

7-30-2018

The Education Loan Bubble: How the Discharge Student Loans in Bankruptcy Act of 2017 and Legislation Alike is the Only Answer to the Student Loan Crisis

Andrew A. Sexton

Follow this and additional works at: <https://scholarlycommons.law.cwsl.edu/cwlr>

Recommended Citation

Sexton, Andrew A. (2018) "The Education Loan Bubble: How the Discharge Student Loans in Bankruptcy Act of 2017 and Legislation Alike is the Only Answer to the Student Loan Crisis," *California Western Law Review*: Vol. 54 : No. 2 , Article 5.
Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol54/iss2/5>

This Comment is brought to you for free and open access by CWSL Scholarly Commons. It has been accepted for inclusion in California Western Law Review by an authorized editor of CWSL Scholarly Commons. For more information, please contact alm@cwsl.edu.

**THE EDUCATION LOAN BUBBLE: HOW THE DISCHARGE
STUDENT LOANS IN BANKRUPTCY ACT OF 2017 AND
LEGISLATION ALIKE IS THE ONLY ANSWER
TO THE STUDENT LOAN CRISIS**

TABLE OF CONTENTS

INTRODUCTION	323
II. EVOLUTION OF THE FEDERAL STUDENT LOAN	326
III. STUDENT LOANS AND BANKRUPTCY	329
IV. THE UNDUE HARDSHIP TESTS	331
A. <i>The Johnson Test</i>	333
B. <i>The Bryant Test</i>	334
C. <i>The Brunner Test</i>	335
V. THE STUDENT LOAN CRISIS	337
V. PROPOSALS	342
A. <i>Congressional Proposals</i>	344
B. <i>Judicial Proposals</i>	347
CONCLUSION	347

INTRODUCTION

Young Americans are starting their adult lives with chains around their necks.¹ Increasingly, they feel penalized for getting an education.²

I borrowed 42K, and I now owe double . . . I feel like this is NEVER going to end. I can't afford to buy a house; I have excellent credit,

1. Mario Parra Sr., Real Student Debt Stories, Student Debt Crisis: Real Student Debt Stories (Aug. 11, 2017), <http://studentdebtcrisis.org/read-student-debt-stories/> (entries are listed chronologically descending from the most recent post).

2. Shayne, Real Student Debt Stories, Student Debt Crisis: Real Student Debt Stories (Aug. 31, 2017), <http://studentdebtcrisis.org/read-student-debt-stories/>.

but my debt to income ratio is so disproportionate that I cannot get a loan.³

I graduated in 2007 with a 3yr BFA degree and now owe 180,191+. This will never be paid off. It rises every day. I'm an American citizen that has been penalized for getting an education that should have bettered my situation. Not garnished my wages and my life.⁴

To see the young starting their adult life with a chain around their necks. Never in our past history has that been the case. How is it possible that instead of making it easier we are making it more difficult for them to succeed?⁵

These general feelings of hopelessness will be exacerbated by President Trump's plan to end the Public Service Loan Forgiveness program ("PSLF") in an effort to take even more away from the unfortunate indebted student.⁶ PSLF forgives the outstanding balance on a federal loan when the student has made 120 qualifying monthly payments under a repayment plan while working for an eligible employer.⁷ This program is one of few available to students with federal loans, enabling students to escape the indentured servitude of student loan repayment after making a significant and good faith effort at to repay.⁸

Unfortunately, for the majority of students today, cheap or free higher education is an unattainable fairy-tale of the past.⁹ It is a pay to play system; unless a student has money or scholarships, he must obtain student loans if he desires a college and/or graduate level education.

3. Ashley Biggs, Real Student Debt Stories, Student Debt Crisis: Real Student Debt Stories (Sept. 30, 2017), <http://studentdebtcrisis.org/read-student-debt-stories/>.

4. Shayne, *supra* note 2.

5. Parra Sr., *supra* note 1.

6. *See id.*; *see also* Zack Friedman, *Trump May End Public Service Student Loan Forgiveness*, FORBES (May 18, 2017, 8:02 AM) [hereinafter *Trump May End*], <https://www.forbes.com/sites/zackfriedman/2017/05/18/trump-public-service-student-loan-forgiveness/#55eda6ee1eb8>.

7. *Public Service Loan Forgiveness*, Fed. Student Aid: An Off. of the U.S. Dep't of Educ., <https://studentaid.ed.gov/sa/repay-loans/forgiveness-cancellation/public-service> (last visited Mar. 27, 2018).

8. *Id.*

9. Carolyn Maloney, *The Student Debt Crisis Solution*, POLITICO (Oct. 4, 2015) <http://www.politico.com/magazine/story/2015/10/the-answer-to-the-student-loan-debt-crisis-213217>.

Economists have expressed that this new education system is affecting the economy in a harmful manner.¹⁰ Americans are still paying off their student loans well into their 30s, 40s, and 50s, instead of buying homes, investing, or starting businesses.¹¹ As of February 2017, the national student debt was the highest it had ever been—at a whopping \$1.3 trillion total—with 44.2 million borrowers, and an average borrower graduating with \$37,172 in student loan debt.¹² The debt reached \$1.4 trillion during that same year.¹³ With student loan debt accelerating and compounding at such a high rate, a repeat of the 2008 Mortgage Crisis may not be so distant. To avoid another economic disaster, the student loan debt crisis must be addressed before it is too late.

Not only is the government considering the removal of PSLF and other beneficial programs for students, but currently, student loans are virtually non-dischargeable in bankruptcy.¹⁴ Bankruptcy used to be a viable option for unfortunate student loan debtors until Congress enacted 11 U.S.C. § 523(a)(8), which made student loans virtually non-dischargeable overnight.¹⁵ Although not entirely immune to bankruptcy, the amendment required student loan debtors to establish that repaying the loan would cause an “undue hardship” on the student to be absolved of liability.¹⁶ However, Congress left “undue hardship” open to interpretation by the courts. Now, almost thirty years after the enactment of § 523(a)(8), circuit splits have emerged with majority views, minority views, and super minority views concerning the “undue hardship” test. The bankruptcy code requires consistency, but a strict test making the discharge of these loans impossible will not suffice.

10. *Id.*

11. *Id.*

12. Zach Friedman, *Student Loan Debt in 2017: A \$1.3 Trillion Crisis*, Forbes (Feb. 21, 2017, 7:45 AM), <https://www.forbes.com/sites/zackfriedman/2017/02/21/student-loan-debt-statistics-2017/#651347ed5dab> Student; *Household Debt: Changes in Types of Borrowers and Debt*, Fed. Res. Bank of N.Y., <https://www.newyorkfed.org/press/pressbriefings/household-borrowing-student-loans-homeownership> (last visited Mar. 30, 2018).

13. Bill Fay, *Students & Debt: More on Students*, DEBT.ORG, <https://www.debt.org/students/> (last visited May 17, 2018) [hereinafter *Students & Debt*].

14. *Trump May End*, *supra* note 6; *see also infra* Part III.

15. *See* 11 U.S.C. § 523(a)(8) (2012).

16. *See infra* Part III, IV.

Fortunately, it is not too late for Congress to reconsider student loan discharge. The debt trend shows that the national student loan debt will only continue to increase and the midnight hour is approaching.

This comment suggests that the answer to the student loan crisis is a combination of congressional reform and judicial persistence. Overturning 11 U.S.C. § 523(a)(8) is the most effective way to hold student loan lenders accountable for their predatory and unethical practices, while at the same time preventing economic collapse in the future. Meanwhile, the judiciary must consistently adjudicate these ongoing student loan issues. This comment will not focus on an in-depth economic analysis of the 2008 Mortgage Crisis and the current student loan situation. Instead, it will compare the similarities and differences between the 2008 disaster and the impending student loan crisis. Part II will illuminate the history and evolution of student loans and the rising cost of education.¹⁷ Part III will explain how Congress virtually abolished student loan dischargeability in bankruptcy and enabled lenders to lend predatorily and without risk.¹⁸ Part IV will then survey the statutes and case law surrounding the current and convoluted status of student loan dischargeability in bankruptcy.¹⁹ Part V will introduce the student loan crisis and compare the existing student loan situation with what happened in 2008.²⁰ Finally, Part VI will propose congressional and judicial solutions to fixing not just the student loan problem, but the educational system as well.²¹

II. EVOLUTION OF THE FEDERAL STUDENT LOAN

This may be hard for some to fathom, but education used to be free. Not until the 1990s were student loans even necessary for higher education.²² Federal loans were first introduced in the late 1950s when America entered the “Space Race” with Russia and the rest of the

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Part IV.

20. *See infra* Part V.

21. *See infra* Part VI.

22. BILL ZIMMERMAN, *THE STUDENT LOAN SWINDLE: WHY IT HAPPENED – WHO’S TO BLAME – HOW THE VICTIMS CAN BE SAVED* 281–91 (2014) (ebook).

2018]

THE EDUCATION LOAN BUBBLE

327

world.²³ President Dwight Eisenhower's focus on scientific expansion and research led to the enactment of the National Defense Education Act of 1958, which authorized direct loans to student borrowers, backed by the United States Treasury.²⁴ These low interest loans made it easier for public universities to grow as they now had funding from both the government and students.²⁵ However, only a small group of public and private universities received close to 80 percent of the funding allotted.²⁶ Thus, Lyndon B. Johnson enacted the Higher Education Act of 1965 "to bring better education to millions of disadvantaged youth who need it most" and "to put the best educational equipment and ideas and innovations within the reach of all students."²⁷ First, the federal government guaranteed student loans provided by private bankers and non-profit lenders, forming a program now entitled the Federal Family Education Loan Program ("FFELP").²⁸ Economists and politicians disagreed considerably over whether the loans should be direct or guaranteed.²⁹ Interestingly, the 1965 budget rules required a loss when loans were made directly rather than when loans were guaranteed.³⁰ Therefore, it was a win-win for Johnson's budget—there was no immediate loss, and more students were able to attend college. However, economists were concerned that the government was making financial decisions without assessing the future risks and costs that

23. 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).

24. *Id.* (citing National Defense Education Act of 1958, Pub. L. No. 85-864, 72 Stat. 1580 (1958) (codified as amended in 20 U.S.C.)).

25. *Id.*

26. *Id.* at n.25 (explaining that this small group consisted of merely twenty universities).

27. *Id.* (quoting Lyndon B. Johnson, *Special Message to the Congress: Toward Full Educational Opportunity*, The Am. Presidency Project (Jan. 12, 1965), <http://www.presidency.ucsb.edu/ws/?pid=27448>).

28. *Education Policy: Student Loan History*, NEW AM., <https://www.newamerica.org/education-policy/policy-explainers/higher-ed-workforce/federal-student-aid/federal-student-loans/federal-student-loan-history> (last visited Mar. 22, 2018).

29. *Id.*

30. *Id.*

come with potential defaults, administrative costs, and interest subsidies.³¹

The economists' prayers were answered in 1990 when President George H.W. Bush signed the Federal Credit Reform Act.³² This Act required that all loans include an estimated "subsidy cost;" the government would need to set aside money to cover the costs associated with each loan.³³ This more logical approach to budgeting brought new policy to Capitol Hill and as soon as 1992, the government began leaning away from guaranteed backed loans and toward direct loans.³⁴ An analysis from the Bush administration indicated that direct loans would deliver loans at a significantly lower cost to taxpayers because private banks no longer served as middlemen, and the government was freed from paying private lender fees and cost subsidies.³⁵ However, until 2010, roughly 73 percent of all student loan borrowers continued to choose lending through the guaranteed loans of FFELP, partly due to the aggressive marketing tactics used by the private banks.³⁶ Congress then passed The Student Aid and Fiscal Responsibility Act of 2010, which eliminated FFELP and made all federally-backed loans under the direct loan program mandatory.³⁷ Although FFELP loans were discontinued, private education loans were still authorized; the federal government simply refrained from guaranteeing them.³⁸

As student loans were evolving, college was becoming more expensive. Beginning in the late 1980s and 1990s, college tuition increased as many states developed large budget-deficits.³⁹ With popular support for tax-reducing measures, state welfare and poverty programs were first put on the chopping block, followed by other public services.⁴⁰ Soon after, state funding to public universities was dramatically reduced and the universities had no choice but to raise

31. *See id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Keeton, *supra* note 23, at 73.

37. *See id.*

38. *See id.*

39. Zimmerman, *supra* note 22, at 295.

40. *Id.*

tuition.⁴¹ State cuts to education have further accelerated in the recent years. For example, California's public university tuition increased more than 70 percent between 2007 and 2012.⁴² To keep their elite status and take advantage of the ever-growing need for a college degree, private institutions also increased their tuition.⁴³

Over the last twenty years, there has been a tectonic shift in how America views education.⁴⁴ The burden to educate the public was initially on the state government, but now, the expense is transferred to the student because states and universities can get away with it.⁴⁵ This was the perfect profit opportunity for Wall Street;⁴⁶ loans were guaranteed, college was expensive, and the market for a college degree was flourishing.⁴⁷ With the increasing cost of education, lenders recognized the huge profit potential.⁴⁸ When students repaid loans—as opposed to the government—banks could retain their fees and interest.⁴⁹ However, when students defaulted, the guarantees kicked in and the government would pay the remaining loan balance to the banks, as well as late fees and any accumulated penalties.⁵⁰ It was a win-win for the lenders and there was seemingly no risk to student loan lending.

III. STUDENT LOANS AND BANKRUPTCY

If risk-free lending was not enough for the banks, students took the largest blow when their only escape route was taken away: the right to discharge federally backed student loans in bankruptcy.⁵¹ This was the

41. *Id.* at 300.

42. *Id.* at 320–25.

43. *Id.* at 325.

44. *See id.* at 310, 325.

45. *Id.*

46. *See generally id.* at 365–74.

47. *See id.* at 365–80.

48. *Id.* at 374.

49. *Id.*

50. *Id.*

51. G. Michael Bedinger VI, Note, *Time for a Fresh Look at the “Undue Hardship” Bankruptcy Standard for Student Debtors*, 99 IOWA L. REV. 1817, 1821 (2014) (citing 11 U.S.C. § 523(a)(8) (2012)).

first time the government wholly singled out a specific class of loan.⁵² In 1998, Congress repealed and replaced 11 U.S.C. § 523(a)(8) with statutory language that allowed students to discharge their loans only when repaying such loans would cause an “undue hardship.”⁵³ The “undue hardship” test was not a novel concept relating to the dischargeability of student loans in 1998.⁵⁴ The test was enacted in 1976.⁵⁵ In the late 1970s Congress was alarmed when it heard rumors of medical and legal professionals abusing the bankruptcy system and discharging massive debt before entering their practices.⁵⁶ At that time, the U.S. Trustee Program (the organization now responsible for policing and enforcing the integrity of the bankruptcy code) did not exist.⁵⁷ Congress decided to address the abuse of student loan dischargeability by requiring debtors to wait five years before they could discharge the loan or prove to the court that making payments toward the student loan was causing an “undue hardship.”⁵⁸ This five year waiting requirement forced many doctors and other professionals with graduate student loan debt to attempt a “good faith” effort to pay their debts. Ironically, this push for regulation was based on practically no statistical evidence.⁵⁹

52. Zimmerman, *supra* note 22, at 398.

53. See Higher Education Amendments of 1998, Pub. L. 105-244, § 971, 112 Stat. 1581, 1837 (striking the other option for student debt relief following a specified time period) (codified as amended at 11 U.S.C. § 523(a)(8) (2012)).

54. As of 1998, the “undue hardship” test was not a novel concept because Congress had previously inserted this language into legislation. See Education Amendments of 1976, Pub. L. 94-482, § 439, 90 Stat. 2081 (1976) (codified as 20 U.S.C. § 1087-3 (1976)) (repealed 1978).

55. *Id.* (providing how a loan could only be discharged prior to a five-year waiting period if payment would “impose an undue hardship on the debtor or his dependents.”).

56. See Frank T. Bayuk, *The Superiority of Partial Discharge for Student Loans Under 11 U.S.C. § 523(A)(8): Ensuring a Meaningful Existence for the Undue Hardship Exception*, 31 FLA. ST. U. L. REV. 1091, 1094 (2004).

57. See Bankruptcy Reform Act of 1978, Pub. L. 95-598, §§ 101 *et seq.*, 586, 92 Stat. 2549, 2549–54, 2663–64 (1978) (codified as amended in 28 U.S.C. § 586 (2012) and 11 U.S.C. §§ 101 *et seq.* (2012)); *About the U.S. Trustee Program*, U.S. Dep’t of Just., <https://www.justice.gov/ust> (last visited Mar. 27, 2018).

58. Bayuk, *supra* note 56, at 1094–95.

59. *Id.* (“Rather, it justified the proposal on the belief that even a small number of ‘abuses’ discredit the system and cause disrespect for the law and those charged

2018]

THE EDUCATION LOAN BUBBLE

331

The difference between the 1976 legislation and the 1998 legislation was that the 1976 legislation provided a student with two routes to discharge student loans in bankruptcy.⁶⁰ Students could either wait five years from the time payment on the loan commenced, or they could qualify under the “undue hardship” analysis.⁶¹ Post 1998, only the “undue hardship” route existed and it was subject to court interpretation.⁶² The last nail was hammered into the student loan dischargeability coffin in 2005 when Congress amended the statutory definition of student loan to a “qualified educational loan,” aligning it with the broad definition of the Internal Revenue Code § 221(d)(1).⁶³ With this new broad definition and assuming that a student could not pass the “undue hardship” standard, all student loans were now non-dischargeable if they were “incurred by the taxpayer solely to pay qualified higher education expenses”⁶⁴ Consequently, private lenders who did not participate in FFELP were also able to join the club when it came to non-risk lending.

IV. THE UNDUE HARDSHIP TESTS

Section 523 of the United States Code references many types of debts that are non-dischargeable in bankruptcy.⁶⁵ The prominent policy behind bankruptcy is “to discharge certain debts to give an honest individual debtor a ‘fresh start.’”⁶⁶ With the use of the words “certain

with its administration.”); COMM’N ON THE BANKR. LAWS OF THE U.S., REPORT ON BANKRUPTCY LAWS, H.R. DOC. NO. 93-137, pt. I, at 11, 170, 176–77 (1973).

60. See Bayuk, *supra* note 56, at 1095–96.

61. See *id.*

62. See *id.*

63. Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59 (2005) (codified as amended at 11 U.S.C. § 523(a)(8)(B) (2012)).

64. I.R.C. § 221(d)(1) (Supp. 2000).

65. See 11 U.S.C. § 523(a) (2012).

66. Chapter 7 Eligibility, U.S. Cts., <http://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-7-bankruptcy-basics> (last visited May 17, 2018) [hereinafter *Chapter 7*]; see also *Stellwagen v. Clum*, 245 U.S. 605, 617 (1918) (“The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned

debts,” it is clear that Congress intended that all debts not be created equally.⁶⁷ “Congress created these exceptions to the general rule of dischargeability on the ground that ‘the creditors’ interest in recovering full payment of debts in these categories outweighed the debtors’ interest in a fresh start.”⁶⁸ Even though the amendment to § 523(a)(8) is highly discouraging, Congress did not place student loans on the same non-dischargeable platform as other non-dischargeable debts.⁶⁹ There is a back door for student loan dischargeability, which is the “undue hardship” test.⁷⁰ Unfortunately for students, it is up to the courts to interpret the meaning of “undue hardship” and to this day the Supreme Court has refused to put it to rest.⁷¹ Currently, 11 U.S.C. § 523(a)(8) states:

(8) unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor’s dependents, for—

(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or

at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law—as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life.”).

67. See generally Chapter 7, *supra* note 64.

68. *Hiatt v. Ind. State Student Assistance Comm’n*, 36 F.3d 21, 24 (7th Cir. 1994) (quoting *Grogan v. Garner*, 498 U.S. 279, 287 (1991)).

69. See 11 U.S.C. § 523(a) (Taxes, government fines and penalties, money obtained by fraud, and willful and malicious injury are just some of the completely non-dischargeable debts listed).

70. 11 U.S.C. § 523(a)(8).

71. See *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 794 F.3d 756, 759 (7th Cir. 2015) (where the Seventh Circuit held that the debtor’s student loans were not dischargeable because the debtor did not have an “undue hardship” under the *Brunner Test*), *cert. denied*, 136 S. Ct. 803 (2016).

2018]

THE EDUCATION LOAN BUBBLE

333

(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 individual⁷²

Because the legislature left “undue hardship” undefined, many circuit courts began to define the meaning for themselves.⁷³

A. *The Johnson Test*

A notable approach to interpreting the meaning of undue hardship occurred in *In re Johnson*.⁷⁴ There, the court established that for a debtor or bankrupt person to have an “undue hardship” they must pass the three-prong *Johnson* test: the “mechanical test,” the good faith test, and the policy test.⁷⁵ The “mechanical test” asked whether the debtor’s foreseeable income would allow the debtor to pay the student loan while also paying any expenses associated with staying above the minimum poverty line including supporting any dependents.⁷⁶ If answered in the negative, the court would proceed to the second prong, the good faith test.⁷⁷ If answered in the affirmative, the court would deny the discharge.⁷⁸ Once the debtor passed the “mechanical test,” the court would then apply the good faith test, asking whether the debtor was irresponsible or negligent in minimizing expenditures, securing employment, or maximizing resources.⁷⁹ If no negligence or irresponsibility was found, the debtor was entitled to discharge.⁸⁰ If the answer was yes—and such irresponsibility or negligence would have changed the answer of the “mechanical test”—a presumption to deny discharge was created; a negative answer to the policy test, however,

72. 11 U.S.C. § 523(a)(8) (2012).

73. *See infra* Part VI Sections A–C.

74. *See generally* Pa. Higher Educ. Assistance Agency v. Johnson (*In re Johnson*), No. 77-2033, 1979 U.S. Dist. LEXIS 11428, at *21 (Bankr. E.D. Pa. June 27, 1979).

75. *Id.* at *59–60.

76. *Id.* at *60.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

could rebut this presumption.⁸¹ The policy test required that the debtor’s “circumstances,” meaning “the amount and percentage of total indebtedness of the student loan and the employment prospects of the petitioner, indicate” whether the primary reason for the bankruptcy was to discharge the student loan, or whether the debtor has benefited financially from obtaining the loan.⁸² In other words, the policy test determined whether the debtor had financially bettered himself because of the student loan or was simply trying to rid himself of the obligation to pay it back. If the answer was affirmative to either question, a discharge would be denied.⁸³ If answered in the negative, a discharge would be granted.⁸⁴ Because this test is confusing and complicated, other courts have rejected it and moved on to a more objective and simplistic approach.⁸⁵

B. *The Bryant Test*

Almost a decade after the *Johnson* court first set the standard for “undue hardship,” the same Pennsylvania court searched for a simpler approach to the issue in *In re Bryant*.⁸⁶ Here, unlike the test in *Johnson*, the court objectively focused on the federal poverty line and whether the debtor’s income was above or below that threshold.⁸⁷ If the debtor’s income was below the poverty line, a discharge would be appropriate. Again, this rationale was based on Congress’ intent to prevent abuse and inequitable situations from occurring; thus, the court alluded that low-income individuals are not abusing the system.⁸⁸ If the debtor’s income was above the federal poverty line, a presumption of abuse would arise and the debtor would receive no discharge unless he or she could show “unique” or “extraordinary” circumstances.⁸⁹ By

81. *Id.*

82. *Id.* at *60–61.

83. *Id.* at *61.

84. *Id.*

85. *See, e.g.,* Bryant v. Pa. Higher Educ. Assistance Agency (*In re Bryant*), 72 B.R. 913, 915 n.2 (Bankr. E.D. Pa. 1987).

86. *Id.* at 915, 915 n.2.

87. *Id.* at 915.

88. *See id.* at 917 (“It is quite apparent that such ‘abuses’ are not unchecked by allowing discharges to persons whose income is at or below the poverty guidelines.”).

89. *Id.* at 917.

simplifying the *Johnson* test down to one step, the court's idea was to provide a more objective approach to defining "undue hardship."⁹⁰ Unfortunately, this test only survived six months before the Second Circuit adopted a new test.⁹¹

C. The Brunner Test

The Second Circuit's *Brunner* test, derived from *In re Brunner*, has been accepted in some fashion as the leading majority standard in the Third, Fifth, Sixth, Seventh, Ninth, Tenth, and Eleventh Circuits.⁹² In *Brunner*, the debtor filed for bankruptcy after receiving her Master's degree in social work.⁹³ At the time of filing, the debtor was unemployed, on food stamps, and seeking treatment for anxiety.⁹⁴ The debtor testified that her anxiety was partly due to her inability to gain employment in her field of study after sending out over one hundred resumes in pursuit of a job.⁹⁵ Two months after filing her petition, the debtor filed an adversary proceeding seeking to discharge her student loans.⁹⁶ The New York bankruptcy court found that employment in her field was limited and her current income would not allow her to repay her student loans without "undue hardship."⁹⁷ In reversing the bankruptcy court's ruling, the district court explained that 11 U.S.C. § 523(a)(8), "commits the student to repayment regardless of his or her subsequent economic circumstances."⁹⁸ In obtaining a discharge of student loans in bankruptcy prior to five years after they first came due, the court required a three-part showing:

90. *Id.* at 915; *see also* Keeton, *supra* note 23, at 80.

91. Keeton, *supra* note 23, at 80; *see generally* Brunner v. N.Y. State Higher Educ. Servs. Corp. (*In re Brunner*), 831 F.2d 395 (2d Cir. 1987) (*per curiam*).

92. B.J. Huey, Comment, *Undue Hardship or Undue Burden: Has the Time Finally Arrived for Congress to Discharge Section 523(a)(8) of the Bankruptcy Code?*, 34 TEX. TECH L. REV. 89, 111–12 (2002).

93. Brunner v. N.Y. State Higher Educ. Servs. Corp., 46 B.R. 752, 753 (Bankr. S.D.N.Y. 1985), *aff'd*, 831 F.2d 395 (2d Cir. 1987).

94. *Id.* at 757.

95. *Id.*

96. *Id.* at 753.

97. *Id.* at 757.

98. *Id.* at 756.

1) that the debtor cannot, based on current income and expenses, maintain a “minimal” standard of living for himself or herself and his or her dependents if forced to repay the loans, 2) that this state of affairs is likely to persist for a significant portion of the repayment period of the student loan, and 3) that the debtor has made good faith efforts to repay the loans.⁹⁹

On appeal to the district court, the bankruptcy court’s judgment was reversed and the court found that the debtor had not sufficiently established the second and third elements of the test.¹⁰⁰ The court placed a focus on the debtor’s ability to pay her student loans in the future and noted that nothing in the record supported a finding that the debtor maintained an inability to pay or find work for any significant time.¹⁰¹ The court first noted that the debtor was capable of at least some type of work and had no dependents at the time of her bankruptcy filing.¹⁰² Although the debtor testified that she was consulting a therapist about her anxiety in relation to her unemployment, “there was no evidence in the record that her depression and anxiety impaired her capacity to work.”¹⁰³ Secondly, the court alluded that the debtor had not adequately demonstrated to the court that her filing was in good faith.¹⁰⁴ The debtor filed for bankruptcy within one month of the date that her first student loan payment was due.¹⁰⁵ Nor had the debtor even attempted to seek out bankruptcy alternatives, such as deferred payment.¹⁰⁶ As such, the debtor did not meet the last two elements of the test and she was not entitled to discharge.¹⁰⁷

99. *Id.*

100. *Id.* at 758.

101. *Id.*

102. *Id.*

103. *Id.* at 757.

104. *See id.* at 758; *see also* Hedlund v. Educ. Res. Inst., Inc., 718 F.3d 848, 854 (9th Cir. 2013) (discussing how interpretation of the “good faith” requirement ultimately rests with the appellate courts under the clearly erroneous standard of review).

105. *Brunner*, 46 B.R. at 758.

106. *Id.*

107. *See id.*

V. THE STUDENT LOAN CRISIS

Today and since the beginning of time, misconceptions have roamed the minds of individuals everywhere. From the early days of Ptolemy and the “geocentric” theory that the earth was the center of the universe to the Renaissance and the belief that Christopher Columbus discovered America (Christopher Columbus did not discover North America first¹⁰⁸), it is clear that misconceptions are still prevalent. Luckily, these misconceptions were innocuous because those beliefs were later corrected with new information. But what happens when a misconception is capable of producing dire consequences to the masses? The most recent example of this situation appeared in 2008, known as the 2008 Mortgage Crisis or Great Recession. The bursting of the mortgage bubble started with the misconception that housing prices would continue to increase indefinitely.¹⁰⁹ From the 1940s to the 2000s, housing prices had increased over 390 percent.¹¹⁰ This misconception did not solely affect buyers looking to get in on a “safe investment” either—subprime mortgage lenders alike were stern believers.¹¹¹ Subprime mortgage lending dealt with originating loans to individuals who normally and traditionally have lower credit scores and who do not have the recommended amount of cash collateral available to enter into a traditional loan.¹¹² For instance, individuals with a high debt to income ratio and poor credit were given mortgages that they normally would not be able to receive from other lenders in exchange for much higher interest rates.¹¹³ Another tradeoff for homeowners was

108. Eric Weiner, *Coming to America: Who Was First?*, Nat’l Pub. Radio (Oct. 8, 2007, 2:22 PM), <http://www.npr.org/templates/story/story.php?storyId=15040888>.

109. Andrew Woodman, Note, *The Student Loan Bubble: How the Mortgage Crisis Can Inform the Bankruptcy Courts*, 6 ALB. GOV’T L. REV. 179, 181–82 (2013).

110. *Id.* at 182 (explaining that during this time period, “[t]he median home value in the United States quadrupled from \$30,600 to \$119,600.”).

111. *See id.* (citing Greg Ip, *Housing Prices Always Rise*, Wash. Post (Dec. 20, 2009), <http://www.washingtonpost.com/wp-srv/special/opinions/outlook/worst-ideas/housing-bubble.html>).

112. *See* FIN. CRISIS INQUIRY COMM’N, THE FINANCIAL CRISIS INQUIRY REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES 67 (2011), <https://www.gpo.gov/fdsys/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf>.

113. *Id.*

that most of these subprime loans were structured as Adjustable Rate Mortgages (ARMs) that would initially start with lower payments, but in turn would increase significantly over the years forcing the homeowner to either refinance or be foreclosed upon when they could no longer afford the payments.¹¹⁴ The subprime lenders had nothing to lose because the loans were secured by real properties with values increasing annually.¹¹⁵ Even if the homeowners defaulted, the banks were protected by foreclosure. This misconception was discredited in 2007 when there was a rapid decrease in housing prices, which caused widespread panic.¹¹⁶ In 2008, together with the subprime mortgage loans and the plunge in housing prices, one out of every twenty homeowners was in default, leaving foreclosure as the only viable option.¹¹⁷

Wall Street was in a panic. Many mortgage-backed securities (“MBS’s”) instantly became “toxic” assets overnight.¹¹⁸ MBS’s consisted of a compilation of mortgages that were packaged up and sold to investors for trade on the open market.¹¹⁹ When the collateral (the homes) that secured the mortgages became under secured¹²⁰ due to the price fall and with the combination of one in every twenty homeowners defaulting, MBS’s lost value immediately and investment firms imploded in what we know now as the 2008 Mortgage Crisis.¹²¹

A similar student loan bubble has the potential to be an even larger problem and requires attention before America suffers the same crisis it suffered in 2008. Unlike the Mortgage Crisis, not one misconception is involved, but two.¹²² The first misconception is that obtaining a college degree will always be economically viable, and the second is that student loans are low-risk investments and non-dischargeable in

114. Michael Simkovic, *Competition and Crisis in Mortgage Securitization*, 88 IND. L.J. 213, 227 n.58 (2013).

115. See Woodman, *supra* note 109, at 182.

116. Jamie P. Hopkins & Katherine A. Pustizzi, *A Blast From The Past: Are the Robo-Signing Issues that Plagued the Mortgage Crisis Set to Engulf the Student Loan Industry?*, 45 U. TOL. L. REV. 239, 241 (2014).

117. See *id.* at 243–44.

118. *Id.* at 241.

119. Simkovic, *supra* note 114, at 214.

120. Meaning the value of the home dropped to less than that of the mortgage.

121. *Id.*

122. See generally Woodman, *supra* note 109, at 183.

bankruptcy.¹²³ Traditionally in America, a college degree increased earning potential when compared to individuals lacking a college degree.¹²⁴ From 1976 to 1999, a college graduate's salary was 1.8 times more than the salary of a high school graduate.¹²⁵ The increase rose to 50 percent more when a graduate degree was pursued.¹²⁶ On average, these increases acted similarly across genders and race, and education was in fact, considered as a whole, a worthy investment.¹²⁷ Compiling the value of a college degree with the availability of college through student loans, bachelor degree awards have exploded.¹²⁸ From 1988 to 2011, there was a 72 percent increase in bachelor degrees awarded and the numbers continue to rise.¹²⁹ For instance, in the 2015–16 graduating year there were 2,894,987 graduates, which equated to a 170 percent increase from 2011 and a 290 percent increase from 1988.¹³⁰ The 2015–16 graduating statistics are slightly lower than those of the prior year, which counted graduates at 2,915,251, but I would not declare a plateau just yet.¹³¹ These statistics only account for students who complete their education in an undergraduate degree program.¹³² However, they do not account for the students who enter college or graduate degree programs, nor for students who leave or drop out with student loan debt.¹³³

Naturally, with more students entering and completing college, there is a rising national student debt. This can be seen when looking at 1999's cumulative student loan debt of just \$92 billion and comparing it to today's student loan debt of about \$1.4 trillion, which is a near 1000 percent increase.¹³⁴ How can the number of graduating students rise only 290 percent, while outstanding student loan debt rises to 1500

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *See supra* Part II.

129. *See Woodman, supra* note 109, at 184.

130. *See Christian Tizon, Undergraduate Degree Earners Report, 2015-16, Nat'l Student Clearinghouse Res. Ctr., fig.1 (2017), <https://nscresearchcenter.org/wp-content/uploads/UndergradDegreeEarnersRpt-2015-16.pdf>.*

131. *Id.*

132. *See id.*

133. *Id.*

134. *See Woodman, supra* note 109, at 188; *Students & Debt, supra* note 13.

percent? What is causing this grossly disproportionate ratio of graduating students to student loan debt? Inflation is certainly one factor (as graduating students are individuals who do not adjust for inflation), but the true cause is the government—enabling bankers, investors, and students into activities believed to have no consequences.¹³⁵ For the student, it is the promise that education is the best investment and that students are guaranteed to repay their loans later, but for investors and banks, it is that student loans are entirely low risk assets that can be traded.¹³⁶

Advocates of change in the student loan industry focus on many of the similarities between the circumstances leading up to the housing crisis and what is currently happening with student loans. The first similarity, briefly touched on above, is the eccentric idea that everyone can own a home and that everyone should have a college education.¹³⁷ Ken Lin, the CEO of *creditkarma.com*, stated, “A college education is a path to life success just like home ownership is a path to financial stability. In reality, some people aren’t suited for it.”¹³⁸ The ideas that both objectives are necessities and everyone should participate in obtaining an education contributes to the bubble.

The second similarity is that interest rates played a large role in both the 2008 mortgage collapse and the current student loan situation.¹³⁹ People can no longer pay their debts once interest rates spiral the debt out of control. Although the interest rates appear to be low and attractive, the ARM loans of the mortgage industry quickly became unaffordable, just as a \$30,000 student loan will turn into \$50,000 within a matter of years.¹⁴⁰ But the most notable similarity is how both industries focused on getting anyone and everyone approved for a loan. In the mortgage industry, this was achieved through subprime mortgage lenders, while in the student loan industry, it is even easier because the government allows students to obtain government backed loans without

135. *See supra* Part II.

136. *See generally* Woodman, *supra* note 109, at 185; *see supra* Part II.

137. Sheryl Nance Nash, *5 Ways the Student Loan Bubble Mirrors the Housing Crisis*, THE FISCAL TIMES (Oct. 25, 2012), <http://www.thefiscaltimes.com/Articles/2012/10/25/5-Ways-the-Student-Loan-Bubble-Mirrors-the-Housing-Crisis>.

138. *Id.*

139. *Id.*

140. *Id.*

2018]

THE EDUCATION LOAN BUBBLE

341

even a credit check.¹⁴¹ This first started through FFELP and now occurs under the direct loan avenues.¹⁴²

The policy decision to authorize loans without assessing the risk to repay them has had a detrimental impact on the quality of our educational system. Issues such as Trump University are popping up, where private for-profit education institutions are taking advantage of the student's ability to obtain loans and using high-pressure sales tactics on individuals who are just beginning their professional lives.¹⁴³ In return, students are left with nothing to show for their expensive investment.¹⁴⁴ And Trump University is not the only perpetrator; for-profits have begun a takeover in the student loan industry through savvier and more effective marketing tactics.¹⁴⁵ For instance, from 2000 to 2014, the total student loan debt of students enrolled at for-profit institutions grew from \$39 billion to \$229 billion.¹⁴⁶ Although alarming, investors and politicians do not seem to fear the consequences.

A primary reason bankers, investors, and politicians are able to sleep at night might revolve around the overall size of the student loan debt in comparison to the mortgage industry. Although student loan debt has been consistently and considerably increasing over past decades, \$1.4 trillion remains a dwarf in comparison to the current \$8.94 trillion in mortgages.¹⁴⁷ While opponents to change suspect a crash would still hurt the economy—and specifically, the industry of higher education—they distinguish it from the mortgage crash.¹⁴⁸ But

141. *Id.*

142. *See supra* Part II.

143. *See* Michael Barbaro & Steve Eder, *Former Trump University Workers Call the School a 'Lie' and a 'Scheme' in Testimony*, N.Y. TIMES (May 31, 2016), <https://www.nytimes.com/2016/06/01/us/politics/donald-trump-university.html>.

144. *Id.*

145. Gillian B. White, *The Empty Promises of For-Profit Colleges*, THE ATLANTIC (Sept. 15, 2015), <https://www.theatlantic.com/business/archive/2015/09/the-failure-of-for-profit-colleges/405301/>.

146. *Id.*

147. *See Students & Debt*, *supra* note 13; Fed. Res. Bank of N.Y., Quarterly Report on Household Debt and Credit pmb1. (2018), https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2018Q1.pdf.

148. *See, e.g.*, Marc Prosser, *5 Reasons the Student Loan Crisis is Nothing like the Mortgage Crisis*, FORBES (Aug. 22, 2012), <https://www.forbes.com/sites/marcprosser/2012/08/22/student-loan-crisis/#2054a6896c1c>.

distinguishing the crises does not equate to disregarding the issue of student loans altogether. Even opponents believe that the student loan industry is causing an economic strain as the availability of student loans enable more loans, triggering college tuition to rise, thus increasing student loan balances.¹⁴⁹ “If the level of student debt continues to grow at its current rate, it could become a significant economic drag, as the younger generations delay purchases that would have otherwise fed economic growth.”¹⁵⁰

Like MBS’s, student loan asset backed securities (“SLABS”) have now become heavily traded.¹⁵¹ MBS’s are similar to SLABS because they both start with a single student loan that is packaged with other student loans and then traded on the free market.¹⁵² However, the difference between SLABS and MBS’s is critical. For one, SLABS are completely unsecured.¹⁵³ The only thing securing SLABS is 11 U.S.C. § 523(a)(8) non-dischargeable bankruptcy law.¹⁵⁴ Mortgages, on the other hand, are at least secured by a piece of property.¹⁵⁵ When the housing market collapsed, there was something to pursue even if the value of the home had decreased significantly. The owner did not incur a complete loss of the security. Conversely, if the SLABS market crashes, there is nothing to go after and no home to foreclose on. While creditors do have access to the courts for a creditor judgment, this remedy still poses a risk—these debtors just finished college and may have no assets at all, leaving nothing for creditors to collect.

V. PROPOSALS

Just as the Mortgage Crisis myth led to the 2008 crash, the myth that student loans are non-dischargeable will contribute to the

149. *See id.*; *see also supra* Part II.

150. Prosser, *supra* note 148.

151. *See Woodman, supra* note 109, at 199.

152. *Id.*

153. *Id.* at 218.

154. *Id.* (citing Julie Swedback & Kelly Prettnner, *Discharge or No Discharge? An Overview of Eighth Circuit Jurisprudence in Student Loan Discharge Cases*, 36 WM. MITCHELL L. REV. 1679, 1681–83 n.16 (2010)).

155. *See Woodman, supra* note 109, at 183.

2018]

THE EDUCATION LOAN BUBBLE

343

industry's demise. In 2011, Jason Iuliano¹⁵⁶ conducted a study of student loan adversary proceedings in bankruptcy and reviewed how many of those proceedings were successful in discharging student loans.¹⁵⁷ The results were alarming. In 2007, 169,774 student loan debtors filed for bankruptcy.¹⁵⁸ Of those 169,774, only 217 adversary proceedings were filed seeking a student loan discharge.¹⁵⁹ Of those 217 proceedings, 51 received a full discharge, 30 received a partial discharge, 25 received an administrative remedy, and 111 received no remedy at all.¹⁶⁰ Why are only 0.00128 percent of student loan debtors filing adversary proceedings when roughly 50 percent of all proceedings filed receive some form of remedy? The study further found no statistical difference in outcome between being represented by an attorney and appearing *pro se*.¹⁶¹ Iuliano's study focused primarily on three possible theories. First, lenders may be settling outside of bankruptcy.¹⁶² This theory is unlikely, because bankruptcy courts can discharge federal student debt, which makes up the bulk of total student loan debt as a whole.¹⁶³ Second, debtors may be turning to administrative remedies such as the Income Contingent Repayment Plan¹⁶⁴ or PSLF. Third, and the most likely theory, is student debtors in bankruptcy believe in the myth that student loans are either non-dischargeable or nearly impossible to discharge.¹⁶⁵ Since 11 U.S.C. § 523(a)(8) was enacted, the myth has circulated that student loan debtors are having an extremely difficult time meeting the "undue hardship" test.¹⁶⁶ "One article in *The New York Times* went so far as to contend

156. Jason Iuliano obtained the following credentials: J.D. Harvard Law School; Ph.D. Student in Politics, Princeton University. Jason Iuliano, *An Empirical Assessment of Student Loan Discharges and the Undue Hardship Standard*, 86 AM. BANKR. L.J. 495, 495 n.* (2012).

157. *See generally id.* at 499–501

158. *Id.* at 505.

159. *Id.*

160. *Id.*

161. *Id.* at 523.

162. *See id.* at 506.

163. *See id.* (explaining how "less than fifteen percent of borrowers have private student loans . . .").

164. *Id.*

165. *Id.*

166. *Id.*

that “[t]he cases are so harsh in measuring what an undue hardship is that anybody who is working and maintaining any kind of home life has very little chance of discharging these things in bankruptcy.”¹⁶⁷

A. Congressional Proposals

If another Mortgage Crisis is to be prevented, action must be taken sooner, rather than later. In the House of Representatives, the Discharge of Student Loans in Bankruptcy Act of 2017 was introduced by House Member John Delaney on May 4, 2017.¹⁶⁸ The bill has not yet been passed and remains in the first stage of the legislative process.¹⁶⁹ “This bill amends the federal bankruptcy code to permit a borrower to discharge in bankruptcy a nonprofit, government, or private student loan, or an obligation to repay an educational benefit, scholarship, or stipend.”¹⁷⁰

The only way to prevent another economic disaster is by going back to our roots and making student loans dischargeable again. In pre-1998 bankruptcy laws, college degrees were offered based on supply and demand.¹⁷¹ Colleges needed to research the job market and adjust curricula accordingly. Universities had “skin in the game.” It is only logical that if students do not find jobs after school and begin paying their loans, the loans will default, the bank will suffer losses, and ultimately, the bank will not lend or at least be hesitant to lend to that college or university in the future.

Loans were based on an analysis of risk versus benefit. This system forced colleges to perform a risk analysis on the degrees offered and

167. *Id.* at 506–07; (quoting Jonathan D. Glater, *That Student Loan, So Hard to Shake*, N.Y. TIMES (Aug. 23, 2008) <https://www.nytimes.com/2008/08/24/business/24loans.html>).

168. Discharge Student Loans in Bankruptcy Act of 2017, H.R. 2366, 115th Cong. § 1 (2017) [hereinafter DSLBA].

169. *Id.*; see also *H.R. 2366 Discharge Student Loans in Bankruptcy Act of 2017*, GOVTRACK, <https://www.govtrack.us/congress/bills/115/hr2366> (last visited May 18, 2018).

170. *Summary H.R. 2366—115th Congress (2017–2018)*, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/2366> (May 18, 2018); see generally DSLBA, *supra* note 168.

171. Pauly, *Supply and Demand of College Degrees: 101*, CHI.NOW: The C. Scoop (July 25, 2016, 2:18 PM), <http://www.chicagonow.com/college-scoop/2016/07/supply-and-demand-of-college-degrees-101/>.

2018]

THE EDUCATION LOAN BUBBLE

345

compete heavily. For-profit private schools like Trump University, that took advantage of easy money, were almost entirely non-existent or failed because they were unable to produce wage earning students. Although FFELP—the current direct student loan system—and private loans are based on good intentions, they have morphed into a weed that is slowly killing the economy. By making student loans dischargeable, banks and lenders will lose the secured status of their asset, be forced to perform better risk assessments, and ultimately, lend less. Fewer loans will result in more balanced tuition costs, because universities and colleges will not be able to increase tuition without loan funds available. In other words, colleges and universities will not be able to charge students more for tuition simply because they can get away with it. Colleges and universities will not be able to offer “basket weaving” degrees that serve little to no value to a student upon graduating.

Congress has tried already to fix this issue.¹⁷² Most recently, Illinois Senator Richard Durbin introduced the Fairness for Struggling Students Act of 2013.¹⁷³ While similar to the recent Discharge Student Loans in Bankruptcy Act of 2017, this bill was different because it focused solely on discharging private student loans.¹⁷⁴ Although this bill died in Congress, it appears that Democratic senators still feel that student loans are an impending disaster and wish to fix it by introducing a bill that covers not just private, but all student loans.¹⁷⁵

Opponents of this idea and of House bills alike, might argue that introducing these bills will cause immediate damage to the economy. If student loans become dischargeable, a very large portion of the \$1.4 trillion debt may be discharged overnight leaving investors and banks at a major loss. Ultimately, these losses would make their way to the taxpayer because the majority of all student loans are now federally direct¹⁷⁶ and if there is a default, the government pays the price. When the government pays, the taxpayers are directly impacted. The last thing America needs is a bailout of defaulting students.

172. *See generally* Fairness for Struggling Students Act of 2013, S. 114, 113th Cong. §§ 1–2 (2013).

173. *Id.*

174. *See id.*

175. *See* DSLBA, *supra* note 168.

176. *See supra* Part II.

What many policy makers and investors do not understand is that for a full discharge to take effect under this new law, the debtor must still pass muster under the normal “means test” requirement to qualify for Chapter 7 Bankruptcy.¹⁷⁷ The “means test” analyzes the debtor’s financial situation for the past sixty months to the date of filing.¹⁷⁸ A large part of this calculation is based on the debtor’s income.¹⁷⁹ If the debtor’s income is over a certain threshold (which is adjusted for dependents), the debtor will not qualify for Chapter 7 and be forced to pursue Chapter 13 Bankruptcy.¹⁸⁰ Chapter 13 Bankruptcy forces the debtor to pay a percentage of their overall unsecured debt over a period of thirty-six to sixty months using their current disposable income.¹⁸¹ At the end of this time-frame, the debtor’s remaining unsecured debt is discharged.¹⁸² A Chapter 13 Bankruptcy may also be useful to debtors seeking a discharge for their student loans considering Chapter 13 plans would pay at least something back to the lenders.¹⁸³ Therefore, lenders would not suffer a complete loss, but would be able to receive sixty months of payments. However, this would defeat the purpose of the original loan contract by enabling student debtors to trade what may have been a fifteen to twenty-year loan repayment agreement to one of five-years in duration. Alternatively, it would be wise for lenders to push for ten-year Chapter 13 plans rather than five in student loan circumstances.

If the Discharge Student Loans in Bankruptcy Act was passed, investors and politicians should not worry about the economy collapsing immediately because many student debtors would not qualify for bankruptcy. Currently, any single debtor making above the income threshold (which can range from \$39,231 to \$64,901 annually depending on the state of residence) would not qualify for Chapter 7

177. See 11 U.S.C. § 707(b)(2) (2012); see generally *Means Testing*, U.S. Dep’t of Just., <https://www.justice.gov/ust/means-testing> (last updated Apr. 16, 2018).

178. See 11 U.S.C. § 707(b)(2)(A)(iii)(I) (2012).

179. See *id.*

180. See 11 U.S.C. § 707(b)(1) (2012).

181. See 11 U.S.C. § 1325(b)(4) (2012).

182. See 11 U.S.C. § 1328 (a) (2012).

183. See *id.*

2018]

THE EDUCATION LOAN BUBBLE

347

Bankruptcy.¹⁸⁴ Only those below the income threshold would remain eligible. But, for student debtors whose income is below the “means test” threshold, it is a clear indication that the student loan education system may have failed them, as with their investment. The current “means test” law, paired with the good faith repayment requirement of the pre-1998 bankruptcy laws would serve as a safeguard to prevent students from abusing bankruptcy by using the law as an avenue to discharge their loans when they have the means to pay them.

B. Judicial Proposals

The courtroom is another avenue where change is needed. The Supreme Court of the United States has not yet granted *certiorari* for any case concerning the “undue hardship” test.¹⁸⁵ This has created an ambiguous definition of “undue hardship.” Depending on where a student debtor resides, the Court’s interpretation of “undue hardship” will determine whether or not the debtor qualifies for discharge in bankruptcy. This nation needs consistency, considering that the national student loan debt is spiraling out of control at an exponential rate. The rumor is that judges are reconsidering the *Brunner* test and seeking more adversary proceedings concerning the “undue hardship” analysis.¹⁸⁶ Only 0.00128 percent of student debtors with student loan debt actually filed adversary proceedings.¹⁸⁷ That number is simply too low for individuals who are seeking a fresh start.

CONCLUSION

America’s view and treatment of education is at the root of the education loan bubble. Americans must demand more than “basket weaving” degrees that provide no future and fail to promote the

184. *Means Testing: Census Bureau, IRS Data and Administrative Expenses Multipliers*, U.S. Dep’t of Just., <https://www.justice.gov/ust/means-testing/20171101> (last updated Mar. 14, 2018).

185. *Tetzlaff v. Educ. Credit Mgmt. Corp.*, 136 S. Ct. 803 (2016) (The United States Supreme Court denied petition for *certiorari*).

186. Tara Siegel Bernard, *Judges Rebuke Limits on Wiping Out Student Loan Debt*, N.Y. Times (July 17, 2015), <https://www.nytimes.com/2015/07/18/your-money/student-loans/judges-rebuke-limits-on-wiping-out-student-loan-debt.html>.

187. *See supra* Part VI.

American dream of home ownership. The catalyst for change must start with Congress and the Judiciary, because student loan lenders are secured through bankruptcy law. The myth that student loans are non-dischargeable has become a misconception to the majority. This ideology must change if we wish to avoid another economic crash and desire to better the education of Americans. The weed must be cut before it kills the tree. The last time our country faced a potential crash of such magnitude, it did not just watch, but encouraged one of the greatest mortgage collapses ever recorded.

*Andrew A. Sexton**

* J.D., *magna cum laude*, California Western School of Law, 2018; B.S., *cum laude*, San Diego State University. I would like to thank my senior editors, Zayde Kahlil, Jonathan Scott, Hana Maazaoui Willard, and Editor-in-Chief, Brooke Raunig, for the endless support and hours dedicated to this comment. I would also like to thank my fellow law school peer and fiancé, Jennifer Duren, for her encouragement, feedback, and patience. Finally, a special thanks to my father, James F. Sexton, Esq., for introducing me to the world of bankruptcy law.