

Gilded Chains: The Inability to Discharge Student Loan Debt in the United States and the Effect on the Future of the Country

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Introduction

This aim of this paper is to analyze the massive problems stemming from the trillion dollar student loan debt issue in the United States, and to propose a solution. The causes, issues, and effect on the future of the country will all be covered in depth. In addition, a brief analysis of how Canada and the United Kingdom handle this contentious issue will be analyzed in order to provide a roadmap for future successes in the United States while remaining mindful of the differences between private loans and federal loans. This will be coupled with a discussion on whether the solutions prescribed will be more or less beneficial than the current regime. A special attention will be given to those students who did not graduate and yet still owe money from loans, and to the problem of “for-profit” colleges. To accomplish these goals, both bankruptcy and constitutional law will be analyzed.

The average American student owes more than thirty thousand dollars of non-dischargeable student loan debt.¹ This multi-generational albatross is creating a massive drag on the future prospects of younger Americans and the consequences can be dire.² Most types of private loan debt can be discharged through bankruptcy.³ This is not the case for debts which were acquired to pay for a post-secondary education. Political inaction and lack of any constructive oversight has caused a situation in the United States where colleges can charge whatever they wish to incoming students. The government then compounded the issues inherent in such a system by adding further obstacles in the form of requirements that one cannot easily, or sometimes even plausibly, divest themselves of educational debt.⁴ From 1976 to 2005, Congress continually amended the Bankruptcy Code and that made it more and

¹ Bidwell, Allie, *Average Student Loan Debt Approaches \$30,000* (November 3, 2014) <http://www.usnews.com/news/articles/2014/11/13/average-student-loan-debt-hits-30-000>

²Peterson-Withorn, Chase, *How Today's Student Loan Debt is Failing Future Generations* (July 30, 2014), <http://www.forbes.com/sites/chasewithorn/2014/07/30/how-todays-student-loan-debt-is-failing-future-generations/>

³ 11 U.S.C.

⁴ 11 U.S.C. §523(a)(8)

more difficult to discharge debt from educational loans.⁵ In addition, Congress has made no effort to place a cap on the amount which a school can charge a student. This has led to a system where the average tuition for a public four year college is \$23,410 and the price for a private four year college is \$46,272.⁶ These tuition prices are fueling a regime where the average graduate owes \$30,000 in debt.⁷

Problem Stated

The general consensus is that the mass number of young people who cannot purchase houses, cars, or start families due to their overwhelming debt is going to create catastrophic results in the future. The "American Dream" of a house, children, and white picket fence is increasingly out of reach for a huge amount of young Americans. This inability to invest in their future is causing not only a generational malaise, but a grave forecast from economists.⁸

Student debt in the United States is undoubtedly a contentious issue. A large portion of those who suffer the most from this burden are young and tend not to vote, which means that their particular plight receives much handwringing but no solutions. However, this is not to say that only those who have graduated college in the past few years are the only ones struggling with this issue. The elder group with loan debt is starting to become a political force.⁹ This means that this problem will, for better or worse, be decided sooner rather than later. The ideal solution is one that does not provide blanket forgiveness, as that would provide a decidedly negative impact on the economy. Nearly eighty percent of student debt is in the form of loans provided by the government of the United States, and funded by the

⁵ Sather, Stephen, *Dischargability of Student Loans in Bankruptcy*, (May 6, 2014)

<http://www.lexisnexis.com/legalnewsroom/bankruptcy/b/bankruptcy-law-blog/archive/2014/05/06/dischargeability-of-student-loans-in-bankruptcy.aspx>

⁶ Associated Press, *Stock up on ramen: Average Cost of Tuition Rises Again*, (Nov. 13, 2014), <http://college.usatoday.com/2014/11/13/stock-up-on-ramen-average-cost-of-college-rises-again/>

⁷ Bidwell, Allie, *Average Student Loan Debt Approaches \$30,000*, (Nov. 13, 2014), <http://www.usnews.com/news/articles/2014/11/13/average-student-loan-debt-hits-30-000>

⁸ Bhatia, Pooja, *The long term impact of student loan debt*, (Mar. 3, 2014), <http://www.usatoday.com/story/money/personalfinance/2014/03/03/ozy-student-debt/5976111/>

⁹ *Id.*

American taxpayer.¹⁰ In addition, the government makes a significant return on their investment, to the tune of nearly \$127 billion over the next ten years.¹¹ There is the further complicating factor that nearly three quarters of these loans come from individuals who were granted them so that they could become doctors, lawyers, or businessman. These are three groups that traditionally do rather well for themselves, but that should still garner the protection afforded to their peers. There are large portions of lawyers with law degrees, massive debt, and no jobs.

The end result of this system is a debt-burdened group of people who do not have the ability to discharge their debts as easily as do their fellows. Therefore, there should be a substantially lower burden to allowing the dischargement of student loan debt during a bankruptcy proceeding. The current judicial standard is unnecessarily burdensome on those who are supposed to be the great drivers of the economy. Furthermore, it is unconstitutional, as it unnecessarily and improperly discriminates against a specific and stated class of people: student debtors. There is no data to prove that student debtors are any more or less likely than other debtors to commit fraud in order to alleviate their debts.

¹⁰ Associated Press, *Stock up on ramen: Average Cost of Tuition Rises Again*, (Nov. 13, 2014), <http://college.usatoday.com/2014/11/13/stock-up-on-ramen-average-cost-of-college-rises-again/>

¹¹ Dorfman, Jeffrey, *Student Loan 'Profits' Show Government Should Get Out of Student Loan Business*, (April 19, 2014) <http://www.forbes.com/sites/jeffreydorfman/2014/04/19/student-loan-profits-show-government-should-get-out-of-student-loan-business/>

Overview of the History of and Current Impact of the Existing Student Loan System

The extant student loan regime places those who student debt in the position where they cannot relieve their burden unless they meet a high standard of need. Student loan debt is explicitly stated in the Bankruptcy Code section that deals with non-dischargeable debt.¹² There is no such standard attached to, for example, credit card debt.

As stated by John Pottow, a professor at the University Of Michigan Law School, the current situation was created out of a fear that professionals, primarily lawyers and doctors, who had assumed a large debt burden would be able to fraudulently discharge that debt without a dire need. He states that the rationale can largely be based upon; “an assumption that they [student debtors] are presumptively fraudulent. This would in turn assume that the prototypical student loan debtor - a student - is presumptively dishonest.”¹³

Professor Pottow goes on to stress that this is a rather ludicrous presumption, and that even the legislatures at the time of the drafting of the current law seemed to think that the proposed changes placed too high of a burden on those with debt gained from receiving an education.

What is probably most important to glean is that these nondischargeability provisions came up at the last minute over the opposition of key legislators. Both the primary co-sponsor of the 1978 Bankruptcy Code (Rep. Don Edwards) and the Chairman of the House Subcommittee on Postsecondary Education who oversaw the Education Amendments of 1976 (Rep. James O'Hara) objected to the introduction of a student loan nondischargeability rule. O'Hara protested bitterly that Congress was "fighting a 'scandal' which exists primarily in the imagination" and that the amendment "treats educational loans precisely as the law now treats loans incurred by fraud, felony, and alimony dodging".¹⁴

¹² Pottow, John A.E. *The Nondischargeability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*. Canadian Bus. L. J. 44, no. 2 (2007):245-78

¹³ *Id.*

¹⁴ *Id.*

This difficulty in discharging student loan debt is a burden to achieving a fresh start through bankruptcy that has been placed on those who would need it most. Some of the hardest hit groups of student debtors is comprised of those who took out student loans and did not subsequently obtain a degree, those who attended for-profit schools that are nothing more than “diploma mills,” and those who did obtain a degree but who have subsequently endured life-altering circumstances that inhibit their ability to pay back their debt. These are not people who are looking to defraud the system, they are those who are struggling to pay back debt without the umbrella provided to their peers who can discharge credit card or other types of loan debt.

A distinction must be drawn between private loans and federal loans. Federal loans are those that are provided to prospective students through the Department of Education.¹⁵ These loans should be available for discharge through bankruptcy, albeit at a stricter standard than private loans, as they are provided by the American taxpayer and must therefore be paid back lest the country lose billions. In order to further alleviate the burden of federal loans, and to help prevent bankruptcy, there must be maintenance on existing systems that enable borrowers to mitigate their debt burden without causing an undue burden on the taxpayer.

Private loans are loans that are provided through an independent, for-profit entity, such as a bank.¹⁶ These loans are not dischargeable in bankruptcy in the same as other forms of privately held debt. This perpetuates an unfair system wherein the borrower may alleviate debt that is accrued through the conspicuous consumption found in a consumerist society, but not the attempt to change and better their circumstances through acquiring an education. This in turn leads a drag on the economy, as more and more people are unable to acquire jobs that

¹⁵ Available at, <https://studentaid.ed.gov/types/loans>

¹⁶ Available at, <http://definitions.uslegal.com/p/private-loan/>

would provide them for alleviating their debt. Furthermore, those with private loans are burdened with higher interest rates and far less flexible repayment plans than those with federal loans. In addition, private loans are similar to those which are dischargeable through bankruptcy, the only difference that makes certain loans easily dischargeable and others not is the use for which they will be used, which is irrelevant.

The conclusion that I have reached is that private loan debt in the United States should be as easily divestible as credit card debt. However, when it comes to federal loan debt, which makes up almost 80% of all loan debt, a more rigorous standard should be applied. This standard should make use of the current loan mitigation and flexible payment methods, but should still allow for the dischargement of these student loans in a bankruptcy proceeding.

This paper will only make passing mention of the wisdom of taking out money to pay for college, the meteoric rise of tuition costs in the United State, or the lack of any comprehensive regulation of the schools. However, this is not to say that a current regime could be implemented that also provides a better alternative in the future for student borrowers. Although the proposal that I have reached at the end of the paper does provide assurances of security that this problem will not arise in the future, that is a side-effect of this analysis rather than the stated intent.

Definitions

Bankruptcy Proceedings in the United States

Before a detailed discussion of the problems of student loan debt can be undertaken, a brief foundation of definitions must be laid.

Bankruptcy law in the United States has its origin in the Constitution; “The Congress shall have the Power to...establish...uniform Laws on the subject of Bankruptcies throughout the United States...”¹⁷ Congress eventually acted on this power, and the United States currently has a regime where a private individual may claim a “fresh start” to ensure that the debtor might reduce their burden. ¹⁸

Under current American law, each person has the right and ability to discharge their debts under specific circumstances. Bankruptcy is defined as

The state or condition of one who is a bankrupt; amenability to the bankrupt laws; the condition of one who has committed an act of bankruptcy, and is liable to be proceeded against by his creditors therefor, or of one whose circumstances are such that he is entitled, on his voluntary application, to take the benefit of the bankrupt laws.¹⁹

This means, effectively, that a person has dug themselves into a financial hole, and that the State may assist them in extracting themselves from it. The two kinds of bankruptcy that are available to private citizens are Chapters 7 & 13.²⁰ These two differ slightly. Chapter 7 allows for a complete divestment of debts, whereas when filing a Chapter 13, the filing party must pay back some of their debts in an attempt to mitigate the loss to the lender.²¹ The “must pay” debts are termed “priority debts.”²²

¹⁷ U.S. Const. Art. 1, § 8, Cl. 4

¹⁸ Available at, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Process.aspx>

¹⁹ Available at, <http://thelawdictionary.org/>

²⁰ 11 U.S.C.

²¹ *Id.*

²² Available at, <http://www.nolo.com/legal-encyclopedia/chapter-13-bankruptcy-overview-30099.html>

Student Loans, and Student Loan Debt

Student loan debt refers to a financial obligation that is assumed by the borrower in order to pay the costs of higher education (post-secondary) education in the United States. Due to the extremely high costs of higher education in the US, it is estimated that upwards of 40 million students have ended their academic career with some amount of debt.²³ Unique among most debts in the United States, it is exceedingly difficult to divest oneself of student loans.

There are two types of student loans; those provided by the government, and those provided by private lenders. Government loans are provided by the Department of Education, and are funded through the collection of taxes. Private loans are those that are acquired by the student without assistance from the government. There are advantages and disadvantages to each. Federal loans generally provide more favorable interest rates, and there are much more flexible in terms of repayment plans²⁴ Private loans are more expensive, less flexible in terms of repayment, and are not eligible for Income Based Repayment plans.²⁵

Income Based Repayment plans are government programs that allow a large amount of flexibility in how one repays their federal loan debt.²⁶ They are provided by the government, and moderate the amount calculated for monthly payments based on the income of the debtor. These plans are not available for private loans.

²³ Available at, <https://studentaid.ed.gov/repay-loans/understand/plans/income-driven>

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

Assessment of the Current Standards in Regards to Discharging of Non-Student Loan Debt in Bankruptcy Proceedings

As the central concept of this paper revolves around loosening the restrictions on relieving oneself of the burden of student loan debt in bankruptcy, there must first be a brief analysis of the current state of bankruptcy law in the United States in regards to non student loan debt.

Chapter 7 Bankruptcy

Chapter 7 bankruptcy is the most common form of personal bankruptcy in the United States. Under Chapter 7, the debtor is entitled to keep certain indebted property. Liens, however, survive the bankruptcy action. It is possible that certain property will be sold off to meet the needs of the various creditors. Under current bankruptcy law, student loans are specifically exempted from bankruptcy, absent a showing of undue hardship.²⁷

Chapter 13 Bankruptcy

Another form of bankruptcy that is available to private individuals is Chapter 13, which is also termed "reorganization." Chapter 13 is less readily available than Chapter 7, as there are several higher hurdles that one must surpass. Chapter 13 provides for the debtor and his or her creditors to negotiate a plan that will provide the creditors with relief, and will allow the debtor to mitigate their circumstances.²⁸ This plan must alleviate the concerns of the creditors with the needs of the debtor. The plan must begin in a thirty to forty five day window from the beginning of the case: the creditors cannot move to retrieve the debt owed to them. The compromise usually results in the debtor keeping the majority of their assets.

Problems associated with bankruptcy

²⁷ 11 U.S.C. §523(a)(8)

²⁸ Available at, <http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter13.aspx>

Bankruptcy has a very large effect on the credit score of the debtor. During a Chapter 7, the debtor may obtain new loans after a small period of time, roughly one to two years. However, while a Chapter 13 is underway, a debtor may not assume new lines of credit without the approval of the court.

This is stated to show that those who will need to declare bankruptcy to rid themselves of student loan debt will not do so easily. Bankruptcy holds just enough pitfalls to keep people from taking advantage of it lightly. In addition, there are sufficient safeguards to prevent those who would practice fraud in their proceeding are kept from doing so.²⁹

Treatment of Credit Card Debt under Chapter 7 and Chapter 13 Bankruptcy Proceedings

Credit card debt is referred to as unsecured claims, which means that the debt that was accrued was not secured by collateral.³⁰ Credit card debt is comparatively easy to divest in a bankruptcy proceeding, as there is no non-dischargability provision as there is for student loan debt³¹ In a Chapter 13 case, a plan may be drawn up if the debt is excessive enough that it requires some repayment. This debt may not be available to be discharged if it was made with intent to defraud or if the person never intended to pay back what they borrowed.³²

Analogies between Credit Card Debt and Student Loan Debt

Credit cards are meant to provide a way for people to obtain lines of credit so that they would be able to make larger purchases than their current cash flow allows. Student loans are meant to provide people a method by which they can enrich their lives and better themselves. Both of these methods are fundamentally similar, as they provide the ease of securing something of value in return for a promise to repay the money at a later date. There

²⁹ 11 USC, § 110

³⁰ Available at, <http://www.nolo.com/legal-encyclopedia/debt-discharged-chapter-7-bankruptcy.html>

³¹ 11 U.S.C. §523(a)(8)

³² 11 USC, § 110

is, however, a quantifiable difference in the two. Credit card debt is not an investment in to the future of a nation, but the future of a bank.

Assessment of the Current Status of American Law in Regards to Student Loan Debt

History

The history of student loans in the United States dates back to the 1940s. At this time in American history, there was a large impetus to send as many people to college as possible for several reasons. One was the theory that the more people that get an education, the better the country will be. There was also a sense of competition in the burgeoning Cold War with the Soviet Union, and the US did not wish to be left behind in technological prowess. There was also substantial assistance provided to returning American servicemen and women that were returning for the war. Anticipating the coming end of hostilities in World War II, Congress passed the Serviceman's Readjustment Act of 1944 (hereinafter "G.I. Bill"). This Act was passed in order to provide for postwar assistance to the returning American servicemen. One of the cornerstones of this Act was providing financial assistance to veterans who wished to acquire a college or university education.³³

The success of the G.I. Bill and the ensuing surge in college graduates (By 1947, nearly 50% of students were veterans of the War³⁴) provided the impetus to fund loans for the general public. These loans were provided to students so that they could subsidize the costs of secondary education.

The problems related to student loans began in the 1960s, as Congress passed a series of laws making it more and more difficult to divest oneself of student debt.³⁵ The first of these was the Higher Education Act of 1965, which led in turn to § 439A of the Education Amendments of 1976³⁶. This section placed a prohibition on discharging student loan until

³³ Pottow, John A.E. *The Nondischargability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*. Canadian Bus. L. J. 44, no. 2 (2007):245-78

³⁴ Available at, <http://legal-dictionary.thefreedictionary.com/Effects+of+the+GI+Bill>

³⁵ Pottow, John A.E. *The Nondischargability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*. Canadian Bus. L. J. 44, no. 2 (2007):245-78

³⁶ *Id.*

after 5 years had passed after the beginning of the repayment period.³⁷ This was also the first legislation that provided the onerous “undue hardship” requirement. In its original form, the debtor could waive the five year requirement if it could be shown that continuing to repay the loans would place an undue burden on the livelihood of the debtor. These laws were driven partly by sensationalized stories of doctors and lawyers gaming the system so that they could attend school while making the taxpayers pay for it.³⁸ This created a fear that student debt was an easily and constantly defrauded institution that must be further protected from the feckless whims of those younger than those proposing the laws. This was debated at the highest levels, and even some of the legislators involved decried the non-dischargeability requirements as onerously burdensome. It was stated that placing student debtors in the same camp as alimony dodgers would be a counterproductive exercise. Be that as it may, it was still possible to discharge these loans after the five year requirement was satisfied. Then, the Bankruptcy code was amended again in 1990 (raises the time limit to seven years after beginning of the repayment period)³⁹, 1998 (no time limit, this effectively made the loans non-dischargeable)⁴⁰ and finally in 2005 (this change made privately-funded loans non-dischargeable as well)⁴¹. It is through these amendment that we arrive at the current situation: that it is borderline impossible to alleviate the debt burden from loans that were acquired to achieve an education.

³⁷ Pottow, John A.E. *The Nondischargability of Student Loans in Personal Bankruptcy Proceedings: The Search for a Theory*. Canadian Bus. L. J. 44, no. 2 (2007):245-78

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

The Judicial Standard For Discharging Student Debt

As stated previously, it is still possible to discharge education related debt in the United States, but the burden is quite high. The text of Section 523(a)(8) of the Bankruptcy code states that

unless excepting such debt from discharge under this paragraph would impose an undue hardship on the debtor and the debtor's dependents, for--(A)(i) an educational benefit overpayment or loan made, insured, or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution; or (ii) an obligation to repay funds received as an educational benefit, scholarship, or stipend; or (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.⁴²

This is the culmination of the Congressional efforts over the forty years leading up to 2005. Loans used for educational purposes are specifically exempt from being discharged unless the person so affected can show that they are experiencing an extreme privation of they cannot alleviate their burden. The effect of this standard is a presumption that loans used for educational purposes *cannot* be paid back, but if one can show that they are sufficiently overburdened by the debt, then they can extract themselves from their burden.

The burden that must be met is one of "undue hardship" which is defined as two differing standards depending on the jurisdiction. The first is the *Brunner* test, which is stated as

Based on legislative history and the decisions of other district and bankruptcy courts, the district court adopted a standard for "undue hardship" requiring a three-part showing: (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans; (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period of the student loans;

⁴² 11 U.S.C. Section 523(a)(8)

and (3) that the debtor has made good faith efforts to repay the loans.⁴³

The second test to prove undue hardship is one of totality of the circumstances. A totality of the circumstances test is one in which all the relevant information is accrued in order to achieve a result that best resonates with the principles of justice and law.⁴⁴ This is a lesser standard than the *Brunner* test as it does not require a showing that the debtor is impoverished.

Assessment of the Current Standard of “Undue Hardship”

One of the problems in analyzing this issue is that there is no one standard. However, it is clear that one standard is better than the other. The totality of the circumstances is manifestly a better method for determining whether a debtor can relieve themselves of their debt. The crucial failing of the *Brunner* test is that it requires the debtor to have fallen so low that their choices are discharge or starvation. This becomes an issue when one realizes that the main point of bankruptcy law is to prevent debt from destroying the quality of life of an individual. The totality of the circumstances test is manifestly better, as it allows for all the specific facts to be considered, and this allows the judge to achieve a more equitable resolution.

The issue remains that even though the totality of the circumstances test is better, it is still not enough for many. My contention is that there shouldn't even *be* a judicial standard to determine the worthiness of a debtor to relieve debt gained from pursuing an education if there is no such standard applied to other forms of debt. Student loans have been singled out as the one burden which demands an overly burdensome standard.

⁴³ *Brunner v. New York State Higher Education Services Corp.* 831 F2d. 41 (2nd Cir. 1987), available at <https://law.resource.org/pub/us/case/reporter/F2/831/831.F2d.395.41.87-5013.html>

⁴⁴ Available at, <https://www.translegal.com/legal-english-dictionary/totality-circumstances-test>

Current Programs Designed to Lessen the Debt Burden of Individuals Possessing Federal Student Loan Debt.

This paper is only tangentially concerned with the overarching problems inherent in the educational system, such as with the possibility of regulation of school admissions, it is concerned solely with the ability of persons currently burdened with debt to alleviate their issues. Before an examination of the dischargeability of student debt can be undertaken, an analysis of the current programs in place that can be relied upon to alleviate the burden can be must be made. There are a number of programs that currently provide for the alleviation of student debt that was acquired through the federal government. Federal loans should be treated differently than private loans, as these are provided at the expense of the American tax payer, and should only be discharged in bankruptcy if no other solution presents itself.

The government already has a plan in place that shows great promise, and it also provides an avenue for productive use of government. There is a program called the “Pay-As-You-Earn”⁴⁵ and is geared towards offering those with substantial debt an avenue through which their debts will be forgiven so long as certain qualifications are met. The student must gain employment with a governmental agency, and they must pay each of their loan payments on time, and. The end result is that, after ten years, the rest of the debt is absolved. This is far and away the most mutually beneficial situation for both parties. The students gain the ability to alleviate their debt burden, and the government receives a return on its investment. The complete forgiveness of all loans would create a crisis as the government would be divested of its initial investment as well as the interest on these loans. In addition, it would cause serious problems politically, as there are many in the US that would be

⁴⁵ Dorfman, Jeffrey, *Here Comes The Student Loan Forgiveness*, (Jun. 19, 2014)
<http://www.forbes.com/sites/jeffreydorfman/2014/06/19/here-comes-the-student-loan-forgiveness/>

infuriated at the prospect that they would be forced to pay for others' loan debt. This program should be expanded to provide a way out of student loan debt that does n

Allowing an avenue for governmental service alleviates the problems that would result from a complete loan forgiveness while still allowing the government to recoup some of its losses. The program provides a reservoir of manpower that the government would not otherwise have access to, as many do not wish to go into government work due to the comparatively lower pay than they would receive in the private sector.

The existence of this program provides some hope that the student debt issue may be resolved without wholesale declarations of bankruptcy. The money provided for these loans was financed by the American taxpayer, and it would not be right for those individuals to be forced to deal with the extreme issues that large scale divestment of these loans would cause.

Current and Contributing Problems

Given that this issue is one of the major political, economic, and cultural discussions in the United States today, it is a radically changing topic. There are articles on the problem weekly, and a constant pressure on elected officials to do something about the situation. The problem arises when, wisely, most elected officials are hesitant to take action because of the view that what is asked for is not the ability to discharge, but amnesty. Amnesty is a minority viewpoint among those who wish for student debt reform. The central issue is that only twenty percent of education-based debt is private held, while the rest of the loans are provided by the United States government. This distinction is one of the biggest issues facing those who wish to make student debt dischargeable in bankruptcy. These loans were provided by the government, which means that they were made available out of funding procured through the collection of taxes. This creates an unenviable position for the government, as amnesty would entail forgoing not only the money that was invested but the substantial amount gained through interest payments, and it would also signal to the voters that their money has been collected for frivolous and pointless reasons. Politically, this is not something that any sane elected official will endorse. On the other hand, many people are burdened by this debt, and alleviating their suffering is in the best interests of the nation.

Student loan debt has had an incredible effect on the culture of the United States. Almost everyone that has gone to college in the last two decades has some amount of debt.⁴⁶ This has been compounded by the trend in recent decades for people to push young adults to go to college even though they are either unprepared or uninterested. The problem compounds itself when those who were so pushed then drop out of school, and must then

⁴⁶ *CNN Money, 40 Million Americans now have student loan debt*(Sep. 10, 2014)
<http://money.cnn.com/2014/09/10/pf/college/student-loans/>

payback their loans without the benefit of the college degree: a college graduate, on average, earns \$1.3 Million more than a non-graduate over the course of their life,⁴⁷ and this obviously impacts on the debtors ability to both pay down their debt and continue to live a life that is both fulfilling and beneficial to the greater economy.

There are myriad problems as to why treating educational debt differently from other forms of debt in regards to bankruptcy is both unfair and undesirable. One of the groups that is worst affected are those who possess debt, but do not have degrees. This group has the dual burden of paying off their lenders without the added benefits of actually possessing a degree.

Interest on Student Loans Begins Accruing Immediately

The logic behind student loans is allowing young adults to subsidize their expenses when attempting to earn a bachelor's degree. However, the interest on these loans begins accruing immediately, meaning that as soon as the loan is taken out, the student begins owing more immediately.⁴⁸ This leaves students in the unenviable position of simultaneously needing a loan to go to school, and needing a job to pay off the accruing interest. This factor, while minor, is another contributing factor the overall problem.

Lack of Limitations on What Schools May Charge for Tuition

Another small facet of the problem is that there is no legislation on the books that caps or otherwise limits the amount of money that schools can charge for tuition. College tuition has outpaced inflation in the United States for the past decade.⁴⁹ This contributes to

⁴⁷ Available at <http://usgovinfo.about.com/od/moneymatters/a/edandearnings.htm>

⁴⁸ Available at, <https://studentaid.ed.gov/types/loans/interest-rates>

⁴⁹ Lorin, Janet, *College Tuition in the U.S. Again Rises Faster Than Inflation*, (Nov. 13, 2014) <http://www.bloomberg.com/news/articles/2014-11-13/college-tuition-in-the-u-s-again-rises-faster-than-inflation>

the problem experienced by so many families: that the expenses they need to incur to send their child to college may very well cripple them. There needs to be a comprehensive Congressional effort to force colleges and universities to lower tuition over the coming decades, or all of the efforts laid out in this paper, even if they were implemented, would mean nothing. The United States must not merely block the holes in the damn, it must replace the very base upon which the current system stands.

[The Effect of Student Loan Debt on the Economy of the United States](#)

The worst effect of student loan debt is the detrimental effect that the accrued debt has of the economy. Even though the economy has grown by leaps and bounds since the beginning of the Financial Crisis, debt-laden students are still contributing to the slow nature of the recovery. There are many things that post-college students did in the past that charged the economy that are simply not feasible today. Owning a house, starting a family, and earning a good salary is out of the reach of many, and that problem is compounded when one must deal with large monthly loan repayments.

The Current Disparate Treatment Due to the Debtor's Status as a Student is Unconstitutional

There is also a constitutional basis for allowing private loan debt to be more easily discharged. It is unconstitutional to treat similar situated parties differently.⁵⁰ This standard is usually applied to discrimination cases, and is similarly applicable here. Student debtor's differ from their credit card debtor peers merely for the reasons for which they removed their loans. In addition, the legislative history clearly shows an animus against student debtor's, as the only logical conclusion that can be drawn from these repeated amendments to the Code is that the Legislature has deemed that student debtors are more likely to default on their debt. There is no data to back up this accusation.

This argument shall be deemed to be the impetus for the following proposal. Forcing student debtor's to be subject to differing standards than their peers without a due showing of cause is *de facto* discrimination.

⁵⁰ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.).*available at*, <http://www.eeoc.gov/laws/statutes/titlevii.cfm>

The Unique Problem of For-Profit Education

For-profit schools are exactly what they seem, they do away with the pretense of providing an education for the benefit of their students, and declare that they are a money-making business.⁵¹ The student debt burdens of those graduating from these universities. Kevin Carey, the policy director of *Education Sector*, which is a think-tank in Washington DC, wrote about the issue of for-profit institutions in *The Chronicle of Higher Education*.

Unfortunately, a large and growing number of graduates of for-profit colleges are having trouble paying those loans back. Horror stories of aggressive recruiters' inducing students to take out huge loans for nearly worthless degrees are filling the news. The Obama administration...has proposed cutting off federal aid to for-profits that saddle students with unmanageable debt.⁵²

This quote perfectly illustrates the issues facing the graduates of these institutions. Certain of these schools have garnered reputations for inducing students without the proper knowledge to take out loans that they will struggle to repay.⁵³ Carey sums up the problem with this system thusly; “The federal government has every right to regulate the billions of taxpayer dollars it is pouring into the pockets of for-profit shareholders. The sooner abusive colleges are prevented from loading students with crushing debt in exchange for low-value degrees, the better.”⁵⁴

This is not to say that these institutions are inherently bad, they aren't. They provide a service for those who are unable to attain a degree at a traditional college or university, and provide a valuable service to those who wish to attain a degree later in life while also working a full time job. These benefits can be kept while still alleviating the problems

⁵¹ Kevin, Carey, *Why Do You Think They're Called For-Profit Colleges*, (Jul. 25, 2010) <http://chronicle.com/article/Why-Do-You-Think-Theyre/123660/>

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

caused by some of the less than savory practices created by these schools. Holding the schools accountable for federal loans that are discharged by their students would allow stricter federal oversight, so the problems that were created in the past would be lessened. In addition, it would create an avenue by which the American taxpayer would not be forced to foot the bill for a private for-profit institution that is beholden to its shareholders.

Comparisons between the American, Canadian, and English Systems of Student Loans

Student loans are not a uniquely American problem. There are other nations that follow the same or a similar model of tertiary education for a fee. Three of these nations are very close to the United States for cultural and historical purposes, and are a good bellwether to see how the United States could handle the current problem. The countries that will be analyzed in this section are the United Kingdom, Canada, and Australia.

United Kingdom

Unlike the United States, tuition fees for attending university are a comparatively recent phenomenon in the UK, having started as recently as 2007.⁵⁵ Interestingly, these fees are only applicable in England, as Scotland and Wales have declined to extend the tuition fee regimen to their universities.⁵⁶

England has a much more manageable view on student loan cancellation than the United States. For example, upon the death or the permanent incapacity of the borrower, the remaining loan is cancelled. Neither of these happens in the United States. In addition, if the debtor fulfills certain categories, they may have their debt wiped clean at a certain point.⁵⁷

The cancellation of these loans raises a crucial issue that must be dealt with, and that is how this system is not wholly applicable to the United States. As I mentioned previously, eligibility for debt cancellation should be very strict, as the tuition fees, and the corresponding amount loaned, is so much higher in the USA than it is in the United Kingdom. The maximum tuition that can be charged in the United Kingdom is £9,000, or

⁵⁵ Available at, <http://www.slc.co.uk/services/loan-repayment/loan-cancellation.aspx>

⁵⁶ *Id.*

⁵⁷ *Id.* According to UK law, “if the borrower is from England or Wales and the money is borrowed after September 1st 2012, then the remainder of the loan is cancelled if it is not paid back by 30 years after the borrower becomes eligible to repay. If the loan was taken out before that date, then the requirements are either 1) that loan taken out before the 2005 to 2006 school year is cancelled if the debt is still extant once the borrower turns 65, or 2) if the loans was taken out after that date, then the debt is cancelled 25 years after eligibility to repay begins.”

roughly \$14,550 dollars.⁵⁸ There is no maximum in the US, and the average ranges from \$23,000 to \$43,000 depending on if one attends a private or a public school. This vast discrepancy means that cancelling the debt in the United States as it is done in England and Wales would cause a huge amount of taxpayer funded money to disappear. It is an unenviable system, but the United State profits enormously off of the backs of its students.⁵⁹ This system needs to be changed, but a flat cancellation at a pre-set time will not work. There is too much invested in this system to allow for this kind of debt cancellation service. In addition, that practice was used to, incrementally, to achieve the problems that currently compose the reason for this paper.

Canada

In recent years, Canada has begun experience the same difficulties associated with an increase in student loan debt that the United States has.⁶⁰ It has been ascertained that the average Canadian student takes 14 years to repay their loan.⁶¹ It seems that the total debt burden of Canadians as opposed to Americans is lower, but is a growing issue.⁶² As the problem in Canada is emerging, the United States can assess the Canadian attempts to handling their situation and see if they have any novel ideas are presented.

There are three types of student loans in Canada, National, Provincial, or Private. National are those provided by the central government, Provincial by the government of an individual province, and private, which are the same as in the United States.⁶³ This almost

⁵⁸ Playdon, Jane, How Much Does it Cost to Study in the UK? (Apr. 2, 2015),

<http://www.topuniversities.com/student-info/student-finance/uk-tuition-fees-how-much-does-it-cost-study-uk>

⁵⁹ Dorfman, Jeffrey, *Student Loan 'Profits' Show Government Should Get Out of Student Loan Business*, (April 19, 2014) <http://www.forbes.com/sites/jeffreydorfman/2014/04/19/student-loan-profits-show-government-should-get-out-of-student-loan-business/>

⁶⁰ Lagerquist, Jeff, *Student debt: Average payback takes 14 years*, (Sep. 4, 2012)

<http://business.financialpost.com/2012/09/04/student-debt-average-payback-takes-14-years/>

⁶¹ *Id.*

⁶² Tencer, Daniel, *Canadian Student Debt is Growing Fast, But U.S. is Much Worse Off* (Mar. 04, 2014)

http://www.huffingtonpost.ca/2014/03/04/student-debt-canada-statscan_n_4897125.html

⁶³ Available at, <http://www.canlearn.ca/eng/index.shtml>

identical system makes the Canadian student loan plan a prime target for seeing how the American system might retain some good ideas.

The Canadian student loan debacle is still in its infancy, so unfortunately there are as of now no concrete lessons to take away and apply to the United States. However, given that Canada seems to be headed down a similar track, it would be prudent to keep aware of the effect of future Canadian policies.

Proposed Solutions and Mitigating Alternatives

A Proposed Solution that would be More Detrimental than Beneficial

There have been certain proposals that advance the idea that student loans should be easily forgiven. The logic behind this is clear; without the burden of debt looming over their heads, American students can enter into the same kind of lifestyle that is encompassed by the term "The American Dream." This includes, but is not limited to, home ownership, starting a family, and acquiring a stable job. These milestones are increasingly out of the reach of many students who delay these goals due to the millstone of debt that hangs around their necks.⁶⁴

Despite how appealing and easy this idea may seem, I find that it is, at best, a disastrous decision. Whether or not one agrees with the policy, the United States Government has a huge amount of money invested in students. Approximately eighty percent of student debt is held by the government, and as has been stated previously, the government stand to make billions over the next ten years from interest payments alone. Allowing for a widespread cancellation or forgiveness of these debts would severely short change the country as a whole. Furthermore, it would be monstrously unfair to the majority of American taxpayers, as the federal loan program is derived from revenue acquired through taxation. This also means that this solution, while appealing to some, would be political suicide.

In addition, there are already some programs in place that would alleviate the majority of governmental loan debt. One of these is the staggered-tier system of the repayment programs.⁶⁵ These programs allow for extended repayment, income based repayment, and

⁶⁴ Wolfers, John, *Forgive Student Loans? Worst Idea Ever*. (Sep. 19, 2011) <http://freakonomics.com/2011/09/19/forgive-student-loans-worst-idea-ever/>

⁶⁵ Available at, <https://studentaid.ed.gov/repay-loans>

pay-as-you-earn. While important, there is too much information to recite here. Suffice it to say that these programs provide a multitude of mitigating the problems that face student loan debtors. These programs also provide an umbrella, albeit an insufficient one, to those with education based debt.

However, the existence of these programs is also a stumbling block to the proposal that this paper espouses. There is a train of thought that sees these programs as sufficient, and that there should be no more extensive loan-forgiveness programs. "Some form of income-based repayment should be the only repayment option in the student loan program," says Jason Delisle, director of the Federal Education Budget Project at the New America Foundation.⁶⁶ I disagree with Mr. Delisle's assessment. Although important, these programs do not do enough to alleviate those with the greatest burden. Debt repayment programs also exist with loan debt that was acquired for other reasons than education, and the debtors that owe these loans may still avail themselves of a bankruptcy proceeding.

Jeffrey Dorfman, an economics professor at The University of Georgia and a contributor to Forbes magazine, states the issue succinctly. He argues that the issue is not one of the total amount of debt held by the majority of students, which he compares to a car loan. He delineates when the loans do become an issue; "Student loan debt becomes a problem when the borrower wants to spend their newly increased incomes on nice food, clothes, cars, housing, and vacations rather than on their student debt payments."⁶⁷ This view lends credence to the contention that the loans may seem manageable in and of themselves, but become a problem when the debtor desires to do more than merely work to pay off their

⁶⁶ Webley, Kayla, *Is Forgiving Student Loan Debt a Good Idea?* (Apr. 20, 2012) <http://business.time.com/2012/04/20/is-forgiving-student-loan-debt-a-good-idea/>

⁶⁷ Dorfman, Jeffrey, *Student Loan Forgiveness Could Be Expensive Education For Taxpayers*, (Feb. 12, 2015) <http://www.forbes.com/sites/jeffreydorfman/2015/02/12/student-loan-forgiveness-could-be-expensive-education-for-taxpayers/>

debt. Discretionary spending is what drives a capitalist society, and when a large portion of young adults do not do so out of a lack of capital, the economy suffers.

Professor Dorfman goes on to state that;

This would be mostly a small, side matter in the American economy if not for one important facet of the story: the federal government takeover of student lending. Because the federal government makes most of the student loans currently being issued and has made or guaranteed most of the outstanding student loan debt, taxpayers are on the hook for that \$1.3 trillion in outstanding debt.⁶⁸

This is the cause of my hesitation to allow for widespread forgiveness as argued for by some politicians and others, such as Preeti Vissa, the Chief Operating Officer of the Greenlining Institute.⁶⁹ The Greenlining Institute is a social policy non-profit organization that advocates for those deemed to be a disadvantaged group, with a special focus on racial inequality. Ms. Vissa states ; “...forgive it all. Banks got bailed out...but most ordinary Americans got no bailout at all. Forgiving student debt would give the economy an instant shot in the arm by putting billions of dollars in the hands of the people most likely spend it: young adults...starting families and households.”⁷⁰ Admittedly, this view does not have a wide support base due to the problems that it would bring, it is a consistent thought process, especially after the bailing out of the American banking system during the Financial Crisis. This is, however, an argument more out of emotion than out of reason and political possibility. Disagreeing with the TARP bailouts is one thing, but then saying that this same bailout strategy should be applied to student loans is a disastrous idea. Firstly, TARP was predicated on using taxpayer money to bail out the failing banks. This was done with a massive infusion of taxpayer money that the banks were then obligated to repay. In essence,

⁶⁸ Dorfman, Jeffrey, *Student Loan Forgiveness Could Be Expensive Education For Taxpayers*, (Feb. 12, 2015) <http://www.forbes.com/sites/jeffreydorfman/2015/02/12/student-loan-forgiveness-could-be-expensive-education-for-taxpayers/>

⁶⁹ Vissa, Preeti, *Forgive All Student Loan Debt*, (Aug. 12, 2013) http://www.huffingtonpost.com/preeti-vissa/forgive-all-student-loan_b_3429758.html

⁷⁰ *Id.*

a student TARP would be using taxpayer money to bail out loans that were originally funded by those same taxpayers, without the security that these loans would be paid back.

If, in the alternative, the proposed plan is one not of bailout but of amnesty, the end solution is much the same. As stated previously, these loans were provided through revenue accumulated through the federal taxing power: this money came from the American people. It would be monstrously unfair to put the American taxpayer on the hook for the trillion dollars that would default back to them if this proposal were implemented. In terms of a general amnesty, the government would suddenly face almost a trillion dollars that disappeared overnight, to say nothing of the proposed revenue that these loans were to bring in. If history is any factor, the result in this massive increase in the budget would be filling the hole by gutting social services, education, and infrastructure. This would create a far bigger problem than that of student loan debt, as it would cripple the country in the long run.

Professor Dorfman succinctly argues that allowing for cancellation of the debt would be unfair to the American taxpayer who would be forced to foot the bill. Outside of the obvious political fallout from such an act, this proposal would create an impossible position for the government, as they would struggle to make up for the fall in revenue from interest rates and the loss of nearly a trillion dollars at a time when the federal debt approaches the twenty trillion dollar mark.⁷¹

Forbes identifies himself as of a libertarian bent, which in the United States means that he is opposed to most governmental intervention, and would prefer that the market dictate the majority of the economic system.⁷² Because of this, he also stands opposed to the debt mitigation policies enacted by the Obama administration that I had previously argued for. I agree with Professor Forbes on his assessment of the core of the issue, but not in his

⁷¹ Available at http://www.brillig.com/debt_clock/

⁷² Available at <http://www.lp.org/>

calculations for fixing the problem. In order to fully satisfy both the needs of the government and of the debtor, both mitigation principles must be put into effect together. The debt repayment plan provides an avenue through which the debtors may avoid the problems of a bankruptcy proceeding while still paying down their debt. However, if these programs are deemed to be insufficient for their stated purpose, then the debtor should be allowed to divest themselves of the debt. At this point, the burden should fall onto the school that provided the debtor with his or her degree to repay the balance of the loan. In order to fashion this program as less of a bitter pill and to mollify some of its presumptive opponents, the schools should not be placed on the hook for the entirety of the loan, meaning that the accrued interest should be waived, and the school should only pay the balance of the loan.

Proposed Solution

Amend the Bankruptcy Code to Remove the Non-Dischargeability Provisions in Regard to Student Loans Acquired from a Private Lender

Taking account of the totality of the information outlined above, my conclusion is that debt that is accrued from private lenders in order to pay for one's higher education should be treated like credit card debt in regards to personal bankruptcy. This would allow for a more powerful fresh start. Firstly, private loans lack the more generous and flexible terms that one receives from federal loans. This means that when one falls on hard times, their choices are continue to pay until they are broke enough to ask for the *Brunner* test or to fall upon the mercy of a judge who may decide that their circumstances do not provide sufficient need of relief.

This conclusion cannot exist in a vacuum, as there must be a comprehensive plan for then providing a more stable student loan distribution system so that this problem does not arise again. The changing of the bankruptcy laws will provide for relief for those struggling with current debt, but the regime must also be changed so that in the future there is less possibility for a repeat performance of the current debt issue.

Preserve Current Programs for Mitigation of Student Loans Provided by the Federal Government

The case for more lenient discharge of student loan debt from a federal source is less compelling, as there are many more opportunities for a debtor to achieve a favorable outcome in that regard. Despite its less-compelling nature, federal loans should still be dischargeable in bankruptcy, albeit with a bit of a twist. If a debtor can meet the requirements to discharge their debt, the school should be forced to pay back the balance of the loan. This should not be the first step. There are programs through which one can have their debt mitigated and possibly even cancelled, and Income Based Repayment allows for a modification of the

payments required when the earned income of the debtor is taken into consideration. In order to satisfy the need to discharge a student loan that was funded by the government, the debtor must be able to show that they attempted to take advantage of these programs. This provides a double layer of protection for the taxpayer.

[Amend the Bankruptcy Code to Allow for the Discharge of Student Loan Debt from Loans Provided by the Federal Government](#)

This proposal raises certain issues, namely that of the applicable standard. Private loans should be treated as any other during bankruptcy proceedings, but what of federal loans? A sufficiently high standard would provide the necessary protections for the schools and would still allow a window of opportunity for debtors. I propose that the standard be one of totality of the circumstances. This would allow for each case to be decided on the merits of that individual case, so as not to allow those who merely want to walk away from their debt to do so while still affording those who show a sufficient need to do so. This would satisfy the fear of some that students are more likely to commit fraud in order to reduce their debt burden.

In addition, the debtor should have to show a good faith attempt to satisfy their debt, and show that continuing their payments would place them in a financially burdensome predicament. The poverty and persistence prongs of the *Brunner* test should be done away with, as these form an undue impediment to success on the merits. The poverty requirement means that unless one can show that they will become destitute that they must continue to pay their loans. This places the debtor in the untenable position that they must first face poverty before being allowed to extract themselves from their debt. This is clearly The persistence prong is especially troublesome as it requires the debtor to prove that their status under the poverty prong will continue for a significant part of the repayment period. As the repayment period theoretically only ends at death, this prong is *overarchingly bad*.

The fact of the matter is that a huge portion of American post-graduates are struggling to repay debt without the umbrella provided to other debtors. The price of this is a generation of young adults that are unable to enter into the world with the hopes and dreams that have so long been a part of American culture. Owning a house, a car, starting a family, all of these are out of reach of many who are working to pay off their debt. Allowing student loans to be discharged in bankruptcy would provide an avenue of release to these people. This is not to say that bankruptcy should be encouraged. The penalties and impact of bankruptcy proceedings are not to be entered into lightly. It should be a last resort, one that would allow student debtors to divest themselves of their burdens and begin to contribute more to the rebounding American economy.

This is an interesting idea, and it must be further analyzed. Forcing the schools to pay for the debts discharged by students would bring about many changes to the current educational system. Schools would be more selective, as they would now have a personal stake in the economic success of future students. This process of selectivity would also ensure that the best and brightest get the education to succeed, and those that cannot get in would not be saddled with un-dischargeable debt. Naturally, there are downsides to such a proposal. One of the cornerstones of American higher education is the notion that “If you want to, you should go.” This process would keep many that are currently college educated from attaining that education at their preferred place of study. However, this is not a particularly compelling argument. Firstly, the current selection process keeps many from going to their “dream schools.” It is an unfair system, but there is no guarantee that one will get the education that one desires. In theory, academic standards aren’t meant to discriminate against students, but rather to ensure that those who enter into the school are sufficiently prepared for the academic rigor that faces them. A tightening of this system would be in the best interests of both schools and students. The students would be provided with a better

education as there wouldn't be as many people in the room who were there either because they thought they had to or they were forced to. The schools would be assured that their entrance requirements would protect them from the majority of bankruptcy proceedings.

Two Special Considerations: Individuals Dealing with Changed Circumstances and Debtors without Degrees

Individuals Dealing with Changed Circumstances

Student loans are meant to provide people with a way to afford school so that they might then acquire a better paying job than they would receive if they did not have the degree. It is axiomatic that jobs can end without the input or design of the person holding their position. Private loans do not provide the assistance of federal loans if there is a forced change in circumstances. Chapter 13 Bankruptcy however, does. Under the Bankruptcy Code, a debtor may request a “hardship discharge” if they can prove 1) that the circumstances are beyond their control, 2) that their creditors would have received the same amount in a Chapter 7 liquidation, and 3) a modification of the proposed plan is impossible.⁷³ This same kind of arrangement is absent from private student loan payment programs an implementation of such a system would greatly benefit many of those struggling with debt.

Debtors without Degrees

One of the hardest hit groups are those who possess debt yet do not possess a degree.⁷⁴ This group has the dual blow of the possession of non-dischargeable loans combined with the lack of a college degree (which earns its owner, on average, over \$1 million over the course of a working lifetime). There should be in place a more comprehensive safety net for these individuals that surpasses the ability for a regular student debtor (one that possesses the degree) as they have limited earning potential and therefore have less of a chance to achieve a debt free life.

⁷³ 11 U.S.C. § 1328(b)

⁷⁴ Fry, Richard, *A Demographic Profile of Young Student Debtors*, (May 14, 2014) <http://www.pewsocialtrends.org/2014/05/14/section-2-a-demographic-profile-of-young-student-debtors/>

Possible Disadvantages and Impediments to Implementation of Such a Proposed System, and Possible Solutions

When bankruptcy is declared, there are consequences, such as a difficulty in the future for accessing credit, a reluctance for lenders to provide such services in the future, and possible higher interest rates on those that are still taking out the money. The ostensible reason for non-dischargeability in the first place was fear that student-aged Americans are more likely to commit fraud in order to divest themselves of debt. Changing to my proposed solution would cause some immediate political and cultural backlash. Many voters would be displeased that their tax dollars are going to a program that allows students to “welch” on their obligations. The largest problem with allowing for discharge of federal loan debt is placing the schools in the position where they have to pay the balance of the loan. As this topic will be exhaustively detailed elsewhere in this paper, it will merit only a mention here.

Support for Proposed Solution

The idea that I have posited, that private student loan debt should be dischargeable through bankruptcy, has some supporters. In 2012, a group of lawyers from the National Association of Consumer Bankruptcy Attorneys issued a report that called for exactly this under the title of "Student Loan Debt Bomb."⁷⁵

The idea that private loans should also be dischargeable is not without its proponents. George Leef, the Director of Research of the John W. Pope Center for Higher Education Policy, argues for a slightly different proposal. In an article for Forbes, he also points to the issues that I have raised in allowing debtors to discharge their federal loans, stating that; "Student loans...are now overwhelmingly in federal hands and almost anyone who wants a loan can get one. It thus seems that allowing bankruptcy would merely encourage more careless borrowing and force taxpayers cover the costs for clueless students who borrowed a lot for a fluff degree."⁷⁶ This statement buttresses my central concern with amending the bankruptcy statute; that the risk of dischargability is more borrowing and more money lost to the taxpayer. He, however, entertains a proposal which he is basing off an article by Ike Bannon of The Weekly Standard, a conservative publication.⁷⁷ This proposal would be to place the onus of debt dischargement on the schools themselves. This proposed change would allow for the dischargement of federally held student debt by forcing the schools themselves to pay back the debt. This is one way that non private educational debt could be discharged without expense to the American taxpayer, and it would simultaneously force the colleges to be more selective, and force them from their current diploma mill status.

⁷⁵ Available at, <http://www.nacba.org/Legislative/StudentLoanDebt.aspx>

⁷⁶Leef, George, *Let Students Discharge College Debts in Bankruptcy? Yes, But...* (Jul. 24, 2014) <http://www.forbes.com/sites/georgeleef/2014/07/24/let-students-discharge-college-debts-in-bankruptcy-yes-but/>

⁷⁷ *Id.*

A further impact of this scheme would be to force schools to lower tuition rates. A more selective entrance procedure coupled with the. Some schools may be forced to close their doors due to this, however, that is the price of making education a business. This scheme would be especially burdensome aforementioned “for profit schools.”

In summation, allowing for discharging federal student debt whilst forcing the schools to pick up the tab is the best solution at hand for the thorny issue of federal student loan debt. It allows for the student to alleviate their debt burden, it ensures that the American taxpayer is not put on the hook for the money owed, and it would force changes to the educational system that would prevent this problem from reoccurring again.

The system should be structured thusly. Privately obtained student loans should not be treated any differently than any other privately obtained debt, and should be dischargeable as such. There should be no higher standard or proof of burden in order for a student debtor to alleviate their burden. Loans obtained through the federal government should not be dischargeable in bankruptcy in the same way that private loans are. The threshold for dischargeability be a higher burden than average, but not one that rises to the level that it is currently extant for student loans. If this burden is met, then the school in which the debtor was enrolled should pay the balance of the loan. The school should not be liable for the calculated interest on that loan.

This system would ensure that a proper balance is met among all the parties involved. Banks and other sources of private debt should not be given leverage over student debtors in the manner that they now possess. These institutions are aware of the fact that their debts must be paid back unless a very high standard is met. Removing this would also force the banks to be more selective with the loans that they divulge.

The debtors' rights are satisfied as they now possess an avenue for discharging their debts and assuming the fresh start that is available for other similarly situated debtors. The government is satisfied because the money that was leant for educational purposes will be returned, and the taxpayer does not assume the burden of debt amnesty.

Conclusion

Student loan debt is killing the future of the United States, as those who are traditionally the drivers of the economy (young professionals and workers) are struggling to repay loans on a degree that is, unofficially, needed for almost any job in the current era. In addition, even those whose jobs do not require a higher education are suffering from these loans, as they had been told since birth that one simply “must” obtain a degree. Instead of buying houses, getting married, and starting families, those trapped by these loans are living at home, spending less, and wasting more and more money on paying down their debt. It is incumbent upon those in power to seek to provide the brightest future for their nation as is possible, and as such there must be a way for those burdened with student loans to more easily divest themselves of them. Treating private loan debt similar to credit card debt, and allowing for more lenient divestment strategies for federal loans will provide a net boon to the United State in the future, even if the short term strategies are complicated. In order to prosper, Americans must be able to cut their gilded chains, and start their adult lives free of the ever present fear that they owe more than they can ever repay.

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