, e.g.,* Roots, *supra* note 5, at 504–05.

19. *Id.*

20. *Id.* at 507.

21. *Id.* at 515. A sub-theory of this cause posits that many debtors with meritorious claims for discharge of their student loans do not attempt to discharge them because of the expense of the separate bankruptcy hearing required for adjudication. Rafael I. Pardo & Michelle R. Lacey, *The Real Student-Loan Scandal: Undue Hardship Discharge Litigation*, 83 AM. BANKR. L.J. 179, 190–91 (2009). Additionally, these hearings are fraught with uncertainty due to the lack of a consensus definition of undue hardship. *Id.*

alter the student loan landscape. Part III proposes a new solution to improve the long-term viability of the federal student loan programs.

### I. HISTORY

The transformation of federal student loans from a minor federal program to a ubiquitous part of higher education began in 1958 with the National Defense Education Act.<sup>22</sup> This investment in education during the height of the space race was at least in part to encourage Americans to pursue science and mathematics and thereby counter Russian advances during the ongoing Cold War.<sup>23</sup> Given the success of these initial federal loans, the 1965 Higher Education Act included an expanded Guaranteed Student Loan Program.<sup>24</sup> These loans, the inception of Stafford Loans,<sup>25</sup> were available to the poorest students who needed outside financing to afford higher education.<sup>26</sup>

With college costs rising<sup>27</sup> and loan financing unavailable to most middle-class families,<sup>28</sup> the political climate aligned for yet another expansion of federal student loans.<sup>29</sup> The Middle-Income Student Assistance Act of 1978 followed.<sup>30</sup> This Act worked within the existing federal framework of the Stafford Loan program (and minor

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22. National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958) (repealed 1970). The 1958 Act's authorized annual loans totaled \$47.5 million. *Id.* In recent years, outstanding federal student loans exceeded \$1 Trillion. Rohit Chopra, *A Closer Look at the Trillion*, CONSUMER FIN. PROT. BUREAU (Aug. 5, 2013), <http://www.consumerfinance.gov/blog/a-closer-look-at-the-trillion/>.

23. Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 549–50 (2013).

24. Cloud & Fossey, *supra* note 8, at 473. *See generally* Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified throughout sections 20 and 42 U.S.C.).

25. Cloud & Fossey, *supra* note 8, at 473.

26. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1232 (1965). This requirement by Congress was eventually codified as disallowing grants to those with a family income exceeding \$25,000. 20 U.S.C. § 1078(A)(2)(B) & (D) (1976).

27. H.R. REP. NO. 95-951, at 2 (1978).

28. *See supra* note 26 and accompanying text.

29. Cloud & Fossey, *supra* note 8, at 473.

30. Middle-Income Student Assistance Act, Pub. L. No. 95-566, 92 Stat. 2402 (1978). It provided for “financial assistance to millions of middle-income students who are now ineligible for most financial aid programs. In accomplishing this objective the level of federal assistance to students from low-income families is not reduced. It is, in fact, also increased.” H.R. REP. NO. 95-951, at 3 (1978).

grant programs) to provide up to \$4.7 billion in loans in 1979 alone.<sup>31</sup> The effect was immediate: within three years, federal student loans tripled.<sup>32</sup> The periodic expansion continued again with the Higher Education Amendments of 1992.<sup>33</sup> These Amendments were part of the frequent reauthorizations of the Higher Education Act, but in 1992 also included new loan programs: the umbrella Federal Family Education Loan Program,<sup>34</sup> Family PLUS Loans,<sup>35</sup> Federal Direct Loans,<sup>36</sup> and Federal Perkins Loans.<sup>37</sup>

Student loans and their increasing availability marked a gradual but fundamental shift in federal education funding.<sup>38</sup> In 1965, the landmark Higher Education Act appropriated 68% of its funds to institutional aid for expenses like physical improvements, and only 32% to student aid.<sup>39</sup> By 1992, the Higher Education Amendments to the Act funneled 97% of appropriations to student aid.<sup>40</sup> Despite this shift, an enduring goal remained: equal opportunity to attain higher education.<sup>41</sup>

Institutional aid, student grants, and student loans all promote this goal, however, student loans present a distinct quid pro quo: in exchange for opportunity, students promise to tap into their future

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31. *Id.*

32. MICHAEL MUMPER, REMOVING COLLEGE PRICE BARRIERS: WHAT GOVERNMENT HAS DONE AND WHY IT DOESN'T WORK 90 (1996).

33. Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992).

34. *Id.* at § 411-32.

35. *Id.* at § 418. This expansion allowed “parents of a dependent student” to enroll in (graduate) PLUS loans, thereby expanding education loans beyond individuals directly enrolled in higher education. *Id.*

36. *Id.* at § 451. This is the William D. Ford Program. See generally *Direct Loans: The William D. Ford Federal Direct Loan Program*, U.S. DEP’T OF EDUC., <http://www2.ed.gov/offices/OSFAP/DirectLoan/index.html>.

37. *Id.* at § 461-68; Cloud & Fossey, *supra* note 8, at 474. See generally *Perkins Loans*, U.S. DEP’T OF EDUC., <https://studentaid.ed.gov/sa/types/loans/perkins>.

38. Congress noted in 1992, the Higher Education Act transmuted, “from an Act which primarily supported higher education through the purchase of things, such as buildings and books,” into “primarily . . . student aid programs.” H.R. REP. NO. 102-447, at 7 (1992).

39. *Id.*

40. *Id.* at 8.

41. *Id.* at 7. Equal opportunity in education was heralded long before federal student loans were proposed. *Id.* President Truman, through his Commission on Higher Education, President Eisenhower, through his Committee on Education Beyond the High School, President Johnson, and President Nixon all expressed an important interest in higher education opportunity. *Id.*

success and repay the government and taxpayers.<sup>42</sup> To implement this reciprocity and to prevent abuse, federal student loans are easily obtained<sup>43</sup> and contain advantageous terms,<sup>44</sup> but are exceedingly difficult to discharge in bankruptcy.<sup>45</sup> The first Higher Education Act in 1965 did not have a higher standard for discharge of student loans in bankruptcy than was ordinary for other debts in such proceedings.<sup>46</sup> By the 1970s, however, Congress became worried students were cheating the system by declaring bankruptcy before beginning work, thereby eliminating or reducing federal loan repayments.<sup>47</sup> To combat this, an undue hardship standard<sup>48</sup> was included in the Education Amendments of 1976.<sup>49</sup> Despite continuing debate in Congress of whether educational debt should be treated differently than other debt,<sup>50</sup> the undue hardship standard (when discharging federal student loans five years or less after repayment begins)<sup>51</sup> was retained in the 1978 Bankruptcy Reform Act.<sup>52</sup> The 1978 Act took the 1976 reforms and codified them directly into the Bankruptcy Code.<sup>53</sup> Congress acted again in 1990<sup>54</sup> and 1998,<sup>55</sup> first

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42. Cloud & Fossey, *supra* note 8, at 475.

43. Robert C. Cloud, *Offsetting Social Security Benefits to Repay Student Loans: Pay Us Now or Pay Us Later*, 208 EDUC. L. REP. 11, 21 (2006).

44. Federal student loans do not require a co-signor, have relatively low interest rates, contain hardship deferment possibilities, and can be eligible for income-based repayment schemes. Cloud & Fossey, *supra* note 8, at 474–75.

45. U.S. Bankruptcy Code requires a debtor to demonstrate “undue hardship” before student loans may be discharged. 11 U.S.C. § 523 (a)(8) (LEXIS through Pub. L. No. 114-327). Lacking a legislated definition of undue hardship, courts have generally defined this term as a high bar for discharge, ranging from “certainty of hopelessness,” to something more than passing financial instability, even if severe. Cloud, *supra* note 14, at 784–85.

46. Nancy H. Kratzke & Thomas O. Depperschmidt, *The Disparate Treatment of Student and Family Farmer Debtors: Suggestions for Reform of Bankruptcy Policy*, 16 N. ILL. U. L. REV. 25, 27 (1995).

47. *In re Pelkowski*, 990 F.2d 737, 742 (3d Cir. 1993).

48. “[S]uch loan may be released only if the court in which the proceeding is pending determines that payment from future income of other wealth will impose an *undue hardship* on the debtor or his dependents[.]” The Educational Amendments of 1976, Pub. L. No. 94-482, tit. I § 127(a), 90 Stat. 2081, 2141 (1976) (emphasis added) (codified at 20 U.S.C. § 1087-3) (repealed 1978). This undue hardship provision lives on in the present-day U.S. Bankruptcy Code, 11 U.S.C. § 523(a)(8).

49. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219, 1232 (1965).

50. *In re Pelkowski*, 990 F.2d at 742.

51. Higher Education Act of 1965.

52. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2591 (1978).

53. *Id.* (codified throughout sections 11 and 20 of the U.S. Code).

increasing the undue hardship standard limit to seven years, and then eliminating the time limitation altogether.<sup>56</sup> Undue hardship remains, to this day, the standard to discharge federal student loans in bankruptcy.<sup>57</sup>

With the undue hardship standard firmly entrenched for federal student loans in bankruptcy proceedings, Congress extended this approach to private student loans in 2005.<sup>58</sup> Later in 2007, Congress added a few alternatives to full student loan debt repayment with the College Cost Reduction and Access Act (CCRAA),<sup>59</sup> including income-based repayment<sup>60</sup> and even loan forgiveness,<sup>61</sup> but these alternatives were supplementary, not replacements for traditional student debt with its difficult discharge requirements.

Except for the recent alternatives, public and private student loan relief relies on discharge via the undue hardship standard written into the U.S. Bankruptcy Code at 11 U.S.C. § 523(a)(8).<sup>62</sup> While continued emphasis on undue hardship ought to compel clear

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54. Crime Control Act of 1990, Pub. L. No. 101-647, § 3621(1), 104 Stat 4789, 4964 (1990).

55. Higher Education Amendments of 1998, Pub. L. No. 105-244, § 971(a), 112 Stat. 1837 (1998).

56. 11 U.S.C. § 523(a)(8) (LEXIS through Pub. L. No. 114-327).

57. *Id.*

58. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (2005) (amending 11 U.S.C. § 523(a)(8) to include: “any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986”).

59. College Cost Reduction and Access Act of 2007, Pub. L. No. 110-84, 121 Stat. 784 (2007).

60. The CCRAA amended the income-contingent repayment plan to make it available for more types of loans and capped loan payments at 15% of a borrower’s adjusted gross income. H.R. REP. 110-210.

61. The committee that drafted the bill took a tailored approach to loan forgiveness (as opposed to the wide availability of loans generally) by limiting it to public service workers. *Id.* “These targeted professions include: first responders, law enforcement officers, firefighters, nurses, public defenders, prosecutors, early childhood educators, librarians, and other public sector employees.” *Id.* The generosity of partial or complete loan forgiveness for these public sector employees is an attempt to spur students into careers of national need. *Id.* Where student loans were once directed to boost America’s performance in the science and technology-laden space race, today we see emerging federal education incentives directed toward contemporary areas of need. Specifically, \$1,000 is forgiven for each year served in designated jobs, up to \$5,000 total, and/or total Direct Loan forgiveness is available for “public sector employees” after ten years on the job. *Id.*

62. 11 U.S.C. § 523(a)(8).



definitions for this legal term of art, “undue hardship” was statutorily undefined in the Education Amendments of 1976<sup>63</sup> and remained undefined the Bankruptcy Reform Act of 1978.<sup>64</sup>

In the absence of a legislated definition of undue hardship, courts imbue the term with what some scholars believe are unreasonably difficult conditions for discharging student loan debt in bankruptcy.<sup>65</sup> Four main tests have emerged from the federal circuit and district courts for determining undue hardship: the *Johnson* test,<sup>66</sup> the totality of circumstances test,<sup>67</sup> the *Brunner* test,<sup>68</sup> and the *Bryant* poverty test.<sup>69</sup> The *Brunner* test is the most widely embraced of the four,<sup>70</sup> the Third, Seventh, and Ninth Circuits adopted it directly, while the Fifth, Sixth, Tenth, and Eleventh use it to varying degrees.<sup>71</sup> The three-part *Brunner* test is:

(1) [T]hat 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

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63. Educational Amendments of 1976, Pub. L. No. 94-482, tit. I § 127(a), 90 Stat. 2081, 2141 (1976).

64. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2591 (1978).

65. Richard Fossey, *The Certainty of Hopelessness: Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*, 26 J.L. & EDUC. 29, 29, 48 (1997).

66. *In re Johnson*, 5 Bankr. Ct. Dec. 532, 59–60 (Bankr. E.D. Pa. 1979) (applying a three-contingent-part mechanical, good faith, and policy test). At its most basic, the test asks: will the debtor be able to repay the loan when balanced with living expenses? Was the debtor negligent or irresponsible with financial planning? If yes, would a theoretical lack of negligence or irresponsibility alter the first (mechanical) question? Finally, is it clear the debtor is undergoing bankruptcy proceedings solely to discharge student loan debt or has the debtor clearly benefitted from the education? *Id.*

67. *Andrews v. S.D. Student Loan Assistance Corp.*, 661 F.2d 702 (8th Cir. 1981) (vacating and remanding for further fact-finding).

68. *In re Brunner*, 46 B.R. 752, 756 (Bankr. S.D.N.Y. 1985), *aff'd sub nom. Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395 (2d Cir. 1987) (per curiam).

69. *Bryant v. Pa. Higher Educ. Assistance Agency*, 72 B.R. 913, 915 (Bankr. E.D. Pa. 1987) (proposing a test “to analyze the income and resources of the debtor and his dependents in relation to federal poverty guidelines”). The district court stated the easy application, definite objectivity, and use of an existing federal benchmark would eliminate the need for complex totality-of-circumstances analyses in all but the most unusual scenarios. *Id.* at 915–18. The district court felt judges should avoid moral adjudication on others’ finances whenever possible. *Id.* at 918.

70. Cloud & Fossey, *supra* note 8, at 479.

71. *Id.*

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.<sup>72</sup>

As if the underlying complexity of the doctrine were not enough, undue hardship discharge determinations also must be filed as an adversary proceeding—effectively a small-scale litigation within the ongoing bankruptcy proceeding.<sup>73</sup> This is an expensive proceeding with a high risk of losing.<sup>74</sup> The irony of the discharge procedure is that those suffering legitimate undue hardship are the least likely to be able to afford adequate representation necessary for success in adversarial litigation contexts.<sup>75</sup>

For better or worse, federal student loans have become an integral part of the United States' educational system, with over two-thirds of higher education enrollees depending on loans to pay for some portion of their education.<sup>76</sup> In recent years, the numbers of student borrowers, the size of loans, and the respective portion of household debt, have all risen precipitously.<sup>77</sup> From 2004 to 2012, outstanding loans increased nearly three-fold to reach \$966 billion,<sup>78</sup> with a 70% escalation in the number of loans over the same time period.<sup>79</sup> Presently, federal student loans exceed \$1 trillion.<sup>80</sup> Scholars postulate many different reasons<sup>81</sup> for the recent loan surge, including

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

73. Fed. R. Bankr. P. 7001(6); Pardo & Lacey, *supra* note 21, at 188.

74. NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 212 (1997), <http://govinfo.library.unt.edu/nbrcreport/07consum.pdf>.

75. *Id.* at 211–12.

76. Jeffrey J. Williams, *Academic Freedom and Indentured Students: Escalating Student Debt is a Kind of Bondage*, 98 ACAD. 12 (2012). See also Inst. for College Access & Success, *Student Debt and the Class of 2013*, at 1 (Nov. 2014), <http://ticas.org/sites/default/files/legacy/fckfiles/pub/classof2013.pdf> (69% of 2013 college graduates had student loan debt, averaging \$28,400).

77. Lee, *supra* note 6, at 7 (since 2008, student loans have surpassed home equity lines of credit, auto loans, and credit as a leading share of American debt second only to home mortgages).

78. *Id.* at 9. This number continues to rise. Chopra, *supra* note 22.

79. Lee, *supra* note 6, at 9.

80. U.S. Gov. Accountability Office, *Federal Student Loans: Education Could Do More to Help Ensure Borrowers Are Aware of Repayment and Forgiveness Options*, at 1 (Aug. 2015), <http://www.gao.gov/assets/680/672136.pdf>.

81. *Id.* Lee suggests increases in higher education matriculants, parental loans on behalf of students, longer time-to-completion of programs, common deferment of payments, and the

after-effects of the 2008–09 economic recession.<sup>82</sup> It is unclear what ultimate repercussions will result from America’s continued and increased reliance on student loans. Emerging trends, however, are not positive: as loans surge, so does the percentage of debtors behind on payments.<sup>83</sup> Further, when examining only loans ripe for repayment, i.e., excluding loans not yet due, over 30% of loans are delinquent.<sup>84</sup> The historic discharge rate for federal student loans is quite low,<sup>85</sup> but if 30% of borrowers are genuinely unable to repay,<sup>86</sup> this may increase discharge rates causing billions of dollars in losses to the programs.<sup>87</sup>

## II. ANALYSIS

### A. *Undue Hardship*

Scholars often critique federal student loans because section 523(a)(8) of the Bankruptcy Code—the undue hardship standard for discharge<sup>88</sup>—creates uncertainty<sup>89</sup> and generally sets such a high bar that it deters those facing genuine hardship from requesting discharge.<sup>90</sup> Despite frequent criticism and a lack of evidence of

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inability to discharge all contributed to the rise of student loan debt in the 2000s. Lee, *supra* note 6.

82. Recession-based effects may include unemployed individuals unable to make loan payments and students postponing entering the job market, instead attending more advanced school and acquiring additional loan debt. Cloud & Fossey, *supra* note 8, at 469, 493.

83. Lee, *supra* note 6, at 11 (summarizing 2004–12 data showing student loan delinquency—ninety days late—increasing across all age group from less than 10% to 17%).

84. *Id.* at 15. Additionally, as of September 2014, an estimated \$103 billion of over \$1 trillion debt was in default. *Federal Student Loans*, *supra* note 80, at 1.

85. Janet Kosol, *Running the Gauntlet of “Undue Hardship”—The Discharge of Student Loans in Bankruptcy*, 11 GOLDEN GATE U. L. REV. 457, 462 (1981).

86. Lee, *supra* note 77 at 15. To be clear, Lee’s presentation does not suggest 30% of loan holders would rise to the level of undue hardship, as required for bankruptcy discharge. In fact, the challenging undue hardship standard is a major hurdle. Fossey, *supra* note 65, at 34 (discussing the difficulty of the standard).

87. Cloud & Fossey, *supra* note 8, at 468 (noting approximately \$1.2 trillion of outstanding federal student loan debt; a 30% discharge in bankruptcy proceedings would therefore represent \$300 billion).

88. 11 U.S.C. § 523(a)(8) (2012).

89. *See supra* note 45.

90. Pardo, *supra* note 21, at 190–91.

student loan abuse, the standard persists.<sup>91</sup> Academics and scholars nearly all support abolishing the undue hardship standard.<sup>92</sup> Given that discharge rates are currently low, however, this change would impact only a small portion of loans—those owed by debtors entering bankruptcy—leaving most debtors unaffected.<sup>93</sup> If loan discharge became more commonplace, however, debtors would default *en masse* and federal taxpayers would bear education costs. Fear of this sort of loan program collapse led to the initial undue hardship standard and its subsequent expansions.<sup>94</sup>

### B. Education Cost

The next two issues weighing on student loans, higher education cost and loan availability, present a chicken-and-egg style dilemma because they appear intractably intertwined. Does increasing higher education cost lead to escalating loan usage, or does loan access drive up tuition and associated spending? Colleges and universities have lined up largely in support of the former assertion<sup>95</sup> while many other

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91. Kosol, *supra* note 85, at 462 (\$17 million was discharged from 1969 to 1975, which was a minute fraction of the total \$7 billion outstanding at the time).

92. *See, e.g.*, Pardo, *supra* note 21, at 235; Cloud & Fossey, *supra* note 8, at 497.

93. Pardo & Lacey, *supra* note 21, at 181. A recent General Accounting Office study established that the discharge rate was less than 1% of all federal loans issued. *Id.*

94. Cloud & Fossey, *supra* note 8, at 477–78 (describing the impression in Congress that student loan holders might attempt to defraud taxpayers through loan discharge).

95. Colleges suggest several reasons, exclusive of loan availability, why tuition has increased dramatically, including: “new demands by parents and students for computers and other expensive amenities, increased competition for a shrinking pool of college-age students, expanded efforts to diversify the student body, higher financial-aid costs borne by colleges and universities, heightened competition for quality faculty,” necessary systems upgrades, and a perception that price is directly proportional with quality. R. Paul Guerre, *Financial Aid in Higher Education: What's Wrong, Who's Being Hurt, What's Being Done*, 17 J.C. & U.L. 483, 486–87 (1991). Governmental changes, including reduced public education funding and tax code changes (diminishing charitable giving), may also increase funding reliance on tuition revenues. *Id.* at 488. Other scholars use an economic framework to explain that tuition is not driven by loans: they say the market for education is inelastic because increasing numbers of people are going to college while the spots at the best and most expensive schools have not increased, keeping demand constant and incentivizing schools to raise prices. William S. Howard, *The Student Loan Crisis and the Race to Princeton Law School*, 7 J.L. ECON. & POL'Y 485, 496–97 (2011). Furthermore, scholars indicate inelasticity exists because education is a luxury good, institutions are driven to improve national rankings by spending money on ranking factors, the education sector is not a free market because of heavy regulation, for example,

observers point to the latter.<sup>96</sup> Both sides acknowledge inelastic education demand, i.e., students attending regardless of cost, but draw different conclusions about why it exists.<sup>97</sup> The case for examining higher education as a luxury good<sup>98</sup> and thereby tuition driving loans is particularly compelling. The most expensive and prestigious schools derive value by providing social status, excellent career opportunities, and significant networking.<sup>99</sup> To maintain their effectiveness as opportunity generators, they must remain exclusive (largely to attract lucrative employers), and exclusivity ensures consistent, unwavering demand regardless of price.<sup>100</sup> Where race, gender, or last name once served a gatekeeping function into the highest ranks of society, now a handful of exclusive degrees from America's best institutions serve the same purpose.<sup>101</sup> The tremendous social and personal advantages conferred by such degrees make them luxury goods with virtually no limit to what they charge students.<sup>102</sup> Federal research tentatively points in the other direction—to loan availability as spurring higher tuition.<sup>103</sup> One

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accreditation and statutory requirements, and admission of previously marginalized classes of people in unprecedented numbers. *Id.* at 497.

96. One economic interpretation implies inelastic education demand (and the resulting price insensitivity) results from delayed payment for education thanks to loans. Roots, *supra* note 5, at 505–06. As a result, colleges raise prices because they are able to do so without dampening attendance. *Id.* Additionally, while colleges avoid framing tuition increases as a consequence of loan availability, one college leader directly told a congressional committee federal loans led to growing tuition. *Id.* at 507–08. Anecdotally, “[i]n the 1990’s, when Republicans in Congress threatened to enact tuition cost controls if schools did not rein in costs, tuitions immediately began to rise more moderately.” *Id.* A congressional threat to loans and subsequent moderation of tuition ostensibly demonstrates that loans drive tuition and not vice versa. Further, although some argue decreased state funding led to more loan-funded tuition, one scholar asserts state de-funding of education occurred because states saw federal student loans as a method to off-board state expenses. *Id.* at 505.

97. *See supra* notes 95–96.

98. Howard, *supra* note 95, at 497–98.

99. *Id.*

100. *Id.* at 498–99.

101. *Id.* at 498.

102. *Id.* at 497–98. Ironically, the most prestigious institutions, for example Harvard, charge some of the highest tuitions despite having large endowments and a great ability to leverage institutional resources to reduce student expenses. *See generally Harvard at a Glance*, HARV. U., <http://www.harvard.edu/about-harvard/harvard-glance> (last visited Nov. 17, 2016) (total undergraduate cost of \$63,025 for 2016–17, an endowment of \$37.6 billion in 2015, and over 55% of undergraduates receive scholarships averaging \$50,000).

103. The Congressional Research Service conducted a literature review but said it could

federal agency found increases in federal student aid precipitated increases in tuition by schools relying most on this aid for revenue,<sup>104</sup> while another study by a different agency was inconclusive.<sup>105</sup>

Regardless of whether tuition growth propels federal student loan growth or the converse is true, the interrelatedness yields many solutions attacking one variable to limit the other. Some directly regulate tuition, including: paying for public education,<sup>106</sup> capping tuition,<sup>107</sup> imposing progressive tuition rates,<sup>108</sup> and creating a public school pre-paid model.<sup>109</sup> Paying for public education presents several challenges: by implication it excludes funding private schools, it is costly to undertake,<sup>110</sup> and it would be difficult to prevent states from decreasing their own funding of higher education, as allegedly occurred in response to past increases in federal loans.<sup>111</sup> Further, the administration of free public education would be inequitable across the country, as differing states fund their higher

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not reach a definite conclusion on the relationship of federal funding and tuition prices, though it did not rule out a possible causal connection. ADAM STOLL ET AL., OVERVIEW OF THE RELATIONSHIP BETWEEN FEDERAL STUDENT AID AND INCREASES IN COLLEGE PRICES (Cong. Research Serv., 2014), <http://c.y.mcdn.com/sites/www.ncher.us/resource/collection/1CFB07FA-74C6-4F0A-8E79-3ADB2C453546/R43692.pdf>. Another recent report by the Federal Reserve Bank of New York “used a Bartik-like approach to identify the effect of increased loan supply on tuition following large policy changes between 2008 and 2010 in the maximum federal aid amounts available to undergraduate students.” DAVID O. LUCCA ET AL., CREDIT SUPPLY AND THE RISE IN COLLEGE TUITION: EVIDENCE FROM THE EXPANSION IN FEDERAL STUDENT AID PROGRAMS 26 (Fed. Reserve Bank of N.Y. ed., 2015), [https://www.newyorkfed.org/medialibrary/media/research/staff\\_reports/sr733.pdf](https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr733.pdf). They found that schools most affected by policy changes increased aid at the same time they raised their tuition more than would be expected. *Id.*

104. *Id.*

105. STOLL, *supra* note 103.

106. Notably and most recently, presidential candidate Hillary Clinton proposed a \$350 billion plan to make public higher education tuition free for all students. *The New College Compact*, HILLARY FOR AM. (Aug. 10, 2015), <https://www.hillaryclinton.com/p/briefing/factsheets/2015/08/10/college-compact-debt/>.

107. Howard, *supra* note 95, at 508 (exploring several proposed or enacted state tuition caps).

108. Implementing progressive tuition means the amount of tuition charged would vary based on socioeconomic health of the student and his or her family. *Id.* at 509. For instance, students might be expected to pay 15% of their family’s income; this would be \$15,000 for a family making \$100,000 or \$150,000 for a family making \$1 million. *Id.*

109. See *infra* notes 114–116 and accompanying text (defining and discussing the public school pre-paid model).

110. See *The New College Compact*, *supra* note 106.

111. See Roots, *supra* note 5, at 505.

education systems at different rates, charge different amounts of tuition, and are not of uniform academic quality. Capping tuition would also be difficult because it is not clear if the federal government has the power to cap tuition unilaterally.<sup>112</sup> Even if capping tuition among public schools were feasible, this would not extend to private institutions, which provide about one quarter of all higher education.<sup>113</sup> Several states created a feasible pre-paid model,<sup>114</sup> whereby parents contribute to a state investment program to grow contributions for future use at a public school.<sup>115</sup> Pre-paid programs, however, most advantage middle-class families who have the knowledge, foresight, and income to join the program far in advance of a child going to college.<sup>116</sup> Pre-paid programs do little to help low-income students who lack awareness and the financial ability to reduce their future loan debt.

### C. Education Financing

Instead of modifying tuition, altering the structure of loans would directly impact loans themselves and could act as a check on education costs. Proposals range from modest limits on loan interest rates<sup>117</sup> to extreme abolition of federal loans altogether.<sup>118</sup> Logically, limiting interest, and thereby reducing (the interest portion of) loan payments, does not provide any meaningful check on the education

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112. Strand, *supra* note 5, at 300 (public education is within the purview of the states, not the federal government).

113. Lynn O'Shaughnessy, *20 Surprising Higher Education Facts*, U.S. NEWS & WORLD REP. (Sept. 16, 2011), <http://www.usnews.com/education/blogs/the-college-solution/2011/09/06/20-surprising-higher-education-facts>. Seventy-three percent of college students attend public schools. *Id.* Assuming, *arguendo*, that state-established public education belongs to states, not the federal government, then neither controls private education, at least as they relate to tuition caps. Note 112. For an exploration of federal and state powers impacting private institutions of higher education, see generally Philip J. Faccenda & Kathleen Ross, *Constitutional and Statutory Regulation of Private Colleges and Universities*, 9 VAL. U. L. REV. 539 (1975).

114. Guerre, *supra* note 95, at 524.

115. *Id.* at 524–28.

116. *Id.* at 524.

117. *The New College Compact*, *supra* note 106 (proposing to “[s]ignificantly cut the interest rate on student loans”).

118. Ben Barrett et al., *Starting From Scratch*, NEW AM. (Feb. 2016), <https://static.newamerica.org/attachments/12616--463/Starting-From-Scratch.78d72818d45e4cf18327b0ff2bd8f85b.pdf>.

system that perpetuates rising loan balances because it does not directly affect tuition. One positive aspect of lowering interest rates is that it is politically feasible, evidenced by regular lowering in the past; rates ebb and flow depending on the political climate of any given Congress.<sup>119</sup>

Completely eliminating loans would certainly get the attention of stakeholders who control tuition, but might fall short of the American ideal of equal access to higher education. It is unclear what mechanisms, if any, would exist in place of federal loans to finance college expenses. Opportunistic predatory lenders might fill the lending space, preying on vulnerable, unsophisticated students. Then again, if this reform were coupled with loosening of bankruptcy standards, students who were taken advantage of could escape from predatory loans, leading to self-policing by the industry to preserve their business. This is but one imagined scenario in the absence of federal student loans.

Colleges and universities faced with the loss of billions of dollars of federal student loan money could tighten budgets dramatically—to reduce tuition—or find alternate sources of funding. Schools with great fundraising power and large endowments could tap these resources, while others could solicit local businesses to defray education costs in exchange for closely aligning student competencies with those businesses' workforce needs. Student amenities, such as climbing walls, bowling alleys, free music concerts, and frequently remodeled dormitories, might disappear as colleges focus on their core mission: educating students in the classroom. Schools might enter the student loan market, originating loans themselves. Lending by colleges, were it ever to occur, would pressure the institutions to produce graduates capable of paying student loans because graduates incapable of repaying their loans would thereby reduce the school's revenue (from payments on loans). This is an incentive colleges do not currently have because the federal government is the lender and thus bears the cost when loans go unpaid. *Arguendo*, schools with high fixed costs, little cash flow, and high defaults on their self-originated student loans would not

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119. *Historical Interest Rates*, FINAID, <http://www.finaid.org/loans/historicalrates.phtml> (demonstrating multitudinous interest rate changes over nearly two decades).



survive in a system without federal loans. Ostensibly, the education market would stabilize as adaptive schools would persist and take the place of perished schools unable to endure without federal student loans.

Complete elimination of student lending is fraught with issues, despite its potential benefits. Chiefly, it may run counter to the American ideal of equal opportunity education.<sup>120</sup> Tuition and other costs may remain high, and without publicly available loans the poor and disadvantaged may be priced out of higher education. Similarly, alternative funding sources may not appear, or may not be abundant enough to offset the loss of federal loans, reducing access to education. Additionally, due to cost constraints, the education market may shrink too much, reducing our national capacity to educate students desirous of the improved lifetime earnings and other benefits of education. Instead of improving educational opportunity, complete removal of federal student loans could potentially decrease access to higher education by reducing supply.

### III. PROPOSAL

A reasoned middle ground between the narrowness of interest rate reductions and the austerity of loan elimination seems the best path forward. I propose limiting federal student loan borrowing to the seventy-fifth percentile of national average college costs.<sup>121</sup> Schools wanting students to borrow more than this amount in loans would need to petition the federal government and prove that their institution provides “exceptional value” through employment statistics, high admissions to graduate school, or some other clearly quantifiable metric. The seventy-fifth percentile benchmark would not have any allowable annual growth, but it would automatically adjust upward for inflation. The same concept could easily be applied to graduate and professional school loans.

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120. H.R. REP. 102-447, at 7 (1992).

121. In practice, there would be several different seventy-fifth percentiles grouped by similarly situated programs. Each percentile would be determined by comparing costs amongst higher education degrees of similar duration, accreditation, and scope.

This plan strikes the right balance on several accounts. First, its present-day impact on schools is relatively minimal. By definition, 75% of schools would have students who could borrow the maximum cost of their education from the federal government. The schools in the upper 25%, which—beyond being expensive—are largely prestigious, have endowments, wealthy donors, and histories of generous private need-based grants. Prestige and its accompanying resources usually beget high employment and other characteristics that might demonstrate “exceptional value.”<sup>122</sup> Further, with strong financial resources they can replace lost loans with other funds. A funding shift may be wholly unnecessary, however, because prestigious schools already provide many grants to poor entrants,<sup>123</sup> and the wealthier matriculants are unlikely to utilize any loans.

Favorably, the seventy-fifth percentile cut-off would disadvantage high-priced schools lacking “exceptional value,” for example, many private, for-profit schools. Private, for-profit colleges are the scourges of higher education because of poor unemployment outcomes<sup>124</sup> and extremely high student loan default rates.<sup>125</sup> For-profits’ tuition costs also run significantly higher than other undergraduate tuition costs—nearly five times the cost of two-year

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122. For example, at Harvard, an undeniably prestigious yet expensive school, class of 2016 employed graduates reported salaries with a median range of \$70,000 to \$89,000. Cordelia F. Mendez, *The Graduating Class of 2016 by the Numbers: Post-Harvard Plans*, HARV. CRIMSON, <http://features.thecrimson.com/2016/senior-survey/post-harvard-narrative/> (last visited Nov. 18, 2016). Using the midpoint of the range, \$79,500, as a point of comparison, Harvard graduates’ starting salaries are approximately 57% higher than the national average starting salary for class of 2016 college graduates, \$50,556. Susie Poppick, *Here’s What the Average Grad Makes Right Out of College*, MONEY (Apr. 22, 2015), <http://time.com/money/3829776/heres-what-the-average-grad-makes-right-out-of-college/>.

123. Ivy League and peer schools often claim to meet all of a student’s financial needs through grants. *See, e.g., How Aid Works*, HARV. C. GRIFFIN FIN. AID OFF., <https://college.harvard.edu/financial-aid/how-aid-works>.

124. Susannah Snider, *3 Must-Know Facts About For-Profit Colleges, Student Debt*, U.S. NEWS & WORLD REP. HIGHER EDUC. (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>.

125. Inst. for College Access & Success, *Despite Lower Rates More Than 650,000 Defaulted on Federal Student Loans* (Sept. 24, 2014), [http://www.ticas.org/sites/default/files/legacy/pub\\_files/CDR\\_2014\\_NR.pdf](http://www.ticas.org/sites/default/files/legacy/pub_files/CDR_2014_NR.pdf) (noting for-profit student loan default rates about four times as high as community colleges and three times as high as public four-year schools).

public colleges and over 50% more than four-year public colleges.<sup>126</sup> Tamping down students' ability to borrow to attend for-profits could lead to a decline in the industry or to a renewed focus by for-profits to provide lower-cost, higher-quality education.

The biggest benefit of this approach may not be immediate. Admittedly, a seventy-fifth percentile cap on costs would at first affect 25% of schools, and even fewer when accounting for schools where borrowers are not taking maximum loans. However, limiting education expense growth only to inflation reins in all future cost increases. Whereas current loan amounts are virtually unlimited, the seventy-fifth percentile benchmark would prevent loan borrowing from outpacing inflation. This would be a warning to high-cost schools that students may follow full-expense-coverage loans to cheaper schools if they do not tamp down costs. Notably, schools retain complete autonomy; a high-priced school might keep prices high and offer no alternative student funding to offset loan losses. Alternatively, it might build its own private loan infrastructure to lend directly to students needing more loans. Scholarships and grants—need-based or merit-based—can continue to be used to offset the cost of education. Ultimately, this proposal strikes a balance between preserving short-term stability and the status quo while ensuring long-term economic viability of federal student loans.

#### IV. CONCLUSION

Federal loans got their start during the space race to improve math and science talent pipelines.<sup>127</sup> In the mid-1960s, loans were expanded for the poorest individuals who could not attend college without financial assistance.<sup>128</sup> Congress continued to expand loans in

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126. *Trends in College Pricing 2015*, COLLEGEBOARD, at 10 (2015), <https://trends.collegeboard.org/sites/default/files/trends-college-pricing-web-final-508-2.pdf>. In the 2015–2016 school year, for-profit undergraduate tuition averaged \$15,610, while equivalent tuition at “public two-year in-district” and “public four-year in-state” schools averaged \$3,435 and \$9,410, respectively. *Id.*

127. *See supra* note 23 and accompanying text.

128. *See supra* note 26 and accompanying text.

the following decades, leading to loan balances nearly doubling or tripling after each expansion,<sup>129</sup> into the 1990s.<sup>130</sup>

American students are accumulating more and more loan debt at a rapid pace as a result of this expansion. Total national student loan debt now stands at over \$1.2 trillion.<sup>131</sup> Student loans are now the second largest source of household debt, behind only home mortgages.<sup>132</sup> There is no evidence that this trend of upward costs will be reversed.<sup>133</sup>

The growth in loans has brought with it an increasing percentage of debtors in default or behind on payments.<sup>134</sup> However, section 523(a)(8) of the United States Bankruptcy Code allows discharge of student loans in bankruptcy only if the student can demonstrate an undue hardship.<sup>135</sup> The greatest irritation with undue hardship is that it is an undefined term,<sup>136</sup> creating uncertainty for debtors who consequently do not even attempt student loan discharge. Today, four different definitions of undue hardship persist in various localities around the country: the *Johnson* test,<sup>137</sup> the totality of circumstances test,<sup>138</sup> the *Brunner* test,<sup>139</sup> and the *Bryant* poverty test.<sup>140</sup> The lack of a unanimous definition causes wide judicial latitude and inconsistent decisions.

Action must be taken to reform student loans so they continue to be a source of economic good and not a woe in our economy. Rethinking federal student loans also helps ensure America stays true to its core value of equal opportunity education. Loan-based

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129. See *supra* notes 27–32 and accompanying text.

130. See *supra* notes 33–37 and accompanying text.

131. Chopra, *supra* note 22.

132. See *supra* note 6 and accompanying text.

133. See *supra* notes 4–5 and accompanying text.

134. See *supra* notes 83–84 and accompanying text.

135. 11 U.S.C. § 523(a)(8); Kratzke, *supra* note 46 (a heightened standard compared to other debts in bankruptcy). See also *supra* notes 49–57 and accompanying text.

136. Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549, 2591 (1978).

137. See *In re Johnson*, 5 Bankr. Ct. Dec. 532 (Bankr. E.D. Pa. 1979); *supra* text accompanying note 66.

138. See *Andrews v. S.D. Student Loan Assistance Corp.*, 661 F.2d 702 (8th Cir. 1981); *supra* text accompanying note 67.

139. See *supra* text accompanying note 72.

140. *In re Johnson*, 5 Bankr. Ct. Dec. 532 (applying a three-contingent-part mechanical, good faith, and policy test).

alternatives include reducing interest rates<sup>141</sup> and eliminating federal student loans. Prior tuition proposals take a variety of forms, including complete public funding of public education,<sup>142</sup> capping tuition,<sup>143</sup> imposing progressive tuition rates,<sup>144</sup> and creating a public school pre-paid model.<sup>145</sup>

This Note proposes to improve the student debt crisis in America by capping loans to a seventy-fifth percentile benchmark. The benchmark would not have any allowable growth over time but would increase only to keep pace with inflation. This plan would allow most schools to operate with relatively minimal impact while curbing the most expensive, generally prestigious, highly-endowed schools that already are in a better position to provide grants and other funding to their students unless they can demonstrate “exceptional value.” Ultimately, this would prevent loan borrowing from outpacing inflation and encourage schools to reduce costs while allowing schools to maintain their autonomy. It is an ideal plan, balanced between preserving short-term stability within the status quo and ensuring long-term economic viability of federal student loans.

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141. *See supra* note 117.

142. *See supra* note 106.

143. *See supra* note 107.

144. *See supra* note 108.

145. *See supra* note 109 and accompanying text.