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## Consumer Protection & Bankruptcy Law—Rewarding Repayment: Removing the Fear from Crushing Student Loan Debt Through Alternatives to Discharge

Sarah Holden

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CONSUMER PROTECTION & BANKRUPTCY LAW—REWARDING  
REPAYMENT: REMOVING THE FEAR FROM CRUSHING STUDENT LOAN DEBT  
THROUGH ALTERNATIVES TO DISCHARGE

I. INTRODUCTION

The narrative surrounding student loan debt is long overdue for a change. Since 1978, changes to the Bankruptcy Code<sup>1</sup> have made it increasingly difficult for student loan borrowers to achieve bankruptcy’s often-promised “fresh start.”<sup>2</sup> However, the conventional wisdom that student loan debt is nondischargeable in bankruptcy, absent a showing of undue hardship, is not just wrong—it is recklessly dangerous, benefiting proselytizing student loan servicers and lenders at enormous costs. Additionally, focusing solely on the dischargeability of this debt reinforces the idea that student borrowers are trying to shirk their repayment responsibilities, perpetuating the misconceptions that led to the extraordinary bankruptcy treatment of student loans in the first place.<sup>3</sup>

The discharge restrictions bankruptcy places on student loan debt reflect an alarmingly myopic perspective concerning the struggles that millions of borrowers experience while trying to repay their school loans.<sup>4</sup> Federal student loan programs were founded on the assumption that not all borrowers will be able to repay—a fact many policymakers seem to forget.<sup>5</sup> An ever-growing number of people are staying in debt for ever-increasing amounts of time because the student loan industry is filled with traps and tripwires that make these loans difficult to escape.<sup>6</sup> Unfortunately, this is the consequence

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1. The “Bankruptcy Code” refers to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified as amended at 11 U.S.C. §§ 101–1532).

2. Aaron N. Taylor, *Undo Undue Hardship: An Objective Approach to Discharging Federal Student Loans in Bankruptcy*, 38 J. LEGIS. 185, 219 (2012) (quoting *Williams v. U.S. Fid. & Guar. Co.*, 236 U.S. 549 (1915)); see also Anne E. Wells, *Replacing Undue Hardship with Good Faith: An Alternative Proposal for Discharging Student Loans in Bankruptcy*, 33 CAL. BANKR. J. 313, 315 (2016).

3. See, e.g., H.R. REP. NO. 95-595, at 161 (1977), as reprinted in 1978 U.S.C.C.A.N. 5963, 6122.

4. Arthur Ryman, *Contract Obligation: A Discussion of Morality, Bankruptcy, and Student Debt*, 42 DRAKE L. REV. 205, 222 (1993); see also Roger Roots, *The Student Loan Debt Crisis: A Lesson in Unintended Consequences*, 29 SW. U. L. REV. 501, 517–19 (2000); William J. Cox, *The Student Borrower: Slave to the Servicer?*, 27 LOY. CONSUMER L. REV. 189, 189–90 (2015).

5. See 124 CONG. REC. 1791–98 (1978) (debate on student loans); NAT’L BANKR. REV. COMM’N, BANKRUPTCY: THE NEXT TWENTY YEARS, FINAL REPORT 214 (1997).

6. See Elissa Nadworny, *These Are the People Struggling the Most to Pay Back Student Loans*, NPR (July 9, 2019, 10:51 AM), <https://www.npr.org/2019/07/09/738985632/these-are>

of a program whose central goal is to provide access to higher education funding to as many people as possible, while addressing the repayment mechanism as an afterthought.<sup>7</sup>

Some form of student loan crisis has been in existence almost as long as federal student loans themselves.<sup>8</sup> Prior to the Guaranteed Student Loan Program in 1965, both student loans and student loan bankruptcies were rare.<sup>9</sup> Before federal student loans became widely available, the student loan crisis centered around the wasted brainpower of bright and capable young people who were unable to afford a college education.<sup>10</sup> Over the next decade, as student loans became more common, the student loan crisis refocused on the rising rate of non-repayment.<sup>11</sup> By the 1970s, the public fixated on the stories of “deadbeat defaulters” who were taking out loans and simply refusing to repay them.<sup>12</sup> From 1972 to early 1975, calls for bankruptcy reform increased as student loan bankruptcies reportedly tripled.<sup>13</sup>

Despite the “blame the borrower” narrative, very little data supported the resulting constraints put on the dischargeability of student loan debt in

the-people-struggling-the-most-to-pay-back-student-loans; DAVID P. SMOLE & RITA R. ZOTA, CONG. RSCH. SERV., IF10158, A SNAPSHOT OF STUDENT LOAN DEBT 2 (2022) (“The federal student loan portfolio continues to grow as new loans are disbursed at a faster rate than existing loans are repaid.”); Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. CIV. RTS. & SOC. JUST. 215, 218 (2014) (“A student loan resembles a labyrinth; it’s easy for you to enter, but once you get into trouble, it is difficult, maybe impossible, to exit.”).

7. See JOEL BEST & ERIC BEST, THE STUDENT LOAN MESS: HOW GOOD INTENTIONS CREATED A TRILLION-DOLLAR PROBLEM 162 (2014).

8. See generally *Student Loan Defaults: Oversight Hearing Before the H. Subcomm. on Postsecondary Educ. of the Comm. on Educ. & Labor*, 95th Cong. (1977) [hereinafter *Student Loan Defaults Hearing*].

9. See *Higher Education Act of 1965: Hearings Before the S. Subcomm. on Educ. of the Comm. on Labor & Public Welfare*, 89th Cong. 181–82 (1965) (statement of Dr. Peter Muirhead) (noting that, between 1959 and mid-1964, only forty-seven loans were discharged due to bankruptcy and fewer than 2% of accounts in repayment were past due); JOSH MITCHELL, THE DEBT TRAP: HOW STUDENT LOANS BECAME A NATIONAL CATASTROPHE 14 (2021). Private loans existed but were even more rare and were often issued through funds set up by philanthropists, schools, and banks. *Id.*

10. BEST & BEST, *supra* note 7, at 43.

11. See *Student Loan Defaults Hearing*, *supra* note 8.

12. BEST & BEST, *supra* note 7, at 43. The crisis was framed in such a way that one-in-six loan recipients were supposedly engaged in “shoddy financial practice[s],” such as “casually” filing for bankruptcy after graduation. See *Student Loan Defaults Hearing*, *supra* note 8, at 48 (statement of Rep. Jack Brinkley).

13. *Review of Higher Education Programs, 1975: Hearing Before the Subcomm. on Educ. of the Comm. on Labor & Public Welfare*, 94th Cong. 6 (1975) [hereinafter *Review of Higher Education Programs, 1975*] (statement of Hon. T. H. Bell, U.S. Commissioner of Education, Department of Health, Education, and Welfare).

bankruptcy.<sup>14</sup> Although the total number of student loan bankruptcies was increasing, so, too, was the number of student loan borrowers and the amount of money being loaned.<sup>15</sup> The actual rate of student loan bankruptcies, as a function of the number of loans issued, remained relatively low.<sup>16</sup>

Limiting the dischargeability of student loans quickly gained bipartisan support, championed by those believing that students who chose to receive the benefit of extra education ought to be obligated to bear the associated cost.<sup>17</sup> After all, with easier access to education came the presumption of lucrative careers.<sup>18</sup> This led some to claim that preventing student loan discharge through bankruptcy was “a matter of moral principle.”<sup>19</sup> Others viewed discharging student loan debt as “tantamount to fraud.”<sup>20</sup>

In 1976, when Congress first passed legislation limiting the dischargeability of student loans by requiring a debtor to show “undue hardship,”<sup>21</sup> Congress’ principal concern centered on perceived, rather than actual, abuses.<sup>22</sup> Capitalizing on sensationalized stories circulating in the media, members of Congress employed carefully crafted statistics to further stoke fears.<sup>23</sup> For instance, one congressional committee cited a 225% increase in student borrower bankruptcy in a single year in Pennsylvania but failed to mention that this increase represented the change from four bankruptcies to thirteen.<sup>24</sup> In another instance, a congressman pointed to a 1,200% increase in total student

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14. See Roots, *supra* note 4, at 509 (noting that the default rate hit a high-water mark of 22.4% in 1990, more than a decade after dischargeability limits were first put in place).

15. H.R. REP. NO. 95-595, at 135 (1977).

16. *Id.* at 148 (reporting that only 0.2% of all student loans had been discharged in bankruptcy, accounting for less than 0.3% of the dollars loaned).

17. BEST & BEST, *supra* note 7, at 158; see, e.g., H.R. DOC. NO. 93-137, pt.1, at 170, 176–77 (1973).

18. Kathryn E. Hancock, *A Certainty of Hopelessness: Debt, Depression, and the Discharge of Student Loans Under the Bankruptcy Code*, 33 L. & PSYCH. REV. 151, 165 (2009).

19. *Oversight Hearings on All Forms of Federal Student Financial Assistance: Oversight Hearings Before the H. Subcomm. on Postsecondary Educ. of the Comm. on Educ. & Labor*, 95th Cong. 314–15 (1977) [hereinafter *Oversight Hearings on Federal Student Financial Assistance*] (statement of M. Wilmer Mirandon, President of the National Council of Higher Education Loan Programs).

20. 124 CONG. REC. 1793–94 (1978) (statement of Rep. John Erlenborn).

21. Education Amendments of 1976, Pub. L. No. 94-482, sec. 127, § 439A, 90 Stat. 2081, 2141 (§ 439A effective September 30, 1977) (codified at 20 U.S.C. § 1087-3) (repealed by Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 317, 92 Stat. 2549, 2678).

22. John Patrick Hunt, *Help or Hardship?: Income-Driven Repayment in Student-Loan Bankruptcies*, 106 GEO. L.J. 1287, 1305 (2018) (“The paradigm case of abuse was the hypothetical borrower who discharged her debt immediately upon graduation without making any effort to repay the debt while enjoying an increased salary because of the education the debt made possible.”); see also *Review of Higher Education Programs, 1975*, *supra* note 13, at 34–35.

23. *Student Loan Defaults Hearing*, *supra* note 8, at 7, 34–35.

24. H.R. REP. NO. 95-595, at 148 (1977).

loans discharged from 1965–1972 to 1972–1975.<sup>25</sup> Yet, this increase in discharge was proportional to the increase in loans entering repayment during the same period.<sup>26</sup>

While some members of Congress highlighted individual examples of bad actors,<sup>27</sup> student borrowers were not filing for bankruptcy at significantly higher rates than the general population.<sup>28</sup> Limiting bankruptcy discharge for student loans was regarded by one congressman as “a discriminatory remedy for a ‘scandal’ which exists primarily in the imagination.”<sup>29</sup> As explained by Deanne Loonin, writing for the National Consumer Law Center, “[s]omewhat like the stories of mothers on public assistance riding in Cadillacs to buy steaks with food stamps, stories of doctors making big bucks discharging their hefty student loans caught the attention of Congress, the media, and the public.”<sup>30</sup> In the first ten years of the Guaranteed Student Loan Program, the program issued \$7 billion in student loans, and only 0.3% of those funds were discharged in bankruptcy.<sup>31</sup>

Fear is a powerful motivator, but it can also lead to flawed assumptions.<sup>32</sup> Abysmal loan administration played a large role in the rising delinquency and default rates, especially where the loans were administered directly by the federal government.<sup>33</sup> Borrowers who dropped out of school without graduating could not be identified,<sup>34</sup> and little to no regular communication took place

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25. 124 CONG. REC. 1792 (1978) (statement of Rep. Ronald Mottl).

26. H.R. REP. NO. 95-595, at 133.

27. *See, e.g.*, 122 CONG. REC. 28037 (1976) (statement of Sen. Glenn Beall).

28. H.R. REP. NO. 95-595, at 133.

29. *Id.* at 148 (statement of Rep. James O’Hara). While “a large and growing number of students” were supposedly filing for bankruptcy, the federal student loan program itself was also growing rapidly. *Id.* at 131. *But see* Roots, *supra* note 4, at 512 n.77 (concluding that the bankruptcy rate would have indeed risen had Congress not limited bankruptcy discharge in 1976).

30. DEANNE LOONIN, NAT’L CONSUMER L. CTR., NO WAY OUT: STUDENT LOANS, FINANCIAL DISTRESS, AND THE NEED FOR POLICY REFORM 29 (2006), <https://www.bankruptcy-division.com/Bankruptcy-Student-Loan/nowayout.pdf>.

31. Richard Fossey, “*The Certainty of Hopelessness: Are Courts Too Harsh Toward Bankrupt Student Loan Debtors?*,” 26 J.L. & EDUC. 29, 34 (1997).

32. *See, e.g.*, H.R. DOC. NO. 93-137, pt.1, at 170 (1973) (discussing how concern over potential abuse, rather than actual abuse, was the driving force behind dischargeability limitations).

33. H.R. REP. NO. 95-595, at 135. Default rates for loans directly insured by the federal government were often twice as high as those insured by either private or nonprofit guarantee agencies (and, subsequently, reinsured by the federal government). *Id.* (“Through fiscal year 1975, OE [Office of Education] calculated a cumulative loss rate, based on total matured loans, of 17.6 percent for the federally insured portion and 8.9 percent for the guarantee agency portion.”).

34. U.S. GOV’T ACCOUNTABILITY OFF., B-164031(1), OFF. OF EDUC., DEP’T OF HEALTH, EDUC., & WELFARE: IMPROVEMENTS NEEDED IN THE ADMINISTRATION OF THE GUARANTEED

between borrowers and lenders prior to default.<sup>35</sup> Lenders rarely pursued borrowers through collection efforts.<sup>36</sup> Before 1977, there was not even a mechanism in place through which a borrower with a defaulted loan could get caught up on their payments.<sup>37</sup> Loan administration and collections processes were even more unreliable where educational institutions originated the loans.<sup>38</sup> But, despite Congress' awareness of these pervasive administrative issues, legislators largely ignored recommendations that focused on the need for improvement in student loan administration as an alternative to limiting access to relief through bankruptcy.<sup>39</sup>

The fear that bankruptcy relief would be abused by student loan borrowers has, since 1976, outstripped the actual risk of such abuse.<sup>40</sup> This fear has resulted in bipartisan majorities placing ever-higher hurdles in front of student borrowers seeking relief in bankruptcy.<sup>41</sup> Consequently, the student loan debt crisis persists to this day, though the arguments have somewhat evolved. The student loan debt crisis is now characterized as a product of creditor manipulation,<sup>42</sup> enslaving borrowers to abusive servicers,<sup>43</sup> and requiring debtors to prove a certainty of hopelessness to achieve relief.<sup>44</sup> As a result, student loan debt is creating financial instability for tens of millions of people.<sup>45</sup>

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STUDENT LOAN PROGRAM 2 (1973) (“Students were often out of school for a year or longer before lenders learned they had defaulted on loans.”).

35. *Student Loan Defaults Hearing*, *supra* note 8, at 27–29.

36. Timothy D. Naegele, *The Guaranteed Student Loan Program: Do Lenders' Risks Exceed Their Rewards?*, 34 HASTINGS L.J. 599, 622 n.132 (1983). “Without some reasonable expectation that the Department would seek repayment on such defaulted loans, it is not surprising that so many students chose not to repay their loans.” *Id.* at 602 n.23.

37. 124 CONG. REC. 1796 (1978) (statement of Rep. William D. Ford).

38. *See Student Loan Defaults Hearing*, *supra* note 8, at 27–28; *Review of Higher Education Programs, 1975*, *supra* note 13, at 5.

39. *See* H.R. REP. NO. 95-595, at 151 (1977) (statement of Rep. James O'Hara) (“Treating students, all students, as though they were suspected frauds and felons is no substitute for improving the administration of the [student loan] program.”).

40. *See supra* notes 22–26 and accompanying text.

41. *See infra* Section II.A; *see also* John A. E. Pottow, *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*, 44 CANADIAN BUS. L.J. 245, 249 (2006).

42. Jason Iuliano, *The Student Loan Bankruptcy Gap*, 70 DUKE L.J. 497, 499 (2020).

43. Cox, *supra* note 4, at 192.

44. *E.g.*, *Oyler v. Educ. Credit Mgmt. Corp. (In re Oyler)*, 397 F.3d 382, 386 (6th Cir. 2005). Bankruptcy courts regularly interpret the undue hardship provision of 11 U.S.C. § 523(a)(8) as requiring debtors to prove a “certainty of hopelessness.” Bruce Grohsgal, *The Long Strange Trip to a Certainty of Hopelessness: The Legislative and Political History of the Nondischarge of Student Loans in Bankruptcy*, 95 AM. BANKR. L.J. 443, 445 (2021).

45. *See* Roots, *supra* note 4, at 517 (“The student loan debt crisis has reached such proportions that policy makers can neither ignore the growing demand for student debtor relief nor afford to write off defaulted loans at a higher rate.”); Cox, *supra* note 4, at 189–90 (“[Third party servicers] have no accountability to the borrowers they collect from and often little accountability to the lenders with whom they contract. This system of lending has become

Adopting a macro view of these crises makes it easier to see that two central themes have remained constant throughout the past fifty years: (1) student loans should be broadly accessible, and (2) repaying student loan debt should not be impossible.<sup>46</sup> However, providing equal access to educational funding does nothing to eliminate the complex inequities that make student loan debt repayment harder for some than others.<sup>47</sup>

History has made clear how fixating on a particular student loan crisis seems to create the foundation for the next crisis.<sup>48</sup> As such, the focus of this Note is not on highlighting a particular crisis or blaming particular policies for today's student loan problems, nor does it intend to suggest that a singular "solution" will suddenly fix a flawed system impacting millions of people. Instead, this Note argues that the loan repayment mechanism has been ignored for far too long and that the thoughtful creation of an intuitive, easy-to-use repayment tool could begin to correct this deficit, subsequently helping millions of people get out from under trillions of dollars of student loan debt.

This Note urges a "think outside the box" approach to student loan repayment reform focusing on pre-default opportunities for more effective borrower engagement and more efficient debt management. Section II of this Note reviews the legislative framework that created increasingly harsh treatment of student loan discharge in bankruptcy.<sup>49</sup> Section II then examines the various methods lenders have used to abuse and exploit both borrowers and the judicial system as a result of presumptive nondischargeability.<sup>50</sup> Section III of this Note argues for an interdisciplinary, evidence-based approach to tackling student loan debt management that leverages gamification and rewards by utilizing a servicer-agnostic platform to encourage faster and more efficient debt repayment.<sup>51</sup> Section III also suggests that the burden of funding a student loan management platform should be shouldered by educational institutions relative to the number of student loan borrowers an institution generates and the amount of time it takes borrowers to repay the incurred debt.<sup>52</sup>

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particularly troubling in the context of student loans, shackling our nation's youth with the heavy chains of student loan debt.").

46. See Rendleman & Weingart, *supra* note 6, at 218; BEST & BEST, *supra* note 7, at 158–60.

47. See, e.g., Darrick Hamilton & Naomi Zewde, *Promote Economic and Racial Justice: Eliminate Student Loan Debt and Establish a Right to Higher Education Across the United States*, WASH. CTR. FOR EQUITABLE GROWTH (Feb. 18, 2020), <https://equitablegrowth.org/promote-economic-and-racial-justice-eliminate-student-loan-debt-and-establish-a-right-to-higher-education-across-the-united-states/> (detailing additional challenges Black, Latinx, and Native American student loan borrowers face in repaying their student loan debt).

48. BEST & BEST, *supra* note 7, at 2.

49. See *infra* Section II.A.

50. See *infra* Sections II.B–II.C.

51. See *infra* Section III.A.

52. See *infra* Section III.B.

Finally, Section IV of this Note explores alternative methods of reducing defaults and correcting systemic inequities in student loan borrowing and argues that these alternatives are insufficient to provide the long-term relief sought by millions of people.<sup>53</sup>

## II. BACKGROUND

Today's educational landscape looks drastically different than it did a century ago.<sup>54</sup> In 1920, less than one in ten people attended college.<sup>55</sup> For many, the primary barrier to matriculation was cost.<sup>56</sup> Consequently, a college education was often unattainable for most people until federally guaranteed educational financing became commonplace.<sup>57</sup>

The advent of federal funding for postsecondary education began with the introduction of the GI Bill in 1944.<sup>58</sup> The GI Bill provided funding for college tuition in conjunction with a monthly living allowance,<sup>59</sup> and within only two years, half of all college students were veterans.<sup>60</sup>

Fear of Soviet supremacy during the Cold War space race fueled the next advancement in federal postsecondary student aid.<sup>61</sup> Crediting the Soviet educational system with the success of Sputnik,<sup>62</sup> Congress passed the National

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53. See *infra* Section IV.

54. See generally ELIZABETH TANDY SHERMER, *INDENTURED STUDENTS: HOW GOVERNMENT-GUARANTEED LOANS LEFT GENERATIONS DROWNING IN COLLEGE DEBT* 22 (2021) (highlighting how the exclusive admissions policies at Harvard and other elite institutions did not allow students to enroll even though they could afford the tuition, serving to keep both academia and the top tiers of business and politics overwhelmingly white and male).

55. MITCHELL, *supra* note 9, at 13; JEFFREY J. KUENZI, *CONG. RSCH. SERV.*, RL33963, *HIGH SCHOOL GRADUATION, COMPLETION, AND DROPOUTS: FEDERAL POLICY, PROGRAMS, AND ISSUES* 7 fig.1 (2008) (showing that in 1920, only 16.4% of adults aged twenty-five and over had completed high school).

56. MITCHELL, *supra* note 9, at 13.

57. See NAT'L CTR. FOR EDUC. STAT., U.S. DEP'T OF EDUC. OFF. OF EDUC. RSCH. & IMPROVEMENT, *120 YEARS OF AMERICAN EDUCATION: A STATISTICAL PORTRAIT* 7 (1993) (showing how educational attainment changed as federal student loans became increasingly available).

58. See Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, sec. 400, § 1(f), 58 Stat. 284, 289 (codified at 38 U.S.C. § 3011); Dalie Jimenez & Jonathan D. Glater, *Student Debt is a Civil Rights Issue: The Case for Debt Relief and Higher Education Reform*, 55 HARV. C.R.-C.L. L. REV. 131, 155 (2020).

59. MITCHELL, *supra* note 9, at 15; Robert Proudfoot, *Securitization of Student Loans: A Proposal to Reform Federal Accounting, Reduce Government Risk, and Introduce Market Mechanisms as Indicators of Quality Education*, 9 U. MASS. L. REV. 6, 12-13 (2014).

60. MITCHELL, *supra* note 9, at 16.

61. Marcel Garsaud Jr., *National Defense Education Act, Title II—Student Loan Program—Moving Toward the End of the First Decade*, 14 LOY. L. REV. 79, 82 (1967); Michael Simkovic, *Risk-Based Student Loans*, 70 WASH. & LEE L. REV. 527, 549 n.37 (2013); Proudfoot, *supra* note 59, at 14.

62. Simkovic, *supra* note 61, at 549.



Defense Education Act of 1958 (NDEA) primarily as a national defense measure.<sup>63</sup> Through the NDEA, the federal government created the first federal educational loan program aimed at benefiting low-income students.<sup>64</sup> However, by 1960—just two years after the program began—NDEA funds were proving woefully insufficient to meet the demands of the country’s growing appetite for postsecondary education.<sup>65</sup>

The administration of President Lyndon B. Johnson laid the foundation for the modern student loan industry.<sup>66</sup> As part of Johnson’s “war on poverty,” an entirely new federal student loan program was created through the Higher Education Act (HEA) of 1965.<sup>67</sup> Under the NDEA, the HEA’s predecessor, student loans were issued directly from funds held by the U.S. Treasury, driving up the federal deficit.<sup>68</sup> The HEA, by contrast, created the Guaranteed Student Loan Program (GSLP) to incentivize private lenders to originate educational loans, which helped to expand federal lending without furthering budgetary constraints.<sup>69</sup> Under the GSLP, these private lenders were largely protected against losses because the government guaranteed the loans against default.<sup>70</sup>

By 1978, the federal government paid a cumulative total of \$985 million to private lenders for default claims arising during the first twelve years of the

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63. Daniel A. Austin, *The Indentured Generation: Bankruptcy and Student Loan Debt*, 53 SANTA CLARA L. REV. 329, 338 (2013); Garsaud, *supra* note 61, at 83–84. Title II of the NDEA authorized the National Defense Student Loan Program. *Oversight Hearings on Federal Student Financial Assistance*, *supra* note 19, at 19.

64. Camilla E. Watson, *Federal Financing of Higher Education at a Crossroads: The Evolution of the Student Loan Debt Crisis and the Reauthorization of the Higher Education Act of 1965*, 2019 MICH. ST. L. REV. 883, 892–93.

65. See SHERMER, *supra* note 54, at 159–60 (explaining how many students quickly exhausted their NDEA funds and, once the money ran out, were forced to drop out of college altogether). Considering that borrowers who dropped out of college were not well tracked, if tracked at all, exhausted NDEA funds almost certainly played a role in the rising default rates experienced in the early 1970s. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 34 and accompanying text.

66. See Roots, *supra* note 4, at 504. As a former schoolteacher, Johnson believed higher education was a necessity and saw education as a tool that could reduce national poverty levels and help close the racial education gap. MITCHELL, *supra* note 9, at 22–23.

67. See Roots, *supra* note 4, at 505; Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified as amended at 20 U.S.C. § 108711). The Act was originally only authorized for five years but has since been repeatedly reauthorized. Watson, *supra* note 64, at 896 n.68.

68. See MITCHELL, *supra* note 9, at 24–25.

69. See Higher Education Act of 1965 § 430(a); Watson, *supra* note 64, at 897–98.

70. See H.R. REP. NO. 95-595, at 135 (1977). Under the Guaranteed Student Loan Program, loans made to students by private lenders were insured by either the Office of Education or by a state or private nonprofit guaranty agency that had a reinsurance agreement with the Office of Education. *Id.* If a student defaulted, filed for bankruptcy, was disabled, or died, the lender would ultimately be reimbursed for the loss by the Office of Education. *Id.*

GSLP.<sup>71</sup> By the end of the 1991 fiscal year, that number grew to more than \$16 billion.<sup>72</sup>

#### A. The Progression of Nondischargeability

Prior to the 1970s, student loans were treated the same as any other consumer debt in bankruptcy—freely dischargeable absent evidence of fraud.<sup>73</sup> In 1976, Congress passed the first legislation limiting the discharge of student loan debt, requiring a borrower to prove that repaying the debt would “impose an undue hardship on the debtor or his dependents” for the debt to be dischargeable.<sup>74</sup> Seemingly simple, this undue hardship provision only applied to federal student loans and only during the first five years a borrower was in active repayment.<sup>75</sup> Nevertheless, courts have struggled since its enactment to decipher precisely what constitutes an undue hardship.<sup>76</sup>

The undue hardship requirement was reenacted with only minor changes in 1978 as § 523(a)(8) of the Bankruptcy Code.<sup>77</sup> In 1990, the five-year requirement was extended to seven.<sup>78</sup> The time limit was then removed altogether in 1998 for the sake of “budget neutrality,”<sup>79</sup> a decision that doomed millions of struggling borrowers to a lifetime of student loan debt in exchange for a meager \$56 million per year budgetary offset.<sup>80</sup>

While federal student loans were excepted from discharge in bankruptcy purportedly to safeguard the integrity of the federal student loan system,<sup>81</sup> that

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71. Ryman, *supra* note 4, at 218.

72. *Id.*

73. Jimenez & Glater, *supra* note 58, at 180.

74. See Education Amendments of 1976, Pub. L. No. 94-482, sec. 127, § 439A, 90 Stat. 2081, 2141.

75. *See id.*

76. *See, e.g.,* NAT'L BANKR. REV. COMM'N, *supra* note 5, at 211–12 nn.531–34.

77. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 523(a)(8), 92 Stat. 2549, 2591 (codified as amended at 11 U.S.C. § 523(a)(8)). For an overview of various arguments made during congressional debates relating to the adoption of 11 U.S.C. § 523(a)(8), in support of restricting student loan dischargeability, see Jennifer L. Frattini, *The Dischargeability of Student Loans: An Undue Burden*, 17 BANKR. DEV. J. 537, 547–50 (2001).

78. Crime Control Act of 1990, Pub. L. No. 101-647, sec. 3621, § 523(a)(8), 104 Stat. 4789, 4964–65. At this time, Congress also added the phrase “for an obligation to repay funds received as an educational benefit” to 11 U.S.C. § 523(a)(8). *Id.*

79. *See* Higher Education Amendments of 1998, Pub. L. No. 105-244, sec. 971, § 523(a)(8), 112 Stat. 1581, 1837; H.R. REP. NO. 105-750, at 408 (1998) (Conf. Rep.) (citing budget neutrality as the justification); Grohsgal, *supra* note 44, at 447 (“The law’s stated purpose of ensuring the ‘budget neutrality’ of a comprehensive federal education bill was a mere distraction . . . from consideration of the likely effect on students who could not repay their loans.”).

80. Grohsgal, *supra* note 44, at 445.

81. 4 COLLIER ON BANKRUPTCY ¶ 523.14 (Richard Levin & Henry J. Sommer eds., 16th ed.).

logic cannot be extended to support the exception of private student loan debt from discharge.<sup>82</sup> Unlike the Department of Education, private lenders screen borrowers for creditworthiness as part of the lending process, treating this debt more like a credit card than a student loan.<sup>83</sup> Nevertheless, Congress extended the discharge protections of 11 U.S.C. § 523(a)(8) to education loans made by private lenders through the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005.<sup>84</sup>

As the Senate Judiciary Committee presciently noted in 1975, excepting student loans from discharge in bankruptcy “suggests that if sufficient political pressure can be generated, a special interest group can obtain special treatment under the bankruptcy law.”<sup>85</sup> The lobbying that produced the BAPCPA is evidence of *exactly this* phenomenon.<sup>86</sup> Bankruptcy is supposed to serve an essential role in deterring unscrupulous lenders from offering risky credit products due to the threat of that debt being discharged in bankruptcy.<sup>87</sup> Yet, within just six years of the passing of the BAPCPA—without the deterrence of bankruptcy in place—the outstanding balance of private student loan debt almost tripled.<sup>88</sup>

#### B. Private Student Loans in Bankruptcy Under 11 U.S.C. § 523(a)(8)

Following the BAPCPA, few borrowers (and fewer bankruptcy attorneys) even attempt to have student loans discharged in bankruptcy thanks to

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82. Alexei Alexandrov & Dalie Jimenez, *Lessons from Bankruptcy Reform in the Private Student Loan Market*, 11 HARV. L. & POL’Y REV. 175, 210 (2017); see also *id.* at 211 (“The CFPB found that less than 1.3% of outstanding loans issued between 1999–2011 were in a bankruptcy status at any point between 2005–11.”).

83. Susan M. Dynarski, *The RNC Wants to Make Student Loans Competitive Again. They Never Were*, BROOKINGS (July 21, 2016), <https://www.brookings.edu/research/the-rnc-wants-to-make-student-loans-competitive-again-they-never-were/>.

84. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59.

85. *The Bankruptcy Reform Act, Hearings Before the S. Subcomm. on Improvements in Jud. Mach. of the Comm. on the Judiciary*, 94th Cong. 129 (1975).

86. See Henry J. Sommer, *Trying to Make Sense Out of Nonsense: Representing Consumers Under the “Bankruptcy Abuse Prevention and Consumer Protection Act of 2005”*, 79 AM. BANKR. L.J. 191, 191–92 (2005); Stephen Labaton, *House Passes Bankruptcy Bill: Overhaul Now Awaits President’s Signature*, N.Y. TIMES (Apr. 15, 2005), <http://www.ny-times.com/2005/04/15/business/house-passes-bankruptcy-bill-overhaul-now-awaits-presidents.html>.

87. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 72 (2008).

88. See Anne Johnson et al., *The Student Debt Crisis*, CTR. FOR AM. PROGRESS (Oct. 25, 2012), <https://www.americanprogress.org/article/the-student-debt-crisis/>.

the presumption of nondischargeability.<sup>89</sup> Between 2015 and 2020, approximately 250,000 people with student loan debt filed for bankruptcy, of which less than 1% filed an adversary proceeding to attempt to have the student debt discharged.<sup>90</sup> The Student Borrower Protection Center estimates that there could be tens of billions of dollars of private student loan debt that either (1) could be discharged through normal bankruptcy proceedings, if discharge was attempted, or (2) actually *was* discharged but, because the lender continued to send bills and collection notices, the borrower continued to pay.<sup>91</sup> Others estimate that as many as one in two borrowers could obtain some relief if the appropriate steps were taken during the bankruptcy proceeding.<sup>92</sup> However, lenders' long-term litigation strategies have caused a massive distortion in precedent that masks this likelihood of success.<sup>93</sup>

Many of the pro-creditor changes produced by the BAPCPA's passing were the result of extensive pressure put on Congress by lenders and lobbyists.<sup>94</sup> Prior to 2005, 11 U.S.C. § 523(a)(8) was a single paragraph that included almost the exact same language § 523(a)(8)(A)(i)–(ii) contains today.<sup>95</sup> However, through the BAPCPA, Congress expanded the Bankruptcy Code's student loan discharge exception with the addition of § 523(a)(8)(B), adding discharge protection to qualified private student loans.<sup>96</sup>

The evolution of this statute makes clear that § 523(a)(8) is not, nor was intended to be, a catch-all provision covering the entire universe of student

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89. Iuliano, *supra* note 42, at 499; Austin Smith, *Here Is Why Your Private Student Loan May Able to Be Eliminated in Bankruptcy*, GET OUT OF DEBT GUY (Dec. 29, 2016), <https://getoutofdebt.org/100708/private-student-loan-may-able-eliminated-bankruptcy>.

90. Tara Siegel Bernard, *Biden Administration Offers New Path to Discharging Student Debt in Bankruptcy*, N.Y. TIMES (Nov. 17, 2022), <https://www.nytimes.com/2022/11/17/your-money/bankruptcy-student-loans.html>; Iuliano, *supra* note 42, at 523 (showing 0.185% in 2017). When loans fall within the discharge exception of 11 U.S.C. § 523(a)(8), the debt is not automatically dischargeable—rather, a debtor must file an adversary proceeding requesting that the court make an undue hardship determination in order for these loans to be discharged in the course of the debtor's bankruptcy. *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 451 (2004).

91. *Morally Bankrupt: How the Student Loan Industry Stole a Generation's Right to Debt Relief*, STUDENT BORROWER PROT. CTR. 6 (Jan. 2022) [hereinafter *Morally Bankrupt*], [https://protectborrowers.org/wp-content/uploads/2022/01/SBPC\\_Morally-Bankrupt.pdf](https://protectborrowers.org/wp-content/uploads/2022/01/SBPC_Morally-Bankrupt.pdf).

92. Iuliano, *supra* note 42, at 499.

93. *Id.*

94. See Sommer, *supra* note 86, at 191–92; Labaton, *supra* note 86.

95. See Federal Debt Collection Procedures Act of 1990, Pub. L. No. 101-647, § 3621, 104 Stat. 4933, 4964–65 (excepting from discharge a debt “for 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 for any obligation to repay funds received as an educational benefit, scholarship or stipend”).

96. See Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 220, 119 Stat. 23, 59.

loans.<sup>97</sup> In its current formation, § 523(a)(8) provides that, absent showing of undue hardship, a debtor is not discharged from any debt that constitutes:

(A)

(i) an educational benefit overpayment or loan made, insured, or guaranteed by a government 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

(B) any other educational loan that is a qualified education loan, as defined in section 221(d)(1) of the Internal Revenue Code of 1986, incurred by a debtor who is an individual.<sup>98</sup>

The statute, as a whole, can be read as creating four broad categories of presumptively nondischargeable student loan debt: (1) educational benefit overpayments and loans made, insured, or guaranteed by the government;<sup>99</sup> (2) loans made under programs partially or fully funded by the government or a nonprofit institution;<sup>100</sup> (3) obligations to repay funds that were received as an educational benefit, scholarship, or stipend;<sup>101</sup> and (4) qualified private student loans.<sup>102</sup>

The first two categories of presumptively nondischargeable student debts include both direct and guaranteed federal student loans,<sup>103</sup> as well as overpayments occurring from programs such as the GI Bill.<sup>104</sup> The intent behind these discharge exceptions is to protect both taxpayers and nonprofits

97. *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595, 603 (2d Cir. 2021) (quoting *Inst. of Imaginal Stud. v. Christoff* (*In re Christoff*), 527 B.R. 624, 634 (B.A.P. 9th Cir. 2015)).

98. 11 U.S.C. § 523(a)(8); *see also* *Parker v. Gen. Revenue Corp.* (*In re Parker*), 322 B.R. 856, 859 (Bankr. E.D. Ark. 2005) (quoting 11 U.S.C. § 523(a)(8) (2000)).

99. 11 U.S.C. § 523(a)(8)(A)(i).

100. *Id.*

101. 11 U.S.C. § 523(a)(8)(A)(ii).

102. 11 U.S.C. § 523(a)(8)(B). The Internal Revenue Code defines a “qualified education loan” as “any indebtedness incurred by the taxpayer solely to pay for qualified higher education expenses.” 26 U.S.C. § 221(d)(1). “Qualified higher education expenses” is then defined as “the cost of attendance” at an eligible educational institution, after reductions are made for scholarships, allowances, or other payments. 26 U.S.C. § 221(d)(2); *see also In re Homaidan*, Nos. 08-48275-ess, 13-46495-ess, Adv. No. 17-1085-ess, 2022 Bankr. LEXIS 2426, at \*75 (Bankr. E.D.N.Y. Sep. 2, 2022).

103. *See* BiQi Chen, *The Revival of Student Loan Discharge in Bankruptcy by the Tenth and Second Circuits*, 43 CARDOZO L. REV. 1275, 1284–85 (2022).

104. *See, e.g., N.M. Inst. of Mining & Tech v. Coole* (*In re Coole*), 202 B.R. 518, 519 (Bankr. D.N.M. 1996); *Johnson v. Va. Commonwealth Univ.* (*In re Johnson*), 222 B.R. 783, 786 (Bankr. E.D. Va. 1998).

from the risk associated with loan defaults<sup>105</sup> and to safeguard the financial integrity of the federal student loan system.<sup>106</sup>

The third and fourth categories, involving “educational benefits” and private loans, are where private student loan lenders’ litigation strategies, and the resulting distortion of precedent, become very evident.<sup>107</sup> Debtors and lenders naturally have different goals: while individual debtors are focused on the disposition of just their personal case, it is to lenders’ benefit to aggressively litigate cases more likely to yield beneficial precedent.<sup>108</sup> By devoting resources towards their long-term litigation strategy, lenders can deter future litigation and make future cases easier to win.<sup>109</sup> As a result of these selective litigation tactics, courts have no clear consensus on whether private student loans are encompassed by either § 523(a)(8)(A)(ii) or (B).<sup>110</sup>

The analysis required by § 523(a)(8)(B), which determines the extent of the protection granted to lenders of private loans, has been aptly described as a “journey.”<sup>111</sup> In effect, § 523(a)(8)(B) only excepts from discharge private student loans if those loans supplemented and mirrored federal student lending: that is, the money was lent to eligible students at Title IV accredited schools solely for tuition, room, board, and books (e.g., “qualified education loans”).<sup>112</sup> The result of this analysis is that not every debt incurred by a student is, by default, a nondischargeable student loan.<sup>113</sup> Where the loans exceed

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105. Iuliano, *supra* note 42, at 507.

106. COLLIER ON BANKRUPTCY, *supra* note 81, ¶ 523.14.

107. *See generally* Chen, *supra* note 103, at 1289–96.

108. Iuliano, *supra* note 42, at 519.

109. *Id.*; *see also* Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1491–92 (2003).

110. *E.g., compare* Homaidan v. Sallie Mae, Inc., 3 F.4th 595, 605 (2d Cir. 2021) (private student loan *not* educational benefit), *with* Skipworth v. Citibank Student Loan Corp. (*In re* Skipworth), No. 09-83982-JAC-7, Adv. No. 09-80149-JAC-7, 2010 Bankr. LEXIS 1201, at \*4 (Bankr. N.D. Ala. Apr. 1, 2010) (private student loan *is* educational benefit).

111. *See* Crocker v. Navient Sols, LLC (*In re* Crocker), 941 F.3d 206, 217 (5th Cir. 2019).

112. *See id.* at 217–18. A student loan is only a “qualified education loan” under 11 U.S.C. § 523(a)(8)(B) if the amount of money borrowed was within the cost of the student’s attendance at school and was incurred solely for “qualified higher education expense” under 26 U.S.C. § 221(d). *Id.* at 217. “Qualified higher education expenses” are then defined in 26 U.S.C. § 221(d)(2) as the “cost of education,” reduced by other financial aid and scholarships “at an eligible educational institution.” *Id.* at 217–18. The “cost of education” is then defined in the Higher Education Act of 1965, codified as 20 U.S.C. § 1087ll, as to include tuition, fees, books, and other expenses, while an “eligible education institution” is one that is accredited under Title IV of the Higher Education Act such that it is eligible to offer federal financial aid pursuant to 26 U.S.C. § 25A(f)(2). *Id.* at 218.

113. *See* Golden v. JP Morgan Chase Bank (*In re* Golden), 596 B.R. 239, 269 (Bankr. E.D.N.Y. 2019).

the cost of attendance, the loan is dischargeable.<sup>114</sup> The alternative—interpreting § 523(a)(8)(B) to mean *any and all* loans used for expenses related to education—renders the entirety of § 523(a)(8)(A) superfluous.<sup>115</sup> Yet, private student loan lenders have succeeded with this argument in the past.<sup>116</sup> Therefore, despite initially appearing to constitute a blanket presumption against dischargeability, private student loans should be excepted from discharge *only if* they are qualified education loans pursuant to § 523(a)(8)(B).<sup>117</sup>

Where a private student loan lender cannot find protection under § 523(a)(8)(B), these lenders often turn to § 523(a)(8)(A)(ii), which excepts from discharge obligations “to repay funds received as an educational benefit.”<sup>118</sup> While this may seem straightforward, this phrase has been heavily litigated due to the fact that “educational benefits” is not defined anywhere in the Bankruptcy Code.<sup>119</sup> As such, § 523(a)(8)(A)(ii) lends itself to two drastically different interpretations—one broad and the other narrow.<sup>120</sup>

The broad interpretation of “educational benefit” has come under scrutiny in recent years as overly-broad.<sup>121</sup> The courts using the broad interpretation focus on the educational *purpose* of the loan rather than the characteristic of the *benefit*,<sup>122</sup> ultimately sweeping all manner of student loan debt into the Bankruptcy Code’s discharge exceptions.<sup>123</sup> Rather than focusing on the

114. See *Fernandez v. Nat’l Collegiate Student Loan Tr.* 2006-2 (*In re Fernandez-Lopez*), No. DL 14-01520, Adv. No. 20-80069, 2021 Bankr. LEXIS 329, at \*24–27 (Bankr. W.D. Mich. Feb. 10, 2021).

115. See *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595, 602–04 (2d Cir. 2021).

116. See, e.g., *Carow v. Chase Loan Serv.* (*In re Carow*), No. 10-30264, Adv. No. 10-7011, 2011 Bankr. LEXIS 823, at \*9–11 (Bankr. D.N.D. Mar 2, 2011); *Noland v. Iowa Student Loan Liquidity Corp.* (*In re Noland*), No. BK09-80873-TJM, Adv. No. A09-8048-TJM, 2010 Bankr. LEXIS 1188, at \*8 (Bankr. D. Neb. Mar. 30, 2010).

117. See, e.g., *McDaniel v. Navient Sols, LLC* (*In re McDaniel*), 973 F.3d 1083, 1086 (10th Cir. 2020).

118. 11 U.S.C. § 523(a)(8)(A)(ii); see also Jason Iuliano, *Student Loan Bankruptcy and the Meaning of Educational Benefit*, 93 AM. BANKR. L.J. 277, 292–95 (2019).

119. Iuliano, *supra* note 118, at 290.

120. *Id.* at 288–89, 292.

121. *Campbell v. Citibank N.A.* (*In re Campbell*), 547 B.R. 49, 54 (Bankr. E.D.N.Y. 2016) (“Some courts have decided without explanation, or assumed, that ‘educational benefit,’ as used in § 523(a)(8)(A)(ii), encompasses any loan which relates in some way to education.”). See, e.g., *Roy v. Sallie Mae* (*In re Roy*), No. 08-33318, Adv. No. 09-1406, 2010 Bankr. LEXIS 1218, at \*2–3 (Bankr. D.N.J. Apr. 8, 2010); *Skipworth v. Citibank Student Loan Corp.* (*In re Skipworth*), Nos. 09-83982-JAC-7, 09-80149-JAC-7, 2010 Bankr. LEXIS 1201, at \*4 (Bankr. N.D. Ala. Apr. 1, 2010); *In re Carow*, 2011 Bankr. LEXIS 823, at \*4–5.

122. See, e.g., *Busson-Sokolik v. Milwaukee Sch. of Eng’g* (*In re Busson-Sokolik*), 635 F.3d 261, 266 (7th Cir.), *cert. denied*, 564 U.S. 1020 (2011); *Stevens Inst. of Tech. v. Joyner* (*In re Joyner*), 171 B.R. 762, 764 (Bankr. E.D. Pa. 1994); U.S. Dep’t of Health & Hum. Servs. v. *Vretis* (*In re Vretis*), 56 B.R. 156, 157 (Bankr. M.D. Fla. 1985).

123. Iuliano, *supra* note 118, at 280. See, e.g., *Liberty Bay Credit Union v. Belforte* (*In re Belforte*), No. 10-22742-JNF, Adv. No. 11-1008, 2012 Bankr. LEXIS 4574, at \*25 (Bankr. D. Mass. Oct. 1, 2012) (holding that a general, unsecured personal loan for \$10,000, that was then

parallel use of “educational benefit” in both § 523(a)(8)(A)(i) and (ii), a growing number of courts are adopting the narrower reading, shifting their attention instead to the presumptively intentional omission of “loan” from § 523(a)(8)(A)(ii).<sup>124</sup>

For example, the Fifth Circuit in *Homaidan v. Sallie Mae, Inc.* held that § 523(a)(8)(A)(ii) was not meant to cover loans, reasoning instead that reading “an obligation to repay funds received as an educational benefit” as synonymous with “loan” simply obliterated the canons of statutory construction.<sup>125</sup> This narrow interpretation is bolstered by the argument that, since the subparts immediately before and after both expressly include “loan,” if Congress had intended § 523(a)(8)(A)(ii) to apply to loans, Congress would have included “loan” in this subpart, too.<sup>126</sup> Interpreting “an obligation to repay funds received as an educational benefit” outside of the context of the rest of the provision—which is all but required to conclude it means “loan”—effectively excepts from discharge *any and all* debt that played *any* role in a debtor’s education, enveloping both credit card debt and personal loans within this discharge exception.<sup>127</sup> The Fifth and Tenth Circuits have recently joined the Second Circuit in concluding that “educational benefit” should be construed narrowly and read in the context of the benefits immediately following: scholarships or stipends.<sup>128</sup>

Despite what appears to be a growing adoption of the narrower reading of § 523(a)(8)(A)(ii), this is far from sufficient to result in much meaningful change for the vast majority of borrowers. These holdings primarily involve the discharge of private student loans, and private student loans account for less than 10% of all outstanding student loan debt.<sup>129</sup> Moreover, the narrower

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rewritten for \$14,000 for taken out for debtor’s children’s tuition and books, was a nondischargeable “obligation to repay funds received as an educational benefit” under 11 U.S.C. § 523(a)(8)(A)(ii)); *In re Roy*, 2010 Bankr. LEXIS 1218, at \*3 (Bankr. D.N.J. Apr. 8, 2010) (finding tutoring services purchased for debtor’s child constituted a nondischargeable educational benefit); *Vuini v. Zions Bank (In re Vuini)*, No. 6:11-bk-07559-KSJ, Adv. No. 6:11-ap-00227, 2012 Bankr. LEXIS 5326, at \*11 (Bankr. M.D. Fla. Nov. 14, 2012) (determining loans for bar prep classes to be nondischargeable student loans).

124. See *Homaidan v. Sallie Mae, Inc.*, 3 F.4th 595, 601 (2d Cir. 2021) (explaining that had Congress intended 11 U.S.C. § 523(a)(8)(A)(ii) to apply to loans, “it would not have done so in such stilted terms”); *McDaniel v. Navient Sols., Inc. (In re McDaniel)*, 590 B.R. 537, 549 (Bankr. D. Colo. 2018), *aff’d sub nom. McDaniel v. Navient Sols. LLC*, 973 F.3d 1083 (10th Cir. 2020); *Crocker v. Navient Sols, LLC (In re Crocker)*, 941 F.3d 206, 224 (5th Cir. 2019).

125. *Homaidan*, 3 F.4th at 601–02.

126. *Id.* at 602 (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *In re Crocker*, 941 F.3d at 220; *accord Gustafson v. Alloyd Co.*, 513 U.S. 561, 577 (1995).

127. *Homaidan*, 3 F.4th at 602 (citation omitted).

128. *Id.* at 605.

129. See *Federal Reserve Statistical Release: Consumer Credit for December 2022*, FED. RES. SYS. (Feb. 7, 2023), <https://www.federalreserve.gov/releases/g19/20230207/> (\$1.757 trillion in aggregate student loan debt as of the end of 2022); *Federal Student Loan Portfolio*, U.S.



reading of this particular provision offers relief for borrowers *only* where their private student loans are not otherwise excepted from discharge under § 523(a)(8)(B) and *only* for borrowers actually in dire enough financial positions to file for bankruptcy.<sup>130</sup> Lenders' selective litigation strategies continue to prove exceedingly effective at dissuading the supermajority of borrowers from ever attempting to establish an undue hardship determination, despite evidence that the majority of adversary proceedings result in settlements rather than judicial rulings on the merits.<sup>131</sup>

Although the shortcomings of judicial relief may frustrate many borrowers, Oren Bar-Gill and Elizabeth Warren explain that “[t]he problem is not with particular judges; it is systemic. Concerns about institutional competence, doctrinal limitations and procedural barriers justify the observed judicial restraint.”<sup>132</sup> The judiciary plays only a reactive role; judges are limited to the disputes presented by litigants.<sup>133</sup> For a final judicial determination to ever be reached, the parties involved must first decide to force this kind of resolution for their dispute.<sup>134</sup> Given that these courts are also at the mercy of established precedents, federal statutes, and well-established canons of statutory interpretation, it seems clear that tackling student loan debt problems on a case-by-case basis through bankruptcy is never going to be an effective means of providing the broad, systemic changes to the student loan industry that must occur.<sup>135</sup>

### C. Exploitation by Private Lenders

The dischargeability protection received by private student loan lenders through the BAPCPA in 2005 marked the beginning of a three-year lending boom in the private student loan market.<sup>136</sup> This boom was fueled by lenders increasingly marketing and disbursing funds directly to students through

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DEP'T EDUC., OFF. OF FED. STUDENT AID, <https://studentaid.gov/data-center/student/portfolio> (last visited Aug. 25, 2023) (choose “Federal Student Aid Portfolio Summary” to download the spreadsheet) (reporting \$1.635 trillion in federal student loan debt shared by 43.5 million borrowers as of the end of 2022).

130. See generally Iuliano, *supra* note 42, at 507–08; Austin, *supra* note 63, at 331.

131. See Iuliano, *supra* note 42, at 527.

132. Bar-Gill & Warren, *supra* note 87, at 74.

133. Cross, *supra* note 109, at 1494.

134. *Id.* at 1491.

135. See generally Ryan Freeman, *Student-Loan Discharge—An Empirical Study of the Undue Hardship Provision of Sec. 523(a)(8) Under Appellate Review*, 30 EMORY BANKR. DEVS. J. 147, 191 (2013) (suggesting that “courts should take a second look at their approach to undue hardship determinations to see if they really are conforming to the Code’s intent”).

136. See CONSUMER FIN. PROT. BUREAU, PRIVATE STUDENT LOANS 17 (2012), [https://files.consumerfinance.gov/f/201207\\_cfpb\\_Reports\\_Private-Student-Loans.pdf](https://files.consumerfinance.gov/f/201207_cfpb_Reports_Private-Student-Loans.pdf) [hereinafter CFPB PSL REPORT].

direct-to-consumer loans.<sup>137</sup> In 2005, 18% of undergraduate loans were issued to students without the involvement of a student's school and without any certification of need; by only 2007, this number had leaped to over 31%.<sup>138</sup>

Private student loans were originally designed to supplement and support the federal student loan program.<sup>139</sup> After a student fills out their Free Application for Federal Student Aid (FAFSA), the Department of Education uses that information to calculate the student's Expected Family Contribution (EFC), which is then reported to schools.<sup>140</sup> Schools, meanwhile, calculate the hypothetical student's "cost of attendance," which includes the cost of tuition, fees, books, and estimates for food, housing, and other expenses for the school year.<sup>141</sup> Then, federal student aid loan awards are determined based on the difference between the school's cost of attendance calculation and the student's EFC.<sup>142</sup> The Department of Education offers loan products that can be used to finance a student's EFC, such as PLUS loans and unsubsidized Stafford loans; private student loans are intended to be just another such method of financing the EFC, competing against the Department of Education's products.<sup>143</sup> The school's financial aid office is then responsible for packaging all of a student's eligible financial aid, including both federal and private aid, and presenting this to students.<sup>144</sup>

Direct-to-consumer loans were a monumental divergence from this established financial aid process because they removed the lenders' need to coordinate with schools' financial aid offices.<sup>145</sup> When private student loans operate as intended, the lenders' coordination and certification with the school prevents excessive borrowing.<sup>146</sup> But with direct-to-consumer loans, lenders did not have to limit loan awards based on a student's financial need.<sup>147</sup> These lenders also made riskier loans since these loans were now more difficult to discharge in bankruptcy.<sup>148</sup> Such practices enabled private student loan lenders to increase both their total number of borrowers *and* the total amount

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137. *See id.* at 19.

138. *Id.* at 3.

139. *Id.* at 6; *see also Morally Bankrupt*, *supra* note 91, at 12.

140. CFPB PSL REPORT, *supra* note 136, at 10.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 10–11.

145. *See id.* at 19; *see also Morally Bankrupt*, *supra* note 91, at 14.

146. CFPB PSL REPORT, *supra* note 136, at 10; *Morally Bankrupt*, *supra* note 91, at 13–14.

147. CFPB PSL REPORT, *supra* note 136, at 19.

148. *See id.* at 3; *SBPC Investigation Uncovers Decades-Long Student Loan Industry Scheme to Deprive Millions of Private Student Loan Borrowers of Bankruptcy Rights*, STUDENT BORROWER PROT. CTR. (Jan. 20, 2021) [hereinafter *SBPC Investigation*], <https://protectborrowers.org/sbpc-investigation-uncovers-decades-long-student-loan-industry-scheme-to-deprive-millions-of-private-student-loan-borrowers-of-bankruptcy-rights/>.

borrowed, frequently leading to excessive borrowing by unsophisticated borrowers while generating windfall profits for lenders.<sup>149</sup>

To counteract the elevated default risk caused by issuing riskier loans, private lenders knowingly misrepresented to borrowers that the Bankruptcy Code prohibited the discharge of any loan made to a person for education-related expenses.<sup>150</sup> If a student borrower filed for bankruptcy, many lenders would continue to try and collect on loans that were actually discharged, relying again on the presumptive nondischargeability argument.<sup>151</sup> While lenders told borrowers that all student loans were nondischargeable, lenders simultaneously warned Wall Street investors that the loans *could* be discharged.<sup>152</sup> Student loan companies like Navient were plainly aware that even sophisticated investors were unclear about the dischargeability of these loans, evidenced by the prospectuses issued for student loan asset-backed securities.<sup>153</sup> These prospectuses warned investors that, pursuant to 11 U.S.C. § 523(a)(8), only private loans made for qualified expenses were excepted from discharge—and that, because the cost of attendance had been determined by the borrower rather than the school, the loans may be dischargeable in bankruptcy.<sup>154</sup> Although these affirmative disclosures were made to investors, no such disclosures were made to borrowers.<sup>155</sup>

Congress passed the BAPCPA with the stated objective of improving “bankruptcy law and practice by restoring personal responsibility and integrity in the bankruptcy system.”<sup>156</sup> Ironically, a law that was intended to prevent students from taking advantage of the bankruptcy process has instead been distorted in such a way as to enable unscrupulous creditors to lend in excess, ruthlessly exploit unsophisticated student borrowers, and manipulate the judicial system into producing precedents most likely to reduce future litigation.<sup>157</sup>

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149. CFPB PSL REPORT, *supra* note 136, at 19–22; *SBPC Investigation*, *supra* note 148.

150. *SBPC Investigation*, *supra* note 148.

151. *Id.*; see, e.g., Plaintiffs’ Memorandum of Law in Support of Their Motion for Class Certification at 5, *Homaidan v. SLM Corp.* (*In re Homaidan*), 587 B.R. 428 (Bankr. E.D.N.Y. 2018) (Adv. No. 17-01085-ees).

152. *SBPC Investigation*, *supra* note 148.

153. See *Morally Bankrupt*, *supra* note 91, at 15; e.g., SLM STUDENT LOAN TRUST 2008-1, PROSPECTUS SUPPLEMENT TO BASE PROSPECTUS DATED OCTOBER 16, 2007, at 33 (2008) [hereinafter SLM PROSPECTUS], <https://www.navient.com/assets/about/investors/debtasset/SLM-Loan-Trusts/06-10/2008-1/20081.pdf> [<https://perma.cc/99GW-4JUJ>].

154. See SLM PROSPECTUS, *supra* note 153, at 33.

155. See Iuliano, *supra* note 42, at 520–21.

156. H.R. REP. NO. 109-31, at 2 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89.

157. Iuliano, *supra* note 42, at 519.

### III. AN INTERDISCIPLINARY APPROACH TO STUDENT LOAN DEBT MANAGEMENT

Despite the alarm expressed about high default rates in the early 1970s, the resulting restrictive treatment of student loan debt in bankruptcy has yet to produce any meaningful reduction in student loan default rates.<sup>158</sup> A large reason for the persistently high default rate—in addition to lender misconduct—is that too many borrowers are struggling to pay off loans that they do not understand.<sup>159</sup> Within the first year of repayment, almost 41% of borrowers will have at least one delinquent student loan payment and nearly 11% will enter default.<sup>160</sup> Within the first five years, 78% of borrowers will be delinquent on their loan payments at least once and 25% will default.<sup>161</sup> As of March 2021, even though a COVID-related loan repayment freeze had been in effect for roughly a year,<sup>162</sup> sources estimate that as many as 17% of borrowers defaulted on their federal student loans.<sup>163</sup>

Counter-intuitively, default rates are highest among borrowers with the lowest balances.<sup>164</sup> A third of all borrowers—those with the lowest balances—make up only 4% of all outstanding federal loan debt.<sup>165</sup> In sharp contrast, almost half of the outstanding federal student loan debt is owed by just 10% of borrowers.<sup>166</sup> The top 2% of borrowers—those with balances over \$200,000—make up 17% of the total outstanding federal student loan debt.<sup>167</sup>

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158. See Melanie Hanson, *Student Loan Default Rate*, EDUC. DATA INITIATIVE, <https://educationdata.org/student-loan-default-rate> (Jan. 8, 2022).

159. *Borrowers Discuss the Challenges of Student Loan Repayment*, PEW CHARITABLE TR. (May 20, 2020), <https://www.pewtrusts.org/en/research-and-analysis/reports/2020/05/borrowers-discuss-the-challenges-of-student-loan-repayment>.

160. Hanson, *Student Loan Default Rate*, *supra* note 158.

161. *Id.*; see also *Student Loan System Presents Repayment Challenges*, PEW CHARITABLE TR. (Nov. 6, 2019), <https://www.pewtrusts.org/en/research-and-analysis/reports/2019/11/student-loan-system-presents-repayment-challenges>.

162. See, e.g., Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 3508, 134 Stat. 281, 398–99 (2020); Memorandum on Continued Student Loan Payment Relief During the COVID-19 Pandemic, 85 Fed. Reg. 49585–86 (Aug. 13, 2020) (to be codified at 20 U.S.C. § 1087e).

163. Jennifer Ma & Matea Pender, *Trends in College Pricing & Student Aid 2021*, COLL. BD. 42 (Oct. 2021) (“In March 2021, 17% of borrowers (and 11% of outstanding dollars) were in default.”).

164. *Id.* High default rates on low balances are frequently seen amongst borrowers who have dropped out of college prior to completion, causing relatively low student loan debt balances to become a disproportionately large financial burden due to the absence of the higher income potential a degree could have provided. See Tara Siegel Bernard, *They Got the Debt, but Not the Degree*, N.Y. TIMES (June 1, 2022), <https://www.nytimes.com/2022/06/01/your-money/student-loan-debt-degree.html>.

165. Ma & Pender, *supra* note 163, at 40.

166. *Id.*

167. *Id.*

### A. Evidence-Based Student Loan Debt Management: Teaching Efficient Repayment Skills Through Gamification

Much of the growth of the country's aggregate student loan debt is caused by the inefficiencies within the loan repayment process.<sup>168</sup> While shortening the amount of time someone spends in repayment reduces the amount of interest paid (thereby reducing the overall cost of the debt), a significant number of borrowers experience repayment struggles above and beyond simply devoting a few extra dollars towards their loans each month.<sup>169</sup> Many borrowers have reported difficulties navigating various loan repayment systems or negative interactions with servicers when repayment first begins.<sup>170</sup> Missing payments, especially early in the repayment process, is discouraging and easily leads to growing balances.<sup>171</sup> An inexperienced borrower in financial distress, struggling to navigate long-term relief options, such as income-driven repayment plans, may be steered instead towards expensive shorter-term options like forbearance and deferment.<sup>172</sup> When a loan is in forbearance, not only does the borrower not make progress toward repayment and forgiveness goals, but interest on the loan continues to accrue.<sup>173</sup> If the interest is not paid during the forbearance period, that accrued interest is capitalized when the forbearance period ends, increasing the overall principal of the loan.<sup>174</sup> Growing balances, in turn, increase the likelihood of borrowers feeling overwhelmed and discouraged.<sup>175</sup> Discouraged and overwhelmed borrowers are then more likely to be disengaged from their student loans and less inclined to get any repayment issues sorted out, perpetuating their repayment struggles.<sup>176</sup>

Implementing an interdisciplinary, evidence-based repayment management tool provides an opportunity to ease the emotional and financial burden of repaying student loan debt without indiscriminately shifting the cost of education back to taxpayers.<sup>177</sup> This tool could also eliminate the need to rely on

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168. SMOLE & ZOTA, *supra* note 6, at 2 (“The federal student loan portfolio continues to grow as new loans are disbursed at a faster rate than existing loans are repaid.”).

169. PEW CHARITABLE TR., *supra* note 159.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Student Loan Forbearance Allows You to Temporarily Stop Making Payments*, U.S. DEP'T EDUC., OFF. OF FED. STUDENT AID, <https://studentaid.gov/manage-loans/lower-payments/get-temporary-relief/forbearance> (last visited Aug. 25, 2023).

174. *Id.*

175. PEW CHARITABLE TR., *supra* note 159.

176. *Id.*

177. See Josh Mitchell, *Student Loan Losses Seen Costing U.S. More Than \$400 Billion*, WALL ST. J. (Nov. 21, 2020, 8:00 AM), <https://www.wsj.com/articles/student-loan-losses-seen-costing-u-s-more-than-400-billion-11605963600?mod=e2li> (estimating \$435 billion federal student loans are uncollectible). Although the government can borrow trillions of dollars at low

lenders or servicers to be the arbiters of truth as it relates to borrowers' student loans.<sup>178</sup> Such a tool, likely taking the form of a mobile-friendly web application, would also provide an opportunity to hold educational institutions more accountable for rising costs of higher education in a way that is administratively simple while also relative to the volume of student loan debt an institution produces.<sup>179</sup>

### 1. *Addressing the Barriers to Effective Financial Literacy Education*

Borrowers frequently report feeling unprepared to manage repayment of their loans and are instead forced to learn how to repay their loans through trial and error.<sup>180</sup> As a result, many borrowers may make extremely costly mistakes in their first few years of repayment, quickly adding thousands of dollars to their principal balances and adding years to the life of their loans.<sup>181</sup> While research has shown that some forms of financial literacy interventions can leave borrowers essentially no better off,<sup>182</sup> this does not mean it is impossible to come up with better tools that account for the psychological barriers that have prevented the success of financial education in the past.<sup>183</sup>

Many financial education intervention methods have historically undercut the importance of relevance and timing.<sup>184</sup> Even though exit counseling is often required for borrowers leaving school or otherwise entering student loan

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rates to absorb these losses, taxpayers still end up covering the cost of defaulted loans because Congress will inevitably have to raise taxes, cut services, or increase the deficit as a result. *Id.*

178. See, e.g., *CFPB Supervisory Examinations Find Violations of Federal Law by Student Loan Servicers and University-Owned Lenders*, CONSUMER FIN. PROT. BUREAU (Sept. 29, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-supervisory-examinations-find-violations-of-federal-law-by-student-loan-servicers-and-university-owned-lenders/> (finding that servicers unlawfully hampered borrowers' access to federal loan cancellation and loan repayment options).

179. See generally Melanie Hanson, *Student Loan Debt by Age*, EDUC. DATA INITIATIVE, <https://educationdata.org/student-loan-debt-by-age> (Apr. 19, 2022) (detailing how the cost of a college education remained stable from 1963 to 1983 after adjusting for inflation, but in the 1983–84 academic year, the cost of education began to skyrocket).

180. PEW CHARITABLE TR., *supra* note 159.

181. *Student Loan Forbearance Allows You to Temporarily Stop Making Payments*, *supra* note 173.

182. See generally Lauren E. Willis, *Against Financial-Literacy Education*, 94 IOWA L. REV. 197, 201 (2008) (explaining some of the confounding variables that can make financial literacy education ineffective).

183. See PEW CHARITABLE TR., *supra* note 159.

184. Philip Fernbach & Abigail Sussman, *Teaching People About Money Doesn't Seem to Make Them About Money—Here's What Might*, MARKETWATCH (Oct. 27, 2018, 7:51 AM), <https://www.marketwatch.com/story/financial-education-flunks-out-and-heres-whats-being-done-about-it-2018-10-10>.

repayment,<sup>185</sup> the information delivered through these sessions is typically insufficient to help borrowers feel prepared to manage repayment once they are on their own.<sup>186</sup> Not only is the information received not likely to be retained, but receiving so much complex information all at once easily makes a borrower feel even more overwhelmed about the loan repayment process.<sup>187</sup>

Financial decisions inevitably involve numbers, yet many people experience significant math anxiety.<sup>188</sup> This anxiety can lead to math avoidance while also reducing the likelihood of successfully completing tasks with numeric components.<sup>189</sup> Even for those without math anxiety, some financial principles are highly counterintuitive, such as compounding interest.<sup>190</sup> Additionally, financial decisions often require borrowers to project into the future, such as when trying to figure out whether their income would be able to support a payment plan that began with a lower monthly payment but then increased every two years.<sup>191</sup> Yet, when projecting into the future, people regularly give too much weight to increased earnings while neglecting to account for growing expenses.<sup>192</sup>

Evidence shows that financial literacy interventions can successfully mitigate these psychological barriers.<sup>193</sup> For example, delivering information to people as that information actually becomes relevant can greatly increase the rate at which that information is retained.<sup>194</sup> Also termed “just-in-time” education, the underlying concept is that, for financial education to be effective, there must be a close connection between when information is delivered and when that information needs to be used.<sup>195</sup> Another promising mitigation technique leverages choice architecture.<sup>196</sup> Rather than relying on proactively educating borrowers, this alternative aims to encourage consumers to make beneficial decisions without any effort on the part of the consumer.<sup>197</sup> Choice

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185. See *Start Exit Counseling Based on Your Student Type*, U.S. DEP'T EDUC., OFF. OF FED. STUDENT AID, <https://studentaid.gov/exit-counseling/> (last visited Aug. 25, 2023) (“You must complete exit counseling when you leave school or drop below half-time enrollment. The purpose of exit counseling is to ensure you understand your student loan obligations and are prepared for repayment.”).

186. PEW CHARITABLE TR., *supra* note 159.

187. *Id.*

188. Fernbach & Sussman, *supra* note 184.

189. *Id.*

190. *Id.*

191. *The Graduated Repayment Plan Starts with Lower Payments That Increase Every Two Years*, U.S. DEP'T EDUC., OFF. OF FED. STUDENT AID, <https://studentaid.gov/manage-loans/repayment/plans/graduated> (last visited Aug. 25, 2023).

192. Fernbach & Sussman, *supra* note 184.

193. See PEW CHARITABLE TR., *supra* note 159.

194. *Id.*

195. Fernbach & Sussman, *supra* note 184.

196. *Id.*

197. *Id.*

architecture, also known as “default switching” or “nudging,” is increasingly used in group retirement plans.<sup>198</sup> Instead of requiring employees to opt-in to their retirement plan, they have to intentionally *opt-out* to avoid making contributions.<sup>199</sup> Default switching regularly helps employees save at comparatively higher levels by making the better long-term financial decision the path of least resistance.<sup>200</sup> Algorithmic recommendations present yet another promising option, falling somewhere between the explicit knowledge transfer of just-in-time education and the passive persuasion of default switching.<sup>201</sup> Through the use of algorithms, computers are able to incorporate data about an individual borrower’s characteristics and goals to make individually tailored recommendations.<sup>202</sup>

That said, each tool also has its own challenge. Just-in-time financial education can be difficult to implement because it can be tough to pinpoint when a participant is close enough to making a decision that receiving information is optimally beneficial, versus receiving the information either too early or too late.<sup>203</sup> Choice architecture may be considered excessively paternalistic.<sup>204</sup> Paternalism concerns are most likely to arise when the individual transaction costs, such as learning effective student loan repayment strategies through trial and error, are not high enough or sufficiently improved to justify supplanting individual choice.<sup>205</sup> Finally, many consumers are wary of privacy concerns when it comes to algorithmic or computer-generated advice.<sup>206</sup> Research also shows consumers tend to be less forgiving when errors are made by algorithms rather than human beings.<sup>207</sup>

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198. See *Choice Architecture*, DECISION LAB, <https://thedecisionlab.com/reference-guide/psychology/choice-architecture> (last visited Aug. 25, 2023).

199. *New Study Shows Overwhelmingly Positive Employee Endorsement of Automatic Enrollment in 401(k) Plans Most Feel It Makes Saving for Retirement Easier*, FINRA (Nov. 7, 2007), <https://www.finra.org/media-center/news-releases/2007/new-study-shows-overwhelmingly-positive-employee-endorsement-automatic>.

200. See generally Richard H. Thaler & Shlomo Benartzi, *Save More Tomorrow: Using Behavioral Economics to Increase Employee Saving*, J. POL. ECON. S164, S168–69 (2004).

201. Fernbach & Sussman, *supra* note 184.

202. *Id.*

203. *Id.*

204. *Id.*

205. Jeffrey J. Rachlinski, *Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior: The Uncertain Psychological Case for Paternalism*, 97 NW. U.L. REV. 1165, 1225 (2003) (“Paternalistic constraints on choice cannot be justified with psychology absent a showing that the costs of privately developing better ways to make choices are greater than the costs of restricting individual choice.”).

206. Fernbach & Sussman, *supra* note 184.

207. *Id.*



## 2. *Gamifying Repayment*

In recent years, gamification has been utilized with increasing frequency to incentivize engagement and encourage beneficial decision-making in a variety of contexts, including education, healthcare, personnel management, and more.<sup>208</sup> Unlike merely playing, which is free-form and unstructured, playing *games* involves an interactive and structured process with a defined goal.<sup>209</sup> While inspired by games' fun and motivational characteristics, gamification does not rely on fully structured games to elicit desired behaviors.<sup>210</sup> Instead, gamification utilizes specific game *elements*, such as badges, points, milestones, and rewards, to achieve non-game goals.<sup>211</sup>

Gamifying a student loan repayment tool could provide numerous opportunities to encourage struggling borrowers to develop the skills needed to help them achieve specific repayment goals.<sup>212</sup> Such a tool could also provide a mechanism through which dynamic financial literacy interventions could be supplied based on borrowers' individual needs and aptitudes. Moreover, a gamified repayment tool could be highly tailored to the specific needs of different groups of borrowers, such as borrowers who are staying in debt longer than their cohorts, or those who are just entering debt repayment, enabling them to avoid the costs of learning how to repay their debts through trial and error.<sup>213</sup>

Gamification relies on psychological and emotional drivers to affect change,<sup>214</sup> motivating participants to develop skills and adapt behaviors through competition, exploration, acquisition of new knowledge, and collaboration.<sup>215</sup> As such, the use of gamification in the context of student loan debt repayment represents an opportunity to leverage game-like elements as a means of affecting borrowers' behavior by increasing the delivery of relevant repayment information at the right times to the relevant borrowers.<sup>216</sup> These game-like elements also provide opportunities to utilize basic forms of choice

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208. Yifat Nahmias et al., *Game of Terms*, 45 VT. L. REV. 387, 389–90, 394 (2021).

209. *Id.* at 393.

210. *Id.* at 394.

211. *Id.*

212. See generally U.S. FIN. LITERACY & EDUC. COMM'N, BEST PRACTICES FOR FINANCIAL LITERACY AND EDUCATION AT INSTITUTIONS OF HIGHER EDUCATION (2019), <https://home.treasury.gov/system/files/136/Best-Practices-for-Financial-Literacy-and-Education-at-Institutions-of-Higher-Education2019.pdf>.

213. See Beth Akers, *Experimental Evidence on the Impact of Student Debt Letters on Borrowing, Financial Literacy, and Academic Progress*, BROOKINGS INST. (2017), [https://www.brookings.edu/wp-content/uploads/2017/12/es\\_20170601\\_akers-debt-letters.pdf](https://www.brookings.edu/wp-content/uploads/2017/12/es_20170601_akers-debt-letters.pdf).

214. Nahmias et al., *supra* note 208, at 389.

215. Stephanie Kimbro, *What We Know and Need to Know About Gamification and Online Engagement*, 67 S.C. L. REV. 345, 362 (2016).

216. Fernbach & Sussman, *supra* note 184.

architecture and nudging, encouraging borrowers to make beneficial decisions, such as incrementally increasing loan repayment amounts, without the borrower having to make the extra effort of opting in.<sup>217</sup> The underlying goal of the tool would be to help borrowers increase the efficiency and speed at which their student loans are repaid while simultaneously avoiding many of the cumbersome and costly traps that have historically set previous borrowers back.<sup>218</sup>

Utilizing gamification to educate consumers has proven effective in other contexts.<sup>219</sup> In 2011, the European Union launched a game that resembles an interactive comic strip designed to teach basic legal concepts related to internet usage.<sup>220</sup> Organized into topic-based modules such as freedom of expression, copyright, and privacy, each module taught users through case studies, comics, and quizzes.<sup>221</sup> Another game, Data Dealer, was an online game whereby users stored caches of fictional, private information and then sold that information to various corporations, insurance companies, and governmental agencies.<sup>222</sup> The aim of Data Dealers was to educate users about how their personal information was being collected and the potential commercial value of personal data.<sup>223</sup>

There are currently over one hundred different fin-tech startups attempting to tackle various components of education financing and student loan debt management.<sup>224</sup> Some of these companies have created platforms that utilize various gamification features, but those with the most robust offerings are typically not available to individual consumers.<sup>225</sup> Startups such as Tuition.io, Candidly (formerly Futurefuel.io), and Peanut Butter only operate in the business-to-business market, meaning that use of the platform is paid for by another company, typically with the goal of being included in competitive employee benefits packages.<sup>226</sup> Nevertheless, these platforms offer a variety of

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217. *Id.*

218. See PEW CHARITABLE TR., *supra* note 159.

219. See, e.g., Bianca Baumann, *4 Ways to Use Gamification in Client Engagement and Create Customer Advocates*, LINKEDIN (June 8, 2015), <https://www.linkedin.com/pulse/4-ways-use-gamification-client-education-create-baumann-ctdp-m-sc-/>.

220. Nahmias et al., *supra* note 208, at 401.

221. *Id.*

222. *Id.* at 402.

223. *Id.*

224. Carla Napoleão, *Student Loan Startups: Coming of Age*, DEALROOM.CO (June 1, 2022), <https://dealroom.co/blog/reinventing-student-loans-education-financing-startups> (estimating more than ninety startups working on educational financing); T.J. Porter, *Student Loan Apps to Pay Off Student Loans*, LENDEDU (Sept. 12, 2022), <https://lendedu.com/blog/student-loan-apps/> (reviewing mobile apps involved in student loan debt management).

225. See, e.g., *Employer-Assisted Student Loan Repayment*, BENEFITED, <https://youbenefited.com/programs/employer-assisted-student-loan-repayment/> (last visited Aug. 25, 2023).

226. TUITION.IO, <https://www.tuition.io/> (last visited Aug. 25, 2023); CANDIDLY, <https://getcandidly.com/> (last visited Aug. 25, 2023); PEANUT BUTTER,

engaging tools to help customers pay down their student loan debt, such as utilizing artificial intelligence to make recommendations to borrowers.<sup>227</sup> These platforms also offer debt repayment tools that an employer can purchase at an additional cost, such as the ability to make payments on employees' student loans directly,<sup>228</sup> to convert employees' unused PTO into student loan payments,<sup>229</sup> or to make matching contributions to retirement plans based off an employee's verified student loan payments.<sup>230</sup> The upside of gaining access to these platforms through an employer is that the platform's primary revenue model is clear; the downside is that they can be expensive and administratively complex, so many employers may be wary of having such a unique benefit offering.<sup>231</sup>

In contrast, companies like Student Loan Hero and Simple Tuition are available to every consumer, and these platforms offer free advice about student loan repayment, debt consolidation, and refinancing.<sup>232</sup> However, these companies keep their lights on by earning commissions from the various lenders they recommend to their users.<sup>233</sup> This revenue model increases the risk

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<https://www.getpeanutbutter.com/> (last visited Aug. 25, 2023); see also, e.g., *Employer-Assisted Student Loan Repayment*, *supra* note 225.

227. Noah Zuss, *Vanguard Partners with Candidly for Student Loan Program*, PLANSPONSOR (June 28, 2022), <https://www.plansponsor.com/vanguard-partners-candidly-student-loan-repayment-program/>.

228. *Pricing*, PEANUT BUTTER, <https://www.getpeanutbutter.com/pricing/> (last visited Aug. 25, 2023).

229. Amanda Schiavo, *Tuition.io Offers Employers New Weapons in War on Student Loan Debt*, EMP. BENEFIT NEWS (Feb. 2, 2021, 1:59 PM), <https://www.benefitnews.com/news/tuition-io-offers-employers-new-weapons-in-war-on-student-loan-debt>.

230. See, e.g., Courtney Degen, *SECURE 2.0 Allows Employers to Match Student Loan Payments in Retirement Accounts*, PENSIONS & INVEST. (Jan. 18, 2023, 12:43 PM), <https://www.pionline.com/retirement-plans/secure-20-allows-employers-match-student-loan-payments-401k-retirement-accounts>; Brian O'Connell, *How to Get a 401(k) Match for Your Student Loan Payment*, U.S. NEWS & WORLD REPORT (Feb. 16, 2023, 12:50 PM), <https://money.usnews.com/money/retirement/401ks/articles/how-to-get-a-401k-match-for-your-student-loan-payment>.

231. See, e.g., Leo Aquino, *Your Employer Can Help Pay for Your Student Loans—Here's an Email Template to Ask Them*, BUS. INSIDER, <https://www.businessinsider.com/personal-finance/student-loan-repayment-assistance-workplace-benefits-2022-5> (Aug. 24, 2022, 2:14 PM).

232. See STUDENT LOAN HERO, <https://studentloanhero.com/> (last visited Dec. 30, 2022) [<https://web.archive.org/web/20221230204151/https://studentloanhero.com/>]; SIMPLETUITION, <https://www.simpletuition.com/> (last visited Aug. 25, 2023).

233. See STUDENT LOAN HERO, *supra* note 232 (hover over the "How Student Loan Hero Gets Paid" question and this disclosure pops up: "Student Loan Hero is compensated by companies on this site and this compensation may impact how and where offers appear on this site (such as the order). Student Loan Hero does not include all lenders, savings products, or loan options available in the marketplace.").

that borrowers may have solutions recommended to them that are not financially prudent, thereby increasing the risk of predatory lending.<sup>234</sup>

There are some student loan debt management companies popping up that are available directly to consumers *and* have revenue models that might be more suitable for unsophisticated borrowers. Chipper, for example, is currently free to use and offers a variety of student debt navigation tools.<sup>235</sup> Moreover, this platform offers two innovative ways to help users “chip away” at their debt.<sup>236</sup> First, Chipper users can sign up to earn “rewards” by making everyday purchases, where the rewards are then redeemed as “cash-back for additional payments towards a user’s student loans.”<sup>237</sup> Alternatively, users can connect their bank account to the Chipper platform, and Chipper will round up the user’s individual, everyday transactions to the nearest dollar and use the resulting micro-transactions to make extra payments towards a user’s student loans.<sup>238</sup> Chipper’s revenue source is not entirely clear, but it is likely that the platform receives compensation from its various “reward” partners based on the transactions made by Chipper users.<sup>239</sup>

Even with so many different options on the market, none currently meet the basic requirements that a good gamification tool for student loan debt management should have. In an ideal world, a platform that utilized gamification to elicit positive student loan debt management would have features that are carefully tailored to meet the needs of the target audience.<sup>240</sup> The audience that would stand to benefit the most from this extra engagement would inevitably be the most unsophisticated student loan borrowers or borrowers who currently understand the least about the mechanics of their student loan debt and are thus likely to remain indebted the longest.<sup>241</sup> Additionally, the interactive nature of the game elements used in gamification is critical.<sup>242</sup> Interactivity allows the game to provide continuous feedback to the game’s

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234. See, e.g., *id.*

235. Sarah Graves, *Chipper App Review – Pay Off Your Student Loan Debt*, MONEY CRASHERS (Aug. 9, 2022), <https://www.moneycrashers.com/chipper-app-review/>; *Find Your Best Plan Before Payments Start*, CHIPPER, <https://www.chipper.app/repayment> (last visited Aug. 25, 2023).

236. See, e.g., *Chip Away Student Debt Every Day*, CHIPPER, <https://www.chipper.app/round-ups> (last visited Mar. 28, 2023) [<https://web.archive.org/web/20230328174054/https://www.chipper.app/round-ups>]; *The New Way to Chip Away*, CHIPPER, <https://www.chipper.app/rewards> (last visited Mar. 12, 2023) [<https://web.archive.org/web/20230324061309/https://www.chipper.app/rewards>].

237. See *The New Way to Chip Away*, *supra* note 236.

238. See *Chip Away Student Debt Every Day*, *supra* note 236.

239. See *The New Way to Chip Away*, *supra* note 236.

240. See Mitchell Denton, *Gamification Campaign: What to Consider Before Commissioning a Game*, GAMIFY (Oct. 8, 2018), <https://www.gamify.com/gamification-blog/gamification-campaign-what-to-consider-before-commissioning-a-game>.

241. See generally PEW CHARITABLE TR., *supra* note 159.

242. See Nahmias et al., *supra* note 208, at 393.

players, incentivizing pattern discovery, strategy development, and an overall improvement in decision-making processes, all in an enjoyable manner.<sup>243</sup>

By leveraging gamification to help borrowers repay their debt, this tool could be built to allow borrowers to experience more immediate, incremental rewards while on their repayment journey, ultimately leading to the long-term positive outcome of saving money by paying off student loan debt faster. But the development of such a tool offers a wealth of other opportunities, too. For example, the tool could be developed to allow its users to make their monthly student loan payments to various loan servicers, similar to many banks' bill-pay features.<sup>244</sup> A bill-pay feature could provide users with an easier way to manage more efficient repayment strategies, like making biweekly payments or utilizing the avalanche repayment method.<sup>245</sup>

This tool could also serve as a central source of information about the ever-changing student loan debt landscape.<sup>246</sup> With access to borrowers' complete student loan portfolios, it even provides an opportunity to give borrowers individually tailored recommendations that take into consideration both their private and federal student loan debt—a service that the Department of Education cannot deliver.<sup>247</sup> Perhaps most importantly, such a tool removes the need for millions of people to independently become their own student loan expert in order to figure out how to successfully repay their debt.<sup>248</sup> While the complexity of the student loan industry may remain a labyrinth, this tool could give borrowers an opportunity to arm themselves with both a flashlight and a map.<sup>249</sup>

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243. *Id.*

244. See Ken Tumin, *What Is Online Bill Pay? How It Works and Why to Use It*, DEPOSITACCOUNTS (Sept. 3, 2020), <https://www.depositaccounts.com/blog/what-is-online-bill-pay.html>; *How Do Automatic Debit Payments from My Bank Account Work?*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/ask-cfpb/how-do-automatic-debit-payments-from-my-bank-account-work-en-2021/> (Aug. 25, 2020) (explaining the distinction between bill-pay and automatic debits).

245. Ryan Lane, *Biweekly Student Loan Payments Knock Out Debt Faster*, NERDWALLET, (Mar. 8, 2023, 6:15 AM), <https://www.nerdwallet.com/article/loans/student-loans/biweekly-student-loan-payments>; *Comparing the Snowball and the Avalanche Methods of Paying Down Debt*, WELLS FARGO, <https://www.wellsfargo.com/goals-credit/smarter-credit/manage-your-debt/snowball-vs-avalanche-paydown/> (last visited Aug. 25, 2023).

246. See PEW CHARITABLE TR., *supra* note 159 (discussing the various hurdles borrowers have to overcome in order to repay their student loan debt).

247. See *When It Comes to Paying for College, Career School, or Graduate School, Federal Loans Can Offer Several Advantages over Private Student Loans*, U.S. DEP'T EDUC., OFF. OF FED. STUDENT AID, <https://studentaid.gov/understand-aid/types/loans/federal-vs-private> (last visited Aug. 25, 2023).

248. See Bar-Gill & Warren, *supra* note 87, at 14.

249. See Rendleman & Weingart, *supra* note 6, at 218.

## B. Program Funding

Identifying a sustainable, internally-financed revenue model—e.g., not reliant on tax revenue to subsidize operating expenses—is likely a key requirement for any student loan repayment tool to achieve political viability.<sup>250</sup> However, because the targeted audience is chiefly unsophisticated borrowers, extra attention must be paid to avoid potentially predatory revenue streams.<sup>251</sup>

The most obvious solution seems to be that such a repayment tool should be financed by student loan lenders and servicers, but even the most preliminary counterarguments against both of these options are compelling. Since over 90% of student loans are issued by the federal government,<sup>252</sup> lenders bearing the cost of this tool largely equates to taxpayers bearing the cost.<sup>253</sup> While this might arguably still be less expensive for taxpayers than other debt-relief options,<sup>254</sup> it is likely to garner little public support.<sup>255</sup> Moreover, federal student loans do not produce revenue for the federal government.<sup>256</sup> Funds generated by the interest and fees charged on federal student loans are spent on originating, servicing, and collecting loan payments, as well as on defaults, bankruptcy discharges, and loan repayment and forgiveness programs.<sup>257</sup> Similarly, while servicers' role as the middleman between the lender and borrower generates revenue from both sides,<sup>258</sup> in 2021 alone, three large student

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250. See John R. Brooks & Adam J. Levitin, *Redesigning Education Finance: How Student Loans Outgrew the "Debt" Paradigm*, 109 GEO. L.J. 5, 77 (2020); see also Denton, *supra* note 240.

251. See, e.g., *Pushing Predatory Products: How Public Universities are Partnering with Unaccountable Contractors to Drive Students Towards Risky Private Debt and Credit*, STUDENT BORROWER PROT. CTR. 4–5 (June 2021), [https://protectborrowers.org/wp-content/uploads/2021/06/SBPC\\_OPM.pdf](https://protectborrowers.org/wp-content/uploads/2021/06/SBPC_OPM.pdf) (discussing the high interest rates and fees, reckless underwriting, and aggressive debt collection practices that make up the “shadow” student loan debt market).

252. Alicia Hahn, *2023 Student Loan Debt Statistics: Average Student Loan Debt*, FORBES ADVISOR, <https://www.forbes.com/advisor/student-loans/average-student-loan-statistics/> (July 16, 2023, 5:43 PM) (“About 92% of all student debt are federal student loans; the remaining amount is private student loans.”).

253. See Mitchell, *supra* note 177 (discussing how student loan policy decisions impact taxpayers).

254. See discussion *infra* Section IV.B.

255. See, e.g., Emily Ekins, *New Poll: 76% of Americans Oppose Student Debt Cancellation if It Drives up the Price of College, 64% Oppose if It Raises Taxes*, CATO INST. (Sept. 1, 2022, 10:43 AM), <https://www.cato.org/blog/new-poll-76-americans-oppose-student-debt-cancellation-it-drives-price-college-64-oppose-it>.

256. Mark Kantrowitz, *Does the Government Profit Off of Student Loans?*, THE COLL. INV., <https://thecollegeinvestor.com/39673/does-the-government-profit-off-of-student-loans/> (June 4, 2023).

257. *Id.*

258. Mark Kantrowitz, *How Much Do Federal Student Loan Servicers Make Per Loan?*, THE COLL. INV., <https://thecollegeinvestor.com/36556/how-much-do-federal-student-loan-servicers-make/> (Aug. 24, 2022).

loan servicers announced they would discontinue servicing federal loans, citing rising costs and loan complexity among the reasons for not renewing their servicing contracts.<sup>259</sup>

A better solution would be to require institutions of higher education to fund the program in order to increase institutional accountability.<sup>260</sup> The cost of higher education has ballooned for decades, outstripping inflation three and a half times since 1978.<sup>261</sup> Federal funding for higher education is unquestionably the most significant cause of the skyrocketing costs.<sup>262</sup> A 2017 study from the Federal Reserve Bank of New York found that increases in student loan lending resulted in tuition increases by as much as sixty cents per dollar.<sup>263</sup> This rising education cost creates a domino effect: as increased education costs inevitably lead to increased borrowing, increased borrowing results in higher loan balances, and higher loan balances lead to longer repayment periods and higher overall costs.<sup>264</sup> Consequently, requiring these educational institutions to cover the cost of a loan repayment tool could add some much-needed pressure to encourage these schools to curb their rising costs.<sup>265</sup>

Funding for a gamified loan repayment tool could be incorporated into the Higher Education Act of 1965 as a requirement for Title IV accreditation. Title IV accredited schools currently risk their students losing access to federal direct loans if the school's student loan default rate rises too high.<sup>266</sup> Yet, this default threshold is alarmingly low—currently, an institution's default rate for a cohort of borrowers would need to be above 30% for three years before federal student loan funding is at risk.<sup>267</sup> Instead of threatening student

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259. Mark Kantrowitz, *Why Are Student Loan Servicers Dropping Out?*, THE COLL. INV., <https://thecollegeinvestor.com/37839/student-loan-servicers-dropping-out/> (Nov. 2, 2021).

260. See Adam Looney & Tara Watson, *A Risk-Sharing Proposal to Hold Higher Ed Institutions Accountable to Their Students*, BROOKINGS (Feb. 22, 2018), <https://www.brookings.edu/research/a-risk-sharing-proposal-to-hold-higher-ed-institutions-accountable-to-their-students/>.

261. Cody Branham, *Stuck in the Middle: Curbing Income Inequality with the Better Bargain Plan*, 25 KAN. J.L. & PUB. POL'Y 187, 188 (2016).

262. DAVID O. LUCCA ET AL., FED. RSRV. BANK OF N.Y., CREDIT SUPPLY AND THE RISE IN COLLEGE TUITION: EVIDENCE FROM THE EXPANSION IN FEDERAL STUDENT AID PROGRAMS, STAFF REPORT NO. 733, at 2 (2017), [https://www.newyorkfed.org/medialibrary/media-research/staff\\_reports/sr733.pdf](https://www.newyorkfed.org/medialibrary/media-research/staff_reports/sr733.pdf).

263. *Id.*

264. David Boaz, *Federal Student Loans and Rising Tuition Costs: An Insider Speaks Up*, CATO INSTITUTE (July 28, 2021, 10:58 AM), <https://www.cato.org/blog/federal-student-loans-rising-tuition-costs-insider-speaks>.

265. See *id.*

266. See 20 U.S.C. § 1085(a)(2), (m) (stripping Title IV accreditation, thereby disallowing receipt of federal student loans, to schools with a cohort default rate above 30% for three consecutive years). *But see* 122 Cong. Rec. 28032 (1976) (statement of Sen. Thomas Eagleton) (citing that in 1976, Title IV accreditation was removed if the cohort default rate was above 15% for two years).

267. 20 U.S.C. § 1085(a)(2)(A)–(B).

loan access if default rates rise too high, schools should be required to bear some direct cost long before loan repayment issues become dire.<sup>268</sup>

Postsecondary institutions could be charged a per-participant-per-month (PPPM) fee as a means of providing revenue to fund the loan repayment tool, based on how many borrowers had outstanding student loans from attendance at that particular institution.<sup>269</sup> The PPPM fee can be extraordinarily low because the captive market is large—even just looking at the federal student loan market, there are approximately 43.6 million borrowers with loan balances.<sup>270</sup> For example, if the PPPM fee was \$.10, an institution would end up paying \$1.20 per year for every borrower that was repaying a student loan debt incurred to attend that institution. This would mean that a school with 10,000 borrowers working towards repaying loans would contribute \$1,000 per month or \$12,000 per year, while a school with 300,000 borrowers with outstanding loans would contribute \$30,000 per month or \$360,000 per year. The benefit of the PPPM model is that the schools generating the largest number of indebted individuals would be responsible for the largest contributions, proportional to how long it took those borrowers to repay the debt.<sup>271</sup>

A \$.10 PPPM cost to schools would generate more than \$52 million annually—an amount that is likely significantly more than what would be needed to develop and maintain such a tool,<sup>272</sup> while also being far less than the average \$5 PPPM fee of other student loan debt repayment tools.<sup>273</sup> Importantly, such a small PPPM obligation is not likely to discourage schools from educating students wanting to work in lower-paying or public sector

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268. See Looney & Watson, *supra* note 260 (noting that colleges and universities currently incur no cost when student fail to repay their loans).

269. See, e.g., *Pricing*, *supra* note 228 (showing PPPM models, both with and without annual base fees).

270. See Melanie Hanson, *Student Loan Debt Statistics*, EDUC. DATA INITIATIVE, <https://educationdata.org/student-loan-debt-statistics> (July 17, 2023).

271. See *id.* For a school generating 1,000 new borrowers per year, if the average borrower took thirty years to repay, the school would end up contributing \$3,000 per month or \$36,000 per year because, at any given point in time, 30,000 people have outstanding loans. See *id.* If a similar school generated 1,000 new borrowers per year, but these borrowers repaid their loans in fifteen years, the school would only be contributing \$1,500 per month or \$18,000 per year because, at any given point in time, only 15,000 people are still repaying their loans. See *id.*

272. See, e.g., *How Much Does It Cost to Develop an App in 2023? Cost Breakdown*, SPDLOAD, <https://spdload.com/blog/app-development-cost/> (last visited Aug. 27, 2023) (estimating the cost of developing complex apps to be up to \$300,000); Matthew Carrington, *How Much Does It Cost to Make an App in 2023?*, VELVETECH (Feb. 24, 2023), <https://www.velvetech.com/blog/how-much-mobile-app-cost/> (estimating \$600,000 for the development of a mobile commerce web application).

273. See *Pricing*, *supra* note 228 (quoting \$2,500 annual base fee per employer, and a \$5 PPPM fee).



careers. At \$0.10 PPPM, even a student who took a full twenty-four years to repay her loans would only cost the school \$28.80 in total.<sup>274</sup>

A PPPM financing structure would cause the largest share of the cost of the program to be shouldered by the institutions generating the largest numbers of struggling borrowers.<sup>275</sup> This would apply extra pressure to institutions responsible for generating the largest number of struggling borrowers, such as schools with high drop-out rates and schools generating excessively large student debt burdens coupled with poor career opportunities, and encourage them to take more steps to help their borrowers repay their debt more efficiently.<sup>276</sup> A per-borrower fee structure could provide schools with some much-needed additional accountability, motivating institutions to offer meaningful help to struggling borrowers that the institutions helped produce.<sup>277</sup>

#### IV. THE FAILURE OF ALTERNATIVES

At the heart of many of the recurring issues related to student loan debt is the impossibility of either the borrower or the lender having any guarantee of when (or if) the financial investment is going to pay off.<sup>278</sup> It is a gamble for both sides that is made riskier still because of the class of people most frequently borrowing: young adults.<sup>279</sup> However, higher education is often seen as essential to those striving to obtain the American Dream,<sup>280</sup> and for families who cannot otherwise afford to pay for college, student loans often play a critical role in achieving that dream.<sup>281</sup>

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274. See *Public Service Loan Forgiveness (PSLF)*, U.S. DEP'T EDUC., OFF. OF FED. STUDENT AID, <https://studentaid.gov/manage-loans/forgiveness-cancellation/public-service> (last visited Aug. 27, 2023). Twenty-four years would account for four years spent in school plus the additional twenty years, or one hundred and twenty payments, needed to qualify for Public Service Loan Forgiveness. *Id.*

275. See generally Looney & Watson, *supra* note 260 (discussing how income-driven repayment plans will inevitably render the existing default-based accountability system less effective at measuring institutional quality or student loan repayment rates).

276. See generally *Not What It Used to Be*, ECONOMIST (Dec. 1, 2012), <https://www.economist.com/united-states/2012/12/01/not-what-it-used-to-be> (discussing the declining quality of post-secondary education as costs continue to rise).

277. See generally Mike Brown, *Student Loan Default Rates by School & State*, LENDEDU, <https://lendedu.com/blog/student-loan-default-rates-by-school-state/> (Apr. 5, 2023) (aggregating data on school-level default rates); Looney & Watson, *supra* note 260.

278. See Amanda M. Foster, *All or Nothing: Partial Discharge of Student Loans Is Not the Answer to Perceived Unfairness of the Undue Hardship Exception*, 16 WIDENER L.J. 1053, 1057 (2007).

279. Hanson, *Student Loan Debt by Age*, *supra* note 179 (34% of adults aged 18–29 have student loans, compared to 22% of adults aged 30–44, 7% aged 45–59, and 1% over the age of 60).

280. Cox, *supra* note 4, at 195.

281. BEST & BEST, *supra* note 7, at 86.

### A. Discouraging Borrowing

Given that student loans are intended to put college attainment within reach of students who may otherwise struggle to afford it, simply discouraging borrowing as a way to reduce the national student loan debt burden would have far-reaching negative consequences for those striving for college attainment.<sup>282</sup> For example, a 2018 study showed that community college students who borrowed more student loans ultimately took more classes, earned more credits, and achieved higher grade point averages.<sup>283</sup> The implication of the study is that discouraging students from borrowing hinders students' educational outcomes.<sup>284</sup>

Discouraging borrowing would also likely have negative consequences outside of educational attainment. On average, the weekly income of someone with a bachelor's degree is more than 60% higher than for high school graduates,<sup>285</sup> but the cost of college makes student loans unavoidable for many seeking that increased income.<sup>286</sup> At the same time, going into debt to pay for school can have a large negative impact on lifetime wealth accumulation.<sup>287</sup> According to a 2018 study from the Center for Retirement at Boston College, young adults who graduate college without student loan debt have, on average, twice as much saved for retirement by the age of thirty than their indebted peers.<sup>288</sup> Another study projected that a household with two college-educated adults, both holding average student loan debt burdens, is expected to have a lifetime wealth accumulation that is \$200,000 less than similarly educated peers who graduated debt free.<sup>289</sup>

Deterring people from borrowing to reduce the nation's aggregate student loan debt balance would greatly limit, if not wholly eliminate, college

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282. *Id.*

283. Elissa Nadworny, *The Benefits of Taking Out Loans for College*, NPR (Nov. 14, 2018, 5:15 AM), <https://www.npr.org/2018/11/14/667699220/the-benefits-of-taking-out-loans-for-college>.

284. Benjamin M. Marx & Lesley J. Turner, *The Benefits of Borrowing: Evidence on Student Loan Debt and Community College Attainment*, 19 *EDUC. NEXT* 70, 76 (2019), <https://www.educationnext.org/benefits-of-borrowing-evidence-student-loan-debt-community-college-attainment/>.

285. Tim Stobierski, *Average Salary by Education Level*, NE. UNIV. (June 2, 2020), <https://www.northeastern.edu/bachelors-completion/news/average-salary-by-education-level/>.

286. Crystal Liu, *America's \$1.7 Trillion Student Loan Debt Problem: A Story of the American Dream, Good Intentions, and Easy Money*, 16 *BROOK. J. CORP. FIN. & COM. L.* 225, 230 (2021).

287. See Seth Frothman, *Broken Promises: How Debt-financed Higher Education Rewrote America's Social Contract and Fueled a Quiet Crisis*, 2018 *UTAH. L. REV.* 811, 824.

288. Joe Pinsker, *How Student-Loan Debt, or Not Having It, Shapes Lives*, *WALL ST. J.* (Nov. 28, 2022, 5:30 AM), <https://www.wsj.com/articles/how-student-loan-debt-or-not-having-it-shapes-lives-11669575228>.

289. Frothman, *supra* note 287, at 284.

access for people of modest means.<sup>290</sup> However, simply because a borrower has access to loans does not mean that all of life's other inequities are somehow erased.<sup>291</sup> The reality is that some students grew up with more resources, in more advantaged circumstances, with access to better academic preparation, and with more overall stability than others.<sup>292</sup> Such inequalities not only play a role in how successful a college student is, but in how easy it will be for a student to later repay their loans.<sup>293</sup> Ambitious students should not be classified as financially irresponsible for utilizing student loans that exist precisely to give them educational attainment opportunities they would not otherwise be able to afford.<sup>294</sup>

## B. Student Loan Debt Cancellation

On August 24, 2022, President Biden's Administration announced its plan to provide up to \$20,000 in federal student loan cancellation for low- and middle-income families.<sup>295</sup> Under Biden's plan, eligible borrowers—individuals with income under \$125,000 or married couples with income under \$250,000—could have seen up to \$10,000 of their federal student loan debt forgiven,<sup>296</sup> with up to an additional \$10,000 in forgiveness available for Pell Grant recipients.<sup>297</sup> Invoking its authority from the Higher Education Relief Opportunities for Student Act of 2003 (HEROES Act),<sup>298</sup> Biden's student loan cancellation plan would have eliminated the outstanding balance of approximately 20 million borrowers and helped 43 million people.<sup>299</sup>

On June 30, 2023, the United States Supreme Court issued decisions on two cases challenging Biden's forgiveness plan.<sup>300</sup> In *Department of*

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290. BEST & BEST, *supra* note 7, at 63, 156.

291. *Id.* at 86.

292. *Id.* at 161–63.

293. *Id.* at 164.

294. *See* Liu, *supra* note 286, at 230–31 (discussing how student loan debt is unavoidable for many Americans).

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

296. *Id.*

297. *Id.*

298. CONG. RSCH. SERV., R47505, STUDENT LOAN CANCELLATION UNDER THE HEROES ACT 1 (2023); *see* Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904.

299. *Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, *supra* note 295.

300. *See* Dep't of Educ. v. Brown, 600 U.S. \_\_\_, 143 S. Ct. 2343, 2348 (2023); Biden v. Nebraska, 600 U.S. \_\_\_, 143 S. Ct. 2355, 2362 (2023).

*Education v. Brown*,<sup>301</sup> two plaintiffs challenged Biden’s student loan cancellation on procedural grounds, arguing that they had been denied a “formal opportunity to voice their views on the Plan prior to its adoption.”<sup>302</sup> In a unanimous opinion by Justice Alito, the Court held that the plaintiffs lacked Article III standing to bring their claim.<sup>303</sup> By contrast, in *Biden v. Nebraska*,<sup>304</sup> in a 6-3 opinion by Chief Justice Roberts, the Court found that the state of Missouri, through the Missouri Higher Education Loan Authority (MOHELA), satisfied the threshold standing requirement imposed by Article III.<sup>305</sup> Striking down Biden’s plan to cancel student loan debt due to an absence of clear congressional authority,<sup>306</sup> the Court held that the Secretary of Education was unable to use the HEROES Act to “rewrite” Title IV of the Education Act “from the ground up.”<sup>307</sup>

There are numerous arguments against student loan debt cancellation or forgiveness, chief among which is the staggering cost to be borne by taxpayers.<sup>308</sup> For example, it was estimated that Biden’s cancellation plan would have cost taxpayers in the range of \$300 to \$400 billion over the next ten years.<sup>309</sup> Biden’s new student loan repayment plan—the Saving on a Valuable Education (SAVE) plan—was expected to cost taxpayers anywhere from \$138 to \$361 billion *more*, on top of the cost of loan cancellation.<sup>310</sup> Since the loan cancellation plan was struck down, revised estimates will undoubtedly

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301. 600 U.S. \_\_\_, 143 S. Ct. 2343 (2023).

302. *Id.* at 2349–50.

303. *Id.* at 2348.

304. 600 U.S. \_\_\_, 143 S. Ct. 2355 (2023).

305. *Id.* at 2368.

306. *Id.* at 2375–76.

307. *Id.* at 2368; *see also id.* at 2370–70 (“Labeling the Secretary’s plan a mere ‘modification’ does not lessen its effect, which is in essence to allow the Secretary unfettered discretion to cancel student loans. It is ‘highly unlikely that Congress’ authorized such a sweeping loan cancellation program ‘through such a subtle device as permission to “modify.”’” (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994))).

308. *See, e.g.*, Libby Nelson, *The “Fairness” Debate Over Student Loan Forgiveness, Explained*, VOX (Aug. 31, 2022, 9:00 AM), <https://www.vox.com/policy-and-politics/23322129/student-loan-forgiveness-fair-inflation>.

309. Phil Mattingly, *White House Analysis Finds Biden Plan to Cancel Some Student Loan Debt Costs \$379 billion*, CNN, <https://www.cnn.com/2022/09/29/politics/white-house-student-loan-cancellation-cost-estimate> (Sept. 29, 2022, 9:52 PM).

310. Cory Turner & Emily Olson, *You Could Still Be Eligible for Student Loan Forgiveness Under This Plan*, NPR (July 14, 2023, 5:01 AM), <https://www.npr.org/2023/07/14/1187545921/student-loan-forgiveness-save-repayment>; *see, e.g.*, *Budgetary Cost of Newly Proposed Income-Driven Repayment Plan*, PENN. WHARTON: BUDGET MODEL (Jan. 30, 2023), <https://budgetmodel.wharton.upenn.edu/issues/2023/1/30/budgetary-cost-of-proposed-income-driven-repayment> (noting that the \$333 to \$361 billion estimated cost of the new repayment plan was in addition to direct loan forgiveness).

be even more expensive because many of the loans that would have been cancelled will now need to be factored back in as SAVE-eligible loans.<sup>311</sup>

Notwithstanding sticker shock from the cost of student loan relief, choosing to leave the mounting student loan problem otherwise unaddressed could easily cost taxpayers even more.<sup>312</sup> While default and delinquency rates are presently low, with only 4% of the aggregate student loan debt currently either delinquent or in default, this is a result of three years of COVID-related payment freezes.<sup>313</sup> Prior to the pandemic relief, the ninety-day delinquency and default rate was 11.1%.<sup>314</sup> The ninety-day delinquency and default rate jumps to nearly 20% for the same time period if it is calculated without the inclusion of loans that are in a grace period, deferment, or forbearance status.<sup>315</sup> Hypothetically, if 20% of the total outstanding student loan balance (\$1.757 trillion as of the end of 2022)<sup>316</sup> were written off as bad debt, this loss would total roughly \$351.4 billion—a figure that is remarkably close to the estimated cost of Biden’s proposed student loan cancellation plan.<sup>317</sup>

The more massive the aggregate student loan debt balance becomes, the more expensive it will be to provide relief.<sup>318</sup> In the past decade, the aggregate outstanding federal student loan debt has grown roughly 6% per annum.<sup>319</sup> The federal government estimates that most student debt should be repayable within ten years, yet more than half of all borrowers do not see their balances

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311. See, e.g., VIRGINIA FOXX & WILLIAM CASSIDY, CONG. BUDGET OFF., COSTS OF THE PROPOSED INCOME-DRIVEN REPAYMENT PLAN FOR STUDENT LOANS 3 (2023) (noting that \$1.3 trillion in outstanding direct loans would be reduced to \$900 billion after the proposed loan cancellation).

312. BEST & BEST, *supra* note 7, at 86; Mitchell, *supra* note 177 (estimating \$435 billion federal student loans are uncollectible).

313. CTR. FOR MICROECONOMIC DATA, FED. RSRV. BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2022:Q3, at 2 (2022), [https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC\\_2022Q3](https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2022Q3). Note, however, that the delinquency rate in the Federal Reserve quarterly report is for ninety-plus days, while *any* payment that is not made on time is technically delinquent. See *Student Loan Delinquency and Default*, U.S. DEP’T EDUC., OFF. OF FED. STUDENT AID, <https://studentaid.gov/manage-loans/default> (last visited Aug. 27, 2023).

314. See CTR. FOR MICROECONOMIC DATA, FED. RSRV. BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2019:Q4, at 2 (2019), [https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC\\_2019Q4](https://www.newyorkfed.org/medialibrary/interactives/householdcredit/data/pdf/HHDC_2019Q4).

315. *Id.* at 2 n.2.

316. *Federal Reserve Statistical Release: Consumer Credit for December 2022*, *supra* note 129.

317. See Mattingly, *supra* note 309.

318. See Melanie Hanson, *Average Time to Repay Student Loans*, EDUC. DATA INITIATIVE, <https://educationdata.org/average-time-to-repay-student-loans> (Dec. 16, 2021).

319. See Hanson, *Student Loan Debt Statistics*, *supra* note 270.

decrease in the first five years of repayment.<sup>320</sup> On average, it takes borrowers more than twenty years to fully repay this debt.<sup>321</sup> These long repayment periods produce final balances that are multiple times higher than the amount originally borrowed.<sup>322</sup> If 6% average annual growth continues, by 2042, the outstanding student loan balance would be over \$5.6 trillion.<sup>323</sup> Assuming that default and delinquency rates will eventually return to their pre-pandemic levels, that same 20% write-off loss, costing only \$351.4 billion in 2022, becomes a staggering \$1.1 trillion burden to taxpayers by 2042 due to nothing more than the continued aggregate growth of this debt.<sup>324</sup>

While student loan forgiveness would be obvious lifelines to those struggling under the weight of this debt, debt forgiveness can be only a short-term solution because it does nothing to address long-term systemic failures that continue to exist in the student loan industry.<sup>325</sup> Additionally, taxpayers are *already* left responsible for assisting borrowers struggling to repay their student loan debt.<sup>326</sup> Since the federal government is responsible for originating more than 90% of all student loans,<sup>327</sup> when federal student loan borrowers default on this debt because they are unable to make their payments, taxpayers are forced to swallow the loss on the back end.<sup>328</sup> Even as the federal government comes up with an ever-increasing number of ways to calculate what a reasonable monthly payment ought to be based on borrowers' incomes,

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320. See Hanson, *Average Time to Repay Student Loans*, *supra* note 318 (“10 years is the ideal timeline for paying off student loan debt according to financial experts and the U.S. Department of Education (ED).”).

321. *Id.*

322. Hanson, *Student Loan Debt by Age*, *supra* note 179 (noting that the student loan debt balance of the typical 35-year-old is 287% higher than the value of their original loan); see also Annie Nova, *For Some, Student Loan Debt Is Doubling, Tripling, and Even Quadrupling*, CNBC, <https://www.cnbc.com/2018/05/05/for-some-student-loan-debt-is-doubling-tripling-and-even-quadrupling.html> (May 7, 2018, 10:22 AM).

323. See CTR. FOR MICROECONOMIC DATA, FED. RSRV. BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2019:Q4, *supra* note 314, at 2. This result is achieved by adding 6% of 2022's aggregate debt balance back to the 2022 balance, producing an estimate of the aggregate debt balance for 2023, then taking 6% of the calculated 2023 balance to produce the value for 2024, and so on, until 2042, which calculates to \$5.635 trillion. See generally *id.*

324. See CTR. FOR MICROECONOMIC DATA, FED. RSRV. BANK OF N.Y., QUARTERLY REPORT ON HOUSEHOLD DEBT AND CREDIT 2019:Q4, *supra* note 314, at 2 n.2.

325. See Rachlinski, *supra* note 205, at 1222 (“People are also less likely to learn to adopt better cognitive processes for making decisions when they do not suffer all of the costs of erroneous choices directly.”).

326. See William Chittenden, *Who Benefits from a Break on Federal Student Loan Payments? An Economist Answers 3 Questions*, CONVERSATION (Jan. 11, 2022, 8:34 AM), <https://theconversation.com/who-benefits-from-a-break-on-federal-student-loan-payments-an-economist-answers-3-questions-174228>.

327. See Hahn, *supra* note 252.

328. See Mitchell, *supra* note 177.

income-driven repayment plans and loan forgiveness options still leave taxpayers financing a significant amount of this debt.<sup>329</sup>

Where borrowers are still unable to make their monthly payments—despite being enrolled in income-driven repayment plans—these loans will eventually go into default.<sup>330</sup> Defaulting invariably increases the likelihood that a borrower will end up in bankruptcy, where an undue hardship determination could be made because defaulting on a loan causes the loan to accelerate, meaning the entire unpaid balance of a loan becomes immediately due.<sup>331</sup> Defaulted loans are no longer eligible to be repaid through more affordable income-driven repayment plans,<sup>332</sup> nor will the borrower be able to find relief through deferment or forbearance.<sup>333</sup> Even though the discharge of student loan debt in bankruptcy has been infrequent in the past, when it does occur, much of the cost of these discharged loans is hoisted on the shoulders of taxpayers.<sup>334</sup>

There is also a possibility that discharge under the undue burden standard may be less rare in the near future.<sup>335</sup> In November 2022, the Department of Justice promulgated new stipulations for undue hardship discharges.<sup>336</sup> While it remains to be seen exactly how this guidance will impact dischargeability determinations, it is expected that the more factors a bankrupt borrower is able to demonstrate through the required attestation, the more likely it is that even a partial discharge could be granted without costly litigation.<sup>337</sup> If these changes result in less stringent treatment of student loan debt in

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329. See CONG. RSCH. SERV., R43571, FEDERAL STUDENT LOAN FORGIVENESS AND REPAYMENT PROGRAMS 27–31 (2018); Sequoia Carrillo, *The U.S. Government Underestimated the Cost of the Student Loan Program by Billions*, NPR (July 29, 2022, 2:20 PM), <https://www.npr.org/2022/07/29/1114560119/student-loan-program-cost> (“From 1997 to 2021, the Education Department estimated that payments from federal direct student loans would generate \$114 billion for the government. But the GAO found that, as of 2021, the program has actually cost the government an estimated \$197 billion.”).

330. *Student Loan Delinquency and Default*, *supra* note 313.

331. *See id.*

332. CONG. RSCH. SERV., R43571, *supra* note 329, at 21.

333. *Student Loan Delinquency and Default*, *supra* note 313.

334. BEST & BEST, *supra* note 7, at 169.

335. *See* Press Release, U.S. Dep’t of Just., Justice Department and Department of Education Announce a Fairer and More Accessible Bankruptcy Discharge Process for Student Loan Borrowers (Nov. 17, 2022), <https://www.justice.gov/opa/pr/justice-department-and-department-education-announce-fairer-and-more-accessible-bankruptcy>.

336. *Id.*; *At a Glance: Department of Justice’s New Process for Student Loan Bankruptcy Discharge Cases*, U.S. DEP’T OF JUST., <https://www.justice.gov/civil/page/file/1552676/download>; *Guidance for Department Attorneys Regarding Student Loan Bankruptcy Litigation* (Nov. 17, 2022), <https://www.justice.gov/civil/page/file/1552681/download>.

337. John L. Culhane & Elanor A. Mulhern, *Justice Department Announces New Guidance for Handling Bankruptcy Discharge of Federal Student Loans*, BALLARD SPAHR (Dec. 1, 2022), <https://www.consumerfinancemonitor.com/2022/12/01/justice-department-announces-new-guidance-for-handling-bankruptcy-discharge-of-federal-student-loans/>.

bankruptcy, and borrowers are allowed to discharge this debt more easily, the resulting losses will again shift the financial burden to taxpayers.<sup>338</sup>

As costly solutions like forgiveness and repayment plans increase in number and complexity, the heavy impact these plans have on the federal budget increases the odds that lawmakers will push even harder against meaningful reform.<sup>339</sup> History has made clear how easy it is for combative lawmakers to argue that student loan programs are already extraordinarily expensive to taxpayers, many of whom never received the benefit of this federal aid.<sup>340</sup> The more lawmakers perceive student loan borrowers as abusing the very system that is investing in their education and their future, the greater the odds are that new legislation will be introduced that could create additional systemic problems for borrowers and make debt repayment even more difficult and expensive.<sup>341</sup>

## V. CONCLUSION

It is unfairly punitive, if not morally reprehensible, to treat student loans as a social welfare program when the loans are being granted, only to later argue that these loans are nothing more than a business arrangement when borrowers struggle to repay.<sup>342</sup> Equal access to funding for education does not guarantee equal outcomes, whether education or financial.<sup>343</sup> Moreover, the stubborn assertion that personal responsibility requires that individuals who choose to take out student loans ought solely to bear the cost of repaying that debt willfully ignores the reality that not all students enter college on an equal footing, not all incur student loan debt with the same ability to repay, and not all will experience the same struggles with repayment.<sup>344</sup> Frustratingly, this argument also disregards the benefits that inure to society when it has a highly educated workforce.<sup>345</sup>

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338. BEST & BEST, *supra* note 7, at 169.

339. *See, e.g.*, CONG. RSCH. SERV., R43571, *supra* note 329, at 31.

340. *See* Mitchell, *supra* note 177.

341. *See, e.g.*, Hunt, *supra* note 22, at 1305; *Review of Higher Education Programs, 1975*, *supra* note 13, at 34–35.

342. LOONIN, *supra* note 30, at 30; H.R. REP. NO. 95-595, at 134 (1977) (“It is inappropriate to view the program as social legislation when granting the loans, but strictly as business when attempting to collect.”).

343. BEST & BEST, *supra* note 7, at 162 (“We may agree that everyone deserves equal access to student loans, and we may want to give everyone the chance to succeed, but we shouldn’t be surprised when some people fall short.”).

344. *See* H.R. REP. NO. 109-31, at 2 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 89; Cory Turner, *Exclusive: How the Most Affordable Student Loan Program Failed Low-Income Borrowers*, NPR, <https://www.npr.org/2022/04/01/1089750113/student-loan-debt-investigation> (Apr. 1, 2022, 9:28 AM) (“Borrowers with the lowest incomes are being hurt most.”).

345. Ryman, *supra* note 4, at 223.



Just as a single policy did not create our current student loan debt problem, a single solution will not fix it.<sup>346</sup> However, this does not mean that there are not numerous under-utilized opportunities available that could ease the repayment struggle that so many are experiencing.<sup>347</sup> Rather than continuing to focus on the nondischargeability of student loan debt, the conversation needs to shift towards helping borrowers find more efficient, effective means of loan repayment. Resources should focus on leveraging tools that encourage borrowers to engage with their student loans, manage their debt burden more effectively, and repay these loans more efficiently—all without throwing additional obstacles in the way.<sup>348</sup> If borrowers are able to repay their student loan debts more reliably and more efficiently, it might finally be possible to bring the student loan “crisis” to an end for both the borrower *and* the lender.

*Sarah Holden\**

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346. BEST & BEST, *supra* note 7, at 182.

347. *See, e.g.*, Renee Onque, *54% of Student Loan Borrowers Say Their Mental Health Issues Like Anxiety and Depression Are Directly Related to Their Debt*, CNBC, <https://www.cnbc.com/2022/09/21/americans-mental-health-continue-to-struggle-amid-student-loan-debt.html> (Sept. 23, 2022, 2:36 PM).

348. *See, e.g.*, PEW CHARITABLE TR., *supra* note 159.

\* J.D. Candidate, University of Arkansas at Little Rock, William H. Bowen School of Law, expected graduated December 2024; B.A. in Psychology, University of Central Arkansas, 2011. This Note is dedicated to my husband, Dustin Holden, whose personal student loan saga fuels my passion for student debt reform, and Leon Snyman, because without you both, this project would have been impossible. I would also like to give special thanks A.J. Teotia for his support, encouragement, and willingness to champion on my behalf; Jennings Stanley and Cameron Edmonson, for their patience and diligence in the editing process; and to the rest of my colleagues at the Law Review, for their time spent providing feedback and editing this Note.